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SIMULATED LEGAL EXERCISES: DEVELOPING REAL-WORLD EXPERIENCES IN THE BUSINESS LAW CLASSROOM

ANDREW W. SWAIN*

Post-secondary academics commonly subscribe to the belief that, because new college- or graduate-level instructors were once students, they intuitively know how to conduct lectures, plan and direct classroom and homework activities, engage students in problem-based classes and simulations, and so forth. This is only partially true at best. The lack of pedagogical training and knowledge is a problem faced by many new full-time academics who begin teaching either immediately after finishing their own post-secondary education or, like myself, later in life, as a second career. The crux of this Article is my realizing my need for pedagogical knowledge for teaching undergraduate and graduate courses, my acquiring it, and my using it to develop and improve mock, in-class jury exercises that are done in a way comporting with experiential learning methods and allow my business law students to have real-world legal experiences. Through a few personal anecdotes, I want to impart practical wisdom to new post-secondary educators regarding pedagogical development and implementation. This Article has three goals—first, to underscore the importance of stories in encouraging educators to strive for classroom improvement; second, to serve as an educational tool regarding how to improve one's classroom instruction, particularly in the realm of simulated legal exercises; and third, to provide business law instructors with a mock-jury exercise that they can use without alteration or addition, modify to their needs, or use for guidance in developing their own exercises.

INTRODUCTION

Full-time academic work came late in my life as a second career. In August 2017, I joined the full-time faculty at the Judd Leighton School of Business and Economics on the Indiana University South Bend (IUSB) campus, where I teach business law.[1] In my IUSB courses, as in most

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1. I started teaching as an adjunct professor in August 2012 at the Indiana University (IU) McKinney School of Law, teaching classes in partnership and international taxation. I started

business law courses offered by business schools, students learn about U.S. law in general, but also how the law can both threaten and protect business assets. At the beginning of each semester, I tell my undergraduate and graduate students that learning the law is like both learning a language and mastering an art. When learning a language, students first memorize words and their meanings, then become able to communicate when they can use those words to convey and receive thoughts and information. Similarly, students begin their legal education by memorizing legal terms and their meanings, then learn legal analysis through the application of these concepts to the facts of legal dilemmas. The law is not math or science, but essentially an art. Through practice, students learn persuasion. In math and science, 2 + 2 always equals 4. In law, however, a legal practitioner brings to bear their skill to persuade the finder of fact and law that, pursuant to a particular set of legal concepts and policies applied to a unique set of circumstances, 2 + 2 = 4 might not be the correct answer, and their client should therefore prevail. These persuasive skills of legal argument make up the sinew, if not the backbone, of the U.S.'s adversarial legal system.[2]

Because students learn the deeper meaning of legal words and phrases through using them and learn legal persuasion through practice, my experience has taught me they acquire a sufficient and complete legal education only through active, hands-on learning. I began my new full-time academic career without knowing how to create effective teaching and learning environments for all students. Many new full-time academics who begin teaching in undergraduate or graduate programs either immediately after finishing their own post-secondary education lack pedagogical training and knowledge. This is especially true for

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teaching business law in 2015 as an adjunct professor at the IU Kelley School of Business on the Indianapolis campus. At this time, my full-time "day job" was as Chief Counsel for the Office of the Indiana Attorney General, where, for twelve years, I oversaw all tax litigation for the State of Indiana. At IUSB, I teach two business law courses, C502 *The Legal and Ethical Environment of Business*, a hybrid MBA class, and L201 *The Legal Environment of Business*.

2. *See, e.g.*, United States v. Sineneng-Smith, 590 U.S. 371, 375, 140 S. Ct. 1575, 1579 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation. . . . [As such, it is presumed] 'that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'") (quoting Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment) (alteration in original). In other words, a court's role is to sit as a neutral arbiter, not to act as an additional advocate sifting through each party's evidence to determine which side made the most persuasive arguments. Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 EMORY L. J. 1255, 1288 (1999) (providing that in the U.S. adversarial system, "lawyers for both sides vigorously present their clients' most persuasive arguments before a neutral or impartial arbiter. In theory, this adversarial presentation of evidence and arguments gives the judge and jury the strongest possible view of each side's case and allows the fact finder to make accurate and fair judgments.").

instructors, like myself, who begin teaching later in life as a second career.[3]

This Article describes a small portion of my pedagogical education and how I used newly acquired knowledge to develop and improve simulated exercises that allow my business law students to participate in real-world legal experiences in the classroom. Through a few anecdotes, I want to impart practical wisdom to new post-secondary educators regarding pedagogical development and implementation. This Article has three goals—first, to underscore the importance of stories in encouraging educators to continually strive for classroom improvement; second, to serve as an educational tool regarding how to improve one's classroom instruction, particularly in the realm of simulated legal exercises; and third, to provide business law instructors with a mock-jury exercise that they can use as is or as an example and guide to develop their own mock-jury exercises.

Part I of this Article tells how my learning experiences formed my rudimentary teaching philosophy and my instinctive preference for active learning. Part II discusses my initial attempt to introduce active learning into the business law classroom using a mock-jury exercise and my first iteration of that exercise. Part III of this Article describes my realization that I lacked and greatly needed a pedological education to improve my classes in general and my mock-jury exercise specifically. This section also discusses how I began applying my newly acquired educational insights to measure my mock-jury exercise's success in accomplishing student learning outcomes. Part IV of the Article details how I improved my mock-jury exercise. Part IV also provides the detailed methodology, including supporting documents, by which I implement my mock-jury exercise that instructors can use without alteration or addition, modify to their needs, or use for guidance in developing their own exercises. Part V discusses my remeasuring student learning outcomes after effecting changes to my mock-jury exercise and the improved results. Finally, Part VI concludes the Article discussing the exercise's additional applications and extensions, remaining questions regarding its versatility, and an

3. *See, e.g.*, JESSAMYN NEUHAUS, GEEKY PEDAGOGY 2 (2019) (noting that the worst assumption made about teaching at the college level is that "sheer love of a subject inevitably leads to effective teaching and student learning" and that "knowing a lot about a subject doesn't automatically mean that [one] can effectively teach other people how to do things in and with that subject matter."); Terrell E. Robinson & Warren C. Hope, *Teaching in Higher Education: Is There a Need for Training in Pedagogy in Graduate Degree Programs?*, 21 RSCH. HIGHER EDUC. J. (Aug. 2013), http://www.aabri.com/manuscripts/131564.pdf [https://perma.cc/ZAZ7-XVLR] (discussing the need for college and university faculty receiving pedagogical instruction to prepare them to teach in higher education); Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLINICAL L. REV. 505, 507 (2012) (discussing the mistaken assumption that, "since the new teachers were once students, they intuitively understand how to conduct lectures, plan and direct seminar activities, engage students in problem-based classes and simulations, and perform traditional Socratic exercises.").

expression of my desire that my story inspires new post-secondary instructors to improve their teaching skills to better serve their students.

I. INTUITIVE DEVELOPMENT OF A RUDIMENTARY TEACHING PHILOSOPHY

Like all law students, I took civil procedure my first year of law school. It covers the rules governing court proceedings. The class material was dry and delivered in an imperious manner, with the students questioned via the Socratic method as to their understanding. In my third year, I took a criminal defense clinic that required me to work in a public defender's office. After graduation, when I did my first civil case, I did not know how to write or file a complaint, with whom to file it, or how to serve either a complaint or a summons. I learned all this on the fly, so to speak, from watching others and being motivated by the simple fact that I had to learn it or suffer the consequences. My civil procedure class had, to some degree, failed me.

On the other hand, when given my first criminal case, I already knew how to interview the client and ascertain important facts, answer criminal charges at a hearing or arraignment, serve discovery and file other pretrial motions, conduct a guilty plea hearing, and prepare for and conduct various types of pre-trial hearings and trials. I had learned how to do these things and do them well from the criminal defense clinic and from working with public defenders in Bloomington, Indiana. The difference in my experiences lay in the difference between the civil procedure lectures and the criminal law training. In practical application, the latter was far more useful.

