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From the Editor-in-Chief... 

This is the 9th 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 eighth 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 start of the Journal. 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, 2017. Congratulations to all our authors. I extend a hearty invitation to the 2017 meeting of the SALSB in San Antonio, Texas, March, 2018.

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.

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MEDIATION MADNESS III: MANAGING MICROWAVE MEDIATION

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

This paper highlights fundamental differences in group processes between compulsory mediation and traditional mediation. It offers four tools from the field of group dynamics to help mediators identify and deal with the impact of Microwave Mediation on vital group processes and an integrative model proposing a new collaborative style of mediation.

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 When business leaders prepare for and manage a successful mediation, they will understand the dynamics of the process.

Applying models and recent research from the field of group dynamics, this paper examines the trend toward compulsory mediation and how it differs from traditional mediation in practice and in the vital group processes underlying it. The meteoric rise of compulsory mediation, or Microwave Mediation, as the dominant form of mediation has profound implications for business leaders. With most lawsuits referred to compulsory mediation, business leaders must be familiar with the process and must work with mediators to resist the temptation -- in the quest for a quick settlement -- to bypass the vital group processes upon which mediation is built. This article explores the issue by analyzing the differences between compulsory mediation and traditional facilitative mediation; examining the underlying group processes of compulsory mediation using four classic models of group dynamics; and offering an integrative model that

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2 Ibid.
proposes a hybrid mediation style that addresses the need for speed while retaining the positive group dynamics of traditional facilitative mediation.

The extent to which business leaders recognize and respond to the challenges of compulsory mediation can determine whether mediation succeeds. Before considering how skills can be developed in this area, it is important to examine the meaning of mediation, its use, and its success in resolving conflict.

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 actually 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 avoid costly settlements and the potential of costly litigation. Given the number of lawsuits filed and the heavy reliance on compulsory mediation by the courts, business leaders must understand the process and how to prepare for and conduct mediation.

III. THE USE OF MEDIATION

Over the past two decades, the use of mediation has exploded. Business leaders and the courts have discovered its value as a cost-effective alternative to litigation in the traditional adversarial system. The number of mediation cases in Texas, Oklahoma, and Nebraska (the states nearest the region to track statistics) is staggering. Cases received by Texas alternative dispute resolution centers in the most recent three-year period for which records were kept average almost 20,000 annually, with a total of more than 58,000 from 2003 to 2005.5 The same situation is true of Oklahoma. As shown in Table 1, on average, nearly 6,000 cases have been referred annually to the alternative dispute resolution system there, with 65,249 cases referred in just over a decade. Also, an impressive average settlement rate of 64 percent has been

5 Annual Report of the Texas Judiciary, Office of Court Administration, 2005 (last year reported).
registered. Farther north, results in Nebraska (see Table 2) are even more impressive. The number of cases referred annually to that state’s alternative dispute resolution system has almost doubled in eight years, with an average settlement rate of 81 percent. These striking regional settlement rates are mirrored across the United States (e.g., Better Business Bureau, 78%; U.S. Equal Employment Opportunity Commission, 70%; Financial Industry Regulatory Authority, 80%; and State of Florida Division of Administrative Hearings, 78.5%) and internationally (e.g., World Intellectual Property Organization – exceeds 70% across its 188-member-nations). Thus, the widespread use of mediation and its potential for cost-effective conflict resolution are well-established.

IV. PURPOSE

Mediation is a form of alternative dispute resolution that allows parties to avoid traditional litigation. Mediation parties agree to allow an impartial mediator to manage the process as they seek common ground and, hopefully, a win-win settlement. Because the parties are at odds initially, each attempts to influence the other in an effort to resolve the dispute. Negotiation, in general, has been assumed to be a rational process whereby the parties, focused on substantive issues, reach agreement. The advent of compulsory mediation (otherwise known as court-ordered, court-assisted, or court-mandated mediation), has had a profound impact on this process. From its humble beginnings in the 1980’s in a few states, primarily in large cities, the practice has exploded not only across America but abroad. The primary impetus for its expansion is its potential to clear hopelessly backlogged civil court dockets, some of which are four to five years behind. Compulsory mediation is quick and cost efficient. Conservative estimates indicate settlement rates of nearly 80%, with most mediations lasting only a few hours and seldom exceeding a full day. Because of its speed and efficiency, compulsory mediation, which the authors have labeled Microwave Mediation, is now the dominant form of mediation.

Unlike traditional mediation between a mediator and two or more parties, which is completely voluntary and with few strict guidelines or time constraints, compulsory mediation is court-ordered; requires the parties to have representation (an attorney); and operates under more stringent guidelines and time limitations. Moreover, the mediator (in most cases a former judge or an attorney) is appointed by the court or selected by the parties’ attorneys in accordance with court guidelines. All the players in this triad are attorneys who are responsible to the court as well as to the clients (parties). Collaborative interaction between the parties is rare in

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7 Annual Mediation Center Case Data Report, Nebraska Office of Dispute Resolution, 2008-2016.
Compulsory mediation as mediators resort to shuttle diplomacy, negotiating separately with the parties and their attorneys in private caucuses, in a rush to the bottom line, a settlement that leaves both parties somewhat dissatisfied. Joint session, the hallmark of traditional mediation, is relegated to an opening “meet and greet” and a “benediction” at the end once a settlement has been reached in private caucuses.\textsuperscript{12} The efficiency and cost effectiveness of compulsory mediation, however, is unparalleled as a form of Alternative Dispute Resolution. A total of 741,992 new civil cases were filed in district, county, and justice courts in Texas in 2016. If only a fraction were referred to mediation, the number of cases is staggering, dwarfing mediation from all other sources.\textsuperscript{13} The meteoric ascent of compulsory mediation in the courts has given rise to Super Mediators who settle hundreds of cases each year and large mediation firms settling thousands of cases per year. Despite its speed and efficiency, compulsory mediation bypasses key group dynamics that are vital to group decision making and effectiveness. The authors identify these shortcomings by applying four classic models of group dynamics to compulsory mediation and offer mediators tools to address them. Specifically addressed are Migration of Conflict Style, Arrested Group Development, Suboptimal Decision Making (Groupthink), and Stifled Party Involvement. The paper first analyzes differences between compulsory mediation and traditional mediation before closing with an integrative model of mediation that proposes a hybrid style, the collaborative style, as an effective means to manage Microwave Mediation. Effective use of these tools is vital to success in compulsory mediation.

V. MANAGING MICROWAVE MEDIATION

A. DIFFERENCES BETWEEN COMPULSORY AND TRADITIONAL MEDIATION

Traditional facilitative mediation, in which disputants attempt to resolve their differences with the assistance of an impartial mediator, dates back to Ancient Greece and Rome.\textsuperscript{14} Texas Justice Frank Evans brought mediation to the courts when he drafted in 1987 the Texas ADR Statute, which has stood the test of time, without modification, as the template for ADR. This is true not only in Texas but in many other states and foreign countries.\textsuperscript{15} Any case pending in Texas courts may be referred for mandatory ADR procedures, including mediation, upon the motion of any party or the court’s own motion.\textsuperscript{16} Steve Brutsche, an early pioneer of mediation in Texas, trained mediators and convinced judges in Dallas and Houston with four-to-five year case backlogs to try compulsory mediation.\textsuperscript{17} It caught on and is now standard practice, not only

\textsuperscript{13} Annual Statistical Report for the Texas Judiciary, Fiscal Year 2016, Office of Court Administration.
\textsuperscript{14} Ramsbotham, O., Woodhouse, T., & Miall, H., Contemporary Conflict Resolution. 3rd Ed. Cambridge: Polity Press, 2011.
\textsuperscript{15} Bergman, T. Association of Attorney-Mediators Newsletter, December 2007, p. 1.
in Texas, but in many states and foreign countries. The settlement rate with qualified professional attorney-mediators is 80% or more.\textsuperscript{18}

Compulsory mediation differs from traditional mediation in many ways (see Table 3 for a complete analysis). Perhaps the most significant difference is the insertion of attorneys in compulsory mediation, which has profound implications for the structure of the mediation process. Figure 1 illustrates the difference in the structure of traditional facilitative mediation versus compulsory mediation. Traditional mediation is a relatively simple process in which the parties meet directly with the mediator (primarily in joint session) and use a collaborative approach to reach a settlement. Compulsory mediation adds a level of complexity as the parties interact through their respective attorneys with the mediator. Private caucuses are used exclusively, with the only direct interaction between the parties occurring in an opening “meet and greet” and closing “benediction” in joint session.\textsuperscript{19} Mediators use shuttle diplomacy and an evaluative style of mediation (manipulating the parties) to drive party attorneys to the bottom line as quickly as possible, ferrying offers back and forth until a settlement is reached. While a settlement can be reached quickly, some question whether this process is mediation. Paul Rajkowski, an experienced community mediator, calls it a “shameful” process.\textsuperscript{20} He claims the mediator’s neutrality is compromised because he acts as an agent for the party when he interprets and delivers messages and offers in shuttle diplomacy. He also claims self-determination is compromised because private caucuses allow attorneys to withhold information and give both the attorney and mediator power at the expense of the parties. Finally, he points out that compulsory mediation yields agreement, but not resolution.\textsuperscript{21} The goal of compulsory mediation, according to attorney David Willis, is not to win, leaving both sides unhappy.\textsuperscript{22}

Compulsory mediation yields a quick settlement in most cases, but shortcuts on the path to agreement compromise vital group dynamics required for effective decision making and meaningful conflict resolution. Next, the authors offer tools to help mediators identify and deal with four major challenges in compulsory mediation.

B. MIGRATION OF CONFLICT STYLE – THE SHARK TANK EFFECT

The hallmark of effective mediation is conflict resolution, and the best known model of the various options for resolving conflict is Thomas’ Model of Conflict Management Styles.\textsuperscript{23} Thomas’ five distinct conflict styles (avoiding, accommodating, competing, compromising, and collaborating) are represented in four quadrants and the central area of Figure 2. Each style is defined in terms of assertiveness (concern for self) and cooperativeness (concern for other’s

\textsuperscript{19} Folberg, p. 7.
\textsuperscript{21} Rajkowski, p. 5.
\textsuperscript{22} Willis, p. 2.
needs).\textsuperscript{24} Participants may choose \textbf{Avoiding} (neither assertive nor cooperative) to escape the
collision. This approach is represented by the Turtle, who pulls inside his shell at the first sign of
trouble. At other times, participants may simply yield to others, using the \textbf{Accommodating} (not
assertive, but highly cooperative) style, represented by the cuddly Teddy Bear who loses
willingly. The assertive styles are by far most common in mediation. \textbf{Competing} (highly
assertive and uncooperative) is the most inflexible, least-effective approach. Here, one
participant insists on having his way (“My way or the highway”), represented by the aggressive
Shark who forces a win-lose scenario. A better alternative is the middle-of-the-road
\textbf{Compromising} (somewhat assertive and somewhat cooperative) approach represented by the
crafty Fox. While it is common, it is a lose-lose proposition requiring both sides to give up
something to reach agreement. The most effective implement in the mediator’s toolkit for
reaching a mutually beneficial win-win solution is \textbf{Collaborating} (highly assertive and highly
cooperative), represented by the wise old Owl.\textsuperscript{25}

Mediation, by definition, is a collaborative process between parties. The goal of traditional
facilitative mediation is exactly that, leading to a win-win resolution to the conflict. Because of
time constraints, compulsory mediation bypasses party collaboration and shifts directly to private
caucuses between the mediator, one of the parties, and his/her attorney. Due to the imbalance of
power and legal expertise, the attorney’s role is amplified.

Insertion of lawyers into mediation, as required by law in compulsory mediation, has had
profound effects on the process driving parties away from direct collaboration. In Roselle
Wissler’s study of exit surveys from 2,626 parties in compulsory mediation in Ohio and Maine,
57% of parties said their lawyer talked more than they did during mediation.\textsuperscript{26} Parties who
participated more were more satisfied with the mediator and process. Cecilia Morgan’s survey
of 249 professional mediators in 24 states ranked attorneys as fourth in the Top 13 Reasons
Mediation Fails.\textsuperscript{27} Mediators reported that lawyers tend to dominate the proceedings with secret
agendas and inflated egos that hinder collaboration in mediation.\textsuperscript{28}

As shown in Figure 1, mediators and lawyers tend to form a powerful triad that dominates
compulsory mediation, relegating parties to an indirect or passive role. As shown in Figure 2,
the Mediator/Attorney alliance migrates away from the traditional collaborative approach toward
the Competing and Compromising conflict styles. Meanwhile, the parties, who have little direct
contact with one another, become more passive, shifting toward the Accommodating and
Avoiding approaches. This is called “The Shark Tank Effect” because the parties who are
supposed to be central to mediation sit outside the tank, watching the sharks (mediators and
attorneys) thrashing and biting through the glass. When the waters settle, the case settles -- in a
compromise.

\textsuperscript{24} Ibid.
\textsuperscript{25} Ibid.
\textsuperscript{26} Wissler, R. Party Participation and Voice in Mediation. \textit{Dispute Resolution Magazine}, Fall 2011, pp. 20-21.
\textsuperscript{27} Morgan, C. Why Mediations Fail. State Bar of Texas Alternative Dispute Resolution Conference, January, 17,
2017, Austin, Texas, pp. 1-3.
\textsuperscript{28} Morgan, pp. 2-3.
Mediators must avoid the temptation to cast lawyers as proxies for the parties in compulsory mediation. They must “Resist the Shift” that separates parties and drives them away from the collaborative process underlying mediation success. It’s time to redefine the role of attorney’s, calm the waters, and invite the parties into the tank to collaborate fully in both private and joint sessions. After all, without party participation and self-determination, there is no mediation.

C. ARRESTED GROUP DEVELOPMENT

Bruce Tuckman’s classic model of small-group development offers valuable insight into the process of mediation. Newly formed or immature groups pass through a series of predictable stages, from initial chaos to order and performance. Mediation teams are similarly comprised of relative strangers, although attorneys may know some mediators selected in compulsory mediation. Thus, Tuckman’s model (see Figure 3) is useful in assessing and directing group development in mediation. When applied to mediation, the stages are as follow. In the Forming Stage, participants are generally unfamiliar with each other and unclear about their roles and responsibilities. They rely on the mediator to build the team, clarify roles, and set ground rules. A joint session is required to navigate this stage. If the mediator is successful, the team passes into the Storming Stage where, as the name suggests, conflict, power struggles, cliques, and factions develop. The mediator takes on a coaching role in this stage, attempting to address emotions, calm tensions, and build the team. This stage is also suited well to joint sessions, where the parties must be allowed to tell their story, vent emotions, and explore root causes of the conflict. Private caucuses may be in order if tensions run too high. Mediators miss an opportunity to diffuse the conflict and reach early settlement when they bypass this stage. Next, the team enters the Norming Stage, where the roles and responsibilities of participants become clear and are accepted. Here the mediator, the attorneys, and the parties understand their roles; the mediator simply facilitates the process. Unfortunately, in the rush to settlement in compulsory mediation, mediators separate the parties at or before this point, in order to rely exclusively on shuttle diplomacy in private caucuses. While they often succeed in hammering out a settlement, team development is arrested at this stage as shown in Figure 3.

Had the mediator taken the time to remain in joint session, the team might have progressed to the Performing Stage, where the parties have worked through the emotional issues (the core of the conflict) and are focused on working together to reach a collaborative, long-term win-win resolution of the conflict. If the mediator can guide the team to this level, he can maintain face-to-face contact between the parties and employ a facilitative mediation style to reach this type of conflict resolution rather than a quick-fix compromise settlement that leaves neither party satisfied.

30 Ibid.
31 Ibid.
32 Ibid.
33 Tuckman, p. 384-399.
If the parties reach the Performing Stage, true mediation has occurred and its benefits will accrue to the parties. However, the process is not complete until the **Adjourning Stage** has been achieved.\(^{34}\) Having completed its task, the mediation team adjourns, or is disbanded, in this stage. A final joint session, which some have described as a “benediction,”\(^{35}\) is held by the mediator to recognize and thank the participants for their efforts, reiterate the settlement agreement, and reinforce relationships between the parties, attorneys, and the mediator. The parties have a final opportunity to fully resolve the conflict and potentially restore their relationship. According to Rajkowski, referenced earlier, agreement and resolution are not synonymous.\(^{36}\) Agreement can exist without resolution, as would be the case if one agreed to give up his wallet after a gun was put to his head. When the adjourning stage is skipped, unresolved issues may remain with an agreement that will spark a later court filing as the “War of the Roses” rages in the next round of conflict. Although no statistics are available, the authors surmise that there is a significant “refile rate” among parties, especially in family law cases settled via Microwave Mediation.

The message for mediators is to Finish, not Diminish, development of the mediation team. Early exit from face-to-face joint sessions arrests team development, jeopardizing mediation success. Few ADR statutes impose limitations on duration of mediation provided that the scheduling deadline is met. Nevertheless, compulsory mediation is carried out at lightning speed. Microwave Mediation arrests team development and long-term mediation success. Patience on the part of the mediator to allow the team to develop is likely to pay off with resolution of the conflict (the goal of mediation) rather than mere agreement (a settlement).

**D. Suboptimal Decision Making--Groupthink**

In his classic model, Irving Janus described Groupthink as an insidious disease that attacks group decision making.\(^{37}\) It occurs when the norm for consensus overrides the realistic appraisal of alternatives and when the group is more interested in reaching agreement than in taking the time to make an effective decision.\(^{38}\) Table 4 outlines the conditions under which Groupthink is most likely to occur, its consequences, and guidelines to avoid it.

Compulsory mediation is fertile ground for Groupthink, because it involves a court-appointed or attorney-selected mediator using an evaluative (directive) style, assertive attorneys who are required by law to represent the parties, heavy reliance on private caucuses, and intense time pressure to settle quickly. All the precursors of Groupthink in Table 4 are present in compulsory mediation, with the exception of cohesion. Thus, Groupthink is likely to impact the process, leading to suboptimal decision making.

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34 Ibid.
35 Folberg, p. 7.
36 Rajkowski, p. 5.
38 Ibid.
Janus’ guidelines for preventing Groupthink are clearly applicable to compulsory mediation. These guidelines suggest four important recommendations for mediators to improve the process. First, mediators must employ brainstorming to generate more feasible win-win alternatives. Brainstorming is problematic in private caucus, so mediators must incorporate brainstorming into joint sessions. Second, mediators must relax the time pressure that hampers critical analysis of information, alternatives, and courses of action. Third, mediators should tone down the evaluative approach of formulating and brokering deals in shuttle diplomacy, which violates self-determination of the parties. Mediators should allow the parties to interact, evaluate information, and formulate their own offers before the mediator shares his opinion or advances an offer. Finally, mediators should employ devil’s advocacy to question any course of action as a safeguard against Groupthink. This is the easiest recommendation to implement because most of the participants in compulsory mediation are attorneys, who are well-trained in such techniques.

E. STIFLED PARTY INVOLVEMENT

Some argue that compulsory mediation has stifled party involvement with its short duration and heavy reliance on private caucuses. A final tool mediators can use to navigate the rising trend toward high-speed compulsory mediation, or Microwave Mediation, is a classic model developed by Victor Vroom to help leaders determine the appropriate degree of subordinate participation in decision making. Party participation, or self-direction, is a key tenet of mediation protected in most ADR statutes and ethical guidelines. The Texas ADR Statute, which has become the model for compulsory mediation in many states and abroad, states that the mediator “will attempt to facilitate the voluntary resolution of the dispute by the parties” and that the mediator “cannot impose a settlement…it must be voluntarily agreed to by the parties.” Foundational to mediation is party self-determination. Critics of compulsory mediation consider it an oxymoron in that it is a “voluntary” process that is court-ordered. Others question whether self-determination has been violated in the tactics commonly used in compulsory mediation. At the center of the debate is the extent to which parties participate in the mediation process. Participation ranges from transformative mediation where parties structure both the process and outcome of mediation in joint session to the present practice of shuttle diplomacy where parties negotiate indirectly through their attorneys with strong direction by the mediator in private caucuses.

42 Kovach, p. 1.
43 Rajkowski, p. 5.
Vroom’s Normative Decision Model, shown in Figure 4, applies directly to this issue. According to Vroom, one size does NOT fit all. Leadership and mediation are dynamic processes. The leader, mediator in this case, must examine several key factors in the situation in determining the appropriate degree of participation in the decision. This proposes that mediators alter their mediation style depending on the unique nature of the case at hand. Vroom specifies five options in Figure 4 that correspond to five options in dispute resolution. His time-tested model is relevant to the determination of the appropriate level of party participation in mediation and is the only model the authors have found that offers specific direction in this area. Vroom offers a decision tree for determining the appropriate level of participation that considers 12 key aspects of the situation (e.g., scope of the decision, expertise of the leader and participants, willingness to accept the leader’s involvement, problem solving skills, and teamwork). These factors, among others, apply to mediation where the mediator must determine the appropriate degree of party participation based on the unique nature of the case and the parties involved. Compulsory mediation as practiced today seems to be locked into Vroom’s second level.

Figure 4 provides a graphic framework outlining Vroom’s five levels in increasing order of subordinate (party) participation, connecting them to the corresponding mediation approach. The first level of participation is **Decide Alone**, which entails no participation. In some instances in the workplace, such as with a corporate layoff, the leader would not seek the involvement of subordinates and would decide alone. In the justice system, deciding alone is equivalent to a ruling by a judge in litigation that would be pursued only as a last resort, should mediation fail. Next, the leader may **Consult Individually**, meeting privately with subordinates to gain their input before making a decision. Compulsory mediation seems to be locked into this level, where the mediator, using an Evaluative (Directive) Style, meets with the party and his counsel in private caucus. Jay Folberg, in his study of 204 JAMS mediators in 24 resolution centers across the United States and Canada, reported that attorneys are a major factor in the slow death of joint sessions. More than 80% of mediators used joint sessions when they began practicing and in 2016 only 45% use joint sessions. The top reasons given for the decline were that attorneys resist joint sessions in favor of the secrecy and security of private caucuses and that mediators resist joint sessions to avoid grandstanding, posturing, and angry outbursts by attorneys. In both cases, attorneys are a major factor diminishing the use of joint sessions that are vital to the facilitative (collaborative) approach used in traditional mediation. The problem extends to the dynamics of private caucuses, where mediation parties are often dominated or muted by attorneys who see themselves as surrogates or proxies of the represented party. Brutsche, who pioneered mandatory mediation, expressed the sentiment well in his claim that lawyers are the “preeminent professional conflict managers” and the “field generals who design and implement

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45 Vroom, p. 82-94.
46 Ibid.
47 Folberg, pp. 6,9.
the negotiating strategy.” Over-reliance on counsel, whether granted by the party or not, seems to violate self-determination, derailing any greater level of participation in the process.

In Vroom’s next level, Consult Group, the leader meets with the group collectively to obtain its input before making a decision. In mediation, this level of participation would involve an Evaluative Style of mediation, with greater use of joint sessions. It is a step forward, but the mediator still dominates, seeking input from the parties in joint session but retaining considerable control over the nature and structure of negotiation and formulation of settlement offers. The Facilitative level of Vroom’s model corresponds with the Facilitative Style of mediation, which is the gold standard in mediation. It allows the free flow of information, puts the parties back into a position of responsibility for an agreement, and allows for longer-lasting agreements. Facilitative mediators do not make recommendations or give their own advice or opinion as to the outcome. They predominantly hold joint sessions with all the parties and “want the parties to have the major influence on decisions made rather than the parties’ attorneys.” Just as Vroom advocated an analysis of situational factors in determining the level of participation, mediators must consider whether the parties have the maturity, expertise, problem-solving skills, and motivation to apply this approach.

Finally, Vroom’s Delegate level is the highest level of participation. At this level, the leader sets the boundaries of the decision and entrusts the entire process to the subordinates. It requires capable subordinates and ultimate trust and flexibility. In mediation, this equates to the newest concept in mediation, the Transformative Style. Here the mediator offers support and allows the parties to structure both the process and the outcome. The aim is to transform the relationship and to allow the parties to determine their own fate. Parties usually meet in joint session; mediators empower the parties as much as possible; and each party recognizes the needs, interests, values, and point of view of the others. It is the most autonomous mediation style and is reserved only for parties with the highest levels of maturity, skill, expertise, and motivation. It is difficult to imagine, with the requirement of counsel, that this approach would be feasible in mandatory mediation. It remains a lofty goal aspired to by many but rarely attained in mediation.

It is unfortunate as mediation has been rolled out to the masses by the courts that party participation has been pushed down in just two decades from a high level in traditional facilitative mediation, Vroom’s Level Four, to among the lowest, Vroom’s Level Two, where it seems to be stuck. The culprits seem to be time and budgetary constraints as well as domination by directive mediators and attorneys who stifle party participation in many cases. In Texas, as well as in other states, steps should be taken to amend ADR statutes to restore the parties’ right

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48 Brutsche, p. 581-582.
50 Zumeta, p.2.
53 Ibid.
of self-determination by limiting the role of attorneys in mandatory mediation. In some cases, attorneys may be respecting the wishes of their clients who don’t want to be involved in the process, but Folberg’s study of JAMS mediators\textsuperscript{54} suggests this is rarely the case. Meanwhile, mediators should promote party involvement through greater use of joint sessions, avoid high pressure tactics in shuttle diplomacy, and reign in attorneys by establishing and enforcing clear ground rules.

F. Integrative Model of Mediation Styles

The major mediation styles have been discussed in this paper. Four mediation styles are plotted in Figure 5 in terms of the level of involvement by the mediator and the parties. The \textbf{Preemptive} style was added by the authors to reflect the occasional mediation in which one or more of the parties preempt mediation (have no intention of settling). The parties are simply going through the motions of court-ordered mediation on their way to trial. At the other extreme is the \textbf{Transformative} style in which the parties control their own fate, with the mediator acting in a purely supportive role. It is a lofty goal that is rarely attained in practice.

This leaves the two primary mediation styles most mediators use. The \textbf{Evaluative} style is more directive, with a high degree of mediator involvement, heavy use of private caucuses, shuttle diplomacy, and limited involvement by the parties. Because of time constraints, this style is often preferred by mediators engaged in compulsory mediation. The traditional \textbf{Facilitative} style, on the other hand, is far more collaborative, with parties meeting primarily in joint session and with high involvement by both the parties and the mediator. Its use has been declining, but it is suited well to community mediation, where it is still common.

Evaluative mediation, which is used extensively in compulsory mediation, is criticized for heavy-handed mediator tactics and limited party involvement. Mediators have resorted to the practice out of necessity because of time constraints and limitations imposed by the courts. Rajkowski calls the secrecy and lack of party self-determination shameful,\textsuperscript{55} Kim Kovach questions the mediator’s impartiality and the mistrust it breeds,\textsuperscript{56} and Adam Curle claims evaluative mediation is not mediation at all.\textsuperscript{57} Many believe mediators have compromised the foundational principles, the Holy Grail of mediation—neutrality, impartiality, self-determination, and voluntariness—by accepting the practice. So, how do mediators reconcile the foundational principles of mediation in light of Microwave Mediation? The authors propose a hybrid approach, called the Collaborative style, as a solution.

As shown in Figure 5, the \textbf{Collaborative} style combines the Evaluative and Facilitative styles. The authors propose a two-stage process. \textbf{Stage 1} occurs early in the mediation, using the Facilitative style entirely in joint session. The mediator facilitates joint sessions designed to allow the parties to meet, vent emotions, and discuss and resolve core issues. Great skill is

\textsuperscript{54} Folberg, p. 11.
\textsuperscript{55} Rajkowski, p. 3.
\textsuperscript{56} Kovach, p. 1.
\textsuperscript{57} Curle, p. 5.
required of the mediator in this stage because some parties may drop the case or settle early after a sincere hearing of their grievances. As this stage draws to a close, the mediator explores broad parameters on how to resolve the issue and brainstorms with the parties to generate a variety of creative options for potential settlement. **Stage 2** shifts to a more Evaluative approach. With a head start from Stage 1, the mediator engages the parties in private caucuses to move toward settlement. This approach requires more time, discipline, and skill on the part of the mediator and more cooperation from parties and their attorneys, but promises to pay off in enhanced self-determination, better quality decisions, and better outcomes. Conflict is not well addressed at lightning speed. Research indicates that the rush to settlement is a major cause of disappointment among parties. The Collaborative approach places a few speed bumps on the mediation superhighway in order to restore quality, enhance positive group dynamics, and ensure that the basic principles of mediation are upheld.

**VI. SUMMARY**

The flood of cases referred to mediation by the courts has given rise to high-speed compulsory mediation, or Microwave Mediation, that entails a far more directive approach by the mediator, a virtual end to joint sessions, less direct involvement by parties, and shuttle diplomacy that more resembles a court settlement conference than mediation. To date, little has been done to address the impact of these shortcuts on the quality and conduct of mediation. This paper fills the gap by first examining the differences in compulsory and traditional mediation in Table 3 and in Figure 1. Then, it offers direction to mediators by examining changes in underlying group processes revealed by applying four classic models of group dynamics to mediation. Initially, a shift in conflict styles among mediators, attorneys, and parties and how to respond to it was explored in the Migration of Conflict Styles in Figure 2. Next, the interruption of group development and how to prevent it was examined in the Arrested Group Development model in Figure 3. Specific guidelines for avoiding Suboptimal Decision Making by preventing groupthink were provided in Table 4. The decline in party participation and how to restore it were dealt with in the final model, Mediation Style and Degree of Party Participation in Figure 4. Finally, an Integrative Model of Mediation Style was proposed in Figure 5 to classify four styles of mediation and to introduce a new two-stage hybrid called the Collaborative style as a means for mediators to retain both the positive group dynamics of the Facilitative style and the speed and efficiency of the Evaluative style of mediation.

**VII. SUCCESSFUL MEDIATION IN BUSINESS**

While there is room to improve mediation through application of the models presented in this paper, there is little doubt that mediation has become a highly effective mechanism for conflict

resolution. The significance of the process can be seen in the large number of cases in Texas and Oklahoma, the rapid growth in the number of cases in Nebraska, and the impressive settlement rates seen in the region. These impressive regional settlement rates are mirrored across the United States and internationally. Thus, the widespread use of mediation and its potential for cost-effective conflict resolution are well-established. Beyond the numbers, however, mediation’s success is also evident in the wide variety of cases settled, not to mention the many cases that do not reach full settlement yet narrow the differences to be subsequently resolved through arbitration or litigation. As shown in Table 5, successful mediation has occurred in a broad range of conflict situations, varying greatly in both the size and nature of the dispute. Cases range from massive corporate cases such as the global product liability case against Stryker Orthopedics to small domestic disputes involving a neighbor’s dog. Table 5 also highlights the variety of issues involved in mediation, varying from suits over medical claims, life insurance distribution, gender discrimination, and rape to claims over lead paint abatement, ADA compliance, apartment cleaning supplies, and misconduct on a university campus. Overall, the increasing volume, variety, and scope of mediation cases highlight its expanding role in business and society.

VIII. CONCLUSION

The success of mediation and its application across a spectrum of conflict situations have been noted, the problems posed by high-speed compulsory mediation have been exposed, and several tools to help mediators and participants respond appropriately to ensure success in mediation have been supported. Business leaders can use these tools to avoid the pitfalls of compulsory mediation and better prepare for the inevitability of mediation when a dispute or lawsuit arises. Mediation need not be a maddening process. It is most likely to succeed when participants recognize and respond appropriately to the realities of compulsory mediation.

The volume, variety, and settlement rates of mediation cases suggest a bright future for this form of conflict resolution. With the use of mediation on the rise, it is more important than ever for business leaders to master skills necessary to take full advantage of the opportunities this process offers. Mediation is an effective tool when business leaders prepare for and navigate the process with a clear understanding of how to remove interpersonal barriers, thus ensuring more understanding, mutual respect, and open communication.
Appendix A - Tables

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>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>2013</td>
<td>5,261</td>
<td>61%</td>
</tr>
<tr>
<td>2014</td>
<td>5,046</td>
<td>63%</td>
</tr>
<tr>
<td>2015</td>
<td>4,852</td>
<td>63%</td>
</tr>
<tr>
<td>Total</td>
<td>65,249</td>
<td>64%</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>2010</td>
<td>1,604</td>
<td>85%</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>2014</td>
<td>2,133</td>
<td>79%</td>
</tr>
<tr>
<td>2015</td>
<td>2,083</td>
<td>78%</td>
</tr>
<tr>
<td>2016</td>
<td>2,271</td>
<td>80%</td>
</tr>
<tr>
<td>Total</td>
<td>16,276</td>
<td>81%</td>
</tr>
</tbody>
</table>

Source: Annual Mediation Center Case Data Report from the Nebraska Office of Dispute Resolution
<table>
<thead>
<tr>
<th></th>
<th>Compulsory Mediation</th>
<th>Traditional Mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Initiation</strong></td>
<td>Court-Order</td>
<td>Voluntary, by parties</td>
</tr>
<tr>
<td><strong>Time Frame</strong></td>
<td>Half to full day</td>
<td>Whatever it takes</td>
</tr>
<tr>
<td><strong>Mediator Selection</strong></td>
<td>Court appointed or selected by attorneys (court rules)</td>
<td>Selected by parties</td>
</tr>
<tr>
<td><strong>Attorney Representation</strong></td>
<td>Required</td>
<td>Optional</td>
</tr>
<tr>
<td><strong>Mediation Style</strong></td>
<td>Evaluative – Directive</td>
<td>Facilitative - Collaborative</td>
</tr>
<tr>
<td><strong>Conflict Style</strong></td>
<td>Compromise (Lose-Lose)</td>
<td>Collaboration (Win-Win)</td>
</tr>
<tr>
<td><strong>Party Involvement</strong></td>
<td>Limited in private caucuses</td>
<td>Likely in joint sessions</td>
</tr>
<tr>
<td><strong>Brainstorming</strong></td>
<td>Limited in private caucuses</td>
<td>Likely in joint sessions</td>
</tr>
<tr>
<td><strong>Quality Group Decision Making</strong></td>
<td>Limited in private caucuses</td>
<td>Likely in joint sessions</td>
</tr>
<tr>
<td><strong>Resolving Core &amp; Trust Issues</strong></td>
<td>Limited in private caucuses</td>
<td>Likely in joint sessions</td>
</tr>
<tr>
<td><strong>Mediation Goal</strong></td>
<td>Agreement</td>
<td>Resolution</td>
</tr>
<tr>
<td><strong>Satisfaction with the Outcome</strong></td>
<td>Both parties leave unhappy, may be regret and remorse</td>
<td>Greater resolution of issues, win-win settlement</td>
</tr>
</tbody>
</table>

**Source:** A compilation of readings in the literature. Empirical research is limited at this time.
### Table 4: Suboptimal Decision Making - Groupthink

<table>
<thead>
<tr>
<th>When is Groupthink Most Likely to Occur?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Decision that has high impact on the group members</td>
</tr>
<tr>
<td>• Highly cohesive groups or groups trying to avoid conflict</td>
</tr>
<tr>
<td>• Directive, charismatic leadership</td>
</tr>
<tr>
<td>• Stressful conditions – making an important decision with little time</td>
</tr>
<tr>
<td>• Insulation of the group from outside forces</td>
</tr>
<tr>
<td>• Lack of procedures for developing and evaluating alternatives</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>What are the Consequences of Groupthink?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Time constraints cause members to rush through decision-making process</td>
</tr>
<tr>
<td>• Members so desire concurrence that they fail to critically evaluate information</td>
</tr>
<tr>
<td>• Incomplete survey of alternatives</td>
</tr>
<tr>
<td>• Failure to evaluate the risks of the preferred course of action</td>
</tr>
<tr>
<td>• Biased information processing</td>
</tr>
<tr>
<td>• Failure to work out contingency plans</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Guidelines for Preventing Groupthink</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Allow more time to make the decision</td>
</tr>
<tr>
<td>• Brainstorm to identify all the alternatives</td>
</tr>
<tr>
<td>• Have each member assume the role of the critical evaluator</td>
</tr>
<tr>
<td>• Have the leader avoid stating his or her position until the group decides</td>
</tr>
<tr>
<td>• Appoint a Devil’s Advocate to question the group’s course of action</td>
</tr>
<tr>
<td>• Encourage the group to reexamine alternatives once consensus is reached,</td>
</tr>
</tbody>
</table>

**Source:** Janis (1972)\(^{59}\)

\(^{59}\) Janis, 1972.
Table 5: Examples of Successful Mediation in Business

Cases Mediated by Bruce Meyerson\(^{60}\)
- Claims for fraud and breach of contract over foreclosure of an RV by a lender.
- A dispute between business partners over the distribution of $20 million in assets.
- A claim of defamation and trade libel in a dispute regarding allegedly toxic products.
- A dispute between an executor of an estate and stepson over life insurance proceeds.
- A dispute between a home buyer, seller, home inspector and real estate agent over claims of misrepresentation and nondisclosure.
- A claim for breach of a stock bonus plan against an international electronics firm.

Major Cases Mediated by JAMS\(^{61}\)
- Mediated a global settlement of the state and federal products liability proceedings brought against Stryker Orthopedics.
- Claim by general contractor against regional transportation authority totaling more than $20 million in cost overruns due federal requirements regarding lead paint abatement.
- Claim against school district on behalf of special education student raped by their students in a classroom supervised by a substitute teacher.
- Cases involving hazing, harassment, and sexual misconduct on a University sports team.

Cases Mediated by NAFCM (National Association for Community Mediation)\(^{62}\)
- A new homeowner was disturbed by barking from neighbor’s dog. Dog owner agreed to use a bark suppression collar and not let the dog out when he and his wife were away.
- Tenant had to move out of his apartment several days due to chemical odor from staining the floors in the apartment below. Landlord agreed to reimburse two nights lodging.
- Tenant was bothered by fertilizers and cleaners the landlord used around the house. Landlord agreed to seek tenant’s input on what to use. Tenant paid additional cost.

EEOC Notable Mediation Cases\(^{63}\)
- Mediated settlement of ADA case in which a cleaning company firing a janitor with scoliosis because he could not wear a vacuum cleaner pack on his back.
- Mediated settlement for a male employee of a cleaning company who was fired because his gender interfered with him cleaning the women’s bathroom.
- Mediated settlement of $300,000 from a bottled water company for not promoting a female employee in favor of hiring a male employee and later retaliating against her.
- Mediated settlement of $325,000 in an ADA case in which a health care provider fired employees who developed post-employment disabilities without accommodation.

\(^{60}\) Bruce Meyerson, Examples of Cases Mediated, \url{http://www.brucemeyerson.com/arizonamediationservices.html} (last visited March 15, 2017) lead author retains a copy.
\(^{62}\) NAFCM National Association for Community Mediation, Mediations Success Stories, \url{http://www.nafcm.org/?page=Success_Stories} (last visited March 15, 2017) lead author retains copy.
Appendix B – Figures

Figure 1: Structure of Traditional vs. Compulsory Mediation

Traditional Mediation

Mediator

Primarily Joint Session

Party A
Attorney Optional

Party B
Attorney Optional

Compulsory Mediation

Mediator

Primarily Private Caucuses

Attorney A
Required

Attorney B
Required

Party A
Meet & Greet Benediction

Party B

Source: C. D. Bultena, C. D. Ramser, and K. R. Tilker
Figure 2: Migration of Conflict Style in Compulsory Mediation

![Diagram showing the migration of conflict styles with axes for Assertiveness (Concern for Self) and Cooperativeness (Concern for Others). The styles are Competing, Collaborating, Compromising, Avoiding, and Accommodating.]

**Source:** Adapted from Thomas (1992) animals and arrows added by authors.64

Figure 3: Arrested Group Development in Compulsory Mediation

![Diagram showing the arrested group development stages: Forming (Confusion), Storming (Conflict), Norming (Clear Roles), Performing (Fully Functioning), and Adjourning (Disbanding).]

**Source:** Tuckman (1965) subheadings, settlement, and broken arrows by authors.65

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64 Thomas, p. 668.
65 Ibid, p. 386.
Figure 4: Mediation Style and Degree of Party Participation

Delegate
  - Transformative - Open Format

Facilitative
  - Facilitative - Joint Sessions

Consult as a Group
  - Evaluative - Joint & Private Sessions

Consult Individually
  - Evaluative - Private Caucuses

Decide Alone
  - Litigation - Ruling by a Judge

Source: Adapted from Vroom (2000) mediation equivalents and graphics by authors.\textsuperscript{66}

\textsuperscript{66} Vroom, p. 82-94.
Figure 5: Integrative Model of Mediation Style

Source: C. D. Bultena, C. D. Ramser, and K. R. Tilker
TECHNIQUES FOR INTEGRATING LEGAL CONSIDERATIONS WITH BUSINESS PROCESSES

Evan Peterson

Managers routinely hold viewpoints that marginalize the importance of the legal profession in the corporate setting. This outlook reflects a careless disregard for the connection between law and competitive advantage. Given that managers will routinely execute a growing number of business decisions in the years ahead requiring an appreciation of legal strategy initiatives, organizations will face an escalating need to reexamine and adjust managerial attitudes toward the value of law and the legal department within the corporate setting. Numerous scholars have developed frameworks that will facilitate organizational efforts to obtain competitive advantage from the law by further integrating legal considerations into business decision-making, including the five pathways of legal strategy, the manager’s legal plan, legal astuteness, concept-sensitive managerial analysis, and the proactive approach to sustainable governance. Despite the growth of scholarship highlighting the significance of law to business strategy, there is far less research focused on the identification of techniques for putting the legal significance concepts generated by such discussions into practice within the organization. As each framework relies on different techniques for emphasizing the importance of legal strategy, there is an absence of common ground for exercising influence, changing...

3 Evans & Gabel, supra note 1, at 335; George J. Siedel & Helena Haapio, PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE (2016).
4 Bird & Orozco, supra note 1.
5 Siedel & Haapio, supra note 3.
behavior, and managing relations between the legal and management spheres within the corporation.10

I. STUDY BACKGROUND

I conducted a 3-round Delphi study to address the general problem concerning the severe limitations placed on the organizational ability to derive strategic value from the law due to the lack of integration between legal strategy and business strategy in the corporate setting. The specific problem that I addressed in this study is that managers hold unreceptive viewpoints toward the strategic value of law within the corporate setting.11 Although in-house general counsel working across business industries in the United States stand in a position to develop techniques for altering unreceptive managerial viewpoints toward the law, a lack of consensus exists among them with regard to techniques that will alter unreceptive managerial viewpoints toward the strategic value of law within the corporate setting.

The purpose of my study was to build this consensus.12 Data collection took place between March 13, 2017, and June 5, 2017. During the first round, I distributed an electronic questionnaire containing 6 broad, open-ended questions to a study panel comprised of in-house general counsel working across business industries in the United States. The second-round questionnaire consisted of theme statements derived from panelists’ responses to the first round questionnaire. Panelists rated each statement on the second round questionnaire against 2 separate 5-point Likert scales: desirability and feasibility. Any statement where the collective frequency of panelists’ top 2 responses (rating of 4 or 5) was 70% or higher on both the desirability and feasibility scale passed to the third round.13 The third-round questionnaire consisted solely of theme statements carried over from Round 2. In Round 3, panelists rated each remaining statement against 2 other scales: importance and confidence. The statements where the collective frequency of panelists’ top 2 responses (rating of 4 or 5) was 70% or higher on both the importance and confidence scales formed a consensus on techniques that will alter unreceptive managerial viewpoints toward the law within the corporate setting.

The final list of 25 theme statements generated by the study panel in Round 3 encompassed the following categories: (a) managerial attitudes toward lawyers and the law; (b) relationships between lawyers and non-lawyer managers; (c) leadership in the legal profession; (d) role and functions of in-house general counsel, and (e) law, legal strategy, and competitive advantage. The discussion in the present article will focus on the last major category: law, legal strategy, and competitive advantage.

11 Evans & Gabel, supra note 1, at 335.
12 I conducted this Delphi study for my doctoral dissertation in partial fulfillment of the requirements for a Ph.D. in Management program. This article encompasses the literature and results from one of the five key themes in the study: law, legal strategy, and competitive advantage.
13 Setting the level of consensus at 70% set a relatively high bar indicating that a substantial majority of the panelists leaned toward consensus.
II. LITERATURE REVIEW

A. The Delphi Method

The Delphi research design is an iterative process for developing a consensus among a panel of experts through the distribution of questionnaires and feedback. The Delphi method is geared toward the formation of consensus among a group of experts in cases where an absence of existing scholarship exists on a research topic. Delphi studies occur through a series of iterations (rounds), beginning commonly with the distribution of broad, open-ended questions in the first round and concluding with the development of consensus in the final round. The technique was pioneered by the RAND Corporation in the 1950s as a means to generate forecasts in connection with military technological innovations. Scholars have applied the Delphi method to problems in multiple areas, including government, medicine, environmental and social studies, and industrial/business research.

The Delphi design consists of four principal characteristics: (a) participant selection is based on predefined qualifications; (b) participants communicate solely with the study coordinator and remain anonymous to other participants; (c) information is gathered and redistributed to study participants by the study coordinator through a series of iterations (rounds), and (d) the responses of individual participants are combined by the study coordinator into a collective group response. The benefits of the Delphi method include the minimization of biases stemming from face-to-face interaction, the gathering of varied experts from isolated geographical locations, the abolition of prolonged face-to-face meetings, and the facilitation of greater inclusion from groups of individuals who are habitually omitted from participation in academic research. Rigor is central to the Delphi method, wherein researchers commonly use rating scales to evaluate panelists’ responses along four key dimensions: desirability, feasibility, importance, and confidence. These four dimensions denote the minimum amount of information required for the adequate assessment of an issue using the Delphi method.

Although the four principal characteristics of the design are common to all Delphi studies, numerous types of Delphi studies exist within the academic literature. In a classical Delphi study, researchers determine the degree of consensus among a panel of experts on a

20 Linstone & Turoff, supra note 17.
specific topic or issue. In a decision Delphi, researchers ask panelists to articulate and strengthen their decisions in response to a given scenario. In a modified Delphi, panelists respond to pre-selected items drawn from the existing literature. In studies that use policy Delphi, researchers try to develop the strongest potential viewpoints in opposition to the resolution of a key policy issue. In a real-time Delphi study, panelists use computer technology to reach a real-time consensus. Further distinctions that separate Delphi studies include variations in panel size, number of rounds, and measurement of consensus. Although the typical Delphi study contains either 2 or 3 rounds of data collection, researchers may incorporate additional rounds as necessary to achieve consensus. Differences exist among the viewpoints held by researchers regarding the minimum number of panelists that are necessary to run a Delphi panel. With respect to measuring consensus in a Delphi study, researchers have used percentage agreement, stipulated number of rounds, coefficient of variation, post-group consensus, and subjective analysis.

B. Law, Legal Strategy, and Competitive Advantage

1. Viewpoints toward Legal Strategy

The connection between legal strategy and business strategy represents a growing phenomenon within legal and management scholarship. Organizations historically viewed the primary function of the legal system regarding setting up the rules of the game by delineating the margins that society should impose upon business sector operations from a public policy standpoint. Existing scholarship reflects a diverse array of managerial viewpoints toward law and the regulatory system. Common perceptions of in-house counsel include beliefs that lawyers are not team players and a necessary evil in the corporate environment. Managers often view the law as a hindrance to organizational growth. While some managers believe that law is the solitary obligation of in-house attorneys or outside counsel, other managers believe that contract negotiations do not require the presence of in-house counsel. Corporate clients often consider

22 Id.
23 Id.
24 Id.
25 Id.
27 von der Gracht, supra note 14, at 1529.
legal implications in the limited context of responding to events or incidents with potential legal significance. Managerial perspectives of in-house counsel include perceptions that attorneys have unwarranted authority over decisions affecting the employer-employee relationship, including demotions, promotions, access to benefits, inter-departmental transfers, and terminations. The fictional depictions of aggressive fighter attorneys in movies and television shows may nurture impracticable expectations and affect perceptions of attorneys in practice.

Despite traditional perspectives and viewpoints regarding legal strategy, the complexities and challenges of modern commerce have catalyzed the need for change. Six forces have propelled legal strategy considerations to the forefront of management concerns: regulation, litigation, entrepreneurship, globalization, compliance, and technology. In response to the growing hypercompetitive nature of the business environment, organizations will experience a growing need to use law for strategic business purposes. Three categories of flexibility are intrinsic to every legal system: systemic flexibility, substantive flexibility, and enforcement flexibility. An organization that acknowledges and manages these inherent flexibilities will stand in a strong position to develop legal competitive advantage. Law will continue to affect each of the five forces that define an enterprise’s attractiveness to customers: (a) competitive threats posed by rivals; (b) buyer power; (c) supplier power; (d) availability of substitutes, and (e) threat of new entrants. Law will affect every activity in the value chain.

Scholars have applied legal strategy concepts to numerous areas of business strategy. Remus examined how corporate lobbying practices may influence future legal changes by the national legislature. Rahim studied how legal strategies designed to unite corporate social responsibility principles with production standards will lead to a potential competitive advantage. Iqbal, Khan, and Naseer surveyed the potential strategic benefits associated with future revisions to e-commerce regulations. DeStefano, Sahani, Sebok, and Lovell each used legal strategy concepts to analyze future trends in commercial claim funding. Steinitz examined the application of corporate governance practices to litigation governance, noting that such integration will diminish the costs imposed by litigation in transactions related to future mergers or acquisitions. Mortan, Rațiu, Vereș, and Baciu examined the challenges that will

32 Lovett, supra note 9, at 131.
33 Lovett, supra note 9, at 131.
34 Haapio, supra note 31.
38 Id.
39 Bagley, supra note 28; Bagley, supra note 2.
40 Id.
42 MIA M. RAHIM, LEGAL REGULATION OF CORPORATE SOCIAL RESPONSIBILITY: A META-REGULATION APPROACH OF LAW FOR RAISING CSR IN A WEAK ECONOMY (2013).
surround the integration of legal strategies designed to address environmental issues with global company practices.\textsuperscript{46}

Alongside defensive legal strategies, the use of aggressive litigation practices is a common but contentious implementation of legal strategy principles. The use of aggressive litigation to protect intangible assets and drive firm value creation will continue to affect patent law in the years ahead.\textsuperscript{47} Commonly referred to as patent trolling, the aggressive litigation process involves the following features: (a) the acquisition of patent ownership rights for the sole objective of extracting payments from alleged patent infringers; (b) the absence of any research or development connected to products or technology related to the subject matter of the patent, and (c) the opportunistic assertion of patent infringement claims after alleged infringers have made irreparable resource investments.\textsuperscript{48} Although patent trolling is permissible under existing federal regulations, such practices will continue to generate extensive debate within the legal and business communities.\textsuperscript{49} Two central factors will continue to drive the heated nature of the debate: (a) patent trolls engage in nuisance value litigation by suing numerous alleged infringers at one time in the hope of reaching a quick out-of-court settlement, and (b) patent trolls initiate litigation when their targets are most vulnerable, such as immediately before new product releases.\textsuperscript{50}

Scholars have criticized the unscrupulous nature of the process, noting that patent trolls will send thousands of letters to potential infringers, fail to provide sufficient explanation of the alleged infringement, and place unreasonable time constraints on requests for excessive financial compensation.\textsuperscript{51} Increasing discussion exists within the legislature regarding future reforms and modifications to patent regulations necessary to counteract the aggressive nature of such practices.\textsuperscript{52} Other scholars have examined ways to strategically use exemptions and exceptions within existing patent regulations as a defense to future infringement suits brought by patent trolls.\textsuperscript{53} Despite the controversy, aggressive litigation practices reflect changing perspectives


\textsuperscript{50} Hagiu & Yoffie, supra note 48.


toward the role of legal strategy in the business context: a shift from a reactive posture to a proactive posture.

