**SYLLABUS FOR COURSE ON U.S. BUSINESS LAW**

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**CHICAGO, ILLINOIS, U.S.A.**

**MARCH 23, 24, 25, 30, 31, APRIL 3**

**EACH CLASS TO BE 90 MINUTES LONG**

**Background and Experience of Robert W. Edler**

Academic Credentials

 DePauw University, B.A. (1954-56; 1957-58) [liberal arts]

 Durham University, England (1956-57) [history and economics]

University of Chicago, M.A. (1958-59) [history]

Stanford University, LL.B. (1959-62) [law]

Professional Experience

Practice of law in Chicago 1962 to present, concentrating practice in following areas:

 Corporation and securities law; mergers and acquisitions; business

finance, both public and private; representation of issuers, brokers and dealers and underwriters in connection with public and private offerings of securities; representation of public and private corporations in general corporate matters; representation of national banks and bank holding companies in connection with offerings of capital notes and preferred stock; acting as special counsel to litigation firms relative to securities law issues; organization of various types of new businesses; serving as arbitrator for Financial Industry Regulatory Authority Dispute Resolution and Cook County Circuit Court Mandatory Arbitration Program; testifying as expert witness regarding securities and corporate law matters.

**“Ground rules” for Classes and Teaching Concepts**

 There is no such thing as a stupid question. Questions will always be

encouraged. This will help students learn more about what they want to learn, and will help me discover whether or not I am communicating effectively with the students or getting into too much detail or too much complexity and making too many assumptions about what the students already know.

Students should let me know if something I say is not clear or not understood.

It is likely that I will use some words that will not be clear. There is likely to be some communication problem due to the course being taught in English, no matter how good the students’ command of English may be (in part because many of us U.S. lawyers suffer from the “big word disease” – the use of an unusual and complex word when a simple word would be quite adequate).

 Students should attempt to learn more about English language terminology,

usage, sentence structure, grammar, etc. The more effectively you can communicate, the more effective lawyer you will be. I would like to help students improve their English communication skills. Never hesitate to ask about the best way to express an idea in English.

 If you disagree with any assumption I make or any conclusion I reach, raise your

hand and let me and your classmates hear your argument. This could lead to a dialogue that might be interesting and educational to all class members. Also, it will give you a chance to express yourself orally in English in a legal context.

[Example of an English language problem: my embarrassment as a student in a University of Chicago graduate program seminar: pronunciation of “Magdalen”]

 Do not ever be embarrassed to challenge me; I will appreciate the challenge. I

want students to learn as much as possible, and challenging me can assist in reaching that goal. Most people, including me, fear, or have feared, speaking up in class, in groups, and in court -- because they are afraid of sounding stupid or being ridiculed for the position they take. To become a successful lawyer, one must overcome this fear; and there is no better time to begin that process than in class. Your attitude should be: “I must have the courage of my convictions, and I must trust my own instincts. If I make a mistake, or appear to be stupid, I have simply proved that I am human. Everyone makes mistakes; everyone appears to be stupid sometimes.”

 Example: My first appearance in court: the $500 fence case.

 When challenging me or a fellow student, be courteous and pleasant, not just

because that is the proper thing to do, but also because it is good training for you as a lawyer. When you are in a court or arbitration proceeding, the judges will like you better, listen to you more intently, and probably lean toward accepting your arguments to a greater extent, if you are pleasant and courteous. It seems that judges and arbitrators do not like unpleasantness and lack of courtesy; therefore, they prefer lawyers who are courteous and, at least subconsciously, tend to want the more pleasant and more courteous lawyer to win the case. Although this is not how cases should be decided, it is a fact of life, it is human nature; and, of course, the principle also applies to getting along with clients and handling oneself in a conference with one’s client and opposing parties and their counsel.

 If a student misses a class, he or she should obtain copies of the notes taken by

another student and copies of any documents handed out in class. I will not repeat any lectures or portions of lectures for anyone who misses a class.

 As a matter of courtesy to me and to one’s classmates, no student should make

or receive a telephone call or send a text message during class. All students should put away and turn off all cell phones before entering the classroom. This rule extends to all iPods, MP3 players, headsets, CD players, Blackberries, calculators and any other similar device.

 No food or drink (other than water) will be permitted in the classroom during

 class.

**A Bit of U.S. History**

Native Americans (? to the present)

 English Colonies (1609 to 1776)

 Revolutionary War (1775-1783)

 Articles of Confederation (1781 to 1789)

 Like E.U., power of the states was greater than the power of the central

 government: central government was too weak to be effective.

 U.S. Constitution (1789 to the present)

 Central government’s power is stronger than states’ power.