Similar to civil procedure, my LL. M. course work in tax law left me feeling ill prepared. I completed corporate tax, partnership tax, trusts and estates tax, and other core courses as well as several elective tax courses such as international tax. In truth, though, what I had learned in class had not prepared me to read a tax return and connect it to the client's financial information. I realized that my tax knowledge was largely bereft of context, and I had to correct this to be effective as a tax attorney. I developed these skills while working for Arthur Andersen and KMPG. In other words, I developed the required knowledge and skills on the job.

From these experiences, I intuitively developed my rudimentary teaching philosophy and preference for active, hands-on learning. My first chance to apply this philosophy in the academic setting occurred in 2012, when, as an adjunct professor, I taught partnership tax at the Indiana University (IU) McKinney School of Law and later at the IU Kelley School of Business. I used hands-on learning to ensure that my tax students did not suffer a deficiency in their education similar to my graduating law school unable to file a civil lawsuit or graduating a tax program with only a scholastic understanding of taxes. Students did an in-class exercise in which they prepared a partnership tax return (form

1065), the return's Schedule K, and each partner's Schedule K-1. The information they used was presented to them in the way a client would present it to their tax attorney or accountant. I told the law students that I was not trying to make them return preparers or accountants, but I made clear the value of their understanding tax concepts in a real-world, tax litigation context. I gave them examples from my own practice, past and present, that demonstrated this.

At this early period in my academic career, I lacked any pedagogical training and did not know the formal name for my educational philosophy. Neither did I try to structure the exercise to comport with any research related to my approach. This would change.

II. NEXT APPLICATION OF THE RUDIMENTARY TEACHING PHILOSOPHY

When I began teaching a business law course as an adjunct professor at the IU Kelley School of Business, I wanted to develop an exercise in which the students would learn the deeper meaning of legal words and phrases through using them and learn legal persuasion through practice. Because I had been a trial and appellate attorney my entire career, my thinking immediately jumped to a mock-trial exercise. Such exercises are commonly used in law schools to teach students trial and appellate advocacy.[4] This instruction would exceed the scope of all business law courses, which are not intended to develop future lawyers. Also, law schools' mock-trial exercises encompass semester-long courses devoted solely to either trial or appellate advocacy.[5] A business law course's wide breadth and its required goal of showing students the many ways in which law and business interact allowed scant time for a mock-trial exercise. Beyond that, mock-trial exercises would generally exceed the knowledge

4. *See, e.g.*, Arthur Gross Schaefer, *Mock Trials: A Valuable Teaching Tool*, 8 J. LEGAL STUD. EDUC. 199, 199 (1989) (saying that "[t]he mock trial is an attempt to provide [law] students with an opportunity to apply their newly acquired skills in a 'real life' situation requiring the preparation of legal papers and the presentation of arguments before a group of legal experts."). Private and government law firms frequently subject their recently graduated and hired young attorneys to mock-trial exercises to permit them to develop their trial experience. *See, e.g.*, Andrew Jackson et al., *A Young Trail Lawyer's Guide to Gaining Experience Through Mock Exercises*, 20 MASS TORTS 18 (2022).

5. *See, e.g.*, Carol J. Miller, *Mock Jury Trial: A Model for Business Law I Courses*, 6 J. LEGAL STUD. EDUC. 91 (1987) (discussing the challenge confronting an undergraduate business law instructor in making court cases and legal processes tangible realities for business law students); Schaefer, *supra* note 4, at 200 (saying that, because undergraduate students, unlike the law students, have not been exposed to a "sufficient quantity and quality of legal methodologies and structures to be able to prepare documents and arguments as [would] an attorney[,] . . . the undergraduate mock trial will normally not be as sophisticated and will not attempt to fully mirror an actual trial.").

and skill level of most undergraduate and graduate business law students.[6] Nevertheless, such hands-on, law-based exercises are invaluable methods of facilitating student comprehension of the law, as well as helping students develop communication skills.[7] Due to the ubiquity of personal electronic devices, many students today fail to possess effective, or even

6. *See, e.g.*, Jehan El-Jourbagy et al., *Combining Business Law with Business Theory: An Experiential Classroom Crossover Activity*, 38 J. LEGAL STUD. EDUC. 143, 146–47 (2021) (pointing out that, "[a]mong experiential learning methods, mock trials have been proven to be effective[,]" permitting students to integrate and apply concepts learned in class); Donna Steslow, *I Don't Want to Go to School Today; I Have to Teach Negotiable Instruments: Three Simple Hands-on Exercises to Enrich Lessons on Article 3*, 19 ATL. L. J. 1, 2 (2017) (discussing how mock-trial exercises in a business law course involving negotiable instruments transform a "normally dry topic into an engaging lesson" and, through increased engagement, facilitate student understanding and retention of the topic); Miller, *supra* note 5, at 93, 94 (discussing how business students' participation in a mock jury trial gives them an insight into the U.S. legal system more difficultly acquired from traditional lectures); William J. McDevitt, *Three Ready-To-Use Mock Jury Trials for The Classroom*, 16 J. LEGAL STUD. EDUC. 149, 150 (1998) (concluding that, because business students are not law school students, a successful mock jury trial in a business school classroom must focus on the "experiential value of the trial and not on the various procedural stages that precede the trial"); Murray S. Levin, *Learning About the Unpredictability of Litigation Through a Mock Jury Exercise*, 16 J. LEGAL STUD. EDUC. 271, 272, 277 (1998) (discussing the use of mock-jury exercises in a graduate course in the legal environment of business to "stimulate thought and discussion about the process of civil litigation" and provide students insight into how juries decide cases); Robert B. Bennett, Jr., et al., *Using a Jury Simulation as a Classroom Exercise*, 15 J. LEGAL STUD. EDUC. 191, 195 (1997) (discussing the difficulties associated with conducting mock-trial exercises in undergraduate courses due to students lacking legal knowledge); Schaefer, *supra* note 4, at 199 (asserting that mock-jury exercises modified for undergraduate business law courses are tools that stimulate learning, aid the review of material, and promote the introduction of new material); Lee Arbetman & Ed O'Brien, *From Classroom to Courtroom: The Mock Trial*, 2 UPDATE ON L. RELATED EDUC. 13, 13 (1978) (maintaining that mock-trial exercises are fun for students and "help [them] gain a basic understanding of the legal mechanism[s] through which society chooses to resolve many of its disputes").

7. *See, e.g.*, El-Jourbagy et al., *supra* note 6, at 146–47 (pointing out that, "[a]mong experiential learning methods, mock trials have been proven to be effective[,]" permitting students to develop communication skills, as well as practical presentation and reasoning skills needed in today's business world).

adequate, interpersonal communication skills.[8] Business schools struggle to combat this student deficiency.[9]

Then I had a thought. There is one aspect of a trial experience that those untutored in the law often do, one that gives them experience with the law while requiring no previous knowledge; they serve as jurors. I concluded that, rather than perform a mock trial in the business law classroom, I would conduct a mock-jury exercise. A mock-jury exercise would permit business law students to focus on the experiential value of the trial—resolving a legal dispute by weighting facts and applying the law to a real-world situation—and not on the various procedural stages (filing pleadings, examining witness, or tendering objections) that precede and compose a trial.[10] The question became how I could do this and do it in a way that accomplished my goals—that is, the students learning the deeper meaning of legal words and learning legal persuasion through practice.

Luck struck. I discovered a collection of videos called *You Be the Judge* that depicted the litigation of various parties' legal disputes before a judge and covered numerous legal topics such as, for example, contract, tort, and agency laws. These videos were created by IU Professor Jane P.

