


Teaching Business Law Through an Entrepreneurial Lens

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MICHELLE M. HARNER*

Teaching Business Law Through an Entrepreneurial Lens

“A pessimist sees the difficulty in every opportunity;
an optimist sees the opportunity in every difficulty.”
—Winston Churchill

THE LEGAL PROFESSION IS ADJUSTING TO A NEW NORMAL. As one report noted:

There is strong evidence that unprecedented changes in practice are producing a restructuring in the way legal services are delivered. These changes include widespread access to legal information, the routinization of many legal tasks, demands by clients for more control of legal service delivery, and the emergence of an increasingly competitive marketplace.¹

What these developments mean for the profession in the longer term remains unclear, but the shorter term consequences are notable: several large law firms have imploded,² thousands of lawyers have lost their jobs,³ and thousands more cannot find that first legal job.⁴

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* Professor of Law, University of Maryland Francis King Carey School of Law. This essay benefitted from the comments of, or discussions with, Daniel Goldberg, Paul Harner, Teresa LaMaster, and the participants in the 2012 Southeastern Association of Law Schools Annual Meeting Business Law Discussion Group. Nevertheless, all opinions, errors, omissions and conclusions in this essay are my own. I also would like to thank the University of Maryland Francis King Carey School of Law for financial support in connection with this essay.

1. N.Y. STATE BAR ASS'N, REPORT OF THE TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION 1 (2011), available at <http://www.nylat.org/publications/documents/TaskForceReport.pdf> [hereinafter NYSB REPORT].

2. See, e.g., Peter Lattman, *Dewey & LeBoeuf Files for Bankruptcy*, N.Y. TIMES DEALBOOK (May 28, 2012, 10:21 PM), <http://dealbook.nytimes.com/2012/05/28/dewey-leboeuf-files-for-bankruptcy/> (discussing bankruptcy filing of Dewey & LeBoeuf and the collapse of other long-standing law firms).

3. See, e.g., Jonathan D. Glater, *Even Lawyers Are Getting Laid Off*, N.Y. TIMES (Nov. 12, 2008), <http://www.nytimes.com/2008/11/12/business/worldbusiness/12iht-law.1.17744787.html>; Tom Huddleston Jr., *Legal Sector Lost 3,900 Jobs in June*, LAW.COM (July 6, 2010), <http://www.law.com/jsp/article.jsp?id=1202463264613>.

4. One article reports that “[s]lightly more than half of the class of 2011 — 55 percent — found full-time, long-term jobs that require bar passage nine months after they graduated, according to employment figures released on June 18 by the American Bar Association.” Karen Sloan, *ABA: Only 55 Percent of Law Grads*

The new normal has moved me to think about how I can ready my students for business law practice, when “Biglaw” positions and training will not be available to most of them upon graduation from law school. Newly minted graduates will be expected to not just be smart and have the ability to do legal analysis, but will also be expected to have judgment in the face of risk and uncertainty and be able to function as lawyers. This means that they must not only be able to analyze legal issues in a business deal but also understand the business aspects of the deal and carry out the deal through the preparation of appropriate legal documents. Just as necessity is the mother of invention, this new challenge has given me the opportunity to rethink what my role is as a law teacher.

As I reflect on the past several years, I cannot say that the developments in the legal market have fundamentally changed *what* I teach in my Business Associations, Bankruptcy and Creditors’ Rights, or Business Planning courses.⁵ I do think, however, that they have changed *how* I teach in certain respects. I ask students not only to apply the law and underlying theory to the facts, but we also then role-play the conversation with the client, and I ask the students to articulate alternative ways to achieve the client’s objective. I do not just ask students to read the disputed contract provisions included in the case book but also to “mark-up” the provisions or offer statutory revisions to facilitate better results. I ask students to be more proactive in their legal education and to start defining now how they might add value to their clients and to the profession.

My gravitation towards more role-playing and simulation in the classroom was at first subtle and likely subconscious. I thoroughly enjoyed participating in negotiations, client strategy sessions, and boardroom discussions in practice, and I often cannot help but engage with my students in a situational dialogue. Nevertheless, in more recent years, I have more consciously elected to use these techniques in the classroom. In fact, I co-teach my Business Planning course with my tax colleague, Dan Goldberg, and we run the entire course as a simulation. Dan and I play the tax and corporate partners, respectively, and the students act as corporate associates. We work with hypothetical clients with legal and ethical issues based on actual case studies. Our “ask” of the students is very different than that traditionally expected in law school classes.

So, what is this “ask” I make of my students? I ask them to be lawyers — to do legal analysis, apply it to the situation we are working on in the simulation, and most importantly, exercise judgment. Note that this proactive, value-seeking expectation is not very different from the common characteristics of the entrepreneurs and venture capitalists the students learn about and work with in the

Found Full-Time Law Jobs, NAT’L L.J. (June 18, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202559883779>.

5. I of course incorporate changes in applicable law and new perspectives on traditional doctrine and theory, and I always feel as though I have less time to cover more materials.

simulations. These entrepreneurial traits⁶ include: imagination, “always questioning,”⁷ innovative thinking about old problems, intuition, positive attitude, willingness to take risks and fail, finding and maintaining balance, and using the latest technology.⁸ Challenging students to be imaginative, innovative, positive, and value-seeking as they define their roles in the legal profession is challenging them to be more entrepreneurial.