 Powers not specifically delegated to the central government were

 reserved to the States [10th Amendment to U.S. Constitution].

 Separation of powers concept (fear of kings?)

 Basis of U.S. law: English law (exception: State of Louisiana)

Common law versus statutory law versus La Code Napoleon.

 Why do U.S. drivers drive on the right side of the road?

**General Overview of U. S. law**

 Federal Constitution and the Federal system

The basic allocation of power between the federal government versus state and local governments

The U. S. Civil War 1861-65 (Causes: disputes over each State’s

right to decide the slavery question and to decide whether to remain part of the Union)

Pres. Lincoln’s Emancipation Proclamation – 1863

Was it worth 600,000 lives to preserve the Union?

Should any governmental subdivision of a nation or a state be able to secede and form an independent country?

 Federal Government and Federal laws

 Federal court system

 Judges are appointed by the President and confirmed by the

 Senate. Result: excellent judges.

 District Courts (trial courts)

 Circuit Courts of Appeal (appellate courts)

 U.S. Supreme Court (the ultimate authority on the law)

Does it ever act as a trial court?

What do 5-4 decisions indicate that will be extremely

 significant in your legal career?

Example: “scienter” under Section 10(b) of the Securities Exchange Act of 1934; one of my first research assignments as a beginning lawyer in 1962

Example: Brown v. Board of Education: Are

 “separate but equal” facilities equal?

 Concept of “Preemption” of state and local law by Federal law

 Example: Federal versus state securities laws

 Example: Banking laws

 The current “tug of war” between a potentially more efficient system of law

that is the same throughout the 50 states, and the U.S. Constitution’s preservation of states’ rights (apparently less efficient but with certain positive factors, such as local control and local knowledge of local conditions)

 Totalitarianism’s efficiency (e.g., China) versus Democracy’s inefficiency.

 Is it possible that apparent inefficiency is actually more efficient if

 viewed over a long period of time?

 State Governments and state laws

 State court systems

 Elected judges: result: poor quality compared with Federal court judges

 (appointed by the President)

 Why is this so?

 County Governments and laws

 City and Village Governments and laws

 Never-ending controversy in legal and political circles: “strict

construction” of statutes (courts are not legislatures and should only enforce the law as written by legislatures) versus “loose construction” of statutes (“courts should give effect to the intent of the legislature even if the law is ambiguous – and, if necessary to make the law effective, courts should add provisions the legislature probably intended but failed to state”)

 Example: Section 10(b) of the Securities Exchange Act of 1934:

 private right of action

**General Overview of U.S. Business Law: Need To Consider Both Federal and State Business Laws When Both Are Applicable to the Legal Problem You Are Addressing**

Laws Providing for Organization (i.e., creation) of New Business Entities: largely

 state law (one of few exceptions: national, as opposed to state, banks)

 Corporation statutes in each of the 50 States

Delaware Corporation Law is the most famous and most respected.

Why is this so? How can this be the case when New York, California, Illinois and other commercial states are so much larger and more economically significant?

 Partnership statutes in each of the 50 States

 Limited liability company statutes in each of the 50 States

 Contract law: Is this the most basic of all laws? Underlies both Federal and state

 law

 Anachronism: seal. (What if a mouse ate the seal in old English law?)

 Securities laws: both Federal and state

 Federal: emphasis is disclosure of all “material facts” to the buyer

 State law: emphasis is on “merit” [fundamental value and fairness] of the

 securities being offered and sold

 Anti-trust laws: largely Federal; some state “restraint of trade” laws

 Intellectual property laws (patent, trademark, copyright laws): largely Federal

 Labor and employment laws: both Federal and state

 Taxation laws: Federal, state and local

 Real estate laws: largely state and local

 School laws: Federal, state and local

 Criminal laws: Federal, state and local

 Consumer protection laws: Federal, state and local

**How the Practice of U.S. Business Law has changed since 1950 (When I was 14 and my Father was practicing law in a small “Midwestern” U.S. town)**

General practitioners versus specialists

 One person representation versus team of lawyers

 Gentlemen/lady lawyers versus “Rambo” lawyers (“take no prisoners”) approach

 Would you have lunch with your opposing counsel during a trial?

**Some Basic Ethical Problems U.S. Lawyers Frequently Face**

 How often does a U.S. Attorney or a State’s Attorney in a criminal matter

place the interests of justice and fairness above his or her desire to “win” the case and establish a personal reputation as a “winning” attorney?

 If you were prosecuting someone for an alleged criminal act, such as

bribing a foreign official in violation of the U.S. Foreign Corrupt Practices Act, would you turn over evidence (that comes into your hands) that shows that the defendant is innocent – even though it means you will “lose” the case?