8. *See, e.g.*, Muhammad Saleem & Muhammad Bakhsh, *Impact of Mobile Phone Usage on Students' Writing Skills: A Case Study of University of Peshawar*, 2 J. DISTANCE EDUC. & RSCH. 41 (2017) (a study involving students at the University of Peshawar, Pakistan, and revealing the negative effects that their use of mobile phones had on their writing skills); Lauren C. Davis, *The Flight from Conversation*, ATL. (Oct. 7, 2015), https://www.theatlantic.com/technology/archive/2015/10/reclaiming-conversation-sherry-turkle/409273/ (discussing the negative effect electronic devices have on the ability to engage in face-to-face conversations); Emily Drago, *The Effect of Technology on Face-to-Face Communication*, 6 ELON J. UNDERGRADUATE RSCH. COMMC'N 13, 16 (2015) (a study concluding that the rapid expansion of technology has negatively affected student face-to-face communication). *But see* Lieke Verheijen, *The Effect of Text Messaging and Instant Messaging on Literacy*, 94 ENG. STUD. 582 (2013) (discussing the academic debate over whether the ever-growing environment of electronic communication is facilitating or hindering written-communication skills in society).

9. *See, e.g.*, Nunzio Quacquarelli, *Why Business Schools Should Focus on Communication Skills*, QS QUACQUARELLI SYMONDS LTD. (Oct. 3, 2018), https://www.qs.com/why-business-schools-should-focus-on-communication-skills/ [https://perma.cc/SS9W-RNP4] (discussing that top business schools still struggle to find the best ways to teach the vital tool of communication skills to their students); *Employers Stress the Need for College Grads to Have Strong Oral Skills*, IOWA STATE UNIV. NEWS SERV. (June 1, 2016, 9:00 AM), https://www.news.iastate.edu/news/2016/06/01/oralskills [https://perma.cc/68ZE-DER5] (discussing how colleges attempt to improve student communication skills).

10. *See, e.g.*, McDevitt, *supra* note 6, at 150 (1998) (concluding that, because business students are not law school students, a successful mock jury trial in a business school classroom must focus on the "experiential value of the trial and not on the various procedural stages that precede the trial.").

Mallor at the IU Kelley School of Business in Bloomington, Indiana.[11] Professor Mallor created these bench trial simulations for the business law courses offered at business schools. The videos were intended to permit business law students to act in the role of a trial judge—hence the videos' name, *You Be the Judge*. They could also be used, I thought, to permit students to act in the role of jurors. Accordingly, with these videos, all I needed to do was design a mock-jury exercise around the legal disputes they depicted.

The DVD edition of the *You Be the Judge* trial videos that I used is rare and, therefore, difficult to acquire. McGraw-Hill Education, however, offers all the *You Be the Judge* videos, including the contract-dispute video discussed in detail in this article, on its Connect e-learning platform as part of the Application-Based Activity Modules.[12] Also, all the *You Be the Judge* videos are currently available online free of charge.[13] If a business law instructor wanted to formulate a mock-jury exercise using trial videos not part of *You Be the Judge*, others are available. For example, many student-performed mock trials are available on YouTube.[14] These videos are short and therefore easily useable in a mock-jury exercise. Also, most law schools offer courses in which students perform a mock trial with the instructor acting as a judge and other law students as jurors.[15] These are recorded and usually less than an hour. A business law instructor could work with the law school instructor to use them as the basis of their own mock-jury exercise.

I created my first mock-jury exercise using the bench trial video titled *Verbal Agreement: Recording Studio Blues*.[16] This initial effort was, at

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11. *Jane P. Mallor*, KELLEY SCHOOL OF BUSINESS, https://kelley.iu.edu/faculty-research/faculty-directory/profile.html?id=MALLOR) [https://perma.cc/7ZNR-SFX7] (Sept. 8, 2017).

12. *See Business Law Application-Based Activities*, MCGRAW HILL https://acrobat.adobe.com/link/review?uri=urn:aaid:scds:US:11f2b32a-e588-3758-85be-12ec2f453e8c (last visited Mar. 12, 2024) (an informational flyer providing a list of the 120 application-based activities available on McGraw Hill Education's Connect e-learning platform including *You Be the Judge*). Also, within Connect's *Instructor Resource Center*, all the application-based activities are listed and accessible, including the *You Be the Judge* trial videos.

13. *You Be The Judge (closed-caption videos,)* MCGRAW HILL: CONNECT, https://lectures.mhhe.com/connect/0077733711/ybtj_videos_cc.html [https://perma.cc/DC8U-X5WD].

14. *See, e.g.*, MCAETtv, *2020 Mock Trial*, YOUTUBE (Apr. 2, 2020), https://www.youtube.com/watch?v=RlKs5V4zQnY; MCAETtv, *2018 Mock Trial Finals*, YOUTUBE (Apr. 3, 2018), https://www.youtube.com/watch?v=tJP45ObH1zk; Rachel Alper, *The People v. Joe Jones: A 10 Minute Mock Trial*, YOUTUBE (Jan. 10, 2018), https://www.youtube.com/watch?v=Fm0pIpPQuaU.

15. *See, e.g.*, *Official Course Descriptions*, IUPUI, https://mckinneylaw.iu.edu/courses/official-descriptions/index.html?ltr=T [https://perma.cc/M7PZ-KDFN] (offering the course titled "Trial Practice (3cr.) D/N 718—*Simulation*").

16. *See* DVD: You Be the Judge (McGraw-Hill/Irwin 2005) (on file with author). *Verbal Agreement: Recording Studio Blues* can be found on disc one.

best, rudimentary. The video portrayed a contract dispute between a plaintiff, the owner of a recording studio, and the defendant, a musician who had used the studio to record his first album. The plaintiff argued that he had entered into an oral contract with the defendant such that the latter could use the studio for a week in exchange for paying only 10% of the normal studio rental rate.[17] He offered the defendant the discounted rate based on their friendship. The plaintiff claimed that he left his offer on the defendant's voice mail. He alleged that he offered the defendant the use of his recording studio for a week, starting on a certain date and at a certain time, in return for the discounted payment of $700 rather than the normal studio rate of $7,000.[18] The defendant said he received the message and heard when he could use the studio. He asserted, however, that he did not listen to the entire message and, therefore, did not hear the plaintiff's offer of the discounted rate, then erased the message.[19]

According to one commentator, a successful mock-jury exercise in a business school classroom must: 1) be relatively simple and easily understood; 2) involve no more than a couple discrete issues; 3) assert no more than two defense theories; 4) use straightforward facts; 5) be realistic, fair, and balanced in order to result in different but equally valid outcomes; and 6) provide factual intricacies that affect witness credibility.[20] The bench trial video *Verbal Agreement: Recording Studio Blues* satisfied all these factors.[21] For example, the video is short—approximately twelve minutes in length—and, therefore, quickly displayable in a class. Whether the parties formed a contract is a simple and easily understood question regularly encountered in the real world. The plaintiff claimed that he made an offer of studio time and recording services in exchange for a discounted price. The defendant claimed he did not hear the entire offer—that is, the requirement for the exchange of consideration—but nevertheless arrived at the studio at the date and time specified in the offer to avail himself of the offer.[22] These facts are straightforward. The defendant asserted two contrary defense arguments. He argued that no contract existed because the plaintiff let him use the studio for free out of friendship. In the alternative, he argued that, if an oral contract existed, it was for studio use in exchange for unpaid work he had done in the past for the plaintiff.[23] Whether the plaintiff conveyed his offer via a recorded phone message and whether the defendant listened to the entire message or only part of it, then deleted it, provided factual

17. *Id*.
18. *Id*.
19. *Id*.
20. *See* McDevitt, *supra* note 6, at 150–51.
21. *See generally* DVD: You Be the Judge, *supra* note 16.
22. *Id*.
23. *Id*.

intricacies that require students judge the parties' credibility. Finally, the opposing facts and contrasting claims and defenses permit students to arrive at different, equally valid outcomes.

The class did this mock-jury exercise after viewing my in-class lectures pertaining to contract law and reading the corresponding textbook chapters. The exercise consisted of the class breaking into faux juries. The class watched the video depicting the parties presenting their evidence and legal arguments to a judge. The student juries debated among themselves who should prevail. The class then regrouped, and we discussed each jury's conclusions, what legal rules or principles it used to arrive at them, and what facts it identified as satisfying the legal rules it applied. I developed similar mock-jury exercises using the videos portraying disputes involving tort and agency law. I assigned these mock-jury exercises to my students and administered them in the same minimalist manner for my remaining tenure as an adjunct professor at IU Kelley, and when, in August 2017, I started teaching business law at IUSB's business school as a fulltime assistant professor.