2. Proactive Law

Proactive law represents a newer development in the area of legal scholarship. It began in late 1990s Scandinavia as a movement to enhance business contracting processes. Proactive law encompasses practices, skills, procedures, and knowledge that support the identification of forthcoming legal difficulties while preventive action remains feasible, as well as the identification of business opportunities in sufficient time to exploit conceivable benefits. The principles of proactive law center on using the law as an empowering mechanism to foster relationships, cultivate value, and manage future risk, rather than relegating law to the inconsequential status of an encumbrance, constriction, or cost feature. A central tenet of proactive law centers on the cultivation of inter-professional collaboration between managers, lawyers, and other subject matter experts. Proactive law consists of the following elements:

- Supporting compliance with applicable legal rules and regulations.
- Minimizing the risks, problems, and losses associated with non-compliance.
- Eliminating the chief causes of compliance failures.
- Lawyers serving as strategic advisors.
- Assisting in the attainment of mutual goals and objectives.
- Maximizing the positive benefits and outcomes of upcoming business opportunities.
- Driving impending business success factors.
- Promoting the involvement of lawyers in cross-professional collaborative teams.

The proactive law movement is not localized to Europe. In the United States, legal scholars and practitioners have applied the fundamental concepts of proactive law to efforts geared toward assisting in-house legal departments in transitioning from reactive postures to proactive postures. A reactive law department constantly functions in firefighter mode by reacting to critical events only as they arise. A major disadvantage of such an approach lies in the department’s reduced capacity to establish a chain of priorities and identify future business risks in a systematic manner. In contrast, Lees et al. referred to a proactive law department as one that will maintain the necessary behaviors, resources, processes, and procedures to successfully respond to emerging issues in a timely and efficient manner. The reduced emphasis on firefighter mode inherent in the proactive approach will provide the law department with additional time to prepare for future problems preemptively, generate creative methods for

56 Berger-Walliser, supra note 9, at 435.
57 Id.
59 Id.
60 Id.
legally achieving strategic business objectives, examine the potential legal consequences of developing business trends, and address known risks in a pre-emptive manner.61 Proactive law moves beyond the mere consideration of preventing legal problems to the future-oriented integration of legal skills and knowledge firmly into corporate culture, strategy, and day-to-day business activities.62

Over the last several years, scholars have applied proactive law to a variety of emerging issues, disciplines, and events affecting the business environment. The forward-thinking application of proactive law to a variety of disciplines, including risk management, contract economics, marketing, and tax law reflects the movement’s interdisciplinary nature.63 Scholars have conducted extensive research on how businesses can approach contracting to promote the development of holistic business opportunities.64 Kerikmäe and Rull applied proactive law principles to escalating critical issues surrounding the relationship between law and technology.65 Barton noted that technological advancement will continue to test old-fashioned legal methodologies and prompt a re-design of legal systems using proactive law approaches.66 Berger-Walliser et al. noted that proactive law will enhance organizational environmental sustainability strategies.67 Proactive law has not yet achieved widespread general acceptance or universal comprehension among legal scholars and business practitioners.68

There is no one-size-fits-all approach to legal strategy. Implementing an effective legal strategy is an iterative process that will take time, requiring careful consideration of important factors, including financial resources, reporting structures, and the competitive landscape.69 A more important consideration relates to the challenges imposed by managerial attitudes on efforts to use the law for competitive advantage.70 Bird noted that it is essential to identify, understand, and encourage the conditions and characteristics that will drive legally strategic behavior in managerial employees.71 As noted by Berger-Walliser, although scholars have addressed the paradigm shift accompanying the new objectives of proactive law, they have largely failed to examine approaches for actually facilitating the shift.72 Berger-Walliser identified a need for methods and tools to turn proactive law into practice.73 The work of Siedel and Haapio supports this viewpoint. Siedel and Haapio noted that once an organization identifies the attitudinal variables necessary for encouraging the development of legal strategy among managers, it will need a framework to encourage behaviors and practices based on those new understandings.74 A fundamental component of proactive law, stemming from the movement’s future-oriented

61 Id.
62 Haapio, supra note 31.
63 Berger-Walliser, supra note 9; Berger-Walliser & Shrivastava, supra note 54.
65 TANEL KERIKMÄE & ADDI RULL, THE FUTURE OF LAW AND ETENOCITIES (2016)
67 Berger-Walliser, Shrivastava, & Sulkowski, supra note 8.
68 Barton, supra note 66; Berger-Walliser, supra note 9.
69 Bird & Orozco, supra note 1.
70 Siedel & Haapio, supra note 28.
71 Bird, supra note 1.
72 Berger-Walliser, supra note 9.
73 Id.
74 Siedel & Haapio, supra note 30.
emphasis on the integration of legal and business acumen, is the facilitation of inter-professional collaboration. Haapio further noted that by learning and working together collaboratively, managers and lawyers will develop enhanced actions plans to achieve business success.

3. Existing Frameworks

Scholars have developed numerous frameworks geared toward obtaining a competitive advantage from the law by changing the role of law in business decision-making. As noted more fully below, the differences among the frameworks fall along 3 dimensions: (a) the specific tactics used to promote legal strategy; (b) the degree of response regarding managerial attitudes toward the law, and (c) the identification of tangible, concrete action steps for implementing the proposed tactics.

a. Zero-Expense Legal Department

This framework involves the reorganization of the legal department to eliminate unnecessary expenses. Di Cicco Jr. asserted that corporate counsel might change managerial perceptions of lawyers’ roles within the company by transforming the legal department into a zero-expense legal department. Di Cicco Jr. suggested that legal departments will use a variety of tools to cause this transformation, including the implementation of alternative fee schedules, increased emphasis on alternative dispute resolution, establishing clear performance metrics on managing the costs of litigation and transactional legal work, and the creation of a budget for every legal matter. Because this approach focuses on cost concerns, opportunities for further research include the identification and analysis of potential factors that may drive how the zero-expense legal department framework may affect relations with other organizational departments. Di Cicco Jr.’s discussion of the zero-expense legal department did not include practical guidance or action steps for organizations wishing to implement his suggestions.

b. Five Pathways of Legal Strategy

This framework reflects an attempt to categorize the various ways in which organizations view the law along a continuum. Bird and Orozco identified five different legal pathways on a continuum of strategic affect that organizations will employ to identify value-creating opportunities from the law: (a) avoidance; (b) compliance; (c) prevention; (d) value, and (e) transformation. While the first three pathways center on legal risk management, the final two pathways focus on the generation of future-oriented business opportunities. The framework promotes legal strategy by identifying the strategic opportunities connected to policies along a continuum of 5 pathways of legal strategy. Although a considerable bulk of Bird and Orozco’s article centered on a description of each pathway, they also indicated that the execution of a legal strategy audit and the appointment of a chief legal strategist represented two action steps for implementing the concepts noted in their overall framework. Because the authors did not include

75 Haapio, supra note 33.
77 Id.
78 Bird & Orozco, supra note 1.
79 Id.
any substantive discussion of any discussion on the practical implementation of their pathways or action steps, opportunities for future research exist in further identifying the factors that may drive or hinder the implementation of these pathways and action steps within the organization.

c. Manager’s Legal Plan

The Manager’s Legal Plan (MLP) provides managers with a method for identifying and creating value from the legal elements inherent in routine business situations. The MLP is a proactive decision-making process focused on altering the belief that law attaches solely to legal problems.\(^{80}\) The goal of the MLP is to support the future transformation of managerial viewpoints away from reactive perceptions of the law toward proactive perceptions of the law.\(^{81}\) According to Siedel and Haapio, the MLP consists of four steps:\(^{82}\)

- Step 1: Understand the legal dimensions of business and learn how to work alongside legal professionals.
- Step 2: Recognize methods for dealing with a legal problem by handling its costs and learning from the challenges it creates.
- Step 3: Concentrate on developing business solutions and strategies to prevent the legal problem from occurring again in the future.
- Step 4: Reframe the legal problem as a business opportunity to cultivate new options for creating value.

The MLP places a primary emphasis on addressing managerial perceptions of the role of law and legal strategy within the organization. A unique feature of the MLP is that Siedel and Haapio tied it specifically to a variety of decisions and issues that managers will encounter on a routine basis, including human resource management, environmental regulation, intangible asset management, product development, business contracting and negotiations, ethics and compliance.\(^{83}\) Despite the breadth and depth of the MLP, there is room for additional research centered on identifying tangible action steps for putting the framework into practice within the organization.

d. Legal Astuteness

The legal astuteness framework places a heavy emphasis on proactive attitudes toward legal regulation and the importance of law. Legal astuteness supports the realization of competitive advantage by enhancing innovation in response to shifting market, institutional, and technological conditions.\(^{84}\) Legal astuteness encompasses the capability of a top management team to collaborate with in-house counsel toward the resolution of future complex challenges.\(^{85}\) Four central components comprise legal astuteness: (a) value-laden attitudes toward the importance of law to business success; (b) proactive attitudes toward legal regulation; (c) the capacity to use informed judgment in the management of legal issues affecting the business, and

\(^{80}\) Siedel & Haapio, supra note 3.

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) Siedel & Haapio, supra note 3.

\(^{84}\) Bagley, supra note 6.

\(^{85}\) Id.
(d) the ability to use suitable legal tools in conjunction with context-specific legal knowledge. The framework is unique in that it focuses on collaboration between top management teams and in-house counsel. As with other frameworks, recommendations for implementing the components of legal astuteness represent opportunities for future research.

e. Concept-Sensitive Managerial Analysis

The concept-sensitive managerial analysis sheds new light on the role of legal analysis in business decision-making. This framework relies on managerial prudence and judgment to recognize circumstances where identified legal, financial, and other factors will hinder managerial flexibility in decision-making. Holloway described the core essence of the concept-sensitive managerial analysis with law as centering on the integration of information from the business environment with legal analysis and business methods to facilitate future business decision-making. The analytical method will allow managers to comprehend the effect of legal regulations on business decisions. The process is an integrated conceptual framework comprised of 3 components: (a) the application of business concepts to legal regulations to detect conditions that will promote business opportunities; (b) the identification of environmental conditions where the flexibility to exploit business opportunities will remain absent due to existing legal regulations, business concepts, and other constraints, and (c) the engagement of a legal-analytical methodology in each step of the decision-making process to ensure compliance with legal requirements. The complexity and advanced nature of Holloway’s approach, however, may limit the framework’s applicability beyond managerial employees with a favorable predisposition to legal strategy.

f. Systems Approach to Law, Business, and Society

The systems approach to law, business, and society is a graphical framework that illustrates the relationship between top management teams, law, the value chain, the competitive environment, and company resources. The framework integrates legal issues into mental models that will drive the pursuit of competitive advantage within the organization. Researchers may use the framework to evaluate the degree of fit between an organization’s corporate social responsibility, legal, and political routines against the organization’s value chain, resources, and competitive environment in a holistic fashion. The framework allows top management teams to assess and pursue strategic opportunities for value creation in the value chain while managing the associated hazards. Similar to the legal astuteness framework, the systems approach to law, business, and society focuses largely on top management teams. A substantial portion of Bagley’s discussion emphasized the connection between legal strategy and competitive advantage, leaving little room for a more in-depth explanation of the framework’s individual elements.

86 Id.
87 Holloway, supra note 7.
88 Id.
89 Id.
90 Bagley, supra note 28, at 592.
91 Id.
92 Id.
g. Pharmaceutical Public-Private Partnership

The pharmaceutical public-private partnership (PPPP) framework possesses a unique feature that sets it apart from competing frameworks: the incorporation of tactics for supporting the pursuit of shared goals. PPPP’s will provide an effective collaboration framework if they include instruments for promoting cooperative performance.93 Contractual agreements driving PPPP arrangements ought to inspire diverse groups to collaborate as well as place a solid emphasis on the accomplishment of shared goals and objectives.94 Transparency in information, communication, and innovation through shared risk/reward systems will support the pursuit of shared goals through the equal distribution of gains and losses.95 Although the connections to the pharmaceutical setting inherent in the current articulation of the framework may limit its applicability to other industries, it may serve as a foundation for other industry-specific approaches.

h. Lean Compliance Management

Lean compliance management denotes an approach for encouraging and upholding legal compliance practices in an uncertain and ambiguous regulatory environment. The use of continuous improvement and analysis to create effective compliance processes is the cornerstone of lean compliance management.96 By following this process, legal compliance specialists and business executives will collaboratively shape future compliance practices in response to changing environmental conditions.97

i. Proactive Approach to Sustainable Governance

The proactive approach to sustainable governance is a response to the deficiencies displayed by existing sustainable development frameworks. According to Berger-Walliser and Shrivastava, the current legal framework for sustainable development is inadequate.98 To resolve the insufficiency, Berger-Walliser and Shrivastava applied the fundamental principles of proactive law to develop a method for facilitating better control over enterprise sustainability and improve private sector sustainable governance strategies. Their approach includes the following core elements: (a) participation and collaboration (i.e. stakeholder participation, multi-party collaboration, shift from adversarial to win-win relationships); (b) shared power and responsibility (i.e. empowering public-private partnerships, shared expertise and responsibility, decentralization, competition, pragmatism, and flexibility), and (c) problem-prevention and value-creation.99

III. RESEARCH DESIGN AND METHODOLOGY

94 Id.
95 Id.
97 Id.
98 Berger-Walliser, Shrivastava, & Sulkowski, supra note 8.
99 Id.


A. Panelist Selection

A fundamental component of the Delphi design encompasses the selection of experts to serve as study participants. Participant selection is a critical element in the Delphi technique. Rather than selecting participants using representative random samples, Delphi researchers select participants based on their expertise with the issue(s) involved in the study.\(^{100}\) Because no universal set of criteria exists for qualifying someone as a suitable expert for a Delphi panel, researchers have used a variety of criteria, including education, years of work experience, professional qualifications, project involvement, licensures, and professional publications.\(^{101}\) Participants in this study needed to meet 4 eligibility requirements: (a) possess a juris doctor degree from an ABA-accredited law school located in the United States; (b) possess a license to practice law in at least 1 state; (c) possess at least 5 years of business industry experience, and (d) currently serve in the role of in-house general counsel for an organization headquartered in the United States. I identified participants for this study using the professional networking site LinkedIn. Thirty-nine in-house general counsel who satisfied the study eligibility criteria agreed to participate in the study. Of the 39 individuals who agreed to participate, 19 participated in all 3 rounds of the study.

B. Data Collection and Data Analysis

1. The First Round

I developed the first round questionnaire based on a review of the existing literature, a field test of the questionnaire, and other peer feedback. To address the theme of law, legal strategy, and competitive advantage, and to develop techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting, the first question in Round 1 solicited panelists’ recommendations in response to the following open-ended statement: What actions will support the successful implementation of initiatives designed to better integrate legal considerations with company business processes? The instructions asked panelists to provide a minimum of 3 – 5 recommendations in response to the question, along with a short description for each recommendation. The study panelists generated 72 recommendations in response to the question.

I used thematic content analysis to analyze and code participants’ first round responses according to key themes. I used constant comparison to search for commonly used words and phrases and to group similar items together in tentative categories to minimize redundancy. I adjusted the codes and categories each time I received another response to the first round questionnaire. Upon final review and tabulation, the panel’s recommendations in response to the open-ended question led to the generation of 11 theme statements spanning the following 8 sub-categories: communication, relationship management, training, knowledge, results, oversight,\(^{100}\) Sinead Keeney, Felicity Hasson, & Hugh P. McKenna, *A Critical Review of the Delphi Technique as a Research Methodology for Nursing*, 38 INT’L J. NURS. STUD. 195, 196 (2001).
policy development, and involvement/participation. Table 1 contains an overview of the relevant Round 1 results.

Table 1
First Round Coding Results

<table>
<thead>
<tr>
<th>Code category/description</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Communication</strong></td>
<td></td>
</tr>
<tr>
<td>Timely and effective delivery of legal advice</td>
<td>6</td>
</tr>
<tr>
<td>Presence of clear, up-to-date policies and procedures</td>
<td>3</td>
</tr>
<tr>
<td>Use of info tech and other tools to support organizational processes</td>
<td>7</td>
</tr>
<tr>
<td>Proactive communication of legal department activities</td>
<td>2</td>
</tr>
<tr>
<td><strong>Relationship Management</strong></td>
<td></td>
</tr>
<tr>
<td>Environment where manager/lawyer supports contributions of the other</td>
<td>9</td>
</tr>
<tr>
<td><strong>Training and Education</strong></td>
<td></td>
</tr>
<tr>
<td>Identification of legal risks and new developments in law</td>
<td>6</td>
</tr>
<tr>
<td><strong>Knowledge</strong></td>
<td></td>
</tr>
<tr>
<td>Develop skills and knowledge beyond legal acumen</td>
<td>3</td>
</tr>
<tr>
<td><strong>Litigation Management</strong></td>
<td></td>
</tr>
<tr>
<td>Success in managing litigation and other legal matters</td>
<td>3</td>
</tr>
<tr>
<td><strong>Oversight</strong></td>
<td></td>
</tr>
<tr>
<td>Active corporate compliance infrastructure</td>
<td>4</td>
</tr>
<tr>
<td><strong>Policy Development</strong></td>
<td></td>
</tr>
<tr>
<td>Creation of business policies that directly include legal considerations</td>
<td>10</td>
</tr>
<tr>
<td><strong>Involvement and Participation</strong></td>
<td></td>
</tr>
<tr>
<td>Legal counsel connect with employees at all levels and stages of business process</td>
<td>19</td>
</tr>
</tbody>
</table>

2. The Second Round

The second-round questionnaire included the 7 statements derived from panelists’ responses to the first round questionnaire. Panelists rated each statement on the second round questionnaire against 2 separate 5-point Likert scales: desirability and feasibility. The scale measuring desirability ranged from (1) highly undesirable to (5) highly desirable, whereas the scale measuring feasibility ranged from (1) definitely infeasible to (5) definitely feasible. The instructions asked panelists to explain their reasoning if they applied a rating of 1 or 2 to a statement on either the desirability or the feasibility scale. The second round questionnaire included a list of references and definitions to provide panelists with clarity as to the meaning of each item on the desirability and feasibility scales respectively (see Appendix A). Any statement where the collective frequency of panelists’ top 2 responses (rating of 4 or 5) was 70% or higher on both the desirability and feasibility scale would pass on to the third round. Setting the level of consensus at 70% set a relatively high bar indicating that a substantial majority leaned toward consensus. As indicated in Table 2, 8 of the 11 statements satisfied the 70% threshold and
passed to Round 3. The panelists in Round 2 also provided a diverse assortment of optional comments and explanations of their reasoning.

Table 2
Round 2 Ratings

<table>
<thead>
<tr>
<th>Statement</th>
<th>Desirability rating %</th>
<th>Feasibility rating %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Integrating legal considerations w/company business processes by delivering timely and effective legal advice.</td>
<td>91%</td>
<td>74%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes through the dissemination of clear, up-to-date company policies and procedures by in-house counsel.</td>
<td>91%</td>
<td>78%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by fostering the joint use of information technology and other support tools by managers and in-house counsel.</td>
<td>65%</td>
<td>35%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by proactively circulating notices of legal department activities.</td>
<td>43%</td>
<td>74%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by stimulating a work environment where managers and lawyers recognize and rely on each other's contributions to the company.</td>
<td>100%</td>
<td>74%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by providing training on identifying legal risks and legal developments affecting the company.</td>
<td>100%</td>
<td>74%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by employing in-house counsel who possess business skills and business knowledge.</td>
<td>96%</td>
<td>52%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by successfully managing litigation and other company legal matters.</td>
<td>91%</td>
<td>78%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes through corporate compliance programs.</td>
<td>74%</td>
<td>70%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by creating business policies that directly include legal considerations.</td>
<td>100%</td>
<td>83%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by involving in-house counsel in company business processes.</td>
<td>100%</td>
<td>87%</td>
</tr>
</tbody>
</table>

3. The Third Round

The third-round questionnaire included the 6 statements that carried over from Round 2. The panelists rated each statement against the other 2 scales: importance and confidence. The scale measuring importance ranged from (1) most unimportant to (5) very important, whereas the scale measuring confidence ranged from (1) unreliable to (5) certain. Similar to Round 2, the third-round questionnaire included a list of references and definitions to provide panelists with clarity as to the meaning of each item on the importance and confidence scales respectively (see Appendix A). The instructions once again asked panelists to explain their reasoning if they applied a rating of 1 or 2 to a statement on either the importance or the confidence scale. As
indicated in Table 3, 7 of the 8 statements satisfied the 70% threshold for both importance and confidence. Similar to Round 2, the panelists in Round 3 provided a diverse assortment of optional comments and explanations of their reasoning.

Table 3

Round 3 Ratings

<table>
<thead>
<tr>
<th>Statement</th>
<th>Importance rating %</th>
<th>Confidence rating %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Integrating legal considerations w/company business processes by delivering timely and effective legal advice.</td>
<td>100%</td>
<td>89%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by stimulating a work environment where managers and lawyers recognize and rely on each other's contributions to the company.</td>
<td>84%</td>
<td>79%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes through the dissemination of clear, up-to-date company policies and procedures by in-house counsel.</td>
<td>74%</td>
<td>79%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes through corporate compliance programs.</td>
<td>74%</td>
<td>74%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by successfully managing litigation and other company legal matters.</td>
<td>79%</td>
<td>68%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by providing training on identifying legal risks and legal developments affecting the company.</td>
<td>79%</td>
<td>84%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by involving in-house counsel in company business processes.</td>
<td>95%</td>
<td>79%</td>
</tr>
<tr>
<td>Integrating legal considerations w/company business processes by creating business policies that directly include legal considerations.</td>
<td>79%</td>
<td>74%</td>
</tr>
</tbody>
</table>

C. Exploring the Results

The key findings of this study, depicted by the theme statements contained in Table 3, represent a consensus by the study panel on actions for supporting the successful implementation of initiatives designed to better integrate legal considerations with company business processes. The actions for supporting the successful implementation of integration initiatives, in turn, represent a subset of techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting. The findings suggest that organizations seeking to integrate legal considerations with company business processes should pursue techniques related to delivering timely and effective legal advice, involving in-house counsel in company business processes, and stimulating a work environment where managers and lawyers recognize and rely on each other's contributions to the company. A review of non-consensus items (items failing to reach the 70% consensus threshold on at least one scale) must fall alongside the final consensus items, as both sets of items highlight the areas where organizations should direct limited time and resources in conjunction with techniques aimed at integrating legal considerations with company business processes.

1. Communication
The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the desirability, feasibility, importance, and confidence of integrating legal considerations with company business processes by delivering timely and effective legal advice. These findings are consistent with the literature. The exercise of good communication skills is a critical leadership attribute in modern in-house legal practice. The capacity to work with people, which contains interpersonal communication, also represents an indispensable core competency. Mitigating or preventing organizational conflict between in-house lawyers and managers will require both groups to integrate their respective spheres of knowledge and abilities using effective communication. While several panelists commented that the timely delivery of effective legal advice by in-house counsel is a key, non-negotiable value proposition for every legal department, one panelist expressed a concern that the delivery of legal advice must accompany active engagement by legal at an early stage.

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the desirability, feasibility, importance, and confidence of integrating legal considerations with company business processes through the dissemination of clear, up-to-date company policies and procedures by in-house counsel. Comments by the panelists highlighted several key factors that must accompany the dissemination of policies and procedures by in-house counsel, including: (a) the legal department must avoid exercising excessive control over policies that are owned/operationalized by other departments; (b) the legal department cannot exclude the HR department from revisions/updates to company policies, and (c) distributing policies and procedures does not guarantee acceptance.

The collective ratings supplied by the panelists in Round 2 indicated low levels of agreement with the desirability and feasibility of integrating legal considerations with company business processes by fostering the joint use of information technology and other support tools by managers and in-house counsel. While these findings do not necessarily discredit prior research that understanding information technology is an essential skill for general counsel, the findings do highlight necessary considerations and inevitable challenges relative to the collaborative use of information technology by managers and in-house counsel. The emphasis of such considerations and challenges may pose difficulties for the re-design of legal systems noted by Barton and for the collaboration between legal counsel, corporate executives, and technology experts envisioned by McAfee and Shackelford respectively. Combined with the low feasibility ratings, the associated comments raise the possibility that in-house counsel may oppose efforts to integrate legal considerations into company business processes.

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102 *High level agreement* indicates the collective ratings supplied by the panel met or exceeded the 70% measure of consensus established for the Delphi study. *Low level of agreement* indicates that the collective ratings supplied by the panel did not meet or exceed the 70% measure of consensus established for the Delphi study.


through the joint use of information technology by managers and in-house counsel. To manage potential interpersonal conflict between managers and in-house counsel, organizational change agents contemplating initiatives designed to encourage the joint use of information technology will need to address the opposition to such initiatives potentially posed by in-house counsel.

The collective ratings supplied by the panelists in Round 2 indicated a low level of agreement with the desirability but a high level agreement with the feasibility of integrating legal considerations w/ company business processes by proactively circulating notices of legal department activities. This result may appear inconsistent with conclusions by Haapio that communication between lawyers and managers will integration legal and business considerations within the organization.107 Research efforts by the Association of Corporate Counsel also emphasize the importance of effective communication in an interdisciplinary, organizational setting.108 A review of the comments accompanying the ratings suggests a possible explanation for the low collective desirability rating. An obstacle to the circulation of legal department activity notices identified by multiple panelists centered on concerns that such communications may erode attorney-client privilege. The comments further raise the possibility that even genuine, sincere efforts by the legal department to increase transparency over its activities may have negative, unintended results. One panelist cautioned that non-legal employees may perceive the notices as a means for the legal department to boast about its collective accomplishments. Given the diverse factors that drive managerial mental frames and cognitive biases toward the legal department), it is important not to discount such a possibility.109

2. Relationship Management

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the desirability, feasibility, importance, and confidence of integrating legal considerations w/ company business processes by stimulating a work environment where managers and lawyers recognize and rely on each other's contributions to the company. These results are consistent with research by Mottershead and Magliozzi who noted that emotional intelligence, collaboration, and the ability to build relationships and work with people are among the core competencies necessary for success in the modern legal profession.110 The results are also consistent with research by Broderick who noted that critical leadership attributes and qualities include the ability to build coalitions, humility, and empathy.111 The findings also reinforce the need for research on the benefits that collaborative relationships between internal lawyers and managers will bring to the organization. Despite the high ratings provided by the panel, the comments serve as an important reminder that in-house lawyers may approach relationship management from different perspectives. While recognizing and relying on each other's contributions may lead to a more pleasant working environment, such behaviors alone

107 Haapio, supra note 51.
108 Association of Corporate Counsel, supra note 105.
110 Mottershead & Magliozzi, supra note 104.
111 Broderick, supra note 103.
may lack the force necessary to alter some of the factors that typically drive interpersonal conflict between lawyers and managers.\textsuperscript{112}

3. Training and Education

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the desirability, feasibility, importance, and confidence of integrating legal considerations w/company business processes by providing training on identifying legal risks and legal developments affecting the company. As one panelist noted, the feasibility is contingent upon the reception from management. Anxiety over the authority of corporate counsel and interpersonal conflicts stemming from differences in training and education may undercut the effectiveness of any training provided by in-house counsel.\textsuperscript{113} In-house lawyers must avoid overwhelming managers with discussions of hazards that may have the unwanted consequence of stifling managerial creativity. This suggests a limit to drawing responsibilities for law-related risk management techniques to individuals outside the legal department.

4. Knowledge

The collective ratings supplied by the panelists in Round 2 indicated a high level of agreement with the desirability but a low level agreement with the feasibility of integrating legal considerations w/company business processes by employing in-house counsel who possess business skills and business knowledge. The findings are consistent with the conclusions noted by Cochran, Trezza, and other researchers that many lawyers often lack formal training, ability, and comfort with business and leadership skills.\textsuperscript{114} These findings may also conflict with the work of the Association of Corporate Counsel indicating that a majority of chief legal officers have played an increasing role in corporate strategy development in recent years.\textsuperscript{115} The discrepancy in findings may stem from the difference in roles: the Association of Corporate Counsel study surveyed chief legal officers whereas the present study covered individuals serving as general counsel. The desirability ratings relative to the expansion of general counsels’ roles to include business strategy are relatively consistent with the existing literature. The comments also drew attention to the fact that the skill level of the legal department staff may also affect feasibility. Access to knowledge resources alone is insufficient; access must accompany concerted efforts to encourage managers to take advantage of such resources.

5. Litigation Management

\textsuperscript{112} K. B. C. Ashipu & Gloria M. Umukoro, \textit{A Critique of the Language of Law in Selected Court Cases in Nigeria}, 5 MEDITERRANEAN J. SOC. SCI. 622 (2014) (inability to understand legalese may lead others to ignore or discount applicable, even critical, legal information); Stephen Betts & William Healy, \textit{Having a Ball Catching on to Teamwork: An Experiential Learning Approach to Teaching the Phases of Group Development}, 19 ACAD. EDUC. LEAD. J. 1, 1 (2015) (managers and lawyers often have different viewpoints and perspectives on teamworke due to difference in business education and legal education).


\textsuperscript{115} Association of Corporate Counsel, \textit{supra} note 105
The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the desirability, feasibility, importance, and confidence of integrating legal considerations w/company business processes by successfully managing litigation and other company legal matters. One panelist noted that assumptions already exist with respect to the legal department’s primary task of managing litigation issues. This comment may suggest that emphasizing managerial expectations that are already present in the workplace with respect to legal department activities may serve as poor techniques for changing those same managerial perspectives toward legal strategy. The other comments supplied by the panelists appear to reflect concerns about using litigation outcomes as a measure to alter managerial viewpoints. One panelist noted that the outcome of litigation is often uncertain and requires a significant amount of judgment. Another panelist referenced an old adage that if you win, you should have won, and if you lose, you are incompetent and screwed it up. The comments potentially suggest thoughts by the panel that employees outside the legal department may misinterpret failure in litigation as a failure by the legal department itself rather than a potential outcome inherent in all litigation.

6. Oversight and Policy Development

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the desirability, feasibility, importance, and confidence of integrating legal considerations w/company business processes through: (a) corporate compliance programs, and (b) business policies that directly include legal considerations. These findings support Bird and Orozco’s five pathways of legal strategy framework by further illustrating the connection between strategic opportunities, the roles of in-house legal counsel, and manager’s perceptions of the law.116 One panelist noted that the statement referenced a key element only insofar as the organizational culture is supportive of enforcement. Other panelists highlighted another potential challenge to the effectiveness of this technique: incorporating legal considerations into compliance programs will not improve perceptions of in-house counsel in organizations where the compliance department is separate from the legal department. A potential implication is that change agents who seek to implement new policies or compliance programs must include organizational change strategies for addressing the inevitable organizational conflict.

8. Involvement and Participation

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the desirability, feasibility, importance, and confidence of integrating legal considerations w/company business processes by involving in-house counsel in company business processes. These findings lend potential support to the assertion by Orozco that collaboration between managers and attorneys will lead to group learning and the generation of advanced legal knowledge, as well as support the contentions by Bird that knowledge generated through group learning will lead to the development of collaborative solutions to complex problems.117 These findings also highlight an important aspect of Bird’s and Orozco’s respective works: organizations must involve in-house counsel in the business process. In addition to likely

116 Bird & Orozco, supra note 1.
resistance from employees at numerous organizational levels who may view the presence of in-house counsel with suspicion or trepidation, some in-house counsel may hold the viewpoint that business processes are not their responsibility. In-house counsel must also take caution to avoid overwhelming managers with discussions of hazards and to avoid the perception that they are overseers rather than collaborators.

IV. CONCLUSION

The specific problem that I addressed in this study is that managers hold unreceptive viewpoints toward the strategic value of law within the corporate setting. While in-house general counsel working across business industries in the United States are poised to develop techniques for altering unreceptive managerial viewpoints toward the law, a lack of consensus exists among them with respect to techniques that will alter unreceptive managerial viewpoints toward the strategic value of law within the corporate setting. To address the theme of law, legal strategy, and competitive advantage, and to develop techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting, the Round 1 questionnaire solicited panelists' recommendations in response to the following open-ended statement: What actions will support the successful implementation of initiatives designed to better integrate legal considerations with company business processes? The final list of theme statements generated by the study panel in Round 3 encompassed the following actions: (a) delivering timely and effective legal advice; (b) stimulating a work environment where managers and lawyers recognize and rely on each other's contributions to the company; (c) the dissemination of clear, up-to-date company policies and procedures by in-house counsel; (d) corporate compliance programs; (e) providing training on identifying legal risks and legal developments affecting the company; (f) involving in-house counsel in company business processes, and (g) creating business policies that directly include legal considerations.

The key findings of this study represent a consensus by the study panel on actions for integrating legal considerations with company business processes. The actions for integrating legal considerations with company business processes, in turn, represent a set of techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting. The findings suggest that organizations seeking to integrate legal considerations with company business processes should pursue techniques related to delivering timely and effective legal advice, involving in-house counsel in company business processes, and stimulating a work environment where managers and lawyers recognize and rely on each other's contributions to the company.
APPENDIX A

Desirability Scale:

(1) – Highly Undesirable: Will have major negative effect
(2) – Undesirable: Will have a negative effect with little or no positive effect
(3) – Neither Desirable nor Undesirable: Will have equal positive and negative effects
(4) – Desirable: Will have a positive effect with minimum negative effects
(5) – Highly Desirable: Will have a positive effect and little or no negative effect

Feasibility Scale:

(1) – Definitely Infeasible: Cannot be implemented (unworkable)
(2) – Probably Infeasible: Some indication this cannot be implemented
(3) – May or May Not be Feasible: Contradictory evidence this can be implemented
(4) – Probably Feasible: Some indication this can be implemented
(5) – Definitely Feasible: Can be implemented

Importance Scale:

(1) – Most Unimportant: No relevance to the issue
(2) – Unimportant: Insignificantly relevant to the issue
(3) – Moderately Important: May be relevant to the issue
(4) – Important: Relevant to the issue
(5) – Very Important: Most relevant to the issue

Confidence Scale:

(1) – Unreliable: Great risk of being wrong
(2) – Risky: Substantial risk of being wrong
(3) – Not Determinable: Information needed to evaluate risk is unavailable
(4) – Reliable: Some risk of being wrong
(5) – Certain: Low risk of being wrong
TRADE DRESS: RISING FROM THE ASHES

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ABSTRACT

Trade dress represents an often overlooked form of intellectual property. While simply defined as a unique design that identifies the good or service being provided, trade dress has played second fiddle to more identifiable intellectual property assets such as patents, copyrights, and trademarks. Trade dress was essentially dormant for the better part of the 20th century, with renewed interest in it beginning with the 1992 Supreme Court decision in Two Pesos v. Taco Cabana. Its recognition has been further enhanced with some cases since, most notably the Wal-Mart v. Samara Brothers suit, and then the recent Apple v. Samsung litigation.

We navigate through these and other landmark cases, explaining how each has helped to shape the current status of trade dress. We conclude by providing some recommendations as to how an entity might ensure that its trade dress is best initially developed, and then subsequently protected.

Key Words: trade dress, intellectual property, design patent, trademark, inherently unique, functionality, nonfunctional, Lanham Act, secondary meaning

I. INTRODUCTION

Most businesspeople are aware of the traditional areas of intellectual property: patents, copyrights, trademarks, service marks, and trade secrets. But many of these same people are not aware of another area of IP law that is becoming increasingly important and valuable—trade dress. This often ignored intellectual property has been defined very broadly, as when the 5th Circuit Court of Appeals described trade dress as “essentially [a business’] total image and overall appearance.” More recently it has been identified as “a product’s physical appearance, including its size, shape, color, design, and texture.” In addition, trade dress may include how a product is packaged, wrapped, labeled, presented, promoted, or advertised. The advertising protection can include any distinctive graphics, configurations, or marketing strategies.

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1 Blue Bell Bio-Medical v. Cin-Bad, Inc., 864 F.2d 1253, 1256 (5th Cir. 1989)
3 Id.
4 Id.
While the term “trade dress” was not used at the time, courts recognized the concept as early as 1900. In the case of Charles E. Hires Co. v. Consumers’ Co., the court found that the defendant had changed the shape of its root beer bottles to one identical in form to the complainant’s bottle. Consumers argued that the change was made so that the root beer bottle contained two full glasses of the beverage. As the court pointed out:

“This excuse is pretentious, merely. The bottle could have been enlarged without change of form. It was said at the bar that this act was a mistake on the part of the defendant. This is a charitable view of the act, but is in fact erroneous. It was not a mistake. The act was deliberate and designed. Its purpose, clearly, was to adopt the form of package previously adopted by the complainant.”

The court went on to say: “It is clear that here was deliberate imitation of the complainant's form of package, and… deliberate imitation of the complainant's trademark and label upon it. The obvious purpose and the manifest result of this piracy were to enable retail dealers to palm off upon the public the goods of the defendant as the goods of the complainant… It was proven that the complainant's root beer was principally known to and recognized by consumers from the peculiar form of bottle. It was this distinguishing feature which caught the eye, and abided prominently in the memory. Indeed, the court below declared in its opinion that the changes made by the defendant in its label tended to deceive 'when taken in connection with the shape of the bottle,’ thus clearly recognizing the fact that the form of the bottle employed was an effective factor in the deception practiced.”

In ruling in favor of Hires, the court noted that Consumers was not deprived of its right to market its root beer, but:

“at its peril, must see to it that its product is not dressed in the clothes of another’s. We may aptly conclude with the happy suggestion… that, ‘in the period of rest and quiet which will be secured by a temporary injunction, possibly defendants may renew their strength sufficiently to be able to get further away from' -- the complainant's form of bottle – ‘the next time they try to strictly differentiate their own goods.’”

While the court treated this as a case of palming off by Consumers, the concepts laid out in its opinion form the foundation for trade dress that are followed today: a unique design that identifies the source of the product or service being provided. Note that the court’s ruling had nothing to do with the product itself, only with how the product was packaged and the message that the packaging sent to its customers. It addressed the uniqueness of the package, not its function.

Another early case, Crescent Tool Co. v. Kilborn & Bishop Co., involved adjustable wrenches and addressed the issues of “secondary meanings” and nonfunctionality. Crescent
Tool Company introduced its “Crescent wrench, an adjustable wrench that became so identified with the company that it was simply called a ‘Crescent wrench’.” In 1910, Kilborn & Bishop began to produce and market an adjustable wrench that was similar in appearance to the wrenches manufactured by Crescent Tool. Crescent sued, alleging that Kilborn & Bishop (K&B) was guilty of unfair competition. Its “K&B 22 ½ adjustable” wrench looked virtually identical to the adjustable wrenches manufactured by Crescent, the only difference being that the handle had “The Kilborn & Bishop Company, New Haven, Connecticut, U.S.A.” printed on it where the Crescent wrenches simply had the name “Crescent.” Crescent asserted that the K&B wrench was so similar in appearance to the Crescent wrench that is caused confusion for the public about the source of the product.

The court held that “It is not enough to show that the wrench became popular under the name ‘Crescent’; the plaintiff must prove that before 1910 the public had already established the habit of buying it, not solely because they wanted that kind of wrench, but because they also wanted a Crescent, and thought all such wrenches were Crescents.”\(^{10}\) The court agreed with Crescent in part, stating that Crescent Tools had the right to not lose its customers through false representations regarding the origin of the wrenches. However, Kilborn & Bishop had the right to produce and market similar wrenches, provided it made sufficient changes in the appearance of its wrenches as to distinguish them from those produced by Crescent Tool, but “in no event may the plaintiff suppress the defendant's sale altogether. The proper meaning of the phrase ‘nonfunctional,’ is only this: That in such cases the injunction is usually confined to nonessential elements, since these are usually enough to distinguish the goods, and are the least burdensome for the defendant to change.”\(^{11}\)

This case highlights the distinction between functional features—which cannot be treated as trade dress—and nonfunctional features, which may be eligible for treatment as trade dress. In other words, what a product does or what it is used for is not protected unless through a patent. But what that product looks like or how it is packaged may be protected by trademark, service mark, or trade dress, as long as it is distinct and identifies the source of the product or service. The design of the adjustable wrench manufactured by Crescent had acquired a ‘secondary meaning’ in the mind of the public. The angled handle, the shape of the handle, and the hole at the end of the handle to allow for hanging the wrench all led to customers’ assumptions that a wrench that looked like that must be a Crescent wrench. “Trade dress acquires secondary meaning when ‘in the minds of the public, the primary significance of a product feature... is to identify the source of the product rather than the product itself.’”\(^{12}\) Secondary meaning is alternatively defined as the “mental association by a substantial segment of consumers and potential consumers ‘between the alleged mark and a single source of the product.’”\(^{13}\) Since the Crescent wrench had indeed acquired this secondary meaning, K&B was only allowed to produce adjustable wrenches that did not look like a Crescent wrench.

The Lanham Act\(^ {14}\), also known as the Federal Trademark Act, was passed in 1946 and signed into law by President Truman in 1947. This landmark legislation provides a national system of trademark registration, and it protects the owner of a federally registered mark from

\(^{10}\) Id. at 301.

\(^{11}\) Id.


the use by others of a similar mark if that mark is likely to cause confusion to customers of the mark’s owner, or to result in dilution of the registered mark. In addition, service marks and trade dress can also be registered under the Act, providing federal protection as well as common law enforcement options to the holder. The Lanham Act does not supersede state common law provisions, including the protections provided at common law for palming off of goods.  

While the Lanham Act was designed to protect registered trademarks from infringements, its coverage has expanded over time. It now provides protections for registered service marks and trade dress, as well as for trademarks. It also protects some unregistered assets. For example, Section 43 of the Lanham Act includes the following provision: “In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.” This wording demonstrates that there are indeed assets protected that are not registered.

II. THE APOGEE OF TRADE DRESS

Cases involving trade dress were relatively uncommon for most of the latter half of the twentieth century, but that changed in 1992 with the Supreme Court’s decision in Two Pesos, Inc. v. Taco Cabana, Inc., 17 “The issue in this case is whether the trade dress of a restaurant may be protected under § 43(a) of the Trademark Act of 1946 (Lanham Act)… based on a finding of inherent distinctiveness, without proof that the trade dress has secondary meaning.” 18 Taco Cabana had been operating in Texas since 1978. Its first location was in San Antonio, and by 1985 it had five more locations in San Antonio. According to Taco Cabana, its trade dress consisted of:

“[A] festive eating atmosphere having interior dining and patio areas decorated with artifacts, bright colors, paintings and murals. The patio includes interior and exterior areas with the interior patio capable of being sealed off from the outside patio by overhead garage doors. The stepped exterior of the building is a festive and vivid color scheme using top border paint and neon stripes. Bright awnings and umbrellas continue the theme.” 19

Two Pesos restaurant opened in Houston in December of 1985, and expanded into other areas in relatively short order. The Two Pesos restaurants were decorated in a similar manner to the Taco Cabana restaurants. Taco Cabana was also expanding its market, and in 1986 it opened sites in Houston, Dallas, and Austin. There were already two Pesos sites in Dallas when Taco Cabana opened its own Dallas location. Once both restaurants were operating in some of the same cities, Taco Cabana recognized the similarity in the décor of its competitor, Two Pesos, and Taco Cabana filed suit in the U.S. District Court. Taco Cabana alleged trade dress infringement under the Lanham Act, while also claiming there was a theft of trade secrets under Texas

18 Id. at 765.
19 Id.
common law. The case was tried by a jury, and at the conclusion of the trial, the judge instructed the jury to return its verdict in the form of answers to five questions propounded by the judge. The jury’s verdict included the answers to the five questions posed by the judge and indicated that (1) Taco Cabana had a trade dress, (2) the trade dress was nonfunctional, (3) the trade dress was inherently distinctive, (4) the trade dress had not acquired a secondary meaning, and (5) the alleged infringement created a likelihood of confusion on the part of ordinary customers as to the source of the restaurant’s goods or services.  

The court concluded that Taco Cabana had acquired trade dress deserving of protection. Despite the restaurant’s trade dress not acquiring secondary meaning, the court declared that it was inherently distinctive, and found Two Pesos had intentionally and deliberately infringed Taco Cabana’s trade dress. 

Two Pesos appealed, arguing that unless a secondary meaning was found, the trade dress could not be considered to be inherently distinctive, and was therefore not entitled to protection under the Lanham Act. The Court of Appeals, however, upheld the trial court. The basis for the court’s judgment was the logic applied by the 5th Circuit Court of Appeals in its decision in *Chevron Chemical Co. v. Voluntary Purchasing Groups, Inc.* 21 In that case, the 5th Circuit had “noted that trademark law requires a demonstration of secondary meaning only when the claimed trademark is not sufficiently distinctive of itself to identify the producer; the court held that the same principles should apply to protection of trade dresses.” 22 

Since the decisions in these two circuits were contrary to the 2nd Circuit’s decision, which had held §43(a) of the Lanham Act only protected unregistered trademarks or designs in which a secondary meaning had attached, the Supreme Court granted *certiorari*. The Supreme Court found that the protections do apply, even absent the acquisition of a secondary meaning. According to the Court, “[t]he Lanham Act was intended to make ‘actionable the deceptive and misleading use of marks’ and ‘to protect persons engaged in . . . commerce against unfair competition.’… Section 43(a) ‘prohibits a broader range of practices than does § 32,’ which applies to registered marks… but it is common ground that § 43(a) protects qualifying unregistered trademarks and that the general principles qualifying a mark for registration under § 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under § 43(a).” 23

**III. THE WAL-MART CASE: THE NADIR FOR TRADE DRESS**

In 1999, the Court was once again asked to decide when a product’s design is distinctive, therefore being entitled to protection as trade dress. 24 In this case, Wal-Mart had copied the design of a line of children’s clothing produced by Samara Brothers and sold at a number of retail outlets, but not at any Wal-Mart stores. Wal-Mart had provided photos of the Samara clothing to one of its suppliers, Judy-Phillipine, and asked the supplier to provide it with a line of Judy-Phillipine clothing based on the Samara Brothers designs, which it did. 

When Samara Brothers discovered that Wal-Mart was selling this line of “knock-offs” of its merchandise, it filed suit, claiming copyright infringement, unfair trade practices, and

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20 Id. at 766.  
22 Id. at 702  
23 505 U.S. 763, 767.  
infringement of its trade dress, namely the design of the children’s clothing. Samara prevailed at trial and was awarded nearly $1.6 million in damages, fees, interest, and costs. The Second Circuit affirmed the trial court’s judgment and the Supreme Court granted certiorari.25

A unanimous Court reversed the lower courts, ruling in favor of Wal-Mart on the matter of infringement of the trade dress of Samara Brothers. The Court pointed out that in order to qualify for trade dress protection, the purported trade dress must be distinctive. Citing prior opinions, the Court pointed out that a mark will be deemed to be distinctive in one of two ways: it can be inherently distinctive, or it can acquire a secondary meaning that identifies the source of the provider from the mark or design. A mark is “inherently distinctive if ‘[its] intrinsic nature serves to identify a particular source.’”26 A mark has acquired secondary meaning when, "in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself."27 As an aside, the Court has also held that color is never inherently distinctive and that color, standing alone, can never acquire a secondary meaning identifying the source based only on color.

In Wal-Mart v. Samara, the Court held that “design, like color, is not inherently distinctive... With product design, as with color, consumers are aware of the reality that, almost invariably, even the most unusual of product designs - such as a cocktail shaker shaped like a penguin-is intended not to identify the source, but to render the product itself more useful or more appealing.”28 The Court concluded by holding “in an action for infringement of unregistered trade dress under § 43(a) of the Lanham Act, a product's design is distinctive, and therefore protectible, only upon a showing of secondary meaning.”29

In this case “the... Court held that a product design can never be inherently distinctive, and therefore protectible, in an action for infringement of unregistered trade dress. In order to qualify for protection of product design or trade dress, a plaintiff must show that its unregistered trade dress has ‘acquired distinctiveness’ or ‘secondary meaning’. It also held that trade dress, a category that originally included only the packaging, or ‘dressing’ of a product, has in recent years expanded in meaning to include the design of a product.”30 The Court held that product design is intended to make the product more appealing and/or more useful, but it is not intended to identify the source of the product and therefore cannot be inherently distinctive.31 Absent a secondary meaning or inherent distinctiveness, trade dress was not protectable. Packaging could qualify, but product design could not, and in close cases the Supreme Court “realised [sic] that it [could not] provide a foolproof manner in which to distinguish designs from packaging, and hence ruled that close cases must be classified as design. This goes against the owner of the trade dress, but serves the consumer protection rationale of the Lanham Act.”32

IV. TRADE DRESS REDUX

28 528 U.S. 205, 212-213.
29 Id. at 216.
31 Id.
32 Id.
To some, the Wal-Mart decision seemed to signal the end of the controversy of whether product design or configuration trade dress is entitled to trade dress protection.\textsuperscript{33} The Court “held that a product design can never be inherently distinctive, and therefore protectible, in an action for infringement of unregistered trade dress. In order to qualify for protection of product design or trade dress, a plaintiff must show that its unregistered trade dress has ‘acquired’ distinctiveness or ‘secondary meaning.’ It also held that trade dress, a category that originally included only the packaging, or ‘dressing’ of a product, has in recent years expanded in meaning to include the design of a product.”\textsuperscript{34} The Court ruled that close cases must be classified as design, and thus cannot be inherently distinctive. This ruling serves the consumer protection rationale of the Lanham Act, but goes against the interests of owners of designs who might be seeking trade dress protection.\textsuperscript{35}

While the Court’s ruling seemed to preclude any further arguments regarding product design as trade dress, the courts have on occasion recognized that design can be closely related to product packaging, which can qualify as trade dress. Relying on the concept of tertium quid,\textsuperscript{36} the courts have then granted trade dress protection. For example, in Best Cellars, Inc. v. Wine Made Simple, Inc. the Court held that Best Cellars’ strategy of organizing wines in its stores by taste categories rather than by grape type or country of origin qualified as trade dress due to its distinctiveness. The décor design was treated as a part of the store’s “packaging” and was entitled classification as trade dress. Although Wine Cellars was unable to establish that a competitor’s somewhat similar design was likely to cause confusion, resulting in a denial of its motion for summary judgment.\textsuperscript{37}

In a 2008 presentation by Foley & Lardner LLP, it was reported that the previous five years saw 135 litigations involving trade dress, including fifteen involving food and non-alcoholic beverages, and fifteen involving automotive, marine, and small engine issues.\textsuperscript{38} In a 2016 webinar,\textsuperscript{39} the presenters noted that the prior six years had seen a significant increase in complaints involving trade dress. It also mentioned that trade dress litigation usually involves lower overall costs in litigation than litigation involving a design patent. Given the publicity surrounding the Samsung Electronics Co., Ltd. v. Apple Inc.\textsuperscript{40} case and the lower cost of litigation, there is likely to be an increase in the use of trade dress as a basis for legal disputes. It also mentioned that trade dress litigation usually involves lower overall costs in litigation than litigation involving a design patent.