 If you are mediating a case and you decide that one party is intelligent,

crafty and strong-willed, and the other party is uneducated, naïve, and weak, would you advise the parties to cease mediation and go to litigation (where the court process would be more likely to do justice)? Even though your “failure” to cause the parties to reach a settlement would hurt your “success” record as a mediator?

 Is law a business, or a profession, or both?

 Is professionalism always more important than making money?

 Is it realistic to expect a lawyer to resist the values of his fellow

 citizens when they are inconsistent with professionalism?

 Ethics codes of American Bar Association, state bar associations (e.g.,

Illinois Bar Association), and city bar associations (e.g., Chicago Bar Association)

 Are these codes adequately enforced?

 What are some examples of violations of these codes that

 can lead to a disbarment of a U.S. attorney?

 Use of client’s funds?

 Commingling of client’s funds with law firm’s

 funds?

 Romantic relationship with a client?

 Inattentiveness to client’s problem?

**How U.S. Businesses Are Formed and How the Form of the Entity is Chosen**

Corporations

 Why is this the most common business entity?

 Cost

 History and availability of precedent

 Is limited liability the most important reason for the corporate form?

 Corporation laws provide for what corporation can do, must do, may do,

and must not do. Are such laws usually workable for the average U.S. business?

 Why are Delaware corporations the most popular?

 Why I almost always suggest the corporate form for a new business.

 Tax disadvantage if there is income to be taxed (double taxation)

 S Corporation solution for smaller corporations

 What is cost, including legal fees, of setting up a new corporation?

 My firm’s fixed fee for a one shareholder corporation, that includes

preparing, filing and recording the articles of incorporation, preparing the by-laws, preparing the stock certificate and receipt therefor, preparing the initial shareholder resolutions (electing directors, et al.) and initial directors’ resolutions: $1,000 [out of pocket costs: about $500. Legal fee: about $500]

 Is there any difference between a “stockholder” and “shareholder”?

 Is there any difference between a “lawyer”, an “attorney”, a “counsel”?

 Limited Liability Companies (“LLC’s”): “New Kid on the Block”

 Also provides for limited liability for members (counterparts of

 stockholders)

 Much more flexible than corporations in terms of what members and

managers can and cannot do; in effect a lawyer can write a legal code (the “Operating Agreement”) governing the internal affairs of the LLC to fit the particular situation. Practical result: much higher legal fees. Typical cost: $2,500 for simple LLC; $25,000 for complex LLC with many unique features to be drafted into the Operating Agreement.

 Disadvantages of being a new form of business organization.

 Membership interests cannot be traded publicly and/or listed on a

 stock exchange

 Lack of reported cases, i.e., lack of clarity of the law

 Tax advantage

 Partnerships (General and Limited)

 General Partnerships

 No limited liability

 Why law firms have been partnerships historically.

 Tax advantage

 Limited Partnerships

 Limited liability for limited partners

 No limited liability for general partners

 Use of corporate general partner to avoid problem, so long

 as it has substantial net worth

Tax advantage

 Corporations, Partnerships, LLCs as “Persons”

 What would you do if you were asked by the President of a U.S.

corporation to “represent” (act as the lawyer for) both the corporation and the President in a problem involving the proper compensation to be paid to the President pursuant to an ambiguous provision of his employment contract with the corporation?

 What would you do if you were asked by the President of a U.S.

corporation to represent both the corporation and the President in a problem involving the issuance of 1,000 separate, new stock certificates in exchange for the President’s single stock certificate for 59,000 shares of the corporation’s common stock?

 “Piercing the ‘Corporate Veil’” [Losing Limited Liability]

 Examples of how this potential disaster can occur.

 Where corporation is under complete domination of stockholder

 and corporation commits a fraudulent act against plaintiff.

 Where corporation and its controlling stockholder commingle their

funds, thereby not respecting the separate entities, and this causes damage to plaintiff.

 Effects of Successfully Piercing the Corporate Veil

A U.S. subsidiary of a Czech Republic parent corporation could

have the limited liability of the corporate parent destroyed, making the parent liable for the U.S. debts of its subsidiary.

 A shareholder of a corporation whose veil is pierced can be held

liable for all of the debts and obligations of that corporation, a potential tragedy.

**U.S. Corporate “Democracy”; Rights and Obligations of Stockholders, Directors, Officers, and Employees**

Rights of Stockholders

 Election of directors

 Approval of mergers, consolidations, sales of all or substantially all of

corporation’s assets outside its ordinary course of business, amendment of articles of incorporation, dissolution and liquidation

 Right to examine corporation’s books and records

 Right to be informed of “material” developments affecting corporation:

 If corporation is private?

