

“101 Assets, Activities, and Approaches for Students in Business Associations/Corporations Courses”

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Below, in no special order, are suggested methods and considerations that students in Business Associations/Corporations courses or seminars, or related courses, might find useful in identifying practical and theoretical themes; developing and refining paper topics; reviewing for exams; and preparing for job applications, interviews, and internships.

Some of the material has been adapted from the author’s casebook (or supplementary text), *Corporate Governance: Principles and Practices* (Aspen 2010).

1. Much of “the law of business associations” (that is, the caselaw, statutes, and regulations governing partnerships, corporations, and limited liability companies) concerns the ways in which one person or a group of people act as agents for business entities; their roles, responsibilities, and potential personal liability; and the ways in which they can incur liability for the entity and possibly for its owners (shareholders, partners, members). Is this body of law largely a special form of the law of agency?
2. Alternatively (or additionally), could much of the law of business associations be seen as special applications of the law of contracts?
3. Even if you’re not a regular reader of the *Wall Street Journal* and/or *Bloomberg Businessweek*, you might follow their coverage of one complex business situation (for instance, a corporate scandal) through the course of the semester. Watch not only how the facts and allegations emerge and are clarified, but how they’re being interpreted or “spun” by lawyers and commentators, and how a variety of legal issues (not all restricted to the law of business associations) may arise and intersect.
4. Beyond the model forms of corporate documents (such as articles of incorporation, bylaws, committee charters, codes of conduct, and corporate social responsibility policies) available in your statutory supplement, you can find examples on the Web sites of many of the country’s largest corporations (such as those appearing on the annual “Fortune 500” list of U.S. companies with the largest revenues), often under a link to “Corporate Governance” or “Investor Relations.” How and why do these documents differ from the forms? From each other?

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5. Skim through some of the prospectuses, proxy statements, 10-K (annual report) filings, and other corporate documents available on some corporations' Web sites or on the Securities and Exchange Commission's EDGAR database, sec.gov/edgar/quickedgar.htm.

6. The blog footnoted.com offers a "closer look at the things that companies try to bury in their routine SEC filings." You might also find useful the book, *Financial Fine Print* (2003), written by the blog's editor and founder, Michelle Leder.

7. You can join the ABA's Law Student Division (abanet.org/lsd/home.html) at a cost of \$25 (or \$60 for three years); and then, at no additional charge, the organization's Business Law Section (abanet.org/buslaw/home.shtml).

The Business Law Section has a myriad of subgroups, which collectively address the latest developments across the entire spectrum of commercial law. Members receive the Section's law review (*The Business Lawyer*; hard copy) and magazine (*Business Law Today*; online) and can participate in the ongoing work of its subgroups.

The Section generally (and often enthusiastically) welcomes student participation. You can often contribute remotely, by conference calls and/or through the Internet; in addition, meetings of the ABA's sections, committees, and working groups—extraordinary opportunities for professional networking-- rotate through different cities.

8. Nolo Press (nolo.com) publishes a valuable series of manuals, including several that address the formation of and documentation for partnerships, corporations, and limited liability companies. Though marketed to the general public, these works can also be quite instructive to lawyers and law students.

9. *The Practical Lawyer* magazine is issued every two months by the ALI-ABA, a collaboration of the American Law Institute and the American Bar Association. As its name indicates, this publication provides nuts-and-bolts guidance on a wide range of legal issues (especially the drafting of various documents), including those of business associations.

10. Browse through the corporate/"business associations" section of your law school's library.

11. How much discretion do legislators and courts allow directors and officers to exercise in taking risks with their corporations' fortunes and future? In what ways can, and should, shareholders limit this discretion?