\textsuperscript{35} Id.

\textsuperscript{36} Tertium quid is a middle course; something that cannot be classified into either of two groups, but distinct from both. A middle ground between two comparable but competing concepts.

\textsuperscript{37} Best Cellars, Inc. v. Wine Made Simple, Inc. 320 FSupp.2d 60 (2003).


\textsuperscript{40} 580 U.S. ____ (2016). No. 15-177 (December 6, 2016).
V. RECOMMENDATIONS

A design patent gives its holder the exclusive right to an ornamental feature of a good for fifteen years from the date of the grant for any application files after May 13, 2015 (for applications prior to May 13, 2015, the period was fourteen years). Of course, the only thing protected by a design patent is the appearance of the good, not its utility or function. The limit of protection obtained with a design patent is the physical appearance, the ornamental component of the product. The design patent may be issued for the shape or configuration of the product, for any ornamentation applied to the product, or to any combination of shape and ornamentation for the product. The design patent protects what the product looks like, not what it does or how it is used. In order to be patentable as a design patent, the application must satisfy four standards: novelty, originality, ornamentality, and the item must be an “article of manufacture.” In addition, the design must be non-obvious. These elements are measured by the drawing submitted with the application, and the drawing establishes the parameters of the protection if the patent application is approved.

Applying for a design patent is much easier and significantly less expensive than applying for a utility patent. For example, Legalzoom quotes a price of $899 plus federal filing fees for a standard filing, or $1099 plus federal filing fees for a Gold filing that includes a comprehensive patent search (the federal filing fee for a design patent is $180). By contrast, Legalzoom quotes a price of $3099 for filing a utility patent, plus the $280 federal filing fee.

Design patent protection begins as soon as the patent is issued. However, upon filing the application, the designer can list the design as “patent pending,” and when the application is published (normally about 18 months after applying) patent damages begin to accrue for any infringements.

By contrast, if a person files for protection of his or her trade dress with the Patent and Trademark Office (PTO, hereafter), the pendency period is normally about fifteen months. If the trade dress is based on its uniqueness, a distinctiveness that customers relate to the provider of the service, the trade dress may be registered and entitled to protection from the date the PTO approves it for registration. When an applicant files for the registration of his or her trade dress with the PTO, “the examining attorney must consider two substantive issues: (1) functionality; and (2) distinctiveness.” If the examiner determines that the trade dress is not distinctive, the application will be denied. If the item to be protected by the application involves the functionality of that item the application will also be turned down, since functionality negates distinctiveness.

However, if the trade dress protection is being sought on secondary meaning arising from use, it is likely to require an extensive time period—often about five years—to establish that a secondary meaning has been established. Establishing the secondary meaning binds the trade dress to identification of the provider of the goods or services. The problem with this approach is that the business must be especially vigilant during the time it takes to develop a secondary meaning that the courts will recognize and protect. During this period the business will need to identify any competitors who are copying what it hopes to develop into protected trade dress. Once such conduct is found, the business will need to seek an injunction to prevent the alleged copying by the competitor. The most likely argument for the injunction would be that the competitor is trying to palm off its goods, or that the competitor’s copying is likely to cause confusion among consumers. However, without a showing of a secondary meaning, it may be difficult to convince the court of any possible confusion.

What is a business that believes it has a design that merits trade dress protection to do? Perhaps the safest action to take is to first apply for a design patent. Then, assuming the design patent is granted, the entity could spend the first several years under the patent’s protection attempting to establish a secondary meaning that would qualify for registration of the trade dress under trademark protection. The design patent would provide fifteen years of exclusive use of the design, and during those fifteen years the business could exploit the design so that the design becomes identified with the business, thus acquiring the required “secondary meaning” that permits trade dress protection. Applying for a design patent may be the safest approach to protecting one’s trade dress, but it is not the only alternative.

VI. Recap

In the United States trade dress has been recognized, even if not by that term, since at least 1900 when the court handed down its opinion in the Hires Root Beer case. Whether the shape of a root beer bottle of the shape of a handle on an adjustable wrench, the design could be legally protected. If the court found that the design or packaging of a product served as an identifier of the producer, and if the design or packaging was not functional, the courts were willing to protect it from being copied by competitors. The reasoning was that copying might lead to confusion in the minds of the consuming public. In effect the copying was a form of palming off of the goods, which is an unfair trade practice.

Over time the court developed two distinct ways in which a firm could acquire trade dress protections. If the design or packaging was unique and served to identify the producer it was entitled to protection. Similarly, if the design or packaging had acquired a secondary meaning in the market, it was entitled to protection as trade dress. Treating a unique design as protected trade dress was a key feature of the Court’s opinion in Two Pesos v. Taco Cabana, where bright colors and a festive atmosphere was deemed adequately unique to deserve protection.

The Wal-Mart v. Samara Brothers case was thought by many to signal the demise of trade dress based on uniqueness of design, absent registration of the dress with the PTO. The Court held that design, like color, is never inherently distinctive. (This seems to indirectly reject the precedent set in the Two Pesos opinion.) As a result, the Court concluded that no unregistered

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47 Charles E. Hires, supra note 5.
48 Two Pesos, Inc., supra Note 17.
design could be protected absent the showing of a secondary meaning. But it appears these commentators were in error.

However, since the Wal-Mart opinion in 2000, there have been more than one hundred trade dress cases filed in U.S. courts. Some of these, admittedly involved secondary meaning trade dress, but others were based on the uniqueness of the design. Included among these cases was the extremely complex litigation between Apple and Samsung. When the case finally reached the U.S. Supreme Court, there was a brief filed in support of Apple by more than one hundred designers, included some of the best known designers in the world, 50 emphasizing the importance of design to product identification and to market success. (There were at least 18 amicus curie briefs filed in this case, some supporting Apple’s position, other supporting Samsung’s position, and some that were neutral.51) More litigation is likely, and the standards applied by the courts are not crystal clear. This may, in part, have given rise to the number of trade dress cases filed in the last decade. Certainly, there is a heightened awareness of the topic stemming merely from the publicity of the Apple v. Samsung litigation, and it seems fair to say that the concept of trade dress is alive and well.

51 Id.
NIX THE “SUE SOMEONE TODAY” MENTALITY: TEACHING MEDIATION TO ONLINE BUSINESS LAW STUDENTS

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ABSTRACT

Business majors at this southern university take only one Business Law class. Thus, assuming that many of these students will eventually own and operate a small business, it is important to understand mediation as a way for small business to avoid costly litigation in areas such as wrongful termination, discrimination, workers compensation, personal injury, partnerships, landlord/tenant disputes and other situations.

Current Business Law textbooks usually offer a single chapter on Alternative Dispute Resolution, which would include arbitration and mediation. This pedagogical exercise is not meant to be a full-on mediator training but an expansion of the typical single-chapter exposure.

By selecting to highlight mediation, online students move as close to a “hands on” experience as possible to better learn the benefits of mediation vs. lawsuits in business disputes. This one-week exercise utilizes Blackboard’s Collaborate feature. Students are divided into groups of three with an assigned business scenario (Mediator, Plaintiff, or Defendant).

INTRODUCTION

Scores of studies have been conducted regarding the legal concepts to be taught in undergraduate business law classes, including such topics as ethics, corporate responsibility, employment law, risk management, in-depth contracts, and property law. Additionally, several studies have noted non-tangible concepts like critical thinking and research skills as key to the success of undergraduate business law students. What has caused the increase of focus on the topics being taught inside the business law curriculum? In a study conducted by George Siedel, findings indicated a list of factors affecting the importance of business law, including litigation.1

In today’s business law textbooks, students are usually only presented with a single chapter on Alternative Dispute Resolution, which would include arbitration, mediation and negotiation. Assuming that many of the students in a business law class will eventually own and operate a small business, mediation is important to small businesses as a way to avoid costly litigation in areas such as wrongful termination, discrimination, workers compensation, personal injury, partnerships, landlord/tenant disputes, and other situations.

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In fact, the Equal Employment Opportunities Commission encourages small businesses toward mediation, listing the following ten reasons to mediate EEOC claims:

- Mediation is free under the EEOC National Mediation Program.
- Mediation is fair and neutral.
- Mediation saves time and money.
- Mediation is confidential.
- Mediation avoids litigation.
- Mediation fosters cooperation.
- Mediation improves communication.
- Mediation helps to discover the real issues in your workplace.
- Mediation allows you to design your own solution.
- With mediation, everyone wins.²

The EEOC mediation process, as initially evaluated, was highly success. Over 4,600 surveys from both plaintiffs and defendants were returned from the year 2000. According to the EEOC commissioned report, 96% of the defendants and 91% of the plaintiffs indicated that they would use the mediation process again if needed.³

By selecting to highlight mediation, online students move as close to a “hands on” experience as possible to better learn the benefits of mediation versus litigation in business disputes. Benefits include maximizing areas of agreement, minimizing the harm, creating more expedient solutions (vs. months or years via the court system thus also saving costs), keeping the information confidential (vs. the public records of court cases), and providing a result amenable to both disputants (oftentimes a solution that a judge or jury cannot legally provide).⁴

We propose an activity that will be presented as a synchronous exercise for online students. It addresses the persistent problem of the need to bridge the divide between online students at distant locations, and those attending on-campus classes, thus to provide equivalent learning opportunities.

To better engage students in an online business law class, this one-week exercise utilizes Blackboard’s Collaborate feature. Students are divided into groups of three (Mediator, Plaintiff, and Defendant) with an assigned business scenario. They will watch two instructional videos: one explains the process of mediation and one previews a mock thirty minute mediation session.

Students will record (via Collaborate) their thirty minute mediation attempt from their various locations. Following the mediation session, all Plaintiffs, Defendants, and Mediators will be reassigned to new Collaborate rooms and will discuss the outcomes from their perspectives in a debriefing session.

This project will be pilot-tested in the Fall 2016 semester. In the Spring 2016, there were approximately 125 students in Business Law (the single law course required for business majors at our university). Those students were divided, with fifty in an all online classes and the remainder in a face-to-face traditional class. All forty summer class students were in a 100% online class.

Fall registration indicates 127 currently enrolled for 2016, with forty-five currently registered in the all online Business Law class. All forty-five Fall students will conduct this mediation simulation online while all face-to-face students will follow the traditional format. Data will be collected on each and analyzed for trends.

This exercise is not meant to be a full-on mediator training but, rather, an exposure of future business owners and managers to alternative avenues for conflict resolution. It is essential that students make a causal connection between what is learned in class and what is applicable in the business world to which they are moving.

I. ONLINE EDUCATION AT THE SECONDARY LEVEL

A. Growth of Internet Offerings

As students continue to balance family, education, and employment, secondary education offerings move increasingly toward online and hybrid classes. Reasons pushing students toward online learning include distance from the source, military service, control of time (asynchronous learning), oftentimes decreased costs (by using e-texts), opportunity for handicapped and housebound individuals, childcare issues, and work schedules. Furthermore, it has been suggested that the intimidation factor, or the fear many people feel when talking in front of a large group of strangers, is mitigated. Since interaction with online school instructors and classmates is accomplished by using message boards, chat rooms or teleconferencing technologies, students may be more eager to contribute to classroom discussion without feeling inhibited.

The number of college students who have taken at least one online course increases every year. The number reached 6.7 million in 2013. Universities, as institutions, like the online/hybrid format as well as students do. As early as 2006, 88% of public four-year degree-granting institutions offered hybrid or online formats. In Arkansas specifically, 7.4% of undergraduate students were enrolled exclusively in online education in 2012; over 18.9% were enrolled in some, but not all, distance education classes.

Loafman and Altman reported that at a conference of the Southern Academy of Legal Studies in Business just a few years ago, one third of those in the audience had taught courses online. An additional third anticipated teaching online courses at some time during their careers.

5 Benjamin Evans, Top Ten Reasons Students Take Online Classes, ONLINE SCHOOL (Oct. 18, 2012), http://www.onlineschool.com/why-students-take-online-classes/.
6 Joel Hartman, Online Learning: Everything Old is New Again, HUFFINGTON POST (Feb. 27, 2013), http://www.huffingtonpost.com/joel-hartman/massive-open-online-course-effectiveness_b_2768926.html
9 Lucas Loafman & Barbara Altman, Going Online: Building Your Business Law Course Using the Quality Matter Rubric, 1 J. OF LEGAL STUD. IN EDUC. WINTER 21, 31 (2014) (discussing the number of teachers expecting to teach online in the coming years).
B. Concerns About Online Education

While there are many reasons to employ online education, there are also concerns. Limitations include lack of access due to economical or logistical reasons, especially in rural or lower socioeconomic areas. Internet accessibility is not universal and may even pose a significant cost. Computer literacy can be an issue. Finally, breakdowns can happen in several places during the communication: the server can crash and cut off all students; students’ individual PCs can have problems; the Internet can go down; the school’s server could become bogged down with users and slow down or fail. Technology is not seamless and may, indeed, detract from the learning experience.10

In a small study utilizing Blackboard Collaborate, one professor found that students indicated distractions. These included echo in the lines as well as their own personal distractions. Overall, the students considered chatting and video capabilities as the least useful and effective features within Blackboard Collaborate.11

Though the issues with synchronous learning might be the lack of education of the educator,12 the authors of this paper are experienced in college and university teaching in all modalities. Therefore, the technical problems that may result will be addressed by STAR (Scholarly Technology and Resources) at the university, which provides opportunities for education in the online environment for teachers, instructional design and course development, assistance with creating engaging content, Blackboard administration, and technical support for faculty and students. This service is available from 8:00 – 5:00 Monday through Friday.13 Students also have 24-hour daily help via Blackboard by FAQs, email, live-time chat, or phone.

C. Online Education in Business Schools

Recently, several suggestions were recommended to business schools. First, professors must learn about the technology through networking, enrolling in classes, attending professional development activities, and forming consortiums. Second, every business school must have some knowledge of online education and explore how it fits with their mission and strategies.14

In a paper measuring the effectiveness of teaching business law in a fully online format against one taught face-to-face, the researchers found no difference between student satisfaction with the delivery system. However, they did find that face-to-face students more significantly agreed that classroom discussion benefited their learning of business law concepts. Online students significantly agreed more that classmate interaction helped them learn.15

10 Illinois Online Network, Weakness of Online Learning, (July 25, 2016), http://www.ion.uillinois.edu/resources/tutorials/overview/weaknesses.asp
13 University of Arkansas at Little Rock Scholarly Technology and Resources, (July 28, 2016), www.ualr.edu/star/
D. Synchronous and Asynchronous Learning

Researchers Chickering and Erhrmann called asynchronous or time-based communication the “biggest success story” in online education. They noted that email and computer conferencing increase the ability for students and faculty to converse in a more speedy way. They also considered it a more “safe” way because it was less intimidating than face-to-face communication with faculty.16

However, researchers now continue to measure whether synchronous learning is more akin to the face-to-face setting and whether students learn better from the live-time interaction. In a dissertation, the author measured various delivery methods for developmental reading classes and found that IP Video had the highest rating in academic success, retention, and class grades at significant levels.17

In a huge nine-year study on synchronous learning best practices with business students (with an emphasis on applied skill development, including the field of negotiation), the researchers end with this caveat, “At a time when video conferencing is commonplace and virtual worlds, through gaming, are more popular than box office movies, educators risk marginalization by not effectively engaging with these technologies.”18 They suggest going beyond mere video conferencing as synchronous learning.

In an article published thirty years ago, a faculty member investigated many, many learning-style studies and came to the conclusion that a combination of using a hypothetical case study in a class discussion, followed by a Socratic dialogue, is the most successful way to teach in a business law class. “This type of cognitive development is unlikely to occur in a lecture format, where students passively receive ‘hand-delivered’ answers from the instructor, and tend to memorize lecture notes.”19

Illinois Online University (ION) represents thousands of internet faculty. It offers professional development for online faculty and staff from higher education institutions across the United States. The website states that, “Online learning has its most promising potential in the high synergy represented by active dialog among the participants, one of the most important sources of learning in a Virtual Classroom.”20 However, the website also believes this is the case only in classes with 20 or less students; otherwise, the synergy level begins to shift.

Thus, in the case of an online business law class, the web-conferencing capability within Blackboard Collaborate will serve as the “classroom.” In this exercise, the students will conduct a mock mediation of a proposed HR policy, based on synchronous communication with each of the three students in a different location. Students will first read all the materials on mediation techniques and advantages. The Socratic dialogue will follow after the mediation groups of three

19 Samuel S. Paschall , Expanding Educational Objectives Through the Undergraduate Business Law Course , 19 AKRON L. REV. 615-663 (1986).
20 Illinois Online Network, supra note 9.
are re-formed into groups per their roles (plaintiffs, defendants, and mediators) to discuss how successful, or not, were their attempts at mediation.

II. TEACHING MEDIATION IN BUSINESS LAW

A. Mediation in the Business Law Curriculum

Even in a case destined for litigation, one practicing attorney suggests mediation first. She reasons that it would enable the attorney to determine whether the “client’s case is a dream or a dog,” or whether to try or settle a case. Twenty-five years ago, a law school professor considered the various studies about including mediation as a part of the law school requirements, and concluded that mediation should be taught to law students as both a separate class and embedded across the curriculum.

There is an explosion of litigation. As far back as 25 years ago, Fortune 1000 companies filed 6,954 cases as plaintiffs and defended themselves in 23,959 personal injury and 22,968 employment law cases. Twenty years ago, the EEOC alone saw 6,194 lawsuits (civil rights, discrimination, disabilities, and equal pay issues) filed between 1997 through 2015. Mediation is usually expeditious, inexpensive, and more simple than lawsuits.

In the case of small businesses, costs of tort litigation are staggering, with the tort liability price tag for small businesses in 2008 of $105.4 billion dollars. Many, according to the National Federation of Small Businesses, are completely without merit. Small businesses that are sued still have to defend themselves, and this defense is often costly to both businesses and consumers.

Perhaps because trial lawyers consider that a small business owner is more likely to settle a case rather than litigate, small businesses may find themselves the target of many frivolous lawsuits. But even a $1,000 - $5,000 settlement is costly for a small business and can result in higher insurance premiums. Overall, small businesses paid $35.6 billion out of pocket to settle those claims in 2010.

A professional mediator advocates teaching mediation skills to elementary students. Although her aim is to teach it in K12 situations, her assessment holds for all mediation. “Many people are beginning to realize, however, that there are benefits to settling one's own disputes. Furthermore, it is becoming increasingly apparent that disputes settled by judges or arbitrators...

23 Siedel, supra note 1.
27 U.S. Chamber of Commerce, supra note 23.
often create even more dissension and animosity between the parties than did the original issue.”

Business law curriculum needs to provide students with the skills to enter the business world. Among the topics suggested for inclusion are negotiation, risk management, hiring and managing an attorney, legal audits, business dispute resolution systems, small claims court, self-help law and basic legal research. It must be remembered that business law faculty are not teaching future lawyers; they are teaching future business practitioners. Lampe, a business college professor who is an attorney with an MBA, also adds, “To meet the needs of today’s businessperson, college Business Law and Legal Environment courses must stress economical, intelligent prevention of legal problems and resolution of conflict.”

B. Mediation Online

The Association to Advance Collegiate Schools of Business (AACSB) Standard 13, requires that accredited business schools provide curriculum and instructional techniques that are timely and relevant. Student academic and professional engagement occurs when students are actively involved in their educational experiences, in both academic and professional settings and when they are able to connect those experiences. For this reason, this teaching lesson is utilizing a synchronous student-role play exercise to offer a more real-life experience.

Let us look at the development of the internet historically. The commercialization of the internet resulted in an increase in online transactions (etrade) and the concomitant online disputes. The need emerged for an alternative resolution system -- an online resolution system to match the online trading.

eBay, for example, has an informal and formal policy for dispute resolution. Buyers and sellers are asked to “rate” each other. But eBay cautions the participants to resolve any disputes first, before posting negative reviews. eBay even suggests accommodations that might be made (be prompt and courteous in your responses, free return postage, always maintain shipping confirmations, contact the seller directly by email, allow sufficient time for response). Once the participants have exhausted the informal modes of resolution, it then advances to a PayPal agent, who makes a decision which is binding.

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30 Id. at 1


32 Fernandez, supra note 4, at 398.

Online dispute resolution mirrors the traditional face-to-face techniques. Tools utilized include emails, instant messaging, settlement software, videoconferencing, and even the use of avatars and holography, in which the participants seemingly “appear” in the room.

C. Role-Playing in an E-Learning Environment

In role-playing, students act out a part. This gives them a better idea of the concept and theories being discussed. The primary purpose is to get students to see the material in a new light and thus allows them to alter their mental maps of the world by looking through others’ eyes. They begin to understand things outside their own mindset.

Role plays are an established teaching technique. Such experiential teaching techniques are also used in law clinics, as Gouvin (a law school professor as well as a licensed attorney with an LL.M.) suggests that students learn business law by doing it.

Role play is useful with many disciplines. Although writing about teaching in the sciences, a teaching center explains that role-playing goes beyond teaching and lecturing. “Information, alone, rarely makes people change their minds, but personal experience often does. Role-playing, like any good inquiry approach, transforms the content of education from information into experience.”

In a role play of the Scopes Monkey Trial over 30 years ago, student interviews months after the assignment indicated that students successfully remembered the event and the facts that they studied to prepare for it.

D. Blackboard Collaborate as the Online Platform

Five years ago, the National Center for Education Statistics reported that distance learning is important for business students. Compared with all students, students studying business enrolled at higher rates in both distance learning education classes (24% compared to 20%) and distance education programs (6% compared to 4%). Chen defends online education as a parity to face-to-face instruction with “student-faculty interaction, peer-to-peer collaboration, and active learning.” Consequently, adding the online mediation simulation in this Business Law class encompasses

34 Sarah Randolph Cole and Krisein M. Blankley, *Online Mediation: Where We Have Been; Where are Now, Where We Should Be*, 38, U TOL. L REV. 193 (2006).
all three. Among the suggestions for the instructional technology in web conferencing are Adobe Connect, Blackboard Collaborate, and Big Blue Button, all of which simulate the traditional learning experience.\textsuperscript{42}

Another recent, small study from Australia revealed that students had meaningful interaction and acquired higher-order thinking skills with Blackboard Collaborate.\textsuperscript{43}

In teaching negotiation skills via Blackboard Collaborate, researchers in an all-online management course surveyed eight-four online learners. They found that, with students having access to reliable internet with at least asynchronous capabilities (and effectively using communication etechnologies), learners had suitable online collaboration and interaction.\textsuperscript{44}

It is essential that a web-conferencing program be used for role playing. Non-verbal behavior is critical to negotiation and Blackboard Collaborate allows one to see gestures, facial expressions, and body language from the waist up. Dr. Albert Mehrabian found that only 7% of any message is conveyed through words, 38% through certain vocal elements (inflection, rate, emphasis, etc.), and 55% through nonverbal elements (expressions, gestures, posture, etc).\textsuperscript{45}

Imagine, only 7% of a communication message is based upon the choice of the words themselves.

This exercise uses the most basic of the Blackboard Collaborate qualities; but, there is much potential. Particularly in a university setting such as ours, small groups are perfect for understanding complex concepts. There are avenues beyond just regular web-conferencing for distant students. A professor can pre-load content into facial breakout rooms for small group exercises, add closed captioning to recording (to aid with deaf students), add subtitles, and provide students with personalized coaching and assessments.\textsuperscript{46} Breakout rooms can be created for one project and then reconvened for debriefing in a second project, such as in our project.

III. METHODOLOGY FOR INTEGRATING MEDIATION WITH ROLE-PLAING THROUGH BLACKBOARD COLLABORATE IN A BUSINESS LAW CLASS

A. Methodology

Role play mediation is best conducted toward the midpoint of the semester. This allows students to gain familiarity with the technology and with one another. This role play is set up in three phases: preparation, application, and debriefing. Prior to beginning the lesson, an overview of these steps is given to help students see the larger picture of the unit.

In the preparation stage, students are asked to go over the required reading. Additionally, the professor will record a lecture illustrating the current role of mediation in the legal environment and will also provide a sample simulation allowing students to observe an actual mediation.

\textsuperscript{42} John Politis & Denis Politis, \textit{The Relationship Between an Online Synchronous Learning Environment and Knowledge Acquisition Skills and Traits: The Blackboard Collaborate Experience}, 14 \textsc{The Electronic J. of E-Learning} 3, 196-222 (2016).
\textsuperscript{43} Steven Wdowik, \textit{Using a Synchronous Online Learning Environment to Promote and Enhance Transactional Engagement Beyond the Classroom}, 31 \textsc{Campus-Wide Info. Systems} 264-275 (2014).
\textsuperscript{44} Politis, supra note 41.
In the application section, students are broken down into small groups of three and provided general instructions regarding the story they will mediate. Next, the members of the group are randomly assigned a role as a plaintiff, defendant, or a mediator. Once assignments are given, students are provided with private information regarding their role in an asynchronous staging area.

Each group will be assigned to a Blackboard Collaborate session in which they will complete and record their mediation session. Given the nature of online classes, flexibility is key. Groups are allowed to set a time for their recording that works for all parties in the group. At the conclusion of the session, students will be asked to write up their mediated agreement, complete with agreed-upon conditions. These will then be uploaded onto a discussion board for review by other students upon the completion of all sessions.

Students will all join together as a group from a Blackboard Collaborate session called “Debriefing”. During this debriefing time, students are asked to discuss their experience with mediation. Based on previous experience with this exercise in a traditional setting, the debriefing will likely show disruptive trends that include latent issues and values, such as respect. This brings about an enriched dialogue regarding legal rights and the balance of employee needs.

Finally, each group will be asked to write up a short reflection paper on the mediation process and its applicability to their future business career.

B. Selection of Case Study

One of the most helpful source of simulations is The Society for Human Resource Management’s Workplace Dispute Resolution instructor’s manual.47 This is an open source workbook. Cases and modules are intended specifically for human resource classes at universities, but work very well for a case study within the single Business Law class inside a business degree program.

The case study selected for this exercise is the enforcement of an “English Only” policy. The plaintiff wants to enforce the policy; the disputant feels it is discriminatory.

C. Blackboard Collaborate for Mediation Set-up

There are a number of ways that mediation simulations can be facilitated online through Blackboard. Below you will find three different strategies to utilize Blackboard Collaborate (BBC) for mediation simulation depending on the version of BBC installed at your institution. Note: Blackboard Collaborate sessions can be recorded, but what happens in breakout rooms is not included in the recording. However, multiple sessions can be used to capture mediation simulations for assessment.

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Blackboard Collaborate Classic Setup – Multiple Sessions

1. Session Scheduling – Schedule a session for all participants to meet in prior to their group mediation simulations and role-based sessions.
   a. Click the Create Session button on the Blackboard Collaborate Scheduling Manager page.
   b. Name the session. (Example: “Mediation Meeting Space”)
   c. Set the start date and time for the session. (Optional: Set an early entry time for the session.)
   d. Set Teleconference Options to “Use Built-in.”
   e. Set the Max Simultaneous Talkers to the number of participants in each group. Additionally, set the Max Cameras to the number of participants in each group.
f. Disable Full Participants Permissions. (This can be changed in session.)

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Max Simultaneous Talkers 4
Max Cameras 4
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Full Participant Permissions OFF
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g. Click the Save button.

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Cancel Save
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2. Session Scheduling Continued – There also needs to be a session created for each mediation group and a session for each role: plaintiffs, defendants, and mediators.

   a. Click the Create Session button on the Blackboard Collaborate Scheduling Manager page.
   b. Name the session. (Example: “Mediation Group 1” or “Plaintiffs Group”)
   c. Set the start date and time for the session.
   d. Set Teleconference Options to “Use Built-in.”
   e. Set the Max Simultaneous Talkers to the number of participants in each group. Additionally, set the Max Cameras to the number of participants in each group.
   f. Enable Full Participants Permissions.

```
Full Participant Permissions ON
```

g. Enable All Users Join as Moderators.

```
Roles and Access

- All users join as moderators
  - Restrict access to this session
```