III. THE ARRIVAL OF CHANGE

In March 2018, I was tasked by my business school to transform my in-person business law courses into fully asynchronous online ones. Knowing nothing about asynchronous online education and wanting to do this task well, I attended numerous courses, seminars, and workshops to increase my pedagogical knowledge and skills.[24] What I learned from the seminars and workshops made me take a hard look at my courses to determine if changes were warranted—in regard to not only the task of converting in-person courses to online ones, but also my in-person courses.[25]

I began by looking at the mock-jury exercises I presented in my in-person business law courses, in particular the one pertaining to contract law. From my pedagogical study, I discovered the formal name for my hands-on, active learning approach—that is, experiential learning, in

24. Much of this instruction was offered by IU South Bend's University Center for Excellence in Teaching (UCET), which supports teaching on the IUSB campus. I took teaching courses such as, the *UCET Course Design Institute*, *Updates from eLearning Design and Services*, *UCET Affordable Educational Resources Course Redesign Institute*, and the annual *IU Online Conferences*. UCET provides invaluable pedagogical training for which I am eternally grateful. I also took courses offered by non-UCET entities such as the *Quality Matters (QM) APPQMR/IUQM Workshop: Independent Application of the QM Rubric*, *the QM Peer Review Course*, *the QM Master Reviewer Course*, *the Midwest Conference on the Scholarship of Teaching and Learning*, *and the Inclusive Teaching: Supporting All Students in the College Classroom (ColumbiaX)*. These courses too provided invaluable pedagogical training.

25. *See, e.g.*, Leela Cejnar, *Student Learning in Business Law: A Critical Reflection*, 9 MACQUARIE J. BUS. L. 251 (2012) (the author discusses the importance of instructors reflecting on student learning experiences in an introductory business law course and how they can accomplish this task).

which students learn from partaking in activities rather than merely reading a book or attending a lecture.[26] This training confirmed my intuition that interactive learning is more engaging and effective than traditional classroom instruction.[27] I also learned to consider a course and its exercises' learning goals or objectives in a way that allowed measurement and explained this to the students. Measuring learning outcomes was a concept I learned in the course development class I had taken or was taking.[28]

I developed, for example, the following measurable course-level student learning competencies pertaining[29] to legal analysis and persuasion:

> Upon completion of *Business in the Legal Environment*, students will be able to:
>
> 1. Identify the appropriate legal rule, precedent, policy, or concept needed to analyze and solve a legal problem and make a decision rooted in the law.
>
> 2. Apply a legal rule, precedent, policy, or concept to solve a legal problem or dilemma.

To achieve these two goals in, for example, the context of contract law, I designed module/unit-level learning objectives (i.e., student learning outcomes) for the mock contract jury exercise that were measurable and comported with both experiential learning and the intended learning outcomes. For example, I explained the measurable learning outcomes

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26. *See, e.g.*, Diana D'Amico Juettner, *Exploring Undergraduate Experiential Learning*, 2 J. EXPERIENTIAL LEARNING 1 (2017) (defining experiential learning and discussing how it enhances students' chances of success in dealing with legal challenges they might face in the real world); Molly George et al., *Learning by Doing: Experiential Learning in Criminal Justice*, 26 J. CRIM. J. ED. 471 (2015) (discussing the importance of offering experiential learning opportunities to undergraduate students in criminal justice); Anne Tucker Nees et al., *Enhancing the Educational Value of Experiential Learning: The Business Court Project*, 27 J. LEGAL STUD. EDUC. 171 (2010) (discussing the importance of experiential learning in an undergraduate Legal and Ethical Environment of Business course); Homer C. La Rue, *Developing an Identity of Responsible Layering Through Experiential Learning*, 43 HASTINGS L.J. 1147 (1991).

27. *See, e.g.*, Mary Lou Vercellotti, *Do Interactive Learning Spaces Increase Student Achievement*, 19(3) ACTIVE LEARNING HIGHER EDUC. 197 (2017) (discussing the research reporting students' favorable responses to interactive classroom learning and its positive effect on achieving learning outcomes).

28. *See, e.g.*, Anthony Niedwiecki, *Law Schools and Learning Outcomes: Developing a Coherent, Cohesive, and Comprehensive Law School Curriculum*, 64 CLEV. ST. L. REV. 661, 678 (2016) (discussing developing measurable learning outcomes in a law school curriculum).

29. *See, e.g.*, R.W. Hartel & E.A. Foegeding, *Learning: Objectives, Competencies, or Outcomes?*, 3 J. FOOD SCI. EDUC. 69 (2004) (providing a detailed explanation of the differences between learning competencies, objectives, and outcomes, as well as providing examples of all three).

for the contract law module and its mock-jury exercise concerning contract law this way to the business law students:

> Upon completion of this contract law module, students will be able to:
>
> 1. Apply the six elements of a legally enforceable contract to the facts of a legal dispute.
> 2. Demonstrate whether two disputing parties entered into a legally binding and enforceable contract.
> 3. Decide if one party failed to perform its contractual obligations, thereby breaching the contract.
> 4. Apply the three types of contractual damages to the harm suffered by a party due to a breached contract.
> 5. Identify the facts (evidence), if any, that demonstrate the existence of one, all, or some of the applicable contract damages.
> 6. Apply the applicable equity remedy to demonstrate why one party is sometimes entitled to equity damages despite no contract having existed.

Next came the difficult task of measuring these outcomes in order to access my past administration of the mock contract jury exercise. I realized I could measure achievement of the module/unit-level learning objectives or competencies in two ways. First, I could determine it through observation and interactions with the students after their deliberations. For example, I could judge the student's application of contract law to the scenario's facts. The first element of contract formation is one party's offering another a promise to act in a specific way. If the students argued that, based on the testimony (evidence) they heard, neither the plaintiff nor the defendant made an offer to contract with the other party, they had failed at a part of the objective; the existence of the offer was, in fact, obvious from the trial video. The second way of measuring the student's achievement was a quiz pertaining to all the contract law concepts covered in the mock-jury exercise. Accordingly, I considered the quiz data and my observations of student performance during the exercise. The contract law mock-jury exercise exemplified what I found.

A. *Course Assessment Data—Quizzes*

During the first iteration of the business law mock jury contract exercise, which I used from Spring 2018 to Spring 2019, the average contract quiz scores ranged from mediocre to failing.[30] This contract quiz

30. *See* Table 1 *infra* Section III.A.

was the primary method used to objectively measure student mastery of the learning outcomes pertaining to contract law.

Table 1: Average Scores for Contract Quiz (Fall 2017 to Spring 2019):

Semester and Number of Students	**Average Contract Quiz Score**
Fall 2017 (Did not administer a separate contract quiz. Contract law **knowledge measured** in the final exam)	N/A
Spring 2018 (8 students)	61%
Fall 2018 (13 students)	77%
Spring 2019 (13 students)	67%

These scores struck me as unacceptable despite one or two students doing exceedingly well on the contract quizzes each year.

B. *Course Assessment Data—Observation of Student Performance*

Student comments during the discussion portion of the contract jury exercise were even more telling. For example, to form a legally binding contract, one party must offer to act or refrain from acting, the other party must accept this offer, and an exchange of consideration must take place. Many students, relying on their reading of the relevant textbook chapters and review of their lecture notes, could not identify the rules applicable to ascertaining the existence of a contract; of those who could, many could not apply them. For instance, put simply, consideration is a benefit or detriment bargained for between the parties. It cannot be based on benefits already received or detriments already experienced.

The contract jury exercise presented evidence of previously performed work. Students regularly mistook this work as sufficient to constitute consideration to form a current contract. Students often used an intuitive but antiquated and discarded subjective standard of assent for determining the existence of necessary contractual elements (i.e., offer, acceptance, and consideration) rather than the modern objective standard based on the outward expressions of the parties. Also, the students did not know how to resolve the dilemma caused by conflicting witness testimony regarding the existence of a fact. These and other confused responses regarding their analysis of the hypothetical contract dispute indicated a problem.