12. How is the standard by which courts review executives' decisions different from the standard(s) by which appellate courts review the rulings and determinations of lower courts?
13. One way to analyze some legal issues of business associations is to identify: (a) the *authority* of each person or entity involved; (b) the *responsibility* or fiduciary duty associated with the exercise of that authority; and (c) the *liability* that the actor could, if not exercising his/her/its authority appropriately, incur (1) personally, (2) for his/her/its entity, (3) for [other] managers of that entity, and/or (4) for [other] owners of that entity.
14. Can directors of the same corporation have different roles, responsibilities, and liabilities? How do their roles, responsibilities, and liabilities differ from those of the company's officers?
15. A frequently-voiced moral of the *Spider-Man* saga is, "With great power comes great responsibility." Is this true for business associations? Are fiduciary duties, and/or the standards for fulfilling those duties, different for more powerful enterprises and executives than for less powerful ones?
16. Would it be more appropriate to say that, both for executives and for their counsel, "With great *knowledge* comes great responsibility?" Is it ever appropriate for directors, officers, and/or counsel to deliberately decline the opportunity to learn of, or investigate, a situation?
17. What are the *minimum* standards or levels of activity and behavior that will prevent a director or officer from being held personally liable for economic harm suffered by her corporation?
18. Courts and statutes may suggest, but do not compel, *aspirational*, or optimal, behavior on the part of directors and officers. How would such behavior differ from minimum or even average executive conduct? Why aren't executives being held to this highest standard? (How would aspirational and average conduct differ for corporate (or executive or shareholder) counsel?)
19. List the types of default arrangements that are embedded in the partnership, corporation, and limited liability company statutes; and consider why and in what ways the parties involved could change these defaults.

20. Much of the law of business associations, particularly concerning the responsibilities (and potential liability) of corporate directors and officers, involves the processes by which executives reach decisions. Can these processes—and the “duty of care,” the “duty of loyalty,” and the “business judgment rule”—be analogized to aspects of your own professional and personal decision-making?

21. Often one element of a (hypothetical or real) “fact pattern” can give rise to several legal issues: for instance, a dividend payment approved by a board of directors might be excessive, which might lead to personal liability for some directors and shareholders (to the extent that they received too much money); and it might also make the firm undercapitalized, which (if other factors are present) could result in a plaintiff’s being able to “pierce the veil” to hold a controlling shareholder personally liable for obligations of the firm.

What facts can give rise to which groups of issues? Which issues tend to arise together? Given the factual situation presented by an examination (or an actual client), what additional information might you need in order to determine the presence or extent of any of these issues?

22. Are owners of business associations who are not also managers (for instance, shareholders who are neither directors nor officers) required by statute or by the entities’ operating documents to participate in the decision-making of these entities? If not, should they be?

23. Can shareholders effectively monitor the actions of directors and officers? If not, what prevents those executives from abusing their power? How can such prevention be enhanced?

24. Can a business association or its executives legitimately resist the production in litigation of such documents as partnership agreements, bylaws, board of directors’ resolutions, and minutes of board or shareholder meetings? If so, when, and on what grounds? If not, why not?

25. How and why might various parties preparing, approving, and/or being bound by partnership agreements, articles of incorporation, board resolutions, and minutes of board or shareholder meetings differ over the types and detail of information to be included in those documents? Should the default position of counsel for the partnership or corporation be to favor inclusion? To favor exclusion? Or does it depend on the document and the situation?

26. Should a corporation adopt a policy that no directors create their own personal notes at board meetings—or that if they do take notes, all such notes must be destroyed before the directors leave the meeting room? Should any such policy be adopted for all board meetings, or only for specific meetings (or for parts of specific meetings)?

27. Under what circumstances do directors and officers have the burden of establishing that they fulfilled their fiduciary duties to the corporation?
28. How do the rules of (local, state, or national) political elections correspond to, and differ from, corporate rules about the selection of, and voting for, candidates for directorships?
29. Do corporations operate as democracies? republics? oligarchies? plutocracies?
30. One trend in the evolution of the law of business associations has been towards greater immunity from liability, not only for those who own a business enterprise (partners, limited partners, shareholders, members) but also for those who manage the enterprise (partners, general partners, directors, officers, members, managers). What are some other trends?
31. Examine the descriptions of the corporate and related (e.g., corporate governance) practice groups and sub-groups on the Web sites of large law firms. What services do these groups provide, and why are they useful to clients?
32. Can you find any Web sites for “boutique” law firms that specialize in the law of business associations? How, if at all, are such firms’ services, clients, and approaches different from those of less specialized law firms?
33. What recent developments in the caselaw and statutory law of business associations are law firms highlighting and analyzing on their Web sites for the benefit of their existing and potential clients? Are different firms identifying and interpreting these emerging issues and their implications differently?
34. In *The Sun Also Rises* (1926), one of Hemingway’s characters, when asked, “How did you go bankrupt?”, responds, “Two ways. . . . Gradually and then suddenly.” How can the board identify and resolve slowly-emerging issues? How should this process differ from the board’s methods for addressing a crisis?
35. To what degree are federal statutes like the Sarbanes-Oxley Act (2002) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) supplanting the states’ traditional roles in regulating corporate operations and governance?