h. Click the Save button.

```
Cancel Save
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i. The Blackboard Collaborate Scheduling page should look similar to this when all sessions have been created:
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<tr>
<th>Title</th>
<th>Start Date</th>
<th>End Date</th>
<th>Creator</th>
<th>Session Type</th>
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<tr>
<td>Mediation Defendants Group</td>
<td>Tuesday, August 2, 2016 5:15:00 PM CDT</td>
<td>Tuesday, August 2, 2016 7:15:00 PM CDT</td>
<td>Drew (Bb Support) Glover</td>
<td>Course</td>
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<tr>
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<td>Tuesday, August 2, 2016 7:15:00 PM CDT</td>
<td>Drew (Bb Support) Glover</td>
<td>Course</td>
</tr>
<tr>
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<td>Tuesday, August 2, 2016 5:15:00 PM CDT</td>
<td>Tuesday, August 2, 2016 7:15:00 PM CDT</td>
<td>Drew (Bb Support) Glover</td>
<td>Course</td>
</tr>
<tr>
<td>Mediation Plaintiffs Group</td>
<td>Tuesday, August 2, 2016 5:15:00 PM CDT</td>
<td>Tuesday, August 2, 2016 7:15:00 PM CDT</td>
<td>Drew (Bb Support) Glover</td>
<td>Course</td>
</tr>
<tr>
<td>Mediation Simulation Group 1</td>
<td>Tuesday, August 2, 2016 5:15:00 PM CDT</td>
<td>Tuesday, August 2, 2016 7:15:00 PM CDT</td>
<td>Drew (Bb Support) Glover</td>
<td>Course</td>
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<tr>
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<td>Tuesday, August 2, 2016 7:15:00 PM CDT</td>
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<td>Course</td>
</tr>
<tr>
<td>Mediation Simulation Group 3</td>
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<td>Tuesday, August 2, 2016 7:15:00 PM CDT</td>
<td>Drew (Bb Support) Glover</td>
<td>Course</td>
</tr>
</tbody>
</table>
Blackboard Collaborate Classic In-Session Instructions – Multiple Sessions

1. Have all participants meet initially in the Mediation Meeting Space session.
2. The moderator will need to instruct participants on what they should do in their simulation group sessions and in their role-based group sessions. Then, the moderator should ask all participants to close the Mediation Meeting Space and open their group sessions. (i.e. “Mediation Group 1) Each group should start recording when all members of the group have joined the session.

(The moderator can then choose to access the simulation and role-based sessions for observation or remain in the Mediation Meeting Space session.)

3. Participants should work through the provided scenario in their group sessions. When completed (or after a certain period time), the participants should close their group sessions and open their role-based sessions.
4. Again, participants should start recording once all members of the role-based group are present. In these sessions, participants will then debrief and explain how their group functioned, whether agreements were reached, etc.
5. When completed (or after a certain period of time), participants should close their role-based group sessions and return to the Mediation Meeting Space session for further instruction.
Blackboard Collaborate Ultra Setup – Multiple Sessions

1. Session Scheduling – Schedule group sessions and role-based sessions.
   a. Click the Create Session button on the Blackboard Collaborate Ultra page.

   ![Create Session Button]

   b. Name the session. (Example: “Mediation Simulation Group 1”)

   ![Name Session]

   c. Set the start date and time for the session. (Optional: Set an early entry time for the session.)

   ![Set Start Date]

   d. Click the Save button.

   ![Save Session]

   e. Session Scheduling-Part #2 – Repeat steps (a-d) above for remaining simulation groups and role-based groups.
**Blackboard Collaborate Ultra**

<table>
<thead>
<tr>
<th>Name</th>
<th>Starts</th>
<th>Ends</th>
</tr>
</thead>
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<tr>
<td>Mediation Simulation Group 1</td>
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</tr>
<tr>
<td>Mediation Simulation Group 2</td>
<td>8/3/16, 10:00 AM</td>
<td>N/A</td>
</tr>
<tr>
<td>Mediation Simulation Group 3</td>
<td>8/3/16, 10:00 AM</td>
<td>N/A</td>
</tr>
<tr>
<td>Role-Based Group - Defendants</td>
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<td>N/A</td>
</tr>
<tr>
<td>Role-Based Group - Mediators</td>
<td>8/3/16, 10:00 AM</td>
<td>N/A</td>
</tr>
<tr>
<td>Role-Based Group - Plaintiffs</td>
<td>8/3/16, 10:00 AM</td>
<td>N/A</td>
</tr>
</tbody>
</table>
Blackboard Collaborate Ultra In-Session Instructions – Multiple Sessions

1. Have all participants meet initially in the Course Room by clicking on the Join Room link.

2. After covering any necessary materials and/or instructions, ask participants to close the course room and join their mediation group sessions. At this point, the moderator will need to join each mediation group session to start the recording.

3. Participants should work through the provided scenario in their group sessions. When completed (or after a certain period time), the participants should close their group sessions and open their role-based sessions. Again, the moderator will need to join the sessions to start the recordings.

4. When completed, participants should close their role-based group sessions and return to the main course room session for further instruction.

D. Supportive Educational Videos

Two additional videos were created to support this exercise. The first is a lecture on mediation and its need in the business environment, prepared by the professor for the course. Students are required to read the text chapter on mediation. The second video is a recorded business mediation, which has been staged. In this, the students may learn and model the roles of the actual participants: Mediator, Plaintiff, or Defendant. The staged video example will be from a different scenario, although it will also be based on a civil rights case. This will help affirm the students’ learning of the law prior to beginning their mediation, thereby alleviating some anxiety so that students can focus on the actual mediation occurring.
E. Student-Created Web Conferences to Complete Assignment

Student-created Video One: A class of approximately fifty students will be randomly divided into groups of three and assigned a role: Mediator, Plaintiff, or Defendant. Utilizing the scenario, which they will have had for a week, they will enact a realistic mediation of the issue. They will record it and post it to the class, so other students in the class can watch. It will last approximately thirty minutes. The group may or may not reach an agreement, but they are urged to write up a mediated agreement with their agreed-upon terms, reinforcing the concept from the video that some resolution will expedite any future litigation.

Student-created Video Two: The class will once again be divided into three groups to use the Socratic method of instruction. The Mediators will meet together; the Plaintiffs together; and the Defendants together. They will then debrief and explain how their group functioned, whether agreements were reached, etc. These videos will be recorded and posted. This video will also run 30 minutes.

Questions that may be posed/answered:
1. Did you have any preconceived biases prior to beginning the mediation?
2. Were you able to anticipate all of the issues that arose in the negotiations?
3. Did you identify the other party’s need and desires before negotiation began?
4. Did you start the negotiation offering or demanding more than you were willing to settle for?
5. Did you have a clear idea of what points were negotiable vs. what points were “deal breakers”?48

The exercise is designed so that students in distant locations can easily log on through Blackboard Collaborate to complete the videos. Should they have technical issues, they may also come to campus to use the business school computer lab.

F. Reflection

The final mediation assignment is to write a short reflection paper on the mediation process. This will allow students to bridge the content from the classroom to potential use in their business careers. This reflection paper will call upon students to think about ways that they can apply mediation to their future businesses, infer cost saving implications, and conduct additional research on potential resources where mediation support can be found.

Students will also complete a short survey (contained in the appendix) to determine the success and learning from the experience.

G. Professor’s Evaluation

For this role-play assignment, the instructor will be able to observe the online group’s work and derive a grade for participation. As an alternative, the students could be allowed to assess one another’s work. This grading could stand alone or be in conjunction with the instructor’s assessment.

48 Id. at 10-11
H. Assessment and Future Research Implications

Students will be assessed at the conclusion of this activity. This assessment will seek to determine an increase in the understanding of the value of mediation and usefulness in the business environment and their thoughts on potential future uses of mediation in their business careers.

IV. CONCLUSION

Online role play engages students in the learning process and encourages distributed participation among students at diverse locations. It provides students an opportunity to delve into the higher-order thinking skills more so than traditional lecture format. Students also develop presentations skills as they share in the debriefing. As such, online role-playing calls upon students to do something more than be an observer who simply memorized. Moreover, role play leads to a more concrete understanding of the concepts and, in turn a greater retention49 with the long-term goal of mediation becoming a consideration for conflict resolution in the future.

V. FUTURE RESEARCH

This pedagogical proposal seeks to add to and confirm findings that students in online classes deserve a similar experience to those in the traditional format. Future research is warranted on the results of this exercise including student perceptions of connectedness to the instructor, connectedness to their classmates, any increased understanding of the mediation as a tool for utilization for dispute resolution, and retention of skills learned. Because higher education will likely continue to increase online offerings and, potentially, class sizes, research is warranted on ways to improve role playing inside online business law classes for other skills.

<table>
<thead>
<tr>
<th>Statements</th>
<th>Agree</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>I liked participating in the mediation simulation.</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Prior to this activity, I did not think mediation would be useful in my future career.</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>After this assignment, I feel as if mediation would be useful in my future career.</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Based on this activity, I am excited to learn more about alternative dispute resolution techniques rather than litigation.</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Based on this activity, I have a better understanding of mediation.</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Based on this activity, I have learned to be a better business leader.</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>As a future business leader, I would feel comfortable suggesting mediation as a way to resolve conflict.</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>In this lesson, I felt like I was successfully communicating with my fellow students, even though they were in other locations.</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>I thought the Blackboard Collaborate sessions were as successful as if I had been in an actual classroom.</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>I learned more (5) or less (1) than I would have in a classroom.</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>I would like to see role play used in other subjects I study.</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>I thought this role play was fun.</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>I would like to do more role plays in this class.</td>
<td>5</td>
<td>4</td>
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</tbody>
</table>
START SPREADING THE NEWS: NEW YORK HAS GONE TO POT

MARTY LUDLUM1

DARRELL FORD2

Abstract

This paper will explore transformative changes in marijuana laws occurring in the last few years, culminating in New York State’s innovative medical marijuana program. The paper will be in four sections. The first section will examine the historical policies on marijuana. The second section will examine the staggering changes from recent years. The third section will examine the details of New York State’s new medical marijuana law. The final section will conclude with a discussion of the potential impacts from New York’s law, an ideal guide for states interested in a credible and effective medical marijuana program.

Introduction3

While the benefits of marijuana are being debated in political circles, states are offering a potpourri of policies. One of the most innovative programs has been enacted by New York State. New York has always been a cultural leader for America. From Wall Street to Broadway, from fashion to politics, New York has set national trends. Now the Empire State is entering a new sphere, legalized marijuana with insight and innovation.

This is an interesting time for marijuana policy. We are witnessing an epic showdown between states and the federal government over marijuana.4 At the moment, marijuana is both legal and illegal, depending upon where you are and who you ask. The marijuana issue follows America’s laboratory of democracy tradition.5 This is a unique experiment where an action (possessing marijuana) may be legal in some states for some people but is always illegal at the federal level.6

1 Professor of Legal Studies at the University of Central Oklahoma. Professor Ludlum teaches International Trade Law and the Legal Environment of Business. He can be reached at mludlum@uco.edu.
2 Professor of Legal Studies at the University of Central Oklahoma. Professor Ford teaches Legal Studies at undergraduate and graduate levels. He can be reached at dford@uco.edu.
3 A previous version of this paper was presented to the Southern Academy of Legal Studies in Business, San Antonio, Texas, March 27, 2015.
Stephen DeAngelo, founder of Oakland, California’s Harborside dispensary and TV personality from the show “Weed Wars” called this time the “tipping point” on the issue of marijuana use. He was correct. The public’s attitude toward marijuana and the War on Drugs has tipped. Marijuana is no longer confined to criminals and jazz musicians. One-third of the U.S. population reports to having used marijuana at least once. Marijuana use is becoming mainstream and this has political impacts on several social programs. The American public is supporting a dramatic de-escalation in the War on Drugs.

In the last few years, the public attitudes on marijuana have changed towards legalization. Gallup polls in 2011 found that 50% favored marijuana legalization. A Pew Center survey in 2013 indicated 52% favor marijuana legalization. Future predictions suggest legalization, as the young (aged 18-32) support legalization at 65%. Even the baby boomer generation has increased acceptance for legalization from minimal support to 32% in favor.

Rasmussen Reports from May, 2012 indicated 56% of Americans favored legalization. Recently, Public Policy Polling found that 58% of registered voters favored legalization of pot. Public opinion has changed, and those supporting legalization have the majority. Whether the change is from an informed view of marijuana or outrage at the social costs of imprisoning marijuana users or a combination of both, the future favors legalization.

In the past few years, the United States has reached a cultural tipping point on marijuana, just as we recently have with gay marriage. What once was a fringe movement is becoming the majority. An overwhelming majority (75%) of Americans say the legalization of marijuana
is inevitable. However, currently there is a large gender gap in support for legalization, as 65% of males support it, while only 46% of females support legalization.

The federal reactions to the marijuana experiment have been mixed depending on the political influences in the White House. The Bush administration was strongly anti-drugs, and his administration supported federal raids on several marijuana businesses that were legal according to state laws. In 2005, the Supreme Court in Gonzales v. Raich held that the Controlled Substances Act applies even to intrastate growers of marijuana and users for medical purposes.

This view changed with the Obama administration. While a candidate, Obama became famous for his memoirs which portrayed him as a regular pot smoker in his youth. The Obama administration changed the enforcement of marijuana laws, but it is too early to break out the party bongs yet. The federal government may be changing their emphasis, while not actually changing the law. Marijuana remains illegal under federal law. The now infamous Ogden memo (2009) indicated that President Obama put prosecution of federal pot laws as a low priority in states which had legalized medical marijuana.

Deputy Attorney General James Cole followed with an August 29, 2013 memo on federal policy towards marijuana. The Cole memo indicated that federal enforcement would not occur where entities were obeying state laws and where eight specific goals were being followed. The Cole memo will likely define the future of marijuana prohibition until the Trump administration takes action on marijuana policy.

While federal law enforcement is in limbo, states have been marching forward towards legalization, with 44 states allowing some form of marijuana legalization in a potpourri of

18 Id.
19 Id.
20 Jacob Sullum, Judging from prosecutions, Obama is 80 percent worse than Bush on medical marijuana, REASON June 14, 2013, available at https://reason.com/blog/2013/06/14/obama-is-80-percent-worse-than-bush-on-m.
21 Gonzales v. Raich, 545 U.S. 1 (2005).
22 Tim Mullaney, These guys are high on pot, USA TODAY, April 8, 2013, 1A.
23 Kevin Fagan, supra note 7 at C1. See also Jacob Sullum, supra note 20.
24 Michael Kinsley, Joint Committee, NEW REPUBLIC, Aug. 19, 2013, 9-11 (indicating that while the Obama Administration has promised to allow the state programs to continue, the promise not a guarantee).
25 See footnotes infra 4 to 10 and accompanying text.
28 Id.
29 Jacob Sullum, Tolerating pot with a frown, 45.7 REASON (2013), 16 (noting that the letter was more accommodation rather than confrontation, since the federal government had no viable way to stop the state marijuana programs, and if state regulations were stopped, the solution would be an unregulated illegal market). See also Brad Knickerbocker, supra note 8 (the letter also indicated that strong regulation and enforcement is required to avoid federal involvement).
inconsistent and contradictory laws and regulations. The United States is in a unique legal dilemma. The federal government has prohibited marijuana; however, the federal authorities have indicated they will not enforce the federal prohibition. Some states have allowed possession of marijuana to certain people under certain conditions. Other states have kept their marijuana prohibitions. It is a challenging time for those interpreting marijuana law.

This paper will explore transformative changes in marijuana laws occurring in the last few years, culminating in New York State’s innovative medical marijuana program. The paper will be presented in four sections. The first section will examine the historical policies on marijuana. The second section will examine the staggering changes during the last three years. The third section will examine the details of New York State’s new medical marijuana law. The final section will conclude with a discussion of the likely future impacts of New York State’s new stance on marijuana.

I. History of Marijuana

Marijuana is not new, despite popular accounts which would leave one to believe it was discovered by the Beatles. The earliest accounts of the medical use of marijuana are from China in 3000 B.C., where marijuana was used to treat malaria and pain. Five millennia later, marijuana was included in the United States Pharmacopoeia in 1850 as a treatment for many ailments. It remained there for nine decades (until 1941). Large pharmaceutical companies, including Pfizer and Eli Lilly, sold marijuana in various forms as a medicine. America has a long history of marijuana for medical use.

The United States simultaneously took a parallel road of criminalizing marijuana, after finishing the failed experiment on the prohibition of alcohol. American attempts to prohibit marijuana have a racially charged history, often because the drug was associated with African-Americans and Mexican-Americans. Racial fears led to marijuana’s prohibitionist taxes in 1937. Interestingly, for four years (1937-1941) marijuana was considered illegal and a legitimate medicine at the same time.

Aside from prohibitive taxes, marijuana was largely ignored by the federal government until the counterculture of the 1960s. In response, the Nixon administration pushed for a change in the law, resulting in the Controlled Substances Act in 1970. Drugs are put into schedules

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30 Ludlum & Ford, supra note 4 (29 states have assorted medical marijuana statutes, and many states have recently added “CBD only” legislation on medical marijuana).


32 Id.

33 Id at 19.

34 Debra Bortchardt, Pfizer, Eli Lilly were the original medical marijuana sellers, FORBES, April 8, 2015, available at http://www.forbes.com/sites/debraborchardt/2015/04/08/pfizer-eli-lilly-were-the-original-medical-marijuana-sellers/.


36 Julie Delcour, supra note 5.

37 Boire & Feeney, supra note 31.

and each schedule has specific restrictions. Marijuana was put into Schedule 1, the same as heroin, claiming it had no accepted use and high potential for abuse. The War on Drugs was launched with righteous fanfare. Drugs would be eliminated in our society if we only informed the public of the dangers of drugs and punished the offenders. How has it worked?

We are currently in the fifth decade in our War on Drugs. America is feeling the heavy weight of Nixon’s War, in both financial and social costs. Marijuana use and arrests for marijuana have not decreased despite forty years of effort. In 2010, more than 45% of drug arrests were for marijuana. Currently, America has over 45,000 marijuana prisoners at a cost of $1 billion a year. America arrests someone for marijuana possession every 42 seconds. However, most of these concerns are state issues, as only 1% of federal arrests are for marijuana possession.

Suffice to say, the War on Drugs has not been a success. Even the staunchest supporters of the program would have to admit the War on Drugs has been ineffective and very expensive. Despite decades of combat, drugs are more plentiful and more affordable than when the War on Drugs started. This has been an epic policy failure.

A. Federal Programs on Medical Marijuana

Marijuana was not always illegal, at least not for everyone. Even with the War on Drugs, marijuana was allowed for a select few. America’s experiment with medical marijuana did not start in 1995 in California. Medical marijuana started as a federal program called the Compassionate Investigative New Drug (CIND) program in the 1970s. The program was very small and flew under the public’s radar. It allowed a tiny group of selected patients to receive free federally grown marijuana after a lengthy approval process. Where did the federal government acquire the pot for the program?

The marijuana for the CIND program was grown at the only federally approved marijuana farm which is located at the University of Mississippi. The small (five acre) farm supplied all the legal marijuana for the CIND program as well as all the marijuana for research in the United States. The Mississippi marijuana farm existed for years in the shadows with virtually no public attention. In 1989, with the growth of AIDS and surging numbers of

40 Kamin & Wald, supra note 35 at 875. See also Szalavitz, supra note 6 (noting that of the arrests, 82% are for simple possession).
41 Kamin & Wald, supra note 35.
43 Ludlum & Ford, supra note 10.
46 See Ethan Russo, Mary Lynn Mathre, Al Byrne, Robert Velin, Paul J. Bach, Juan Sanchez-Ramos, & Kristin A. Kirlin, Chronic Cannabis Use in the Compassionate Investigational New Drug Program: An Examination of Benefits and Adverse Effects of Legal Clinical Cannabis, 2.1 J. OF CANNABIS THERAPEUTICS 3-4 (2002) (noting that the five acre plot is grown mainly from Mexican marijuana seeds). See also Jane B. Marmor, Commentary, Medical Marijuana, 168 W.J. MED, 540, 541 (1998).
47 Id.
applications, and public (cynical) reactions to government provided marijuana. The federal government ended new registrations for the program. Twenty-five years later, fewer than ten patients are still on the program. Despite the War on Drugs and the highly charged anti-drug rhetoric, the federal government has consistently sent a group of selected patients tins filled with 150 medical marijuana cigarettes for three decades, and continues to do so.

B. State Medical Marijuana Programs

States also got into the marijuana game. The early state medical marijuana programs were very limited in scope, often only treating glaucoma or chemotherapy. Most were disbanded after the FDA approved a synthetic form of marijuana, Marinol, in 1986. With a pill to substitute for (politically unpopular) marijuana, state programs declined or died, avoiding the public stigma of the government providing marijuana with one hand while outlawing it with the other.

Marinol, marketed under the name Dronabinol, was categorized as a Schedule II substance. Marinol’s listing in schedule II allowed for doctors to write prescriptions and allowed for insurance coverage. While Marinol held promise, it did not lived up to the expectations. Being in pill form, it could not be tolerated by those who became violently nauseated because of chemotherapy. Also, the pill form of marijuana takes days or weeks to have any positive effect, while the traditional use (inhaled) has an impact within minutes. Ms. Fiorini, Monroe, a Connecticut medical marijuana patient, described it this way: “Within 10 minutes of smoking marijuana, every single symptom of chemo was completely gone…I went from vomiting to eating a full meal.” Many illnesses besides glaucoma and wasting illnesses have benefited from the use of marijuana. For example, studies on children with severe forms of epilepsy have seen dramatic results, including the quantity of seizures dropping by half because of medical marijuana.

After the demise of CIND, states filled the void. The first was California, which passed Proposition 215 in 1996. As originally designed and pushed upon the voters, California’s policy was called “Compassionate Use.” It was (assumedly) narrowly designed to help those

50 See Ethan Russo, et al., supra note 46 (noting that as of 2002, there were only eight survivors of the program, while there were 34 in the program in 1991). See also Greenspoon & Bakalar, id.
51 Nicole Dogwill, supra note 45.
52 Id.
54 The medical research on Marinol is beyond the scope of this paper. See Russo, et al., supra note 46 at 51 (finding the pill form of marijuana to be a very poor substitute for the smoked version).
55 Id. (finding the pill form of marijuana to be a very poor substitute for the smoked version).
56 Joseph Berger, Connecticut allows medical marijuana, but sellers encounter hurdles, NEW YORK TIMES (May 2, 2014), 20.
57 Mark Walters, New York University-led medical marijuana study shows promise, YORK DAILY RECORD (Pennsylvania), April 14, 2015 at 1.
with terminal illness. Issues of compassion for those terminally ill have led to the reemergence of medical marijuana. The current California program has little resemblance to the original intent. The narrowly drawn program to help the terminally ill was a facade. The California law was written with such vague standards that virtually anyone can purchase marijuana, as long as the patient can convince one doctor that he/she will benefit from marijuana. California’s medical program has largely become a sham, allowing marijuana for nearly any adult at any time. California allows medical marijuana for almost any condition, even if not medically verified, and for some questionable ailments, including sleeplessness.

The promises from the original program, compassionate marijuana for the terminally ill, have faded into distant memory. Marijuana is sold to anyone and everyone in California. The demand for “legal” marijuana has been overwhelming. California has filled this demand with a flood of marijuana dispensaries, over 500 in Los Angeles alone. Retailers struggle for attention and customers in this heavily saturated market. Marijuana is everywhere in California. Even California Governor Arnold Schwarzenegger commented on the number of people openly smoking marijuana in some public places.

Following the successful passage in California two decades ago, many states have followed with their own medical marijuana programs, including Alabama, Alaska, Arkansas, Arizona, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana.

61 Ludlum & Ford, \textit{supra} note 58.
62 Berger, \textit{supra} note 56.
63 Id.
64 Adam Nagourney, \textit{Marijuana, not yet legal for Californians, might as well be}, \textit{NEW YORK TIMES}, Dec. 21, 2012, A1 (noting that while smoking marijuana in public is technically illegal, it is not highly enforced).
67 ARK. CODE ANN. § 7-9-107 (Supp. 2015).
68 ARIZ. REV. STAT. ANN. § 13-3412.01.
69 CONN. GEN. STAT. § 21a-246.
70 FLO. CONST. ART. X, Sec. 29.
71 GA. CODE ANN. § 43-34-120 to -126.
72 HAW. REV. STAT. § 329-123(b).
73 720 ILL. COMP. STAT. ANN. 550/11.
74 IOWA CODE § 124.204.
75 LA. REV. STAT. ANN. § 40:1021.
76 ME. REV. STAT. tit. 22 § 2425.
77 MY. ANN. CODE Sec. 13-3301 et seq.
78 MASS. GEN. LAWS ANN. Ch. 94D § § 1-4.
79 MICH. COMP. LAWS § 333.26424.
80 MINN. STAT. § 152.21.
81 MONT. CODE ANN. § 50-46-103.
Nevada,\textsuperscript{82} New Hampshire,\textsuperscript{83} New Jersey,\textsuperscript{84} New Mexico,\textsuperscript{85} North Dakota,\textsuperscript{86} Ohio,\textsuperscript{87} Oklahoma,\textsuperscript{88} Oregon,\textsuperscript{89} Pennsylvania,\textsuperscript{90} Rhode Island,\textsuperscript{91} South Carolina,\textsuperscript{92} Tennessee,\textsuperscript{93} Texas,\textsuperscript{94} Vermont,\textsuperscript{95} Virginia,\textsuperscript{96} Washington,\textsuperscript{97} West Virginia,\textsuperscript{98} Wisconsin,\textsuperscript{99} and the District of Columbia.\textsuperscript{100}

Colorado’s medical marijuana program is typical of many. Currently 100,000 Colorado residents are on the medical marijuana program.\textsuperscript{101} Clearly these numbers are not all terminally ill cancer patients. Supply has emerged to fill this demand. There are over 500 medical marijuana dispensaries (retail stores, privately owned) in Colorado.\textsuperscript{102} The marijuana retailers compete with each other for customers with innovative marketing programs, like any restaurant or bar. Recent 2010 amendments to Colorado’s medical marijuana program attempted to remedy some of the abuses of the program.\textsuperscript{103} Colorado is working hard to make the program more legitimate, in contrast to California, which has essentially legalized marijuana under the pretense of medical program.

Marijuana programs are unusual in medical terms. Since marijuana is a Schedule 1 drug, similar to cocaine, no doctor can write a prescription for it. A pharmacy will not have it in stock. As a result, a doctor can only give a recommendation for marijuana.\textsuperscript{104} This distinction is important. Since marijuana is not a prescribed medicine, it is not covered by insurance. Marijuana becomes available only to those who have the resources and the ability to purchase it in the black market. Even with a recommendation, states often provide no legal way to access or acquire the medicine.

\textsuperscript{82} NEV. REV. STAT. § 453A.050.
\textsuperscript{83} N.H. REV. STAT. ANN. § 318-B:10(VI).
\textsuperscript{84} N.J. STAT. ANN. § 24-I-4.
\textsuperscript{85} N.M. STAT. ANN. § 26-2B-4(D).
\textsuperscript{86} N.D. CODE § 19-24-01 et seq.
\textsuperscript{87} See Ohio’s proposed rules at \url{http://medicalmarijuana.ohio.gov/Rules}.
\textsuperscript{88} OKLA. STAT. tit. 63, §§ 2-801 to -805 (Supp. II 2015).
\textsuperscript{89} ORE. REV. STAT. § 475.309(2)(a).
\textsuperscript{90} See Pennsylvania’s Medical Marijuana program at \url{http://www.health.pa.gov/My%20Health/Diseases%20and%20Conditions/M-MedicalMarijuana/Pages/default.aspx}.
\textsuperscript{91} R.I. GEN. LAWS § 21-28.6-4.
\textsuperscript{92} S.C. CODE ANN. § 44-53-610 to -660.
\textsuperscript{93} TENN. CODE ANN. § 39-17-408(b)(6)(A).
\textsuperscript{94} TEXAS HEALTH & SAFETY CODE ANN. § 481.201-.205.
\textsuperscript{95} VT. STAT. ANN. tit. 18, § 4473.
\textsuperscript{96} VA. CODE ANN. § 18.2-251.1.
\textsuperscript{97} WASH. REV. CODE § 69.51A.005.
\textsuperscript{98} W.V. CODE, 1931, § 16-8A-1.
\textsuperscript{99} WIS. STAT. § 961.34.
\textsuperscript{100} D.C. CODE ANN. § 33-522(2).
\textsuperscript{101} Suzanne Weiss, \textit{supra} note 11 at 18.
\textsuperscript{102} \textit{Id}.
\textsuperscript{104} Sam Kamin & Eli Wald, \textit{supra} note 35 at 875 (2013).
II. TRANSFORMATIVE CHANGE

The last few years has seen rapid-fire policy changes in regards to marijuana. Every week a new headline emerged about one state or another modifying their policy about marijuana. With medical marijuana being well-established, and federal interest in enforcement waning, states took bold steps forward, legalizing marijuana for recreational purposes. Colorado and Washington were the first states to plunge into fully legalized pot.¹⁰⁵

In the fall of 2012, Colorado and Washington passed measures legalizing the recreational use of marijuana.¹⁰⁶ Any adult could purchase marijuana for any reason, or for no reason. Marijuana was still illegal under federal law. Pot enthusiasts and academics waited and watched for federal reactions that never happened.

Both states were mavericks at least when it came to cannabis.¹⁰⁷ Both states quickly approved medical marijuana programs (following California’s example).¹⁰⁸ Both states’ medical programs expanded rapidly. Cities also jumped into the political mixer. In 2005, Denver became the first major city to legalize adult possession of marijuana.¹⁰⁹ This act was largely symbolic since the federal prohibition was in place. The marijuana business in Denver has exploded with 204 stores, triple the number of Starbucks and McDonalds combined.¹¹⁰ Marijuana stores and related marketing are becoming commonplace in Colorado.

Colorado’s experience of Legal Day One (January 1, 2014) pointed out the reality of recreational marijuana. Sales exceeded $1 million dollars in the first 24 hours.¹¹¹ Many dispensaries were overrun. For example, the 3D Cannabis Center in Denver averaged 25 customers a day for the previous three years, but on January 1, 2014, had 450 customers and turned away 60 more.¹¹² Similar results occurred in many of Denver’s other recreational stores.¹¹³ Some purchases were pent up demand, and some were just those who wanted to make history, purchasing recreational marijuana legally for the first time.¹¹⁴ Sales were so high, some stores ran out of merchandise.¹¹⁵

The market forces have responded. Demand was so strong, prices doubled in the opening days.¹¹⁶ Sales in Colorado were expected to reach $578 million in the first year.¹¹⁷ The tax man will also benefit from marijuana’s popularity. Pot is expected to bring in $70 million in tax revenue each year for Colorado.¹¹⁸

¹⁰⁵ Jacob Sullum, *The cannabis is out of the bag*, 45.4 REASON (2013) 12.
¹⁰⁶ *Id*.
¹⁰⁹ *Id*.
¹¹⁰ Suzanne Weiss, *supra* note 11 at 18.
¹¹³ *Id*.
¹¹⁴ *Id*.
¹¹⁶ *Id*.
Not everyone in Colorado was cheering. Colorado Springs has opted out of recreational marijuana sales, perhaps because of the 80 medical marijuana dispensaries already in their city. The number of cities opting out of marijuana sales keeps increasing. Under Colorado law, cities can prohibit pot sales, but the ban must be accomplished by popular vote during a regular election, as Colorado Springs has already done. Public sentiment may backfire, as 86 other cities have already voted to prohibit medical marijuana sales in their locales.

Washington State also legalized recreational marijuana in 2012. Washington State’s recreational marijuana election results demonstrated that state’s tipping point, as legalization proponents won 55%-45%. The preliminary rules were a result of a lot of lobbying by the new industry. Public use of marijuana was still prohibited. Under Washington law, only those over 21 can buy or possess marijuana, or work in a marijuana business. The Washington regulators can set maximum number of marijuana businesses in a specific area. The law is not clear on how the maximum number would be determined.

Washington residents are not 100% on board with the pot frenzy. The anti-marijuana view in Washington State is strong. There were many skeptics, since the 1440 retail outlets of Washington’s medical marijuana program were supposed to be regulated from seed to sale, but the enforcement has never been fully implemented. The only realistic changes to be expected are for local areas (cities or counties) to opt out of allowing retail marijuana sales. The Washington law allows for cities to ban the sales within their jurisdiction, and 60 cities have already enacted bans on pot sales. For example, Yakima County and Pierce County (south of Seattle) have barred recreational sales of marijuana. Statewide figures of marijuana users and sales are only estimates. The marijuana program in Washington is difficult to assess since it does not have a registry of valid users.

While Colorado’s medical and recreational systems are working together, Washington’s recreational legalization is threatening the legitimate purpose of the medical marijuana program. Medical marijuana retailers have become more lax to directly compete with the

119 Schrader, supra note 112.
121 Id. at A13.
122 Suzanne Weiss, supra note 11 at 18.
123 DAILY TELEGRAPH (Sydney), States legalize marijuana, Nov. 9, 2012, 43.
124 Id. See also ADVERTISER (Adelaide), Marijuana legalized, Nov. 9, 2012, 1.
125 Jacob Sullum, supra note 105 (The current businesses in medical marijuana are attempting to influence the regulations to favor themselves).
126 WASH. REV. CODE ANN. §69.50.357(5). See also Suzanne Weiss, supra note 11.
127 WASH. REV. CODE ANN. §69.50.331(6) and WASH. REV. CODE ANN. §69.50.357.
128 WASH. REV. CODE ANN. §69.50.354.
129 Brad Knickerbocker, supra note 8 at 10 (the 334 licenses will be apportioned by population). See also Noah Rayman, Washington State approves new rules for marijuana industry, TIME (Oct. 21, 2013) 1 (noting that the board has approved a maximum of 334 licenses, including 21 in the city of Seattle).
130 Id. (The failure is primarily due to inadequate manpower and funding shortages for the enforcement division).
131 Jeremy Lott, Pot Shots! Part Deux, AMERICAN SPECTATOR (Jan./Feb., 2014) 24-27.
132 Johnson, supra note 120.
133 Bob Young, Medical, recreational pot at odds; Washington state’s new recreational marijuana market is highly regulated in contrast to the medical pot market, LOS ANGELES TIMES, April 14, 2013, A11.
recreational sales. The Seattle Times wrote a series about a reporter who got medical marijuana approval after an eleven minute consultation with no medical records of any kind.\textsuperscript{135}

The legitimacy of Washington’s medical marijuana program is under legal attack. Medical marijuana businesses have made a court challenge to Washington State’s authority to tax marijuana since it is federally illegal.\textsuperscript{136} Taxes on marijuana are not insignificant (15% of the retail price).\textsuperscript{137} Legally, this is a precarious position. How can a state enforce a tax on an item that is illegal under federal law to possess? Would filing a tax return as a marijuana business be an admission to violating federal law? The hodgepodge of conflicting policies make operating a marijuana business challenging.

In the 2014 election cycle two additional states, Oregon and Alaska, and the District of Columbia passed public votes supporting the legalization of recreational marijuana. Oregon’s legalization for recreational use (allowing a half pound of marijuana per person) was very popular, gaining 56\% of the voters.\textsuperscript{138} Marijuana got 35,000 more votes than any candidate on the Oregon ballot.\textsuperscript{139} Alaska also considered recreational use in 2014\textsuperscript{140} and voted to legalize recreational use by 53\%.\textsuperscript{141} Neither state’s vote was a landslide, but both showed the tipping point being reached by political forces. In the last few years, four states have legalized marijuana for all adults, in clear violation of federal law, and lacking any pretense of a medical need. Marijuana merchants held their collective breaths, hoping for guidance from the federal government. None was forthcoming.

Washington D.C.’s movement to legalize marijuana had an unusual twist. The public push carried a civil rights tone, “legalization ends discrimination.”\textsuperscript{142} In Washington D.C., blacks were eight times more likely to be arrested for marijuana than whites.\textsuperscript{143} The racial justice argument was central to the election.\textsuperscript{144} The District of Columbia’s vote was also unusual because it is a federal district. It lacks any authority to argue it has a state’s right to regulate marijuana (10th Amendment issue) in violation of federal law.

In addition to the four recreational use states, New York saw a change in the support for marijuana legalization. Before New York State could change its law, in 2014 New York City changed its treatment of marijuana laws, which likely was a signal of the changing views of the entire state. New York City has been the marijuana arrest capital of the nation.\textsuperscript{145} Over the past 20 years, NYC has arrested 600,000 people for possessing small amounts of marijuana, and 80\%
of these arrests were people of color.\textsuperscript{146} A long term examination found that 81\% of all tickets in New York City (7.3 million) from 2001-2013 were to black or Latino defendants.\textsuperscript{147} The racial disparity in arrests sounds like a tale of two cities.\textsuperscript{148}

In an attempt to remedy this racial disparity, following on the heels of the District of Columbia effort, NYC’s Mayor de Blasio and police commissioner Bill Bratton announced scaling back of marijuana arrests.\textsuperscript{149} For a simple marijuana possession case, instead of being arrested, the suspect would be given a court appearance notice and a $100 ticket.\textsuperscript{150} As expected, the number of marijuana arrests dropped significantly (61\%) after the program was launched.\textsuperscript{151} This policy eased racial tensions as well as fueled the discussion of the inevitability of marijuana legalization. With these three hectic years of events as a backdrop, New York State revamped their view of medical marijuana.

III. NEW YORK STATE’S NEW LAW

New York State’s voters wanted medical marijuana.\textsuperscript{152} Advocates in favor of medical marijuana had a large campaign fund ($13 million) including support from George Soros.\textsuperscript{153} Polls showed 82\% of New Yorkers supported medical marijuana.\textsuperscript{154} While the public was in support, the political support lagged behind. Many in New York’s political spectrum wanted only a well-tailored program, one that was narrowly drawn to include the ill but excluded the recreational pot user.

New York had to develop the political coalition in 2014 to allow a medical marijuana program.\textsuperscript{155} A medical marijuana bill had been passed in the New York Assembly multiple times, but never passed in the state senate.\textsuperscript{156} The New York Senate had ignored this issue since 1978.\textsuperscript{157} Political support united once several narrowing provisions were added to the bill.

\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{150} Bruinius, supra note 145. See also Laura Stampler, Marijuana may soon spark just a ticket in New York, TIME (November 10, 2014), available at http://time.com/3575707/marijuana-pot-arrest-ticket-new-york/. See also Dickinson, supra note 10.
\textsuperscript{152} Bond, supra note 117.
\textsuperscript{153} Id.
\textsuperscript{154} Susanne Craig & Jesse McKinley, New York state is set to loosen marijuana laws, NEW YORK TIMES (January 5, 2014), 1a.
\textsuperscript{155} Brian Bremner & Vincent Del Guidice, The mind-expanding economics of pot, BUSINESS WEEK, (Jan. 13, 2014) 11-12. (Governor Andrew Cuomo announced the project on January 8). See also Jeremy Lott, supra note 131 at 26 (limited use would be allowed, much less than the California program).
\textsuperscript{156} Bond, supra note 117. See also Maya Srikrishnan, Medical pot gains ground in two states, NEW YORK TIMES (June 18, 2014), 8. See also McKinley, supra note 136.
\textsuperscript{157} Jessica Glenza, US senators fire up medical marijuana bill in bid to clear path for research, GUARDIAN, March 10, 2015.
One of the disputes in the original bill was the form of marijuana. Governor Cuomo did not favor a smoked version of medical marijuana. The law was modified. New York medical marijuana cannot be smoked. Nearly all other medical marijuana states allow smoked versions to be used. In New York, only the oil form of marijuana can be used. New York City District Attorney Morgenthau also supported the modified initiative. The New York Senate voted to legalize medical marijuana on June 20, 2014. The bill passed the senate by 49 to 10. The Governor signed the bill into law in July, 2014.

Additional safeguards were added to make the program more acceptable to both sides of the political aisle. Richard Gottfried, Democrat who led the NY Assembly’s health committee, said the New York system is not supposed to have any resemblance to California’s lax system. New York’s law was not intended as a sham for legalization. Several modifications needed to be built into the law. First, the statute had an emergency stop switch. The state health department could stop the program at any time if it was perceived as running afoul of the intended purposes.

Second, reasonable limits were put on patients’ ability to possess marijuana. An ill patient could possess only small amounts of marijuana. The law would not allow an ill patient to have large stockpiles of marijuana that could be easily diverted into the recreational market. Upon closer examination, the stoners will not be interested in the product coming from the New York program. New York regulated the potency of doses of medical marijuana. One dose cannot contain more than 10mg of THC, (tetrahydrocannabinol) the psychoactive component of pot. Similar to all medical provisions, the medical marijuana in New York must have independent testing. Labeling and advertising of medical marijuana will be regulated.

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158 Jesse McKinley, New York Senate passes bill on medical marijuana, NEW YORK TIMES (June 21, 2014), 1. See also Bond, supra note 117. See also Jesse McKinley, Talks on marijuana bill as time runs out, NEW YORK TIMES (June 18, 2014), 22a. See also Srikrishnan, supra note 156.
159 N.Y. PUB. HEALTH LAW § 3360.1. See also N.Y. PUB. HEALTH LAW § 3362.2.A. See also Tom Precious, Competing for a piece of state’s medical marijuana business; Rush of growers expected, but only 5 will be approved, BUFFALO NEWS (New York), April 5, 2015 at 37.
161 Precious, supra note 159. See also Jesse McKinley & Catherine Saint Louis, Medical Marijuana regulations are shaping up as unusually restrictive, NEW YORK TIMES, March 30, 2015, 17a.
162 Susan Saulny, Metro Briefing New York: Manhattan: Medical Marijuana Backed, NEW YORK TIMES (June 16, 2004), 6.
164 McKinley, supra note 158.
165 About the New York State Medical Marijuana Program, (October, 2015), accessed at https://www.health.ny.gov/regulations/medical_marijuana/.
166 Craig & McKinley, supra note 154. See also supra notes 58 to 64 for criticism of California’s plan.
167 N.Y. PUB. HEALTH LAW § 3369-C. See also McKinley, supra note 158.
168 McKinley, supra note 136.
169 N.Y. PUB. HEALTH LAW § 3360.15.
171 N.Y. PUB. HEALTH LAW § 3364.3.
172 N.Y. PUB. HEALTH LAW § 3364.12.
173 N.Y. PUB. HEALTH LAW § 3364.13.
New York State’s system presents itself as a legitimate medical program, not a sham that allows anyone to smoke pot based on a wink at the local pot storefront.

Third, New York’s medical marijuana program was not a sham for legalization. Approved patients had to be legitimately ill. Only a specified list of ten illnesses would qualify for medical marijuana.\textsuperscript{174} Serious conditions were specifically defined by being diagnosed with certain illnesses, and the list of illnesses can only be altered by the New York State Department of Health.\textsuperscript{175} Estimates of the eligible patients (ten specified illnesses) could be in the hundreds of thousands.\textsuperscript{176} A person could not complain to one doctor about mysterious pain and get a recommendation for marijuana, as California allowed.\textsuperscript{177}

Prescribing practitioners (doctors) must be licensed to treat the list of accepted illnesses and complete training in medical marijuana offered by New York State.\textsuperscript{178} This regulation should limit the “pill mills” that exist in other states that appear to provide a marijuana recommendation to anyone who pays the fee.

Additionally, instead of being overrun with applications for retail sellers of medical marijuana, New York will only allow twenty hospitals to dispense marijuana oil statewide.\textsuperscript{179} New York does not want to be littered with hundreds of marijuana stores, competing for attention and customers. Being hospital based, the New York program has a legitimacy which is lacking in states with storefront operations with catching pot-slang names, such as “Hashish Haven.”

Two economic issues from New York’s program will have to be tested to see if they will be effective. First, New York State does not require medical marijuana to be covered by insurance.\textsuperscript{180} This may limit access to marijuana for some patients. However, with a third of Americans getting access to pot without insurance, it may not be a significant problem. Additionally, New York is going to set the retail per dose prices.\textsuperscript{181} As proposed, the government is going to set the price, not the market.\textsuperscript{182} Any time the market is replaced by government-set prices there will be some unintended consequences.

If the legal price is too high, the illegal/unregulated market will fulfill the unmet needs. Consumers will go to the black market. If the legal price is too high, some who need medical marijuana may not be able to afford it, resulting in unfulfilled needs. Ordinarily, we would worry about the government setting the price too low, since this might encourage experimentation by potential consumers. A government price set too low might discourage

\textsuperscript{174} McKinley, \textit{supra} note 158. \textit{See also} Michael Gormley, \textit{Pot rules criticized; New medical marijuana regs called too restrictive; State says they guard against black market sales}, \textit{NEWSDAY} (New York) April 2, 2015, A36. \textit{See also} McKinley & Saint Louis, \textit{supra} note 161.

\textsuperscript{175} N.Y. PUB. HEALTH LAW § 3360.7.

\textsuperscript{176} McKinley & Saint Louis, \textit{supra} note 161.

\textsuperscript{177} \textit{See also infra} notes 58 to 64 for criticism of California’s plan.

\textsuperscript{178} N.Y. PUB. HEALTH LAW § 3360.12

\textsuperscript{179} N.Y. PUB. HEALTH LAW § 3365.9. \textit{See also} Craig and McKinley, \textit{supra} note 154. \textit{See also} Srikrishnan, \textit{supra} note 156.

\textsuperscript{180} N.Y. PUB. HEALTH LAW § 3368.2.

\textsuperscript{181} N.Y. PUB. HEALTH LAW § 3369-D.2.

\textsuperscript{182} McKinley & Saint Louis, \textit{supra} note 161.
producers, especially since New York’s marijuana is not simply plant leaves, but a refined oil. Everyone can grow the plant in their basement, but refining the oil is not within everyone’s abilities. However, in a hospital environment, an unusually low price seems unlikely. Leaving the price to be set by the market is the best option.

The program has so far been a success. As of this writing, New York had 1231 registered practitioners (doctors) and 30,486 medical marijuana patients.\footnote{New York State Medical Marijuana Program, Sept. 19, 2017, available at \url{https://www.health.ny.gov/regulations/medical_marijuana/}.} The program is well-regulated, and is functioning on a quite large scale.

New York’s experience will be similar to Florida’s attempt with Charlotte’s Web, a non-euphoric strain of marijuana which was also passed in 2014.\footnote{Srikrishnan, \textit{supra} note 156.} Marijuana oil is targeted for truly ill people for the medical benefits. Florida and New York are being closely watched since these states have a huge population, and will be the largest legal marijuana markets outside of California.\footnote{Id.} The policy in Florida is still in flux. Advocates in Florida pushed for a broader medical marijuana bill in 2016.\footnote{Associated Press, \textit{Florida: Marijuana issue is cleared for ballot}, \textit{New York Times} (January 28, 2014), 14a.} Many changes are due during the next five years. This should be a very exciting time for America’s experiment with marijuana.

\section*{IV. Likely Effects of New York’s Law}

Working out the nuts and bolts of the program will take time. Anytime a new regulatory scheme is enacted, there will be difficulties. New York’s potential regulations seem cumbersome, already generating 1000 pages of rules for marijuana producers.\footnote{Precious, \textit{supra} note 159 at 37.} The new regulations are too restrictive. Advocates complain it will prevent some people from getting the relief they deserve.\footnote{Gormley, \textit{supra} note 174 at A36.} Regional shortages might also occur with only twenty dispensaries maximum for the state. Smaller, rural markets may not be economically viable.

While no industry desires to be regulated, the voluminous medical marijuana regulations seem excessive since the alternative was the completely unregulated black market.\footnote{McKinley & Saint Louis, \textit{supra} note 161.} The new regulatory regime is quite complicated. Regulation compliance is expected to cost a marijuana supplier $8 million every two years.\footnote{Precious, \textit{supra} note 159 at 37.} Since the suppliers will be twenty of the largest hospitals in New York, these costs might be manageable.

Besides new regulations, the new legislation will create a legal (taxable) industry that was previously below the radar. It has the potential for legal job creation across New York State.\footnote{McKinley, \textit{supra} note 136. \textit{See also} Toscano, \textit{supra} note 160.} Moving the industry from the black market to the legal market will benefit everyone: the sellers, the buyers, and the taxpayers. Illegal items will now be taxed and purity controlled. Cash based workers will be replaced with employees with a paycheck. No one can know for certain how many jobs will suddenly appear (that had previously been underground), but the number should...
be significant. As a clear sign of the significance of the numbers involved, labor unions are quickly trying to unite and organize marijuana workers.\textsuperscript{192}

Currently, the New York program only allows for the oil to be taken by those with a medical need. Foods might be a more acceptable alternative to the oil. Currently, edibles remain illegal in New York.\textsuperscript{193} Food products could be a growth market. Colorado has seen 38\% of sales as food items.\textsuperscript{194} Some Colorado retailers see 50\% of sales as food items.\textsuperscript{195} For those who can tolerate the food items, edibles offer new products for the market, and a more appealing item for the ill than oil. Time will tell if New York will expand the methods of taking medical marijuana over the life of the trial program.

Two additional problems follow New York and all states experimenting with marijuana legalization. New Yorkers will still have a problem of access to banking for marijuana businesses.\textsuperscript{196} Federal laws prohibit banks from allowing criminal operations to set up bank accounts. Technically, marijuana dispensaries will be criminal operations, violating federal law, even if the dispensaries are hospitals. The hospitals could be considered money laundering operations for the marijuana business and subject to seizure. New York State’s law does not stop federal enforcement. This will need to be worked out at the federal level.

Second, New York will still have to wrestle with the problem of employment restrictions involving drugs.\textsuperscript{197} Can an employer in New York fire (discriminate) against an employee who tests positive for medical marijuana? Should it matter if the employee took the state approved oil or smoked the plant, since both are against federal law? Can the tests for marijuana distinguish whether testing positive was from taking oil or from smoking the plant? Are the medical marijuana patients considered to be disabled, therefore protected under the Americans with Disabilities Act (ADA)? All of these problems are beyond New York, or any one state’s ability to fix. Cases in this area are creating a patchwork of conflicting decisions at the moment.

A. Split between Recreational and Medical Users

One significant effect of New York’s medical marijuana is to change the political alignment on marijuana legalization. Historically, there were some groups always in favor of marijuana legalization (recreational users and libertarians). Social conservatives were always against marijuana legalization. Both sides fought for the middle ground, and social conservatives have ruled since the 1970s. Medical marijuana changed this political fight.

Recreational users and libertarians remained unchanged, completely in favor. Social conservatives were split, with many supporting legitimate medical use for the ill. Conservatives were heavily swayed by the emotional appeals of helping the suffering of the terminally ill.

\textsuperscript{192} Toscano, \textit{supra} note 160.
\textsuperscript{193} New York Health Department, Medical Marijuana FAQs, available at \url{https://www.health.ny.gov/regulations/medical_marijuana/faq.htm}.
\textsuperscript{194} Bond, \textit{supra} note 118.
\textsuperscript{195} \textit{Id}.
\textsuperscript{196} Jack Healy & Matt Apuzzo, \textit{Legal marijuana businesses should have access to banks, Holder says}, \textit{NEW YORK TIMES}, (January 20, 2014), 20a.
Now, recreational users, libertarians, and many social conservatives supported medical marijuana. This only left a portion of social conservatives against the medical use of marijuana. This is the societal tipping point.

Legitimate medical use of marijuana has strong emotional appeal that extends beyond political parties and other demographic factors. A majority of the public favored the medical use of marijuana. Historically, recreational users have supported the medical use of marijuana, seeing medical marijuana as an interim step before legalization for all purposes. Any legalized use of marijuana, so says the stoners, supported the push for ever broader legalization.

Now, New York has driven a wedge between medical users (which are protected under the new regulations) and recreational users (since smoking marijuana is still illegal). Legalized marijuana oil might remove some momentum to legalize recreational marijuana, since the legitimate medical marijuana needs are already met. The strong emotional appeal is gone. The social conservatives who favored only medical marijuana are likely to be passive at best on the issue of recreational legalization. Medical uses are considered legitimate and are allowed. This would take some of the steam out of the push for ending the ban on marijuana. That leaves only the libertarians and hard core stoners in favor of full legalization. That coalition is unlikely to be majority in most states any time soon.

B. Long Term Effects

Another effect of New York’s change might be part of a regional push for more legal marijuana. We have thought about marijuana as a Pacific coast issue, as Washington, Oregon, and California have dominated the news (along with Alaska). Now the Empire State may set the tone of marijuana policy to the entire New England region.

If New York’s medical marijuana program is successful, and we are confident it will be, it should serve as an example for policy in the region. Nine of New York’s neighbors have medical marijuana (Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont, and Virginia, along with the District of Columbia). Connecticut has medical marijuana, but has had trouble implementing it. Connecticut requires an on-site pharmacist for dispensaries. Six dispensaries are to be competitively chosen from over two dozen applicants.

Neighboring New Jersey has allowed six dispensaries for medical marijuana. Three of the dispensaries in New Jersey are open. Maine will likely pass a complete legalization bill in the near future. The effort is being pushed by Rep. Diane Russell. Massachusetts is also a

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198 See infra notes 67 to 100.
199 Berger, supra note 56.
200 Id.
201 Id.
202 Craig & McKinley, supra note 154.
203 Berger, supra note 56.
205 Suzanne Weiss, supra note 11 at 17.
supporter of marijuana, having recently enacted a medical marijuana program with 63% voter support. Rhode Island passed medical marijuana and will consider recreational use in the future.

New York’s work on medical marijuana will, and should, serve as a guide for the region. New York’s program is well-defined, hospital based, and not a sham for legalization. As a result, it has a majority of the population in support. In contrast, California’s medical marijuana system serves as a bad example for policy makers who desire a working, legitimate medical program.

CONCLUSION

Policy implications are difficult to predict with certainty under any circumstance. As this policy seems to be re-invented every few months, it is even more problematic. One lesson to take from this experiment is the reality. In the fight over marijuana, proponents of legalization claimed that little would change, if anything, just moving an illegal market to the legal side. Legal sales will replace illegal ones. There will be no change in use. Tax proceeds will increase, as a collateral benefit.

Those opposed to legalization claimed the sky would fall; crime would explode, drug use and drug related deaths would skyrocket. Marijuana was legalized for medical reasons for two decades and for recreational use in several states, and the sky did not fall. The drastic warnings of ill consequences and society crumbling did not happen. This made the opponents of legalization look silly and reactionary.

The big unknown is how the Trump administration will handle the marijuana issue. This issue has garnered little attention in recent months. Recently Attorney General Jeff Sessions has implemented a crackdown on medical marijuana states. However, his efforts are facing strong political opposition from many fronts, including military veterans who tout the benefits of medical marijuana for our returning heroes.

Instead of favoring complete legalization, New York State voted for legitimate, workable legalization of marijuana for medical use. Marijuana oil is allowed for the sick, and no one else. It is not intended to be a sham for all out legalization. The safeguards put into place in the New York program ensure it to be narrowly used for the goals outlined. We believe those safeguards explain the overwhelming public support for the law. The New York law should serve as a model for the region, if not the nation for a well-tailored medical marijuana law.

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206 Id.
207 Bond, supra note 117.
210 Id.
LEGAL LIFE AFTER DEATH: PUBLICITY, PHYSICAL, AND DIGITAL ASSETS

BRAD REID*

Abstract

The contemporary inheritability of the right of publicity and the repeal of the Rule Against Perpetuities, together with the rise of digital assets, have created a number of legal possibilities for life after death. Apart from the biological possibility of having children after one dies, and the science fiction, or futuristic thinking, of downloading the human brain into a computer system, what are the prospects of having a trust fund ready to support you in some form of extended life? The future is either Heaven or Hell.

Introduction

Technological developments are rapidly advancing the very real possibility of human life extension and the preservation of some form of “personhood” into the indefinite future. Apart from biology and the philosophy of personhood, right now the ownership of legal assets such as the right of publicity and digital assets after traditional death is being addressed. The concept of dynasty trusts and the more recent Uniform Fiduciary Access to Digital Assets Act are steps along this path. This article addresses inheritable publicity, dynasty trusts and the repeal of the Rule Against Perpetuities, the right of publicity, and ownership of and access to digital assets, and the very interesting future that society faces.

Elvis is Alive and Created Inheritable Publicity

It all begins with Elvis.1 C. Barry Ward was the estate’s general counsel starting in 1983 until at least 1990. In that period revenue grew so that Elvis Presley’s estate in 1990 was grossing some $15 million a year from licensing, music publishing, and tourism to the Graceland estate. “In 1981 we first got federal trademark for Elvis’ TCB (Taking Care of Business) lightning bolt logo.”2 “The fine line between the right of publicity and the First Amendment has yet to be written. Impersonators are a tough issue, and we take them on a case-by-case basis. We only take action if we feel there’s a substantial taking of Elvis’s style and manner for commercial purposes.”3

In 1981 the Second Circuit began an opinion by stating: “The merits of this appeal concern the interesting state law question whether a person has a protected interest in publicizing his name and likeness after his death, or, as the matter has been put, is there a descendible right of publicity?”4 Of course the answer to this question has become a resounding yes. While the

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1 Stan Soocher, Elvis’ Legacy is Safe; the King is Worth More Dead Than Alive Thanks to His Estate’s Lawyers, NATIONAL LAW JOURNAL, p. 1 (July 16, 1990).
2 Id. at 2.
3 Id.
right of privacy may be personal to the individual, the right of publicity has been treated in recent years as an intangible right that is capable of inheritance. All of the objections to a right of publicity, such as it would extend to all public figures; it would cause titles and offices to be inherited; it has no time limitations; its tax status is uncertain; it limits free speech, have been overcome. The right of publicity extends to the persona of the individual a legal life after death.

Prior to 1997 asset protection in the fullest sense was limited to offshore jurisdictions such as the Cayman Islands; however, in 1997 Alaska and Delaware enacted asset protection legislation. The Alaska statute allowed some self-created spendthrift trusts, limited the impact of fraudulent conveyance statutes, and permitted the settlor to choose Alaska law to govern the trust. Creditors could only reach the beneficiary’s trust interest if: 1. it is a fraudulent conveyance under Alaska law; 2. the trust allows the settlor to revoke the trust without the consent of an adverse party; 3. the trust requires income or principal to be distributed to the settlor; or 4. the settlor is more than thirty days behind on child support payments when the transfer was made to the trust. The Alaska statute specifically states that creditors cannot challenge the transfer on the grounds that it was made to defeat support claims. Finally, a trust created elsewhere may be transferred to Alaska.

A celebrity persona is a valuable asset. For example, Ford Motor Company used a Bette Midler sound alike to do a commercial. The value of her persona was “what the market would have paid.” While distinguished and criticized, the Midler decision has been widely commented upon and set a baseline for valuing a persona. In divorce cases the value of a celebrity persona has been determined based upon three of the past five years’ income. These are but two examples of the valuation of persona. Interesting, it appears to me that only New York and New Jersey recognize celebrity status as marital property in divorce, presumably because it does not fit within traditional definitions of marital property in state statutes.

The right of publicity was first judicially recognized in 1953. A baseball player gave a chewing gum company exclusive rights to put his picture on baseball cards. When the player gave the same rights to a competing gum company, the first grantee sued. The court held that “a man has a right to the publicity value of his photograph, i.e. the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made in gross, i.e., without an accompanying transfer of a business or anything else.” Subsequent decisions describe this as a right to commercially exploit one’s name, personality, and likeness. Numerous celebrity estates have sued to preserve a right of publicity including Agatha Christie, Princess Diana, W.C. Fields, Clark Gable, Martin Luther King, Jr., Marilyn Monroe, Elvis

