

REPRESENTING ENTITIES: THE VALUE OF TEACHING STUDENTS HOW TO DRAFT BOARD RESOLUTIONS AND OTHER SIMILAR DOCUMENTATION¹

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This presentation addresses why business law professors should teach the drafting of board resolutions—what the value of teaching board resolutions and other similar documents might be in teaching law students. This is something that I have done in a variety of different contexts in my law teaching career. I have chosen one to cover with you today. But I am more than happy to take questions at the end of the program about other ways that we, as law school instructors, can use the same kind of device (including other ways that I have used it). I also am happy to offer you materials to get you started.

Among other things, I can offer you two things that relate to this presentation. One is a sample assignment that works off of the kind of resolutions I'm going to be talking about this afternoon. The other is a set of resolutions and a memorandum that help accomplish something like the assignment that I gave.

By way of full disclosure, I worked for 15 years in transactional corporate and securities law for a Big Law firm. And so, I did a lot of resolution drafting. In fact, my first assignment was drafting and editing the board resolutions for a transaction that was in process. Luckily, I had drafted board resolutions as a legal assistant, so I had some experience in doing it. I think maybe that is part of the value for me in this teaching. It goes right back to the core of what my practice was at the beginning and what I did as a legal assistant in preparing for my transactional business law career.

I have organized my part of the program today around a series of questions. (And there are questions within the questions.) Really, the talk is organized around a series of question *words* that ate constituent parts of relevant questions.

My first question word is, “What?” Specifically: “What kind of documents am I talking about here?” For those of you who, unlike me, may not be in a boardroom most

¹ This edited transcript includes certain material not in the original presentation that the author believes to be necessary to an understanding of the presentation.

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of the time when you are practicing, I want to briefly identify the drafting I am talking about using in and outside the classroom as a teaching and learning device.

What I am talking about here is the written documentation of the actions of a governing body of a business entity. The clearest example of that type of drafting is the board resolution, the written embodiment of an approved action of the board of directors of a corporation. Board resolutions can be adopted at a meeting of the board of directors (in which case they are drafted into the minutes of the meeting), or they can be adopted by written consent in lieu of a meeting. Essentially, resolutions memorialize the board's actions taken on behalf of the corporation. And for those of you who teach Business Associations (or a similar course in which the basics of business entities are taught), you know that the board manages the corporation itself or it directs the management of the corporation through the officers and agents of the firm.

So, minutes of board meetings and written consents in lieu of meetings actually are pretty important documents, and the resolutions within them are among the most important parts of those documents. Resolutions are something that, whenever the board takes action, it needs to agree on and approve.

Shareholders also approve resolutions to take action. Shareholders may take action in accordance with their governance rights in the corporation (as determined by law, the corporation's charter and bylaws, valid shareholder and voting agreements, voting trusts). To take action, they also adopt resolutions (at their annual meetings and any special meetings, as well as by written consent in lieu of a meeting). Shareholder resolutions are a little less interesting to me, but they can be used as teaching tools in much the same way that I am talking about using board resolutions today. And if you teach the drafting of board resolutions as part of a written consent, that involves even more of the teaching and learning attributes of the kind of drafting that I am talking about today. Accordingly, by teaching the drafting of documents in which resolutions can be embedded (like minutes and consents in lieu of meeting) you are employing additional teaching tools—ways that you can teach even more than just the role of resolutions in corporate governance and the drafting of the resolutions themselves.

Keep in mind, though, that there are other forms of entity. There are limited partnerships. There are partnerships. There are limited liability companies. They, too, take action through governing bodies. As a result, you can engage the activities I suggest today using any other form of entity and a similar kind of instrument. So, that's the first *what* question

The second *what* question (really, two companion questions) is: "What are my learning objectives for the students? What are my teaching objectives in teaching these things?" I plan to come back to these questions throughout the presentation. But basically, I started doing this because I had students asking the following kinds of

questions and making the following kinds of requests of me in my Business Associations class:

- So, when you say that the board takes action, what does that look like?
- Talk to me about where the lawyer is and where the representative of the client entity is when the board takes action.
- Who else is there and how do we know that the board has taken the action?
- When I see action taken by a board of directors in a court opinion, what is it that the court is using as evidence that the action has been taken?

Many students in my Business Associations class come to the material from the standpoint of litigation—as potential trial lawyers. I had not figured that out—that many students would have a litigator’s perspective—when I first started teaching, because I had spent 15 years in transactional law and had never really considered the possibility that my students would be different . . . Their questions were unanticipated. The fact that they had a different interest in the material made me step back and think, “Wow, there are lots of things that underlie these cases that I did not see when I was reading the cases.” My law school experience was different. I was working as a legal assistant at the time for a firm that did corporate work. So, I knew more about board actions than some other folks in my class did.

One way for me to connect the students to the facts that they were reading in some of the cases—and even to the text that the authors of the casebooks were writing about the cases—was to use resolutions to show the students what happens at board meetings—to open the “cupboard” and let them look inside let them discover in a more direct way what boards of directors do. So, my original impetus in showing students resolutions was really just to enable them to better understand the facts in the court opinions they were reading.

I soon came to realize, however, that I had to talk to the students about why each resolution was there—the purpose of it. Why would we, as lawyers, take the time to draft these many paragraphs for a single transaction if each one was not rooted to something specific? This realization—that it might be useful for the students to understand the purpose of each resolution in a series of resolutions—enabled me to use board resolutions to connect students not only to the law in particular but also to other things—accounting and investment banking matters relating to the relevant transactions. The revelations about the origins of each board resolution connected the students back to these legal and extra-legal components of a business transaction. I learned that resolutions could be a great device for reinforcing both legal doctrine and transactional practice context in my traditional Business Associations classroom.

Of course, last (but certainly not least), in revealing drafting issues for each kind of instrument or contract we use in class, we are teaching new and different drafting skills. We are building a foundation of skills that the students can draw upon to do all kinds of different drafting. Board resolutions are highly stylized, routinized drafting. The conventions are strict and the structure is rigid. Among the drafting values that resolutions allow us to teach are (among other things and in no particular order): the role of recitals in legal documents, consistency (in word choice, punctuation, etc.), the appropriate use and pitfalls of repetition in legal drafting, the difference between passive and active voice and the context in which passive voice may be useful and correct, and the use of archaic words in conventional legal drafting. As among the three beneficial learning objectives of introducing students to board resolutions that I have outlined here—exposure to board decision-making mechanics, reinforcement of doctrine and transactional context, and the introduction of specialized drafting skills, the last is the most unique. But each benefit is significant.

Those three benefits explain the student-focused portion of my “*why*,” the second question word in my series for today. Why do I teach board resolutions in class? I’ve already given you the background on this by telling you what my learning objectives are in introducing resolutions to my students. As a general matter, I share my learning objectives with my students directly. However, the nature of an exercise determines when and how these objectives get shared.

A foundational teaching objective in my courses is the connection of doctrine with practice, which is part of the overall teaching objectives we have at The University of Tennessee College of Law. In my classes, I guide students in identifying applicable theory and policy and show them how that theory and policy weaves through doctrine into practice. In other words, I demonstrate how doctrine effectuates policy and uses theory in a practical context. I may ask a question relating to that teaching objective. E.g., “How do the principals in business associations take action in managing or conducting the business of the firm to achieve the firm’s legal and other purposes?” I ask the students that kind of question and wait for someone to answer. Sometimes there is a long pause, and you have to then ask a follow-up question. I’ll ask them the same kinds of questions I was originally asked by students—questions that motivated my teaching of board resolutions in the first place: “What does that look like in connection with a litigated case?” And I wait to see what they say. Then we can talk through things in the classroom, and they get a much richer understanding. Business Associations is obviously an upper-division law school course, but there are still some ways that you can use this kind of teaching technique with resolutions in the first year if corporate (or other business entity) action presents itself in a case. I will say more about that in a few minutes.