36. To what degree does the law of business associations reflect the existence of markets for corporate management (i.e., several different corporations might want the same people to serve as directors and/or officers), investment (competition among corporations to sell their shares to the same people or companies), state laws (leading to an alleged “race to the bottom,” in which states seek incorporations by making their laws more management-friendly), and law firms (which compete to win business from clients)? To what degree does the law attempt to restrict the operations of, and the dominance of a small number of participants in, such markets?
37. How significant are the differences between Delaware’s business associations statutes and their counterparts in other states? How significant are the differences between Delaware courts’ interpretations and application of the provisions of their own (and other states’) business associations statutes, and other states’ interpretations and applications of their own (and Delaware’s) business associations statutes?
38. Is the law of business associations becoming more predictable and/or easier to interpret and apply?
39. Is the law of business associations becoming too flexible, or is it not flexible enough?
40. Is the law of business associations “scalable”—that is, are the rules for large partnerships, corporations, and limited liability companies the same as for small ones? Why or why not?
41. To what degree does the law of business associations protect the reasonable expectations of individuals and companies? How do courts determine which expectations are reasonable? Does it make a difference whether those expectations concern developments over longer periods of time rather than over shorter periods of time?
42. Does the law of business associations treat decision-making processes differently if they take place over longer periods of time rather than over shorter periods? If they concern activities and operations over longer periods of time rather than over shorter periods?
43. How do the following economic concepts apply to the law of, and operations of, business associations: collective action problem, moral hazard, rents and rent-seeking, empire-building, private ordering, agency costs, and rational apathy?
44. What are relative roles of directors, of officers, and of counsel in the “corporate compliance” process?

45. Does it matter what a board's, director's, or officer's *real* reason(s) is/are for taking (or declining to take) an action on behalf of the corporation, so long as he/she/they can plausibly claim to have made the decision "in the best interest of the shareholders"?

46. To what degree does the law of business associations contradict common-sense notions of human motivations and decision-making processes?

47. To what degree does the law of business associations require a minimum level of moral behavior among people and companies?

48. To what degree does the law of business associations make appearances more important than realities, and procedure more important than substance?

49. To what extent is the law of business associations concerned with fairness? Does it emphasize procedural fairness over substantive fairness, or vice versa? Does it define fairness?

50. To what degree does the law of business associations allow a manager of a company—such as a director or officer of a corporation—to cause the company to pursue a course of action that benefits himself (or a close relative, or another company of which the manager or a close relative is an owner and/or manager)? Does the law sufficiently minimize the risk that such a "self-dealing" situation may enable the manager to profit at the expense of the company and its owners?

51. Lawyers have the sensitive tasks of urging often-reluctant clients to contemplate such disconcerting scenarios as divorces (in proposing prenuptial agreements), illnesses and incapacities (power of attorney forms, advanced health care directives) and deaths (wills, trusts). What are the painful possibilities and solemn certainties that business associations lawyers should encourage their clients to address, and what legal arrangements should they propose that their clients consider in these contexts?

52. (Literally and figuratively) behind its celebrity-oriented cover stories, *Vanity Fair* magazine often features perceptive analyses of executives, business issues, and corporate controversies and scandals.

53. How can boards of directors combat the tendency of "groupthink"?

54. You can easily find out which states have enacted the latest version of any of the Uniform Acts produced by the National Conference of Commissioners of Uniform State Laws.