IV. IMPROVEMENT PURSUANT TO PEDAGOGY—THE NEW LESSON PLAN

The course assessment data and student performance convinced me that the mock contract law jury exercise in my in-person business law

courses needed major redevelopment. In my second, improved version of the exercise, I incorporated some of the pedagogy I learned from the courses, seminars, and workshops. For example, researchers in the applied theory of experiential learning have identified four necessary learning cycles: 1) formation of abstract concepts and generalizations, 2) testing the implications of the concepts in new situations and practice, 3) concrete experience, and 4) observation.[31] I structured the mock contract law jury exercises to comport with these four learning cycles. This structure can also be used as the lesson plan for those instructors who want to adopt the mock-jury exercise as is or as a guide to developing their own.

A. *First Cycle: Abstract Concepts and Generalizations*

In the first cycle, I sought to accomplish student formation of abstract legal concepts regarding contract law using another tactic from the course-development training—that is, the flipped class.[32] An instructor flips the classroom when he or she has students do tasks outside class traditionally done in class and perform tasks in class they would normally do outside of it.[33] Students, for example, listen to a recorded lecture at home rather than live in class and, rather than work on a set of related problems at home, they engage in teacher-guided problem-solving, analysis, and discussions in class.[34] Before the contract mock-jury exercise, outside of class, the students viewed recorded lectures I created discussing contract law and the various elements required to form a legally binding contract. I had previously given these lectures in person, in class.

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31. *See, e.g.*, Ron Downs, *Experiential Learning: In a Practical Legal Training Course*, 7 J. PROF. LEGAL EDUC. 141, 142–43 (1989); *see also* Nees et al., *supra* note 26.

32. *See, e.g.*, Mystica M. Alexander, *The Flipped Classroom: Engaging the Student in Active Learning*, 35 J. LEGAL STUD. EDUC. 277 (2018) (discussing how using the flipped classroom permits business students to better engage with the business law topics despite the brief time allotted to them); Jalal Nouri, *The Flipped Classroom: For Active, Effective and Increased Learning—Espcially for Low Achievers*, 13 INT. J. EDUC. TECH. HIGHER EDUC. 1 (2016) (discussing the flipped class model); Tanya M. Marcum & Sandra J. Perry, *Flips and Flops: A New Approach to a Traditional Law Course*, 32 J. LEGAL STUD. EDUC. 255 (2015) (discussing the pedagogical history of the flipped classroom and how the active learning process in a flipped business law classroom effects student analytical thinking through problem-based learning.); Peter Sankoff, *Taking the Instruction of Law Outside the Lecture Hall: How the Flipped Classroom Can Make Learning More Productive and Enjoyable*, 51 ALTA. L. REV. 891 (2014) (discussing the importance of reinventing the law school classroom and using class time to permit students to focus on performing active problem-solving activities.); Dan Berrett, *How 'Flipping' the Classroom Can Improve the Traditional Lecture*, CHRON. OF HIGHER EDUC. (Feb. 19, 2012), http://chronicle.com/article/How-Flipping-the-Classroom/130857/ (discussing the flipped classroom model and its positive attributes).

33. *See, e.g.*, Nouri, *supra* note 32, at 2.

34. *Id.*

B. *Second Cycle: Testing in New Situations and Practice*

In the second experiential learning cycle, I gave in class a short, focused, easily digestible lecture further explaining the laws the students will use to resolve the dispute they are about to view. I told the students that I liken this lecture to a judge giving a jury its legal instructions before jury deliberation. In conjunction with this faux jury instruction lecture, I gave the students a detailed outline of the contract law concepts pertinent to their upcoming mock-jury exercise and that they can use during it. The contract law outline (i.e., jury instructions) is provided.[35]

During this cycle, I also gave the students greater context via examples explaining the application of the legal rules. I also instructed the students regarding how they as jurors, the ultimate finders of fact, can resolve the dilemma caused by conflicting, similarly compelling evidence. I explained that they do this through their subjective determination of a witness's veracity and credibility along with their determination of the evidence's validity and the weight they should assign it based on their common sense and life experiences. Again, I gave them examples.

C. *Third Cycle: Concrete Experience*

The third experiential learning cycle—concrete experience—centered on the mock-jury exercise. I gave the students the exercise's measurable learning outcome discussed previously. I also developed a jury questionnaire that listed the applicable contract rules in a "yes or no" and "please explain your answer" format that let the students analyze the hypothetical facts in a linear fashion.[36] I broke the class into groups of three to five students and had them listen to a video recording of a civil dispute in which the plaintiff accused the defendant of breaching a contract. The students listened to opening statements, the judge's eliciting evidentiary testimony from the parties at trial and closing statements. I gave the students additional documentary evidence in the form of an evidence package. I then instructed them to deliberate as a group each question in the jury questionnaire and determine liability and monetary damages, if any. This interactive third cycle required students to actively participate in the exercise, assess and discuss the material with each other during their deliberations, and persuade the other student jurors as to the strength of their evidentiary and legal assessments.

D. *Fourth Cycle: Observation*

The last cycle is observation. After each student jury group told me it had either reached a verdict or become hopelessly "hung," the class gathered, and we discussed each question in the jury questionnaire. We

35. *See infra* Appendix 1.

36. *See infra* Appendix 2.

discussed how each group decided each issue, what evidence it relied on, and how it applied the applicable law to this evidence in reaching its conclusion. I challenged each group by identifying different ways to view or weigh evidence and judge witness credibility, as well as apply the law to the evidence.

I also reviewed additional contract law concepts not covered in the jury exercise or explained in the jury questionnaire. For instance, we discussed whether the contract illustrated in our hypothetical scenario must be in writing under the Statute of Frauds, the legality of the underlying purpose of the contract, whether the contract was governed by the Uniform Commercial Code or the common law, how to resolve the hybrid contract dilemma, unilateral versus bilateral contracts, mutual assent, the legal remedies available to the party injured by a contract breach, and the role of equity remedies if no contract existed but one party experienced unjust enrichment or a detriment due to an unfulfilled, legally unenforceable promise. This fourth cycle also further facilitated student participation and communication, as well as student comradery.

As a rule and to the benefit of this fourth cycle and mock-jury exercise experience as a whole, the students' verdicts vary. Some groups find that a contract was breached, some find that no contract existed, and others become "hung," failing to unanimously arrive at any decision. This enables me to make an important point. That is, though the U.S. jury system is, in my opinion, the best method known for administering justice and fairly and equitably resolving disputes, it is flawed. This flaw is demonstrated both by the varying verdicts and how the students arrive at them.

Questioning the students after their group deliberations demonstrates that, despite my attempt to educate them during the jury instruction about the contract law concepts they required to evaluate the evidence,[37] many of their verdicts are based on misunderstandings and, therefore, misapplications of the relevant concepts. For example, despite repeated instruction that students should use the modern objective-mutual-assent standard to determine if the parties exchanged an offer and an acceptance, the students mistakenly use the obsolete subjective meeting-of-the-minds standard.[38]

Also, for example, I instruct the students that, in their roles as jurors, they should not merely accept a witness's testimony at face value. They should evaluate the believability or persuasiveness of a witness' testimony (i.e., the weight of the evidence or the evidence's probative value), as well as the witness's credibility. The contract law scenario used in my mock-jury exercise includes witnesses whose testimony should raise questions regarding both their credibility and the believability of their evidence. The

37. *See infra* Appendix 1.

38. *Id*.

students often forgo the instruction and accept the witness's testimony as true without performing the analysis required.

The students' mistaken application of contract law concepts and misunderstanding of jury duties regarding evidentiary evaluation lead to the final idea I want them to draw from the exercise. That is, juries and verdicts are unpredictable. If you find yourself in a legal dispute, accept a settlement you can live with before risking your money or freedom on the vagaries of the jury process.

To emphasize this point beyond noting the varied verdicts, I tell the students a story from my own experiences as a litigator. I once represented a client charged with operating a vehicle while intoxicated (OWI), a felony. Worse, because of his many earlier OWI convictions, he was also charged with being a habitual traffic offender, a conviction which carried an automatic mandatory sentence of ten years in a state prison. My client faced these criminal charges in a rural Indiana county in which everyone knew one another and likely knew the local police officers. My client's conviction or acquittal ultimately depended on one critical factual determination—whether the jury believed his testimony or that of the two arresting officers.

