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# ESSAY

## DEALING WITH THE LIMITS OF VISION: THE PLANNING PROCESS AND THE EDUCATION OF LAWYERS

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### INTRODUCTION

Over forty years ago Professor Karl Llewellyn, the principal architect of the Uniform Commercial Code, advised lawyers that if they saw themselves as troubleshooters and forward planners with skills for sizing up situations and getting things done, and made those skills known as characteristic of the profession, there would be good work to do.<sup>1</sup> This marketing advice was offered at a time of national crisis, when the country was emerging from World War II and there was a perceived lack of utility for lawyers. Since then lawyers have proliferated—and found good work to do—and we have all come to look on ourselves (and believe we are looked upon) as troubleshooters and forward planners with the ability to get things done.

We are not trained in law school to be troubleshooters or forward planners. We become that. Our work demands that we develop such skills and polish them, but the skills begin to develop in law school, if you reflect on it, not from the formal course instruction but from reading endlessly in cases about how things have gone and can go wrong—which is usually not the reason we are assigned the cases or the subject matter of legal teaching. We are expected by the public to finish law school a little more critical of human nature (and thus more worldly) than others not educated as lawyers, an outcome which is also not the subject matter of the teaching. In other words, it is expected that the education to be

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This Essay is dedicated to Leandra, whose legal education has just begun.

<sup>1</sup> Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 Colum. L. Rev. 167 (1946).

provided by our legal schooling will comprise more than we are taught in law school. And in that observation we are saying there is a failure in the teaching.<sup>2</sup>

Let us look in this essay at what we are taught, what it is that we learn, and what legal education may be capable of teaching us. In the process we will look at the way the traditional legal curriculum divides the law into two archetypal points of view, that of the advocate and of the counsellor, and uses the case method to explore advocacy without fully developing the counsellor's perspective. We will then analyze four cases dealing with the close corporation (which are themselves lessons in such diverse subjects as estate planning, real estate, corporate mergers, executive compensation, and federal jurisdiction), first following the conventional advocate's analysis and then, in what we believe is a novel approach, following the counsellor's perspective. Using this approach, we will derive rules to be used in the planning process, rules designed to extend the limits of the planner's vision. In the process we will provide the outline for a new type of course and course materials and show that the traditional dichotomy between the role models of advocate and counsellor is an arbitrary construct.

### LEGAL TRAINING

Lawyers are trained to be advocates. Regardless of the use to which the law is put, legal training begins, and often ends, with the analysis of argument. Opinions of appellate courts are scrutinized for the persuasiveness of the argument. Majority and dissenting opinions are not given

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<sup>2</sup> The recent literature on the perceived crisis in legal education is extensive. See Brown, *The Trouble with Law School Education: A Consultation as a Microcosm*, 18 *Creighton L. Rev.* 1343 (1985); Clark, *The Return of Langdell*, 8 *Harv. J.L. & Pub. Pol'y* 299 (1985); Duncan, *Teaching Legal Skills for Transfer of Learning: Is Simulation the Answer?* 2 *J. Prof. Legal Educ.* 64 (1984); Ely, *Through a Crystal Ball: Legal Education—Its Relation to the Bench, Bar and University Community*, 21 *Tulsa L.J.* 650 (1986); Feinman, *Reforming and Transforming*, 30 *N.Y.L. Sch. L. Rev.* 629 (1985); Feters, *A Personal Reflection on Legal Education*, 36 *Syracuse L. Rev.* 933 (1985); Gorman, *Assessing and Reforming the Current Law School Curriculum*, 30 *N.Y.L. Sch. L. Rev.* 609 (1985); Horwitz, *Are Law Schools Fifty Years out of Date?* 54 *UMKC L. Rev.* 385 (1986); Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 *Seton Hall L. Rev.* 1 (1983); Korngold, *Legal Education for Non-Litigators: The Role of the Law Schools and the Practicing Bar*, 30 *N.Y.L. Sch. L. Rev.* 621 (1985); Scott, *Legal Education: Proposals for Change*, 8 *Harv. J.L. & Pub. Pol'y* 317 (1985); Vernon, *Education for Proficiency: The Continuum*, 33 *J. Legal Educ.* 559 (1983); White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be*, 36 *J. Legal Educ.* 155 (1986). These problems are also dealt with from a historian's perspective in R. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983). In preparing this Essay, we also referred to Ad Hoc Committee on Lawyering, *Evaluation of the Educational, Institutional and Fiscal Implications of the Proposed Lawyering Program* (April 3, 1985) (unpublished memorandum to the faculty of New York University School of Law on file at New York University Law Review).

any particular favor; each must meet the test of accounting for all the facts of the case, explain the place of the subject matter in the body of precedent or the statutory scheme, and be persuasive. Such training approaches the law as if it were divided into the polar extremes of advocate's law and counsellor's law<sup>3</sup>—and ultimately divides the law in our minds into those opposing points of view. The descriptions that follow illustrate the conventional understanding of the contrast between the advocate and the counsellor.