Visit nccusl.org; click on “Final Acts and Legislation” (middle of right side); select the Act (for instance, “[Uniform] Partnership Act” or “[Uniform] Limited Liability Partnership Act”) in question on the pull-down “Select an Act” Menu; and then click on “Search” (without selecting “State”). On the resulting page, click on “Legislative Fact Sheet” (or, to see the text of the Act (including official comments), click on that page’s link to “Final Act”).

55. Versions of previous drafts of Uniform Acts are available at law.upenn.edu/bll/archives/ulc.

56. What are the different kinds of “activist shareholders,” and what are their corresponding goals and means? Which kinds of shareholder activists and activism are most likely to succeed, and why?

57. At law.cornell.edu/uniform/vol7.html you can find links to the text of different states’ versions of business association statutes and other statutes.

58. Is *profit-maximizing* the “better word” for the “greed” championed in the famous—but often-misquoted—shareholder-meeting speech of Michael Douglas’s corporate raider, Gordon Gekko, in the 1987 movie *Wall Street*? Does that substitution make any difference to your reaction to the speech?

The point is, ladies and gentlemen, that greed, for lack of a better word, is good. Greed is right, greed works. Greed clarifies, cuts through, and captures the essence of the evolutionary spirit. Greed, in all of its forms: greed for life, for money, for love, knowledge has marked the upward surge of mankind. And greed, you mark my words, will not only save Teldar Paper, but that other malfunctioning corporation called the USA. Thank you very much.

59. What personal and professional distance should outside counsel for a corporation maintain between herself and the individual directors, officers, and shareholders? What distance should inside counsel keep? If a corporation has both inside and outside counsel, what distance should they maintain from each other?

60. Is it a good idea for outside counsel for a corporation also to serve as an outside director of that corporation?

61. If your university has a business school, compare with students there the information and analytic approaches being taught. In this context, you might also be interested in Philip Delves Broughton's *Ahead of the Curve: Two Years at Harvard Business School* (2008) and Walter Kiechel's *The Lords of Strategy* (2010).
62. The *American Lawyer* magazine often has useful articles on the internal governance and dynamics of law firms.
63. Other reports on law firms as business associations, as well as on developments in the law of business associations generally, can be found on the Wall Street Journal's Law Blog, blogs.wsj.com/law.
64. Do the professional ethics rules that bind lawyers lead law firms to govern themselves differently than do other business associations? If so, how?
65. What are the personal and professional attributes and qualifications that a company should seek in candidates for director and officer positions? In candidates for (in-house or outside) counsel positions? What is the relative importance of each of these "corporate virtues"? Can any of them be quantified? Which of these, if any, are actually required by law?
66. Is there any difference in the rules governing executives' personal liability for (a) affirmatively having decided to pursue a course of action that ultimately harmed the corporation; (b) affirmatively having decided *not* to pursue a course of action, although taking that action would have saved the company from damages that it later incurred; and (c) never having formally considered whether to take an action that, if taken, would have saved the company from damages that it later incurred?
67. Specialized corporate law reviews include *The Journal of Corporate Law*, *The Delaware Journal of Corporate Law*, and *The Corporate Governance Law Review*. Journals with a slightly wider focus include the "Business Law Reviews" of American (Washington College of Law), Columbia, Harvard, University of Miami, and William & Mary; and the "Business Law Journals" of Duquesne, Hastings, Illinois, Ohio (Moritz College of Law) (*Entrepreneurial Business Law Journal*), Pennsylvania (*Journal of Business Law*), Rutgers/Newark, Stanford (*Journal of Law, Business & Finance*), U.C. Berkeley (Boalt), and U.C. Davis.
68. In an era of increased calls for "transparency" in the corporate governance, which information about a corporation's operations and decision-making should be restricted to directors and/or officers, or to a subgroup of them? Under what circumstances should such information be divulged to the shareholders and/or to the public at large? When, if ever, would it be appropriate for the board to convey information to some but not all shareholders?

