

BUSINESS LAW BULLETIN

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TRAINING TRANSACTIONAL LAWYERS

by Robert J. Rhee, Professor of Law

This past spring, Professor Michelle Harner, Professor Sheldon Krantz, and I trained a group of junior transactional attorneys at the DC office of DLA Piper. We were honored that the firm invited us to partake in this important professional activity. Feedback from the participants was positive, and the activity gave us meaningful experience in thinking about future academic—professional collaborations in training and knowledge sharing.

The training vehicle was a simulation titled, Tribeca Real Estate LLC: Negotiating Contribution. We created and wrote the problem specifically for this training session. The simulation involved investments in two limited liability companies and a restructuring of the ownership stakes, including the contribution of an ownership interest in one LLC in exchange for an additional stake in another. We created multiple roles for participants who were designated either as clients, as attorneys for the LLCs, or as attorneys for particular members. Each role had different financial and governance stakes and rationales for their investments.

Like many real world situations, the simulation presented a complex problem that was not easily disentangled into discrete legal and business issues. Those assuming lawyer roles had to understand the business rationale for the proposed transaction, and those assuming client roles had to understand both the legal issues and the business implications of the legal advice given. The simulation presented two additional real world problems: a thorny ethical and business dilemma surrounding the proper handling of a potentially adverse fact; and, issues dealing with valuation.

Each DLA Piper attorney received his or her role ahead of time. At the training session, they negotiated the transaction. Professors Harner and Krantz and I observed the negotiation sessions, and thereafter we debriefed as a group. The experience was very positive for several reasons. The training attorneys performed well; and the problem was sufficiently complex and realistic such that they worked hard to achieve an outcome, which is typically the case in a live matter. From our vantage point as trainers, the participants responded to the simulations in a remarkably realistic way: e.g., the initial search and struggle for a framework of discussion; mutual exploration of facts, interests and options; negotiating the details; and the fact that some portions of the deal go well while other issues seem to get stalled.

We felt that the training attorneys gained valuable, practical experience in handling the matter, even though it was in an educational setting. In experiential learning, struggles and mistakes in any endeavor provide the most concrete teaching moments. In the current economic climate, clients are less likely to pay fees associated with training their lawyers to handle certain matters; experiential learning opportunities and learning through practice will help new attorneys develop their professional skill sets.

The positive experience between DLA Piper and Maryland Carey Law highlights two important questions in the larger debate regarding the legal academy and the legal profession: (1) What changes, if any, to curriculum and pedagogy should law schools make in response to market disturbances in legal education and the legal profession at large? (2) In what ways can law schools



Professor Robert Rhee

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and law firms collaborate in the training of law students and new lawyers?

My answer is that curriculum should include greater opportunities for problem-solving, which would require greater pedagogical diversity than the traditional casebook-oriented lectures. In a forthcoming symposium issue of the *American University Business Law Review*, Professor Harner and I advocate pedagogical techniques such as deal deconstruction, case studies, and case simulations as ways to teach contextualization and to develop better problem-solving skills. These methods are commonly used in business schools. Beyond the 1L curriculum, upper level courses should provide opportunities for students to apply the legal analytic skills in the context of problem-solving situations. The Tribeca simulation is a good example of the benefits of contextualization. It involved substantive issues in the law of LLCs, valuation of business entities, divergent economic interests, business strategy, multi-party negotiations, tort liability, and negotiation ethics. Typically, analysis of an appellate opinion, significantly edited for student consumption, simply will not offer the same breadth of practical, problem-solving based training.

A closer relationship between law schools and the local bar makes sense. Law schools and students have benefitted enormously from the wealth of knowledge and expertise adjunct professors offer, and practitioners have always greatly enriched the curriculum at Maryland Law. The Tribeca simulation also shows there are opportunities for greater faculty collaboration with law firms. Certainly an interest in education and training is a broad common ground.

PROVIDING PRACTICAL INSIGHT ON ENTERPRISE RISK MANAGEMENT

Over the course of this year, Professor Michelle Harner will complete four “Director Notes” for *The Conference Board* on Enterprise Risk Management (ERM). Although risk management is not a new concept, in the past decade or so the practice and scope of risk management has expanded considerably, generally including a wide variety of both financial and non-financial risks.