 Fiduciary obligation of directors and officers to stockholders:

 Does this obligation generally result in correct

behavior by directors and officers of the typical private company? If not, why not?

 If corporation is public?

 Annual report, 8Ks, 10Ks, 10Qs, etc.

Are stockholders generally treated fairly in U.S. corporations?

 Salaries, fringe benefits, retirement plans of officers

 Directors’ fees and perquisites

 Stock options

 Dividends

 Do stockholders have any duties to corporation?

 Any fiduciary duties?

 Any other duties?

Rights and Duties of Directors

 Election of officers

 Oversight of officers and employees and corporation in general

 Business plans and strategies

 Fiduciary duty to stockholders

 Do U.S. boards of directors generally fulfill their responsibilities?

 Rights and Duties of Officers

 Duty to carry out directions and business plan of the directors

 Duty to hire, fire, oversee and supervise employees

 Fiduciary duty to stockholders?

 Should it be the same as directors’ fiduciary duty?

 Recent (2009) Delaware case

 Rights and Duties of Employees

 Duty to carry out directions of their bosses

 Any fiduciary duties?

 Any duties of loyalty to their employer?

 “At will” employees

Union members; union contracts

 What is happening to U.S. labor unions?

 The Detroit experience

Minimum wages

 Are they good for employees: the pros and the cons

 Dissenters’ Appraisal Rights

 Example: my personal investment in a private

 company in 1990, silence for 19 years, then a dissenters’ rights bonanza.

**U.S. Laws Regarding the Financing of U.S. Businesses (Federal and State Securities Laws)**

Where does a U.S. business obtain financing?

 Bank loans (short term, medium term, long term)

 “Private placements” to institutional investors (such as insurance

 companies)

 A personal story: how I got hired right out of law school to work on

private placements without having taken any course about securities law in law school.

 Stanford Law School?

 My father’s insurance company?

 “Private placements” to individuals (this applies to small companies

 primarily)

 Public offerings of debt securities

 What is/was the difference between “bonds”, “debentures”, “notes”?

 Public offerings of equity securities

 Common stock and preferred stock

 To which of foregoing sources of money do Federal and state securities

 laws apply?

General Overview of Federal and State Securities Laws

 A Bit of History:

 Prior to the Great Depression (1929 to ?) [Buyer beware!]

 Is the “Buyer beware!” philosophy workable in our world?

 Without the protection of securities laws, the common law of

fraud is available. [Proof of intent to deceive: an essential element.]

 Sophisticated, highly educated people believing Bernard Madoff

 could pay them over 10% interest year after year after year

 Educated (but obviously unsophisticated) Americans who believed

a company could pay 250% interest per year (Not a typo: 250% a year!)

 President Franklin Delano Roosevelt’s 1933 and 1934 Federal securities

 acts

 State securities laws: how different from Federal securities laws

 Disclosure versus merit regulation

 Harvard Professor Louis Loss (most famous securities law

academician in U.S. history): OK to sell “hole in the ground” if you describe it properly

Under this approach, the 250% annual return offering would be legal if properly disclosed, but the problem is that the issuer would have to state in the prospectus that the offering was a “Ponzi scheme”

 Why are state securities laws called “Blue Sky Laws”?

 Civil remedies and criminal penalties for violations

 Under Federal securities laws:

 Criminal:

 Fines up to $5,000,000 for natural persons and

 $25,000,000 for businesses, and

 Prison terms up to 20 years.

 Civil:

 Rescission

 Damages

 Under State “Blue Sky Laws”:

 Criminal:

 Fines and prison terms, generally less severe than

 Federal

 Civil:

 Rescission

 Actual damages

 Punitive damages in some cases

 Attorneys’ fees in some cases

 Why so important to businesses

 Ability to raise capital

 Ability to have shares traded in a fair and transparent market

 Ability to use shares to make payment of purchase price in acquisitions of

 businesses

Registration requirements

 Disclosure requirements

 What are “material facts” that must be disclosed to purchasers of

 securities?

Are disclosure requirements separate and different from registration

 requirements?

 Projections and forecasts: why so dangerous

The Securities and Exchange Commission (“SEC”) and its significance

Registration of Securities

 How it works: the process from beginning to end

 Decision by board of directors of “issuer” to raise capital by making a

 public offering of its securities.

 Putting together a team to accomplish the public offering

 Members of the team

 Initial meeting of the team

 Selection and negotiation with underwriter or group of underwriters

 Function of the underwriter(s)

 The registration statement

 How is non-financial part prepared?