69. Is the current emphasis on “transparency” depriving directors and officers of their legitimate expectations of personal privacy?
70. Do directors and officers have a duty not to dissent publicly from the positions adopted by, and decisions made by, the board of directors?
71. Do directors and officers have a duty not to embarrass the corporation by the conduct of their personal lives, and the by ways in which they express their personal views on controversial issues? Does it matter whether the controversial issues relate to the corporation’s operations and to the director’s or officer’s corporate responsibilities? Could any such duty be different for different directors and officers of the same corporation?
72. What policies, if any, should corporations adopt with regard to the information that their executives are allowed to post on the companies’ own Web sites, on the executives’ personal Web pages/blogs, and/or on Web sites run by third parties?
73. Do directors and officers, and their counsel, have an obligation to be familiar with and to use (or at least to consider the results of) game theory or other mathematical approaches when they make decisions for the corporation?
74. How have advances in technology changed the roles and responsibilities of directors and officers? How have such advances altered the balance of power between executives and shareholders?
75. Should directors preserve their “independence” from other directors and from officers by not engaging in personal relationships with them? At what point in such a relationship should a director have to disclose its existence and extent to the board? Should corporations adopt policies in this regard? If so, what should they say?
76. Does the law of business associations lead, reflect, or lag behind developments in the practice, culture, and ethics of business?
77. What “safe harbors” are built into the law of business associations to protect companies and people from liability so long as they satisfy specific criteria? Do these “safe harbors” have common characteristics? Are they defined too narrowly? too broadly? too vaguely?

78. What screening mechanisms are built into the law of business associations to prevent legal actions—especially those asserted by shareholders against directors and/or officers—from flooding the court system? Do these safeguards block too many legitimate cases from proceeding?

79. One major law firm’s Web site and print advertisements feature a photograph of an unsmiling (supposed) client next to the statement, “I don’t need theories from my lawyers. I need answers.” Where is the line between the two? In what situations involving business associations could even the best lawyers only offer “theories” as opposed to “answers”?

80. Analyses of recent issues in corporate law can be found in the “Deal Professor” column/feature, dealbook.nytimes.com/category/deal-professor, of the New York Times’ “Dealbook” blog, dealbook.nytimes.com.

81. Does the law of business associations always allow managers of an enterprise—for example, directors and officers of corporations—to terminate their relationships with their companies whenever they wish? On the other hand, can the companies terminate their relationships with these executives at will? What about the respective abilities of an entity and its owners to control when an owner can withdraw her investment?

82. How stable are the various business associations—general partnerships, limited partnerships, limited liability partnerships, corporations, and limited liability companies? Does an owner’s leaving (or being forced out) of the enterprise mean that the company must dissolve? Is there a trend in this regard in the development of business associations statutes, from partnerships to corporations to limited liability companies?

83. Several recent books address the degree to which prolonged and disciplined training may be at least as important as “raw talent” to an individual’s professional development and success. See George Leonard, *Mastery* (1991); Josh Waitzkin, *The Art of Learning* (2007); Malcolm Gladwell, *Outliers* (2008); Geoff Colvin, *Talent is Overrated* (2008); and Daniel Coyle, *The Talent Code* (2009). What are the practical implications of these discussions for executives and for their counsel?

84. What is the role of the federal government as a major shareholder of troubled corporations such as General Motors? What should it be?

85. Can one of the owners of a business association freely transfer to someone else her right to receive payments from the enterprise? Can she transfer her right to participate in the management of the enterprise? Is there a trend in this regard in the development of business associations statutes, from partnerships to corporations to limited liability companies?

86. In *Wall Street*, one of Gordon Gekko's unheralded statements was, "Wake up, pal—if you're not inside, you are outside!" (See/hear also the lyrics of the Dobie Gray performance of the 1960s Bill Page song, *In Crowd*.) Who are the "outsiders" with regard to business associations? Does the law of business associations sufficiently protect them from being exploited by "insiders"?

87. In the context of business associations, what is the legal definition of "good faith"? Of "fair dealing"? Do these definitions involve objective standards, subjective standards, or both? Are these terms defined differently in the law of business associations than in other contexts (such as in the Uniform Commercial Code)?

88. You might consider joining the American Bankruptcy Institute as a student member.

Based in Alexandria, Virginia, this non-partisan group has more than 12,000 members nationwide, including lawyers, bankers, judges, academics, turnaround specialists, and accountants (see the "About ABI" link at abiworld.org). It presents a large number of conferences and is engaged in a wide variety of research projects. Members receive not only the *ABI Law Review* and the *ABI Law Journal*, each of which features detailed analyses of issues in business and personal bankruptcy, but also daily (weekday) e-mail updates on bankruptcy developments.