I selected during voir dire only those jurors who claimed no neighborly familiarity with the officers. All of them swore to this. I won the trial, with my client acquitted on all charges. Curious as to what aspect of my presentation had convinced the jurors to believe my client's version of events over the officers', I questioned them after their release from jury duty. One told me he had gone to high school with the officers and knew them as liars. Another juror said the same, and a third and fourth agreed. They had misled me during voir dire. This benefited my client, but that is not often the case. This story always invokes shocked laughter from the students. It drives home, however, the mock-jury exercise's concluding point—you cannot trust jurors; juries are unpredictable and risky.[39] Therefore, juries should be avoided if possible.[40]

V. ASSESSMENT OF APPROACH TAKEN TO IMPROVE

In fall 2019, I implemented my changes to the mock contract law jury exercise given in my in-person business law courses. The contract quizzes given after the changes (and continually tweaked) showed a significant improvement in student mastery of the contract law concepts and the ability to apply these concepts to a hypothetical scenario.[41]

39. *See* Levin, *supra* note 6, at 274.

40. *See, e.g.*, *id*. at 272 (discussing the use of mock-jury exercises in a graduate school class in the legal environment of business and how the different verdicts produced by the exercise vividly illustrate the unpredictable nature of litigation).

41. *See infra* Table 2.

Table 2: Average Scores for Contract Quiz (Spring 2020 to Fall 2021. Note that, starting in the 2020/2021 academic year, the business law course tested was offered once an academic year):

Semester and Number of Students	**Average Contract Quiz Score**
Fall 2019 (12 students)	78%
Spring 2020 (11 students)	83%
Fall 2020 (21 students)	82%
Fall 2021 (29 students)	80%
Fall 2022 (21 students)	78%

My observation of student performance also revealed an improvement. Student comments during the discussion portion of the contract jury exercise demonstrated a better understanding of the applicable legal concepts and a more thoughtful and analytical application of them to the hypothetical scenario. I instituted similar changes to the other two mock-jury exercises pertaining to two other substantive areas of the law covered in my in-person business law courses—that is, tort and agency law. I saw a similar improvement in quiz scores for both torts and agency law.[42]

42. *See infra* Table 3.

Table 3: Average Scores for the Tort and Agency Law Quizzes (Spring 2018 to Fall 2021 administered immediately after their corresponding mock-jury exercise.)

Before Change: Semester and Number of Students	**Before Change: Average Quiz Score**	**After Change: Semester and Number of Students**	**After Change: Average Quiz Score**
Spring 2018 (8 students)		**Fall 2019** (12 students)	
Tort law quiz	77%	**Tort law quiz**	80%
Agency law quiz	68%	**Agency law quiz**	85%
Fall 2018 (13 students)		**Spring 2020** (11 students)	
Tort law quiz	82%	**Tort law quiz**	87%
Agency law quiz	84%	**Agency law quiz**	88%
Spring 2019 (13 students)		**Fall 2020** (21 students)	
Tort law quiz	75%	**Tort law quiz**	85%
Agency law quiz	81%	**Agency law quiz**	89%
		Fall 2021 (29 students)	
		Tort law quiz	84%
		Agency law quiz	89%
		Fall 2022 (21 students)	
		Tort law quiz	82%
		Agency law quiz	88%

CONCLUSION

I hope the preceding story reviewing my pedagogical journey and course development serves as a guide and inspiration for new instructors teaching any course in post-secondary education. I also hope that this article gives instructors a mock-jury exercise they can readily implement or modify to their needs.

Giving business law students the opportunity to act as a member of a mock jury and decide a legal dispute provides them an entertaining way to accomplish two primary learning outcomes. First, it allows students to use course-acquired knowledge to make legal arguments persuasive enough to sway other student jurors' opinions. Second, it empowers them to evaluate the persuasiveness of other students' arguments. The development of the skills needed to persuade others and evaluate other's persuasiveness will carry over to the business students' personal lives and professional careers. These skills will serve them well in both arenas—a positive result beyond the usual goals of a business law course. The exercise also helps business students develop and practice the important interpersonal communication skills many of them lack. The active-learning exercise gives business law instructors a method beyond quizzes and tests of assessing student mastery of course learning objectives—a more nuanced and realistic method of learning.

I continue to refine my mock-jury exercises. Each time I administer the exercise, I alter the jury questionnaire and jury instructions based on earlier student questions and confusion. I collect informal student feedback for the exercise, which has been quite favorable. In the future, I want to formalize this feedback using a student survey questionnaire. My experience with this method of experiential instruction prompted me to use it to explain other areas of the U.S. adversarial legal system and another bedrock of U.S. law—that is, the appellate process and the development of U.S. common law precedent. Using what I learned from my experience with the mock-jury exercises, I developed a mock appellate exercise that permits business students to apply the two competing judicial philosophies, textualism (original intent) and judicial activism, to a hypothetical factual scenario.

Using Zoom, instructors can readily use a mock-jury exercise designed for an in-person introductory business law course and perform and administer it in a hybrid or fully online synchronous course. How to perform a mock-jury exercise in a fully online asynchronous business law course to the same effect as in an in-person or an online synchronous course remains an open question. More work needs to be done to answer this question—an important question as more universities and colleges give their introductory business law courses in fully online, asynchronous formats. Hopefully, this story will continue.

Appendix 1:

Jury Instructions: Contract Law Outline
(Request a Word version of this outline via the email awswain@iu.edu)

- **The Law of Contracts:**
  - **Contract Law—Promise Sorting Mechanism:** Because not all promises are legally enforceable, contract law sorts them and separates the enforceable from the unenforceable. Contract law also determines what compensation an injured non-breaching party receives when another party breaches a legally enforceable promise.

  - Legal foundation on which is built many other areas of business law such as corporate law, agency law, employment law, partnership law, commercial paper law, and secured transactions law.

- **Elements of a Legally Enforceable Contract (the first three mandatory):**
  1) **Offer:** An expression of a willingness to enter into a specified arrangement.
     - Definite, communicated, and intentional.

  2) **Acceptance:** A manifestation of a willingness to enter into the arrangement proposed by the offeror and performed in the way stated in the offer.
     - Mutual Assent: When two parties enter into a contractual agreement, a couple of things happen. One party, the offeror, offers something of value in exchange for a promise. The offeree accepts or declines. If the offeree accepts, and all elements are legal, there is a mutual agreement. This agreement is called mutual assent—that is, two parties objectively agreed on something and are prepared to objectively enter into a contract.
       - **Old Subjective Standard:** Meeting of the minds. The court is interested in only what the parties actually thought.

       - **Modern Objective Standard:** It replaced the subjective standard in the mid-19th Century. It focuses on the words, acts, and the circumstances signifying the offeror's intent and whether a reasonable person, in the

context of the current circumstances, would interpret the statement as an offer or an acceptance.

- In other words, the court is only interested in what a reasonable person in the same circumstances would have thought.

- **Example:** Tommy offers to buy Pam's farm for $100,000. Pam does not wish to sell her farm, but she jokingly accepts the offer because she does not believe that Tommy has the $100,000. Tommy and Pam work out the terms of the contract and Pam, still joking, writes out the contract on a sheet of paper and signs it. Tommy tries to enforce this.
  - **Under the Old Subjective Meeting of the Minds Standard:** If the court believed that Pam thought Tommy was kidding and did not intend to purchase her property (in other words, she made a mistake regarding Tommy's actual intent), her mind did not meet with Tommy's, and the court would invalidate the contract.

  - **Under the Modern Objective Mutual Assent Standard:** In this situation, the contract is binding even if Pam did not intend to sell her farm. Tommy actually believed this to be a serious transaction based on the parties' objectively manifested behaviors and conduct and, for this reason, his belief, pursuant to a reasonable-person standard, was reasonable.