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5 ALASKA STAT. 13.36.005-.060 (2016).
6 12 DEL. CODE ANN. Secs. 3570-3576 (2016).
7 ALASKA STAT. 34.40.110(b) (2016).
8 ALASKA STAT. 13.36.310(a) (2016).
9 ALASKA STAT. 13.36.043 (2016).
10 Midler v. Ford Motor Co., 849 F.2d 460 at 463 (9th Cir. 1988).
13 Id. at 868.
Presley, and John Wayne to name a few. Artistic or new uses are protected by the First Amendment. Thus the broadcast news footage of a circus act did not violate the right of publicity.

The majority of states today consider the right of publicity to be inheritable. Any kind of property may be placed in trust. Texas states that a property right, and by inference the right of publicity, may be extinguished one year after death if no surviving relatives as statutorily defined exist and there was no inter vivos right transferred. Registration of a claimed property right may be made with the Texas secretary of State. Various states have time limitations on protecting the right of publicity. Texas has fifty years.

In addition, trademark of an image protects the public from deception. As the statute reads: “to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” It must be commercially used to be protected and a successful case shows a “likelihood of confusion” in the mind of the public.

A publicity right established in one state is enforceable everywhere under full faith and credit. “An interpretation placed upon a will, insofar as the will bequeaths interests in movables, by a court of the state where the testator was domiciled at the time of his death, will be followed in other states.” There are numerous examples of this concept being applied to the right of publicity. However, some judicial decisions deny the extra-judicial expansion of postmortem state law publicity rights to individuals who were not domiciled within that state at the time of their death.

When Elvis’ father died in 1979, Elvis’ ex-wife Priscilla Presley became the executor of Elvis’ estate. She acquired a team of experts who reacquired his right of publicity from Boxcar Enterprises, an entity controlled by Col. Parker, Elvis’ manager. They also lobbied the Tennessee legislature to enact the Personal Rights Protection Act in 1984 that specifically protected the right of publicity and made it inheritable. The team also took at least twenty four infringement cases to trial. The results were a dramatic increase in the value of the estate. In the case of Marilyn Monroe, the right of publicity went with the residue of the estate to be split with 25% going to a psychotherapist, Marianne Kris, and 75% to an acting coach, Lee Strasberg. These are but two early examples where the right of publicity proving to be immensely valuable after death.

With improvements in digital technology, it is possible to have deceased celebrities star again. A mechanical robot was considered a “likeness” of Vanna White in a right of publicity

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20 Id.
21 Id.
24 RESTATEMENT (SECOND) CONFLICT OF LAWS, § 264 comment g (1971).
25 See, e.g., Acme Circus Operating Co., Inc. v. Kuperstock, 711 F.2d 1538 (11th Cir. 1983).
case even though it was not an exact duplicate of her. This pioneering decision should apply to
digital reproductions of deceased celebrities. Another interesting case involved a digitally
recreated Fred Astaire to sell a product. The Astaire case led to the enactment in California of
the Astaire Celebrity Protection Act in 1999. The act extended the right of publicity after death
from fifty to seventy years, and made it easier to have standing before a California court. There
still remains First Amendment usages questions under this legislation. There must be significant
transformative creative elements to sustain a First Amendment defense.

**Dynasty Trusts Killed the Rule Against Perpetuities**

The classic Rule Against Perpetuities limited the duration of private trusts to a “life in
being” when created plus twenty-one years. The basic idea was to not tie-up property for a long
period under “dead hand” control. As states have wanted to create incentives for individuals to
create very long trusts within their states, so called “dynasty trusts,” the Rule Against
Perpetuities would need to be repealed or severely modified. Interesting, Idaho repealed the Rule
in the 1957. States have taken a variety of legislative approaches.

Those who want to repeal the Rule Against Perpetuities frequently cite the complexity of
the Rule, the antique flavor of the Rule, or that clever individuals can find lawful ways to defeat
the Rule. One early scholar complained of the “Reign of Terror” imposed by the Rule. Others
assert that since modern trusts allow the trustee to sell assets, the old problem of land being
locked into a family indefinitely is no longer an issue.

Defenders of the Rule assert that “the earth belongs to the living” and argue that wealth
should not be held in tight control for multiple generations. Some assert that while land is
certainly readily available, trust assets are frequently placed in conservative investments, thus
reducing venture capital. Additionally, the macroeconomic effects of large holdings has yet to
be determined. Intergenerational arguments focus on the idea that each generation should be
allowed to decide what it does with its property so that no one generation ties up property
indefinitely. Thomas Jefferson famously wrote: “The earth belongs always to the living
generation. They manage it then, and what proceeds from it, as they please during their
usufruct.” Finally, there is concern that repeal of the Rule is another example of the power and
influence of the wealthy. Since the first statement of the Rule in the Duke of Norfolk’s Case the
wealthy, even as the Earl of Arundel, have devised through their attorneys ways to control
and manage wealth. That is not likely to change whether the Rule exists or not.

29 White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992).
30 Astaire v. Best Film & Video Corp., 116 F.3d 1397 (9th Cir. 1997) amended by 136 F.3d 1208 (9th Cir. 1998).
34 Idaho Code Sec. 55-111 (2016).
38 Thomas Jefferson, Letter to James Madison (Sept. 6, 1789); in 5 WRITINGS OF THOMAS JEFFERSON. 115, 116
(Paul Leicester Ford ed. 1895).
The classic statement of the Rule Against Perpetuities is: “No interest is good unless it must vest, if at all, not later than twenty one years after some life in being at the creation of the interest.”40 Pressure to abolish the Rule became more focused after Congress created in 1986 the generation skipping transfer tax.41 Prior to 1986 one could skip a generation of federal estate tax by making trust transfers to grandchildren or more removed descendants. In 1986 this option was closed but an exemption of $1,000,000 per transfer, indexed for inflation, was allowed.42 But what if one could create a trust of indefinite duration so there would never be future estate taxation? Thus began the concept of the dynasty trust and the Rule Against Perpetuities repeal movement.

While Idaho and Wisconsin by legislation had already limited the application of the Rule to trusts,43 South Dakota legislation in 1983 abolished the Rule.44 As early as 1949 Idaho jurisprudence found the common law Rule not in force, but attracted little attention.45 The 1983 legislation was part of South Dakota’s attempt to attract banking business after the Supreme Court in 1978 indicated that national banks may charge interest rates nationally based upon the rate where the bank is located.46 Subsequently, Delaware in 1995 and Alaska in 1997 also diluted the Rule to obtain trust business.47 Alaska’s statute bluntly stated that the “common law rule against perpetuities does not apply in this state.”48 A variety of other states followed this lead.

The Uniform Statutory Rule Against Perpetuities (USRAP) attempted to reform the Rule.49 USRAP essentially makes non-vested interests valid if they either met the common law Rule or vested or terminated within ninety years of inception.50 However, the ninety year period seems arbitrary so some states enacted the USRAP but exempted qualified trusts from the Rule. So for example, Arizona amended USRAP to make non-vested interests valid whenever the interests are supervised by a trustee with a power of sale and one or more persons living at the time of creation have unlimited power of termination.51

Any statutory regulation of future interests should contain certain fundamental provisions. Firstly, any future interest should be alienable and secondly, the duration of the future interest need not be related to vesting. Today, a majority of jurisdictions allow contingent interests to be transferable. For example, a Texas court as early as 1939 stated: “[a] mere expectancy of inheritance, or remainder of a defeasible estate, may be assigned, and a regular conveyance thereof is valid and will be upheld, unless fraudulently procured.”52 Regarding the second point it is noteworthy that the Rule only applies to contingent future interests and also only applies to nonreversionary interests since by definition reversions are vested. There is one exception to that should exist to the transferability rule and that is spendthrift provisions. The best rationale for free transferability is that it deals with the “dead hand control” issue.

43 IDAHO CODE 55-111 and WIS. STAT. 700.16.
44 S.D. Codified Laws 43-5-1.
47 25 DEL. CODE 503 (a) and ALASKA STAT. 34.27.050 (a) (3).
48 ALASKA STAT. 34.37.051.
50 UNIFORM PROBATE CODE 2-901 (a) (1990).
51 ARIZ. REV. STAT. 14-2901 (A) (3) (2005).
To exert multigenerational control of land, English landowners used tools like the fee tail, which created perpetual life estates in lineal descendants. However, a suit called common recovery allowed the fee tail tenant to convey a fee simple. Subsequently, the fee tail was abolished outright in the mid-1700s. The next tool of the wealthy was to create life estates followed by contingent remainders. Out of this came the Rule Against Perpetuities in response.

**Portable Toilets, Privacy, and Publicity**

In a famous case, Johnny Carson successfully sued a distributor of portable toilets named “Here’s Johnny” under a theory of intentional appropriation of identity for commercial purposes. To what extent may a deceased celebrity restrict the uses of his/her persona? Dead-hand restrictions are not favored. In 1835, the Supreme Court stated that there is a preference for constructions of wills that makes a gift absolute rather than conditional. Subsequent decisions look at a variety of factors to determine if restrictions are reasonable including the type of property, the type of restriction, the purpose of the restriction, and the impact it has upon heirs and society. Persona relates to the right of publicity. A desire to preserve a “good name” should be reasonable. Currently, the Internal Revenue Code generally states that dead-hand restrictions are ignored for federal estate tax calculations. That may be administratively simple but ignores the impact of contemporary perpetual trust fund thinking. Nevertheless, when wills and trusts impose restrictions on future generations, the old statement “making a will is an exercise of power without responsibility” holds true. While living, an individual, as long as others are not harmed, may do anything he/she pleases with property. In like manner the Restatement (Second) of Trusts provides that “a person may deal capriciously with his own property…”

The Ninth Circuit in dicta indicated that directions of a testator to destroy personal letters is enforceable. In giving an example, the court wrote “if a public figure ordered his executor to shred and burn his papers… the value to be [taxed] would be the value of the ashes, rather than the papers.” Presumably the letters are so closely associated with the individual that he/she should be able to control them absolutely. Another example is a restriction or instructions concerning the use of the body after death. Directions concerning organ donations or instructions for cremation are almost always obeyed. In like manner instructions concerning one’s persona should be followed.

It is true that the total circumstances must be considered. Thus instructions in a will to “destroy all of the residue of the money or cash… belonging to the estate was void.”

54 See, e.g., Taltarum’s Case, Y.B. 12 Edw. N, 19 (1472).
56 Tarver v. Tarver, 34 U.S. 174 (1835).
57 26 U.S.C. Sec. 2703 (a) (2) (2016).
58 RESTATEMENT (SECOND) OF TRUSTS Sec. 124 (1957) stating: "Although a person may deal capriciously with his own property, his self interest ordinarily will restrain him from doing so. Where an attempt is made to confer such a power upon a person who is given no other interest in the property, there is no such restraint and it is against public policy to allow him to exercise the power if the purpose is merely capricious." The text is followed by this illustration: "A bequeaths $1,000.00 to B in trust to throw the money into the sea. B holds the money upon a resulting trust for the estate of A and is liable to the estate of A if he throws the money into the sea."
60 In re Scott’s will, Board of Commissioners of Rice County v. Scott, 93 N.W. 109 (Minn. 1903).
impact upon heirs and others is such that the instructions are unreasonable. Consider the situation in which the will directed her executor to demolish her home and sell the land. The court considered the loss to the heirs, the impact upon surrounding property aesthetics and values, and the shortage of housing in the community in concluding: “It becomes apparent that no individual, group of individuals nor the community generally benefits from the senseless destruction of the house; instead, all are harmed and only the caprice of the dead testatrix is served.”61 The court declined to enforce the testamentary instruction.

Clearly one has the right while living to decide the nature and style of life one wishes to live. In the classic argument for a right to privacy, the argument was made that as property law has developed “there came a recognition of man’s spiritual nature, of his feelings and his intellect.”62 The Restatement (Second) of Torts stated: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”63 Now this Restatement statement has been expanded to include identity. Thus using a “sound alike” in a commercial wrongfully appropriates one’s identity even if the defendant merely uses “signs or symbols associated with [the celebrity.]”64 The rationale for this expansion was provided in a subsequent decision when the same court (Ninth Circuit) stated: “A rule which states that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.”65

Some courts require that the right of publicity be exploited by the deceased during his/her lifetime in order to be inherited and others see it as a property right independent of exploitation. Parody is an interesting restriction on the right of publicity. Thus trading cards showing caricatures of major league baseball players that humorously criticize them for their large salaries and egos were upheld with this language:

“Cartoon’s parody trading cards receive full protection under the First Amendment. The cards provide social commentary on public figures, [such as] major league baseball players… This type of commentary on an important social institution constitutes protected expression. The cards are no less protected because they provide humorous rather than serious commentary. Speech that entertains, like speech that informs, is protected by the First Amendment because the line between the informing and the entertaining is too elusive for the protection of that basic right. Moreover, Cardtoons makes use of artistic and literary devices with distinguished traditions. Parody, for example, is a humorous form of social commentary that dates to Greek antiquity and has since made regular appearances in English literature. In addition, cartoons and caricatures, such as those in the trading cards, have played a prominent role in public and political debate throughout our nation’s history.”66

61 Eyerman v. Mercantile Trust Co., 524 S.W.2d 210 (C.A. Mo. 1975).
64 Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).
66 Cardtoons v. Major League Baseball Players Association, 95 F.3d 959, 969 (10th Cir. 1996) (citations omitted).
The court rejected the argument that these cards were commercial speech subject to regulation because “Cardtoons’ trading cards… do not merely advertise another unrelated product.”

There is a distinction between making fun of the celebrity or the social values that the celebrity represents and the commercial exploitation of the celebrity in the context of advertising. Nevertheless, celebrity persona may be used in advertising protected works. Sports Illustrated used a Joe Namath photo in an article about the 1969 Super Bowl. Later, the same photo was used in an advertisement to sell subscriptions. The court upheld this use stating that “the reproduction was used to illustrate the quality and content of the periodical in which it originally appeared…” In like manner, a California court allowed the San Jose Mercury News to sell posters of Joe Montana because the paper reported a “noteworthy event” and the newspaper could engage in promotion by reproducing its news stories.

The line between reporting and infringement of the right of publicity is fine. Physically attaching something to a newspaper or magazine does not provide automatic protection. Thus photos of professional wrestlers four times the size of the magazine’s pages were not automatically entitled to First Amendment protection. The court stated that a factual determination had to be made as to whether the primary purpose was commercial or providing information to the public. Most right of publicity statutes incorporate a First Amendment defense.

Several legal arguments are used by courts to support a protectable right of publicity. The Supreme Court stated in an unjust enrichment argument in the following manner: “The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.” Another is that “vindication of the right [of publicity] will tend to encourage achievement in [the] chosen field and that achievement will ‘enrich our society.’” Another rationale is that “creating artificial scarcity preserves the value to [the celebrity], to advertisers who contract for the use of his likeness, and in the end, to consumers, who receive information from the knowledge that he is being paid to endorse the product.”

Having a protectable right of publicity does not imply full control after death. To destroy the right at the request of a testator would eliminate a valuable property right and cultural resource for future generations. On the other hand, a deceased celebrity may want to prevent uses that disgrace him/her. One might provide such instructions in a will devising the right of publicity. The Restatement (Second) of Trusts states: “It is impossible to draw a clear line between purposes which are capricious and those which are not.” This should be considered a rational restriction.

**Digital Assets**

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67Cardtoons v. Major League Baseball Players Association, 95 F.3d 959, 976 (10th Cir. 1996).
70Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85 (2d Cir. 1989).
72Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831 at 837 (6th Cir. 1983).
73Cardtoons v. Major League Baseball Players Association, 95 F.3d 959, 974 - 975 (10th Cir. 1996) (quoting Matthews v. Wozencraft, 15 F.3d 432, 437-438 (5th Cir. 1994)).
74RESTATEMENT (SECOND) OF TRUSTS 124 comment g.
The term digital asset is difficult to precisely define but includes items such as email, audio visual content, and documents. A proposed definition in Oregon stated: “Digital assets” means text, images, multimedia information, or personal property stored in a digital format, whether stored on a server, computer, or other electronic device which currently exists or may exist as technology develops, and regardless of the ownership of the physical device upon which the digital asset is stored. Digital assets include, without limitation, any words, characters, codes, or contractual rights necessary to access the digital assets. “

In fact, digital assets include not only personal and social media items but also financial and business accounts, domain names and blogs, loyalty program benefits and a variety of online game virtual property. It should come as no surprise that the dead may be victimized by identity theft. There is a life story that may exist in Tweets and blogs, and Facebook postings that are the modern equivalent of diaries and photo albums. This may be potential hurtful private pornography or the digital files of client information that are accumulated by an attorney or physician.

User agreements and terms of service agreements may limit ownership and what happens to the digital content when the account holder dies. Hence estate planning should specify what the provider wants done with the digital asset and coordinate that with the terms of service. Create an automatic back-up system for digital content into some stand-alone tangible media such as an external hard drive. Transferring a user name and password to the direct account may violate the terms of service agreement.

Consider including express directions in a durable power of attorney that authorizes access to digital assets. The following sample language appeared in 2012: “Digital Assets. My agent has (i) the power to access, use, and control my digital device, including, but not limited to, desktops, laptops, peripherals, storage devices, mobile telephones, smart phones, and any similar device which currently exists or exists in the future as technology develops for the purpose of accessing, modifying, deleting, controlling or transferring my digital assets, and (ii) the power to access, modify, delete, control, and transfer my digital assets, including, but not limited to, any emails, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, domain registrations, web hosting accounts, tax preparation service accounts, on-line stores, affiliate programs, other on line programs, including frequent flyer and other bonus programs, and similar digital items which currently exist or exist in the future as technology develops.”

Digital assets might be specified in a will in the following manner: “Digital Assets. My agent has (i) the power to access, use, and control my digital device, including, but not limited to, desktops, laptops, peripherals, storage devices, mobile telephones, smart phones, and any similar device which currently exists or exists in the future as technology develops for the purpose of accessing, modifying, deleting, controlling or transferring my digital assets, and (ii) the power to access, modify, delete, control, and transfer my digital assets, including, but not limited to, any emails, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, domain registrations, web hosting accounts, tax preparation service accounts, on-line stores, affiliate programs, other on line programs, including frequent flyer and other bonus programs, and similar digital items which currently exist or exist in the future as technology develops.”

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line programs, including frequent flyer and other bonus programs, and similar digital items which currently exist or exist in the future as technology develops.\textsuperscript{77}

There are a variety on online afterlife companies that specialize in the estate planning and storage of digital assets. Of course, the durability and reliability of these companies may be questionable.

Several open ended legal questions surround digital assets. To what extend does legislation prohibiting unauthorized access to computers and their data apply to digital assets after death? Additionally, must the service provider make records and data available to a non-subscriber? These issues are being addressed by the Uniform Fiduciary Access to Digital Assets Act discussed in the following section.

**Uniform Fiduciary Access to Digital Assets Act**

The National Conference of Commissioners on Uniform State Laws initially approved the Uniform fiduciary Access to Digital Assets Act in 2014 and a revised version was created in 2015. The following summary is from the 2015 Prefatory Note:

“The purpose of the Revised Fiduciary Access to Digital Assets Act (Revised UFADAA) is twofold. First, it gives fiduciaries the legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts, to the extent possible. Second, it gives custodians of digital assets and electronic communications legal authority to deal with the fiduciaries of their users, while respecting the user’s reasonable expectation of privacy for personal communications. The general goal of the act is to facilitate fiduciary access and custodian disclosure while respecting the privacy and intent of the user. It adheres to the traditional approach of trusts and estates law, which respects the intent of an account holder and promotes the fiduciary’s ability to administer the account holder’s property in accord with legally-binding fiduciary duties. The act removes barriers to a fiduciary’s access to electronic records and property and leaves unaffected other law, such as fiduciary, probate, trust, banking, investment securities, agency, and privacy law. Existing law prohibits any fiduciary from violating fiduciary responsibilities by divulging or publicizing any information the fiduciary obtains while carrying out his or her fiduciary duties.

Revised UFADAA addresses four different types of fiduciaries: personal representatives of decedents’ estates, conservators for protected persons, agents acting pursuant to a power of attorney, and trustees. It distinguishes the authority of fiduciaries, which exercise authority subject to this act only on behalf of the user, from any other efforts to access the digital assets. Family members or friends may seek such access, but, unless they are fiduciaries, their efforts are subject to other laws and are not covered by this act.

Digital assets are electronic records in which individuals have a right or interest. As the number of digital assets held by the average person increases, questions surrounding the disposition of these assets upon the individual’s death or incapacity are becoming more common. These assets, ranging from online gaming items to photos, to digital music, to client lists, can have real economic or sentimental value. Yet few laws exist on the rights of fiduciaries over digital assets.

Holders of digital assets may not consider the fate of their online presences once they are no longer able to manage their assets, and may not expressly provide for the disposition of their digital assets or electronic communications in the event of their death or incapacity. Even when they do, their instructions may come into conflict with custodians’ terms-of-service agreements. Some Internet service providers have explicit policies on what will happen when an individual dies, while others do not, and even where these policies are included in the terms-of-service agreement, consumers may not be fully aware of the implications of these provisions in the event of death or incapacity or how courts might resolve a conflict between such policies and a will, trust instrument, or power of attorney.

The situation regarding fiduciaries’ access to digital assets is less than clear, and is subject to federal and state privacy and computer “hacking” laws as well as state probate law. A minority of states has enacted legislation on fiduciary access to digital assets, and numerous other states have considered, or are considering, legislation. Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, the category of fiduciary included, and whether the principal’s death or incapacity is covered. A uniform approach among states will provide certainty and predictability for courts, users of Internet services, fiduciaries, and Internet service providers. Revised UFADAA gives states precise, comprehensive, and easily accessible guidance on questions concerning fiduciaries’ ability to access the electronic records of a decedent, protected person, principal, or a trust.

With regard to the general scope of the act, the act’s coverage is inherently limited by the definition of “digital assets.” The act applies only to electronic records in which an individual has a property right or interest, which do not include the underlying asset or liability unless it is itself an electronic record.

The act is divided into 21 sections. Section 2 contains definitions of terms used throughout the act. Section 3 governs applicability, clarifying the scope of the act and the fiduciaries who have access to digital assets under Revised UFADAA, and carves out an exception for digital assets of an employer used by an employee during the ordinary course of business. Section 4 provides ways for users to direct the disposition or deletion of their digital assets at their death or incapacity, and establishes a priority system in case of conflicting instructions. Section 5 establishes that the terms-of-service governing an online account apply to fiduciaries as well as to users, and clarify that a fiduciary cannot take any action that the user could not have legally taken. Section 6 gives the custodians of digital assets a choice for disclosing those assets to fiduciaries.

A custodian may, but need not, comply with a request for access by allowing the fiduciary to reset the password and access the user’s account. In many cases that will be the simplest method of compliance. However, a custodian may also comply without giving access to a user’s account by simply giving a copy of all the user’s digital assets to the fiduciary. That method may be preferred for a social media account when a fiduciary has no need for full access and control.

Sections 7-14 establish the rights of personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to different rules for the content of communications protected under federal privacy laws and for other types of digital assets. Generally, a fiduciary will have access to a catalogue of the user’s communications, but not the content, unless the user consented to the disclosure of the content.
Section 15 contains general provisions relating to the rights and responsibilities of the fiduciary. Section 16 addresses compliance by custodians and grants immunity for any acts taken in order to comply with a fiduciary’s request under this act. Sections 17-21 address miscellaneous topics, including retroactivity, the effective date of the act, and similar issues.\textsuperscript{78}

This legislation has been enacted in twenty states and introduced in a number of others.\textsuperscript{79} The original 2014 version was opposed by four organizations: the American civil liberties union, Center for Democracy and Technology, Electronic Frontier Foundation, and Consumer Action. They issued a Joint Letter on January 12, 2015.\textsuperscript{80} The topical headings of the letter indicated their concerns; Digital Assets are not analogous to physical records, Digital assets implicate the privacy of third parties, Conservatorship should not be included in digital estates legislation, and the ULC model legislation conflicts with the federal Electronic Communications Privacy Act.

In response to these concerns, NetChoice, an association of Internet companies, wrote the “Privacy Expectation Afterlife and Choices Act. (PEAC).”\textsuperscript{81} The PEAC limits the circumstances under which a service provider must disclose account information and the request for disclosures must be “narrowly tailored to effect the purpose of the administrator of the estate.” Virginia is the only state to enact this legislation with their statute effective on July 1, 2015.\textsuperscript{82} Virginia did extend the time for requested electronic records from one year to eighteen months before death.

The heart of the legislation is in this section:

“64.2-111. Power granted to personal representative
A. A court that has jurisdiction of the estate of the deceased user shall order a provider to disclose to the personal representative of such estate a user's records for the 18-month period prior to the date of death, but not the contents of the user's electronic communications or stored contents, upon the filing of a motion accompanied by an affidavit by a personal representative attesting, upon information and belief, to the following facts:
1. The user is deceased;
2. The deceased user was a subscriber of or customer of the provider;
3. The account belonging to the deceased user has been reasonably identified, including through a unique identifier assigned by the provider or other identifying information sufficient to enable the service provider to definitively identify the user;
4. There are no other authorized users or owners of the deceased user's account, or if there are other authorized users, that all such users expressly consented in written or electronic form to disclosure of the records to the personal representative;
5. The request for disclosure is tailored to effectuate the purpose of the administration of the estate; and

\textsuperscript{80} Joint Letter: Civil Liberties Organizations Respond to the Uniform Fiduciary Access to Digital Assets Act, https://www.aclu.org/joint-letter-civil-liberty-organizati... (last viewed on October 12, 2016).
\textsuperscript{82} Va. Code Ann. Secs. 64.2-109 to 115.
6. If the user has a will, that the request is not in conflict with the will. The order shall be sent to the provider accompanied by a copy of evidence of consent from joint users, if applicable, and a copy of the death certificate. The personal representative may redact the social security number and cause of death information contained in the death certificate.

B. A court that has jurisdiction of the estate of a deceased user shall order a provider to disclose to the user's personal representative the contents of the deceased user's account, upon the filing of a motion accompanied by a copy of an excerpt of the will of the decedent providing consent for such disclosure, if applicable, and an affidavit by the personal representative attesting, upon information and belief, to the following facts:
   1. The user is deceased;
   2. The deceased user was a subscriber of or customer of the provider;
   3. The account belonging to the deceased user has been reasonably identified, including through a unique identifier assigned by the provider or other identifying information sufficient to enable the service provider to definitively identify the user;
   4. There are no other authorized users or owners of the deceased user's account or, if there are other authorized users, that all such users expressly consented in written or electronic form to disclosure of the contents of the account;
   5. The user consented, through a will provision or by providing affirmative consent in an account setting within the product or service or an affirmative election with a provider, to disclosure of the contents of the user's account. Provisions within a terms of service agreement shall not constitute user consent to disclosure of the contents of the user's account; and
   6. The request for disclosure is tailored to effectuate the purpose of the administration of the estate.

The order shall be sent to the provider accompanied by a copy of evidence of consent from joint users, if applicable, a copy of the death certificate, and an excerpt of the will containing the provision consenting to the disclosure, if applicable. The personal representative may redact the social security number and cause of death information contained in the death certificate.

A provider shall be required to disclose to the personal representative the contents specified in the order to the extent reasonably available.

C. The court may, upon a motion by the personal representative, order a provider to disclose records beyond the 18-month period if the court concludes that such records are necessary to administer the user's estate. Such an order may provide for the payment by the estate of reasonable costs incurred by the provider producing the records for such additional time period beyond the 18 months.

D. A motion filed pursuant to this section shall not require notice to the heirs or beneficiaries of the estate nor to the provider.

E. Nothing in this section shall be construed to require a provider to disclose any information in violation of any applicable state or federal law.”

Will the Deceased Rich Get Richer?

83 Vir. Code Ann. Sec. 64.2-111 (2016).
While the Rule Against Perpetuities is in decline there is another rule, more obscure, to consider, the Rule Against Accumulations of Income. This rule originated in an unusual English will in which the testator directed that his estate and all the income that it would earn during the lives of nine surviving male descendants be accumulated and given to the oldest surviving male descendent at the end of that period. The House of Lords upheld the will’s provisions.\textsuperscript{84} Subsequently the English Parliament enacted the Thellusson Act\textsuperscript{85} limiting accumulations of income to the life of the settlor, twenty one years from the settlor’s death, the minority of a person living at the settlor’s death, or the minority of a person who would be entitled to the income upon majority.

The U.S. application of this rule was stated by the D.C. Circuit as follows: “[A] rule permitting accumulations for as long as the period of the Rule Against Perpetuities… has been the common law of this country.”\textsuperscript{86} Several states including Delaware have expressly repealed the Rule Against Accumulations.\textsuperscript{87} In the absence of express legislation it might be argued that modifications of the Rule Against Perpetuities implicitly modify the Rule Against Accumulations. It is noteworthy that the Maine Supreme Court has held just the opposite.\textsuperscript{88} The way to avoid this result is to allow discretionary, not mandatory, accumulations of income. Nevertheless, this rule is an issue to consider.

In an agricultural economy there was real concern about the concentration of income producing land in the hands of religious charities. The Statute of Mortmain in 1279 required a license to give property to charity. Of course, the fee was designed to compensate the king for the lost tax revenue. In like manner today, states could attach fees to the creation of these long term concentrations of wealth.

\textbf{Conclusion - The Future is Heaven or Hell}

In the year 2120 “you are an “em,” a robotic brain emulation created by scanning a particular human brain and uploading it into a computer. On the upside, you process information 1,000 times faster than a human. On the downside, you inhabit a robotic body, and you stand roughly two millimeters tall.”\textsuperscript{89} For some years there have been conversations concerning cryonaut clients planning to “put assets on ice.”\textsuperscript{90}

“In December [2005], a trusts expert from Wachovia Trust Co., part of Wachovia Corp., participated in the First Annual Colloquium on the Law of Transhuman Persons held in Florida. His Power Point presentation was titled “Issues Facing Trustees of Personal Revival Trusts. To serve clients who plan on being frozen, attorneys are tweaking so-called dynasty trusts than can legally endure hundreds

\textsuperscript{84} Thellusson v. Woodford, 32 Eng. Rep. 103 (Ch. 1805).
\textsuperscript{85} 1800, 39 & 40 Geo. 3, C. 98.
\textsuperscript{86} Gertman v. Burdick, 123 F.2d 924 at 931 (D.C. Cir. 1941).
\textsuperscript{87} DEL. CODE ANN. SEC. 506 (2016) “No provision directing or authorizing accumulation of trust income shall be invalid.”
\textsuperscript{88} White v. Fleet Bank, 739 A.2d 373 (Me. 1999).
\textsuperscript{89} David Westcott, \textit{Is This Economist Too Far Ahead of his Time?} THE CHRONICLE OF HIGHER EDUCATION, The Chronicle Review, online version (October 16, 2016), discussing the work of economist Robin Hanson.
of years or even indefinitely. Such trusts, once widely prohibited, are now allowed by more than 20 states - including Arizona, Illinois, and New Jersey- and typically are used to shield assets from estate taxes.” … “The chilling new twist: In addition to heirs or charities, estate lawyers are also naming cryonics clients as beneficiaries. If they come back to life after being frozen, the funds revert back to them. Assuming, that is, that there are no legal challenges to the plans.”

Unanswered questions include the future status of life insurance that was paid a deceased who is revived. Another issue is whether or not interest earned on a so called “personal revival trust” will exceed the rate of inflation or in fact will trust lose purchasing power over time. The cryonics-trust phenomenon dates at least from 1989, “with the formation by two American entrepreneurs of the Reanimation Foundation, a trust based in Liechtenstein.”

Whether this is pure fantasy or a future life after death remains to be known. What is true is that in this age of individualism, the promise of a future life after death becomes the secular hope for life extension, fueled by a belief that science can solve any problem. What a world full of “immortals” would be like is anyone’s guess but the antics of the ancient Greek and Roman deities provides a cautionary example. The legal system can adapt to any reality on this earth and has started, with the current dynasty trust developments, to show a remarkable capacity to allow one to have children after death, control one’s persona and fame after death, and to control property after death.

What does it mean to be “human?” I assert that it means both thoughts and biology. Alter either and one has something other than human, however one defines that being. The legal definition of “person” is flexible with a corporation being an artificial person. Likewise the age of adulthood varies depending upon the issue in question. Call me old fashioned, but the extremes of life after death make me nervous. Consider 1,000,000 years of Hitler in control.

Besides the biological issues, the problems associated with holding assets in trust are significant. What entity may be a trustee for potentially hundreds of years? Someone, a “trust protector,” will need to be available to “stand in the shoes” of the beneficiary to amend the trust in the best interest of the beneficiary. Will a revived person be the same or different person? These and a host of other issues remain to be resolved. Is the revived person an heir of the cryonically suspended person? Nevertheless, apparently at least a few individuals are creating “personal revival trusts” based upon the existing dynasty trust. Truly a tomb raider’s delight. Caution, you are about to enter a life after death zone.

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92 Id. at 7.
93 22 U.S.C. Sec. 6010 (2016) states: “As used in this title [22 USCS §§ 6001 et seq.], the term "United States person" means any United States citizen or alien admitted for permanent residence in the United States, and any corporation, partnership, or other organization organized under the laws of the United States.” Numerous judicial decisions grant corporations the rights of “persons.”
I. Introduction

“As workplaces continue to become more diverse, religion is becoming a significant workplace issue.”


In today’s diverse and complex workplace, providing a tolerant and productive work environment where discrimination against various religious beliefs and practices are significantly reduced or minimized can be difficult and challenging (Religion in the workplace, 2016). Notwithstanding the reason, employers may have work environments which contain certain behaviors which may allow religious discrimination to exist (Religion in the workplace, 2016). Accordingly, the religious diversity which exists in the general public is clearly in the workplace (Flake, 2016).

The United States, through its many growth periods, has obtained solid experience in working with religious issues. In particular, a number of scholars have noted that the manner in which the religious employee is treated in the work world is a standard for how religion should be treated in the general community (Likins, 2011). However, although noteworthy, the challenges pertaining to religion in the workplace still persist. Therefore, it stands to reason that the treatment of the expression of legally protected religious rights by employees in the workplace has to be noted in conjunction with employer corporate requirements (Likins, 2011). Further, the majority of legal structures required to address issues pertaining to religion are forced to confront questions about religion constantly in the area of labor law and other areas. The increased allegations pertaining to legally protected religious rights in the workplace have, interestingly enough, been noted by political and legal pundits. In fact, it was noted that
“religion seems to be the hound from which we can never flee” (Likins, 2011, p. 111). As a result, if this issue is not properly addressed, it is possible to reason that workplace productivity and overall employee interactions may be negatively affected.

In order to address this issue and provide for a more harmonious work environment, the authors will provide information pertaining to religious discrimination in the workplace as well as present a model to mitigate religious discrimination. This article will proceed with part II discussing the background, part III will discuss the business ethics foundation and a model to reduce religious discrimination, part IV will discuss the managing activities of the religion discrimination model, and part V will discuss the conclusion.

II. Background

The United States has a long and impactful history in dealing with religion as a societal and political endeavor. Initially, an organization’s religious beliefs were required to be based on a deity to be considered a religion by the United States Supreme Court (Likins, 2011). However, after the establishment of Title VII, this narrow view was expanded.

In addressing this complex issue of religion in the workplace, Congress enacted Title VII of the Civil Rights Act of 1964 and its amendments (Clarkson, Miller, Cross, 2014). As a federal law, it “prohibits employment discrimination on the basis of race, color, religion, national origin, and gender at any stage of employment” (Clarkson, Miller, & Cross, 2014, p. 505). “Title VII applies to employers with fifteen or more employees, labor unions with fifteen or more employees, labor unions with fifteen or more members, labor unions that operate hiring halls….and employment agencies”(Clarkson, Miller, & Cross, 2014, p. 505). However, as noted by the United States Supreme Court, an employer is not guaranteed definite protection and freedom from a lawsuit sought under Title VII just because this employer has less than fifteen employees.

The EEOC adopted guidelines in 1967 that required reasonable accommodation by employers, but courts did not impose an affirmative duty on employers to accommodate religious beliefs (Pattison, Sanders & Ross, 2014). In 1972 an amendment to the Civil Rights Act was adopted which included a requirement of accommodation as part of the religious discrimination provision (42 U.S.C. § 2000e(j) (2012).

This presented challenges to employers in deciding how to best accommodate employees with sincere religious beliefs. In examining the time period from 1997 to 2007, there was a marked increase in claims to the Equal Employment Opportunity Commission (EEOC) (U.S. Equal Employment Opportunity Commission, 2016). There were 1,709 charges of religious discrimination in 1997 and 2,880 charges of religious discrimination obtained in 2007 by the EEOC (U.S. Equal Employment Opportunity Commission, 2016). Due to this troubling situation, the EEOC sought to gain insight by meeting with various community organizations. This inability to address these religious concerns and practices in addition to the increase in religious claims was a cause for great concern (Likins, 2011). It was further noted that this increase was “like a running sore on the body politic, and one unlikely to be healed anytime soon” (Likins, 2011, p. 112). However, as time proceeded, the situation continued to raise concerns. There were 3,790 claims in 2010, 3,549 claims in 2014, 3,502 claims in 2015, and 3,825 claims in 2016 received by the EEOC (U.S. Equal Employment Opportunity Commission, 2016). Consequently, this was an issue which needed to be addressed.
There were a number of components or factors which comprised this increase in workplace religious concerns. There were those who noted the escalation in the amount of time Americans spent at work. The increase in time spent on the job could conceivably conflict with religious obligations and requirements (Likins, 2011). Further, there were some who noted the tragic event of September 11, 2001, as well as other tragic events, which have affected the perception of various minority religious groups (Likins, 2011). In addition, some intellectuals pointed to the increased diversity of religious beliefs in the workplace which included faiths such as Hindus and Buddhists (Likins, 2011). This may have increased the possibility of religious conflicts in the workplace. Finally, data suggest that employees are becoming increasingly concerned over their religious rights in the workplace with 50% of non-Christians and 60% of Evangelical Christians’ reporting that employers ignore their religious needs and otherwise discriminate against them (Fox, 2016). Given these facts, the increasing diversity among workers in America (Eck, 2001), and an increase in religious expression in the workplace (Flake, 2015), it is likely, therefore, that more religious discrimination claims requesting an accommodation from employers may arise in the future.

Although religiously diverse, according to the Pew Research Center (2106), with 70.6% of its citizens classifying themselves with some aspects of the Christian faith in 2014, this particular faith is still the majority religion in the United States. However, 78.4% of citizens in the United States classified themselves with some aspect of the Christian faith in 2007. Interestingly enough, during this same time period, those persons classifying themselves as unaffiliated, such as Atheist, Agnostic, or “nothing in particular,” rose from 16.1% in 2007 to 22.8% in 2014. These two groups represent the vast majority of the United States population. Also of note during the time period from 2007 to 2014, those American citizens who classified themselves as non-Christian faiths rose from 4.7% to 5.9% (America’s Changing Religious Landscape, 2015). This was due to an increase in non-Christian faiths of Muslims and Hindus, although still comparatively very low.

There were other changes in the religious arena in the United States. There was a rise in the fluidity of faiths pertaining to religious associations. Interestingly enough, older United States citizens who changed religious associations often had a propensity to move “from one family to another within a religious tradition,” while younger Americans had a propensity to be more extreme in their changes (Flake, 2016, p.94).

III. Business Ethics Foundation and the Model to Mitigate Religious Discrimination

In order to provide the comprehensive basics of the Model to Mitigate Religious Discrimination, it is essential to initially provide a fundamental knowledge of ethics in the workplace. This is particularly important as it applies to corporate management. Accordingly, the principles necessary for good decision making will be a part of the model and will contain basic procedures to assist in the decision making process.

A. The Business Ethics Foundation

At its most elementary level, “the study of ethics is the study of what constitutes right or wrong behavior” (Clarkson, Miller, & Cross, 2014, p. 95). It is a part of a value and belief system to examine the ethics of philosophy concentrating on “morality and the way moral principles are derived and implemented. Ethics has to do with the fairness, justness, rightness, or
wrongness of an action” (Clarkson, Miller, & Cross, 2014, p. 95). As it pertains to the workplace, the concept of business ethics generally focuses on the decisions work organizations make or will make and examine these choices where right or wrong. This is important because corporations, through public perception, have in many instances transitioned from entities that basically maximize “the bottom line” to entities that contribute to the general public as a good corporate citizen (Clarkson, Miller, & Cross, 2014).

Accordingly, business ethics has been grouped with the 1960’s social responsibility movement (McNamara, 1999). As a result, management persons in the middle and upper rungs have been requested to use their resources to address social problems such as scarcity, crime, human rights, medical health issues and educational enhancements.

As a component of the study of ethics, the concept of duty based ethics is grounded in the thought noting that each individual has specific additional responsibilities which include people as well as the earth in particular. Further, duty-based ethics consists of commitments made by the corporation and addresses behavioral requirements which are normally noted in basic truths, rules of religion, and aspects of philosophical understandings (Dierksmeier, 2013). Religious principles as well as other theoretical analyses may be obtained from these duties. In the workplace, principles rooted in religion can be a converging endeavor for workers and a manner in which worker inspiration and enthusiasm is enlarged. However, there can be concerns in that various groups which include customers, owners, and suppliers, may come from different religious perspectives (Clarkson, Miller, & Cross, 2014). It is important to consider these concerns when a business is providing an ethical foundation for its organization.

B. Model to Mitigate Religious Discrimination

The Model to Mitigate Religious Discrimination should initially center on a structure which includes business ethics management in the workplace. Accordingly, ethics management in the workplace will examine areas pertaining to management activities such as promoting a business ethics mitigation policy, training, and recruiting and hiring ((Ethics Management Program, 2016; Ludlum, 2016). As a part of ethics management in the workplace, organizational outcomes are also reviewed. Therefore, these outcomes should be noted as providing the most advantages to all employees in the workplace. As a result, these outcomes should promote a more productive workplace, promote religious tolerance, improve employee satisfaction, increase retention and reduce legal concerns in the work environment (Borstorff & Cunningham, 2013; Ludlum, 2016).

Figure 1, contained within, notes the Model to Mitigate Religious Discrimination as discussed to aid in the examining of the religious discrimination in workplace by the authors. In accordance, the discussion examines the business ethical foundation and the religious mitigation policy, management activities, and various outcomes which are later analyzed.
IV. Managing Activities of the Religious Discrimination Mitigation Model

A. Framework

It is important for a business to establish a solid ethics foundation which mitigates religious discrimination. In order to achieve this result, it is necessary for management to integrate business ethics within the organization. As discussed earlier, ethics, in its simplest form, is the examination of behaviors which are considered either right or wrong. As a result, business ethics is basically “the decisions businesses make or have to make and whether those decisions are right or wrong” (Clarkson, Miller, & Cross, 2014, p. 95). Examining business ethics is significant because of the changing view in which the public perceives businesses. Although maximizing profits is very important, corporate participation in society has gained momentum within society and this may affect the profit bottom line (Clarkson, Miller, & Cross, 2014).

Ethics management programs are reported as the way in which organizations manage ethics in the workplace (Ethics Management Program, 2016). These programs need to include corporate values that are promoted through policies and business practices. Corporate values need to include considerations for employees as it relates to fairness and respect. Thus, it is necessary to provide and promote a culture within the business organization that is tolerant to diverse religious beliefs. The Model to Mitigate Religious discrimination includes processes and procedures that are related to management activities.

B. Management Activities

In agreement with the promotion of ensuring organizational ethical practices, it is important for management to adhere to the law as it relates to the religious mitigation policy, training, and
recruiting and hiring. As organizations tend to lean towards ethical considerations and corporate values, there needs to be an overall policy that is focused on mitigating the discrimination associated with various religious beliefs. This policy needs to include some ethical values including character attributes such as respect, responsibility, compassion, and fairness (Ethics Management Program: An Overview, 2016). Additionally, the policy needs to include examples of behaviors that are associated with the values such as managers ensuring that all religious beliefs are tolerated and treated with fairness. The policy should also stress that all employees are expected to adhere to the policy including senior leadership (Ludlum, 2016).

Merely establishing a policy does not automatically protect the employer against litigation or produce the desired outcomes for employee relations. The policy must be consistently applied in each situation. For example, the circumstance in which religious discrimination issues most often arise is with respect to accommodating a request from an employee for an exception to the employer’s scheduling or grooming requirements. Establishing and communicating a consistent policy regarding accommodations is essential to any defense of undue hardship as a history of providing exceptions to dress and grooming policies will make it difficult for an employer to argue that an accommodation is unfeasible (Bernstein, 2012).

In addition to the religious mitigation policy, organizations need to ensure that there is training related to the awareness and implementation of the policy (Clarkson, Miller & Cross, 2014). The training needs to not only remind employees to be cognizant and understanding of religious beliefs; but to also become more mindful of the practices and associated responses (Ludlum, 2016). For example, managers and supervisors need to be aware of an assortment of legal rules which include exemptions that are provided under Title VII of the Civil Rights Act of 1964. The training involved with religion should be related to accommodating religious behaviors and practices related to hiring decisions (Ludlum, 2016). The training needs to include guidelines on how managers and supervisors should respond to a request for religious accommodations including an analysis of the impact of the request on the current policy. Additionally, organizations cannot use religion and religious accommodates as factors when making hiring decisions.

Recruiting and hiring processes are also important areas for religion in the workplace. These processes should include recruiters and hiring staff not considering religious beliefs and associated accommodations for employment decisions. It is also important to note that Title VII of the Civil Rights Act of 1964 recognizes that private employers can choose to express their own religious beliefs or practices in the workplace (Clarkson, Miller, & Cross, 2014). As organizations hire employees, they must be aware that the law requires most organizations to be in a position to provide religious accommodations (unless can prove undue hardship for making the accommodations) that will allow employees to practice their own religion (Religious Discrimination and Accommodation in the Federal Workplace, 2016). These accommodations typically include modifications to work schedules related to holidays and observances, differences in work attire, religious sayings, and conducting on the job missionary work (Bohlander & Snell, 2009).

A problem may arise if the hiring person suspects that an applicant may need an accommodation for a religious reason but the applicant does not specifically mention this during the interview. Title VII precludes employers from asking potential employees questions based on sex, age, race or religion (EEOC, 2016). However, the Supreme Court decision in EEOC v. Abercrombie & Fitch, Inc. (2015), suggests that even if the applicant does not specifically ask for an accommodation, an employer can be liable for discrimination if it is proven that the reason
it did not hire the applicant was based on religion. In such situations employers are advised to explain all of the policies and conditions of the job to each applicant and ask whether any of them would present a problem. If the applicant says yes, the employer has notice and can start the accommodation dialog. At that point, the hiring manager would be well-advised to consult with the human resource department or even legal counsel to help develop creative accommodations and insure consistent practices within the company (Solowey & Cudkowicz, 2015). Further, managers should be encouraged to attempt to find a middle ground of accommodation rather than avoid making any accommodation. Only after all possibilities are considered should the employer rely on an undue hardship defense (Butler & Ottinger, 2016).

C. Outcomes

This holistic view of the Model to Mitigate Religious Discrimination focuses on a framework including business ethics and the ethics management approach to implement corporate values when engaging in management activities. These combined efforts of the framework and the management activities include a proactive approach that will create a productive work environment that will allow employees the freedom to practice one’s beliefs including the underlying values of religious tolerance and respect for others in the workplace.

Workers are concerned about losing their identities to their religion when they enter the workplace and whether adhering to the requirements of their jobs might be in conflict with their religious beliefs. Employee gratification and high morale have been reported to increase performance and impact an organization’s bottom line (Garcia-Zamor, 2003). Thus, organizations are encouraged to alleviate these religious concerns by creating an open and fair policy including religious accommodations that support a work environment in which employees are satisfied, motivated to perform, and retained.

Title VII of the Civil Rights Act of 1964 includes a mandate that makes religious discrimination illegal (Clarkson, Miller, & Cross, 2014) and as such supports adhering to the framework and management activities that are likely to lead to a reduction in legal issues. Some of the management activities that support lawful practices include establishing a solid policy (Ludlum, 2016), providing excellent training, as well as establishing and maintaining basic communication, that supports religious tolerance. Implementing these management activities will enhance the organization’s ability to manage its operations with fewer distractions and a staff of committed employees in a productive work environment.

The Equal Employment Opportunity Commission is charged with adopting policies related to religious discrimination and as such requires organizations to support their decisions related to not making religious accommodations (Bohlander & Snell, 2010). Research has found a significant and negative relationship between an organization’s implementation and communication of fair and reasonable polices regarding employees’ religions and whether employees would seek other employment or bring a religious accommodation lawsuit based on religious discrimination (Borstorff & Cunningham, 2012). A subsequent study by these researchers found that while most organizations had adopted a religious accommodation policy, over half of the employees surveyed were unaware of these polices which resulted in lower job satisfaction and higher turnover intentions (Borstorff & Cunningham, 2013).

The results of these studies may be explained by organizational justice theory. Previous research on organizational justice shows a positive relationship between justice and employee attitudes (Colquitt, Conlon, Wesson, Porter & Ng, 2001). Employees who perceive that they are
treated fairly have increased organizational commitment, are more satisfied with their jobs, engage in organizational citizenship behaviors and are less likely to leave the organization (Cohen-Charash & Spector, 2001). Studies of justice generally identify three types of justice. Distributive justice focuses on the fairness of outcomes and is based on Adams’ (1965) equity theory. Procedural justice examines whether employees perceive that the process of a decision is fair including whether policies are consistently applied, are free from bias, and conform to prevailing standards of ethics (Colquitt, et al., 2001). Interactional justice is a more recent advance in the justice literature and requires that employees be treated with respect and sufficiently informed about outcomes and processes (Bies & Moag, 1986).

We posit that creating a culture that recognizes and accommodates religious beliefs addresses all three levels of justice. Creating an environment of religious tolerance and respect will benefit the organization by communicating an inclusive approach to understanding individual employees’ concerns which will result in positive workplace attitudes and behaviors.

V. Conclusion

Providing an environment that mitigates religious discrimination and promotes a tolerant work environment is necessary for a healthy business in today’s work environment. Consequently, employees should be treated fairly and with respect as provided by law. In providing a work environment that provides processes and procedures to further this objective, a model is provided by the authors to achieve this initiative. This model supports the position of mitigating religious discrimination through a holistic approach. As a result, a more productive workplace would hopefully be promoted.

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AN EXPLORATORY STUDY: MORAL DISENGAGEMENT LEVELS IN ACCOUNTING MAJORS

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Abstract

Corporate fraud and unethical business practices have been of concern for decades. In some cases, these acts were committed by well-educated and knowledgeable accountants who simply “morally disengaged.” Moral disengagement component levels in accounting majors were measured and ranked. Differences between the components of moral disengagement were then determined and discussed.

Cases of corporate fraud and unethical business practices have become an increasing concern among our global community, and continue despite efforts to stop them (e.g., Enron, 2001; HealthSouth, 2003; AIG, 2005; WorldCom 2005; Lehman Brothers, 2008; Bernie Madoff, 2008; Saytam, 2009; Diamond Foods, 2012). Especially alarming is the fact that many of the individuals involved (e.g. Bernie Madoff) do not seem remorseful for the damage their actions have caused to communities and to individuals’ financial stability. Many of the major participants in the massive accounting scandals that stunned the business world in the early 2000s and the 2008 financial meltdown were highly educated and knowledgeable people. For example, Enron’s Jeffrey Skilling, who spearheaded the fraud that destroyed the world’s largest energy trader, earned an MBA from Harvard. The late Kenneth Lay, former CEO of Enron, obtained both a Master’s in Economics and a Ph.D. from the University of Houston. The leader of the accounting scandal at WorldCom, Scott Sullivan, majored in accounting and became a certified public accountant. In addition to these examples, several banking executives who had pursued higher education were involved in the financial crisis of 2008 and, more recently, the Wells Fargo banking scandal. Although these professionals were most likely required to discuss the implications of unethical business behavior during their individual pursuits of degrees and certifications, they later found themselves embroiled in financial scandals having a detrimental impact on many stakeholders.

Because of these high profile accounting scandals, an increased emphasis on ethics education in the accounting classroom and profession has stimulated interest in determining what factors may lead individuals to commit fraudulent acts. As a result, researchers and other interested parties have questioned what internal mechanisms allow individuals to act unethically, when clearly doing so jeopardizes the financial security of investors, the organization and its employees, as well as others. Further, a question arises as to what allows individuals who are not directly involved in the commission of fraud, yet are aware of these acts, to take no action to intervene (Samuelson and Gentile, 2005).