Students may complete a membership application (available at abiworld.org/join) and forward it to Kimberly A. Hay, the ABI's Membership Retention Manager (khay@abiworld.org, 703-894-5972) with \$20 and proof of full time student status (number of credits taken during the current semester) or expected date of graduation.

89. If a corporation has several different classes of shareholders, and the interests of those classes conflict in a given situation, how can directors and officers reconcile their duties to each of those classes?

90. Whose interests, if any, should directors and officers be protecting in addition to those of the shareholders? When, if ever, should those interests take priority over those of some or all of the shareholders?

91. What does it mean for a business association to be “successful”? How, if at all, can this be measured? How can the company calculate the degree to which that success is attributable to individual executives (directors and officers) and/or to the executives as a group, and reward them appropriately?

92. What policy should a corporation adopt concerning whether and when e-mails, letters, phone calls, voicemail messages, or other communications that it receives from shareholders (or non-shareholders) will be forwarded to individual directors or to the board as a group?

93. What other considerations besides the law should counsel take into account when advising a corporation, its directors or officers (individually or collectively), or any of its shareholders? Is it appropriate, for instance, for a lawyer to discourage a client from pursuing an entirely legal course of action by warning that the action(s) might damage the client’s public image? Should counsel, especially if they are not experienced in the client’s business, restrict themselves to indicating the client’s legal options and suggesting which might be most appropriate from a strictly legal point of view?

94. To what degree does counsel have an ethical and/or practical obligation to become versed in the details of a client’s industry/profession?

95. What are the ethical responsibilities of a business lawyer whose client supplies her with insufficient information and allows insufficient time to perform research, but still demands a substantive answer “on an emergency basis”? How can a lawyer who would like to comply with this request best protect not only the client’s legal interests but also herself and her firm (against potential charges of malpractice)?

96. The story goes that Rabbi Hillel, when challenged (about two thousand years ago) to summarize the Torah during the time that the inquirer could remain standing on one foot, replied, “What is hateful to you, do not do to your fellow. That is the whole Torah: the rest is commentary. Go and study it.”

How succinctly, and in what words, could you summarize the law of business associations?

97. Among the legal documents relevant to a corporation’s shareholders, directors, and officers are the company’s articles of incorporation, bylaws, corporate resolutions, shareholder agreements, employment contracts, code(s) of conduct, and corporate governance principles. If there are conflicts between or among these documents, which documents take precedence over which others? If one of these documents contains provisions that conflict with each other, how can the conflict be resolved?

98. Does “complexity theory,” which concerns the emergence and “path dependence” of properties and patterns among such “self-organizing systems” as weather patterns, swarms of insects, and flocks of birds, hold any practical lessons for executives and their counsel? For non-technical discussions of this field of mathematics, see M. Mitchell Waldrop, *Complexity* (1992) and Kevin Kelly, *Out of Control* (1995). One attempt to link these areas with corporate law is Marc Goergen et al., *Corporate Governance and Complexity Theory* (2010).

99. What is the appropriate role of checklists in the lawyer’s set of tools for providing advice to corporations, their executives, and their shareholders? For a surgeon’s (and medical school professor’s) examination of the role of checklists in the medical context and beyond, see Atul Gawande, *The Checklist Manifesto* (2009).

100. Is the proliferation of caselaw, statutes, regulations, codes of conduct, and bylaw provisions diverting the attention of directors and officers from the details of actually conducting the business of their corporations? Are executives today in the position of many of the viewers of the now-legendary “basketball” video? (Read the directions near, and click on, the “View the ‘basketball’ video” at viscog.beckman.illinois.edu/media/ig.html).

101. To what degree is counseling corporate clients, or their executives or shareholders, not a precise and quantitative science but instead a qualitative art that recognizes the possibility of a variety of successful approaches given a specific counsel, client, and situation?

You might also be interested in the author’s list of “Books Beyond the Syllabus: Recommended Professional Reading” (2000), a link to which appears at the bottom of the page, effross.com.