3) **Consideration:** legal value, bargained for and given in exchange for something (i.e., an act or a promise) **-- a** detriment for a detriment, a detriment for a benefit, or a benefit for a benefit.
   - **Quid pro quo:** In Latin, "something for something" or "this for that," including:
     - Money
     - Goods
     - Services
     - Promise
     - Intangible
     - Action (promise to act)
     - Forbearance (promise not to act—i.e., non-action)
       - **Example:** I will give you $10 a day for each day you do not smoke while you are in high school.

- Past completed performance cannot act as consideration for a current contract. This is an **illusory promise**.

4) Underlying Purpose of Contract—Legality and Violation of Public Policy:

a. Legality (void):

i. **Contract to commit a crime** (e.g., a contract for murder, prostitution, or the sale or distribution of controlled substances).

ii. **Wagering and betting contracts are illegal** (unless such activities are permitted by law in the contracting jurisdiction).

iii. **Contracts not allowed by law** (e.g., Employment contracts for the hiring of underage workers or contracts to provide legal or CPA work or advice by non-attorneys or non-CPAs).

- **Example: Drop Side Baby Cribs banned in 2010** (illegal to manufacture, sell, or even donate drop-side cribs in the U.S.).

b. Public Policy—Contracts that Violate Public Policy (void):

i. **Undue Restraints on Trade or a Person's Ability to Pursue a Livelihood (i.e., covenants not to compete):**

- A barber sells his shop, and the agreement says he cannot work as a barber anywhere in the state after the sale. A court might determine that the geographical breadth of this restriction violates the public policy regarding the right to work.

ii. **Exculpatory Clauses:** when a business places a notice saying it takes no responsibility for breaching a contract.

- Not per se invalid if the parties have equal bargaining positions or equal sophistication in business practices.

iii. **Obstructs justice:**

- Contracts that corrupt public officials—**Example:** government employees forced to sign non-disclosure agreements.
- Contracts that will obstruct or pervert justice.

iv. **Impairs public morality:**

- Contracts that would cause injury to public services.

- An agreement involving public matters that would corrupt a private citizen.
- Contracts that would promote litigation.

v. **Offends public concepts of decency:**
- Contracts involving prostitution or public nudity.

vi. **Discriminates on the basis of a suspect classification:**
- Contracts that **v**iolate Title VII of the Civil Rights Act.

5) Capacity:

➢ **Defined:** the legally defined sufficient level of competent mental ability the contracting parties must possess to enter into a valid and binding agreement.

➢ **Three Categories Pertaining to Capacity:**

i. **Mental Capability (mentally vulnerable people) (void):** Most states impose a "cognitive" test: whether the party possessed the mental capacity to understand the meaning and effect of the words comprising the contract or transaction.

ii. **Intoxication (Drugs or Alcohol) (void):**
- The intoxication must: (1) deprive the subject of the ability to understand the nature of the agreement, and (2) be readily apparent to the other party.

iii. **Minors: Person under the age of majority (generally 18 or 21 years of age) (voidable):**
- The minor can void the contract until he or she reaches the age of majority.
- If the minor has not done so by then, he or she can no longer do so.

6) Form of the Contract:

➢ **A contract must be in writing if the Statute of Frauds (SOF) applies—remember the mnemonic acronym "MY LEGS":**
- Contained in the Act for Prevention of Frauds and Perjuries, which the English Parliament enacted into British law in 1677. Adopted into U.S. common law. Some or all its provisions codified into statute (the Uniform Commercial Code) by many states.

- **SOF Applies To:**
  i. A **marriage** for consideration. **(M)**
  ii. Contracts performed within a **year** or less. **(Y)**

iii. **Land** sales. **(L)**

iv. **Executor or executrix** promises to pay a debt of the **estate** from the executor's personal funds. **(E)**

v. The sale of **goods** worth $500 or more. **(G)**

vi. **Surety (**promise to creditor to pay the debt of another). **(S)**

- **The SOF provisions relevant to the mock-jury exercise:**
  i. **Performed Within a Year or Less:** An agreement which cannot be performed within one year must be in writing.
     - This applies only to contracts that are impossible of completion in **one** year or less. The time period is measured from contract's creation, not date of performance.

     - **Exceptions:**
       a. **If there** is **any possibility** (no matter how theoretical or remote) that the contract can be performed within a year, it is outside the SOF.
          - **Example:** $1 million to clean my house for the rest of my life.
          - **Example:** I promise to play for your team for at least two years or until I retire from the game.

       b. **One year or More Oral Contract Fully Performed:** If an oral contract that cannot be fulfilled within one year has been fully performed, the contract is fully enforceable (regardless of how long performance actually took).
          - **Example:** The Boston Red Sox and Ramon Garcia enter an oral contract in which the Red Sox will pay Garcia $500,000 per year for two years, and Garcia will play for the Red Sox for those two years. Garcia plays for the Red Sox for the two seasons. At this point, the Red Sox are obligated to pay Garcia his salary. Although the contract was oral, and it was impossible to perform within a year, the contract became enforceable

by virtue of the fact that Garcia performed the contract in full. Thus, the Red Sox are obligated to pay him.

ii. **Goods:** the sale of goods worth $500 or more must be in writing.
- Goods are any item of movable, tangible, or personal property.
- Also applies to the leases of goods worth $1,000 or more.
- **Exceptions:**
  a. If the buyer receives and accepts the goods, or receives and accepts part of the goods, the contract will become enforceable as to the goods that were accepted and received.
  b. If the buyer makes a partial payment for the goods contracted for, the contract is enforceable as to the goods for which payment has been made.
  c. **Seller Starts Manufacturing Unique Goods:** If the contract requires the seller to specially manufacture goods for the buyer that are not suitable for sale to others, and the seller makes a substantial beginning in the manufacturing process, the contract is enforceable.

- **Contract Types—Bilateral vs. Unilateral:**
  - **Unilateral Contracts**: When a party makes a promise obligating itself to do something without there being a promise of performance from another party. While the originating party may have made a promise, it may not be obligated to fulfill the promise unless the second party decides to act. Performance equals acceptance.
    - **Examples:** A reward offered for the recovery of a lost pet or item. When an insurance company promises to pay for a loss if the insured party pays its premiums.

  - **Bilateral Contract:** When two or more parties contemporaneously exchange promises to perform.
    - **Example:** When a car dealer and a customer sign a contract for the sale of a new car. The car dealer promises to give the customer a new car in exchange for the customer's promise to pay the car's purchase price.

- **Contract Breach:** a party fails to perform as expected.
  - Occurs when:
    i. Performance is incomplete (i.e., totally or partially).
    ii. Performance is unacceptable (e.g., goods are damaged or non-conforming).
    iii. Party performs but misses a specified time frame or some other contractual requirement. UCC's perfect performance vs. Common Law's substantial performance.
    iv. Party signals that **it** does not intend to perform as promised (i.e., an anticipatory breach and request for assurance).

- **Contract Damages—Expectation Damages:** Protects the non-breaching party's expectations regarding what position it expected to be in if the performance it was promised (contracted for) had, in fact, occurred. Forward looking. Places the non-breaching party in the same position it expected to be in if the contract had been performed as promised.

  1) Direct Damages (promised vs received)–Compensatory (or general) damages:
  - Damages awarded for injuries presumed to have arisen normally and naturally from the contract breach. Intended to make up for what was promised (but not delivered) under the contract (via a monetary equivalent). This type of damage compensates the non-breaching party for benefit of the bargain specified within the contract's four corners that it failed to receive due to the breach.
  - **Calculated by the Cost of Performance—**Difference between the lower contract price and the higher cover price [mitigation cost]). That is, the difference between what the non-breaching party acquired in mitigation and what was promised by the breaching party via the contract.

  2) Indirect Damages (what "flowed" from the breach) – Consequential (or special) damages:
  - Reimburse the injured party for damages that occur outside the contract's four corners and as a consequence of the breach rather than as a direct contractual loss.

  - **Requirements:**
    i. Certainty as to the amount of **loss.** (Need evidence—not a guess, speculation, or estimate);

ii. That the breaching party at the time of contracting had reason to know, or should have known, that the breach would cause the damages (foreseeable) (Similar to the tort concept of proximate cause); and
iii. That the non-breaching party could not reasonably have prevented the damages through mitigation.