 How does securities lawyer know what to include?

Who prepares financial statements?
 What is the “Prospectus”? Is it part of the registration statement?

 Who reviews the registration statement before it is filed with the SEC?

 Directors, officers, internal counsel, accountants, outside counsel

 Do stockholders have any liability with respect to the public

 offering?

 Effect of recent Sarbanes-Oxley Federal legislation

 Filing with “SEC” (Securities Exchange Commission) in Washington, D.C.

 Filings with State “Blue Sky” Commissions in every state in which

 securities will be offered for sale

 After about a six week waiting period during which the SEC reviews the

registration statement, the SEC sends its “comment letter” to issuer’s counsel

 Team prepares amendments to registration statement to meet SEC’s

 comments and objections

 Review of Amendment No. 1 to Registration Statement by all members of

 Team

 Filing with SEC

 Preparation of final registration statement once SEC has no further

 comments

 SEC “effectiveness” order

 Commencement of sales

 If underwritten, issuer sells all securities directly to underwriter for

 resale to public

 If not underwritten, issuer sells directly to public through its officers,

 employees, and agents

 Delivery of Prospectus to every purchaser

 Why should it be called a “retrospectus”?

 Ranges of costs of registration process

 Legal fees -- $100,000 to $1,000,000

 Accounting fees -- $50,000 to $500,000

 Filing fees -- $1,000 to $50,000

 Underwriting fees – 8% to 15% of sales price

 Printing costs -- $50,000 to $1,000,000

 Executive time – hundreds of hours

How would the process be different if a Czech Republic business were to register its

 securities for offering and sale in the U.S.?

 Different SEC rules for financial statements of foreign registrants; not

quite as strict as U.S. “generally accepted accounting principles” (“GAAP”)

 Disclosure requirements are similar to U.S. issuer disclosure

 requirements, but not quite as rigorous

 Post registration reporting requirements are less that those applicable to

 U.S. issuers

 Generally, a similar process

 Regarding fraud and material misrepresentations and omissions of

 material facts, the same as for a U.S. issuer

What if an offering of securities by a U.S. issuer is to be made in Czech Republic and

 other foreign countries in addition to the U.S.?

 Do U.S. laws apply?

 Does a Czech Republic citizen who buys a security of a U.S. issuer have

a right to sue in a U.S. court for violation of U.S. laws regarding fraudulent issuance of securities or failure to properly register the securities with the SEC? Answer: Yes.

 What is the theory behind this?

 Use of U.S. as a basis for fraudulent offering and sale

 of securities abroad cannot be permitted.

Right of Czech Republic, and every sovereign state, to protect its citizens

 against fraud by foreign issuers of securities.

Could a Czech Republic citizen bring a suit against a U.S. issuer based

 upon U.S. securities laws in a Czech Republic court?

Securities exempt from registration requirements

 Federal government securities, e.g., Treasury bonds, notes, “TIPS”

 “Munis”, i.e., municipal securities

 General obligation bonds (“GO’s”)

 Revenue bonds

 Bank securities [After recent financial debacle, one wonders about this one.]

 Securities of religious, charitable, and educational organizations

Certain International Authorities

 International Bank for Reconstruction and Development

 International Finance Corporation

Asian Development Bank

 African Development Bank

Regulation of Brokers, Dealers, and Investment Advisors

 Both Federal and state registration required, with some exemptions

 Supervisory responsibility by broker-dealer entity of its agents (“registered

 representatives” and “financial advisors”)

 “Suitability” requirement

 Anti-churning rules

 Record keeping requirements

 Net capital rules

 “Front running” rules

 Margin rules (My German grandfather’s story: rags to riches to rags)

 Financial Institutions Regulatory Authority (“FINRA”)

 Permits arbitration clauses in customer agreements to be binding

 Regulation of commissions and investment advisory fees (recent U.S.

 Supreme Court holding regarding investment advisory fees)

Regulation of Mutual Funds (Investment Company Act of 1940)

 “Evergreen” prospectuses

European opinion of U.S. securities laws:

 Too extensive, too restrictive, too expensive

 The Ralston Purina case

 The case of a CEO of a U.S. subsidiary of a Czech Republic company

 Is such regulation the *sine qua non* to a free marketplace in securities?

 The “Greater Fool Theory”

 Or, “A fool is born every minute” theory

 The China securities marketplace

 What is the largest, most trusted securities marketplace in the world?

 Despite all of the U.S. regulation, how could the Bernard Madoff “Ponzi

 scheme” happen?

Offerings Exempted from Registration

 Regulation D [the “Private Placement” Exemption]

 What does “private placement” indicate?