To illuminate the connection between the doctrine and legal drafting with my students in Business Associations or Corporate Finance, I might say to them, “Okay, it says in this case that resolutions were adopted by the board of directors. What might

resolutions for this kind of transaction look like?” And I will shown resolutions of that kind to the students. We then can explore the basis for the substance of the resolutions. Questions to ask might include:

- “How did doctrine connect with this resolution . . . or that one?”
- “How is the law that we’re studying in this course something that provides a foundation to this legal drafting?”
- “Why are these board resolutions here?”

Again, I am coming back to the same kinds of questions that I was originally asked by students who were curious about board processes and actions.

When I teach this material in my Corporate Finance class, which is a third-year course for which Business Associations is a prerequisite, I can assume a higher level of knowledge of board processes. Moreover, many of these students already have worked on corporate matters for a business or firm in a summer job, internship, field placements, or externship. The conversation is different. I may ask more pointed or sophisticated questions of this more advanced group of students:

We are studying dividends and repurchases in class today. How does a lawyer structure, draft, and edit a document for consideration by the board of directors relating this kind of a transaction? What does that document look like? Is there a contract? Is there power of attorney? What do we do, as lawyers, to prepare a board of directors for that transaction, and how is that documented?

The classroom conversation inevitably, as it should, comes around to drafting board resolutions. And then I’ll say, “Okay, so what are in those resolutions? What do those resolutions look like?” And they have to step back and think. And I’ll say, “Well, where do you look to figure out what actions a board of directors needs to take to effectuate a dividend or a repurchase?” Some of the techniques that I am using are akin to clinical teaching tools—questions intended to draw out the students’ understanding (and misunderstanding) of the underlying doctrine and the way that the doctrine gets used by a lawyer in a boardroom or in talking to officers. You engage in this reflective technique in any context in which students can be charged with a strong enough foundation in the relevant legal doctrine and transactional setting. I like the boardroom context and often engage this kind of teaching method in engaging students with the job of preparing for a board meeting.

The third question word in my series for today is *when*. So, when would we, as legal instructors, do this? When would we talk about board resolutions and the like with students? Optimally, to achieve the most detailed learning objectives under my “big

three” learning objectives (a solid understanding of board decision-making, corporate governance doctrine in a transactional context, and the unique skills used in resolution drafting) and to accomplish the most from my teaching objective of effectively linking policy and theory to practice through legal doctrine, I have determined that it is best to introduce students to board resolutions just after or during the pendency of a course on business entities (i.e., Business Associations, Corporations, etc.). But, my students, many of whom take Business Associations the first semester of their second year, do not take Corporate Finance until a full year later, in the fall of their third year of law school. And some of those students have been, as I like to say, on a hiatus from business law for the spring semester and the summer in between, which means it’s actually been a long time since they focused on corporate governance doctrine in any detail. So, under those conditions, I have to spend a little bit more time laying a doctrinal foundation for board resolutions with my third-year students than one would have to if teaching board resolutions directly after a course in Business Associations.

At The University of Tennessee College of Law, we have recently split our Business Associations course (starting with our courses next year) into a three-credit-hour fall offering with an additional two-credit-hour Advanced Business Associations course in the curriculum in the spring. I am hoping to do more with things like board resolutions and the kind of connections between doctrine and practice we are talking about today in that second-semester Advanced Business Associations course. The new set of courses adds one credit-hour to what we used to have before (in total); the previous offering on business entity law was a four-credit-hour, single-semester class.

So, you could do this in the first year, as I alluded to earlier. Now, some people find that really scary. I think it takes the right person to do it—and we will come to the “people issue” next (i.e., who may want to teach resolutions in a law school classroom). Even assuming the right person as an instructor, one would have to limit the learning objectives in teaching board resolutions in the first year. An instructor would have to establish certain key things first to have a meaningful board resolution discussion—talk about business entities and how they take action and lay a little bit of foundation before showing the students this form of legal drafting. I still think you can introduce some great drafting tips that are different from but consistent with other legal writing elements being taught in the first-year curriculum. I know that there are some writing instructors in the audience, so they can tell me if I am wrong about this—that a written work product like board resolutions cannot be absorbed by a first-year student. But, I think there are some things that are consistent with the traditional legal research and writing curriculum that could be taught using board resolutions as a device and yet also some new things to layer onto some of those traditional first-year skills and values. It is at least worth thinking about that connection—between the techniques and skills used in drafting board resolutions and those used in the traditional legal research and writing curriculum—if you teach in the first-year curriculum at your school.

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Another option? You could wait until the very end of law school to introduce board resolutions to your students. The assignment example that I provided to each of you is from a second-semester third-year class that is a capstone experience in the Concentration in Business Transactions² offered by The University of Tennessee College of Law's Clayton Center for Entrepreneurial Law.³ I spoke about this program here two years ago with several of my University of Tennessee colleagues.⁴

That capstone course typically includes some students who have were not in my Business Associations class, never had me for Corporate Finance, and have not had anyone else who engaged in discussions with them about how boards of directors or partners in a partnership or LLC members or managers take action. So they, unfortunately, have to be brought along a little bit more to participate in the discussion meaningfully. Sometimes, I will assign students in this course to groups so I can ensure that a student with some experience is in each group. Then, I try to vary the exercise enough so that the people who have been through tours of duty with board resolutions before get a little something new out of the experience and can also act as experts with the other folks in their group.

I alluded to this earlier in the presentation, but it is important to explore whether all instructors can and should undertake to teach their students using board resolutions. This brings me to my fourth question word: *who*. Who would teach this material? Does it have to be someone like me with 15 years of experience in a boardroom with firm management? Obviously it is much easier for someone who has that kind of background to teach board resolutions, but I still think that if an instructor has experience enabling instruction geared to achieve one or more applicable learning objectives, that instructor could use board resolutions to help students achieve those objectives. E.g., if an instructor's learning objectives purely involve research and writing, a little bit of additional background could enable the instructor to do a limited class exercise or assignment involving board resolutions, especially working in conjunction with a colleague (but even working alone). An instructor desiring to engage the more doctrinal objectives would benefit from working in a team with those more familiar with resolution drafting and usage. Again, however, if the instructor's objectives are just to teaching writing skills in a new context, the instructor could probably use board resolutions for that purpose with a little bit of supplemental training. But, as I will freely admit, I may be

² See *Concentration in Business Transactions*, THE UNIVERSITY OF TENNESSEE KNOXVILLE COLLEGE OF LAW, <http://law.utk.edu/centers-clinics/clayton-center/business-concentration/> (last visited Nov. 9, 2014).

³ See *Clayton Center for Entrepreneurial Law*, THE UNIVERSITY OF TENNESSEE KNOXVILLE COLLEGE OF LAW, <http://law.utk.edu/centers-clinics/clayton-center/> (last visited Nov. 9, 2014).

⁴ See Brian K. Krumm, Joan MacLeod Heminway & Michael J. Higdon, *A Case Study in Transactional Centers and Certificate/Concentration Programs: From Program Design to Student Experience*, *The Clayton Center for Entrepreneurial Law*, 14 TENN. J. BUS. L. 569, 571-79 (2013) (describing the concentration program in the context of the overall activities of the Clayton Center in part of the presentation subtitled "A Recipe for the Controlled Organic Growth of a Business Transaction Concentration").

wrong about that. Nevertheless, I want to throw that out there for consideration by all of you.