3) Incidental Damages (incurred by efforts to avoid further loss):

- These are expenses that do not directly pertain to the promises within the four corners of the contract but were incurred and paid dealing with the breach of those promises. These compensate for indirect expenses incurred (out-of-pocket and in real time) dealing with the contract breach. These damages include, for example, expenses incurred:
  i. Stopping the delivery of goods.
  ii. Inspecting, transporting, or storing delivered goods.
  iii. Seeking mitigation goods.

- **Equity Contract Remedies:**
  - To impose "royal justice," in the 11th century, the Norman Kings created an independent but parallel system of justice alongside the common law with ultimate judicial power residing in the king. The system focused primarily on injunctive relief or the specific performance of contracts.

  - **Equitable Remedy of Quasi-Contracts** (or implied-in-law contract) (The equitable remedy applicable to mock-jury exercise. There are other equitable remedies):
    - A **quasi-contractual** remedy that prevents unjust enrichment – unfairly profiting at another's expense.

    - **Requirements:**
      i. The party seeking the remedy conveyed a benefit to another party.
      ii. The receiving party appreciates or knows **it** received a benefit.
      iii. The receiving party retains the benefit.
      iv. It is inequitable for the receiving party to keep benefit without paying or compensating the party that conveyed the benefit (i.e., there exists factual circumstances that make it unjust for the receiving party to incur a windfall).

- **Compensation for an Implied Contract:**
  - **Quantum Meruit:** the amount of compensation due under the implied contract is the current market price called quantum meruit (as much as he or she earned) and not a special or reduced rate.
    - Cannot exceed the amount due if a contract had in fact existed.

  - **Restitution (equity damage):** When a court orders restitution, it orders the defendant to give up his or her gains or profits to the claimant that he or she unjustly earned due to the wrongful act.

Appendix 2:

Assignment Sheet: Jury Questions
(Request a Word version of this outline via the email awswain@iu.edu)

Instructions: Your group is assigned to serve as the jury to weigh the evidence presented in this lawsuit and determine the outcome. Evidence includes only the testimony you heard the judge solicit from the parties. The parties' statements before the trial are not evidence. They should be considered as merely opening statements. Your group must try to make a unanimous decision regarding the lawsuit's outcome. If your group cannot do this, a split decision (called a hung or deadlock jury) is acceptable. Select one person to record your group's answers, thoughts, and reasoning on the Assignment Sheet and be the person who primarily discusses them during the class discussion (though everyone is welcome and encouraged to talk and participate).

1) Does your group find that the plaintiff made an offer to contract with the defendant? Remember to consider this question in the context of whether there was objective mutual assent. *Yes* / *No*

   Provide a brief explanation of your group's answer:

   Note: If your group answered "yes" to question 1, above, continue to question 2. If, however, your group answered "no" to question 1, above, thereby determining that the plaintiff did not make an offer to contract to the defendant go directly to question No. 7 and determine if the plaintiff has a valid claim for equity—that is, a claim for quasi contract.

2) If your group determined that the plaintiff made an offer to contract with the defendant, does your group find that the offer contained a proposed exchange of consideration between the parties? Remember this is determined using the objective mutual assent standard. *Yes* / *No*

   Provide a brief explanation of your group's answer:

Note: If your group answered "yes" to question 2, above, continue to question 3. If, however, your group answered "no" to question 2, above, thereby determining that the offer did not contain a proposed exchange of consideration, go directly to question No. 7 and determine if the plaintiff has a valid claim for equity—that is, a claim for quasi contract.

3) If your group determined that the plaintiff made an offer to contract with the defendant that contained consideration, does your group find that the defendant accepted the offer? Remember to consider this question in the context of whether there was objective mutual assent. *Yes* / *No*

Provide a brief explanation of your group's answer:

Note: If your group answered "yes" to question 3, above, continue to question 4. If, however, your group answered "no" to question 3, above, thereby determining that the defendant did not accept the plaintiff's offer to contract, go directly to question No. 7 and determine if the plaintiff has a valid claim for equity—that is, a claim for quasi contract.

4) Based on your answers to questions 1, 2 and 3, above, does your group find that a contract existed between the plaintiff and the defendant? *Yes* / *No*

Provide a brief explanation of your group's answer:

Note: If your group answered "yes" to question 4, above, thereby determining that a contract existed between the parties, continue to question 5, below. If, however, your group answered "no" to question 4, above, thereby determining that a contract did not exist between the parties, go directly to question No. 7 and determine if the plaintiff has a valid claim for equity—that is, a claim for quasi contract.

5) In light of your group's answer to question 4, above, does your group find that the defendant breached a contract that he entered into with the plaintiff? (For example, does the defendant's failure to pay the plaintiff the $700 constitute a breach of contract.) *Yes / No*

Provide a brief explanation of your group's answer that identifies the breaching party's failure to perform as expected:

Note: If your group answered "yes" to question 5, above, continue to question 6. If, however, your group answered "no" to question 5, above, thereby determining that that the defendant did not breach a contract that he entered into with the plaintiff, go directly to question No. 7 and determine if the plaintiff has a valid claim for equity—that is, a claim for quasi contract.

6) As a result of the defendant's breach of contract, does your group find that the plaintiff is entitled to expectation damages—that is, compensatory (direct), consequential (indirect), or incidental damages? *Yes / No*

If your answer is yes, how much do you award to the plaintiff for each damage category? (Note: identify the evidence that supports the damages and, if applicable, why the damages were foreseeable as a result of the breach)? Provide a brief explanation of your group's answer:

a) Compensatory (direct) damages:

b) Consequential (indirect) damages:

c) Incidental damages:

7) If your group finds that no legally enforceable contract existed between the plaintiff and the defendant, do you find that the plaintiff has a valid

claim for equity (*i.e.*, quasi contract). Remember that these equity rules create a contact when one did not exist pursuant to the legal rules.

Note: Even if your group determines that a contract existed between the parties, it was breached, and the plaintiff is due damages (i.e., answering "yes" to questions 1-6), pretend that a contract did not exist, answer question 7, and determine if the plaintiff has a valid claim for equity—that is, for quasi contract.

In either case, your group should consider the existence of a claim for quasi contract. These are the elements for quasi contract (a/k/a unjust enrichment) (Note: all the elements must be satisfied to find that quasi contract applies):

a) The plaintiff conveyed a benefit to the defendant? *Yes* / *No*

Provide a brief explanation of your group's answer.

b) The defendant appreciates or knows that he has received a benefit from the plaintiff? *Yes* / *No*

Provide a brief explanation of your group's answer.

c) The defendant will retain the benefit he received from the plaintiff? *Yes* / *No*

Provide a brief explanation of your group's answer.

d) It is unjust for the defendant to retain the benefit he received from the plaintiff? (The existence of "injustice" is a question of fact for the jury to decide. Was there any testimonial or documentary evidence offered at trial that establishes the existence of an injustice?) *Yes* / *No*

Provide a brief explanation of your group's answer.

After an analysis of the four quasi contract elements, your group's answer to the question of whether the plaintiff has a valid claim for quasi contract (Note: all the elements

must be satisfied and answered "yes" to find that quasi contract applies): *Yes* / *No*

8) *All Groups Answer:* As an aside, assuming there was a contract between the parties, does the Statute of Frauds require that the plaintiff and defendant put in writing their alleged contract (that is, the requirement of a contract's form)? Is this a contract for goods, services, or for both—and if for both, what is the contract's predominant purpose—that is, to acquire a good or a service?

Provide a brief explanation of your group's answers:

Statute of Frauds requires a writing? *Yes* / *No* Why?

a) Contract for good or services? *Yes* / *No* Why?

b) Contract's underlying primary purpose illegal or violates public policy? *Yes* / *No* Why?

9) *All Groups Answer:* As an aside, is there any evidence that indicates that the parties' lack capacity (e.g., insane, intoxicated, or a minor) to enter into the contract or that the underlying purpose of the contract is illegal or violates public policy? *Yes* / *No*

Provide a brief explanation of your group's answer including a brief explanation of the significance of mental capacity and legality for a contract's formation and legal enforceability: