

A DESCRIPTION OF A BUSINESS APPROACH TO TEACHING THE LEGAL ENVIRONMENT OF BUSINESS

By

Donna J. Cunningham*

I – INTRODUCTION

Typically, an instructor teaching a Legal Environment of Business course requires that students perform legal case analysis and submit case briefs either orally or in writing, as a substantial component of the course. Thus, while the student studies business ethics, the Constitution and torts, for example, in each study module, certain legal case decisions are presented, either in the text, or as separate handouts, which the student must “brief,” citing the legal issue, the court’s reasoning, the facts of the case, and so on. While these exercises may be helpful in developing a student’s analytical and reasoning skills, it is doubtful that the student, as a business person, will ever again brief a legal case decision during his or her business career. Indeed, in twenty years of business law practice, the author never encountered a business client who briefed a case decision, or even read one.

This paper describes a different approach to teaching the Legal Environment of Business – one designed to allow the business student to apply what the student has learned of the law in a business context, and in a way that the student is likely to experience again in his or her career. This paper offers a brief description of this “business approach” for purposes of a panel discussion on the future of the undergraduate business law curriculum. The paper is offered for purposes of discussion only, although it is hoped that a later paper may make a proposal for others to adopt such an approach. This will be the effort of a later paper which, no doubt, will benefit immensely from the input of others on the panel.

II – COURSE CONTENT

There has been much debate over the content that *should* be included in the standard Legal Environment of Business course. Most instructors would agree that a basic understanding of the law, of the idea jurisprudence, of public policy, of legal reasoning, of basic constitutional mandates, should be understood by all students, especially business students. Indeed, these days, since many primary and middle-schools no longer teach what many of us know as “civics” courses, which describe the Constitution, the branches of the government, and the foundations of our system of government, the basic undergraduate business school legal course may be the only opportunity the student will have to engage the subjects of these immensely important principles. In addition, students must be able to identify the legal issue in a dispute, and to understand the practical and public policy reasons behind the rules of law which are developed.

But beyond this basic legal foundation, there is much disagreement. Some instructors prefer a traditional approach, addressing major private law concerns of business (contracts, etc.) , and leaving public law topics (regulation, etc.) for a later (elective) course which is essentially the sequel to the beginning “Legal Environment of Business” course. Experience has led this instructor to ignore the distinction between public and private law, and instead to focus on the kinds of legal situations the business student is most likely to encounter in the future, no matter what their classifications might be. To this end, this instructor’s course addresses the following topics, more or less in the following order: Introduction to Law, Business Organizations, Business Ethics, the Judicial System, the Attorney-Client Privilege, Litigation and Alternative Dispute Resolution, Constitutional Law, Property, Intellectual Property, Torts, Product Liability, Contracts, Criminal Law, Advertising, Regulatory Law, Cyberlaw, Workers’ Compensation, Employment Law, Environmental Law and International Law. Given the scope of the topics to be covered, the time devoted to each topic varies considerably, some topics receiving extended discussion and analysis, and others receiving only the briefest summary or overview which has been dubbed “speed law.”

III – COURSE CONTEXT

It is misleading, perhaps, to list course content before course context in this paper, because in this “business approach” to the Legal Environment of Business, the *context* of the course assumes primary importance, and even dictates the topics to be covered. Over the three years this instructor has been teaching the course, the covered topics have (mostly) expanded and sometimes contracted, based upon those topics which seem most practical to a business student experience, and which can be addressed in the time allotted. In essence, the underlying premise of the course has become its driving force. The context of the course puts students in a “business meeting” mode, rather than a student mode. Student teams will form businesses of their own choosing, and students will study the course topics through that business during the semester, applying legal principles to their particular businesses. Their teammates become co-workers. Coming to class each day is like coming to work. And students will learn something of how to conduct themselves in a business context.