Simulations allow us to push students beyond their comfort zones of reading cases and answering related questions. The simulations we use in Business Planning require the students to embrace more risk and face increased potential for failure. Consequently, although I would not necessarily characterize law students as entrepreneurs, I see my “ask” of students as encouraging them to think about the law through an entrepreneurial lens.⁹

Just as there is no one right way to approach the legal classroom, there is no one accepted definition of entrepreneurial activity. Common concepts across definitions include “creation, recognition, and utilization of opportunities,” “generation of value,” and “judgment in the face of uncertainty.”¹⁰ Although many

6. For a complete explanation of these ten traits, see Mike Werling, *10 Traits Entrepreneurs and Einstein Share*, ENTREPRENEUR (Oct. 15, 2008), <http://www.entrepreneur.com/article/197836>.

7. *Id.* Law schools have historically cultivated this skill well. See, e.g., Amanda Pustilnik, *It Keeps the Student Thinking*, N.Y. TIMES ROOM FOR DEBATE (Dec. 16, 2011, 11:19 AM), <http://www.nytimes.com/roomfordebate/2011/12/15/rethinking-how-the-law-is-taught/the-socratic-method-keeps-the-student-thinking>. We incorporate this traditional approach with a more entrepreneurial bent in our Business Planning course by trying to find exercises that underscore the value of questioning. For example, one exercise requires students to negotiate and document an asset purchase agreement for five retail stores. The deal terms provided by the hypothetical client explain that the business is selling five stores and assigning three related real estate leases. Students who fail to ask about this discrepancy never uncover that the company owns the land for two of its stand-alone stores and often lose ground for the client at the negotiating table.

8. Technology is one catalyst of change in the legal profession, and lawyers can benefit from using it to enhance client services. See, e.g., Michelle Harner, *The Value of “Thinking Like a Lawyer,”* 70 MD. L. REV. 390, 406–10 (2011); see also generally NYSB REPORT, *supra* note 1, at 3, 9–11; RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 28–33, 59–93 (2008); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 780–82 (2010).

9. I recognize that many commentators do not associate entrepreneurial activities with lawyers. See *Can Lawyers Be Entrepreneurial?*, N.Y. TIMES YOU’RE THE BOSS (Nov. 23, 2011, 3:20 PM), <http://boss.blogs.nytimes.com/2011/11/23/can-lawyers-be-entrepreneurial/> (“[T]he phrase entrepreneurial lawyer may sound like an oxymoron . . .”). Nevertheless, some lawyers are becoming more entrepreneurial. See, e.g., Eilene Zimmerman, *Skipping the Partner Track for a Shingle of One’s Own*, N.Y. TIMES (Nov. 23, 2011), <http://www.nytimes.com/2011/11/24/business/smallbusiness/skipping-the-legal-partner-track-for-a-private-shingle.html>. I also do not think a law student or lawyer must become an entrepreneur to benefit from an entrepreneurial approach in some of her endeavors.

10. See, e.g., ADAM SZIRMAI ET AL., *ENTREPRENEURSHIP, INNOVATION, AND ECONOMIC DEVELOPMENT* 4–5 (2011) (introducing definitions of entrepreneurial activity and explaining one line of meanings grounded in “discovery and exploitation of opportunities”); Nadim Ahmad & Richard G. Seymour, *Defining Entrepreneurial Activity: Definitions Supporting Frameworks for Data Collection* 14 (Org. for Econ. Co-operation & Dev. Statistics, Working Paper No. 1, 2008) (defining “entrepreneurial activity” as “the enterprising human action in pursuit of the generation of value, through the creation or expansion of economic activity, by identifying and exploiting new products, processes or markets”); Jeffrey S. McMullen & Dean A. Sheperd, *Extending the Theory of the Entrepreneur Using a Signal Detection Framework*, in 6 COGNITIVE APPROACHES TO

law students may not consider themselves entrepreneurs, approaching the law under these guiding principles can make the classroom more dynamic and help students start to find their place in a changing legal market. To that end, I often pose the following questions, among others, to my Business Planning students, “Why should the client hire you?” and “How are you protecting the client’s interests or furthering its business plan?”¹¹ Forcing students to answer these difficult questions can strengthen their understanding of relevant doctrine and theory because it challenges them not only to know the relevant legal principles but also to dissect the principles to exploit opportunity. Most importantly, perhaps, it requires them to exercise judgment.

I am not sure what the legal profession will bring, or how it might look, for my students in ten years, but I hope they strive to embrace and capitalize on the underlying uncertainty. I hope they use the skills they develop during law school to innovate and move the profession forward, especially in these difficult times.

ENTREPRENEURSHIP RESEARCH 139, 139 (Jerome A. Katz & Dean A. Shepherd eds., 2003) (noting that “the first recognized theory of the entrepreneur defined the entrepreneur as someone who exercises business judgment in the face of uncertainty”).

11. For some interesting perspectives on how lawyers might add value, see Stuart L. Goodman, *The Fundamental Role of the Corporate Lawyer—And How to Succeed in It*, in *INSIDE THE MINDS: THE CORPORATE LAWYER, INDUSTRY INSIDERS ON THE SUCCESSFUL PRACTICE OF BUSINESS LAW* 91 (2003); Stephen Bainbridge, *The Function of Transactional Lawyers*, PROFESSORBAINBRIDGE.COM (June 8, 2009), <http://www.professorbainbridge.com/professorbainbridge.com/2009/06/first-kill-all-the-transactional-lawyers.html>; Scott Edward Walker, *Top 10 Reasons Why Entrepreneurs Hate Lawyers*, VENTURE HACKS (Jan. 14, 2010), <http://venturehacks.com/articles/hate-lawyers>.