One proposed answer to this question is that students who choose business as a major are already more disposed to unethical behavior. Some researchers assert that business schools are actually admitting students with personality tendencies problematic to ethical decision-making (Baker, Detert, and Treviño, 2006). Other individuals have suggested a correlation between a business school education and unethical behavior in the workplace (Gioia, 2002; Gentile and Samuelson, 2005). Their inference is not that business schools actually encourage students to act unethically, but rather that students are taught to focus on shareholder wealth instead of product quality or service to the customer.
Antecedents of the commission of fraudulent acts have been extensively hypothesized and studied. Some have indicated that actions taken with little regard for their negative impact on others may require one to “morally disengage.” In essence, one’s mechanisms that are used to prevent the execution of harmful acts cease to operate, allowing one to commit fraud, embezzlement, theft, etc. by internally justifying one’s actions. This is moral disengagement.

The current study seeks to determine which, if any, components of moral disengagement are more important to accounting students. In other words, do differences exist between components of moral disengagement for these students? The findings of an exploratory study assessing the levels of moral disengagement should be of relevance to educators, practitioners and other interested parties.

Prior Research

The theory of moral disengagement was developed thirty years ago by Albert Bandura who postulated that an individual’s “self-regulatory mechanisms do not operate unless they are activated” (Bandura, 2002). His theory attempts to explain why some individuals are able to live in peace with themselves after committing harmful acts against others. According to Bandura, they do so by selectively disassociating themselves from the results and implications of their actions. Bandura proposes three categories of mechanisms used by individuals to achieve this dissociation. The first is cognitively restructuring behavior, demonstrated by moral justification (e.g., feeling it is all right to lie in order to keep a friend out of trouble), euphemistic labeling (e.g., feeling that imparting known test questions is not the same as cheating), and advantageous comparison (e.g., feeling that the theft of a nickel is not as bad as the theft of a dollar). The second is obscuring or minimizing one’s active role in the injurious behavior by displacing responsibility (e.g., feeling that cheating by students is the result of the professor’s misplaced trust), diffusing responsibility (e.g., feeling that an individual rioter is not responsible for the actions of the group of rioters), and disregarding or distorting the consequences of an action (e.g., feeling that verbal insults do not truly cause harm). The final category of moral disengagement focuses on the unfavorable acts or traits of those negatively affected by the dehumanizing of victims (e.g., feeling that some ethnicities brought bad treatment on themselves) and attributing blame to them (e.g., feeling that employee theft is justified by employer actions).

In the past, Bandura’s theories of moral disengagement were often applied to societal issues, such as terrorism (Maikovich, 2005), the perpetration of inhumanities (Bandura, 1990), and school bullies (Obermann, 2011). After the many financial scandals of the early 2000s and the implosion of our economy in 2008, greater interest has developed in applying Bandura’s theories to the actions of those in business. Some studies have been industry specific such White, Bandura and Bero (2009), which looked at moral disengagement exhibited in harmful corporate research related to tobacco, lead, vinyl chloride, and silicosis. Other studies, such as Claybourn’s 2011 investigation, looked into whether work related variables and moral disengagement influence negative work place behaviors such as harassment. Moore, Detert, Treviño, Baker, and Mayer (2012) considered the effects of moral disengagement on unethical organizational behavior. Barsky (2011) and Anand, Ashforth, and Joshi (2005) researched moral disengagement and how it relates to the rationalization of unethical or corrupt acts in the workplace. Anand et al. even went so far as to assert that virtually every organization suffers from fraud.

Some studies have focused on general moral disengagement tendencies among students, such as Detert, Treviño, and Sweitzer’s 2008 study comparing moral disengagement tendencies among college freshmen majoring in business and freshmen majoring in education. The study tested the relationships between empathy, moral identity, trait cynicism, and locus of control with levels of moral disengagement. Ultimately, the study found a negative association between empathy and moral identity, but a positive association between trait cynicism and locus of control. They also found higher levels of moral disengagement in business majors when compared with education majors. Similarly, Cory (2015) compared moral disengagement tendencies between undergraduates majoring in business with those
majoring in the sciences. She found few differences between the two groups, but discovered that the females in the sample were less morally disengaged than males.

Other studies focused on a particular behavior when testing moral disengagement tendencies. For example, Bing, Davison, Vitell, Ammeter, Garner, and Novicevic (2012) performed an academic cheating experiment with college students and found that students with the highest self-perceived cognitive ability were least likely to cheat. Morgan and Neal (2011) compared students’ perceptions of ethical breaches with freshmen and upper level students in information systems courses. Their results indicated upper level management information systems students judged ethical breaches more severely than students in the introductory courses. Baird and Zelin (2009) used scenarios to determine whether undergraduate students judged a person committing fraud in a situation involving obedience pressure less harshly than an individual committing fraud of their own volition. Among their results, they found that students judged those committing financial statement fraud less harshly when the scenarios included information indicating the individuals were pressured to do so by their superior. More recently, and with similar results, Mayhew and Murphy (2014) determined that students were able to rationalize their financial misreporting behavior by displacing responsibility for doing so. Sagone and De Caroli (2013) used a moral disengagement scale to show that university students majoring in psychology used mechanisms of moral disengagement more than law students.

It is evident that Bandura’s theories are now more likely to be applicable to not only business professionals but also to students studying business. Each year more studies are being conducted using undergraduate students to research not only how business students view and judge moral disengagement, but how those views and judgments differ over time and how the levels of moral disengagement compare between students majoring in different disciplines.

Method

The purpose of this paper is to report the findings of an exploratory study addressing levels of moral disengagement in undergraduate accounting students. This group was chosen for the study because of the importance of the ethical inclinations of tomorrow’s accountants. The sample for this study was drawn from junior and senior students majoring in accounting at a small private university in the southwest. Students completed a moral disengagement survey during class on the first day of the semester. Sample demographics are presented in Table 1.

Some argue against using students as research subjects, labeling them “convenience samples” and questioning whether the research results are generalizable. However, Lucas (2003) indicated that samples drawn using college students are appropriate when the research concerns basic psychological processes, or when gathering data that are independent of sample characteristics. The current study encompasses these criteria. Further, as future business leaders, students represent a population of interest and information gathered using this sample may be informative for use both inside and outside of the classroom (Abdolmohammadi, Gabhart and Reeves, 1997; Ahmed, Chung and Eichenseher, 2003; Borkowski and Ugras, 1998). Finally, accounting students will presumably function in a financial capacity in their business careers and may be in a position to commit fraud, theft, or corporate malfeasance.

The survey, provided in the Appendix, was adapted from Detert, Treviño, and Sweitzer (2008) and measured moral disengagement. Students were presented with a list of 32 statements and asked to determine the degree to which they agreed with each, using a 7-point Likert scale, with 1 indicating “strongly disagree” and 7 indicating “strongly agree.” Questions 1 through 4 measured moral justification (MJ), questions 5 through 8 measured euphemistic labeling (EL), and questions 9 through 12 measured advantageous comparisons (AC). Questions 13 through 16 measured displacement of responsibility (DISR), questions 17 through 20 measured diffusion of responsibility (DIFR), and questions 21 through 24 measured distortion of consequences (DC). Finally, questions 25 through 28 measured attribution of blame (AB), and questions 29 through 32 measured dehumanization (DEH). Responses to each subset of questions were summed to obtain the measurement for that part of the survey. Because this survey, or
one very similar to it, has been used in previous research (e.g. Bandura, Barbaranelli, Caprara, Barbaranelli and Pastorelli, 1996, Pelton, Gound, Forehand and Brody, 2004, Detert, Treviño, and Sweitzer, 2008, Lee, Segal, Kimberlin, Smith and Weiler, 2014, Cory 2015) and previously tested extensively for validity, no further tests of validity were deemed necessary.

Results

First, for ease of analysis and interpretation of results, responses for each statement measuring moral disengagement were re-coded from -3 to 3. For example, a response of “1” was re-coded as “-3”, “2” was re-coded as “-2,” etc. A response of “7” was re-coded as “3,” a response of “6” was re-coded as “2,” etc. This allowed the center of the scale (4), which was “Neither” to be re-coded as zero. Each of the eight components of moral disengagement was measured using four statements. Therefore, the minimum score for each component is -12 (4 statements times -3) and the maximum is 12 (4 statements times 3). The closer the average score is to -12, the stronger the disagreement with the statement. After recoding, variable means and standard deviations were computed for the sample. Results are presented in Table 2.

As the means indicate, the students disagreed with the statements, but disagreed less strongly with the statements measuring moral justification (MJ) and diffusion of responsibility (DIFR). The statements in the survey measuring MJ (1 through 4) deal primarily with protecting one’s family and friends, and the statements that measure DIFR (21 through 24) deal primarily with teasing, insults and small lies. These are issues which the sample of students may find more pertinent to their daily lives. However, analysis of the means indicates that there was general disagreement with all of the statements and consequently the students demonstrated low levels of moral disengagement in all categories.

The moral disengagement components were then ranked, based on their means, from most disagreement to least disagreement. T-tests were computed for differences between each of the moral disengagement categories, from one to the next, in the order of the magnitude of disagreement. Results are shown in Table 3. Three of the seven differences were statistically significant: (1) between dehumanization and euphemistic labeling, (2) between euphemistic labeling and distortion of consequences, and (3) between attribution of blame and diffusion of responsibility.

Discussion

Although the students disagreed with all components of moral disengagement, it appears that some components are not as disagreeable as others. The students disagreed most strongly with advantageous comparison and dehumanization and, as shown in Table 3, perceived no difference between them. Advantageous comparison is measured with statements 9 through 12 and can make harmful acts appear as benign, or of little consequence.

The difference between dehumanization and euphemistic labeling is significant at the 5% level. Dehumanization deals with treating others badly and attributes disparaging qualities to victims. It is measured with statements 29 through 32. Euphemistic labeling, which re-labels unacceptable actions with neutral or understated terms by sanitizing words or using convoluted, innocuous language, is measured with statements 5 through 8. The students felt that abusing others was worse than the actions of cheating, gossiping, or getting high, and this difference is not surprising. The personal human toll of mistreating others would seem to cause more internal anguish than reclassifying one’s personal actions that are part of euphemistic labeling.

However, the students also perceived a difference between euphemistic labeling and distortion of consequences. Distortion of consequences is measured with statements 21 through 24 and deals with lying, teasing and insulting others. The harm resulting from injurious actions to others is minimized, distorted or denied. It is interesting that the students disagreed significantly less with distortion of consequences than euphemistic labeling, suggesting they feel that re-labeling harmful acts is worse than minimizing, distorting, or denying the significance of unacceptable actions.
No difference was found between distortion of consequences and displacement of responsibility. Displacement of responsibility is measured by statements 13 through 16 and allows actions to be viewed as ordered by others or as being the fault or responsibility of others. Additionally, no difference was found between displacement of responsibility and attribution of blame.

The strongest difference (p < .01) was found between attribution of blame and diffusion of responsibility. Attribution of blame is measured with statements 25 through 28 and indicates that those who suffer bring harm to themselves by their own behaviors or their own faults and therefore allows one to blame the victims for one’s harmful actions toward them. Diffusion of responsibility is measured with statements 17 through 20 and indicates that an individual is not responsible for his or her own actions. It diminishes personal accountability for one’s contribution to harmful activities so that one does not feel accountable for any harm done. The accounting students felt strongly that attribution of blame was far worse than diffusion of responsibility, evidently feeling that suffering is not necessarily brought on by the behavior of the victims, which is far different from minimizing one’s personal accountability for one’s contributions to harmful acts.

The last comparison, which was the difference between diffusion of responsibility and moral justification, was not significant. The students disagreed least with these two components of moral disengagements and perceived no difference between them. Therefore, they felt that not being responsible for one’s own actions is no different from protecting one’s family and friends, regardless of the methods employed to do so. Moral justification allows one to sanctify injurious practices or harmful behavior as serving worthy causes, and allows one to live in peace with those actions.

Relating these results to possible actions of future accountants is obviously subjective. What is somewhat troubling is the last comparison between moral justification and diffusion of responsibility, which are the two where students disagreed the least with the statements. This minimal disagreement may allow them to rationalize unethical actions such as financial misreporting by convincing themselves that their activities are the result of social pressures or the dictates of others. This has happened in more than one accounting scandal (e.g., per Latour and Young (2005), WorldCom’s CFO, Scott Sullivan indicated that Bernie Ebbers, the CEO, directed him to “hit the numbers;” and Stuart (2005) reported that Healthsouth’s Richard Scrushy allegedly threatened the employment status of his assistants if they did not modify financial information according to his dictates). In other cases, these future accountants may feel that they are the actual agents of their actions but that they are acting for a worthy cause (e.g., protecting their career, shielding their family from financial harm, or taking action to save their employer from economic ruin). Further, they may be able to justify unethical actions due to the situation in which they find themselves by placing the responsibility for their actions on others.

Evidence presented by Baird and Zelin (2009) is in agreement with these findings. In that case, individuals involved in the commission of financial fraud were judged less harshly when they were pressured into taking those actions. Further, the students in Mayhew and Murphy (2014) rationalized misreporting by displacing responsibility.

One may ask what interventions would be useful in preventing this from occurring. In other words, can university students be convinced to act ethically in the workplace even when pressured to take inappropriate actions by their superiors or when their unsuitable actions will directly minimize hardship to or provide benefits for their family or friends? The current research cannot address this question. Therefore, future research should consider methods of possibly predicting the circumstances in which business professionals allow themselves to morally disengage or to feel comfortable absolving themselves of responsibility when told to act unethically by a superior.

Limitations

Although the results of this study are of interest, they may not be generalizable to the population of all accounting students. It is also possible, as in all survey research, the subjects responded to the moral disengagement questions as they thought they were expected to, rather than honestly. However, all survey research is subject to this possibility and the results should not be unduly biased. Additionally,
analysis by gender may prove of interest. The small sample size in the current research prevented an effective analysis by gender. Future research using a broader, random sample should alleviate these problems. Also, other factors may come into play when making unethical or ethical decisions such as age, work experience, etc. These factors may have influenced the results presented herein.

References


Table 1
Sample Demographics
Junior and Senior Accounting Students

<table>
<thead>
<tr>
<th>Gender</th>
<th>Number</th>
<th>Average Age</th>
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<tr>
<td>Males</td>
<td>21</td>
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<tr>
<td>Females</td>
<td>24</td>
<td>20.39 years</td>
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<td>Total</td>
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Table 2
Variable Means and Standard Deviations

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<tr>
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<th>Standard Deviation</th>
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<tr>
<td>Moral Justification (MJ)</td>
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<td>Euphemistic Labeling (EL)</td>
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<td>-10.422</td>
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<tr>
<td>Displacement of Responsibility (DISR)</td>
<td>-7.689</td>
<td>3.698</td>
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<tr>
<td>Diffusion of Responsibility (DIFR)</td>
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<tr>
<td>Distortion of Consequences (DC)</td>
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<tr>
<td>Attribution of Blame (AB)</td>
<td>-7.533</td>
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<tr>
<td>Dehumanization (DEH)</td>
<td>-10.289</td>
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Table 3
T-tests
Differences between Components of Moral Disengagement

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<th>Significance Level</th>
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<tr>
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<td>Diffusion of Responsibility (DIFR) and Moral Justification (MJ)</td>
<td>-0.099</td>
<td>.3255</td>
</tr>
</tbody>
</table>
Appendix

Moral Disengagement Instrument

AGE:  ______  MAJOR:  _______________________________ GENDER:  ______

Strongly Disagree         Neither     Strongly Agree
1  2  3  4  5  6  7

Choose a number from 1 to 7 from the scale above, based on how strongly you agree or disagree with each statement. Put the number in the space provided.

1. ___ It is alright to fight to protect your friends.
2. ___ It's ok to steal to take care of your family's needs.
3. ___ It's ok to attack someone who threatens your family's honor.
4. ___ It is alright to lie to keep your friends out of trouble.
5. ___ Sharing test questions is just a way of helping your friends.
6. ___ Talking about people behind their backs is just part of the game.
7. ___ Looking at a friend's homework without permission is just “borrowing it.”
8. ___ It is not bad to “get high” once in a while.
9. ___ Damaging some property is no big deal when you consider that others are beating up people.
10. ___ Stealing some money is not too serious compared to those who steal a lot of money.
11. ___ Not working very hard in school is really no big deal when you consider that other people are probably cheating.
12. ___ Compared to other illegal things people do, taking some things from a store without paying for them is not very serious.
13. ___ If people are living under bad conditions, they cannot be blamed for behaving aggressively.
14. ___ If the professor doesn't discipline cheaters, students should not be blamed for cheating.
15. ___ If someone is pressured into doing something, they shouldn't be blamed for it.
16. ___ People cannot be blamed for misbehaving if their friends pressured them to do it.
17. ___ A member of a group or team should not be blamed for the trouble the team caused.
18. ___ A student who only suggests breaking the rules should not be blamed if other students go ahead and do it.
19. ___ If a group decides together to do something harmful, it is unfair to blame any one member of the group for it.
20. ___ You can't blame a person who plays only a small part in the harm caused by a group.
21. ___ It is ok to tell small lies because they don't really do any harm.
22. ___ People don't mind being teased because it shows interest in them.
23. ___ Teasing someone does not really hurt them.
24. ___ Insults don't really hurt anyone.
25. ___ If students misbehave in class, it is their teacher's fault.
26. ___ If someone leaves something lying around, it's their own fault if it gets stolen.
27. ___ People who are mistreated have usually done things to deserve it.
28. ___ People are not at fault for misbehaving at work if their managers mistreat them.
29. ___ Some people deserve to be treated like animals.
30. ___ It is ok to treat badly someone who behaved like a “worm.”
31. ___ Someone who is obnoxious does not deserve to be treated like a human being.
32. ___ Some people have to be treated roughly because they lack feelings that can be hurt.
IT’S ALL ABOUT THE BENJAMINS:  
HOW STUDENT-ATHLETES CAN GENERATE INCOME THROUGH SELF-EMPLOYMENT

JONATHAN R. EVERHART* AND EVA ANASSI**

ABSTRACT

Collegiate athletics is a billion dollar industry. The bulk of the revenue is obtained through media deals, merchandising, licensing, and ticket sales. A clear majority of the revenue generated goes to the colleges, coaches, athletic programs, and the National Collegiate Athletic Association (NCAA). The primary stakeholder – the student-athlete – is labeled as an amateur and limited to the amount and form of compensation he or she can receive for their services on the playing field. The national debate continues as to the amount and manner of compensation student-athletes should receive. This article examines the student-athlete compensation issue and provides a solution within the NCAA regulations for student-athletes to generate income through self-employment.

INTRODUCTION

Collegiate athletics is a billion-dollar industry. The bulk of the revenue is obtained through media deals, merchandising, licensing, and ticket sales. A clear majority of the revenue generated goes to the colleges, coaches, athletic programs, and the National Collegiate Athletic Association (NCAA). The primary stakeholder – the student-athlete – is labeled as an amateur and limited to the amount and form of compensation he or she can receive for their services on the playing field. The national debate continues as to the amount and manner of compensation student-athletes should receive.

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Student-athletes in colleges and universities in the United States are not compensated by their respective schools relative to the revenues generated by these institutions from their athletic departments. Athletic programs and their deemed exploitation of student-athletes without just compensation has been the focus of continuing debates and lawsuits. Students-athletes continue to be exploited by their respective schools without just compensation as their names, images, and likeness are used by the institutions for commercial gain. Mark Emmert, President of the NCAA, declared that he would never pay student-athletes for playing sports, although the manner in which the NCAA does business continues to be challenged. Emmert goes on to say that many university presidents share the same view. The argument for and against payment of additional compensation includes lawsuits from student-athletes and mandates from the NCAA against additional compensation. This article examines the student-athlete compensation issue and provides a solution within the NCAA regulations for student-athletes to generate income through self-employment.

THE NCAA AND COLLEGIATE ATHLETICS

THE NCAA STRUCTURE

It is critical to give a brief overview of the NCAA and its origin including what role it plays in regulating collegiate sports. Different rules apply when it comes to regulation depending on the collegiate division and the type of sport which is in question. The NCAA is a not-for-profit association comprised of institutions, conferences, and individuals from the United States and Canada. The obligations of the members include enforcing regulations relative to athletics and athletes including admissions, financial aid, eligibility, and recruiting. The purpose of the

1 See O'Bannon v. Nat'l Collegiate Athletic Ass'n, C 09-1967 CW, 2010 WL 445190 1, 1 (N.D. Cal. Feb. 8, 2010). Former University of California Basketball (UCLA) player Edward O’Bannon leads a lawsuit against the National Collegiate Athletic Association (NCAA) and the Collegiate Licensing Company (CLC) claiming charges of anti-competitive conduct in violation of the Sherman Act; and Keller v. Electronic Arts Inc., C 09-1967 CW, 2010 WL 530108 1, 1(N.D. Cal. Feb 2010). In the Keller case, former quarterback for Nebraska and Arizona State, Sam Keller, instituted a suit against video developer Electronic Art (EA). In the suit he alleged that Electronic Art designed a game depicting athlete’s jersey numbers, physical characteristics, including the athlete’s home state without compensating these athletes.


3 NAT’L COLLEGIATE ATHLETIC ASS’N 2013-14 NCAA DIVISION MANUAL, (2014) [hereinafter NCAA MANUAL]. President Mark Emmert is only the fifth chief executive officer. Emmert officially began his duties in November 2010 and holds the position to date. Emmert has held a range of leadership positions, including President of University of Washington and Chancellor of Louisiana State University, and other key positions in higher education before taking the position as President of NCAA.

4 NCAA MANUAL, at arts. 1- 33. The NCAA has a history addressing compensation of by-laws about amateur athletes and they have reasons for not changing the rules to keep up with changing times. NCAA has existed in some form for approximately sixty years. The rules of the NCAA are embodied in the NCAA Manual in a total of thirty three articles that are subdivided into three major sections namely the constitution, the operating by-laws and administrative by-laws. The constitution concerns the general principles of conduct of the intercollegiate athletics and provides a general framework within which all the other rules fit.


7 NCAA MANUAL, art. 1.3.2.

8 Id.
NCAA is to ensure that competitive athletics programs are designed and maintained as a vital part of the educational system. The NCAA oversees athletic programs of approximately 1,100 member institutions involving over 450,000 student-athletes in 23 sports.

Commercial opportunity was an integral part of American intercollegiate sports from the beginning. The first intercollegiate sporting event was a regatta between Harvard and Yale which was sponsored by a railway, the Elkins Railroad Line. The precursor of the NCAA was the Intercollegiate Athletic Association (IAA). It was founded by President Theodore Roosevelt after a convention of two White House conferences motivated by the need to regulate football due to the rise in players’ injuries and deaths. Discussions at the convention involved the commercialization of the sport and the need to maintain the integrity of the sport by ensuring the fairness and the well-being of the athletes. Although the NCAA did not play an integral role during the beginning, from the late 1970’s until today, their involvement has substantially increased due to the rise in the commercialization of sports.

**THE CONCEPT OF AMATEURISM**

The concept of amateurism is universally applied to collegiate sports. The term amateurism originated in the late 19th century in an effort to maintain the educational integrity of colleges in society by not paying athletes. However, commercialization of college sports has altered the dynamic of amateurism in college sports. Athletes generate billions in revenues for the NCAA and universities, but yet are the least to financially benefit. Student-athletes only receive scholarships and small stipends.

Proponents for the NCAA argue that the financial incentive for student-athletes is the free education, meal, and room and board they receive. The NCAA is of the view that student-athletes should not be paid for their services since the primary reason why they are in school is to study and their participation in college sports is just but another part of their education. The NCAA further argues that those who do not get an opportunity to play professional sports will enjoy a lucrative career due in part to the free education they were afforded from these scholarships. From inception, this was the basis upon which the student-athletes were awarded money and the concept of amateurism was emanated. The historical roots of denying compensation to student-athletes dates back to the early 1900’s. Revenues grew from the

9 NCAA MANUAL, at art. 1.3.
10 NCAA MANUAL, at page 432 (back cover).
12 Id. at 12.
13 Id.
14 Id.
15 Id. at 13.
16 NCAA MANUAL, at art.12. The concept of amateurism labels student-athlete as amateurs not professional.
18 Id.
19 Id.
21 Id.
22 Id.
growing national attention and popularity of collegiate sports and, as a result, the need to compensate student-athletes commensurate to their athletic ability became an issue. In order to adequately compensate student-athletes without directly paying them, the NCAA offered incentives such as free tuition, meals, and room and board.

In 1940, in an effort to regulate the financial assistance provided to these student-athletes, the NCAA adopted the Sanity Code. The Sanity Code limited the financial assistance that was available to student-athletes and provided guidelines which stated that approval had to be based on financial need. However, by the early 1950’s, the Sanity Code was modified to allow financial assistance based on a student-athlete’s athletic ability. This concept was coined grant-in-aid and replaced direct monetary compensation. It continues today. The grant-in-aid makes up a central feature within the economic regime that governs collegiate athletic programs. Grant-in-aid covers tuition, books, and room and board in return for a student-athlete’s athletic services. It is deemed a transfer of economic value from the universities to the student-athletes for their participation in the athletic programs. The NCAA strictly regulates the student-athletes’ grant-in-aid. The grant-in-aid functions as an employment contract between the student-athletes and the universities where the rules for remuneration are set forth.

**A BILLION DOLLAR INDUSTRY**

The NCAA generates billions of dollars yearly from Division I sports, including revenue from gate receipts and advertising. For example, the NCAA announced in April 2016 an eight-year, $8.8 billion extension of its TV rights with CBS and Turner for the annual March Madness men’s basketball tournament. Millions of dollars are generated under licenses from the sale of merchandise yearly, which averages about $100,000,000 in profit for the universities. The University of Texas generates millions of dollars per year from ticket sales, licensing apparel, and media rights – as they have their own television network. Other top colleges that exceed

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24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 NCAA Manual, at art.12.01.4. (A grant-in-aid is offered to student-athletes who are eligible for institutional financial aid and is in regular attendance at school. The grant-in-aid covers the student-athlete’s tuition, meals, and room and board).
30 NCAA MANUAL, at art. 12.01.4.
31 Id.
32 Id.
33 NCAA MANUAL, at art. 12.01.4.
36 Lawrence Hurley, Supreme Court Won’t Review Disputes Over Whether College Athletes Should Be, The Huffington Post (October 3, 2016), Paidhttp://www.huffingtonpost.com/entry/supreme-court-wont-review-disputes-over-whether-college-athletes-should-be-paid_us_57f26c6ce4b082aad9bc1cdd
37 Id.
$100 million in revenues include Alabama, Auburn, Harvard, Yale, Michigan, Ohio State, and Oklahoma.\textsuperscript{39}

Division I coaches of several teams are paid millions of dollars per year as well.\textsuperscript{40} For instance, the head coach of Louisville, Rick Pitino, receives over $7.7 million annually in compensation, in addition to other bonuses and stipends.\textsuperscript{41} Other high paid coaches include: Kentucky’s John Calipari ($7.4 million), Duke’s Mike Krzyzewski ($5.5 million), and Michigan State’s Tom Izzo ($4.2 million).\textsuperscript{42}

Throughout the years, the financial assistance that is awarded to student-athletes via scholarships has proven to be inadequate to cover the full cost of tuition and living expenses.\textsuperscript{43} The scholarships mostly cover the cost of attendance without considering all living expenses.\textsuperscript{44} The estimated cost of out-of-pocket expenses for athletes is estimated to be up to $6,904 annually.\textsuperscript{45} In restricting the amount and form of compensation awarded to players, the NCAA is controlling the output of the generated revenue at the expense of the athletes. The NCAA is allowing for the universities to limit the flow of revenues and allowing the universities to use the funds for their own gain.\textsuperscript{46}

**THE U.S. SUPREME COURT’S SILENCE ON THE ISSUE**

The U.S. Supreme Court recently steered clear of hearing legal questions about the NCAA’s rules prohibiting student-athletes to be paid.\textsuperscript{47} The justices declined dueling appeals by the NCAA and a group of student-athletes.\textsuperscript{48} In doing so, the justices left in place a mixed appeals court ruling from last year that held the NCAA did not have to allow payments to players, although, the NCAA is in violation of federal antitrust law.\textsuperscript{49}

The initial lawsuit was brought by former UCLA basketball star Ed O’Bannon.\textsuperscript{50} O’Bannon and other student-athletes alleged that the NCAA’s amateurism requirements illegally restrained trade by preventing them from receiving a share of the NCAA’s lucrative licensing revenue for the use of their names and images in broadcasts and sports-themed videogames.\textsuperscript{51} A federal district court ruled in 2014 that the NCAA’s rules barring compensation for student-athletes violated federal antitrust law.\textsuperscript{52} The court concluded that the NCAA must let schools pay

\begin{itemize}
  \item \textsuperscript{41}Id.
  \item \textsuperscript{42}Id.
  \item \textsuperscript{43}Id. at 212.
  \item \textsuperscript{44}Steve Murphy and Jonathan Pace, *A plan for compensating student-athletes*, 1 BYU L. 170, 167-186 (1994) (discussing compensating student-athletes for playing collegiate sports).
  \item \textsuperscript{45}Id.
  \item \textsuperscript{46}Id.
  \item \textsuperscript{48}Id.
  \item \textsuperscript{49}Id.
  \item \textsuperscript{50}O’Bannon v. Nat’l Collegiate Athletic Ass’n, C 09-1967 CW, 2010 WL 445190 1, 1 (N.D. Cal. Feb. 8, 2010).
  \item \textsuperscript{51}O’Bannon, C 09-1967 CW, 2010 WL 445190 at 2.
  \item \textsuperscript{52}Id.
\end{itemize}
up to $5,000 a year in deferred compensation to student-athletes. The Ninth U.S. Circuit Court of Appeals upheld the district court’s ruling of an antitrust violation by the NCAA, but the appeals court threw out the remedy allowing for payments to athletes. Instead, the appeals court held that it was enough that colleges be allowed to pay for an athlete’s full cost of attending school—which allows athletes to receive several thousand dollars more than under the old NCAA standard where athletes received only tuition, books, and housing. The Supreme Court’s silence allows the Ninth Circuit’s ruling to continue to stand.

This case provides a foundation for future litigation to challenge the NCAA’s continued use of student-athletes’ name and image for commercial purposes without paying the student-athletes. So the question still stands: How can student-athletes generate income? A solution is self-employment.

SELF-EMPLOYMENT: A SOLUTION FOR STUDENT-ATHLETES TO GENERATE INCOME

NCAA GUIDELINES FOR SELF-EMPLOYMENT

Under NCAA Bylaw 12.4.4 (Self-employment.), a student-athlete may establish his or her own business, provided the student athlete’s name, photograph, appearance or athletics reputation are not used to promote the business. NCAA Bylaw 12.5.2.1 (Advertisements and Promotions After Becoming a Student-Athlete.), states that after becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) Receives remuneration for endorsing a commercial product or service through the individual’s use of such product or service.

According to Texas A&M University compliance director Brad Barnes:

“The NCAA has no rules on student-athlete employment that would preclude commission-based earnings. However, their earnings “may not include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability. When violations occur, the NCAA has recently been imposing a penalty of requiring the student-athlete to repay earnings (less expenses) that occurred while he or she was using his or her name, picture, image or athletic reputation to promote directly a commercial service or product and to remove such prior uses from his or her social media and other promotional tools as a condition of the reinstatement of eligibility. In none of the cases of previous violations did an institution or the NCAA penalize a student-athlete by withholding him or her from competition...[L]ook at the rule on self-employment and how that precludes promotion or endorsement of businesses as well as commercial services and products that use the student-athlete’s name, image or athletics reputation...There is no NCAA bylaw allowing student-athletes who are employees of a business to use their name, image or likeness to promote a business’ services or products or the business itself. However, the NCAA has been

53 Id.
54 Id.
55 Id.
56 NCAA Bylaw 12.4.4 (Self-employment.).
57 NCAA Bylaw 12.5.2.1 (Advertisements and Promotions After Becoming a Student-Athlete.).
granting waivers of that promotional restriction when the self-employment does not use the student-athlete’s status as an athlete for an NCAA institution for promotion of his or her business. They also have a rule that allows for student-athletes with modeling experience prior to enrollment to do modeling (albeit not endorsement) of commercial products.58

Understanding the nuances of these rules will allow student-athletes to develop a proper business model to generate income of their own. A lack of understanding can lead to unintended violations. Former Ohio State football player Braxton Miller, was involved in a self-employment incident involving him and the company AdvoCare. Miller reposted an Instagram picture of himself and Brandon Oshodin, a trainer for Authentik Fitness, sitting next to AdvoCare nutritional products.59 Miller selling AdvoCare products is not an NCAA violation because the NCAA allows students to be employed and self-employed.60 However, by appearing in the Instagram, Miller could be construed as using his image to endorse the sale of a commercial product which is an NCAA violation.61

THE SELF-EMPLOYMENT BUSINESS MODEL FOR STUDENT-ATHLETES

The global business environment provides ample opportunities for student-athletes to start a business. The vast majority of business support tools and platforms permit student-athletes to own and operate a business without sacrificing a significant amount of their time from being a student-athlete. An example of a successful self-employment business model is the story of LaVar Ball and his family’s Big Baller Brand.62

LaVar Ball created Big Baller Brand to sell apparel. The company and its brand is built around the basketball prowess of his three sons: Lonzo (Los Angeles Lakers 2017 #2 draft pick),63 LiAngelo (UCLA commit for the Class of 018),64 and LaMelo (7th ranked high school player in the Class of 2019).65 According to current public records, the company was initially formed as a limited liability company in the State of Wyoming on November 14, 2014.66 Records indicate that LaVar Ball is a member (owner) of the company, however there is no indication whether the company is owned by additional persons, including his sons.67 LaVar stated that “It's the brand I created for my boys.”68 During Lonzo’s time playing basketball at UCLA, the NCAA received complaints about the company’s website featuring pictures and videos of him.69 The NCAA

59 Id.
60 Id.
61 Id.
66 Big Baller Brand, LLC – Application to Register a Foreign Limited Liability Company, California Secretary of State. Entity Number 201629410297.
67 Id.
69 Id.
investigated the issue. UCLA asked LaVar to remove Lonzo's pictures and videos, but LaVar drew the line at UCLA's request to take Lonzo's name off the About Us section. In a joint statement in response to the investigation, the NCAA and UCLA stated: “Like many schools, UCLA has frequently worked with the NCAA to determine what is and is not allowed within the member-adopted rules. While neither the NCAA nor UCLA will address details of a specific student-athlete's situation, both are comfortable the appropriate measures have been taken to review the potential issues under NCAA rules and processes regarding Lonzo Ball. As is standard practice, both will continue to work together to monitor this matter.” In the end, the NCAA declared that Lonzo would not face NCAA sanctions for his connection to a family apparel website that was using his image. The continued success of the Ball family and their Big Baller Brand provides a shrewd business model for other student-athletes to follow.

The rise of technology (such as mobile applications, the Internet of Things, robotics, data analytics, virtual reality, artificial intelligence, etc.) provides a plethora of opportunities for student-athletes to start a business to generate income. Many resources are available to them, from on-campus business incubator programs to online business development tools. Student-athletes can access these resources typically at no cost. In promoting the business, student-athletes should ensure that they are not using their image or likeness in violation of NCAA regulations. Ultimately, if student-athletes take the time to understand the basic rules of business and today’s opportunities in business, they will be able to think outside of the box to create a viable business model that protects them from NCAA violations.

CONCLUSION

Intercollegiate athletic programs are amateur sports in form and professional sports from a commercial context in substance. The current NCAA rules do not reflect the expansive commercialization of college sports. As with most rules in any industry however, there are opportunities for student-athletes to exploit. With the number of self-employment opportunities available, student-athletes can select a business platform and strategically build a business model which allows them to generate income without violating NCAA regulations. To further this movement, astute entrepreneurs and business professionals can seek to develop adequate business models which can assist student-athletes in generating self-employment income without violating NCAA regulations. Successful challenges to the NCAA’s rules, like LaVar Ball and the Big Baller Brand, can further this trend for student-athletes to follow.

70 Id.
71 Id.
NONPROFIT FORMATION IN TEXAS: ORGANIZATION

RAYMOND H. C. TESKE III

ABSTRACT

The formation of a business organization in Texas can be a fairly simple process – complete the Secretary of State’s promulgated certificate of formation and file it online using SOS Direct. The reality is the organization process, while not complex, requires more complexity in representing the client’s needs and measures to ensure long-term sustainability. This paper reviews the process of forming a Texas business organization, and focuses specifically on the nonprofit corporation.

INTRODUCTION

One limitation I have encountered related to the organization process for a nonprofit corporation is that while attorneys can assist a client in filing the certificate of formation, they often do not understand the totality of what is needed in the organizational process. Or, they do understand and the scope of work is limited to forming the nonprofit corporation, which primarily includes filing the certificate of formation. Additional work included in the scope of service may include preparing a draft of the bylaws, the organizational minutes, and the application for the employer identification number (“EIN”) with the Internal Revenue Service (“IRS”). However, clients generally need guidance not only through the organizational process and the assurance it is completed correctly, but also assistance with the application for exemption, business development, and setting up the operations side of running the nonprofit to assure sustainability of the organization as a viable operation in the future.

Another limitation I have encountered throughout my practice with small business start-ups is the distinction between what a client wants and what they need. What a client wants is generally the lowest cost and fee possible to form an entity so they can begin making money right away (e.g., for a corporation or limited liability company). What clients do not understand, nor do they generally want, are the services that will assist with their long-term success. What they need to be successful are the big picture analysis, an understanding of the organizational process, and having a foundation in the operations side of a business to be sustainable (e.g., business development, strategic planning, management, marketing, and sales/fundraising). One example that is often neglected is the need to protect intellectual property owned by the organization. The response I generally receive from business start-ups is they do not want to spend the money right now because their primary focus is on making money, and that they will address this and other issues later once they have money in the bank. Unfortunately, that later date often never comes, and these business start-ups end up being a one-off scenario. However, individuals wanting to form a nonprofit organization have a different perspective, and that is they have an idea that they need assistance with the organizational process, business development, and operations – their focus in on the mission or purpose of the organization and its success, and not solely focused on making money – but, they have no idea where to begin.
In this paper I will review the organization process for a Texas nonprofit corporation, to include (1) the standard forms needed, (2) the certificate of formation requirements per Texas law and IRS regulations, (3) selecting a name, (4) drafting the purpose statement, (5) understanding the management structure of the nonprofit, (6) review additional provisions for the certificate of formation, and (7) the filing options.

**GENERAL FORMS NEEDED FOR A TEXAS NONPROFIT CORPORATION**

The standard forms needed to form a Texas nonprofit corporation are:

- Certificate of Formation
- Bylaws
- Organizational Minutes
- Application for EIN
- Assumed Name Certificate
- Board Resolution
- Annual Minutes

This paper will focus primarily on the certificate of formation requirements for a Texas nonprofit corporation.

**CERTIFICATE OF FORMATION REQUIREMENTS**

A Texas nonprofit is required to file a certificate of formation to formally organize the legal entity under Texas law. Chapter 3 of the Texas Business Organizations Code (“TBOC”) outlines the general requirements for entity formation in the State of Texas. Section 3.005 provides that the certificate of formation (the document that is filed with the Secretary of State to legally form the entity) must contain:

- “the name of the organization;”¹
- “the type of entity being formed;”²
- the purpose of the entity;³
- “the period of duration;”⁴
- “the registered agent’s name/street address;”⁵
- the organizer’s name and address;⁶
- a statement whether the entity will have members or no members;⁷

• a statement whether the management will be vested in the members or the directors;\textsuperscript{8} 
• “[t]he number of directors constituting the initial board of directors, and their names and addresses;”\textsuperscript{9} 
• a dissolution statement that follows the text of Section 22.304 of the TBOC, or other means of distribution of the organization’s assets;\textsuperscript{10} and 
• the signature of the organizer.\textsuperscript{11}

The Texas Secretary of State has a promulgated form for the certificate of formation to use for organizing a new nonprofit corporation, which meets the minimum requirements of Texas law as required by the TBOC.\textsuperscript{12} The filing fee for the certificate of formation for a Texas nonprofit corporation is $25.\textsuperscript{13}

SELECTING A NAME

For some clients, significant thought may have been given and a name already selected a name for the new entity. For others, they may think the name is not an issue and any name will work, but have not taken into consideration the broader implications in selecting a name; such as branding, marketing trademark infringement, etc. If the client has not given any thought to selecting a name, then this can delay the process.

One of the primary issues in selecting a name is determining name availability under the TBOC and Secretary of State rules.

Certificate of Formation Name Requirements per the TBOC and Secretary of State

When filing a certificate of formation for a new business organization, the Texas Business Organizations Code provides the following rule in relation to the name of the business organization:

“Sec. 5.053. IDENTICAL AND DECEPTIVELY SIMILAR NAMES PROHIBITED. (a) A filing entity may not have a name, and a foreign filing entity may not register to transact business in this state under a name, that is the same as, or that the secretary of state determines to be deceptively similar or similar to: (1) the name of another existing filing entity; (2) the name of a foreign filing entity that is registered under Chapter 9; (3) a name

that is reserved under Subchapter C; or (4) a name that is registered under Subchapter D.”

The Secretary of State, as a state administrative agency, has rule-making authority granted to it by the Texas legislature, and has its own rules that provide for an interpretation of the name availability statute.

One of the primary Secretary of State’s rules is the name cannot be the same as the first two words in the name of an existing entity.

The TBOC and Secretary of State’s rules will assist in narrowing down the name availability when used in conjunction with the next section.

_Name Availability Search_

The Texas Comptroller of Accounts provides the Franchise Tax Account Status for Texas corporations, limited liability companies, and limited partnerships, and includes nonprofit corporations. The franchise tax (also referred to as the business organizations tax) is a tax on corporations, limited liability companies, and limited partnerships for the privilege of doing business in Texas, and these entities are required to file an annual franchise tax report, and if required, pay franchises taxes. The Comptroller provides a Franchise Tax Account Status to certify that a corporation, limited liability company, or limited partnership is in good standing - that it has paid its franchise taxes and filed the annual franchise tax report and Public Information Report. The Franchise Tax Account Status web page is also an efficient means of obtaining information on a corporation, limited liability company, or limited partnership.

The Comptroller’s website is a good place to start to see if the name selected by the client for the entity is available. The Secretary of State will not approve a certificate of formation if the name does not comply with the TBOC and the Secretary of State’s rules. Therefore, I suggest using multiple derivatives of the name to ensure that it has not been used under a different spelling or grammatical use (e.g., Texas and Teksys).

To search for the name using the Comptroller’s website, begin by looking under Franchise Tax Account Status online at https://comptroller.texas.gov/ and select Franchise Tax Account Status. You can access the Taxable Entity Search by going directly to this web page: https://mycpa.cpa.state.tx.us/coa/

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16 Id.
18 Id.
19 See supra notes 15 and 16.
20 Note, that these links are subject to change.
Enter the proposed name of the entity in the “Entity Name” field. Review the search results to determine if there is a conflict with the name using the name rules from the TBOC and the Secretary of State.

Another resource that can be used to check the proposed name of an entity is SOS Direct, a fee-based platform on the Secretary of State’s website that requires an account. The Secretary of State will also accept name availability requests by phone or email, but I have found that using the Comptroller’s website or SOS Direct is more efficient.

*Preferred Domain Name, Email Addresses, and Social Media*

When selecting a name for the nonprofit corporation, the availability of a domain name, free email addresses, and social media usernames should be taken into consideration. There are two reasons for this. One reason is to determine if an existing business or organization has reserved or is using social media usernames that are the same or similar to the organization’s name. This is significant if marketing, branding, and a social media presence is important to the client. A second reason is reserving free email addresses and social media usernames to prevent an individual or another organization from reserving and/or using these names, if they are not already in use.

Examples of preferred domain names, based on the organization’s needs and industry are: .com; .net; .org; .co; and .io

Examples or free email addresses include, but are not limited to, Gmail, Outlook.com, and Yahoo. Reserving these email addresses is not necessarily for an intended use by the organization, but more from a strategic perspective preventing an individual or organization from using an email address that is the same as or similar to the organization’s name.

Examples of social media usernames (and related resources) that should be searched for availability are:

- Google+
- Facebook Page
- Instagram
- LinkedIn Company Page
- Pinterest
- SoundCloud
- Snapchat
- Tubmlr
- Twitter
- Vimeo
- Wordpress

While many of these resources may not be utilized, just like the free email addresses, reserving these resources may be important part of the new organization’s strategy in preventing another individual or organization from using a social media name that is the same as or similar as that of the new organization.

It is also important to ensure that a domain name or social media account that are already in use, especially a Facebook page and Twitter username, are not related to services or goods that could create confusion or a negative association with the name of the new organization, or likely lead to confusion in services offered.

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22 Texas Secretary of State, Name Filings FAQs, Name Availability, http://www.sos.state.tx.us/corp/namefilingsfaqs.shtml (last visited May 21, 2017).
Trademark Search

A new organization should ensure that the selected name is not registered as a federal or state trademark. TBOC Section 5.001, a reference of which is included in the Certificate of Filing for a new entity filing, states:

“EFFECT ON RIGHTS UNDER OTHER LAW. (a) The filing of a certificate of formation by a filing entity under this code, an application for registration by a foreign filing entity under this code, or an application for reservation or registration of a name under this chapter does not authorize the use of a name in this state in violation of a right of another under:
   (1) the Trademark Act of 1946, as amended (15 U.S.C. Section 1051 et seq.);
   (2) Chapter 16 or 71, Business & Commerce Code; or
   (3) common law.”

The Certificate of Filing, a page included with the filed-marked certificate of formation from the Secretary of State, includes the following reference:

“The issuance of this certificate does not authorize the use of name in this state in violation of the rights of another under the federal Trademark Act of 1946, the Texas trademark law, the Assumed Business or Professional Name Act, or the common law.”

The effect of this section in the TBOC is that if the Secretary of State approves the certificate of formation for a new entity, it is only making a representation that the name in the filing document comports to the TBOC and Secretary of State requirements relating to the name, and that the name approved in the certificate of formation does not provide any rights that exceed those under federal or state trademark protection, under an existing assumed name that has been filed with the Secretary of State, or under common trademark rights.

Therefore, a federal trademark search should be conducted using the United States Patent and Trademark ("USTPO") database:

- Use the following link to begin a trademark search: https://www.uspto.gov/trademark
- Select “Basic Word Mark Search” (New User)
- Type in the name of the organization, using various derivatives to ensure there are no potential conflicts

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24 Secretary of State Certificate of Filing for an entity organized on May 16, 2017 by the author.
25 Note that these links are subject to change.
Other Domain Name, Social Media, and Trademark Search Tools

Two resources that may be useful in conducting an aggregated domain, social media, and trademark search are: https://namechk.com/ and http://knowem.com/

PURPOSE STATEMENT

Filing a certificate of formation for a Texas nonprofit corporation creates a nonprofit corporation under Texas law, but the organization is not automatically granted tax exempt status under federal or state law. To receive tax exempt status, an application for exemption must be filed with the IRS and Texas Comptroller, and the IRS requires certain language that is not in the certificate of formation promulgated by the Secretary of State.

The TBOC requires a purpose statement in the certificate of formation.26 The general purpose clause found in the promulgated certificate of formation for a Texas for-profit corporation is:

“The purpose for which the corporation is formed is for the transaction of any and all lawful business for which a for-profit corporation may be organized under the Texas Business Organizations Code.”27

The purpose clause found in the promulgated certificate of formation for a Texas nonprofit corporation is “[t]he nonprofit corporation is organized for the following purpose or purposes:,” 28 and the individual drafting the certificate of formation is required to draft the purpose clause that meets Texas and IRS requirements for a nonprofit. The instructions in the promulgated certificate of formation for a Texas nonprofit state:

“A nonprofit corporation may be formed for any lawful purpose or purposes not expressly prohibited under title 1, chapter 2, or title 2, chapter 22, of the BOC, which may be stated as “any or all lawful purposes” in the space provided. While the BOC allows formation with a general purpose, please note that other laws, including the Texas Tax Code and the Internal Revenue Code, may require that the certificate of formation include a more specific purpose statement as a basis for granting a license or a tax exempt or tax-deductible status.”29

This requires that the individual drafting the purpose clause to have the requisite knowledge of the language to include in the certificate of formation that will meet IRS scrutiny.

A nonprofit may receive tax exempt status under 501(c)(3) of the Internal Revenue Code if it is “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.”30 This language should be included in the certificate of formation as a general purpose clause for tax exempt purposes, as the instructions for IRS Form 1023 Application for Exemption states that “[t]here are two key requirements for an organization

26 See supra note 3.
27 See supra note 12.
28 Id.
29 Id.
to be exempt from federal income tax under section 501(c)(3). A 501(c)(3) organization must be organized and operated exclusively for exempt purposes.” Including this language will be the first key requirement. The second requirement will be discussed.

The drafter should also include the equivalent of the mission statement for the organization, which further identifies the exempt purpose for which it is organized: a religious, charitable, scientific, testing for public safety, literary, or educational purpose. This statement should not be too vague, so as to call into question the nature of the organization. Furthermore, the mission statement should not be too narrow or specific, thus limiting the organization from developing strategically in the future, as the organization can only operate within the confines of the purpose clause. Operating outside of the purpose clause can cause problems with the IRS, and potential personal liability under state law. The organization cannot decide to do something other than what the purpose clause states just because it is not working. So, this is a reason to keep the purpose clause general in nature.

**Dissolution Clause**

A second key element that needs to be included in the certificate of formation, and is not included in the form promulgated by the Secretary of State, is a dissolution clause. To receive tax exempt status, the IRS requires a dissolution clause in the certificate of formation that either follows Texas law or IRC requirements. The IRS has provided the following as an acceptable dissolution clause to be included in the certificate of formation:

> “Upon the dissolution of this organization, assets shall be distributed for one or more exempt purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose.”

Under Texas law, Section 22.304 of the TBOC states:

> “[U]nless otherwise provided by the corporation’s certificate of formation, the remaining property of the corporation shall be distributed only for tax-exempt purposes to one or more organizations that are exempt under Section 501(c)(3), Internal Revenue Code, or described by Section 170(c)(1) or (2), Internal Revenue Code, under a plan or distribution adopted under this chapter.”

A Texas nonprofit corporation seeking status as a Texas nonprofit corporation can rely on and implement this provision of the TBOC in the event of a dissolution. However, reliance on this provision in the TBOC is not acceptable when applying for tax exemption status with the IRS. Therefore, if the drafter will need to include a dissolution clause that meets IRS requirements.

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31 See *supra* note 28.
32 See *supra* note 28.
33 See *supra* note 30.
MANAGEMENT

There are two forms of management for a nonprofit corporation: Member managed, or director managed.

The nonprofit corporation is required to state in the certification of formation if the LLC is to be member-managed or director-managed.\textsuperscript{35} Texas law also requires a minimum of three directors, and the names of the initial directors must be stated in the certificate of formation.\textsuperscript{36}

The member-managed structure resembles that of a partnership where all members have a participation in the decision-making of the organization. The director-managed structure resembles that of an organization with centralized management of the entity conducted by a limited number of individuals.

ADDITIONAL PROVISIONS

Additional provisions that are not in the promulgated certificate of formation include an indemnification clause, and limitations for a 501(c)(3) organization as outlined in the Internal Revenue Code (“IRC”).

The indemnification clause indemnifies the directors for any actions taken in their capacity as a director and within their scope of authority should they be sued, and the organization should ensure it has insurance to cover these issues.

It is recommend to consult with an attorney when drafting additional provisions for the certificate of formation.

REGISTERED AGENT, ORGANIZER, AND SIGNATURE

The certificate of formation will include a registered agent, the street address for the registered agent, and the organizer (the individual filing the certificate of formation). The signature of the organizer is required in the certificate of formation. The entity should also have a statement on file stating the registered agent agrees to act as the registered agent for the entity.

FILING OPTIONS

There are four options for filing a document with the Secretary of State:

1. mail;
2. fax;
3. hand delivery; or
4. SOS Direct (electronic filing).

The most efficient way to file a certificate of formation with the Secretary of State is through SOS Direct, an online platform for filing business organization documents.\textsuperscript{37} However, this requires adding additional language to the Secretary of State’s promulgated form. Therefore,

\textsuperscript{35} See supra note 8.
\textsuperscript{36} See supra note 9.
the drafter may prefer to draft the certificate of formation using a word processing program, and submit the document for filing by mail or fax.

The filing fee for a certificate of formation with the Secretary of State via SOS Direct or by fax is $25.68, and is itemized as follows:38

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certificate of Formation</td>
<td>$25.00</td>
</tr>
<tr>
<td>Credit Card 2.7% Convenience Fee</td>
<td>$.68</td>
</tr>
<tr>
<td>Total</td>
<td>$25.68</td>
</tr>
</tbody>
</table>

To file a certificate for formation for a nonprofit corporation, one would first create an SOS Direct account.39 After the account is created, the following steps would be need to be completed to file the assumed name certificate:

1. Log into the SOS Direct account;
2. Enter your credit card information for payment;
3. Select “Business Organizations” in the top menu;
4. Select “Domestic Nonprofit Corporation” under “Reservation * Formation * Registration Documents”;
5. Select “File Document”;
6. Select “Certificate of Formation” under “Filing Type”;
7. Enter the required statutory information for the certificate of formation, plus any additional provisions;
8. Electronically sign the document; and
9. Submit the document for filing.

In theory, this process could take less than fifteen minutes to file the certificate of formation. The Secretary of State’s website states that “[t]urntime for web filings is generally within 2 business days following date of receipt.”40 Filing using SOS Direct is generally fast, efficient, and timely.

ASSUMED NAME CERTIFICATE

Texas business organizations and foreign entities are required to file an assumed name certificate with the Secretary of State, and the county clerk where the principal office is located, or if the business organization does not have a principle office in this state, then the county where the registered office is located.41

The Texas Business and Commerce Code provides that the certificate must include the following information:

38 See supra note 13.
40 See supra note 37.
(1) the assumed name;
(2) the legal name of the business organization;
(3) the jurisdiction where the business organization is organized;
(4) the period of use for the assumed name;
(5) the type of business organization;
(6) the principal office of the business organization; and
(7) the county or counties where the assumed name will be used.42

While a Texas nonprofit corporation is not required to include “incorporated,” “inc,” “corporation,” “corp,” “company,” or “co” in its name, the organization may find it necessary to file an assumed name certificate as require by Texas law.

**BYLAWS**

The bylaws can be considered the rule book for the organization, and include provisions relating to governance of the organization. Topics in the bylaws include, but are not limited to,

- Annual, special, and regular meetings;
- Directors — Number, qualification, duties, quorum, voting, and term;
- Format for meetings (e.g., face-to-face, electronic, etc.);
- Formation of committees and advisory boards;
- Officers — Responsibilities and duties, term, and compensation;
- Financial and operations;
- Prohibited acts by directors and officers;
- Amendment the bylaws; and
- Record-keeping.

**ORGANIZATIONAL MINUTES**

While the certificate of formation evidences the legal existence of the entity under Texas law, the organizational minutes evidence the “birth” of the entity. The organizational minutes include resolutions that include, but are not limited to:

- Acknowledgment that the certificate of formation was filed;
- Approval of the bylaws;
- Establishing the principal office for the organization;
- Approving the corporate book and record-keeping;
- Electing the initial officers;
- Authorizing the organization to open a bank account;
- Approving the payment or reimbursement of the organizational expenses;
- Establishing the fiscal year for the organization;
- Authorizing the organization to obtain any necessary licenses and/or permits; and

• Authorizing the organization to file any required paperwork to transact business in foreign jurisdictions.

In addition to the organizational minutes being signed by the initial directors, the organization governance can also approve any other resolutions necessary to begin operations for the organization, such as approving an employment agreement for an executive director, hiring service providers (e.g., an attorney and accountant) and vendors.

CONCLUSION

An attorney assisting a client in the formation of a nonprofit should do more than just complete the certificate of formation promulgated by the Secretary of State, and should have a level of knowledge that provide the client with the big picture, including business development, strategic planning, management, marketing, sales/fundraising, and legal guidance to small businesses, and more specifically, nonprofit organizations. If the attorney does not have the requisite knowledge, then they should be prepared to put the client in contact with stakeholders who can assist the client and ensure long-term sustainability of the organization.

DISCLAIMER

This paper is not intended to provide legal or tax advice, and is only intended to provide a context for issues to be taken into consideration when organizing a Texas nonprofit corporation, as each entity requires its own subjective analysis when making a determination as to what is needed for a specific matter. Therefore, it is recommended that an individual wanting to form a nonprofit corporation should seek the assistance of an attorney and/or certified public accountant.
EXPLORING SUCCESS FACTORS FOR WOMEN IN FAMILY FIRMS

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ABSTRACT
We explore the challenges and success strategies of women in family firms to build on existing theory. Many studies have focused on the difficulties and the limited roles for women in family businesses. In this qualitative study, we interviewed 18 women family business owner/managers in depth to discover their strategies in meeting challenges. The respondents represented firms from 18 different industries. The qualitative questionnaire was carefully developed with input from other studies and designed to obtain open-ended answers.

Respondents indicated the importance of knowing the business, hard work, and having to prove oneself. Several respondents reported having challenges with their employees and outsiders while being a woman. Some respondents explained that they had received assistance from their trade associations where many were active and held offices. Respondents also reported focusing on the customer and providing excellent service. Some did not try to expand their family firms but stayed small and continued in their areas of expertise. These successful women multitasked and were competent in their areas of specialization. In many instances, their functions were separate from those of the male owner. Clarity of authority, responsibility, and decision making were observed. Finally, the respondents seemed to remain true to the cultural values of the family firm.

INTRODUCTION
Women are increasingly participating in family businesses leadership. Research shows that 24% of family businesses are led by a female CEO or president. Also, 31.3% of family businesses surveyed indicate that the next successor will be a female. Approximately 60% of the family firms have women in a top management position. Over the past five years, woman-owned family businesses have increased by 37% (Mass Mutual American Family Business Survey, 2007).

Our study was designed to build on existing theory in studies of family firms. Research efforts have been continuously conducted to understand the role of women in family businesses (Hollander & Bukowitz, 1990; Jimenez, 2009). This increased interest has been seen in studies regarding challenges, role conflict, the nature of succession, and family dynamics (Danes & Olson, 2003; Haberman & Danes, 2007). Although much attention has focused on these topics, little research has been conducted on how women in family firms have met these challenges. Our study focuses on such methods and strategies utilized by women.
LITERATURE REVIEW

In this literature review, we divide past research studies concerning women in family firms into the following sections: (1) challenges, (2) power and control, (3) role conflict, and 4) family dynamics.

Challenges

Early in the study of women in family firms, Salganicoff (1990) identified important issues which include: (1) discrimination and stereotyping against women; (2) lack of sense of self and role conflict among women; (3) interpersonal dynamics, including parents’ expectations and acceptance by nonfamily members; and (4) the negative use of power. The study concluded that often women are underutilized in family firms and suggested that women’s strengths may be eventually recognized; therefore, family businesses should tap into this talent.

Nelton (1998) examined the increase in women in family firms and suggested research is needed to understand and be prepared for this insurgence. For instance, wives and daughters are active in the family business, and daughters are involved in traditionally male-dominated firms. She saw the need for research and suggested 12 questions for inquiry, including how women assert themselves in leadership and their relationships with the founder and nonfamily employees.

In a study of ten family businesses which focused on daughters, Vera and Dean (2005) reported difficulties in work-life balance and employee rivalry for daughters. Interestingly, daughters incurred more challenges with their mothers than their fathers. Daughters perceived that other employees doubted their leadership, had difficulties with non-family members, and believed that their managerial style was compared with their mothers’ styles. In addition, daughters faced several challenges and difficulties regarding the nature of succession (Vera & Dean, 2005).

Adkins (2013) found that women became family business owners for a variety of reasons and that their motivation was not always clear. They examined whether women owners shaped the culture and policies of the organization to be consistent with their personal motivators, challenges, and family status. The results showed that being a full-time manager, marital status, and motivation for becoming a business owner were related to the work-family culture of the business.

Power and Control

Using an exploratory case study approach regarding family firm succession, Cadieux, Lorrain, & Hugron (2002) found that women desired more freedom with their time but definitely wanted to remain in control of the family firm. However, there was a lack of planning in most family firms until it was time to make a decision regarding succession. Further, some non-family managers within the firm resisted the succession of a daughter.

Researchers analyzed the nature of power among women in family business and conceived the role of the “invisible woman” (Gillis-Donovan & Moynihan-Brandt, 1990). They analyzed three important areas: (1) changing work roles of women, (2) relationship patterns in family business, and (3) intervention strategies to improve their roles. A typical role for a woman in a family firm was that of a nurturer and adviser, which were viewed as “feminine” roles. Women were relegated to the background of the family firm and seen as participating in the family side, but not the
business side of the family firm. Because they bear the brunt of childcare responsibilities, challenges for women included balancing work and family obligations. Gillis-Donovan & Moynihan-Brandt (1990) suggested that women may even downplay their work in the business and minimize the recognition they receive, which contributes to their feeling of invisibility.

**Role Conflict**

Danes and Olson (2003) examined work involvement of the wife and business tensions and their impact on the success of the family business. The study was based on telephone interviews from 391 business managers. They found a larger number of women than men who reported tensions when the wife worked in the business. Husbands reported these tensions in areas that included confusion over authority, unfair compensation, and unfair workload. Women reported a “lack of role clarity, confusion over authority, and unequal ownership, while their husbands reported that their wives were major decision makers in the business” (Danes & Olson, 2003, p. 65).

Hollander and Bukowitz (1990) identified two roles women have played which were: (1) the over-nurturer and (2) the invisible woman. They suggested that being in either of these roles for a long time could result in burnout. In addition, they anticipated that tremendous opportunities and challenges exist for women in family business. They perceived that family businesses are an extension of the culture and dynamics that may be gender related.

**Family Dynamics**

Poza and Mercer (2001) investigated the role of the spouse in family businesses through interviews with participants in a university family business program. At that time, wives performed mainly the accounting and finance function in their companies. Several leadership roles were mentioned by the spouses, including interpersonal relations, facilitators, and “trust catalysts,” as well as advisor and keeper of family values. The spouses noted over time a shift in roles to a “chief trust officer.” In another study, Davis and Harveston (1998) reported that the founder or founder’s wife remained in control of the family firm as long as possible.

In a study of 592 households that were involved in family businesses, Rowe and Hong (2000) examined the roles of women, reporting that women were working in the family business, managing the household, and working for others. They suggested that women be compensated appropriately and become involved in decision making in their family firms.

Haberman and Danes (2007) studied succession in two separate family situations: father-son and father-daughter. When analyzing the family business where there were women in the father-son business, the women felt excluded, and more conflict existed within the family business. In fact, fathers indicated that woman had little input in decision making. On the other hand, family members felt included in decision making with the father-daughter relationship. Moreover, the women felt an equal partnership with less conflict and more collaboration and integration with other family members.

**METHOD**

This study explores the challenges and success strategies of women in family firms using a qualitative case study approach. The research effort is descriptive in nature and based on personal
interviews conducted with women to discover their perceptions on many variables. Specifically, this study sought to (1) understand and describe the challenges that women family members face and (2) identify factors and approaches women used to meet such challenges.

Case Study Approach

According to Eisenhardt (1989), investigators may use the case study approach to focus on ‘how’ and ‘why’ questions and to purposively choose cases which may replicate or extend a theory. Also, researchers may examine critical cases to prove their major findings or confirm or disconfirm cases (Siggelkow, 2007). Researchers may also select cases that illustrate applicable concepts. Finally, qualitative research may be useful in generating new theory (Patton & Applebaum, 2003).

Interview Questionnaire Development

The questionnaire was carefully developed using open-ended questions to explore the categories of women’s challenges. The instrument was organized into the following sections: history and general information, challenges, family dynamics, leadership style, and others. Interviewing took place during 2015-2017.

Selection of Participants

Approximately 40 prospective firms were contacted to ascertain if the companies met the following requirements: (1) multi-generational family involvement, (2) a woman family member in the leadership (owner/manager) of the company, and (3) willingness to participate in the research project. Also, we reviewed many websites and other media sources to determine if there were women in the family firm. We interviewed the women and other family members and/or managers who had worked with them. This sample was designed to be representative of family businesses in various industrial classifications. Firms from diverse industries participated in the study. The number of employees in the respondent firms varied from 11 to 430 with a median of 43 employees. Table 1 shows demographic characteristics of the 18 companies according to industry, age, number of employees, and estimated annual sales volume.

The respondent businesses ranged in age from 30 years to 150 years, and generations of family participation was from two to four. The firms were located in two states, but several have expanded beyond the local region or own multiple, but related, businesses (see Table 1).

All respondents were advised of confidentiality. We received assistance in selecting respondents from local business leaders, chambers of commerce, university colleagues, friends, acquaintances, alumni, and students.
Data Collection

The research focus in this study was on established family firms, as opposed to start-up companies. The interview questions were open-ended questions concerning women’s challenges and methods of adapting and succeeding in leadership roles in the firm. The interviews were recorded individually with respondents at each family firm, totaling 18 participants, and then transcribed.

FINDINGS

Many women in family businesses have adapted to challenges and gained respect and success. Many overcame the “invisible woman” stereotype by proving themselves through learning all parts of the business along with hard work. Also, the respondent women met family business challenges through seeking outside support and assistance, such as trade associations. The respondent women remained true to the values of their family firms which were instilled by the founders, while also finding creative solutions to problems, even if that meant, in some

<table>
<thead>
<tr>
<th>Firm</th>
<th>Type of Industry</th>
<th>Age of Firm</th>
<th>No. of Employees</th>
<th>Estimated Sales ($Mil.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Bakery &amp; Café</td>
<td>31</td>
<td>15</td>
<td>$1</td>
</tr>
<tr>
<td>2</td>
<td>Boat (Retail Sales &amp;Repair)</td>
<td>42</td>
<td>16</td>
<td>$10</td>
</tr>
<tr>
<td>3</td>
<td>Convenience &amp; Gas Distribution</td>
<td>35</td>
<td>430</td>
<td>$429</td>
</tr>
<tr>
<td>4</td>
<td>Convenience &amp; Wholesale Fuel</td>
<td>46</td>
<td>208</td>
<td>$80</td>
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<tr>
<td>5</td>
<td>Direct Mail</td>
<td>77</td>
<td>85</td>
<td>$14</td>
</tr>
<tr>
<td>6</td>
<td>Engineering &amp; Gas</td>
<td>25</td>
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<td>7</td>
<td>Hardware &amp; Ranch</td>
<td>76</td>
<td>20</td>
<td>$4</td>
</tr>
<tr>
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<td>Health Care &amp; Shopping Center</td>
<td>30</td>
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<td>36</td>
<td>11</td>
<td>$1.5</td>
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<td>Insurance &amp; Funeral Services</td>
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<tr>
<td>11</td>
<td>Jewelry</td>
<td>39</td>
<td>11</td>
<td>$2.5</td>
</tr>
<tr>
<td>12</td>
<td>Lawn Service &amp; Restaurant</td>
<td>31</td>
<td>100</td>
<td>$6.1</td>
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<td>13</td>
<td>Paper &amp; Cleaning Materials</td>
<td>40</td>
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<td>43</td>
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<tr>
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<td>Refrigeration (Wholesale)</td>
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<td>119</td>
<td>$53</td>
</tr>
<tr>
<td>16</td>
<td>Seafood &amp; Steak Restaurant</td>
<td>68</td>
<td>50</td>
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<tr>
<td>17</td>
<td>Sign</td>
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<td>18</td>
<td>Tire (Retailer)</td>
<td>63</td>
<td>32</td>
<td>$8</td>
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</table>
instances, downsizing. For the women in our study, the authority for decisions was clearly defined and accepted. The women exhibited good communication skills, including listening. Finally, a common thread among the respondent women was they remained true to the family’s organizational culture based on the founder’s vision.

**Overcoming the Invisible Woman Image**

Some respondent women perceived that they were being stereotyped and discriminated against. They overcame this image by proving themselves to be competent managers, as well as by perseverance in the face of some resistance from male family members and employees. The respondent women indicated the importance of knowing the business, hard work, and proving oneself. Some of the comments were as follows:

- I had to prove my success. If you come in and work hard and learn all the jobs, you will be mobile throughout the company. The philosophy is work yourself up in the company—hard work is the important thing.
- Women have to overcome the fact that some men are resentful because you are a woman and telling them what to do.
- You have to prove yourself and that goes for anybody, not just a woman. I had to become comfortable with being the only woman in the room at times. I had to be a little bit better in order for people to listen to me. I also had the advantage of my father being ahead of me and being very well respected both within the industry and the community. I think that people, in general, were willing to give me a chance.

Several women mentioned the importance of a mentor who helped with overcoming being stereotyped. The mentor was a father or husband in most cases. Not only did the respondent women learn the business well, but they also became more assertive. Here are two statements:

- After my husband died, there were some that had resentment. That surprised us, but some employees treated me like I was a substitute teacher. When the teacher is away, the mice will play. At first, I did not get the same respect. I started to put down some firm policies that they did not like.
- Once I understood the opportunity and saw that this was something that I could do, then my father became very supportive and wanted to pay for me to travel, learn, and understand. He definitely was a good mentor.

**Utilizing Assistance and Networking**

The respondent women stated that they received assistance and guidance from their trade associations. In fact, many respondents were quite active and held offices in these organizations. The following comments illustrate the details of their involvement.

- I am the vice president of our state trade association this year and will be president next year. Because I worked for the association for three years and have grown up going to the conventions and have worked with our company for over 10 years, I have a certain amount of credibility and recognition.
• We have been members of an association for 75 years, and I have been going to the annual meetings for quite a while. It is by invitation only and they only allow one business in a certain area or radius.

• The national pest management association is very supportive. My peers recognized me, because I was president of our national pest management association three years ago. There are currently no other women on the executive committee, but there are a few on the board of directors.

• I was tapped to lead our association, because I tend to ask the right questions and ask hard questions. Apparently, I raised questions during the board meetings that people had talked about after the board meetings, but not in the meetings.

Furthermore, women were involved in networking and securing information from consultants. When they needed training, they found information in conferences and other organizations. Two examples are shown below:

• We have some books from the Family Business Consulting group and get their newsletter. I needed a lot of training in the industry, and I had to travel to conferences and learn.

• We got involved with The 20 Group. We meet with 20 other tire people across the U.S. and come together at the different dealerships and go by a model. We get great ideas from each other.

**Communication and Management Skills**

The women respondents tended to have good communication skills and were able to motivate workers. Generally, the women tended to be participative leaders and showed concern for their employees. Comments were:

• Every employee would tell you that they are confident to ask for forgiveness rather than permission. They have the confidence to make decisions and go ahead. We know that it was in the customer’s best interest and thought it was the right decision.

• I am much more collaborative in my approach than my dad. I have a lot more structure than my younger brother. My approach is to create as much clarity as possible. I am comfortable with the gray as necessary. I have been told that I communicate and follow up well.

• I care about every employee that works for us from the one who mows lawns to the ones who wash dishes, but they have to do the job. There has to be accountability.

• Leadership to me is all about inspiring people to want to excel and excelling yourself. Doing well yourself is a way to inspire people and making sure that the ones underneath you have the tools to learn and grow.

• I think that women are better at listening, but they can be taken advantage of. The older employees who had not been with the restaurant very long may have had more trouble with me because of my young age. I also worked very hard, and they saw that and respected it.
Adapting to Situations

On an individual level, many of the women respondents were able to multitask and achieve competence in an area of specialization in their family firms. On the firm level, several respondents did not try to expand their business, but kept the family business small and did what their company did best. This is illustrated below:

- We are flexible. You can turn things on a dime. You can make a decision to change something, and it can be changed tomorrow and be implemented immediately.
- We sold our commercial wholesale business and decided to focus on retail, but we do sell wholesale fuel.
- Bigger is not always better. The tire business has changed with big chains. You can’t stock all the tires. Customers know when they come in we will have them the next day.
- I wanted my husband to downsize, but he just had not gotten to the point where he could accept that. At that time, we did not see the big picture.

Several respondents were innovative and made changes in policies and procedures, while adapting to technological changes. In other words, they were entrepreneurial in nature.

- We are becoming a web-based company. The industry will fall behind if we don’t focus on that. Since the launch of our website, we are the most progressive industrial distributor in our segment. People in our industry are only investing in B to B ecommerce, and we are making our website easy and friendly.
- I brought in some tea party things--finger sandwiches and cookies...an expansion on what we already had. Also, we did catering for parties and we developed themes. The theme might be Chinese or African or French. I researched recipes that would go with the themes. We tweaked it to make food that people would want to eat. There is a lot of opportunity for creativity in the kitchen.

Clarity of Authority and Decision Making

Decision making and authority tended to be well defined among the responding companies. In many instances, the functions were separate and each person had authority clarified. Here are some examples:

- My mother did a lot of the financial things--taxes, bills, and licenses. I did more of the operations. I made schedules and dealt with customers. I preferred to be in the front, and she preferred to be in the back. My sister also preferred to work in the back.
- I do finance and accounting decisions, and my husband does marketing and sales. We say: ‘My side of the street, your side of the street, and retreat to battlegrounds.’
- My father has been a good mentor--very patient and very encouraging, letting me make some of my own mistakes within reason. There was a point I wanted
to make a personnel decision. My dad went along with my choice, and it ended up being the right decision.

- I ask ‘What are we really trying to accomplish here.’ I do it with a margin of error, look at how it was done in the past, and pull in the history. We never say, ‘I would never do it this away.’
- We don’t always agree with each other and we value that. We are trying to learn as co-CEOs because we all have such different experiences, interests, and natural strengths and weaknesses. We find this to be complementary.
- The better I got at what we were doing, the more my mother stepped back and let me be in charge. Even though I was just 25 years old, there were things about the business that I knew more about. She was more in the business side of it. She was not comfortable with ordering food. I learned that from my dad.

In some cases, the male family business owner made the final decision, and this was understood and accepted by the women respondents. Several women perceived that because the male founded the business, he should make the final decision on important matters.

- My husband was always the leader, but I am very strong willed, too. I think that I hold people to be accountable for what they are supposed to do. Men do that, but women are a little stronger in certain areas.
- There can only be one boss and my husband wins. He started the store. Sometimes, we plead our case and after a while he will see our point, but I defer to him because he started the business. If he is out, my daughter and I will make the decisions, but he is in charge. My daughter does everything and makes a lot of decisions, but the employees always go to my husband.

**Remain True to Family Values**

The respondent women focused on family values, most of which were part of the organizational culture created by the founder. Among the values that were frequently cited were honesty, concern for the employees, and excellent customer service.

- We have our 12 points of our culture hanging in our office. The first is respect for fellow employees and customers. As we have grown, we have tried to convey a sense of family to everybody in the business. That is one thing that we feel proud of when we bring on new people.
- We care about the customer. We want them to be happy; we will go out of our way. We are very much for the community. We want to improve ourselves and educate ourselves, and we are very loyal. Even though we might not always agree on certain decisions as a family, we come to a conclusion and a compromise as to what we should do. I think it works because as a family unit we have respect for each other.
- Honesty and integrity and caring about people and treating people the way we would want to be treated are important. We believe in customer service.
• When you have a problem, we are there. You get what you pay for. We have 24-hour service. I do whatever needs to be done. That means a lot to customers.
• We want customers to know that they are important, whether they have $30 or $30,000 to spend. We have had customers put $30 on layaway and pay it out $5 per week. We want everyone to feel comfortable and not intimidated.
• Treat all your customers the same, no matter what. Do not cheat your customers. We always used to say that we made good homemade food for a fair price. Treat your employees well. Do not serve anything that you think is sub-par. Care for your community.
• We treat our employees like they are family. Our culture is something we really don’t have to work at. Employees are intimately involved. My door is always open. We are a Christian family.
• We used to be much smaller, and, as we have grown, we have tried to convey a sense of family to everybody in the business.

DISCUSSION

In this study, we focused on exploring success factors for women in family firms and found a variety of positive factors which contribute to success. Figure 1 below shows six factors which we believe have a positive effect on the family business organization. Women in family firms have adapted to challenges and gained respect from other family members and employees.

Our research shows that women have overcome negative stereotypes by proving themselves, learning all parts of the business, and hard work. Also, the women respondents met family firm challenges through seeking outside support and assistance, such as trade associations. An important success factor for our respondents was remaining true to the original values of the founders of the business, but adapting creatively, as needed, to make changes. The authority for decisions was clearly defined, and the respondent women exhibited good communication skills, including listening. Finally, a shared concept among the respondents was that they held fast to the family’s organizational culture based on the founder’s vision.

This study suggests that women have particular strengths and assets which may be valuable to the family firm. Our interview data shows that women owners have progressed into leadership positions in their family firms while remaining true to their family’s values, including honesty in all situations, superior customer service, and treating employees like family. Therefore, this study contributes to the literature regarding women in family businesses by signaling that women are making positive advances into leadership positions in family firms. Although women are gaining acceptance from their male counterparts, more progress is needed.
LIMITATIONS AND FUTURE RESEARCH

Although this study provides interesting insights into the challenges of women in family firms, limitations do exist. We recognize limitations concerning sample size as is common in qualitative studies. Further, our respondents came from only two states. Therefore, there may be limitations concerning cultural differences within the U.S., as well as in comparison to other countries. We especially recognize that in more male-dominated societies, such as those in the Middle East and Far East, that our findings may have less relevance. However, our sample was diverse in regard to industry, size, and sales volume for the respondent companies.

Opportunities for future research exist in analyzing how women meet specific challenges according to family dynamics; i.e., mother-daughter, brother-sister, and others. Additionally, since the research was designed to be exploratory in nature and was broad-based in scope, future research efforts using surveys with large sample sizes may be appropriate. As a final point, future research could analyze the relationship between women who have recently become the successor of the firm in comparison to women who have worked in family firm leadership for many years. The results of this study are particularly important to family business research in identifying the unique factors women have used to meet challenges.

REFERENCES


A CLASSIC AMERICAN DEPARTMENT STORE’S RESURGENCE TO GLORY: USING SOCIAL MEDIA AND ONLINE ADVERTISING STRATEGIES TO GENERATE REVENUE

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ABSTRACT

The triumph of social networking sites such as Facebook, Twitter, Snapchat and YouTube over the past decade has greatly impacted America’s social fabric and how business is conducted in America. With the information age maturing, and consumers increasingly being connected to online devices, department stores and other retailers must consider creative ways to engage their target market. Retailers have been quick to adopt technology for operations and utilize their websites for ecommerce through social media and online advertisement strategies to generate revenue. This paper analyzes and evaluates JCPenney’s implementation and outcomes of social media and online advertising strategies that improve customer engagement and revenue. This study presents a model for other department retail stores to follow when determining methods to engage their target customers online and generate revenue.

INTRODUCTION

Retail Industry Background

The department retail store in America has changed dramatically over the last few years. The impact of the Great Recession of 2008 coupled with the maturing of the internet has mortally mangled many retail icons and has deeply damaged their surviving counterparts. These changes have directly impacted the landscape of how department stores identify their target market, reach their customer and generate revenue.
The competitive American retail department store chain industry’s playing field requires companies to have a strong brand, pocketbook opening deals, and quality products. J. C. Penney Company, Inc. (JCPenney) was on the forefront as the rise of the department store transpired during the 20th century (Whitaker, 2006). During this period, department stores erected in metropolitan downtowns across America as these areas were the central hub for commerce and leisure activity. The retail department stores benefited greatly from the emerging middle-class. The culture of consumption and everyday fashion was fueled by marketing techniques that, for example, displayed women accompanied by friends or enjoying the shopping experience alone (Whitaker, 2006). After World War II, the American economy and values shifted from urban and overcrowded cities to the American Dream of white-picket fence and a cozy residence in the suburbs. The expansion of the American suburb introduced vibrant, spacious shopping malls that were traditionally anchored by big chain department stores. The shopping malls were deemed as conveniently located near your neighborhood and bustling, as they offered many stores under one roof. JCPenney experienced significant growth and success where the department store made several acquisitions, which included discount merchandising, pharmacy retailers, and food retailers. It also expanded into emerging markets and peaked to 2,053 stores in 1973. Over the next several years following the 1974 recession, JCPenney was forced to cut ties with international stores and unprofitable business units, such as supermarkets and discount stores; they also closed their hardware and automotive departments. The suburban landscape started to erode in the late 1990s and early 2000s as the social fabric and consumption habits were closely tied to the cultural paradigm shift associated with the Information Age (Vance, 2012). As a result, JCPenney launched its e-commerce store in 1998 but was forced to close over 40 under-performing stores as they entered the 21st century and celebrated 100 years as a retailer.

Upscale retailer Macy’s leads in department store retail sales, followed by Kohl’s, who in 2013 surpassed JCPenney as America’s largest department store chain by number of stores. In addition to competing with department retail stores, JCPenney has found itself competing against the largest brick-and-mortar U.S. retailer Wal-Mart Stores Inc. and the online retailer Amazon.com, Inc., who in the summer of 2015 surpassed Wal-Mart as the world’s most valuable retailer (Li 2015).

Social media has developed exponentially over the course of the last 10 years as technology has continued to advance. Although sites such as Facebook.com, Twitter.com, Snapchat.com, and Youtube.com, launched since in the mid-2000’s, have set the bar for Social Network Sites (SNSs) today, the first social networking site SixDegrees.com existed nearly a decade before. According to Boyd and Ellison, (2015), more individuals having access to broadband internet along with the accessibility of digital photography and digital cameras has made it easier for users to connect and engage socially online. These authors define social networks sites, also referred to as social networks or social media, as “Web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.” Today, Facebook and YouTube boast over 1 billion monthly active users worldwide according to the respective companies’ websites. In addition, the micro-blogging site Twitter has over 300 million active users, and high-profile companies have ridden the twitter wave
At least one study states that Americans check their Facebook, Twitter, and other social media accounts via their mobile phones around 17 times per day (Chang, 2015). The most active usage was reported amongst individuals between the ages of 25 and 54. In 2015, America’s annual e-retail sales crossed $300 billion (Enright, 2015). With social and behavior patterns altering to an actively online one, department retail stores must pivot to engage their customers where they spend their time.

An effort to capture individuals online started in 1993 when Global Network Navigator sold a clickable ad to Heller Ehrman White & McAuliffe, LLP, a San Francisco based law firm. The clickable ad eventually was labeled as ‘banner ads’ the next year by the staff at Hotwired, the first commercial web magazine, and was used as a way to pay the site. Online advertising has emerged as a staple in a business marketing mix to reach and deliver messages to a targeted market. Social networking sites have provided an even deeper demographic and geographic breakdown of the targeted market for potential advertisers. For example, on social media sites a company may advertise to a specific interest, marital status, gender, and targeted words all in the same effort. By leveraging social media’s real time results, advertisers are able to measure and adjust their online advertising campaigns based on engagement and conversions – which gives online advertisements an edge over television and print ads.

**Company’s Business**

J. C. Penney, commonly written as JCPenney, is a 113 year old department retail store chain that operates over 1,000 stores in 49 states, including Puerto Rico. JCPenney is a leading retailer that sells family apparel and footwear, cosmetics, electronics, furniture, products for the home, fine and fashion jewelry, in addition to services, including styling salon, optical, portrait photography, and custom decorating. James Cash Penney incorporated J.C. Penney Company in 1913 with his co-founder William Henry McManus after a consolidation of his previous dry-goods companies named Golden Rule founded in 1902. The company once employed Sam Walton, founder of Wal-Mart Stores Inc., at its Des Moines, Iowa location in 1940. JCPenney has been headquartered in Salt Lake City, Utah; New York City, New York; it is currently headquartered in Plano, Texas and has 114,000 full time employees. JCPenney retailer web site was launched in 1998. The company has a global ecommerce partnership with Borderfree that allows it to deliver online sales to over 80 countries. JCPenney Company, Inc. is a holding company whose principal operating subsidiary is JCPenney Corporation, Inc. recorded revenues of $12,257 million during the fiscal year ended January 2015, an increase of 0.97% over 2014. The operating profit of the company was $-308 million during fiscal year 2015, an increase of 4.61% over 2014. The net profit was $771 million in fiscal year 2015, an increase of 1.80% over 2014 (Yahoo Finance, 2015). In 2016, JCPenney had revenues of $12.6 billion. This present case study focuses on JCPenny’s efforts using social media during 2015 leading to 2016.

**Challenges And Motivating Factors**

JCPenney has been in a tailspin in the last 5 years, facing intense competition from brick-and-mortar companies such as Macy’s, Kohl’s, and Sears; in addition to online juggernaut
Amazon. Prior to the great recession, the stock peaked at a few dollars shy of $90 per share in 2007 (Yahoo Finance, 2015). After a slight rebound in 2012, the company's stock has remained below $20 a share since 2013. The NYSE ticker JCP has not closed above double digits since the 3rd quarter of 2014 (3Q2014). As a result they have had to continue to close underperforming stores, lay off over 2,000 employees, and liquidate toxic assets such The Foundry Big & Tall Supply Co. The lack of stability in leadership has also proved to be detrimental the company’s vision and strategy. Over the last 5 years, JCPenney has seen the Chief Executive Office change leadership 4 times and the company was dropped from the S&P 500 as market value diminished (Rothwell, 2013). JCPenney has to find a way to think “outside-of-the-box” to curtail the gravely forecast by merging an agile social media and online advertising strategy with a strong in-store, customer-centric plan. According to the U.S. Commerce Department, in 2014 U.S. e-retail sales surpassed $300 billion for the first time. The solidification of internet accessibility in the information age puts traditional mall goers on social networks to interact with friends and family anytime, anywhere. Consumers expect an intimate, informed, personal in-store experience similar to the response, availability, and service they are accustom to receiving online (KPMG, 2015). JCPenney must be able to be more creative with their social media and online advertisement strategy. In the process, it would require the ability to establish an intimate connection with their customers and address their reluctance or concerns with the brand.

JCPenney has the challenge to remain relevant, and build one-on-one relationships with an ever changing consumer whose new convenience is to click “buy” from their mobile phone and the item arrive the same day. This case will attempt to address the following questions regarding JCPenney:

- How can JCPenney use social media and online advertisement to create synergy around its brand in the 21st century? Specifically, how can management revitalize the brand to attract a new generation of consumers that become advocates?
- How can JCPenney leverage social media and online advertisement to understand the profile of, and cater its’ services and products to their target market?
- How can JCPenney utilize social media and online advertisement to generate revenue and reduce costs? In other words, how can JCPenney become more efficient and effective by implementing an aggressive online strategy?

IMPETUS OF THE CASE STUDY

The days of behemoth department stores dominating the retail industry without an online engagement strategy are over. Consumers have incorporated social media as a part of their daily life. They post photos of their happenings, interact with friends and family, and are well-informed and mobile. They are confident shopping online, and have the opportunity to bargain shop for the best available price and see product reviews immediately. In addition, consumers have a platform for communicating directly with the company and the public about service and an experience. The paradigm shift fueled by technology has created an empowered and activist customer, who has the strength to make or break a brand. To remain relevant, department retail
stores must respond with innovation, seamless integration between in-store and online, and the ability to adjust on the fly. These tactics should be based on synergy-driven, customer-centric product and service model that engages the customer with the necessary tools to be your biggest fan where they are.

**STRATEGY AND SOLUTION**

*Strategic Changes*

The company invited Mike Ullman back as CEO and regained their sales and customers on right track. As to marketing, they employed old marketing strategies and all kinds of social media to facilitate their resurge.

Regarding utilization of social media, we did research on three main platforms. Twitter.com, Facebook.com and YouTube.com. Since joining the Facebook community in 2010, the company believes even in its 2014 annual summary, that significant opportunities for incremental sales growth exists in the omnichannel initiative to attract digitally savvy customers (Morissey, 2014).

JCPenney used twitter’s native video functionality to launch an U.S. holiday shopping season social experiment campaign event to generate engagement and to increase brand awareness. The social experiment was centered on giving and was promoted to specific Twitter users during the holiday season. In addition, Twitter campaign was found to be far more effective than the one on Facebook (Slaone, 2015).

*Profile of Target Consumers*

JCPenney began thinking about their social media strategy when the environment was changing and technology allowed faster communication and sharing. Department stores offered experiences to families who were out shopping together but with busier lifestyles and new technology, and online shopping became more favored over spending hours shopping in a store. JCPenney had to think out of the box to continue to grow its market share in men’s, women’s and kid’s apparel.

*Implementation*

**Twitter.com Facilitates the Operations of JC Penney.**

JCPenney filmed real customers at their stores to help facilitate their objectives of giving by allowing their customers to perform a generous gift to any customer in the store. By using the hash tag #JustGotJingled along with their promoted video, the campaign went viral (Rodriguez, 2014). They had two tweet campaigns: “We dare your heart not to grow three sizes while you watch this. #JustGotJingled” and “When you give, you grow. #JustGotJingled”. Watching the human experience to give inspired and motivated viewers to share and join in the holiday giving mood. One user (@StefunnyStyles) joined the movement and partook by performing random acts
of kindness, recording the event, and tweeted about it, “Took the #JustGotJingled challenge with @mrjacobkemp! #spreadkindess #poweredbyJCP http://www.whosay.com/l/lif9TQh.” Sean Ryan, JCPenney’s Director of Social and Digital Content, stated that on Twitter’s Success Stories that ‘One user alone who posted our video had more than 47K Retweets’ (Cude, 2015). The twitter online advertising campaign produced more views of the video than YouTube.

The nature of twitter also allows companies such as JCPenney to create organic social media campaigns that do not involve directly paying for advertisement on the targeted platform. This was evident during the 2014 Super Bowl when JCPenney cleverly created a Twitter campaign to promote their brand, and even get some sales with their #TweetingWithMittens idea (Molina, 2014). Twitter is often described as ‘second screen entertainment’ during special televised events as a way for viewers to connect and provide commentary. The Super Bowl is one of the World’s most watched events and total advertisement spending during the 2017 televised event was around $370 million (Vranica, 2017). This activity gave JCPenney an opportunity to be creative, and the result was a campaign that delivered two tweets, with the first being ‘Who kkmew theis was ghiong tob e a baweball ghamle. #lowsscorinh 5_0’ followed by ‘Touchdown Seadawks!! Is Seattle going to run away with this?’ The strategy was around drawing attention while the Super Bowl was being played in the New Jersey at the Meadowland Stadium and as a way to gain attention and promote their Team USA branded mittens for the Sochi Olympics. Although they had more tweets scheduled, the fiasco generated over 20,000 retweets and 10,000 likes in addition to some concern over the account handler. They received replies from other companies such as Kia, Snickers, and Coors Light displaying consideration of the individual responsible for the company’s Twitter account. But the attention was the goal of the campaign, Ryan stated, ‘Our #TweetingWithMittens Tweets got more RTs than anything we have ever done on Twitter. And thousands of new followers, plus major news media coverage. Our week-over-week mittens sales also doubled in the week following the game!’ (Cude, 2015).

In the case of spontaneous social media engagement on twitter, JCPenney was able to Wittily respond to a tweet by a Twitter User (@GeorgeFoster72) which made reference to Billboard Topping Single Hotline Bling by Grammy Award and Juno Award winning artist Drake. The Twitter user created a meme, which noted that the artist was wearing ‘90’s Catalog swagger’ the tweet received nearly a 1,000 retweets and likes. In response, JCPenney tweeted ‘It's never too late. You can call us on our cell phone, @Drake. 1-800-JCPBLING’ which received over 7500 retweets and over 4,000 likes. Twitter offers such engagement, to promote a company’s brand, relevancy to pop culture, and immediate interaction with a community of over 300 million active users around the world. This move also allows JCPenney to promote offers and seasonal products by having an actively managed twitter account. The offers are crafted to coincide with other marketing campaigns, such as a Veteran’s Day sale, or be a one-off in response to a trending topic.

**YouTube Helps in Gaining Customers**

YouTube is a subsidiary of Google, founded by Steve Chen, Chad Hurley and Jawed Karim in San Bruno, California in 2005. YouTube is known as a video-sharing platform for individuals
or business entities. More and more retail companies take advantage of YouTube’s advertisements to market their merchandise, since it has a large population of viewers.

Both individuals and large companies use YouTube to connect to their viewers. YouTube has partnerships with millions of companies, who provide an advertising fee to YouTube. Since YouTube has a significant social impact, J.C. Penney began to market its stores on YouTube in 2006, remarkably year after YouTube was founded.

“Advertisers are noticing a difference. YouTube is "definitely being more creative," said Nick Bomersbach, vice president of e-commerce for JCPenney Co. JCPenney post a large number of advertisements on YouTube, particularly to market their new clothing and seasonal sales.

J.C. Penney not only partners with YouTube, but also partners with YouTube users. That is another way to gain its audience and customers. There was a trend that teenagers show off new clothes, shoes or bags on YouTube in 2010. These teenagers were called "Vloggers". They have millions of viewers and followers. Some retail stores pays them to create video content about their merchandise. J.C. Penney also attempted this marketing tool. Therefore, the store hired six girls to “create back-to-school videos in exchange for gift cards from $250 to $1,000, according to a report by USA Today” (Ferran, 2010). At the time, the management of J.C. Penney had confidence in these “Vloggers”. "It's one of the most innovative things we're doing this fall," Mike Boylson, chief marketing officer at J.C. Penney, told USA Today. "All of these haulers have followers and friends. That's how you start the ball rolling" (Ferran, 2010).

YouTube ads also help boost reach and brand engagement rates. YouTube’s TrueView ads across the Google Display Network reach a broad audience. TrueView ads allow viewers to skip a commercial on YouTube or watch it in its entirety. This feels less intrusive, and at the same time allows a brand to be promoted in the first few seconds of the ad, if the viewer does not wish to watch the entire commercial. To this end, J.C. Penney posted holiday commercials, men’s store commercials, new clothing debuts, etc. One YouTube commercial called “Beware of the Doghouse” has been seen 65,204 times. It was uploaded for Christmas since January 7, 2009, and is still running to this date with recent comments from users in the past few months. Some viewers commented that it never gets old. With so many views and likes, this commercial has connected well with viewers and helped promote J.C. Penney. This manifests to the power and reach of Youtube in branding. JCPenney is making a far greater thrust via YouTube to promote its new clothing line from professional skateboarder Ryan Sheckler, which was more successful in directing traffic to the retailer’s web site than prior efforts.

**Facebook.com Engages JC Penney Customers**

When JCPenney made its presence on social media, it strategized with customer-friendly events to engage customers in conversation. JCPenney joined Facebook in 2010 and hoped to promote its “Care, Share, & Win” campaign, in which it allowed its fans to select the next organization to receive $1 million in scholarships and grants. This ignited a flurry of status posts, likes, and comments, engaging customers and creating an organic promotion using social media. Facebook facilitates this interaction directly with customers. There is also a “Message Now” section to connect further with customers, and be more responsive and attentive to their needs, as well as create a gateway to promote merchandise and special deals.
Facebook integrates graphics, video, customer comments and reviews, customer service, instant messaging, etc. It can be more informative than Twitter and YouTube are. Hence, Facebook can engage customers with richer content and increase JCPenney’s brand awareness.

RESULTS

JCPenney was highly successful with its Facebook page, currently has over 5.1 million likes (Facebook.com, 2015, 2017). An Instagram account is linked with the Facebook page to share images of products, ensembles on models, and events. JCPenney blogs from the company’s website are shared on the Facebook page as well. Targeting the Hispanic market led JCPenney to create a JCPenney Latino Facebook page. Within a year, the Latino page had 330,000 followers. JCPenney reached fans by paying them, and Facebook is a paid medium. JCPenney stopped paying for fans around 2013, but Facebook continues displaying JCPenney ads and coupons.

On JCPenney’s YouTube channel, there are almost 15,000 subscribers and 14,248,929 views. One of the most popular videos is a one minute thirty-four seconds video clip named #MyStyleStory, already seen by over 252,336 viewers. Other popular videos are uploaded to promote various merchandise and marketing campaigns.

JCPenney has made an increased emphasis on Twitter. JCPenney’s Director of Social and Mobile Media, Sean Ryan confirmed the desire for a “free medium” and running marketing campaigns more organically (Cude, 2015). However, YouTube cannot reach as many users as Facebook.

LESSONS LEARNT

With over one hundred years in the retail industry, serving customers of all different backgrounds and economic classes, JCPenney has weathered through ups and downs (Blakey 2000; Hix, L. 2014; PR Newswire, 2011; Kezar 2015; Mackey, J., O'Reily, S., Shen, V., & Fool, M., 2015; McIntyre & Hess, 2015), and despite recent struggles as of December 2016, it is still one of the largest retailers in the United States. This success could not have been attained without learning a few lessons along the way that include understanding the company brands and the customer relationships with the company, as well as the growth and capabilities that technology can contribute to JC Penney’s revenue strategies. The following lessons learned take into consideration the social media platform that has grown over the past ten years.

Using Social Media To Expand Traditional Revenue Strategies

According to JC Penney’s 2016 US Securities and Exchange Commission annual report, the company is operating 5,311 stores in the United States and Puerto Rico. The company relies on print ads and sales promotions to develop store traffic, a website and catalog to develop online shopping. Since 2006, it has introduced social marketing to reach the target market of technologically savvy consumers. In order to introduce social marketing to a company that has traditionally reached out to its customers using the same strategies for over a century, JCPenney’s Director of Social and Mobile Media, Sean Ryan had some advice to make this transition, “Know
your brand, how your brand is perceived, your audience, and what platform you’re talking to them on” (Cude, 2015).

**Identifying New and Growing Consumer Markets through Social Media**

JCPenney’s customer base has been professionals and families living in large and medium size cities that shop for apparel and home goods. The brands and products have been reputable for decades with generations of loyal customers, bringing their own families for the shopping experience. Catalogs reached out to the consumer that was too far to shop in a store, and when the internet became available for retailing, JCPenney was one of the first companies to offer online shopping. However, when Dot.Com and Generation Y became the force of new consumers, the ability to reach the “now” generation was to make a presence in their social networks. The younger group of consumers stayed online for work, play and to interact and communicate with friends. Their shopping experience is limited to minutes versus the hour plus of shopping adventures that older generations enjoyed. Sharing is important with this segment to recommend products, services or events with their friends (Mahfouz, 2005). JCPenney has learned to interact with tweens, teens and college-age students by offering social media marketing through videos, blogs and events.

**Developing Diverse Strategies for Consumer Interaction**

When JCPenney made its presence on social media, they strategized with customer friendly events to engage customers. Starting with JCPenney’s “Care, Share, & Win” Facebook campaign, in which users selected charities to receive $1 million in scholarships and grants, JCPenney continued with after school care and programs and has donated millions of dollars since 1999 through its signature charity JCPenney Afterschool. Fans can connect with a business and engage in a conversation if it is for a good cause or an example of an act of kindness. For example, during one of JCPenney’s holiday campaigns “Just Got Jingled” on Twitter, customers shopping at JCPenney received surprise gifts from complete strangers. This campaign went viral and was very successful. On YouTube, JCPenney sponsored teenagers to help market back-to-school merchandise by hiring six students to create videos talking about and rating merchandise purchased at JCPenney with free gift cards, provided by the company.

**Adapting to Changes in Consumer Buying Habits and Emotions**

Understanding the consumers’ search and purchase patterns, and how their time is spent are important factors in getting their attention and loyalty. Accessing the same technology that consumers are using for passing time and creating captive content benefit the companies by attracting more online traffic and shopping via e-commerce and m-commerce. Social marketing has also proven to increase foot traffic in the stores. One example was the in-store JCPenney optical centers promotion to advertise to new customers, specifically women and mothers, to cater their specific vision needs, choices, and styles. Consumers have busier lifestyles, and it has not gone unnoticed by the Director of Digital Strategy for U.S. Vision, Jeffrey Pierson. U.S. Vision
operates the in-store optical centers located in select JCPenney stores. Jeffrey Pierson stated, “With limited time to make an impact, we wanted to make sure we were using the most engaging ad formats to make a lasting impression.” Furthermore, the store sought for a strong mobile presence to locate stores for customers on the go. Opening the customer experience into the mobile market provides a new method of engagement in brand identity and experience (Google, 2014).

Consumer emotions are intensified over social media which is a viable platform to connect with others without the awkwardness of face-to-face interactions. Online, digital or virtual interactions are easier to handle without the commitment and effort required for a personal connection (Margalit, 2015).

Positioning JCPenney for Future Technology Adoption

Before JCPenney joined social media in 2006, Nielsen Net Ratings ranked JCPenney.com as the top apparel retailer in 2000. It was identified as a national “three-tailer” because of its current place in brick-and-mortar stores, catalog operations and internet presence, JCPenney’s e-commerce strategy created a multi-channel shopping experience for its customers. This was achieved by setting up the technology in the 1990s and forming the JCP Internet Commerce Solutions, Inc., a wholly owned subsidiary of JCPenney (Blakely, 2000).

JCPenney developed an omnichannel approach when social media made it possible for m-commerce to take place on smartphones, tablets and other mobile devices (Ellison, M.R., 2015). Nielsen in its report about Millennials or Gen Y in 2015 grouped millennials in categories from “total” to “upscale”. JCPenney is listed in both of the categories of the top 10 retailers shopped, placing seventh in overall total millennials and placing ninth for upscale millennials (Neilsen, 2015). This shows that JCPenney is on the right track to stay relevant in the target market segment of young consumers. Within this segment, 92% own a smartphone, and 27% of all millennials and 24% of upscale millennials connect with brands via social media.

JCPenney’s Director of Social and Mobile Media, Sean Ryan, is at the forefront of keeping JCPenney a relevant and conversational topic in real-time social marketing. The company continues to invest more in digital advertising to stay innovative and creative to prepare for the next generation of consumers, known as “Gen Z,” “iGen,” or “Centennials,” who are born in 1996 and later, who love to combine their technology with shopping, just like Millennials do.

CONCLUSION

JCPenney has been successful in increasing revenue when utilizing social media strategies for marketing, outreach and online sales. In the three social media platforms discussed in this case study, consumers are checking in daily and interacting with the potential 302 million active users on Twitter, 1.44 billion users on Facebook, and billions of viewers on YouTube by tweeting, sharing, posting, and viewing videos online and on mobile devices in the palm of their hands. JCPenney has utilized these channels to increase sales, augment web traffic, gain new consumers and provide faster customer service. Creating a captive advertising campaign, strengthening its brands and introducing new brands for the changing face of the consumer will keep JCPenney in
business for many more years and be prepared for the recent challenges for brick-and-mortar stores.

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SHATTERED GLASS AND CREAKY STEPS: REMODELING THE GLASS CEILING AND GLASS ESCALATOR THEORIES USING AN INTERSECTIONAL TOOLBOX

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ABSTRACT

For decades, the Glass Ceiling has been the descriptor of the invisible barrier keeping women out of executive positions in American businesses. While exploring the reality of this ceiling, researchers discovered that men quickly rise to the top even in occupations dominated by women; this phenomenon is called the Glass Escalator. While the facts show an inequity between men and women, current research in intersectionality is showing that not all women have the same experiences under the Glass Ceiling nor do all men ride the Glass Escalator. This research along with changing business models is calling into question the relevance of the traditional tenets of these theories. This study will evaluate the merits of both theories historically. Then it will discuss the role intersectionality plays in drawing out distinctions of ethnicity, class, and gender to remodel each theory.

INTRODUCTION

The historical narrative of the United States is replete with examples of revolution—peaceful and otherwise—as the disadvantaged pursue equality. Gender fairness is rarely only about gender but is instead multiple attributes intersecting gender which may bring about different discriminatory experiences. For example, a white well-educated man from a wealthy family cannot be compared equitably with a poor white man with an average education. While neither individual is guaranteed success, one still has intersecting variables that provide more advantages. The purpose of this paper is to review the current longitudinal research into gender inequality in the workplace and explore tangible solutions to help organizations avoid the current obstacles impacting the disadvantaged. This paper will review a brief gender equality history, describe the Glass Ceiling and Glass Escalator theories that have dominated gender studies and finally remodel these approaches by using Intersectional Analysis. Finally, it will offer three solutions that can be put into place to foster a fair workplace.

LITERATURE REVIEW

the other women in the organization. Bednar & Gicheva (2014) study the effects of female athletic directors and whether they create a more female-friendly environment.

Wingfield (2009) explores the different experiences men have working in female dominated occupations and how their experiences differ based on race to see if a glass escalator exists. Smith (2012) challenges both the glass ceiling and glass escalator theories to see how they hold up for each race when comparing wages, employee benefits and supervisory responsibilities. Williams (2013) revisits her original glass escalator theory and finds that a flaw lies in its narrow approach and introduces new intersectional concepts to approaching the theory.

Branch & Scherer (2013) provide reasons for using intersectionality as an approach to understanding poverty especially among minority populations. Penner & Saperstein (2013) explore racial perceptions and stereotypes and how divorcing these perceptions from gender studies is a mistake lending further support for intersectional analysis when studying gender inequality. Turco (2010) studies the token status of women versus black men in the leverage buyout industry and the advantage black men have over white women. Mintz & Krymkowski (2010) explore changes in workplace authority over time using an intersectional approach.

Wilson (2012) studies women’s mobility to supervisory roles and if there are differences by race. Bhatt (2013) explores the discrimination female, Indian physicians experience in American medicine as compared to other groups. Morales (2009) provides a unique look into Latino/a Co-Ethnic jobsites and the gender and racial discrimination based on immigrant status and skin tone. Rojas-Garcia (2013) also explores Latino/a experiences as first-generation immigrants who were brought to the United States by their parents, are highly educated but experience a glass ceiling based on legal status. McDonald, Lin & Ao (2009) study the impact that informal job leads have in discriminating against groups who are not in the right employee networks.

Williams, Muller & Kilanski (2012) describe the attributes of the new economy and its focus on leaner organizations, self-directed work teams and career maps and their discriminating attributes. Singh & Selvarajan (2012) explore the benefits of organizational diversity programs and an employee’s intent to stay with the firm.

HISTORICAL CONTEXT

The United States has a rich history of the oppressed taking advantage of freedom and demanding justice. The Women’s Movement officially began in Seneca Falls, New York in 1848 which officially outlined the grievances of the American female (Aiken, Salmon & Hanges 2013). While any declaration or grievance does not necessarily paint a broad brush in describing every member’s experience it did make the grievances official. This movement was followed by the formation of the Women’s Trade Union League in 1903, which demanded better working conditions for women with the purpose of protecting a woman’s ability to bear children (Aiken, Salmon & Hanges 2013).

After World War II major changes took place in American businesses. As men emptied the factories and went off to war in large numbers, the scope and scale of the war effort demanded that production continue and who better to fill the role than millions of capable women back home. While this influx of women was short lived, the ripple effect became a tsunami when the Civil Rights act of 1964 was signed into law. This act guaranteed specific rights against discrimination including gender and American business has had to adapt and proactively find ways to be fair ever
since. Recently gains in equality and fairness in women’s rights in the workplace are evident but some researchers are seeing a possible stall in progress (Huffman 2012).

THE GLASS CEILING