 Why should such offerings be exempted from registration?

 Can some persons “fend for themselves”?

 Should issuers be able to sell to “sophisticated investors” without

 registration?

 The insurance company paradigm.

 Warren Buffett types.

 The Bernard Madoff “Ponzi scheme”

 What are the conditions that must be met for the exemption to be

 perfected?

 Purchasers must be “accredited investors” plus 35 non-accredited

 investors.

 What are accredited investors? [“Fat cats”]

 Why the 35 person exception? Does it make any

 sense?

 “Purchaser Representatives”

 Must be no “integration” with any other offering.

 Must furnish all “material facts” to all non-accredited investors.

 Why not to accredited investors?

 What is a “material fact”?

 Must be no “general solicitation” and no “advertising”.

 Must be limitations on resale by the purchasers.

 How is this accomplished?

 Must file a notice of sales with the SEC. Why?

 How it works: the process from beginning to end

 Decision by Board of Directors of issuer that issuer needs to raise

 capital and would prefer to do so by a private placement

Putting the team together

Initial meeting of the team and allocation of responsibilities

 Selection and negotiation with placement agent (similar to

 underwriter in a public offering)

 [No registration statement; this offering is exempt from registration]

 Preparation of a disclosure document to disclose all “material facts”

 to each investor (other than accredited investors) Usually called a “Confidential Private Placement

Memorandum” (as opposed to a Prospectus in a public offering), “CPPM” for short.

 How does lawyer for issuer know what “material” facts must

 be included in the CPPM?

 Looks at form of registration statement that

would be used if offering were a public offering

 Looks at prospectuses that have been used in

public offerings for similar types of issuers.

 Asks executives of issuer.

 Relies on accounting firm to prepare financial

statements in accordance with SEC guidelines.

 CPPM goes through several iterations before all members of

 team agree it is complete and accurate.

 While CPPM is being prepared, lawyers also prepare:

 “subscription documents”, namely:

 Purchase Agreement

 Investor Questionnaire (helps issuer and its counsel

to determine whether proposed investor is “accredited”)

 Confidentiality Agreement

 Shareholders’ Agreement (in some cases)

 Blue Sky Memorandum (regarding state exemptions)

 Offering commences

 What is a “mini-max” offering?

 How does offering get sold if there is no placement agent?

 Filings with certain Blue Sky Commissions

 Stock certificates are prepared with legends and delivered to

 purchasers.

Ranges of costs of this Private Placement Process:

 Legal fees – $50,000 to $150,000

 Accounting fees -- $15,000 to $150,000

 Filing fees -- $500 to $5,000

 Underwriting fees – 8% to 15% of sales price

 Printing costs -- $1,000 to $50,000

 Executive time – 50 to 250 hours

Advantages and Disadvantages of Public Offerings and Private Placements

 Costs of offering

 Ongoing costs of being a public or private company

 Time to complete offering documents and to complete the offering

 Confidentiality and privacy aspects

Intrastate Offerings

 Exempt from Federal Registration

 Requirements

 Must be registered in the one state in which offering is made

 Historical significance: states’ rights; state’s right to regulate an offering within its

 borders only

**Three Principal Ways U.S. Businesses Resolve Their Disputes: Litigation, Arbitration and Mediation**

Litigation

 What is it? What are the steps in its process from beginning to end?

 How costly is it?

 How long does it take to complete?

 How much executive time does it take?

 What percentage of litigated cases are settled before trial?

 What are considerations by plaintiff and by defendant in settling

 cases?

 Why is litigation the preferred method of resolving disputes?

 Is the U.S. a “litigious” society?

 If so, is that good or bad?

 Is it realistic to expect more disputes to be settled by reason,

 negotiation, mediation?

 Would anyone prefer that disputes be settled by fists, guns, bombs

 or terrorism?

 The “Old West”

If the courts are not available to solve disputes that people cannot

 solve themselves, how would the “little guy” fare?

“Small Claims Courts” and “Pro Se Courts” for the “little guy”

Arbitration

 What is it? What are the steps in its process from beginning to end?

 How costly is it?

 Who are the arbitrators?

 How long does it take to complete?

 How much executive time does it take?

 What percentage of these disputes are settled before trial?

 Why is it used less than litigation, as a general rule?

 Example of an arbitration: a FINRA securities law case.

 Pre-dispute arbitration agreements versus post-dispute arbitration

 agreements: what are the pros and cons of each approach?

 The proposed Arbitration Fairness Act

Mediation

What is it? What are the steps in its process from beginning to end?

 Who are the mediators?

How costly is it?

