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THE BENEFITS OF INTEGRATING ENTREPRENEURSHIP INTO BUSINESS ASSOCIATIONS

ANN M. SCARLETT*

Since 2009, the television show *Shark Tank*[®] has popularized entrepreneurship and energized people to start their own businesses or to think about starting a business.¹ On *Shark Tank*, entrepreneurs pitch their product or service to a panel of “sharks” and seek to obtain an investment from one or more of the sharks for their business.² The entrepreneurs’ businesses span a variety of products and services such as jewelry, home repair products, specialty food products, applications for smart phones, food trucks, and babysitting services.³ Although most of the entrepreneurs do not get the investment they seek, the sharks ask the entrepreneurs a variety of questions about their businesses and sometimes offer advice even though they are not willing to make an investment.⁴ When the sharks are interested in investing in a business, an often lively exchange of offers and counteroffers occurs.⁵

In addition to encouraging entrepreneurship, watching *Shark Tank* episodes provides viewers with an introduction to a variety of business concepts such as business valuation, marketing plans, profit margins, and product pricing. It also

* Professor of Law, Saint Louis University. I want to thank all my students in Business Associations, as they are a constant source of inspiration for teaching improvements and their feedback on my course innovations over the years has been invaluable. I also want to thank Daniel Hunkins for providing excellent research assistance.

1. See Abha Bhattarai, *Surviving the Sharks*, WASH. POST, Jan. 20, 2014, at A14 (discussing contestants’ experiences on the show). However, entrepreneurship is not a new concept by any means, as the Kauffman Foundation has been promoting entrepreneurship in various ways since the mid-1960s and the Coleman Foundation since 1951.

2. See *Shark Tank: About*, ABC.COM, <http://abc.go.com/shows/shark-tank/about-the-show> (last visited Sept. 5, 2014) (explaining the plot of the show); see also Bhattarai, *supra* note 1.

3. See *Shark Tank: Episode Guide*, ABC.COM, <http://abc.go.com/shows/shark-tank/episode-guide> (last visited Sept. 5, 2014) (providing examples of the various businesses that have appeared on the show).

4. See Bhattarai, *supra* note 1; see also Kevin Brass, *Secrets of Winning on ‘Shark Tank’: Judges and Contestants on the Entrepreneurial Reality Show Lay Out What it Takes to Win*, WALL ST. J. (Aug. 25, 2014), <http://www.wsj.com/articles/secrets-of-winning-on-shark-tank-1408912047> (discussing keys to success on the show).

5. See, e.g., *Shark Tank: Episode 107*, ABC.COM (Sept. 28, 2009), <http://abc.go.com/shows/shark-tank/episode-guide/season-01/107-episode-107#recap> (noting the pitch for Grill Charms received three offers from the sharks).

introduces issues involving legal principles such as patents, copyrights, trademarks, product licensing, royalty rights, and investment and ownership structures. Seeing the products of successful entrepreneurs from *Shark Tank* for sale in major stores or on the internet shows viewers that entrepreneurs can succeed. Many people associate these entrepreneurs with achieving the “American Dream,” which might mean a number of things such as financial security, greater flexibility for family life, or freedom to pursue your ideas.

Law students have taken notice of this focus on entrepreneurship and it is an area of increasing interest among law students. Some law students aspire to become entrepreneurs themselves, and other law students prefer to represent entrepreneurs. Law students may seek to become entrepreneurs by starting their own law firms or other types of businesses.⁶ Given the lack of traditional law firm jobs following the 2008 financial crisis, more recent law graduates became solo practitioners or combined with several others to form small law firms out of necessity.⁷ The trend toward solo or small law practices, however, is not new. Of attorneys in private practice in the United States, almost half are solo practitioners and almost two-thirds work in law firms with one to five attorneys.⁸

Another segment of law students plan to use their legal training to represent entrepreneurs, which includes self-employed individuals, individuals launching start-up ventures, and owners of existing small businesses.⁹ Legal skills for representing small business clients are particularly necessary for new attorneys who want to practice law in rural areas and small towns. But, even in

6. Although the precise number of attorneys who become entrepreneurs is not known, a survey of JDs who passed the bar in 2000 revealed that 24% were not practicing law and that 27.7% were working in the business sector in 2012. Debra Cassens Weiss, *24 Percent of JDs Who Passed the Bar in 2000 Aren't Practicing Law, Survey Finds*, A.B.A. J. (Feb. 9, 2014, 12:00 AM), available at http://www.abajournal.com/news/article/twelve_years_after_the_jd_20_percent_arent_practicing_law/ (reporting results from the “After the JD” study conducted by the American Bar Foundation).