In 1986 the Glass Ceiling was the term coined to describe the unfairness perceived and experienced by women desiring to move up the corporate ladder. Women were finding that regardless of qualifications, their climb up the ladder was blocked by a very low ceiling. It was described as glass since the individual had hope of reaching a certain level only to find they were barred. The Glass Ceiling nomenclature publicity was such a fitting description for the inequality experienced in the workplace that it encouraged a government study. These studies admittedly did not deliver a knockout punch to the issue but did help shine a rather large light on it.

Two ways researchers have approached the Glass Ceiling is to understand it either as a systemic problem or an individual motivational problem (Cech & Blair-Loy 2009). A systemic approach focuses on seeing the issue as organizational and a deeply cultural problem that favors men over women whether it be in the “old boys club” or in a perceived division of labor into jobs that favor men versus jobs that favor women.

The motivational approach places the responsibility for moving up in an organization on the individual themselves. This approach interprets the Glass Ceiling as a self-fulfilling prophecy—if you expect to experience a glass ceiling, you will. This approach has often been found to be held by women already in senior positions in an organization who see their success as a result of determination and hard work. Similarly married, non-breadwinner, white women with advanced degrees are more likely to blame motivation than a structural barrier (Cech & Blair-Loy 2009).

Some glass ceilings are in place from factors outside of a structural or motivational approach. Insch, McIntyre & Napier (2008) did a study on expatriates from the United States. They focused on expatriates because many companies are finding valuable talent from individuals who have spent time abroad. Currently there is a greater number of men in these positions than women. This study showed that married men with a stay-at-home wife experienced greater job satisfaction, higher salaries and career success than single men or married women with stay-at-home husbands. It was found that married women do not have the same amount of support or encouragement from their husbands when the tables are turned, but instead have the added stress and responsibility of the housework as well as children-rearing. This stress and responsibility puts an extra burden which can impact job performance, time away from work, and second guessing whether to take an assignment that could potentially boost her career. This study shows how outlining factors at home can cause performance issues for woman as well as increase the possibility of passing over the opportunity all together. A perceived glass ceiling can be rooted in much deeper issues.

It may seem that a way to shatter the perceived or real glass ceiling would be for women to be in positions of leadership like a CEO or serving on a Board of Directors. The expectation would be that professional women who succeeded and were cognizant of glass ceiling barriers would lift other women into positions of leadership as they themselves climbed. (Insch, McIntyre & Napier 2008). In a study done by Shin (2012) it was found that women CEO’s, who make up only two percent of the Fortune 500 companies, do more climbing than lifting. This disagrees with Insch, McIntyre & Napier (2008) who expected that female CEO’s who are aware of the Glass Ceiling would help promote women as they themselves moved up. Shin found that female CEO’s are fighting for their own wage equality amongst their male peers and can only find it when at least
two women are on the executive compensation committee of the Board of Directors. These female CEOs have found a recipe for greater equality for themselves but have failed to trickle the equality down. It was concluded that a female CEO does not have a positive effect on executive female compensation.

Bednar & Gicheva (2014) would possibly challenge this statement because they believe focusing on gender alone leaves out other factors that drive unexplained gender differences. In the case of a female CEO it may be lack of time, energy or just plain selfishness that prohibits a lifting while climbing. It could also be a motivational approach the female CEO subscribes to and expects others to fight their way to the top also. There are more intersecting factors then simply the gender of the individual. Perceiving the glass ceiling through the lens of gender only can blur our vision of the complexity.

The Glass Ceiling dominated the narrative of gender inequality in the American workplace for over a decade. It did bring to light many unfair practices but it was hard to isolate the cause and culprit. As time progressed and the number of men increased in historically female dominated occupations like nursing and teaching, studies were done to see if men experienced a similar Glass Ceiling. They experienced the opposite: a Glass Escalator.

**GLASS ESCALATOR**

In 1992 University of Texas at Austin Professor, Christine Williams coined the phrase: the Glass Escalator. The theory described the experience of white men who worked in female dominated occupations and found themselves quickly being moved up the organizational ladder into positions of leadership and higher pay with the full support of their more tenured, female peers.

Recent studies have shown the Glass Escalator effect can benefit men in general regardless of race yet there are distinctions in the level of benefit depending on race. Wingfield (2009) suggests that white men specifically benefit from entering occupations dominated by women because they quickly establish distance from women and the femininity associated with their occupation. This distancing positions them to step on the escalator to greater responsibility and supervisory positions. Black men in the same positions do not find a Glass Escalator effect in distancing themselves from the feminine nature of their jobs. In order to overcompensate for aggressive stereotypes of black males they are culturally forced to embrace the nurturing aspects of the role in order to maintain their job (Wingfield 2009). This study has shown the Glass Escalator is not strictly a gender issue but racial as well, since all men do not share the same experience.

Similar findings can be seen in research done by Smith (2012) which looks at both the Glass Ceiling and Glass Escalator theories together. Smith specifically looked at the wages and benefit of individuals of different genders and races when their manager was a white male versus a non-white male manager. He found that a white man makes more money and moves up faster when he is managed by a non-white supervisor than a white supervisor. This is regardless of the occupation which supports a Glass Escalator theory outside of female dominated occupations. He also found that the wage gap widens between white men and non-white men when the supervisor is also a non-white man.

The above two studies describe male advantage and specifically white male advantage and support a Glass Escalator view of the workplace but the Glass Escalator like the Glass Ceiling is not strictly a gender issue but a much more complicated intersectional issue. As the originator of
the Glass Escalator term more recently said, “I now believe that the concept is of limited use in explaining men’s economic advantages over women…the concept lacks an analysis of intersectionality. The glass escalator was based on the experiences of straight, white, middle-class men” (Williams 2013).

Williams quote is telling: first for her honesty in critically examining her previous theory and secondly for introducing a missing variable: intersectionality. Intersectionality asks the following questions: what other variables come into play when inequality is experienced? Was there a racial, gender, class, economic, or community-specific factor or group of factors that coalesce to enhance the inequality or create an environment for the discrimination to take place? Branch & Scherer (2013) call these factors a “matrix of domination,” to explain the interrelatedness of having multiple disadvantages based on more than one subordinate group status. Intersectionality brings a much-needed depth perspective to the Glass Ceiling and Glass Escalator theories.

INTERSECTIONALITY

Reflecting on the Glass Ceiling and Glass Escalator theories as a strictly gendered issue in the workplace is regarded now as too narrowly focused. Penner & Saperstein (2013) analyzed data from a twenty-year study involving 12,686 U.S men and women between the ages of 14-22 years old when first surveyed. The sample demographics were 67% white, 27% black and 6% other. The researchers looked for changes in stereotypical perceptions based on race as the respondent aged. They found that regardless if the respondent was a male or a female, they perceived blackness being associated with unemployment, poverty, unmarried, and inner-city residence whereas whiteness was associated with living in the suburbs and being married. It was also found that before a person is discriminated against, the perpetrator has already racially classified their target and those classifications vary by gender. For example, a woman who receives welfare is more likely to be racially classified as black. Based on this information, it is reasonable to conclude managers and supervisors in American corporations would not be immune from similar distorted perceptions.

Discrimination and disparate treatment varies by industry. While there may be a Glass Ceiling that covers all businesses, some groups break it more easily than others depending on the nature of the business. In the Leveraged Buyout Industry (LBO) competition is ferocious. There are long hours, aggressive behaviors and it is primarily dominated by highly educated white men. This industry makes for a good case study of the experiences of other races and genders in this field.

In researching the LBO industry, Turco (2010) found that black men can crack the Glass Ceiling more easily than white women. A black male can fit in the culture and be a part of the team through sports. One respondent recounted the importance sports and competition had in the office culture. He described a night when a senior male broke the tension by challenging others to an arm wrestling competition. Women working in similar environments found themselves excluded from these team-building events—structured or not; and 21 out of 25 women reported being alienated because of sports. The LBO industry has a glass ceiling that can be cracked by a man regardless of race but almost impossible to crack for a woman because of sports. Not to mention the amount of negative pressure and alienation when the woman becomes pregnant.

While the LBO industry is an extreme case and most organizations aren’t as homogenous there are clear disparities in workplace authority. An intersectional approach to workplace
authority shows that some races have made further advances than others. A study by Mintz & Krymkowski (2010) found that the overall level of authority among women and minorities has not changed much over 34 years as compared to white men. One reason Wilson (2012) has found is that the seniority status of white workers provides an intergenerational advantage since layoffs impact the new entrants more than the more senior worker, which has eroded the advances that have been made by minority workers.

An intersectional perspective is valuable in understanding gender discrimination in another occupation: American Medicine. Bhatt (2013) interviewed Indian women physicians in their experience with discrimination. In the process of conducting these interviews she found that a reluctance to even answer the questions or participate was based on whether the physician was a second-generation or first-generation immigrant; with the former being more willing than the latter. Bhatt interpreted this as an unwillingness to deal with the reality of racism. The perceptions and cultural behaviors that are brought to the table are evidence of more complex intersections of variables than simply gender alone.

What is unique about this study is that all participants have attained the same high level of education and have the same professional occupation. When surveyed about her perceptions on how open positions are filled, one participant answered that a white male is always the first choice followed by black male, white female, Indian male, black female and at the bottom is Indian female and Hispanic. (Bhatt 2013). Compared to the above studies American Medicine has segregated Indian women below African American women. Even more telling is the position Hispanic physicians hold in medicine. In other occupations Hispanics, especially Latinas, have seen greater increases in workplace authority and were more likely to change occupations over time and move into management positions (Mintz & Krymkowski 2010) but not in the hospital. The same respondent also said that the race of the decisionmaker does not change the outcomes. This rank order will consistently happen.

Another respondent during her residency interview was asked if she was single or planning on becoming pregnant. Other Indian women stated that they were steered away from specialization in medicine because family commitments might impede their progress. While family responsibilities and the possibility of having children are weighed heavily against females, it was further found that gender discrimination was based on the assumptions that women make better secretaries than managers. Bhatt (2013) also found that Indian women physicians not only had to overcome gender bias and racial bias but also educational bias. These three intersections of the Indian female physicians as compared to two intersections for African-American female physicians make it more difficult for the former to prevail.

The plight of the Hispanic female physician and the extra biases impacting her advancement is also worth further study. Which again is counter to Mintz & Krymkowski (2010) who found that Latinos have a better chance at authority attainment by investing in skills and training than any other demographic group. Yet both studies agree that the one group that seems to always rise to the top is the white male. One respondent said that the vast majority of residents in the running for chief resident are minority but almost every chief resident is a white man (Bhatt 2013). This may be because, on average, Caucasian men are given more job information than Caucasian women or minorities since established white males in management positions are frequently already part of the “in the know” informal networks (McDonald, Lin & Ao 2009).

The Hispanic population is not only growing quickly in numbers but also in authority as compared to other ethnicities. Studying the Glass Ceiling and Glass Escalator through a lens of intersectionality on Latina/o Co-Ethnic Jobsites can be very telling of the future of these issues.
There are wage and job disparities amongst Hispanic men and women. The largest disparities are based on color and immigration status for both genders.

In regard to race, Morales (2009) references the thesis called: “Latin Americanization.” This is the cultural preference amongst Hispanics that favors being light-skinned compared to being dark-skinned. The study found that light-skinned Latina females were preferred for interacting with customers over dark-skinned females and the same was true for Hispanic males. It was also found that being foreign-born was a predictor of making a lower wage especially if he or she was dark-skinned. In fact, being a foreign-born woman on a Latina/o Co-Ethnic Jobsite lowers your earnings by 31% as compared to native-born males. Even when the occupational group is homogenous and there is a complete absence of a white male, there is an intersection of attributes that create a lower Glass Ceiling for the foreign-born female and a Glass Escalator for the native-born, light-skinned male. Just as Mintz & Krymkowski (2010) and Bhatt (2013) have found, the data indicate overall women are encountering the Glass Ceiling but the ceiling is lower for some ethnicities than others. Regardless of differences in race, women overall suffered from occupational segregation.

Who someone spends time with can exclude them from opportunities for advancement. Members of a society tend to congregate with others of similar beliefs, cultural norms, behaviors, gender, economic statues, race, etc. The workplace is no different. People spend time with people who have the same job role or work on the same floor or department. These groups that organically form create a network. In these informal networks, information is shared. These networks can be very powerful and helpful or be a mechanism that further supports an intersectional Glass Ceiling.

Informal hiring practices rely heavily on indirect communication. A formal job posting on the career website of an organization may not exist; instead a group of informal discussions may occur throughout the organization regarding possible good fits for an executive role. If you have a broad and diverse linked network, you have a greater possibility of the opportunity to let the right people know you are interested. This makes it hard to determine if the decision to hire was discriminatory based on gender, race, immigration status or any other intersectional attribute.

McDonald, Lin & Ao (2009) have found that this informal distribution of job information is a determining factor of success in today’s labor market. They have found that women and minorities are excluded from most of these networks and are not even aware of the opportunities available. If the informal network was formalized, it would give female and minority workers access to highly sought-after opportunities instead of relegating them to entry-level jobs.

If discrimination in the workplace against women and any other minority group was not complicated enough, the current organizational model used is adding even more complexity. The tradition organizational ladder approach gave employees a clear structure to the next level of supervisory authority. If one was experiencing a Glass Ceiling it was readily apparent even if the reason why was more complex then blatant gender or racial discrimination.

Today the traditional ladder approach to the organization is being eradicated in favor of specialized work teams. This transformation has also changed the way performance is measured and the standard organizational ladder has been removed and replaced by individually-driven career maps (Williams, Muller & Kilanski 2012). These researchers have found that this transition puts even greater emphasis on the value of networking, which as noted before can be gendered and racialized themselves (McDonald, Lin & Ao 2009).

Williams, Muller & Kilanski (2012) studied the oil and gas industry to see what impact this shift has had on women in this field. This industry has already made the transition to a team-based approach. The researchers have found that women in male-dominated teams can be
disadvantaged since evaluations of job performance are rated by the members of the team themselves. Given the short-term duration of most work teams, the need to self-promote in order to be chosen for another team with greater responsibility has been a challenge for many women in this industry.

For the female geoscientists being interviewed, the need to self-promote was a balancing act of being perceived as assertive or perceived as being inappropriately overbearing as a female. One female geoscientist related that her struggle was with not being assertive enough and found that her Asian American culture expected her to be modest and quiet, which ran counter to the Oil and Gas Company’s culture to promote based on assertiveness (Williams, Muller & Kilanski 2012). From the outside, it would appear her gender was impacting her lack of promotion but from her own testimony, it was her ethnic culture. While it is impossible for all companies to be aware of every cultural norm the very organizational structure can create a Glass Ceiling for an Asian female but a Glass Escalator for an aggressive white American male.

It seems study after study of the intersectionality in the workplace is as diverse as the American workforce itself. The Glass Ceiling and Glass Escalator are realities but seem to be best understood through an intersectional lens. This type of perspective can help a corporation focus in on its specific industry, organizational framework, and workforce demographics to see who is being impacted adversely in the organization.

SOLUTIONS

Gender studies research is focusing more and more on the impacts of intersectionality. The research seems to prove that viewing the obstacles in the workplace based on the Glass Ceiling or Glass Escalator can result in a too simplistic focus. Organizations have tried to improve the experience of its diverse workforce and researchers like Singh & Selvarajan (2012) have found an effective diversity program at an organization can have a positive effect on an employee’s intent to stay on at a firm. Diversity programs help in organizations that have robust resources, communication and executive support to devote substantial resources into them. Unfortunately, the dark-skinned, immigrant in a Latino/a Co-Ethnic Jobsite will not have a resource like that to draw support and encouragement from. Even the promotion of a women to a CEO does not show a positive correlation to helping other women move up in the organization. As the creator of the Glass Escalator theory, Christina Williams (2013) has found along with Muller & Kilanski (2012) the new organizational structures being used may create even more barriers for women and minorities.

After evaluating the research and the approach intersectionality gives to the issue of Glass Ceilings and Glass Escalators in the workplace, it seems that the task of finding one single solution is inadequate. If the company would view their people based on intersectionality it would help in creating more valuable diversity programs as well as strategic recruiting and advancement programs. Selecting the right people from the start and providing robust career paths would help in employee engagement and retention.

Companies whose employees are aware of intersectionality in the workplace would also help foster the need for each employee to take the responsibility—with the companies’ overt support—for forming informal work groups that are diverse, multi-level and connected with “in the know” information.

The effort placed into influencing the organizational culture to heighten the awareness of intersectionality could possibly be the most worthwhile variable. The ability for many individuals
at different levels of an organization to identify disparities when they occur and engage with others in their informal networks about them would be an incredibly powerful cultural agent of change in any organization.

SUMMARY

This paper reviewed a brief history of gender inequity in US careers, described the Glass Ceiling and Glass Escalator theories that have dominated gender studies and finally remodeled the approaches by using Intersectional Analysis to see that the underlying causes were varied. It also offered three solutions for an organization to put into place to correct disparities in the workplace. Regardless of the approach when defining gender discrimination or describing the problem as a Glass Ceiling or Glass Escalator, the expanding research in intersectionality is showing the need to be understanding and willing to learn more about the experiences of an individual versus relying on an outdated list of stereotypes.

REFERENCES


DRIVING OUT “SURFACE ERRORS” THROUGH MANDATED REWRITES: A CASE STUDY

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ABSTRACT

Business communication instructors often struggle to retrain a student population that actively resists revising documents carefully to eliminate surface errors. But does mandating student revisions in order to reduce surface errors lead to meaningful improvements in student writing more generally? Based upon a field test at the Rusche College of Business involving nearly two-hundred introductory BCOM students, requiring rewrites can indeed improve student compositional performance; however, the resulting improvements may be incremental, while the instructorial effort to process a steady stream of additional revisions can be quite significant.

INTRODUCTION

Despite the near-universal acknowledgement that surface errors weaken the credibility of business documents—and therefore should be avoided through careful proofreading conforming to the rules of standard English, BCOM students stubbornly resist foundational error-elimination practices like proof-reading papers out loud. Part of this reluctance appears to have been reinforced institutionally, as students often comment that their professors typically avoid offering feedback on surface errors even if they decrement a student’s score because of surface errors (defined here as obvious spelling, punctuation, and grammar errors). At the author’s current and previous post-secondary institutions, in fact, far more than a handful of instructors have admitted to grading student papers based primarily upon “content,” i.e., upon the extent to which key classroom concepts were mastered, or research was articulated, and/or critical analysis was performed by a student. Sadly, expectations within universities regarding the criticality of surface errors in written compositions appear to lag behind those of a business community whose participants view the quality of employee writing as an indicator of a given firm’s level of professionalism and a reflection of its self-image.

Excellent compositional performance requires both an awareness of the standards to be met, as well as extensive and regular practice in achieving those standards. Yet failing to prepare students for these market expectations represents a serious pedagogical disservice. Moreover,
failing to inculcate within students a set of writing practices designed to minimize surface errors can to problematic administrative outcomes at the university level. Low scores on writing assessments for SACS, AACSB, and other accrediting agencies, however, simply foreshadow the disappointing job-search silences students experience thanks to error-riddled resumes and student portfolios. In fact, the author’s frustrations while grading dozens of annual assessment samples—virtually none of which contained fewer than a failing number (i.e., six or more) of surface errors—led directly to the revision experiment documented in this paper.

Given the demand for accurate messaging in the workplace, the mechanical problems plaguing business writing represent a stubborn, expensive, and ongoing market challenge. Indeed, Quible and Griffin (2007) have noted that corporations spend billions of dollars per year to remediate the generally weak writing skills of employees. Within the university setting, business students continue to score poorly in terms of surface errors particularly, as Sigmar and Hynes (2012) have reported that nearly half of all business majors across all of the major business sub-disciplines score “below expectations” on grammar and mechanics. This weakness threatens each student’s transition from academics to employment, as recruiters view the surface errors and related mechanical problems hampering student writing as critical factors that inhibit effective business communication (Connolly, Hoggatt, & Honl, 2003). Nor has the increasing technological predominance of the workplace allowed new market entrants to mask their poor writing skills, as this very same technology “has made everyone in the workplace a writer” whose work remains visible to peers, managers, and customers (Cunningham & Green, 2013).

Finally, in response to the question as to who within a university setting bears responsibility for remediating the compositional weaknesses of business majors, Hoggatt and Lentz (2017) insist that business communication instructors must address chronic surface-error issues because ensuring that “students have [strong compositional] skills is critical both from the perspective of professional ethos and an organization’s ethos and bottom line.” Therefore, business communication instructors need to incorporate practices within their classrooms to ameliorate these technical deficiencies. However, what remains unclear—based upon a screening of multiple research databases featuring English, general academic, and business scholarship—is whether a tactic often used within English composition classes (namely, serial revisions) can address mechanical weaknesses in business communication settings. Additionally, there appears to be no documented evidence yet available to indicate whether this compositional tactic will necessarily produce positive results within this different disciplinary context.

Consequently, the author sought out methods to generate stronger student writing by promulgating within students an appreciation for the criticality of producing “clean” documents for business audiences—and by implementing a policy to require students to practice the process of creating such documents. Conversations with peer instructors failed to reach a clear consensus as to how best to reduce surface errors, and though serial revisions remained a leading alternative, the fact is that neither the author nor the author’s peers could predict to what extent, if any, the introduction of such a process step might improve the quality of student writing. Given the demands of the course in which this requirement would be introduced, furthermore, it
was unclear whether the students and the instructor would be capable of successfully processing an unpredictable number of serial revisions. At the outset of the experiment, indeed, the author was uncertain that the students would be able to generate relatively surface error-free work at all. For that matter, the subsequent decision to analyze student scores on a semester versus semester basis was only taken months after the experiment had concluded, since at the outset a more compelling question remained: namely, could students complete the assignments at all, given the new error-threshold constraint?

IMPLEMENTING THE REVISION CYCLE

To find out, the author challenged students by instituting a surface-error threshold on a sequence of four assignments in BCM 247, an “Introduction to Business Communication” course taught by the author three times in the fall semesters of both 2015 and 2016. The assignments included a “Good News” letter (referred to hereafter by the acronym GNL), a “Bad News” letter (BNL), a “Persuasive” letter (PL), and an “Informed Blog” (IB), a brief commentary requiring each student to adopt a finite position backed by secondary research on a specific public policy question. In each semester, just shy of 100 students took the course, and most participants were first- or second-year students divided roughly evenly between business- and non-business majors. Since about half of the university’s student population consists of first-generation college students, many were the first their families to take such a course.

While none of the assignments in the fall of 2015 required students to produce revisions, students in the fall 2016 sections were not only required to develop the same assignments (and in the same sequence) as the students from a year earlier...they were also required to produce relatively “clean” copy. Any of the GNL/BNL/PL/IB submissions that contained three or more surface errors were returned to their authors with the first three surface errors circled. “Zero” grades indicated that the paper in question had not passed the minimum surface-error threshold. However, students were permitted revise and resubmit a rejected paper as many times as necessary for it to pass the surface-error threshold (known among students as the “three error” rule). Rewritten papers could be submitted up to the very last class session—or roughly nine weeks after the first revision assignment had been returned.

Not surprisingly, many students cared little for the new rule. In dozens of cases, in fact, three or four rewrites of a single paper were necessary to pass the minimum-error threshold. Indeed, the vast majority of all papers submitted during the semester, though most notably the Persuasive Letter and the Informed Blog (see data summary below), failed to pass the error threshold on a student’s initial attempt. Though students were led to believe that the grade for any paper that failed to overcome the surface-error threshold by semester’s end would remain a zero, the instructor supplied a grade on all final resubmissions in order to recognize and reward each student’s participation in the revision process. In the end, only a very small handful of students both failed to pass the three-error threshold initially and subsequently refused to produce even a single revision (and thus their initial “zero” grades persisted). Instead, a combination of peer
pressure and grade anxiety prompted virtually all students whose initial submissions failed to attempt at least one paper revision. During the process, most students experienced multiple paper rejections; indeed, most students were highly disappointed to find all four of their initial attempts returned ungraded. Yet once a resubmitted paper passed beneath the surface-error threshold, it immediately received a grade. Once grade, a paper was deemed “finished:” no student could revise such a paper again in the hopes of securing a higher grade. Nevertheless, as the semester progressed more and more papers required revisions, and most students struggled to juggle drafts of brand new work with revisions of older assignments. In addition, over the final third of the course students engaged in a team project featuring both a technical report and a group oral presentation developed alongside their ongoing GNL/BNL/PL/IB paper revisions. Yet the team project was not subject to the “three error” rule, nor was the writing assignment that both opened and closed the semester: student resumes. Note that while the instructor provided feedback on resume drafts as frequently as any student wished, revisions were never required of students during either semester. Moreover, during both semesters only the final version of the resume (submitted on the last day of class) received a grade—regardless of the number of surface errors it might contain.

DATA COLLECTION METHODOLOGY

As noted above, even though grades were assigned to papers as a matter of course, the initial concern of the revision experiment was to determine if the students and the instructor could bear up under the load of revising and grading (respectively) an unknown number of rewrites. Throughout the revision semester, tallies of revision submissions were kept per assignment in each class section. During the non-revision semester, 96 students produced both draft and final resumes in addition to the four papers that would eventually become subject to the minimum-error rule for students a year later. Only a small number of students failed to turn in one or more assignments during the non-revision semester; more specifically, a total of 2 GNL, 2 BNL, 2 PL, and 6 IB assignments received a zero grade. During the revision semester, a total of 93 students were tasked with producing the same assignment sets as a year earlier…but with the “three-error rule” in place. Despite the presence of that additional (and hardly trivial) revision burden, a nearly identical number of zero grades were assigned as during the non-revision semester (i.e., 2 GNL, 1 BNL, 0 PL, and 7 IB assignments). Only students who received an initial grade of zero during the revision semester—for either not turning the paper in, or for failing to meet the error threshold—and who never attempted a single revision of that paper maintained that zero score.

During the revision semester, the instructor maintained a log noting initial-submission success rates as well as counts of every submitted revision. The data in Table 1 summarizes the number of revisions per assignment totaled across all three course sections that semester. It also identifies the average number of revisions produced per assignment by each student, even as it highlights the (rather disappointing) rates at which initial submissions passed the “three error” threshold for each assignment:
Table 1
Revisions by Assignment for 3 sections of BCM 247 (93 students in total, Fall 2016)

<table>
<thead>
<tr>
<th>Assignment</th>
<th>Total revisions</th>
<th>Average revisions per student</th>
<th>Initial “pass” rate, per assignment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good News Letter (GNL)</td>
<td>136</td>
<td>1.53</td>
<td>12.90%</td>
</tr>
<tr>
<td>Bad News Letter (BNL)</td>
<td>140</td>
<td>1.54</td>
<td>6.45%</td>
</tr>
<tr>
<td>Persuasive Letter (PL)</td>
<td>152</td>
<td>1.65</td>
<td>0.00%</td>
</tr>
<tr>
<td>Informed Blog (IB)</td>
<td>123</td>
<td>1.45</td>
<td>3.23%</td>
</tr>
<tr>
<td>Totals across all revised assignments</td>
<td>551</td>
<td>6.17</td>
<td>5.65%</td>
</tr>
</tbody>
</table>

Based upon the total number of rewrites produced by students (551), the instructor effectively faced a 148% increase in the course’s grading load. Instead of processing an expected total of 372 initial submissions generated by 93 students, the instructor processed an actual total of 923 items for the assignments subject to the revision policy.

SEMESTER vs. SEMESTER GRADING ANALYSIS

Although it was unclear on an a priori basis whether or not students would be able to manage the additional revision load, the statistics noted in the previous section indicate that students completed the assignments during the revision semester at nearly the exact same rate as the students who were not subjected to mandatory revisions. As such, the students demonstrated that they could, if pressed to do so, produce relatively error-free work. Some of the more compelling statistics generated during the revision semester include the following:

- On average, only approximately 5% of initial submissions passed the “three error” threshold.
- Most students required 1.5 additional rewrites per paper (for a total of 6 rewrites per semester) to pass the minimum-error threshold.
- Few students (indeed, only a small handful) proved incapable of meeting this elevated surface-error standard.
- The average scores of the assignments during the revision-required semester proved roughly 3 percentage points higher on three out of the four revision assignments.
- However, grades remained flat on the last assignment in the revision sequence (i.e., on the IB or Informed Blog assignment).
Three factors likely contribute to the flatness of the IB scores. First, as the last assignment in the sequence, Informed Blog rewrites were hampered by the fact that most students were already juggling multiple revisions, and the time remaining in the semester to work through this final revision was relatively brief. Second, student comments during class suggested that a kind of “rewrite fatigue” set in near the end of the semester as students grappled with both “old” and “new” work simultaneously. Third, the Blog assignment included two unique grading elements: in-text citations and Reference list entries in APA format. Students during both semesters persisted in using MLA rather than APA citation formats, perhaps due to their increased level of familiarity with MLA, despite the fact that the assignment prompts and multiple classroom exercises required APA citations. Efforts to familiarize students with the differences between the two styles proved equally unsuccessful in both terms, and thus the resulting APA formatting errors persisted throughout both sets of student papers.

Nevertheless, during the revision semester students achieved statistically significant improvements in both the mean scores and the score variances tied to the GNL, BNL, PL, and F-REZ scores—as summarized in Table 2.

<table>
<thead>
<tr>
<th>Assignment</th>
<th>Mean</th>
<th>Standard Deviation</th>
<th>Min/Max scores</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Good News Letter (GNL)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-revision Period</td>
<td>86.35</td>
<td>3.75</td>
<td>75 - 93</td>
</tr>
<tr>
<td>Revision Period</td>
<td>89.56</td>
<td>2.64</td>
<td>83 - 95</td>
</tr>
<tr>
<td><strong>Bad News Letter (BNL)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-revision Period</td>
<td>86.41</td>
<td>3.39</td>
<td>79 - 94</td>
</tr>
<tr>
<td>Revision Period</td>
<td>87.76</td>
<td>3.13</td>
<td>77 - 92</td>
</tr>
<tr>
<td><strong>Persuasive Letter (PL)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-revision Period</td>
<td>84.74</td>
<td>5.62</td>
<td>64 - 96</td>
</tr>
<tr>
<td>Revision Period</td>
<td>87.58</td>
<td>3.23</td>
<td>75 - 94</td>
</tr>
<tr>
<td><strong>Informed Blog (IB)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-revision Period</td>
<td>87.68</td>
<td>5.20</td>
<td>60 – 97</td>
</tr>
<tr>
<td>Revision Period</td>
<td>87.63</td>
<td>4.05</td>
<td>75 - 98</td>
</tr>
</tbody>
</table>
To determine whether or not these improvements were not simply the result of random chance, a set of two sample t-tests (of both equal and unequal variances) were conducted by a colleague, Dr. Ryan Phelps, Associate Professor of Economics (and a specialist in applied statistical analysis) at Stephen F. Austin State University, against the raw scores from all five assignments produced during the two semesters. To allow for meaningful correlation analysis across assignments, and in order to prevent an undue statistical impact on mean scores and score variances from statistically anomalous data, all zero scores—which represented a student’s failure to complete the assignment at all, or the failure to pass the “three-error” test during the revision semester—were dropped from the analytical process (along with all of the other scores recorded for those students).

Given a 95% confidence interval, the resulting T-test and P-value scores documented in Table 3 indicate that the improvements seen in the average scores recorded during the revision semester for the GNL, BNL, PL, and F-REZ assignments (though not for the Informed Blog) were indeed statistically significant.

<table>
<thead>
<tr>
<th>Assignment</th>
<th>T-test (absolute) value</th>
<th>P-value</th>
<th>Accept/Reject null hypothesis (95% CI)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good News Letter (GNL)</td>
<td>6.26</td>
<td>0.000</td>
<td>Reject</td>
</tr>
<tr>
<td>Bad News Letter (BNL)</td>
<td>2.62</td>
<td>0.005</td>
<td>Reject</td>
</tr>
<tr>
<td>Persuasive Letter (PL)</td>
<td>3.92</td>
<td>0.000</td>
<td>Reject</td>
</tr>
<tr>
<td>Informed Blog (IB)</td>
<td>0.07</td>
<td>0.527</td>
<td>Cannot reject</td>
</tr>
<tr>
<td>Final Resume (F-REZ)</td>
<td>4.10</td>
<td>0.000</td>
<td>Reject</td>
</tr>
</tbody>
</table>

[Test Notes: Both the “revision” and “non-revision” sample sets included data for a total of 80 students. In the test, accepting the null hypothesis would indicate that the difference between pre- and post-revision mean scores was not statistically different. Rejecting that hypothesis (due to high T-test values, along with correspondingly low P-values) indicates that the means of those scores were indeed different in a statistically significant manner.]
Yet of all of the grading-analysis results from semester to semester, the most significant is the improvement shown in the Final Resume score. Why? Given that rewrites were never required of students on their resumes in either semester, the F-REZ represents a de facto control assignment, as it was effectively created under identical revision conditions in both semesters, with the only significant difference being that the resumes created during the revision semester were completed after each student had become familiar with, and quite possibly ad inculcated a habit for (or, perhaps, a diminished reluctance to engage in) serial revisions. The statistically-significant grade improvements along with the reduced standard deviation of the scores recorded during the revision semester imply that the introduction of the revision process led both to better and to more consistent writing…even on assignments that did not require mandatory revisions. In order words, the revision process appears to have led to a general improvement in student writing, an improvement validated within the single document most commonly produced by students that significantly penalizes surface errors in the real world: a student’s resume.

OBSERVATIONS AND PEDAGOGICAL IMPLICATIONS

Most instructors would expect that the process of eliminating initially error-prone submissions represented a quasi-mechanical intervention that should have produced higher average grades on the four “rewrite” assignments during the revision semester. Yet the statistically significant score increase on the final resume suggests that students who incorporate periodic revisions into their writing process stand a good chance of improving their overall compositional skills. Improved grade performances by the end of the revision semester, however, do not fully obscure the astoundingly low initial “pass” rates recorded in Table 1. Across all four assignments, only one out of every twenty submissions passed an error threshold which, by contemporary business standards, seems more than reasonably generous. Nor were the final improvements in average student scores as large as might have been expected.

Yet even the frustrated comments uttered by students as each successive set of unsuccessful revisions were returned ungraded, along with the comments tendered during extensive one-on-one remediation sessions with students working to overcome persistent compositional errors, suggested that students did not view the revision policy as an opportunity to submit knowingly substandard work before securing a better grade on a subsequent and improved revision. Rather, students immediately recognized the unpleasant burden represented by carrying forward additional rewrites during an increasingly hectic semester. Moreover, feedback provided to the author by the university’s writing-center counselors confirms that an increasing number of students sought to avoid subsequent rewrites by taking advantage of the center’s previously unused support services. For that matter, even the decreasing success of students on their initial drafts as the semester progressed, including a roughly fifty percent drop between the first and second assignment followed by complete failure on the third assignment before a slight rebound on the final assignment, can be partly attributed to the increasing complexity of the assignments involved.
In any event, two common themes emerged from both students’ comments and their behaviors to suggest that the experiment was not a total success. First, even though students seemed in time to understand the need for producing less error-prone writing, they also found simultaneously managing both new assignments and carry-over revisions to be both a novel and a frustrating experience. Second, even when students attempted diligently to eliminate surface errors in their initial and/or revision submissions, they also tended to commit identical errors in either most or all of their assignments. Chronic compositional weaknesses like comma abuse, subject-verb disagreement, pronoun misalignments, and incongruous subject/verb/object combinations required extensive—and highly repetitive—tutoring. If in those sessions most students could eventually recall the grammar and usage rules chronically violated in their writing, their capacity to identify the grammatical functions of specific words in their own sentences proved virtually non-existent. The likelihood that students are not subjected to rigorous grammar critiques even in other “writing-centric” courses may have inhibited (and quite poorly positioned) student writers in relation to critiquing and improving their own work.

Ultimately, students appeared to wear down under the strain of chronic revisions. Yet their comments to one another and to the instructor during class indicated that they appreciated the need to practice meeting a minimal acceptable standard for errors, and they were disappointed each time they failed to meet that standard. Students recognized, too, that a superfluity of errors damaged their rhetorical credibility, particularly when confronting delicate communication situations involving bad news and persuasive messaging. The higher grades and smaller grading variances produced during the revision semester suggest that the students became more careful proofreaders—or at least they more regularly solicited help with proof-reading in order to avoid the anxiety of managing additional revisions. Those adjustments, of course, were implemented unevenly as students processed multiple revisions while simultaneously developing a team project featuring both written and oral deliverables. The strain of this workload at times contributed to a carelessness demonstrated within some repeated revision cycles. Moreover, it is possible that a form of compositional “burn out” helps to explain the failure of any student to pass the surface-error threshold on the third assignment, the Persuasive Letter, as well as the comparatively high number of students who either never submitted or did not revise the Informed Blog during the revision semester.

It’s also possible that students already anxious about their compositional weaknesses were de-motivated by the imposition of a surface-error standard since their regular failure to meet that standard within initial submissions tended to confirm their worst fears about their writing skills. Hopefully, the generally higher scores students eventually received softened these misgivings in time, if not necessarily immediately. Yet the risk of possibly de-motivating a young writer remains (from the author’s perspective) much less problematic than the possibility that a student could graduate from the university with an artificially inflated view of his or her compositional skills, particularly if the student consequently lacks a strategy for correcting surface errors prior to submitting critical documents to peers, clients, supervisors, or regulators.
Despite that conviction, however, an open question remains as to whether or not mandating revisions is worth the additional effort imposed on instructors. For just as students labored to keep up with concurrent deliverables featuring both new assignments and old revisions, so too did the instructor. Even with the effort represented in the production and grading of hundreds of additional papers, the fact is that scores improved only modestly. Moreover, in a course already stuffed with assignments serving multiple pedagogical constituencies, the number and pace of required revisions possibly led some students to focus less upon producing exceptional writing than upon simply surviving the workload. And though the imposition of the three-error rule helped to expose for students particularly chronic weaknesses in their writing, the remediation of these errors required significant one-on-one tutoring that did not forestall similar errors in subsequent papers.

Attempting to restructure a student’s writing process is hardly a trivial challenge, and any incremental improvements can be accompanied by ongoing compositional struggles. Even so, a number of positive behavioral signs fortunately emerged during the mandatory revision policy, including a marked increase in office-hour visits to identify and address chronic errors and a concurrent increase in Writing Center consultations. In the end, the mandatory revision experiment proved that students could indeed be challenged to minimize errors in their writing, and it resulted in both an attitudinal change typified by the pronounced frustration expressed by students who failed initially to meet the raised error standards. While those same errors had previously been the subject of student indifference, the students ultimately managed an important and positive writing-process change during the revision semester, even as they doggedly delivered (on average) six additional revisions to meet an elevated compositional standard.

REFERENCES

Cunningham, H., & Green, B. (2013). Why business writing skills are important. *Administrative Professional Today, 39*(6), 1-3.
Earnings Presentations inform the public and stakeholders of a company’s current financial information. What an executive says to the public and how it is said can make a difference in the future stock price of the firm. The executives generally want to portray the company’s ethos, or credibility, as very positive, even if their company is not doing well. In this paper, we explore how the words that the executives use during the public earnings calls are related to a firm’s stock price. We examine the usage of specific words associated with credibility in the calls of some of the top performing firms and for some of the worst performing firms to establish a usage pattern. We show a statistically significant difference in the word usage between the firms depending on the firm’s stock performance.

INTRODUCTION

Tesla stock had an IPO price of $17 a share when it debuted in 2010. In mid-year 2016 the price per share was around $200 a share, yet Tesla had never earned a profit. This suggests that investors consider not only what a firm has proven that they can do financially, but what they think a firm is going to do in the future. The top executives of a company should have the best understanding of a company’s potential, therefore their comments and the choice of words that they use on the earnings conference calls may influence investors’ decisions. In this paper, we examine a particular subset of words associated with credibility and determine if the usage of these words by top executives on earnings conference calls is different if the firms’ stock price is performing well versus if the firm’s stock price is not performing well. We find a statistically significant difference in usage (frequency counts) of a number of ethos based words between the top performing and poor performing firms. This may serve as a signal to investors.

EXISTING LITERATURE

The top executives of a company typically present the information in their earnings presentations, and should have the best understanding of a company’s potential. Therefore, investors pay attention to what executives say on earnings calls. However, it is not only what the executive says, but the choice of words that the executive uses that is important. In many cases,
the executives want to portray the company’s *ethos*, or credibility, as very positive, even if their company is not doing well.

Here we use the definition of *ethos* as provided by Aristotelian rhetoric. In Aristotle’s *Rhetoric*, he defines ethos as "the speaker’s personal character when the speech is so spoken as to make us think him credible” (Book I, chap. 2, 1356a). An executive’s *ethos*, or credibility is key to presenting the company as trustworthy and stable. One of the ways that financial executives promote their own credibility is by their word choice.

According to existing research “the purpose of corporate writers is to influence public opinion and attitudes, particularly among potential investors, in ways that create support for organizational practices or undermine opposition to them” (Conaway & Wardrope, 2010, p. 141). Leibbrand (2015) argues that by using the rhetorical appeals (ethos, pathos, and logos), executives can help create value for their listeners and readers in terms of their own credibility in financial discourse.

Similarly, in an analysis of 10-K annual reports from 1994-2006, Loughran, McDonald, and Yun (2008) find that firms that are more likely to use “ethics-related terms,” are more likely to be “sin” stocks (e.g. casinos, etc.), are “more likely to be the object of class action lawsuits, and are more likely to score poorly on measures of corporate governance” (p. 39).

According to Bodnaruk, Loughran, and McDonald (2015), the percentage of constraining 10-K words (like "required, obligations, impairment, and covenants") may indicate when a company might "suddenly slip into the realm of being financially constrained" (p. 640). These negative-sounding words may be used by stakeholders as red flags.

Other existing research shows that during times of financial crisis (specifically in the most recent economic crisis in 2009) executives tend to use an optimistic tone with both past and future performance (Patelli & Pedrini, 2014). Using Impression Management Theory, Patelli & Pedrini (2014) find that firms engage in communicative action by using honest disclosure. Specifically, some of the rhetorical strategies they look for include phrases that indicate praise, satisfaction, inspiration, blame, hardship, and denial. By using honesty in their financial documents, executives encourage their stakeholders to trust them. In other research, Yuthas et al (2002) focus on the genre of CEO letters, and find that rhetorically, those specific pieces meet the principles of discourse ethics, like honesty and sincerity.

However, the authors know of no other studies that analyzed both the rhetorical strategies and the financial background of the top and bottom ranking companies.

In this paper, we test our idea by examining the usage of words associated with ethos in earnings calls for firms that are performing well and those that are not performing well. We test the hypothesis that the executives of firms that are not performing well will use more words associated with ethos in their earnings calls than the executives of firms that are performing well.

We expect that executives of poor performing firms need to persuade investors not to sell their stock in the firm so they either consciously or unconsciously resort to using words that are persuasive and suggestive of credibility in their earnings conference calls to investors and industry analysts. And in fact, we find that there is a significant difference in the usage of specific words associated with this type of rhetoric. Executives’ selection of words used in the earnings call is different if the firm is performing well versus if the firm is not performing well.

**DATA AND METHODOLOGY**

Our data is from years 2015 to 2017 for fiscal years 2016 to 2017. Stock price data is from the Center for Research in Security Pricing (CRSP) via Wharton Research Data Services (WRDS)
and from Finance.Yahoo.com. We obtain the historical transcripts from earnings calls from the investor relation sections of the individual company websites and from the website www.seekingalpha.com.

We begin by calculating the return for all stocks in CRSP that are listed on one of the three main stock exchanges; Nasdaq, New York Stock Exchange (NYSE), or the American Stock Exchange. We use only stocks that have a price of five dollars or more. We calculate an annual return by summing the monthly returns. We search for historical earnings call transcripts for twenty firms that have some of the top returns for the year and then we search for historical earnings call transcripts for twenty firms that have some of the worst returns.

We require that an earnings call transcript be available in order for us to count the word usage. We do not use the audio files that are available in some cases. This means that we do not specifically use the twenty best or twenty worst firms, but we have some of the top one hundred best performing and worst performing firms based on stock returns for the year. We attempt to use four earnings reports for each firm but not all earnings call transcripts were available. Thus, we ended up with a sample size of 160 earnings call transcripts. We have seventy-seven earnings call transcripts from the top performing firms and eighty-three from the poor performing firms. The two lists are shown in Table 1 top performers, and Table 2 poor performers.

Table 1: Top Performers
This is the annual stock return for fiscal year 2016 to 2017. This list is twenty of the top performing firms, where we were able to find written transcripts of their earnings conference call.

<table>
<thead>
<tr>
<th>Company Name</th>
<th>Annual Return</th>
</tr>
</thead>
<tbody>
<tr>
<td>Impac Mortgage Holdings Inc.</td>
<td>158.02%</td>
</tr>
<tr>
<td>Egalet</td>
<td>124.68%</td>
</tr>
<tr>
<td>Ultragenyx Pharmaceuticals Inc.</td>
<td>115.88%</td>
</tr>
<tr>
<td>Pfenex Inc.</td>
<td>113.46%</td>
</tr>
<tr>
<td>Immunogen Inc.</td>
<td>112.76%</td>
</tr>
<tr>
<td>Wayfair Inc.</td>
<td>103.41%</td>
</tr>
<tr>
<td>Abiomed Inc.</td>
<td>103.24%</td>
</tr>
<tr>
<td>Netflix Inc.</td>
<td>99.22%</td>
</tr>
<tr>
<td>Stamps Com Inc.</td>
<td>95.56%</td>
</tr>
<tr>
<td>Cambrex Corp.</td>
<td>95.52%</td>
</tr>
<tr>
<td>Genie Energy Ltd</td>
<td>93.98%</td>
</tr>
<tr>
<td>Universal Display Corp</td>
<td>90.59%</td>
</tr>
<tr>
<td>Five Prime Therapeutics Inc.</td>
<td>89.44%</td>
</tr>
<tr>
<td>Ebix Inc.</td>
<td>86.44%</td>
</tr>
<tr>
<td>Dycom Industries Inc.</td>
<td>85.16%</td>
</tr>
<tr>
<td>Lendingtree Inc.</td>
<td>81.27%</td>
</tr>
<tr>
<td>Straight Path Communications Inc.</td>
<td>66.03%</td>
</tr>
<tr>
<td>Zagg Inc.</td>
<td>59.68%</td>
</tr>
<tr>
<td>Walker &amp; Dunlop Inc.</td>
<td>56.24%</td>
</tr>
<tr>
<td>Credit Acceptance Corp</td>
<td>51.59%</td>
</tr>
</tbody>
</table>
Table 2: Poor Performers
This is the annual stock return for fiscal year 2016 to 2017. This list is twenty of the worst performing firms, where we were able to find written transcripts of their earnings conference call.

<table>
<thead>
<tr>
<th>Company Name</th>
<th>Annual Return</th>
</tr>
</thead>
<tbody>
<tr>
<td>Westmoreland Coal Co.</td>
<td>-143.10%</td>
</tr>
<tr>
<td>Contango Oil and Gas Company</td>
<td>-125.00%</td>
</tr>
<tr>
<td>Iconix Brand Group Inc.</td>
<td>-122.78%</td>
</tr>
<tr>
<td>3 D Systems Corp Del</td>
<td>-119.92%</td>
</tr>
<tr>
<td>Southwestern Energy Co</td>
<td>-119.71%</td>
</tr>
<tr>
<td>Tidewater Inc.</td>
<td>-118.43%</td>
</tr>
<tr>
<td>Timkensteel Corp.</td>
<td>-118.28%</td>
</tr>
<tr>
<td>Consol Energy Inc.</td>
<td>-116.60%</td>
</tr>
<tr>
<td>Famous Dave’s of America</td>
<td>-116.41%</td>
</tr>
<tr>
<td>Lumber Liquidators Holdings Inc.</td>
<td>-110.47%</td>
</tr>
<tr>
<td>Joy Global Inc.</td>
<td>-107.92%</td>
</tr>
<tr>
<td>Gopro Inc.</td>
<td>-102.56%</td>
</tr>
<tr>
<td>Unisys Corp</td>
<td>-87.15%</td>
</tr>
<tr>
<td>Rent a Center Inc. New</td>
<td>-76.51%</td>
</tr>
<tr>
<td>Celadon Group Inc.</td>
<td>-72.53%</td>
</tr>
<tr>
<td>Stonegate Mortgage Corp</td>
<td>-70.00%</td>
</tr>
<tr>
<td>Harsco Corp</td>
<td>-66.98%</td>
</tr>
<tr>
<td>Murphy Oil Corp</td>
<td>-65.26%</td>
</tr>
<tr>
<td>Swift Transportation Co</td>
<td>-63.77%</td>
</tr>
<tr>
<td>Overstock Com Inc. Del</td>
<td>-63.39%</td>
</tr>
<tr>
<td>Carbo Ceramics Inc.</td>
<td>-59.77%</td>
</tr>
</tbody>
</table>

We then analyze the rhetoric from executives from both the best and worst performing firms of 2016 based on the annual return. Based on the Aristotelian definition of ethos, we associate the following words with the idea of credibility: strong, firm, responsible(ility), ethic(al), trust(worthy), reliable(bility), confidential(ality), commit(ment), discipline(d), steady, solid, hope(ful), duty, and believe. We take the four most recent earning call transcripts that we can find for the top performing firms and then again for the worst performing firms. We sort the call transcripts into two groups, “top” and “poor” based on the firm’s stock performance for the year. We search through the call transcripts and count the number of times the speakers from the firm use each of the words we have identified. We also count the total number of ethos words used in each earnings call transcript.

If there is a difference in ethos word usage we expect to see a statistically significant difference between the counts of words used in the top group versus the poor group. Our null hypothesis is that there will be no difference between word usages in the two groups of earnings call transcripts. Specifically, our models that we test:

\[ H_0: \text{count of instances of strong in top} = \text{count of instances of strong in poor} \]
\[ H_A: \text{count of instances of strong in top} \neq \text{count of instances of strong in poor} \] (1)

We do the above test for each word and then for the total count of ethos words used in the top versus the poor performing firms.

We determine the count of each word for each set. We then compare the counts using a non-parametric test as we have no reason to assume any type of distribution. We use the \( z \) statistic from a Wilcoxon signed rank test to determine the statistical likelihood of the differences in word count between the top and the poor performers being solely by chance.

RESULTS

We first analyze each of our ethos based words using our hypothesis to see if there is a difference in usage between the top performing and the poor performing firms. We find that for some of the words there is indeed a difference in usage and we can reject the null hypothesis. The null hypothesis of no difference can be rejected for the words \textit{reliable, committed, solid, value,} and \textit{believe} at an alpha of 1%. The usage of the words \textit{confident} and \textit{duty} are different at a 5% significance level, and the usage of the word \textit{disciplined} is different at the 10% level. These results are shown in Table 3.

Table 3: Differences in word usage

This chart shows the difference in word usage between the poor performing and the top performing firms. We parsed 160 earnings call transcripts and counted the usage of each word. We used a Wilcoxon signed rank test to determine if the differences in word count was statistically significant. Three stars indicates a significance level of 1%; two stars a significance level of 5%; and one star a significance level of 10%.

| Ethos Term | n  | Pr > |z| |
|------------|----|------|---|
| Strong     | 160| 0.4838|
| Firm       | 160| 0.9981|
| Responsible| 160| 0.3476|
| Ethics     | 160| 0.5178|
| Trust      | 160| 0.9611|
| Reliable   | 160| 0.0026***|
| Confident  | 160| 0.0223**|
| Committed  | 160| 0.0001***|
| Disciplined| 160| 0.0515*|
| Steady     | 160| 0.6339|
| Solid      | 160| 0.0012***|
| Value      | 160| <.0001***|
| Hope       | 160| 0.6439|
| Duty       | 160| 0.0136**|
| Believe    | 160| 0.0002***|
| Total      | 160| <.0001***|

The remaining ethos words we tested, \textit{strong, firm, responsible, ethics, trust, steady and hope} show no statistically significant differences in their usage between the executives of the top performing firms and the executives of the poor performing firms.
We then sum the usage of all our ethos based words and test the hypothesis that executives of poor performing firms use these ethos-based words at a much greater rate than the managers of the top performing firms. We find that there is a difference and it is statistically significant at the 1% level. The mean usage of ethos words in the poor performing firms is 28.66 times per earnings call while the mean usage of the ethos based words for the executives of the top performing firms is 19.83 times per earnings call.

CONCLUSION

The words that executives use to discuss the quarterly performance of their firm with the public are different depending on the performance of the firm. If a firm’s stock is performing well and investors are reaping large returns the executive does not need to use as much ethos-based speech as the executives use on the earnings calls when the firm’s stock is not providing investors with a positive return. When the stock performance is extremely poor, the executives make use of more ethos-based words. Since it is the duty of the executive to maximize the shareholder value, the executive desires to have the stock price increase. By persuading investors to either buy the stock or remain invested in the stock if it has already been purchased, the executive is exercising his duty to the shareholders. Thus, it makes sense that the executive will endeavor to sound more confident when the stock is not performing well. The executive will use more ethos-based words to show that he/she is credible and that the company will recover from its downturn. However, it should be noted that in our findings executives who overused these ethos-based words tended to sound less and less credible and more desperate, achieving the opposite of what they intended.

While this paper shows the difference in word usage, it does not attempt to tease out the endogeneity issues. Does the poor performance of the stock drive the executive’s choice of language or does the choice of language used by the executive on the earnings calls drive the investors’ behavior? This question is one that can possibly be answered with future research.

FURTHER RESEARCH

This area of research is relatively new. As more small investors have access to earnings calls and earnings call transcripts and/or audio files because of an increased focus in transparency, it is to be expected that the language used in the earnings calls could be interpreted as a signal to investors. This could be further explored in a variety of ways. In this study, we only looked at specific words, but parsing the collocates, or the words that are located around the ethos-based words could also provide information about the expectations of the executives.

Another area of interest would be the word usage of executives for top and poor performing firms based on gender or age. Do women utilize different words on earnings calls for poor performing firms? Unfortunately, there is not a large population of women executives but there may be enough to get statistically significant results.

Lastly, the authors envision a much larger study, using all available transcripts and a much larger sample, which may bring other differences to light as well. We hope to learn more about the intersection of ethos-based communication and financial analysis in the financial reporting genres, so we can better teach our students how to communicate in these situations, and so we can inform stakeholders about the importance of ethos-based language.
REFERENCES