 How long does it take to complete?

 How much executive time does it take?

 Why is it used less than litigation, as a general rule?

Why I do not like it as a general rule

 Is it more important to settle disputes or to settle disputes in an

 manner that is fair to all parties and in compliance with the

 law?

 When do I like mediation?

 The “American Rule” versus the English/German/Czech(?) Rule regarding the

 payment of legal fees in lawsuits and arbitrations

 Pros and cons of each approach

**“M&A” (Mergers and Acquisitions): What is Typical Process for a Czech Republic Business to Acquire a U.S. Business or a U.S. Business to Acquire a Czech Republic Business?**

Why is “M&A” a misnomer? It should be “Sales and Acquisitions” [”S&A”].

 Three typical ways to acquire a business:

 Purchase all or a majority of its voting equity shares

 Purchase all or substantially all of its assets

 Merge the acquiring company with the acquired company and issue cash

or shares, or both, in the acquiring company to stockholders of the acquired company

 Usual steps in a friendly acquisition [as opposed to an unfriendly takeover such

 as an unfriendly “Tender Offer” – which is quite a different scenario]:

 Parties’ senior executives have discussions about a possible

 acquisition/sale.

 Parties enter into a “letter of intent” – it should always be, and usually is, a

 non-binding letter agreement of 5 to 10 pages, covering the crucial

business terms, such as price; “holdback”; “earnout”; form (assets sale, merger, or stock purchase); confidentiality; “lock-up” period; due diligence by purchaser time period; due diligence by seller time period (if seller is taking stock in purchaser); who pays expenses if deal falls apart (typically each party pays its own expenses); and any other terms either party considers to be crucial to the deal.

Major mistake that is common: parties (business people) think that they know how to prepare a letter of intent without consulting their lawyers. As a result they sometimes enter into a binding contract, which at least one of the parties, usually the buyer, does not want.

[My “war story” as an expert witness with respect to such a letter of intent.]

 Challenge of drafting a letter of intent

 If too detailed, can kill the deal before parties get

 committed to the deal.

 If your client only wants deal if it gets certain

provisions, be sure to put them in letter of intent very clearly [Better for deal to end early if crucial term is unacceptable to other side].

 If your client wants deal badly, even if client has to

“give” on crucial issues, draft letter of intent with as little detail as possible, hoping that other party will get “invested” in the transaction as it spends legal and executive time in pursuing it.

Is this dishonest business practice or effective representation of your client?

 Due diligence efforts commence, typically by purchaser sending in team of

its lawyers, accountants, acquisition business people, etc. to check the financial integrity of the business of the seller to be sure it is as solid and profitable as anticipated and to see whether there are any “skeletons in the closet” [hidden problems].

If due diligence investigation uncovers any hidden problem that makes

seller materially less attractive as an acquisition, negotiations are held to lower the purchase price. If problem is extremely serious, buyer make terminate the acquisition. [This is main reason why letter of intent must be non-binding.]

 Buyer’s attorneys prepare a lengthy, detailed purchase agreement (Asset

Purchase Agreement if it is an asset deal; Stock Purchase Agreement if it is a stock deal; or Merger Agreement if it is an acquisition by merger). Typical sections of these Agreements include:

 Definitions

 Description of [Assets] [Stock] [Merger]

 Description of Excluded Assets

 Purchase Price and Earnout Provision, if any

 Description of Assumed Liabilities

 Description of Excluded Liabilities

 Sellers Representations and Warranties to Buyer (very

 extensive usually)

 Buyer’s Representations and Warranties to Seller (not

 extensive usually)

 Seller’s Indemnity of Buyer

 Buyer’s Indemnity of Seller

 Obligations of the Parties During Interim Period [Between

 Signing of Agreement and Closing]

 Governmental Consents (if any are required; this would

include anti-trust clearance if there are anti-trust questions]

 Conditions Precedent to Each Party’s Obligation To Close

 Closing [Place of Closing and What Each Party Must Deliver

 to Other Party]

 Post-Closing Matters

 Right of Termination of Agreement Prior To Closing

 Procedures if either Party has a claim against the other party

 Choice of law and forum

 Miscellaneous matters

 Negotiations Regarding Both Business and Legal Terms of the Purchase

Agreement [These negotiations sometimes get tense, heated, and difficult.]

 Example of typical battleground: seller wants all of its

 representations qualified by a “materiality” standard.

 Why is this such a problem for buyer?

 Final changes made in Purchase Agreement

 Execution and delivery of Purchase Agreement by both Parties

 Preparations for Closing

 Legal opinions

 Closing

 Typical Legal Problems in Acquisitions

Choice of law and choice of forum:

 Can parties that have no contact whatsoever with State of

Delaware make Delaware law apply to their acquisition and provide for jurisdiction in Delaware courts?

Extent of Representations and Warranties by Seller

 Seller wants to minimize; wants Buyer to rely on its due diligence

 Buyer feels due diligence cannot be perfect, so it must have

extensive representations and warranties by Seller to protect itself against Seller’s fraud.

 Environmental liability

 Seller wants to avoid; and Buyer wants to avoid.

 Typical compromise: Seller remains liable for any environmental

liability discovered before Closing; Buyer accepts liability for later discovered problems; but Buyer insists on environmental study by experts before Closing.

 Another typical compromise: Seller agrees to assume first

$\_\_\_\_\_\_\_\_ of environmental liability; Buyer agrees to assume the rest.

Example of how one Seller handled this problem: “The sale makes no sense to me if I have to accept more than $5,000,000 of liability.”

 “Holdback Provision”

 Buyer wants to hold back part of purchase price so it can set off

any claims it has against Seller for breach of representations and warranties.

 Seller wants all of purchase price at Closing.

 There is no typical resolution of this problem. It all depends on who

wants the deal most and who is the best negotiator. There is nothing worse for the lawyer working on this kind of deal than having a weak client, who will not stand up for its rights and interests. It happens more often than you might expect.

Governmental Approval

 What if the assets to be acquired are in China, the government of

 which must approve any sale of assets to a foreigner?

Example of a 2009 Asset Purchase Agreement (“German APA”) prepared by

German counsel for the Buyers, compared with a 2009 Asset Purchase Agreement (“U.S. APA”) prepared by U.S. counsel (R.W. Edler) for same transaction (after we pointed out deficiencies in the German APA)

Buyers: Netherlands and Singapore companies (my firm’s clients)

 Sellers: Israeli and Chinese companies

 Language: English

 Applicable Law: Delaware

 Choice of Forum (to litigate disputes): Delaware

 Problems with German APA under Delaware law

If you were asked by your law firm employer to identify these problems, how many could you find? [A copy of the German APA will be given to each student for analysis, with Parties’ names removed.]

 Benefits of U.S. APA under Delaware law and otherwise

[A copy of the U.S. APA will be given to each student for review, with Parties’ names removed; and we will go through the agreement page by page, pointing out the reasons for the detailed provisions from both the Buyers’ and Sellers’ perspectives.]

**Rule 10b-5 Litigation in connection with the purchase and sale of securities [if time permits]**

**Dissenters’ Appraisal Rights [if time permits]**

A ‘war story” of a recent, successful challenge by a Texas stockholder: how a

 $55.80 offer became a $2,550 per share offer.

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**Some Non-Academic Questions I Would Enjoy Discussing With Students Who Are Interested Enough To Get Together Over a Cup of Coffee After Class**

What are the most prestigious U.S. law schools?

 How important is it to get a degree from one of the most prestigious schools if

 you want to get a job in the U.S.?

What is the importance of an LL.M. or doctorate, versus the J.D. (also sometimes

 called an LL.B.)?

How does the study of law in the U.S. work? What is the Socratic Method?

How does one become a lawyer in the U.S. (bar examinations and bar review

 courses)?

How does one become a judge in the U.S. (appointed judges and elected

 judges)?

What is the status of women in the legal profession?

What are the chances of a Czech Republic lawyer finding a job in the U.S. with a

U.S. law firm? And what would I recommend for a Czech lawyer to do to maximize his/her potential to get a good job with a U.S. law firm?

What are the starting salaries for beginning lawyers in the U.S.?

 Are there too many lawyers in the U.S. (supply and demand economics)?

 How ethical are U.S. lawyers?

 How competent are U.S. judges?

 How ethical are U.S. judges?

 What are the advantages and disadvantages of starting one’s law career by

taking a job in government (such as the Securities and Exchange Commission, or a State’s Attorney’s Office, or the U.S. Patent Office, or the Department of Labor, or the Internal Revenue Service, etc.)?

 As a general rule, who makes the most money as a practicing lawyer: the brilliant

legal expert and most accomplished practioner, or the “rainmaker” (the lawyer who brings the most new business and new clients to his/her firm)?

 What does it take to become a rainmaker?

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**The Final Examination on April 3, 2010**

 Will be in writing (please use a pen – not a pencil) and graded by the Professor.

 Some true and false questions

 Some multiple choice questions

 Some short answer questions

 Possibly a short answer essay question

 Questions will be based primarily on lectures and, to a lesser extent, on class

 discussion and documents provided to the students by the Professor.