7. See, e.g., Jennifer A. Rymell, *The Chair's Corner: The Growing World of Legal Entrepreneurs*, 31 GP SOLO, Jan.–Feb. 2014, at 8 (“Since 2008 the number of new law graduates going into solo practice has steadily increased, hitting an all-time high in 2011 of 6.1 percent. Before 2008, only 3.5 percent or less of law school graduates were starting their own solo practice right out of law school.”).

8. *Lawyer Demographics*, A.B.A. 1 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf (reporting that, as of 2005, 49% of attorneys in private practice were solo practitioners, 14% worked in firms with two to five attorneys, 6% in firms with six to ten attorneys, 6% in firms with eleven to twenty attorneys, 6% in firms with twenty-one to fifty attorneys, 4% in firms with fifty-one to 100 attorneys, and 16% in firms with more than 100 attorneys.).

9. The terms entrepreneurs, self-employed, and small business owners are used interchangeably in this Essay. Entrepreneurs also include people who start a franchise, buy or inherit an existing business, or start a charitable or civic organization.

urban and suburban law practices, attorneys are far more likely to work with self-employed individuals and small business owners than with public corporations.¹⁰

The United States has more than twenty-eight million small businesses, which comprise over 99% of all businesses.¹¹ Almost half of all employees work for small businesses.¹² Approximately 90% of firms in the United States have less than twenty employees and 98% have less than 100 employees.¹³ Further, more than 60% of new jobs are created by start-up and small businesses.¹⁴ The importance of small businesses is also demonstrated by the smallest businesses, those with less than twenty-five employees, producing the greatest number of patents per employee.¹⁵ Admittedly, some new businesses cease operations within a few years for a variety of reasons,¹⁶ but the statistics show that small businesses are vitally important to creating new jobs and a key to restarting substantial growth in our economy. Students' interest in entrepreneurship may reflect the reality that start-up and small businesses are a driving force in the United States' economy, and thus a fertile area for future law practice.

I. ADVANTAGES OF INTEGRATING ENTREPRENEURSHIP INTO THE BUSINESS ASSOCIATIONS COURSE

The primary advantage of incorporating entrepreneurship into Business Associations is that it increases students' engagement and interest in the course. Many students enroll in Business Associations simply because it is a bar course and these students often have no background or interest in business. Yet, most students are likely already familiar with small businesses. Some students, like me, come from a family that owns a small business or have

10. *See infra* notes 11–13.

11. *Frequently Asked Questions*, SBA OFFICE ADVOCACY 1 (Mar. 2014), available at http://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf [hereinafter *SBA FAQ*] (defining small business as less than 500 employees and including both full and part-time businesses).

12. *Id.* (stating 48.5% of private sector employers are small businesses); *see also id.* (noting that more than three-quarters of small businesses are non-employers, meaning the businesses are operated only by their owners without employees).

13. *Statistics of U.S. Businesses Annual Data*, U.S. CENSUS BUREAU (2011), <http://www.census.gov/econ/susb/> (last visited Sep. 5, 2014).

14. *SBA FAQ*, *supra* note 11 (stating small businesses created 63% of net new jobs between 1993 and 2013 based on Bureau of Labor Statistics, BED).

15. Anthony Breitzman & Diana Hicks, *An Analysis of Small Business Patents by Industry and Firm Size*, SBA OFFICE ADVOCACY i (Nov. 2008), available at <http://archive.sba.gov/advo/research/rs335tot.pdf>; *see also SBA FAQ*, *supra* note 11, at 3 (“Of high patenting firms (15 or more patents in a four-year period), small businesses produced 16 times more patents per employee than large patenting firms.”).