Now, another *who*-oriented question: to whom would an instructor teach resolution mechanics and drafting? Obviously, an instructor would want to teach this subject matter to students who want to engage in the practice of business law, whether through litigation or other advocacy-oriented matters or whether in a transactional practice. I also believe, however, that others can benefit from instruction based on board resolutions. At a school like ours, where Business Associations is an optional course and there are a few people who squeak by every year without taking this course (whether wisely or unwisely—you make your own judgment on that; I have mine), an instructor may be able to introduce a little bit of business law to these students (who will have to study corporate governance, e.g., for the bar exam) by using board resolutions as a teaching tool in a different kind of setting—maybe in a professional responsibility course, or maybe in a legal research and writing course, or maybe in another course offering.

The fifth question word in my series is *how*. So, how does an instructor prepare to teach board resolutions in class or through an out-of-class exercise or assignment? In all honesty, an instructor would approach the teaching of board resolutions, apart from any self-education that may be needed, the same way an instructor approaches teaching any new material. Start off by identifying appropriate learning objectives. As part of this assessment, the instructor will want to choose the form of business association that he or she desires to work with. Is it a corporation or something simpler, like a partnership? The instructor also will want to identify the business law context. What is the board or other decision-making body doing? What is the context? What is the action that is being taken by the decision-making body on behalf of the business association? Is it something attendant to the formation of the entity itself? Is it something early on in the entity's existence that the decision-making body is approving—maybe a complex loan transaction? Maybe the action is something discrete, like the adoption of the bylaws or other governance rules of the firm or the adoption of a single commercial contract of the firm. All of these things are among those matters that the instructor will have to consider from the get-go.

Then, of course, there are the more nuanced things. An instructor must ask whether he or she desires to teach board resolutions in class. Is this an in-class exercise? Is it productive to the instructor's teaching and learning objectives to spend significant classroom time on this matter? Should the instructor have students work outside the classroom (after laying a foundation for the resolution work in some way) and then return to the material to review it in some way in the classroom? Or are you going to orchestrate a mix of in-class and outside-class engagement with the resolutions? A teaching method that my colleague George Kuney, who is in the audience, and I have used in other courses involves having the students do drafting work outside the classroom, bring a draft work product in for class, and then, in a group setting, give their work product to another student for editing. After the students edit each other's work,

they then they go back and they redraft the document again after class. That would be an example of mixing out-of-class and in-class components focusing on a single work product.

The instructor also must determine whether the exercise is to be graded or how student performance is otherwise to be assessed. That will depend on the instructor's teaching and learning objectives for the exercise or assignment and the course. The assessment choice is driven to a large extent by what the instructor establishes as learning objectives, since good assessment measures the achievement of those objectives.

In the end, the instructor must incorporate all of these decisions into an exercise or assignment and determining how and when to integrate that exercise or assignment into the course. A part of that determination involves, for each instructor, making sure that he or she lays the necessary groundwork for achievement of the related learning objectives. Sequencing and layering can be important.

The first time an instructor teaches resolutions, there will no doubt be some hiccups. The instructor is likely to want to retool the exercise or assignment a little bit. I am more than happy to help with the issues you face and even share with you some of the problems I encountered so that you can avoid making them on your own.

What are some resources that you may want to turn to other than me? Something I will recommend that you look at in terms of relevant drafting tips—although I may not agree with everything he says in the article—is a nifty little commentary on board resolution drafting written by Ken Adams back in 2002.⁵ I love his work in so many ways, and he has written a nice piece on the topic. It has some great points for drafters and practitioners, especially for those who are not yet oriented to or sufficiently steeped in the craft of drafting board resolutions (or the minutes or consents in which they appear).

As part of this presentation, what I would like you to do is to identify in groups the appropriate contents of a board resolution or set of board resolutions to adopt a contract—a simple contract. Try not to worry for the moment what the contract is. Just assume that the corporation is a party to the contract. What does the corporation's board of directors or the corporation's legal counsel have to write down on paper to memorialize that the corporation is adopting a contract for its signature? Spend a few minutes talking about these questions in your group, and then I'm going to take some ideas from you to see what you all came up with. Okay?

⁵ Kenneth A. Adams, *Legal Usage in Drafting Board Resolutions (with "Before" and "After" Examples)*, THE PRACTICAL LAWYER (Sept. 2002), available at <http://www.adamsdrafting.com/downloads/Practical-Lawyer-Resolutions-09.02.pdf>.

[Group activity: the audience members discussed the appropriate contents of board resolutions for the adoption of a contract by a corporate board of directors among themselves in small groups.]

JMH: This group in the front, what did you think and talk about? What would you put on the written page if you had to draft these board resolutions, what is the substance of what you would draft? Let's just focus on the substance first.

Audience: We determined that we needed to identify the contract—for example, the name of the contract, if it has got one, and the parties to the contract. In some situations we might want to know the purpose of the contract to ensure that the purpose of the contract is within the authority of the corporation.

JMH: Good. How did you know that?

Audience: I was on a nonprofit board, and I know we always had to rationalize why we were taking action based on the corporation's mission.

JMH: Good. Business entities have legal purposes that are set forth in their organizational documents and recognized under state law. You certainly want to make sure you are not violating that purpose or otherwise acting outside the scope of the corporation's authority in entering into the contract.

Audience: He suggested maybe attaching a copy of the actual contract.

JMH: Nice. What if you do not have a copy of the contract?

Audience: You could set forth or attach the key terms.

JMH: Yes! You can include or attach the core terms and conditions as agreed between or among the parties—a term sheet—the terms and conditions of the contract comprising its major substance.

Audience: We also knew we should consider whether the contract should be signed by a specific officer or any officer.

JMH: Good. Yes. There would be a separate resolution providing for the authorized signatory or signatories for the contract. That would be necessary, and it would come near the end of the resolutions relating to the contract. A legal entity established under a state statute (like a corporation) is sometimes referred to as a legal fiction (at least that is

what we used to like to call them). It is a statutory creature, and it does not exist and cannot act on its own independent of the statute. You cannot see a corporation walking down the street. As a legally constituted form of organization, a corporation has specific people who can act on its behalf, and one of the ways that people are delegated that authority is in a board resolution. That is a great insight on your part—to identify the signatory issue for our consideration. Thank you!

Are there any other substantive thoughts from other people in the room?

Audience: You also always want to make sure that you authorize the actions of the people who have already done things relating to the contract—things that happened before resolutions on the contract were presented to and adopted by the board.

JMH: Good. That's called ratification. Because people take action on things that the board of directors has not yet authorized. That would usually mimic, in terms of style, the resolution authorizing a specific officer or specific officers to sign and act under the contract on a going-forward basis.

What else?

Audience: How do you feel about including the composition of the board or the membership in drafting board resolutions?

JMH: The answer to that question would depend on whether I am drafting resolutions for inclusion in a board packet or whether I am drafting the minutes of the meeting or a unanimous written consent in lieu of meeting including those resolutions. The composition of the board and the members acting typically are not addressed in the resolutions themselves. But those matters may be addressed in minutes of a meeting or a =the introductory material in a written consent in lieu of a meeting. That's what I meant by adding some new and nuanced things to the drafting of board resolutions.

A drafter may add things like the composition of the board, the required vote for action, where that required vote comes from—a specific part of the statutes or the corporation's organizational documents (in a written consent), relevant citations to Delaware law or Tennessee law or other applicable law (including specific section

references to it), and where a particular person's consent is required, you would want to state that. Of course, in a written consent in lieu of meeting, there would be lines for signatures at the end, although most signatures can now be rendered and recorded electronically. But it used to be that you would then have to pass a written consent around to everybody by mail or fax (if signatures could be given in counterparts). Some folks in the room are old enough to remember that! Electronic signature acts (statutes) have helped out a lot in corporate (law circles) to facilitate the execution of written consents, the accomplishment of virtual transaction closings, and other electronic commerce requiring signatures.

Other substantive thoughts on the resolutions relating to the contract?

Audience: Depending on the content of the contract—and especially if it involves a financing or a merger or acquisition, the drafter might want to say something in the background about due diligence and so forth.

JMH: Good. You're absolutely right, and the drafter may in fact need to go look at other contracts to which the client is a party to see whether the agreement providing for the financing, merger, or acquisition is in conflict with those other contracts. That would certainly be another thing to look for. Obviously, if the contract is an illegal contract, that would be another thing altogether

How many of you teach contracts? A number of you do. But I am not hearing yet about consideration. Are you going to put a recitation of the consideration or anything else relating to the consideration in the resolutions, or is that going to be embodied only in the contract itself? You are going to want to think about contract law, are you not? I expected contract law considerations to be the first thing out of someone's mouth during this group activity!

A drafter of board resolutions for a contract *does* need to think about basic contract law. He or she also needs to think about any specialized substantive law underlying the contract itself. And the drafter needs to think about applicable corporate law. Specific types of transactions also may involve, for example, tax law or accounting conventions. The example I earlier referenced—resolutions relating to dividends and repurchases—involves both income tax and accounting issues. So, you can teach attentiveness to all of those things while teaching the drafting of board resolutions. You do not

have to teach all of those things, but you *can* teach them all. That type of transaction—a dividend or a repurchase, provides a full-blown example of what I intended to illustrate.

If we were going to continue this kind of group activity in a classroom, I might now say, “Take out your laptops, if you have them. Where are we going to find a form of precedent transaction document from which to draft our resolutions? Now we know what to put on the page, but can any of you visualize what this looks like? Have any of you seen that kind of drafting or drafted resolutions before?” I would ask the students to use the electronic databases available (proprietary and public) to find a form of resolutions like the ones I provided to you for use during this presentation.

So, you can clearly visualize what the final work product looks like, since I gave a copy to you. This is the document I see in my mind’s eye when I think about these exercises, minus, for instance, the “whereas” references. During the exercise, I heard someone suggest using *whereas* clauses. I do not use the word “*whereas*” in drafting board resolutions or recitals anymore. I just use simple declarations—statements of fact—and then resolutions. In Massachusetts, however, when I practiced there, resolutions were called “*votes*,” so the convention was to use “*voted*” instead of “*resolved*” to begin each action paragraph.

In any case, there’s a format to this kind of drafting, there are norms about how the document looks, how long it is, etc. Those of you who are legal research and writing instructors are already experienced in instructing students to identify and conform their writing to both applicable law and established norms. You may be especially interested in the formalistic, routinized way in which board resolutions are drafted. You may want to take a close look at the format in the example that I’ve given you to see and critiques that format.

As I close out my part of the program, it seems appropriate in this forum to ask the following question: How many of you learned something by talking to your colleagues in these small groups? It looks like virtually all of you did. Congratulations! You just experienced peer-to-peer teaching, which I do like to use in my classroom. This kind of an exercise—when you have people with different levels of experience in the room—can really, if you leave it for longer than five minutes, lead to a significantly rich discussion. Absent the constraints of time, we would spend a lot more time unpacking the resolution drafting process.

You may be able to envision using something like this in your classroom. Whether you teach Business Associations, Contracts, or Administrative Law or something else, resolutions may unlock doors for your students. I have found that teaching law students using board resolutions enables me to unpack many levels of information with my students over a period of a year and a half or two years of the law

school experience. I have been able to use board resolutions to show these students much more richly how corporate governance doctrine connects theory and policy to the practice of business law. Through corporate board resolutions, I can afford students the opportunity to see what corporate boards of directors do, understand how legal rules impact the existence and content of board action, and reinforce existing and learn new legal drafting skills.

Thank you for your attention. We will take questions at the end.

Marcia Narine

I'm going to give the perspective that's different than Joan's because I was a litigator for I guess 18 years before I started teaching, and I have an in-house perspective. So, I teach from the perspective of the litigator. What I'm going to do is go through what my students really liked and then I'm going to tell you what I didn't do so well. I think that's important as well.

So, my title is *How to Make Transactional Law Less Terrifying and a Bit More Interesting* because I'm going to talk in the context of two courses. One is a seminar that I developed in corporate governance, compliance and corporate responsibility, and one is a required course. At St. Thomas, where I teach in Miami, business associations is required. It's four credits, and you often have people who are like me. They went to law school because they were terrified of numbers. So, I'm going to go through a number of what I think are the "greatest hits" of the exercises some of them really liked and how I get some level of engagement from different kinds of students.

I taught a seminar at the University of Missouri-Kansas City, UMKC. I am now teaching BA at St. Thomas in Miami. Their demographics are different, obviously, but for both typically some people go to big law firms but most of them are not going to go to big law firms. Most of the students are going to go to small to medium size law firms, maybe open up their own shop, so I try to keep that in mind.

I also try to make it interesting. I try to bring a lot of real world examples.

I just finished my third year in academia after, 12 years in-house. I was a Deputy GC Chief Compliance Officer, Chief Privacy Officer, and I served on a number of national industry groups regarding corporate governance and compliance matters. I still do some of that work.

I also do a little bit of consulting, not much, with some small businesses and entrepreneurs, and all of my good friends are lawyers. And what they constantly tell me is what they think law students don't know, so a number of the things that I bring into the classroom are complaints from partners at big firms and people that are solo practitioners that are hiring interns.

I also teach civil procedure, professional responsibility, and employment law.

One of the things that I wanted for both BA and the seminar was to get to know the students a little bit beforehand. In the seminar, we had about 15 students or so. In the BA class, I think I had 42 this time. So, there is a Survey Monkey I send out. Class participation is required. I'll tell you how I do the grading rubric later. But class participation is required. This is their first class participation grade. It is an easy A, but it's a way for me to get to know them.

First, my name is always mispronounced so, the first question I ask them is how they pronounce their names. I do this because I want them to think and know that I care.

But I want to know how about their business experience. Have they worked in a big law firm? What was their major? Do they have an MBA? Because one of the things that I tend to do is I divide the groups up into teams. They're divided up into law firms. The problem in my BA class is I end up having probably half the law review in the BA class, and I do not want them all to sit together. So, I designate what's called a financial expert. And I tell them, "You are an expert compared to the other people in this class. Please don't think you're an expert in anything related to business but instead based on your Survey Monkey response to how comfortable you are with business, finance, or accounting." And I say please be honest. This is the most helpful question.

And then you see at the bottom of the slide the question "I'm terrified of finance and accounting." That helps me as I try to figure out how I am going to approach them and what am I going to do. And I tell them, "You know I went to Columbia for undergrad because they didn't have a math requirement." I became a litigator because as a summer associate, I saw prospectuses. The words were small. It was hard and had a lot of numbers. And I said, "I'll do litigation." Then I had to learn about finance and accounting and that kind of stuff. I had to ask a partner the definition of a "security" because I did commercial litigation.

And everywhere I went, I had to know about business. I talked to them about the fact that some of them say they're never going to be business because they're going to go clerk for a judge. I said, "Great. Who do you think writes these opinions that you guys find so hard to read? The law clerks." I told them, "You may want to work with a nonprofit. If you ever have to sit there and look through the books you have to understand some basic finance and accounting."

So, I try to get to them where they are, and using the Survey Monkey—there are questions where they fill in the blanks—tends to be extremely helpful for me.

Then this is the other helpful question: “Other than to pass, what are your learning goals? What really interests you or scares you?” So, I found out that I had a student who was pretty much ridiculously wealthy, had lots of bitcoin but never planned to work and was only just planning to better manage the company’s millions. And then I find out that I have other people that are like, “Professor, I just want to pass this class and pass the bar. I don’t really care about anything in the class.” And that is fine because I want to know, and that gives me an idea.