Enterprise Risk Management is a holistic, enterprise-wide, approach to risk management wherein individuals at all levels of an organization are encouraged to identify, assess, and communicate regarding actual and potential risks to the company’s goals. The ERM program implementation starts with the company’s board of directors and senior management, who should carefully consider the company’s strategic plan, set the company’s risk appetite, communicate the company’s risk profile internally, and develop a meaningful system for dialogue on risk.

Two of Professor Harner’s articles came out earlier this year. The first article, “The Potential Cost and Value of ERM,” provides an overview of essential ERM concepts and explains some key considerations a board of directors should be aware of regarding ERM implementation. The second article, “Corporate Culture and ERM,” discusses the importance of ‘tone at the top’ -- the attitudes and actions of company leaders -- when implementing a successful ERM program. The article notes that company leaders must embody the values pronounced in the company’s risk policies, and they should design incentive and compensation structures to align with those values.

The third and fourth articles are expected later this year. One article, to which Carey Law student Joey Kroart, III will contribute, will provide data-driven analysis on how ERM implementation affects publicly traded companies. The second, to which Carey Law fellow Jennifer Ivey-Crickenberger ’12 will contribute, will compare the two most popular ERM frameworks and describe how ERM has actually been implemented at several companies.

The Conference Board is a global, independent business membership and research association that aims to supply the world’s leading organizations with the practical, up-to-date knowledge businesses need to improve performance and better serve society. In carrying out its mission, *The Conference Board* offers a wide variety of publications and tools. “Director Notes” is a series of online publications in which *The Conference Board* engages experts from various disciplines of business leadership to provide insight on issues relevant to companies today.



Professor Michelle Harner

PROFESSOR DANIEL GOLDBERG DISCUSSES HIS NEW BOOK, *THE DEATH OF THE INCOME TAX: A PROGRESSIVE CONSUMPTION TAX AND THE PATH TO FISCAL REFORM*

The income tax has structural flaws, as this book explains, and Congress's mismanagement since its original enactment has made income tax intolerable. Problems in the system have led to substantial income tax cheating, costing hundreds of billions of dollars in uncollected tax revenue each year, and to staggering costs of administering the tax system each year, both to taxpayers and the government.

The Death of the Income Tax, recently published by Oxford University Press, examines the flaws in the income tax, some of which are inherent and some of which are self-inflicted. The income tax is needlessly complex, contains perverse incentives against saving and investment, fails to use modern technology to ease compliance and collection burdens, and is subject to micromanaging and mismanaging by Congress. These flaws cost us huge losses in revenue that should be collected under law (the tax gap) and also huge taxpayer and government expenses to operate a broken system (deadweight loss). Even if cost issues could be fixed in the income tax, which they cannot, the micromanagement and mismanagement problems have proven to be beyond the politicians' ability to correct.

This book proposes that we abandon the current income tax and completely replace it with a progressive consumption tax, collected electronically at the point of sale. The acceptance of this solution requires understanding first, that a tax on consumption will serve the country better than a tax on income (see chapter 9); second, that a consumption tax can be implemented in several different ways (see chapters 10 and 11); third, that the current tax system is an eclectic income tax/consumption tax system already (chapter 12); fourth, that an efficient and leak-proof tax system is best designed as a point of sale tax on transactions as they occur (see chapters 13 and 14); and, finally, that such a system can be made progressive by using a two-tier variant of a credit VAT, carving out wages and taxing them at graduated tax rates (see chapters 13 through 15). Transition to the replacement system will pose challenges, which the book addresses (see chapter 16).

The Death of the Income Tax suggests the implementation of e-Tax, a convenient contraction for an electronically collected tax (see chapter 14). e-Tax is based on a European-style, credit value added tax (VAT), because with modern technology, a VAT can be collected electronically and automatically (see chapters 13 through 15). e-Tax builds in progressivity at the wage-earner level. It combines straightforward concepts with appropriate use of technology to achieve ease, efficiency, and assurance of compliance and collection.