16. Half of new businesses are still operating after five years and more than a third after ten years. *SBA FAQ*, *supra* note 11, at 1–2.

relatives that own small businesses. For other students, they may frequent a hair salon, a restaurant, a bar, or a dental office that is owned by local individuals. Even many national brand restaurants and retailers are franchises owned by local individuals. To expand students' awareness of the variety among entrepreneurs, a professor can play clips from *Shark Tank* or similar shows.¹⁷

Students are less intimidated by the legal and business concepts in the course when based on familiar small businesses. Students enjoy *Shark Tank* clips and actively participate in discussions about legal and business issues when based on these clips. The students also seem to engage more fully in hypotheticals based on the real entrepreneurs from *Shark Tank* clips. By incorporating entrepreneurship into the Business Associations course, the legal issues are more interesting to students. It is also easier for students to learn how these legal principles apply to small businesses that they know or have seen on *Shark Tank* clips, and to see how that knowledge can be used in their future legal practices or in starting their own businesses.

Another advantage to incorporating entrepreneurship into Business Associations is the ability to draw upon local resources and speakers. The St. Louis metropolitan area, where my law school is located, has a particularly vibrant entrepreneurship environment. A variety of incubators and accelerators actively encourage and support entrepreneurs in St. Louis. Angel investors and venture capital funds are also present. Some of these organizations specifically encourage technology and biotechnology start-up businesses in St. Louis, while other organizations encourage people to start small local service businesses such as hair salons, lawn service companies, and restaurants. Just as immigrants account for much of the growth in new businesses in the United States,¹⁸ St. Louis' large immigrant communities produce many entrepreneurs that have started a variety of businesses such as restaurants and service businesses. In addition, at least one local organization is encouraging residents

17. *START UP* has television episodes and webinars that focus on entrepreneurship. *Start Up*, USA.COM, <http://startup-usa.com/episodes> (last visited Nov. 1, 2014). Additionally, *Startups: Made in Kansas City* is a series of videos by the public television station in Kansas City that focuses on entrepreneurship. *Startups: Made in Kansas City*, KCPT.ORG, <http://www.kcpt.org/programs/local-programs/startups/> (last visited Nov. 1, 2014).

18. See, e.g., *The Jobs Machine*, ECONOMIST (Apr. 13, 2013), <http://www.economist.com/news/business/21576101-start-ups-founded-immigrants-are-creating-jobs-all-over-america-jobs-machine> ("Some 40% of Fortune 500 firms were founded by immigrants or their children, according to the Partnership for a New American Economy, a pressure group. . . . Although the foreign-born are only an eighth of America's population, a quarter of high-tech start-ups have an immigrant founder.").

in economically distressed areas of the city to start their own businesses as way of revitalizing their neighborhoods.¹⁹

Many of these local organizations host workshops and networking events to educate and support entrepreneurs, and these organizations can dramatically improve a business's chance of succeeding.²⁰ In addition, the Center for Entrepreneurship at Saint Louis University has been inspiring and supporting entrepreneurs for forty years, and other local universities also engage in similar work. All these local resources provide a variety of local events that Business Associations students can attend to learn more about entrepreneurship and to interact with local entrepreneurs. These organizations also serve as an excellent source of engaging entrepreneurs that can speak with a Business Associations class about their experiences starting a business, the legal issues that they have confronted, and their advice about how attorneys can communicate and build relationships with entrepreneurs.

Integrating entrepreneurship into Business Associations also offers cross-curricular advantages. Some law schools have already seized upon students' interest in entrepreneurship by establishing centers, concentrations, or clinics focused on the topic.²¹ Other law schools collaborate with the business school at their universities to educate law students on entrepreneurship.²² For law schools with a clinic or other emphasis on entrepreneurship law, integrating entrepreneurship into the Business Associations course has the advantage of increasing students' interest in those curricular offerings. Even without developing a specialized program, law schools can add entrepreneurship into their curriculum by incorporating entrepreneurship law into the Business Associations course. Further, because students typically enroll in Business Associations in the fall semester of the 2L year, they can be introduced to other classes important for representing entrepreneurs while they still have time to enroll in them. These classes may include Intellectual Property Survey, Employment Law, Securities Regulation, Transactional Drafting, and Taxation

19. Habitat for Business is a non-profit organization organized by the John Cook School of Business's Center for Entrepreneurship at Saint Louis University. *Habitat for Business*, JOHN COOK SCH. BUS., <http://business.slu.edu/centers-of-distinction/center-for-entrepreneurship/programs-events/habitat-for-business/> (last visited Nov. 1, 2014).