I basically let them see the very first day of class, “This is who you are and my goal is to get you from completely terrified to less terrified and for you guys to pass the bar. If you guys enjoy it, then that’s even better.”

I also start off with these business associations. I start off with Legal Zoom. I say “I can set up this LLC in 10 minutes. Let’s go ahead and do it.” I want them to understand what’s the benefit that they have to add, how they have to add the value and how they have to think more like business people versus thinking like lawyers. Because I remember when I was in-house. They sent me a three-day accounting for lawyers so I could speak to our finance people. I didn’t speak in either language, so I talked about the importance of that.

And because so many of them may go work and advise small businesses or entrepreneurs,, it’s particularly important that their client trust them and thinks that they understand their business because whether you’re talking to a venture capitalist—they don’t like lawyers—or you’re talking to small business people—they don’t like lawyers. To get them to feel that this is going to be relevant to their lives I say, “You don’t know what you’re going to do in three years.” I thought I was going to save the world and do public interest law. I was going to save the world and help the indigent, and then I realized that I was the indigent because I had \$120,000 in loan debt. So, I went to a big law firm and tried to pay down the debt. And I went in-house and got stock options and God bless America, the debt is gone.

So, I have also created a-corporate-governance seminar. I always do class participation in both corporate governance and BA because I find that my students have to have an incentive to do some of their reading, even if they buy a \$200 casebook. I don’t know why they wouldn’t do the reading. Maybe your students are different.

But I also wanted to, for the corporate governance seminar, bring in items for discussion, which might include things from blogs, Twitter, and LinkedIn, because I tell them “Many of you might get your business through blogs. Or you may be asked when you go to your firm to start to blog or do newsletters.”

And when I was in-house, every regulatory agency that I dealt with was on Twitter, so I would simply find out that some rule was no longer going to be (in effect or they were going to delay implementation) on Twitter. But I said, “You need to start

looking at these kinds of things.” I told them that my job is to prepare them for the bar but also to prepare them for life. So, I wanted to make sure they had an understanding.

There was a paper requirement. I graded the first draft because, otherwise, God only knows what I would get. And then 60% was graded on the final paper.

For BA, class participation was 20%, and this is where the firm thing got interesting. Initially, they hated the firm. They don’t like to work in groups. I told them:

Your whole life is being graded. I’m being graded by you. I’m going to be graded by a tenure committee. When I was in-house I had 360 feedback mechanisms. The person next to you that was in Torts might be the general counsel 10 years from now. You’ll never know. You’re constantly being graded, so you need to understand this. And people will be fair and honest.

And it was surprising. I saw a boyfriend give his girlfriend a C because they were in a firm together for class participation. Obviously, I never tell the students what people give them as an average, and I can kind of override things. But it’s very interesting because you will see people not come to the group work with a whistle and a smile and not do anything—there will be people that are free-riders that won’t do anything. And then there will be people that will do everything. And once they start realizing that they’re going to be graded on it, it’s a very helpful life skill. I also graded them on their mid term and final.

I did this for both BA and the seminar. For BA, I want them to try to figure out how to integrate BA into their daily lives. So, they didn’t have to do it, and for some reason 80% of them did the actual credit, which really messed up my grading because I had a curve, and it just completely destroyed it. So, I need to know if I’m going to do this again. I have to make it harder. But they work very imaginative, and it had to be due the last day of class. And they could pick a book, movie, or television show that talks about business, t cases that were going on the Supreme Court. . I had a few on *Hobby Lobby* and a few others.

But people tried to bring in movies like *Arbitrage* or *Wolf of Wall Street*. They’d watch and talk about whether things were accurate based on their limited understanding because now they all thought they were experts. But again, they have all said that they don’t look at business news, television, or anything like that the same. I had a student from three years ago emailed me today about the Citibank Jed Rakoff decision that was overturned because we talked about it two years ago at the University of Missouri-Kansas City. They said, “Did you see what the Second Circuit did? I remember talking about that in class.” That made me feel very good.

Let's talk about some selected activities. Most of these are from the seminar. I tried to divide it up into different roles or different entities because I don't know whom they're going to be advising. They might be advising a board. They might be advising a shareholder. They might work for the FCC. They might work for the mayor. It might be a lobbyist. So, they were constantly switching roles, and a part of the thing that I was trying to get them to understand is what they have to do.

One of the exercises that they really liked was an in-class board meeting. We went back in time, and I had them imagine that they were making decisions about whether or not to terminate Mark Hurd, who you may remember was the CEO of HP. HP was doing very well at the time, but he was alleged to have had an affair/sexually harassed a woman, and there was a demand letter by Gloria Alred, which I sent to them. I had them read the proxy at the time. I had them look at HP's code of conduct. I had them look at the eventual severance agreement after they made their decision. And they printed other news articles that discussed the possible successors for him at the time. Then I made them draft minutes.

One of the things that I was trying to get them to understand was the purpose of minutes. When they draft the minutes, by the way, they have to circulate the minutes to the other members of their team. They have to comment on them. All those things were different kinds of exercises, but again, this was kind of the corporate governance part about the role of the board as the gatekeeper. What do you do when you have a CEO who is doing very well, who is also violating the rules, succession planning, etc.

They did their cost benefit analysis. It was another review of *Caremark* and other kinds of things. But then that too led to a very interesting discussion. We talked about the role of the board with executive-compensation say on pay initiatives.

Typically, I gave them a lot of reading, probably more than they would have wanted. One of the things I gave them to read was a 2011 article by Lynn Stout called *Killing Conscience*. They looked at ISS' discussions about what they were recommending in terms of executive compensation. I had them look at YouTube videos with consultants advising in five minutes or less because if it's anything longer they would switch the video to the cats on the piano or whatever it is they watch on YouTube.

So, I said, "Look at these. Think about these different kinds of things." Then I divided them up in an in-class activity and I said, "You guys are going to be the compensation committee and you're doing the new compensation package for the CEO of Yahoo—a struggling, failing company. And you guys are going to be the CEO for a FaceBook-type company the compensation package" I wanted them to look at it in terms of long-term incentives, short-term incentives, and equity—those kinds of things because they had seen and looked at them. And I said, "Now if somebody comes to question you," because we also talked about *Disney*, "how will you answer these?" It was a way to

remind them of *Disney* because they would have had to take Business Associations before and to talk through some of these kinds of things.

We talked about the Sentencing Guidelines because part of the course was about compliance and effective programs. So, this time they looked at deferred prosecution and non-prosecution agreements because some of them are very interested in criminal law. Some are interested in compliance, so we talked about what the sentencing guidelines are and why they exist. I had them to look at the DPAs and NPAs for Massey Energy, which had the big mining accident at that time, and Johnson & Johnson to kind of compared what they were like.

We also did an exercise that is similar to what I'm going to show you in a minute. I also had them look at law review articles. They looked at Pamela Bucy's article, *Corporate Ethos*. They looked at a number of law cases: *New York Central*, *Hilton Hotels*, *New England*. We talked about *Anderson Consulting* and why companies are the way that they are because some of them may want to go into the regulatory sphere.

With the seminar, I kind of tried to make it as though I don't know where you're going to be and you don't know where you're going to be, but these are the things you should be thinking about." I told them, "Some of you might go work for the U.S. Attorney's Office. One of the things you want to think about is what are the pain points for a corporation. What are the things that board is going to be thinking about? What's the GC going to be thinking about?"

I'm going to pause for a second and have you look at this. You don't have to do it. The first page is a hypothetical and the second page is the profiles of the board members. Each person got one profile, and I split the boards up into two different boards. Everything in there is something that I could have seen one day, could of read about, or even could have dreamed about. Nothing was impossible. I tried to explain to them that this might not happen at one board meeting because people would probably quit. But these are the kinds of things that these people might think about but none of those things are impossible. I'll give you about a minute or two just to take a look at that.

So, this is one of the exercises. We did a couple of others that were similar to this but they had even crazier facts. I used this to kind of talk a little bit about professional responsibility issues for those students that were taking PR, and I used it as a preview for those who hadn't yet. One of the things I used was (I think) a talk Steve Bainbridge did for the American Bar Association on the role of the attorney as a gatekeeper. I also talked about Dodd Frank whistleblower and Sarbanes-Oxley whistleblower. We reviewed a little bit of what they learned, since BA was a prerequisite for them, and I tried to bring in what they might have remembered about shareholder derivatives suits. Really, it was a big issue-spotting exercise for them and kind of what are the factors that boards would be considering if they were facing these kinds of things.

And the reason why I gave them a board profile is that they had to put themselves in that mindset because, as I told them, if you think that you're advising a person who's exactly like you, you're completely crazy. You have to sit there and figure out what is going to motivate this person. Someone who is running for office has a very different motivation than somebody who is not

But those things are very important because I remember when I used to do presentations before an audit committee. Every presentation was tailor made to the people in the room, and that's what I tried to guide them to try to understand. So when you go through the proxy, I ask you this: Why do you think Al Gore is on this board? Why do you think this person is on this board? What are they bringing? So, when you are advising this person—even when you are writing something to this person—when you are in a law firm, you've got to write these 30-page memos. The in-house person could say, "I don't want to read this," because the in-house person writes things in bullet points and short emails. So, when you're talking to your clients, whether it's the owner of Joe's Pizzeria or whether it's the CEO of Exxon, how do you communicate with them? You still have to learn how to communicate, and you do that by knowing who they are. So, that is part of the objective of this.

This is also the time where we talked about Jed Rakoff and when he refused to accept the settlement, which was just overturned. But we had a really lively discussion about whether a court should be able to say if a regulator at a corporation would have settled. Is that appropriate? So, then again, that generates some good policy discussion.

They really liked corporate social responsibility. We talked about various different things, whether it was the UN Global Compact, regarding why corporations want to do corporate social responsibility. Is it just a way to make them look good or do they really care about this? I had them read different kinds of articles and one of the more interesting ones some of you might remember—*This American Life*. It had something about the Apple workers and Foxconn kind of jumping off roofs because of the working condition. We then realized that some of the reporting was not accurate.

But, at the time I had them listen to *This American Life*, I also gave them some articles and other kinds of things. Then, we did a debate about the conflict minerals Rules, which had already been composed, and we talked about the role of the SEC. We talked about what is the role to again remind them of what they learned in BA. So, I continue to try to reinforce what they have already learned.

Again, for those of you who have no desire to be in corporations, but maybe you want to work for an NGO, let's look at when there's a multi-stakeholder initiative or other different kinds of things. How would you deal with that? Or maybe you're going to go advise Amnesty International. That's who your client is going to be.

Let's talk about some of these different things. So this was a very good case study. What then really is the role of the SEC? What is too much disclosure? Does this make sense?

We talked about the lobbying process and corporations' First Amendment issues in *Citizens United*. We had an in-class debate on *Citizens United*. I actually had somebody from MoveOn.Org. One of the things that they have to do, that I grade them on, was question her. Part of what I graded them on was not just the substance because this person that was speaking was not a lawyer and some law students can be a little bit strident. And so I talked to them about being respectful because you might be dealing with a lot of pro bono clients or you may be dealing with some kind of citizen activists. How do you ask questions and how do you interact in those kinds of ways?

Also when they debate, I ask people at the beginning where they came out on *Citizens United* and I specifically put them on teams that were the opposite. They didn't like it. But then they realized the value.

The other thing I had them do was a comparison of U.S. and international practices and introduction to enterprise risk management. They had to develop it—it was really a drive-by kind of thing. "This is how they do in Japan. In Germany they have a two-tier board structure." We did that over the period of a few days.

I said, "Now if you had the chance to either enact something from a regulatory perspective or advise a board to adopt something or an industry to adopt something, what would you pick from the different countries?" Because often industries and companies adopt something specifically to avoid regulation so they can say, "We've done this! You don't need to regulate us!"

It got to be a very interesting discussion about, "I like this from UK. I like this comply or explain regime. I like this. I like that. I don't like that."

Then we talked about enterprise risk management, and they were very excited because I told them to pick one company. One team picked Wal-Mart. Two weeks after they picked Wal-Mart, they said that they thought bribing was going to be one of the biggest possible risks. Then, Wal-Mart's bribery schedule broke, and my students who were studying for the bar exam all emailed me saying, "We were right, professor." I was glad. I was glad that they felt like they had learned something.

But again, it made them feel good. In the corporate responsibility, they read Wal-Mart's CSR report versus Target's CSR report. Some of them did their papers as a case study on Wal-Mart, which is why some of them picked Wal-Mart. That's how they figured out from enterprise risk management, because of the level of expansion, the kind of things that come up.

Remember I told you that this semester the students had to do a paper. They had to do a mini symposium. Again, you have to be able to stand up and talk clearly and explain your topic to people that don't understand it. And so they had to speak for 5 to 7 minutes. I said, "You don't have to do a PowerPoint. You don't have to be fancy. You don't have to be dress up." Then, the first person did a PowerPoint—it was impressive—and then everybody did a PowerPoint that saw it. It was particularly spectacular looking. I told them none of that was going to help their grade. But, they did it anyway.

And the other students had to ask relevant questions. They had to ask based on what they did. And I was looking to see—when I was grading the final paper—if any of the feedback that was relevant was actually incorporated, because again I think peer-to-peer learning is particularly important. So, people could not sit there and do nothing while a peer was presenting. They had to actively listen, and they had to be actively engaged in what was going on.

For BA, one of the things I did the other semester, which provided a nicer view, was talk about *Hobby Lobby*. I talked about some of their related issues from a corporate perspective, so I had them look at the Amicus Brief that the corporate law professors wrote, and I had them look at a piece that Steve Bainbridge wrote talking about how terrible the professors' brief was.

But I said, "Let's talk about how you should use some of the things that we've learned. You know, let's talk about reverse veil piercing. This was the last day of class before review. They found that to be really interesting and a really good way to review some of the comments that they learned very early in the semester, which I'm not sure they completely understood at the time. But again, it also reinforced what they were hearing in their constitutional law class. I said, "We're not going to talk about pretty much any of the interesting stuff. We're going to talk about these kinds of things." But, it lead to a very good discussion.

And finally, for BA we did a lot of things where we would advise entrepreneurs. I would just make up some kind of company, and they would advise certain kinds of things and draft a memo to the client. I wanted to see how they were making evaluations for entity formation and where to incorporate. Were they looking at issues about ownership and control? Were they thinking about an exit strategy? Do they eventually want to do an IPO? We talked about how difficult that was.

I introduced them a little bit to crowd funding. I said, "This may come down the pike at some point. I just want you to know that it exists." Those kinds of things.

"What are the taxation issues that you can think about? What are people going to look for in the financial statements?" I wanted to remind them that, "I gave you this

finance and accounting little workbook to look at.” People are going to eventually want to see something. They might want to see a balance sheet, cash statement, cash flow.

This builds on skills of issue spotting and drafting documents in plain English that appropriately laid out the risks. Often I would make the firms review another firm’s work.. I would redact the name of the firm, and I would say, “What is this firm missing?” or, “What does this firm do particularly well?” so they can see.