The issue of tax reform comes at an appropriate time for several reasons. First, the year 2013 is a fiscal crisis year, and the crisis will get appreciably worse in the next few years. The Bush tax cuts of 2001 and 2003 were extended two years and then made permanent, just as they were expiring (except for high income taxpayers, whose tax rates were increased). In addition, in 2013 the baby boomers will begin to retire, putting additional pressure on Medicare. A perceived need for more revenue from the income tax will ensure that tax reform will be on the table, while retirement of the baby boomers will mean that there will be insufficient unallocated revenue coming from social security collections to buy off everyone with tax cuts. Also, the fiscal crisis will be heightened by the need to pay for the stimulus program that was enacted to combat the recession and to provide for the new health care entitlements.

Adoption of e-Tax can reduce substantially both the loss of tax revenue from tax cheating and the deadweight loss from the costs to both taxpayers and the government of administering the current tax system. As the country heads into the fiscal crunch of increasing demand for government-funded benefits and reduced tolerance for higher taxes, e-Tax will be an attractive alternative to reducing government spending or increasing taxes. *The Death of the Income Tax: A Progressive Consumption Tax and the Path to Fiscal Reform* can be the catalyst for transformation.



Professor Daniel
Goldberg

PROGRAM NEWS

BUSINESS LAW TRACK GRADUATES TEN STUDENTS IN SECOND YEAR

The Business Law Program launched its Business Law Track concentration – a guided path of study designed to provide a rigorous and comprehensive preparation for business law practice – two years ago this fall. UM Carey Law graduates Peter Feild and Scott Forney achieved the distinction of becoming our Program’s first two Business Law Track alumni within months of the Track’s inception.

This past May, our alumni class grew with ten additional Track graduates: Chad Brooker, Daniel Davis, Leanne Fryer, Christine Hein, Reshard Kellici, Alvaro Llosa, Zach Ostro, Keivan Shahabi, Ashley Sharif, and Jonathan Watson.

Through custom-designed courses such as Business Law Boot Camp and Business 101, the Track students prepared for a career in business law by mastering concepts in taxation, legal aspects of financing, an understanding of business organizations, and a proficiency in core accounting and finance concepts, as well as gaining exposure to real and simulated transactions. The Track emphasizes professional development and experiential learning as a complement to academic instruction, making it a participatory and comprehensive education that goes beyond the classroom.

For their outstanding accomplishment in completing a challenging course of study, the ten Track graduates of the May 2013 class received letters of recognition from Co-Directors Harner and Rhee. More information about the Business Law Track is available online at <http://www.law.umaryland.edu/programs/business/academics/track.html>.

BUSINESS LAW BOOT CAMP FEATURES CHIEF JUSTICE E. NORMAN VEASEY

Students enrolled in the Business Law Boot Camp course this fall had the chance to learn about the professional responsibilities associated with being a corporate lawyer from distinguished guest lecturer Chief Justice E. Norman Veasey, former chief justice of Delaware’s Supreme Court. Chief Justice Veasey, who recently co-authored *Indispensable Counsel: The Chief Legal Officer in the New Reality* (Oxford University Press, 2012) (with Di Guglielmo), addressed the group of 90 Boot Camp students during their first class session on September 6.

Chief Justice Veasey served a 12-year term as the top judicial officer and administrator of Delaware’s judicial branch, stepping down in May 2004. During his tenure as chief justice, the US Chamber of Commerce ranked Delaware’s courts first in the nation for three consecutive years for their fair, reasonable, and efficient litigation environment.

Chief Justice Veasey has also been credited with leading nationwide programs to restore professionalism to the practice of law and adopt best practices in the running of America’s courts. In 2004, he was awarded the Order of the First State by the Governor of Delaware, the highest honor for meritorious service the State’s governor can grant.

WANT TO GET INVOLVED?

Host a “brown bag” on a topic of Business Law that interests you. Mentor a Business Law Society student. Sponsor a Business Law symposium. We’re always looking for ideas and suggestions to enrich our experiences at UM Carey Law. Contact Hilary Hansen at 410-706-3146 or hhansen@law.umaryland.edu.

RAMSEY LECTURE FEATURES “AN EVENING OF ENTREPRENEURSHIP” WITH MSNBC’S JJ RAMBERG

The Norman P. Ramsey Lecture has brought a succession of luminaries to UM Carey Law, including former U.S. Secretary of State Madeleine Albright. This year’s guest continued that legacy. JJ Ramberg is host of one of the longest running shows on MSNBC, *Your Business*, which has profiled thousands of small business owners and offered advice from countless small business experts and investors. In addition, with her brother Ms. Ramberg founded GoodSearch, a search engine, online shopping mall, and restaurant dining program that contributes 50% of its revenue to nonprofits or schools designated by its users.

Ramberg’s lecture promoted the entrepreneurial spirit, risk-taking, starting small, creative problem solving, and following your heart. A significant theme of the evening was, “I think I can’t” which, despite the initial impression, was not about negative thinking, but more about how knowing limits and asking what is most effective will ultimately advance your business.

For one example, she discussed the early stage growth and management of GoodSearch and how, after significant growth of the company, she and her brother determined the business would be better served by an experienced CEO. She noted that someone who is really great at managing a company with fifty employees may not be well-equipped to manage a company of 500. Other examples included taking hiring decisions seriously and knowing when to get professionals, such as lawyers, involved. Ramberg spent significant time at the end of lecture to field questions from numerous members of the audience.



JJ Ramberg

SPRING SYMPOSIUM EXPLORES THE LEGAL EFFECTS OF SOCIAL MEDIA

Last spring, the Journal of Business & Technology Law hosted a symposium titled, “Social Media and the Law: An Exploratory Look into the Legal Effects of Online Interconnectedness,” designed to bring current legal issues related to social media to the attention of students, professors, scholars, and practitioners. Topics included the constitutionality of student athlete social media policies; the relationship between social media interfaces and copyright law; and how social media laws are developing with respect to employment law, contracts, and privacy matters.

Professor Robert Percival, the Robert F. Stanton Professor of Law and Director of the Environmental Law Program at the University of Maryland Francis King Carey School of Law, began the morning session by highlighting prominent stories from the news involving student athletes and social media that illustrate the importance of this emerging legal topic. Frank LoMonte, Executive Director of the Student Press Law Center, set the stage for the first discussion by describing the legal history of students’ rights to free speech and exploring what legal standard should apply in cases involving social media. Matt Taylor, Assistant Director of Media Relations for the University of Maryland Department of Collegiate Athletics, provided insight into how universities approach the issue and stressed the importance of educating student athletes about the use of social media services rather than censoring athletes’ use of them. Professor Phillip J. Closius, Professor at the University of Baltimore School of Law, focused his segment on applying traditional First Amendment principles to the regulation of social media by school administrators. Approaching the issue from a different perspective, Bradley Shear of the Law Office of Bradley S. Shear,



Professor Robert Percival and Frank LoMonte

LLC explained the potential liabilities schools face if they seek greater control over student-athletes' use of social media.

Professor Robert Suggs of UM Carey Law introduced and moderated the second panel, Social Media and Copyright Law. Cynthia Blake Sanders, an Associate at Ober|Kaler and Adjunct Professor at UM Carey Law, began the conversation by discussing copyright infringement as it relates to social media. Using a case study, she illustrated how those wishing to use online content may be able to apply the "fair use" provisions of the Copyright Act to do so legally. Taking a step back to provide background on the legal framework involved in copyright infringement in online media, Venable attorney Krista S. Coons briefly explained how the Digital Millennium Copyright Act (DMCA) can limit the liability of online service providers like social media sites. Ms. Coons noted that even the DMCA, which was designed with online copyright infringement in mind, did not anticipate the type of mass global sharing of online content we have today. Professor Patricia Aufderheide from the American University School of Communication talked about the successful use of Codes of Best Practices in Fair Use by those in creative fields. She also went into more detail on what "fair use" really means, saying that to be fair, the use of copyrighted material must be transformative in nature. James Campbell, a Washington D.C. photographer, displayed multiple photography projects, all of which utilize online images, to show how artists navigate copyright law in the real world. Collectively the panelists elaborated on the practical risks are to the average internet user, and noted that it is difficult for people to know what risks they actually face when posting content online.

The final panel was introduced by Director of the Maryland Intellectual Property Legal Resource Center and UM Carey Law Associate Professor Patricia Campbell, who introduced the legal implications of social media platforms in the context of privacy and employment law. Eric Raphan, Partner at Sheppard Mullin Richter & Hampton LLP, focused on the rights of employers to access prospective employees' social media accounts or to respond to current employees' comments on social media. Attorney Kirsten Koepsel discussed the terms and conditions of various social media websites, and what they really mean for the user, including the consequences of a violation of the terms. Gerald Ferguson, partner and coordinator of the Intellectual Property, Technology, and Media Group at Baker Hostetler, spoke about the legal consequences of social media use and the legal limitations of social media sites regarding the collection and use of users' information. He questioned whether our existing legal framework provides a level playing field between users and social media sites. David Jacobs, consumer protection counsel at the Electronic Privacy Information Center, explored the intersection of what he called "big data" and social media, the use of facial recognition by social media sites, and the ability of law enforcement to access users' information.

The Journal would like to thank Professor Robert Percival, Professor Robert Suggs, Professor Patricia Campbell, and Dean Phoebe Haddon for their invaluable contributions to the event.



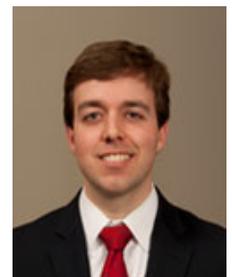
Professor Patricia Aufderheide (speaking) with other panelists (from l to r.): Professor Robert Suggs, Cynthia Blake Sanders, Krista Coons, and James Campbell

ALUMNI SPOTLIGHT

UM Carey Law alum George Everly, III, recently earned the prestigious appointment of Supreme Court Fellow in a program created and implemented 40 years ago by the late Chief Justice Warren Burger. George is one of only four fellows selected annually by a Chief Justice-appointed committee. Each fellow is assigned to a different area of the federal Judiciary, and George's placement in the Administrative Office of the U.S. Courts gives him the opportunity to assist the U.S. Judicial Conference, the policy-making body for the Judicial Branch.

George graduated from UM Carey Law in 2010, concurrently completing his MBA at the Robert H. Smith School of Business. He earned his BA in economics and history at St. Mary's College of Maryland before starting the JD/MBA program. During George's final semester of graduate school, he worked with staff of the Congressional Oversight Panel, a Senate panel established to oversee implementation of the \$700 billion Troubled Asset Relief Program.

Immediately after graduating from UM Carey law, George began working in the personal office of Senator Judd Gregg of New Hampshire. After taking the bar exam, George joined the professional staff of the U.S. Senate Budget Committee,



George Everly, III

where Senator Gregg served as ranking member.

The Budget Committee's primary legislative role is to establish limits on different categories of federal spending, through Senate rules and budget laws, and to enforce those limits on the Senate floor. As Counsel to the committee, George applied these rules and laws to pending legislation and helped develop relevant legislative and communications strategies that advanced larger policy goals. Many times, this work cut across academic disciplines, such as economics, communications, finance, and law. George noticed early in his career that the dual JD/MBA program provided the broad skill set necessary to understand multi-disciplinary policy issues.

While working for the Senate, George visited the People's Republic of China as part of a Congressional staff delegation and met with government and corporate officials to discuss the development of China's financial system. George also participated in the Stennis Emerging Congressional Staff Leaders Program, which provides mentoring and support to staff who demonstrate significant leadership potential.

"The part of the job I enjoyed most," George commented, "was working with very talented people on issues of national significance—such as the Budget Control Act of 2011 and sequestration, annual appropriations, immigration reform, the debt limit, and Dodd-Frank." Now George joins the Judicial Branch as it grapples with the effects of sequestration and the prospect of insufficient funding from a divided Congress.

FACULTY NOTES

Daniel Goldberg recently published a book, *The Death of The Income Tax: A Progressive Consumption Tax and the Path To Fiscal Reform* (Oxford University Press, 2013).

Michelle Harner is currently serving as the Reporter to the ABI Commission to Study the Reform of Chapter 11. She recently completed a three-year term as a member of the Dodd-Frank Study Working Group for the Administrative Office of the United States Courts, which issued reports to Congress under Title II of the Dodd-Frank Act in July 2011, 2012, and 2013. She published "Corporate Culture and ERM," *The Conference Board Director Notes* (June 2013); "The Potential Cost and Value of ERM," *The Conference Board Director Notes* (March 2013); and will publish "Facilitating Successful Failures," 66 *FLORIDA LAW REVIEW* (forthcoming 2014) (with Jamie Marincic Griffin); "A More Realistic Approach to Directors' Duties," 15 *TRANSACTIONS: TENNESSEE JOURNAL OF BUSINESS LAW* (forthcoming 2014); "Deconstructing the Deal, Post-Mortems, and Case Studies: Toward Practice Readiness with New Pedagogies and Partnerships with the Profession," 2 *AMERICAN UNIVERSITY BUSINESS LAW REVIEW* (forthcoming 2013) (with Robert Rhee) (symposium piece).

Michael Greenberger recently published "Closing Wall Street's Commodity and Swaps Betting Parlors: Legal Remedies to Combat Needlessly Gambling up the Price of Crude Oil Beyond What Market Fundamentals Dictate," 81 *GEORGE WASHINGTON LAW REVIEW* 707 (2013); "Diversifying Clearinghouse Ownership in Order to Safeguard Free and Open Access to the Derivatives Clearing Market," 18 *FORDHAM JOURNAL OF CORPORATIONS & FINANCE LAW* 245 (2013); and the book chapter "Derivatives in the Crisis and Financial Reform," in *The Handbook of the Political Economy of Financial Crises* (eds. Gerald Epstein & Martin Wolfson) (Oxford University Handbook, 2013). In addition, Prof. Greenberger has made multiple presentations, including "The Impact of High Price Volatility on Global Commodity Markets," for the USDA Economists Group seminar focused on The Impact of High Price Volatility on Global Commodity Markets in Washington, DC; "Economic Message Briefing," for The Economic Media Project in Washington, DC; and "Extraterritoriality of Dodd-Frank," at the Importance of Cross-Border Application of the CFTC's Derivatives Regulations Tele-Press Conference sponsored by Americans for Financial Reform in Washington, DC. Professor Greenberger also recently served on several panels, including "International Commodity Price Volatility and Risks," for the Council on Food, Agricultural & Resource Economics (CFARE); "The Future Direction of Financial Regulation After the 2012 Elections," at The Political Economy of Financial Regulation roundtable in Washington, DC; and "The Imperative of the Extraterritorial Reach of Dodd-Frank," at the Hyman P. Minsky Conference on Financial Instability, Debt, Deficits, and Unstable Markets in Berlin, Germany.

Shruti Rana recently published the article, "Philanthropic Innovation and Creative Capitalism: A Historical and Comparative Perspective on Social Entrepreneurship," 64 *ALABAMA LAW REVIEW* 1121 (2013); and served as a moderator and discussant for the Banking and Financial Regulation Panel at the National Business Law Scholars Conference at Ohio

State University Moritz College of Law in Columbus, Ohio. Prof. Rana also presented “A Comparative Analysis of China’s Copyright Law Reforms: The Need for a Rules-Based Approach in the Chinese Business Context” at the Temple Law Faculty Colloquium; and was quoted in *The Daily Record* article, “On First Day of Law School, Students Learn the Ropes” (August 26 , 2013).

William Reynolds published the article “From Lord Coke to Internet Privacy: The Past, Present, and Future of Electronic Contracting,” 72 MARYLAND LAW REVIEW 452 (2013) (with Juliet M. Moringiello).

Robert J. Rhee published the article “The Terrorism Risk Insurance Act: Time to End the Corporate Welfare,” in *Policy Analysis*, No. 736 (Cato Institute, Sept. 10, 2013).

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