20. JEROME A. KATZ & RICHARD P. GREEN II, *ENTREPRENEURIAL SMALL BUSINESS* 157 (4th ed. 2014).

21. For example, Duke University School of Law offers an LLM in Law and Entrepreneurship, and Pepperdine University School of Law has the Geoffrey H. Palmer Center for Entrepreneurship and the Law. Some law schools, such as those at Northwestern University and University of Pennsylvania, operate clinics focused on entrepreneurship. Some law schools, including University of Washington School of Law and Drexel University School of Law, offer concentrations involving entrepreneurship.

22. See, e.g., Anthony J. Luppino, *Minding More Than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations*, 30 W. NEW ENG. L. REV. 151, 154 (2007).

for Individuals, Partnerships, and Corporations. With or without an entrepreneurship center or clinic, introducing entrepreneurship into Business Associations can help students understand the necessity of these other classes to prepare for a law practice focused on self-employed and small business clients.

In addition, focusing more attention on start-up and small businesses provides many opportunities to address the professional and ethical issues of transactional law practice. Unlike a public corporation client, these clients can present ethical and professional challenges because the entrepreneurs are so closely connected with their businesses that they often do not distinguish between themselves and their businesses. For instance, an attorney counseling clients about the choice of business entity must clearly identify who is the client being represented. Is it one of the participants in the new venture, all of the participants in the new venture, or the new venture itself? This raises not only ethical issues about conflicts of interest, but also professional issues about who is the best client from the attorney's perspective. The professor can also demonstrate professional skills in counseling a client beyond the merely legal aspects. In helping a client choose a form of business entity, an attorney must consider more than just the legal attributes of the various entity choices, but also the client's ability to comply with annual filing requirements for a particular business entity and the burdens of that entity's tax treatment. Further, because entrepreneurs tend to be risk-takers and attorneys tend to be risk averse, the professor may also include consideration of ways for an attorney to communicate the legal risks of a transaction by a small business, without being seen as a naysayer and damaging the future attorney-client relationship.

A perhaps unexpected benefit of discussing entrepreneurial small businesses within class hypotheticals is the ability to introduce basic business and financial knowledge into the discussion. Although attorneys are not business experts, they need to understand basic business terminology and financial information to draft transactional agreements, such as those documenting an investment in a small business or the sale of that business. By presenting facts concerning a small business, students can learn business concepts in a simpler context. For instance, students can more easily understand the financial statements for a small beauty salon owned by a husband and wife, than those for a public corporation. The professor can then connect a potential buyer's offer price for that beauty salon to different business valuations based on its financial statements. Familiarity with the business and financial information that entrepreneurs constantly consider allows attorneys to assist clients in negotiating transactions and to provide better legal advice. Finally, with enhanced business knowledge, students may be inspired to become entrepreneurs.

II. METHODS FOR INTEGRATING ENTREPRENEURSHIP INTO BUSINESS ASSOCIATIONS

Entrepreneurship integrates easily into the existing topics covered in a Business Associations or Business Organizations course. The credit hours allocated to Business Associations vary among law schools, and some law schools split the material into two separate courses (a Corporations course and a separate Agency and Partnership course or Unincorporated Entities course). Regardless of the exact credit hours or classes, entrepreneurship can be incorporated into the course for the benefits mentioned in Part I.²³ A four-hour Business Associations course typically covers the laws of agency, partnerships, limited liability companies, corporations, securities laws, and mergers and acquisitions.²⁴ Together these laws raise three primary issues: 1) choice of business entity and the laws governing entities; 2) methods for raising capital and related securities laws concerns; and 3) exit strategies. A traditional Business Associations course tends to cover these three issues mostly through a focus on large corporations, particularly public corporations. Indeed legal principles directly related to unincorporated entities often account for only a quarter of the course. However, these three issues are equally relevant to unincorporated business entities and small private corporations as explained below. Integrating entrepreneurship into the course means emphasizing small businesses more than public corporations.