We learned about the shareholder proposal process. We spent time going through the proxies. I think we looked at Apple and Whole Foods, or something like that. And then I wanted to find a company that they care about and draft a proposal. I wanted them to tell me why they choose it, what the issues were, et cetera. So some of them dealt with human rights. Some of them dealt with animal testing. Some of them dealt with political spending, and then I showed them the statistics from last year’s proxy season about how many of these kind of issues actually passed.

And at the time, the Chamber had put something out—they must have been looking to limit certain kinds of access to repeat shareholder proposals that don’t pass. I said to my students, “Let me tell why this is so timely, because this issue might really come into play in a few years. So learn how to draft a proposal regardless of whether it will pass.”

One of the things I found particularly helpful for the BA students to either further discuss things that they really didn’t understand in class or just to help supplement—because I think the more ways you hear something the, better—is I would find short YouTube videos. For every one that I liked, I had to look at about ten that were totally garbage, and I tried to make them very short. And they were not a required viewing, but some of the students found them very, very helpful.

I also had to make up a class (I couldn’t make a class and missed more than one class), so I used a Frontline documentary on the financial crisis. It was in five parts. Some of them actually watched all five. I just told them they have to watch one, and then two episodes on 60 minutes because we didn’t have a lot of time to talk about the financial crisis, but it’s so important. A lot of them said, “Now I kind of get what people have been talking about,” and “This makes this stuff so relevant.” And that’s why I wasn’t surprised that so many students watched all five parts of the Front Line series when they really didn’t have to.

I started almost every class with “BA in the News.” So whenever there was something going on, such as a hostile takeover I would link it back to our classroom discussion on that topic. to show this is why this matters. A lot of times I might show the things on CNBC. “Now you understand what that means. Those words are not like a foreign language to you.” It resonated with them and that (I guess) made them feel a

little bit less like they were learning BA, because it was required, and a little bit more like they were engaged in current events. Again, my goal was to get them from completely terrified to less terrified.

So, here are the key takeaways. Having class participation count at least 20% was critical, because in both the seminar and the BA class there was a lot of outside work required. In the seminar, the students really liked looking at the business issues from different perspectives. I gave you examples from two different years of seminars. We didn't do all of that in one year, just to be clear. Sometimes, we use Harvard Business School case studies on corporate social responsibility. They really enjoyed that kind of work. Sometimes, they would think, "What if I'm the NGO? What if I'm the board member? What if I'm the regulator?" We talked about *regulatory capture* and what that means. "You're a revolving door. Should that matter?" We talked about benefit corporations, so there were a lot of different things we discussed.

What I didn't do as well as I wish I would have is provide feedback, and I think that's really, really important. I didn't provide probably as much feedback to individual students as I should have, and I'm going to do better because it's so much to look at. It was much easier obviously in the seminar than in BA because in BA you probably had about five or six group exercises and then some individual assignments. I don't think that I provided as much detailed feedback as I probably should have, so whether I scale back on some of those assignments or not is something I'm going to have to think about. But, I think the most critical thing is providing the feedback.

On the other hand, every student regardless of how they did was encouraged to go talk to their professors about their exams. So, since I gave a mid-term in civil procedure and BA at the same time, there were 100 and something exams. So, I'd slot each student for an hour, which gave them a lot of feedback on their exams, which showed when it came to the final.

I let students know how to reach me by giving them my cell and office number. Then, I want to make a shameless plug for the blog that Joan and I do. Joan blogs on Mondays, and I blog on Thursdays. The people on there talk about teaching issues but also just different things that we see. That's my presentation.

JMH: Okay, so we'll both take questions now.

Audience: Carol Goforth from the University of Arkansas. Marcia, you mentioned that you had screened through a bunch of YouTube videos. By any chance would you be willing to share which YouTube videos you found helpful?

MN: Yeah, I can send a link. Then, if you think that I clearly committed some sort of teaching malpractice, somebody should tell me. But I

can send a link, if you email me, or I will see if I can upload it. I would send them a few at a time because I'd be up at 4 in the morning. Some student would email me, "I don't know if understand X," and so I'd get that question. I started looking at these things.

And even though they had them every few weeks, they'd say, "Could you resend the video?" I would do is I would just make one big long list with all the names. So, I'd have that together.

And often I would find videos of lawyers talking about the differences between, for instance, an LLC and a this, or an s-corp. versus this. That was mainly for BA. I do that for the seminar because I think the concepts were a little bit easier for them. So, it goes from the very beginning—it doesn't go through agency issues so much, but all the way though—and then through Kickstarter and the difference between crowd funding and crowd sourcing. So, all those different kinds of things are on there and a nice little debate about insider trading, which they really liked as well.

Audience: Rick Friedman from USC. Question for each of you. One is just a sharing question. You also mentioned Survey Monkey, which I'd love to see the questions, and you mentioned there was an accounting workbook. Can you tell us more about that book?

MN: Yes, I don't know if I'm going to use it again, and the only reason that I use it is because the other BA professor said he used it. I didn't want to look as though I was in any way cheating my students of the appropriate accounting experience. Then, he said he wasn't going to use it, but I didn't know that. It's called *Business Essentials for Lawyers* by Rhee. I love this book. I've tried to have them read as many chapters as possible without killing them. And I don't think it was inaccessible, but now nobody else has to read this book. So, I recommend the book if you want to use something like that. But it's big. And a lot of times it's used for advanced classes. It's used a lot for drafting class, and it's used for accounting for lawyers' classes. But, I thought it was very easy to understand.

Audience: A few questions on board resolutions. The first was the actual corporations statutes themselves, the laws that dictate the manner and form of the board action and the resolutions. Does that get introduced in your class or are students expected to have that? Do you show them the statutes that apply?

JMH:

Yes, depending on the exercise and the course in which the resolutions are being used, I may direct the students to the relevant statutes. My presentation really consolidated a number of different ways in which I use board resolutions in the classroom, but in each case, the students have at least had or are then taking a course on business associations law, so they have been introduced to the relevant body of law. If they've taken my Business Associations course, then they have been introduced to two different corporate statutes (Delaware Law and the Model Business Corporation Act) and one uniform statute for each of the other forms of business association.

When I ask them to unpack the required and desired contents of a set of board resolutions, asking students what they would put in and where they would put it, we go back and actually look at the corporate law to do that. That's how the process reaffirms the legal doctrine. When I am teaching with the examples that I provided in the conference materials, which involve tax law as well as securities law, I have also laid the foundation for that doctrine. So, I ask the students to engage in some free thinking based on that general knowledge, but I also make them find the resolution forms—a precedent document that enables them to cross-check their thoughts and ideas.

Sometimes, board resolutions will come up in class serendipitously. I may just say, at a juncture in class “Hey, you are in a boardroom with representatives of a client corporation, and your client all of the sudden decides that to declare a dividend. What do you tell them the board needs to do? What actions must the board take? What goes into the resolutions the directors adopt?” I may then give them time to pursue that outside class. Then, they prepare the response for the next class. I did this during my Corporate Finance course last fall. I put them in groups. They jumped online, and they found the forms for the applicable resolutions. We then backfilled the rationale—deconstructed the resolutions by determining the legal or other basis for each one.

By the way, for those of you who have these resources, you can find forms of board resolution on Westlaw (Practical Law Company). You can find forms of board resolution on Bloomberg. I find that Lexis is not as useful for this task, especially with the new Lexis Advance product. However, Lexis does have practice guides from various states that have board resolution forms in them. There are

multiple tools and proprietary databases for students to use (in addition to traditional, hardcopy forms books).

Then, of course you can just jump online and use a search engine to find resolutions on the Internet. Sometimes, you will get lucky and find some cool stuff through a regular web search. I want them to learn how to find the documents they need. In using the form to teach back to the legal doctrine, I might ask in class: “Okay, now you’ve got a form document. Where did this resolution come from?” I will urge them to reverse engineer the document from the first “whereas” to the last word. “Where did this come from? Where did that come from? Is there anything missing here? What if the corporation wanted to declare a stock dividend and not a cash dividend? Or what if it is a cash dividend and not a stock dividend? What different law would you have to look at to do one or the other?”

You can add your own questions or develop your own set of questions altogether based on the learning objectives associated with the task. The example I’ve just given you involving dividends is one I most often use with second-semester, third-year students, who are in our business transactions concentration program. They have had all of the relevant statutory background in another course, and in some cases more than one other semester.

Audience: One follow-up question: So, as a student, you get to sort of practice—it is useful to know how to do resolutions for that reason. But then as a junior lawyer, you may be doing things like due diligence, where you are viewing minute books or having to write an opinion letter. Do you ask students to practice those skills, too?

JMH: We do, although not in this same exercise. But by raising these ideas in this context, you have given me a great idea to add one or the other of these skills to one of the types of resolution exercises that I do. It would make a nice component to a resolution assignment in many cases. I typically bring those skills in separately. The examples I have shared today came from either cases or other things in my lesson plan that forced me to consider the use of resolutions as tools. So I essentially backed into using resolutions in those classes. But, if I were to create new exercises from scratch, it would be great to be able to have them take a look at some real minutes, some actions by the board taken by written consent—written consent of boards in connection with a small transaction—and have them actually try and

pull some of the things out of board resolutions in the context of a due diligence mission.

That type of assignment also enables an instructor to talk about some great additional stuff, like how a lawyer might document the conduct of due diligence. Who is the audience for that document, how does it get retained, and how does it get labeled? It may become evidence. So, there are evidentiary and professional responsibility issues that the students must face in that kind of exercise. The experience could be incredibly rich.

A sophisticated course in business planning would address these issues together in a simulated practice environment. That is what you are really suggesting. You could just work with a simulated corporation over the course of that semester and construct all of these activities one on top of the other. That would be one approach, assuming you have students advanced enough to have already had most or all of the underlying law.

Audience: Usha Rodriguez from the University of Georgia School of Law. So, my question to Marcia, but also probably to Joan, is . . . do you sleep?

MN: I really enjoyed the seminar because I was teaching professional responsibility in the morning one semester, and the other semester I was doing employment law in the morning because I was an employment lawyer for 15 years.

So, what I really found hardest was that things changed all the time, so I was constantly changing the syllabus. And I remember we had talked about *Kiobel*. We talked corporate responsibility for human rights. One year I had them debate that issue. And right before class, the *Kiobel* decision came down, and a student emailed me before because I always looked at the Wall Street Journal at noon since class started at 1. I looked in the morning, but I wanted to make sure nothing else happened so I could do my little “this is how super current everything you’re learning is,” and somebody beat me to it.

Also, for the corporate governance, it was hard because even though there are some books out there. I only found maybe 30% of it implemented, if that much, and trying to talk about, for example, the New York Stock Exchange listing standards. You can’t give them

the whole thing. They'll never look at it, so how do you figure out what makes sense?

Again, how do you find the YouTube videos on executive compensation that are not going to be over their heads? Because they're not going to understand what a long-term incentive plan is and things like that.

That stuff takes time. But, it's stuff that I love to do, even when I was in practice.

Audience: But what about the five exercises in BA?

MN: That's the part that was hard. Now, this is actually true—I'm a speed-reader, and I'm an insomniac. So, that has a lot to do with it. I'm not saying, "Oh, I can get by on three hours." It's like I can't sleep more than three or four hours a night. I would prefer to, but, on the other hand, I can get a lot of reading done, and I read really fast.

But, it does take a lot of time. That's why for the BA—now some of those I was like, "By the way, the grades are check, check plus, and check minus. You know, I just wanted to make sure you did it." Because where a lot of the grading came in was them grading each other. And if somebody gave somebody a *C* in BA for the class participating, I asked why. They would say, "Because on their shareholder voting agreement, they didn't do this. And on this thing, they didn't do this. And when I sent them the comments about this, they didn't do this." So, that also kind of helped. When I was doing the check plus/check minus, they were really looking at how much the person contributed or "They didn't even understand the concept of *shareholder proposals* until they came to our group meeting, so I know they didn't do the reading."

Audience: So, that's related with my question sort of scale. This all seems like it takes a lot of time. How do you do it all and still have a life?

JMH: I have a slightly different answer. I also need less than eight hours of sleep a night. My husband would say that I do not sleep enough, however. And my doctor would actually say the same thing. I am working on sleeping more.

But what I have done to mitigate the amount of work actually is a bit different from what Marcia does, and this difference may be the result of my fifteen years of teaching experience. A lot of my exercises are not formal graded exercises or the students' work is evaluated in the classroom. So, their work is assessed on some level, but it is not formally graded on the same level that I may assess, for example, writing assignments in a doctrinal class. The formal written processing of doctrine in other standard practice formats is something that I still take a lot of time (too much time) to read and respond to outside the classroom. I still want to make sure that students can find issues or, even if I have spotted the issues for them, that they can find the right rules and apply them to the scenarios and reach appropriate legal conclusions. If they leave law school without being able to do that, I believe that I have committed malpractice. So, I do still engage in that kind of traditional assessment, too.

So, I focus a lot on process in designing my courses. I cut out some content to make room for these exercises. I do not do some of the more nuanced little things—some of the sexier things—that I might otherwise undertake. For example, I do not teach the financial crisis in my Business Associations course. I do very little on crowdfunding, which is an academic passion of mine, but I cover enough to enable students to understand it. If equity is crowdfunded, there's a new statutory exception that is awaiting regulatory implementation. So I say a bit about that, but it is of little relevance until the implementing regulations are adopted, in any case.

I assign some ungraded assignments that I promise students I will comment on by the end of the semester, but these ungraded things do not relate to what I was talking about today. They do not involve board resolutions. I make room for them in the course also, however.

My midterms in my two doctrinal courses (Securities Regulation and Business Associations) is an oral examination, and it is graded on the spot. I am writing about that experience for a forthcoming issue of the *Saint Louis Law Review* for an issue they are producing on teaching business associations law. So, those assessments involve grading student performance in the classroom real-time.

I guess what I am saying is that I mix it up so that I am not always reading to engage in student assessment. I am not a speed-reader at all. I read slowly and my comments are painfully slow to come,

whether they are electronic or whether they are handwritten. I comment on multiple levels. I am endeavoring to catch everything in my comments from their writing issues to their substantive problems. I really need to step back and stop that madness, but that is what I do when I grade written work product. As a result, I have to assign fewer exercises that are like that in order to make sure that they fit into the semester.

MN:

Yeah, a lot of the grading for BA was more pure grading, because some of the stuff they would problem solve—“How do we draft this?” or “How do we think about this, how do we issue spot?” And they would talk about it in class. So, one of them call themselves “Los Pollos Hermanos” for those who watch *Breaking Bad*. And someone was “Better Call Saul,” so they named themselves. So, I’d say, “Better Call Saul, what are the issues that you saw here?” And that’s kind of how they knew they were being assessed that way.

One of the little things is a way for you to make up a class. I just had them watch a bunch of stuff, because it did relate to some of the things that they were looking at. And they understood some of the instruments they were learning about.

And things like crowd funding, that’s literally like a little bit on the slide when we’re talking about exemption. I would say, “This may come down the pipe by the time you guys are out of here. I don’t want you to have never heard about it.” And of course, they get excited about that kind of stuff. But, I would say, “Don’t get too excited.” And of course, they put it on the exam because that’s what they remember. They don’t remember *Unocal*, but they remember that.

JMH:

Other questions? None? Okay. Well, thank you all very much.

End of Session