A. Business Team Formation

During the first day of class, students complete 4 x 6 cards with certain basic information, such as College, Major, business goals, business experience, and anything noteworthy or unusual, including whether the student is a Hope Scholar, an athlete, or an international student. This information is used to introduce the students to the instructor and to each other by a series of brief (1-2 minutes) one-on-one, in open class discussions between a student and the instructor based on the information provided on the index card. Students gain a feel for who their classmates are, and what business experience they have. The “game plan” of business teams is explained, and then, during the first week, after introductions, students are divided into random teams of 5-6 members each. They are given time, in class, to decide what type of business they would like to form. After two semesters of discovering that we had four sports bars and three Italian restaurants in each class, the instructor instituted a method for encouraging the development of different kinds of businesses. One team member draws from a cup the type of business the team must form, such as manufacturing, technology, service, media or entertainment, food or retail, consumer goods, international, and so on. But beyond this bare requirement, the choice is theirs. Students decide how large the company is, how many facilities it has, how many employees, and where the offices, plants and other outlets are located. (They often learn later, much to their chagrin, that you should be careful what you wish for.)

During the past year, team businesses formed by students in this manner included a sporting goods store, a limousine service, a day spa, a brewery, a computer programming and networking company, a printing company, a screen-printing T-shirt manufacturer, a car wash, a magazine publisher, a water bottler, a manufacturer of XM radio components and another for advanced computer systems, both for installation in automobiles, an automobile manufacturer, a manufacturer of computer systems for restaurants, a rental property management firm, a lumber store, a cable company, two restaurants, and three cellular telephone companies. Interestingly, the three cell telephone companies were all developed in the same class, one as a service company, one as a technology company, and one as a media company. Obviously the system used to encourage the development of distinct businesses needs constant tweaking.

During the time the students are discussing what kind of business to form, they are also getting to know each other. As soon as they are ready, they elect officers: a President, who runs meetings and divides work; perhaps a Vice-President as a stand-in when the President is absent; a Reporter, who submits all written assignments on behalf of the team, combining the work of all members into one, coherent whole; a Spokesperson, who makes most oral reports in class for the company; a Secretary, who keeps minutes of meetings and takes attendance; and perhaps others as they decide, which may include a Chief Financial Officer, an Ethics officer or a Researcher. The students’ teammates will be their workmates for the semester, and they may learn some of the benefits and detriments of working in teams.

B. Public Speaking; The Western Business Handshake

Once the teams are formed, the students are given a crash course in public speaking. Most of them already realize that at some point in their careers – in a business meeting perhaps – they will have to get up and speak to their co-workers. Although they may be terrified by that prospect, they are advised that all it takes is practice, and that it will be easier to practice among their friendly classmates. They are given 3 basic rules which will give them instant credibility: 1) Plant your feet; 2) Make eye contact; 3) Don’t read. The instructor provides a demonstration of how (and how not) to do these things. (Power point slides prepared for this purpose are sent to them, so that they have and can retain the information. They are also advised to practice at home in front of a mirror.)

Next, the instructor provides a brief history of the origin of the Western business handshake (the custom developed in Medieval England when strangers on the road displayed their open palms to show that they were not brandishing weapons). The instructor and a (volunteer?) student demonstrate a proper business handshake (firm, but not a bone-cruncher, given while smiling and making eye contact, and speaking an appropriate greeting), and the students practice with each other, to many smiles and much laughter.

Then team reports begin. Briefly, each Spokesperson stands, introduces his or her teammates by name and office, and briefly describes their business. Team members being introduced are told to smile and nod or wave, to acknowledge the introduction; they are also reminded that name recognition (and face recognition) are necessary to advancement in business. This exercise is fun, punctuated by nervous laughter, and very beneficial. The students elected to the position of Spokesperson generally are outgoing, and speak rather easily in front of others. But the students are told that each one of them will speak to the class two or three times during the semester, and that practice will make all the difference. Even the most reluctant agree by the end of the semester, that they are much less afraid than they once were.

C. Choice of Business Organization

Students are given some basic information about business organizations to study before the next class meeting. The major features of corporations, partnerships, limited liability companies and their hybrid forms are listed. Sample stock certificates are displayed. The importance of corporate or other entity identifiers is explained. Students meet in their teams to decide what kind of business form they should choose, and the Reporter submits a brief report listing the choice and why the

teammates chose that particular form of organization. A local business lawyer comes to speak to the class at the next session about the differences between various business forms, and their pros and cons, and then discusses with each team in open class what kind of business they have, what form of business they chose and why. The lawyer asks questions of the students, and they ask questions of the lawyer specific to their business decision. It is a very productive class session, and not only from the standpoint of the choice of form of business organization. Perhaps more importantly, students meet and confer with a real, local business attorney. They gain an understanding of what a business attorney does, and how the attorney works with clients. It is a positive beginning of a sound relationship between business person and business lawyer.

IV – APPLYING THE LAW TO BUSINESS

A. Introduction to Law

Once teams have been formed, course work begins in earnest. In the Introduction to Law segment, whatever other material is covered, it is a major goal to have students realize and acknowledge that the law is not a static set of rules. Two cases are discussed: *Plessy v. Ferguson*,¹ decided in 1896, in which the U.S. Supreme Court declared that segregation is not unconstitutional, and *Brown v. Board of Education*,² decided in 1954, in which the Supreme Court declared that segregation is unconstitutional. Students are asked, “What changed?” Invariably, they realize that society changed, and the law finally acknowledged that change. As a society grows and develops, so the law changes to reflect that growth. This acknowledgment is the beginning of the realization that at any given time, the law is not the only or final answer, that it may not be reflective of societal development, and that therefore, one cannot always hang his proverbial hat on the hook of “legal,” to justify conduct.

B. The Business Ethics Policy

There are no end of appalling examples of unethical business conduct to be found in the headlines these days. However revealing they may be, they are remote. To be effective, business ethics instruction must be personal. The segment on business ethics begins with 3 questions: 1) Where do we learn ethics? 2) If we know ethics, do we automatically know how to apply it to business? and 3) Even if we know ethics, and we know how to apply it to business, does that mean we will automatically do it? Students readily acknowledge that most of what they know of ethics they learned from their parents, that they don't know everything there is to know about *business* ethics, and that even if they did, that doesn't necessarily mean that they would always act ethically. This is food for thought. The reasons why someone might not act ethically are candidly discussed, and the pressures one faces in making such a decision are acknowledged.

i. Students Become Stakeholders

Students are asked to imagine themselves to be a customer of a business, and asked what they want from the business. Invariably, they want a good product or service, a fair price, an exchange of a defective product, a stable company, and so on. Students are asked whether these demands are reasonable, and whether the customer has a right to expect these things, and they agree the customer does have such rights. Each demand is written on the board.

Next, students are asked to imagine themselves to be an employee of a company, and asked what they want – as an employee - from the company for which they work. Invariably, they list things like good wages, benefits, vacation pay, a safe and pleasant working environment, a non-discrimination policy, a chance for advancement, and so on. They are asked whether these demands are reasonable, and whether employees have a right to such conditions, and they agree that employees do have such rights. Each demand is added to the list on the board.

Next, students are asked to think of themselves as members of a community in which a business is located. They are asked what they want from that business, as community members. Invariably, they want noise and light reduced, trash eliminated, no pollution, and so on. These demands are also added to the list on the board. Students begin to see that differing constituencies want different things from businesses.

Depending upon time constraints, the instructor may go through many other stakeholders, and add to the list on the board all of the demands developed by the students. Now, the board displays a list of general rules of conduct which apply to businesses generally.

Next, ask the students to break into their teams and over the next 3-5 minutes, try to figure out what the most likely ethical problems their *particular* kind of business will face, and to write them down. Examples may be cited to get them started. For example, during one semester, students formed a gambling boat business. The ethical problems faced by a gambling boat business were going to be far different from those of a retail store, for instance. Another good example is a bar. Students immediately realize that underage drinking will be a likely ethical problem the business will continually face. Once students understand that ethical problems will differ from business to business, ask them to determine how they will resolve these particular ethical problems. After the students have met in their teams and identified their business' ethical problems, call upon each team in open class to report (as time permits) one to three of their most likely ethical problems for their kind of

business, and what they will do about them. Write these on the board. When all the teams have reported, ask them to look again at the board. Tell the students that this is their starting point for the drafting of a Business Ethics Policy for their businesses – the general conduct guidelines developed earlier by the class, supplemented by the particular ethical problems they have realized their businesses will face. Ask them to build a Business Ethics Policy around these.

The thought process of identifying and acknowledging the differing views of stakeholders, the good conduct issues common to all businesses and the ethical issues specific to their particular businesses help students develop and retain an understanding of business ethics. If all they had studied were various ethical theories, those theories might be forgotten two weeks after the final exam. The assignment of applying their study of ethics to an actual business, even if a mock business, helps students to apply what they have learned in a practical way, and helps them to retain what they have learned.

C. Negotiating and Drafting a Contract

About midway through the course, the instructor assigns contracts to be negotiated between the company teams, one contract for each two teams. (Thus, it is always necessary to have an even number of teams.) It can be a creative exercise to develop some plausible contract to be negotiated between teams based upon what their businesses do, but this is an assignment which students invariably enjoy. Students are advised that their goal is to agree on a contract while protecting their company, but to enter into a fair contract. The trouble which can result from an unfair, one-sided contract is discussed. For the instructor, it is both enjoyable and revealing to watch undergraduate students negotiating. Some of them adapt quickly to their roles, and become consummate negotiators.

In preparation for the assignment of contracts, students are given three major pieces of information as background. First, a description and discussion of the meaning and legal effect of the contract terms “offer,” “acceptance” and “consideration” is given in open class. Next, three conditions which might void what appears to be a valid contract are explained and discussed: legality, capacity, and (lack of) a writing. Finally, the instructor provides and explains 12 major terms³ which should be considered for inclusion in every contract, items such as what exactly is being promised, duration of the contract, guarantee, payment terms, and so on. Other pertinent topics included on the outline are discussed. The instructor gives students a proposed contract subject to begin with (examples range from painting services for money, to a sharing of customer lists for mutual sales calls), but they are told they may change the premise in any way they like, so long as a contract results.

The process of negotiation is explained. Each business meets to decide what it wants in the contract, and is advised to include on its list some items which can be given up during negotiation, and to make sure it has identified which are must-have-deal-breakers. A company may decide to go as a group to the negotiation, or name a negotiator to represent it. In-class time is given for the start of negotiations, though the teams are advised to exchange email addresses and phone numbers in order to continue their negotiations.

The process of drafting the contract is described. After the primary negotiation is concluded, one team develops a draft contract which it submits to the other team. (The advantages of doing the work of a first draft are explained, including setting parameters, and including and excluding items from the contract.) The second team reviews it, making any changes, additions or deletions it wants, and returns the revised contract to the first team, which then reviews the changes. The drafting process continues in this manner until every item is agreed upon. Teams are instructed to have the President or other representative sign the contract in hard copy, and turn it in on the appropriate assignment due date. They are also instructed, as is good business practice, to keep a copy of anything they have signed, and anything signed by a party on the other side of a contract, and also to keep a copy for their lawyers. Finally, they are advised that both parties are to initial any hand-written changes to the final contract, and why.

D. Should Your Business Go International?

Near the end of the course, each team is assigned a country to research with the object of deciding whether or not that team should expand its business to do business in or with that foreign country. Countries are chosen by the instructor from the major continents of Europe, Asia, Africa, perhaps North or South America, and perhaps Australia or New Zealand. Selections can be made based upon current events or particular study goals. Slips of paper with the names of the countries are prepared and placed, folded, into a cup. The team Presidents then draw a name at random from the cup, and the assignment particulars are given. For their assigned country, the teams are to research the common greeting, something of the country’s culture, the population, including their religions, the business culture, a brief history, a review of the government and political system and its stability, business and economic system, law and legal system, and to what extent laws are enforced, and what the market would be in that country for the team’s particular business. Finally, each team is to make a recommendation regarding whether its company would do business with its assigned country, and why or why not. Each team prepares a power point slide presentation, and gives an oral presentation in class. For the presentation, students dress in business attire, each team member reporting on the section of the presentation that the student researched.

The knowledge and understanding gained from this exercise is incalculable. It applies notions of globalization in a practical, concrete way. It brings together many study areas, including law, economics, management, employment law and others, and gives the student an opportunity to use and combine them in a practical application. Students, formerly

nationalistic in viewpoint, begin to see the business opportunities available in the world. Recently, a student team which had formed a brewery business drew China as its research subject. The students groaned – until they did their research and discovered that the Chinese are drinking more beer. Their decision was to expand to China, as soon as possible, to get in on the ground floor.

V – OTHER BUSINESS EXERCISES AND ASSIGNMENTS

In no particular order, listed here are some other business exercises and assignments the author has tried, usually with good effect.

Attorney-client privilege: Ask students about their company’s attorney, “Who does attorney represent?” Usually, they believe the attorney represents them. But it is critical for them to understand that if the attorney represents the business, it is the *business* that is the client, and not the employees of the business, except as agents of the company. Discussions about the business control group, circumstances in which the business attorney does represent the employee, and when an attorney is compelled to disclose what someone has told the attorney all give students a necessary understanding about the role of the attorney, and the information necessary for the student to know whether to discuss matters with a particular attorney or not. Students are told that the first question they should always ask themselves is, “Who does this attorney represent?” Questions leading to discussion are, “Does the company attorney always represent you? When must the attorney report what you tell him/her? Who should be in a meeting with an attorney? And who should not?”

Jurisdiction: After coverage of the judicial system and litigation, ask teams of which states their companies are citizens, and why. They will have already identified how many facilities they have, and where they are located in their initial report about the company. Hypothetical problems may be given in which someone is suing their company, and each team reports on whether it will have to defend in a foreign state. Other discussions might revolve around what its response would be to the lawsuit (Motion to dismiss? Answer? Counterclaim?).

Advertising/Warranty: After covering product liability and warranty, while studying advertising and the FTC, ask each team to draft an ad for its product or service. Once this has been done it and the ads have been read it in open class, ask the class whether the business has, without realizing it, created an express warranty. Have they exposed themselves to liability ?

Criminal law: Pose this hypothetical situation: “Criminal charges have been filed against your business. Can your business claim protection under the 5th amendment of the U.S. Constitution?”

Employment law: Ask: “Which employment laws apply to your business?” This is when students realize that bigger is not always better, as, for many laws, the answer depends on the number of employees the business has.

Environmental law: A practical environmental exercise is: “What are your business’ most likely environmental problems? And what will you do about them?”

VI – CONCLUSION

Many demands are made of the basic undergraduate law course - the multitude of subject matters to be covered, the abilities of the student body, their interest in the law, the likelihood of students continuing on to a more advanced law course, the interest of many students in attending law school, and others. However, in a college of business, the primary student group in need of legal knowledge will be composed of those students who plan to work in business, rather than in the law. For many of them, the basic undergraduate law course is the only opportunity they will have to study the law.

In applying the “business approach” to course content, the idea is to have the student work through the thought process as a business person might do, applying what the student has learned of the law to a business situation. At the end of the course, students are reminded of the experience they have gained, experience which they can discuss in job interviews, for example. They have formed a company, considered the benefits and detriments of particular forms of organization and decided upon a form of organization; they have drafted a Business Ethics Policy specific to that business, they have negotiated and drafted a contract with another business, and they have researched whether to “go global” by researching and reviewing information necessary to such a decision in another country. In addition, they have had a basic introduction to customary business conduct and demeanor, they have learned (if they didn’t already know) how to greet and shake hands in a business context, and how to speak to groups of business people, and they have also gained some practice in doing these things.

Working through the thought process, and applying their knowledge of the law to practical business situations puts students with such experience ahead of others who have not gone through these steps. Acting the part of business people gives them practical experience which makes them feel much less like neophyte beginners. To the extent that the course can be made relevant to their future roles as business persons, and to the extent that it can give them practical experience, the basic undergraduate legal course in a college of business may greatly benefit the students who take it.

FOOTNOTES

¹ 163 U.S. 537 (1896).

² 347 U.S. 483 (1954).

³ A copy of the author's outline for this material was derived from a presentation to various business groups given when the author was a practicing business lawyer. It has since been modified for students, and is included at the end of this paper.

12 THINGS EVERY BUSINESS PERSON SHOULD KNOW ABOUT CONTRACTS

1) What is a contract?

- offer, acceptance, consideration
- objective standard
- there must be a "meeting of the minds"
- contract must include all "material" (major) terms
- doesn't have to be called a "contract;" doesn't have to have any title at all
- could be an oral agreement

2) What is not a contract?

- anything not specific as to major terms
- an agreement to agree (i.e., option)

3) Can I still get paid if I don't have a contract?

- perhaps, under *quantum meruit* theory
- but your oral contract may not be worth the paper it's written on

4) What's included in a contract that you can't see?

- choice of law, choice of jurisdiction
- implied covenant of good faith and fair dealing
- other implied terms, rules of construction
- in a personal services contract, the standard of care (see below)

5) What appears to be in a contract but isn't really there?

- any term which is illegal (gambling contracts)
- any term which is against **public policy** (some non-compete clauses)

6) When do you need a written contract?

- always better

7) What about so-called "standard" contracts?

- The term gives people a false sense of security
- But the party who drafts contract does so for his own benefit.
- The Court will presume that a contract was formed by parties dealing "**at arm's length**". DO IT.

8) What matters should be addressed in a typical business contract?

a) Goods or Services Contracted For

- What are you promising to do? Sell something? Provide a service?

b) Liability

- Does the **Uniform Commercial Code** apply?
- Do you intend to guarantee your product or service?
- If not, should you use a "disclaimer"?* (See below.)
- If you use a disclaimer, how do you make the sale?
- What if someone is injured? Who is responsible?

c) Standard of Care

- If you are providing a service, you are bound by the **standard of care**
- This standard allows for acceptable, but differing courses of action

d) Payment

- price per item? hourly? flat fee?
- payment in advance? afterwards? retainer? periodic payments?
- entire amount due upon completion?
- what if payment is late? Should you charge interest?

e) Duration of Contract

- How long will the contract run? (project or indefinite period?)
- Is it possible to complete the work in less than a year?
- If not, the contract **MUST** be in writing (**Statute of Frauds**).
- The Statute of Frauds requires that certain other contracts be in writing.

f) Remedies for Breach

- If the other party **breaches** the contract, what do you want him to do?
 - pay you money?
 - do something or stop doing something?
 - other?

- Question: Can you enforce a personal services contract by means of the equitable remedy of specific performance?

g) How Will Disputes Be Resolved?

- litigation, arbitration, mediation, other?
- who pays attorneys' fees? (each party pays his own? loser pays?)

9) When you sign for your company, be sure to indicate you are signing as an officer and not as an individual.

10) You should ALWAYS keep a copy of any contract you sign.

11) You should ALWAYS keep a copy of the contract which has been signed by the other party.

12) If any changes are made to a written contract, both parties must initial the changes.

Disclaimer: This Alert is for informational purposes only. It is not intended and should not be considered legal advice, nor substitute for having your specific situation reviewed by legal counsel in your jurisdiction. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship.

Copyright, Donna J. Cunningham, 3-1-05