A. Teaching Methods

The key to teaching entrepreneurship in the Business Associations course is through hypothetical problems or case studies whereby students are presented with the legal issues confronting entrepreneurs. I utilize two different methods for presenting such scenarios. The first is the running hypothetical in which the basic facts of a scenario are changed and expanded as different legal topics are encountered in the course. The running hypothetical is particularly useful for initial class discussions of new legal principles. Because a variety of businesses exist, the running hypotheticals should include at least one focused on a service-oriented business (such as a dental practice, hair salon, or

23. *See supra* Part I.

24. A sampling of Business Associations casebooks illustrates these are the typical laws covered. *See, e.g.*, ERIC A. CHIAPPINELLI, *CASES AND MATERIALS ON BUSINESS ENTITIES* (3d ed. 2014); DWIGHT DRAKE, *BUSINESS ORGANIZATIONS IN A PLANNING CONTEXT: CASES, MATERIALS AND STUDY PROBLEMS* (2013); LEE HARRIS, *CASES AND MATERIALS ON CORPORATIONS AND OTHER BUSINESS ENTITIES: A PRACTICAL APPROACH* (2011); WILLIAM A. KLEIN ET AL., *BUSINESS ASSOCIATIONS: AGENCY, PARTNERSHIPS, AND CORPORATIONS* (8th ed. 2012); D. GORDON SMITH & CYNTHIA A. WILLIAMS, *BUSINESS ORGANIZATIONS: CASES, PROBLEMS, AND CASE STUDIES* (2d ed. 2008).

plumbing company) and another that is product-oriented (such as a consumer product manufacturer or an internet retailer of specialty food items).

The running hypotheticals are supplemented by other hypothetical problems that present different factual scenarios to expand and test the legal principles being studied. Students find these problems most beneficial if distributed several days before being discussed in class. If the professor follows the traditional casebook format of progressing through agency, partnerships, LLCs, and corporations, the most complex choice of law problems will be presented only after the class has covered all the business entities. The same hypotheticals would form the foundation of a course implementing a problem-based approach to the legal issues. The goal of the hypothetical problems is for students to understand the choices that could be made on the three key legal issues (choice of business entity and laws governing entities, methods for raising capital and related securities laws concerns, and exit strategies), and the perceived advantages and disadvantages of each choice.

B. Choice of Business Entity and Laws Governing Entities

By presenting problems focused on start-up businesses, students gain a deeper understanding of each type of business entity. Depending on the chosen state of formation, the choices for a small group of entrepreneurs starting a business may include general partnership, limited liability partnership, limited partnership, limited liability company, S corporation, or C corporation.²⁵ More than one of these business entity forms may be appropriate for the new venture depending on the goals and expectations of the participants as well as the provisions of the governing laws. There is rarely only one answer when deciding the form of business entity for a new venture. Rather, the attorney must ask a series of questions to learn the clients' goals, expectations, and limitations, and then the attorney must outline the advantages and disadvantages of the business entities that best fit the clients. Ultimately it is the clients' choice, but that choice should be informed by the attorney's thoughtful legal advice.

Using real or hypothetical scenarios based on start-up ventures, the professor can easily lead students through discussions of the factors to consider in choosing a business entity. Because businesses operate in a variety of areas, the scenarios should include examples of all types of businesses including: service-oriented, manufacturing, technology, traditional retailers, and internet-based companies. By carefully varying the facts of these scenarios, the professor can demonstrate the reasons that lead start-up businesses to choose

25. For a sole owner, the choices typically include sole proprietorship, limited liability company, S corporation, and C corporation.

different forms of business entities. The professor can also use the scenarios to help students develop the skills to effectively interview a client for the purpose of giving legal advice. To advise a client on the choice of business entity, the attorney must learn, among other things, how the new business will operate, the goals for the business both in the short term and the long term, the expectations of the participants, and the relationships among the participants. The attorney cannot simply focus on the near-term goal of filing any necessary papers to initiate the business, but instead must consider issues that may arise when the business is more mature or when the business is nearing its end.

Many factors combine to influence the choice of business entity, so only a few examples can be mentioned here. For instance, an important consideration in selecting the form of business entity is whether the participants' goal is to eventually sell or merge the business. Conversely, if the participants want to receive a steady income from the business and, perhaps, to pass the business to their children, that may suggest an alternative form of business entity. The tax treatment of the chosen business entity is another important factor, but it is more complex than typically addressed in Business Associations. For instance, the participants may want to limit their individual tax liability on an annual basis, to avoid any individual tax liability until they exit the business, or to maximize tax-free fringe benefits. Alternatively, the participants may not be that focused on taxes if they are simply looking for the business to replace their current income while giving them the flexibility of running their own business. Although tax issues are more fully taught through specific tax courses, it is beneficial for students to identify the tax aspects that impact the choice of business entity and to see the need to enroll in tax courses.

The incorporation of entrepreneurship principles allows for a more multifaceted choice of entity discussion, and students' understanding of the business entities can be further developed by considering the internal governance of those entities. The hypothetical scenarios can be varied to include facts about internal governance issues so that students must carefully compare the statutory provisions governing each form of business entity. In considering the internal governance structure for each business entity, students must focus on the statutory defaults and permissible ways to vary those provisions through agreement. For example, the statutory defaults for exiting the business vary among the business entities, as do the statutory defaults for fiduciary duties and the permissibility of limiting or eliminating those duties. Students' understanding of these issues can be further developed by having them not only analyze the best business entity forms for a particular scenario, but also draft a letter to the client in which they explain the options or draft an agreement to govern the internal relations among the owners (e.g., a LLC operating agreement, a shareholder agreement).

C. *Methods for Raising Capital and Related Securities Laws Concerns*

Integrating an entrepreneurship approach in Business Associations requires an expanded discussion of methods by which a small business may raise capital and concurrently requires an expanded discussion of the exemptions from securities laws for any outside investments. Raising capital is a matter of critical importance in start-up businesses. The methods by which a start-up small business can acquire capital are vastly different from the opportunities available to a public company. Whereas a public company might be able to make an additional public issuance of shares, sell bonds to the public, or borrow money from a commercial bank, the founders of start-up ventures typically start with their own savings or borrowings and then turn to family and friends.²⁶ If the start-up venture is technology based, it may be able to attract an angel investor or venture capital investors. Crowdfunding is also a potential method of raising money popularized by companies such as Kickstarter and Indiegogo.²⁷ Or, if lucky, the entrepreneur may appear on *Shark Tank* and attract an investment from one of the sharks.²⁸ These investors may receive a variety of interests in exchange for investing in a start-up small business and the class can consider the most common forms of investment interests as well as the documents reflecting these investment interests (e.g., subscription agreements, convertible promissory notes).

When the founders of a business seek outside investments whether from family, friends, angel investors, venture capitalists, or crowdfunders,²⁹ issues concerning securities laws arise. Unfortunately, many attorneys and lay people are unaware of the broad applicability of the securities laws. Indeed, the definition of a “security” is much broader than simply stock in a publicly-

26. It is difficult for start-up and small businesses to obtain loans from commercial lenders without substantial collateral or personal guarantees, but they may be able to obtain non-bank financing based on their inventory, purchase orders, or accounts receivables. The professor may want to discuss these issues in considering financing options for start-up and small businesses.

27. See Ellen Huet, *Making the Cut*, S.F. CHRON. (Jan. 5, 2014) (discussing the use of the crowdfunding companies in the fashion industry); Sean M. O’Connor, *Crowdfunding’s Impact on Start-Up IP Strategy*, CPIP (Feb. 24, 2014), <http://cpip.gmu.edu/2014/02/24/crowdfundings-impact-on-start-up-ip-strategy-3/> (noting the popularity of crowdfunding through the companies).

28. See *Shark Tank: Episode Guide*, *supra* note 3.

29. Crowdfunding was originally permitted only for donations, rewards, or non-interest loans, because offering equity interests would have violated the Securities Act of 1933. In 2012, Title III of the Jumpstart Our Business Startups Act (JOBS Act) authorized equity crowdfunding through a new registration exemption. Jumpstart Our Business Startups Act, Pub. L. No. 112–106, 126 Stat. 306 (2012) (codified in various sections of 15 U.S.C. §§ 77a-aa, 78a-pp) (amending Section 4 of the Securities Act of 1933 to create a new exemption for crowdfunded securities). However, the Securities and Exchange Commission has not yet issued final regulations to allow equity crowdfunding to begin.

traded corporation as many people think,³⁰ and includes many of the investments made in unincorporated entities and private corporations.³¹ Thus, individuals receiving an interest in a LLC or a S corporation owned by a friend or family member are likely receiving a security, which either must be registered under the Securities Act of 1933 or fit an exemption to registration under that Act.³² Because most small businesses will rely on exemptions when seeking outside investments, a professor integrating entrepreneurship into Business Associations should expand the coverage of exemptions from the securities registration requirements of the Securities Act of 1933. If the class studies agreements documenting outside investments, the professor can ask students to find the provisions of each agreement addressing the qualifications for a registration exemption and to identify the applicable exemptions.

Similarly, the definition of a “security” is equally broad for purposes of securities fraud liability under the Securities Exchange Act of 1934,³³ particularly Rule 10b-5 liability.³⁴ Thus, securities fraud liability can extend to investments in unincorporated entities and private corporations. When an investment in a small business does not go well, a disgruntled investor may be able to plead a Rule 10b-5 securities fraud claim fairly easily.³⁵ The professor can address the broad applicability of the securities fraud laws by including more cases in which unincorporated entities or private corporations are accused of securities fraud.³⁶

30. Securities Act of 1933 § 2(1), 15 U.S.C. § 77b(1) (2012); Securities Exchange Act of 1934 § 3(a)(10), 15 U.S.C. § 78c(a)(10) (2012).

31. *See, e.g.*, SEC v. W.J. Howey Co., 328 U.S. 293, 298–300 (1946) (holding that the interests in a citrus grove sold by the Howey Company were “investment contracts,” and thus securities under the Securities Act of 1933); Robinson v. Glynn, 349 F.3d 166, 169, 174–75 (4th Cir. 2003) (holding that the interest sold in a LLC was a security).

32. 15 U.S.C. § 77d.

33. *See, e.g.*, Marine Bank v. Weaver, 455 U.S. 551, 555 (1982) (stating the definition of a security is “quite broad” under the Securities Exchange Act of 1934 and essentially the same as the definition of a security under the Securities Act of 1933).

34. 17 C.F.R. § 240.10b-5 (2013).

35. *See* DWIGHT DRAKE, BUSINESS PLANNING: CLOSELY HELD ENTERPRISES 202 (4th ed. 2013) (“The seller has an affirmative duty to accurately state material facts and to not mislead; the buyer has a solid cause of action if the seller blows it. Rule 10b-5 and its state counterparts keep our courts packed with countless disgruntled investors who believe they were unfairly deceived when things didn’t go as planned.”); *id.* at 204 (“The dumb, poor investors may lack the capacity to evaluate what is being promised; but after things go bad, it doesn’t take much to find an aggressive lawyer who is willing to spec the case against a contingent fee because, given the undisputed limitations of the plaintiffs, it’s a slam dunk.”).

36. This expanded coverage can be facilitated by more quickly covering securities fraud liability within public corporations under the Securities Exchange Act of 1934, forms of securities liability under the Securities Act of 1933, and short swing profits liability under Securities Exchange Act of 1934.

D. *Exit Strategies*

A professor incorporating entrepreneurship into Business Associations will have discussed exit strategies to a limited extent within the choice of business entity and internal governance contexts. If time permits, the professor may also want to directly address the possible exit strategies for small business owners. Although going public is the exit strategy for a few start-up companies, the more likely exit strategies involve sales or mergers with competitors. The entrepreneurial focus in this context is achieved by focusing on sales and mergers involving small private corporations, LLCs, and partnerships, rather than mergers and sales among public companies. Doing so makes the financial terms and the conditions for the transactions easier for students to understand. It also allows students to review asset purchase agreements and merger agreements that are generally shorter and simpler to comprehend than those involving public corporations.

III. FOCUSING ON ENTREPRENEURSHIP TO FACILITATE TEACHING PRACTICAL SKILLS

Practical skills are an important focus of law schools as they aim to produce practice-ready attorneys.³⁷ A key skill for all attorneys is legal drafting. For drafting transactional documents, an attorney must also know related skills such as how to find and use form documents, how to review documents drafted by other parties involved in a deal with your client, and how to negotiate in your client's best interest. Therefore, a professor teaching drafting in Business Associations may also want to include discussion and exercises on these issues.

Drafting can be more easily incorporated into the Business Associations course with scenarios involving a few entrepreneurs. Focusing on scenarios of a small business founded by a few individuals has the advantages of simpler facts for students to understand and typically simpler agreements to document the transactions. Such scenarios allow opportunities for drafting the required document to formally create the business entity chosen (e.g., articles of incorporation, articles of formation) and the internal governance document for the business (e.g., shareholder agreement, LLC operating agreement). These drafting exercises can be combined with the related skills of finding and using form documents. The same scenarios can be expanded to include methods for financing the business, the terms of such investments, and drafting the

37. See, e.g., William E. Foster & Emily Grant, *Memorializing the Meal: An Analogical Exercise for Transactional Drafting*, 36 U. HAW. L. REV. 403, 403 (2014) ("The legal academy is increasingly focused on producing practice-ready lawyers."); Kamille Wolff Dean, *Teaching Business Law in the New Economy: Strategies for Success*, 8 J. BUS. & TECH. L. 223, 236–37 (2013) (noting the forces influencing law schools to teach practical skills).

agreements. Finally, the same scenarios can be further developed to include an exit from the business through the drafting of a merger agreement, a stock purchase agreement, or an asset purchase agreement.

In a Business Associations class with a large number of students, it can be difficult to successfully complete even one full drafting exercise. One way to minimize the drafting burden on students and the grading burden on the professor is to develop a drafting exercise based on a simple agreement for a small entity, such as a subscription agreement. Another way to minimize the burden is to limit a drafting exercise to only one or two provisions of an agreement for a small entity.

Alternatively, without requiring students to actually draft a document, a professor can teach some drafting lessons through the review of documents. For example, the professor can give students a draft LLC operating agreement and tell them that they are each a potential LLC member, and then ask them to review the document for any items that they find objectionable, items that they want to negotiate, and items that they think are missing. This exercise can reveal examples of poor drafting and illustrate the potential for one-sidedness within an agreement. The professor can enhance the exercise by posing various “what if” scenarios that will expose any ambiguous or missing provisions of the agreement. For instance, asking students to assume that a member has died a year after the business began may highlight the absence of any provisions in the operating agreement addressing that event. Alternatively, asking students to assume that a member wants to transfer half of her interest as part of a divorce settlement may reveal ambiguity with the existing provisions of the operating agreement. Both variations can then lead to a discussion of the different ways to address the issue in the agreement. As with drafting assignments, a document review exercise can be simplified by focusing on only a few provisions within an agreement.

In advance of reviewing or drafting an agreement, a professor can also have students (in small groups) participate in a mock negotiation of the key terms of that agreement. For instance, the professor can tell students that each small group has formed a LLC and now needs to negotiate its operating agreement. The students can develop their own list of the key terms and negotiate those terms, or the professor can simplify the exercise by giving the students a list of the key terms and having them negotiate those terms. In an ideal setting with unlimited time, the professor would have each student draft the operating agreement according to the negotiated terms. The professor could also have students exchange their draft documents with the other “LLC members” in their small groups to show the variations that can be produced by different drafters (and which may necessitate further negotiations). If such a drafting exercise is not realistic, the negotiation exercise can be followed by the professor distributing an agreement intended to reflect the negotiated deal and having the students review it for items that they find objectionable, items

that vary from the negotiated terms, and items that are ambiguous or missing. Similarly, a professor could have students negotiate the terms for an investment in a small business or the terms for a merger or sale of the business.

CONCLUSION

Integrating entrepreneurship into Business Associations through an emphasis on start-up and small businesses is worth sacrificing some coverage of public corporations. Attorneys are much more likely to work with clients who are self-employed or own small businesses, and thus the legal principles covered in a Business Associations course have more relevance to students when focused on these likely clients. Students are also able to more easily understand the legal concepts presented when focused on start-up and small businesses. Incorporating entrepreneurship also has the advantage of introducing law students to the cross-curricular nature of this practice area and at a time when they can still enroll in other relevant courses. It is also an engaging way for students to understand the legal and business issues presented in transactional legal practice. Some students may even be motivated to become entrepreneurs themselves. For someone who has taught Business Associations for many years, it is energizing to see students so engaged and actively participating in class, and it inspires me to continue developing creative classes and exercises with an entrepreneurship focus.