Advocate's law is law seen from the point of view of the advocate seeking to obtain a fair result, usually in the individual case. Advocate's law views the law as uncertain, subject ultimately to being shaped by persuasive argument. Argument addresses and encourages judicial discretion; planning considerations are given only limited weight. Advocate's law attempts to set the law free from many of the constraints of precedent and is therefore often irreverent. Although in every argument there is an argument for the status quo, advocate's law often embraces change. And change, given a result perceived as fair, is exciting, offering a sense of the advancement of justice, an enrichment of shared morality. Change satisfies our need for movement, accommodation, and a sense of flexibility in the established order. Embracing change, advocate's law is looked on as dynamic.

In contrast, counsellor's law is the law applied prospectively to behavior. Counsellor's law is the law of rules and their application; planning considerations are given great weight. It therefore concerns itself largely with legal doctrine, the body of prescriptive rules that governs our society.<sup>4</sup> Application of such rules is often considered static when compared to advocacy. These rules are usually not given much attention in law school or, if they are considered, are made to look more susceptible to change than is the case.

In this view of the law, and of the role of the lawyer as counsellor, the counsellor describes risks and draws lines that limit behavior; he is often described as conservative. Also in this view of the law, counsellors, for the most part, do not make law. For them, in the moment of challenge, the reward is a declaration that the law is as they thought it to be.

Advocate's law is taught and promoted in the law schools, while counsellor's law is often ignored. The knowledge necessary to be a counsellor is regarded as a by-product of the teaching, an accretion to the student's knowledge that comes over time, after the course material of law school has been mastered. There are many reasons for this result.

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<sup>3</sup> The contrast of advocate's law and counsellor's law is developed in Llewellyn, *supra* note 1, at 167-69.

<sup>4</sup> Llewellyn describes these rules as having "bedrock status." *Id.* at 168 n.3.

Advocate's law is analytical and is therefore entertaining to teach and enlightening for both student and teacher. Advocate's law is issue-seeking. Although it differentiates and distinguishes complex facts and therefore embraces complexity, it is relatively easy to impart to students, as they need have little substantive knowledge to participate in the process. It is often normative rather than descriptive: it tends to concentrate on the way things ought to be rather than on the way they are. Accordingly, it appeals to the student's own idealism, offers immediate rewards, and without doubt engenders an appreciation of the law as a flexible instrument. Moreover, it encourages the examination of the reasons for rules, the policies behind them, and the limitations of their application.<sup>5</sup>

Conversely, counsellor's law seeks simplicity. Complex arrangements usually prove difficult to negotiate or document, and obedience to rules requires straightforward prescriptions that can be followed. Since counsellor's law deals with the application of rules, an examination of the policies behind the rules is often not required.<sup>6</sup> A counsellor can function quite well without making a historical inquiry into the evolution of, or the policies underlying, a rule, just as the precise use of language does not ordinarily require an investigation of the etymology of the words used. This fact is perceived to demean counsellor's law, to make it less intellectual than advocacy, aligning counsellor's law, in the definitional framework, with the rote learning of rules. The better the law school (and, by extension, the better the legal education), the more the student is made to look at the reasons for things rather than merely to learn legal doctrine or certain related substantive rules. The better the law school, the more the mastery of substantive rules becomes the student's own obligation.<sup>7</sup>

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<sup>5</sup> Advocate's training in law school thrives on policy analysis: such analysis is fodder for every advocate. The limits of policy analysis are explored in Duncan Kennedy's article on the politics of the law school curriculum. "There is now policy analysis of every possible stripe, and it has gradually become clear that a skillful person using the policy approach can generate a resoundingly convincing rationale for any rule. There is no existing rule that cannot be legitimated by reference to some set of social policies." Kennedy, *supra* note 2, at 8.

Kennedy explains that mastery of policy analysis has an interesting consequence—it can turn out to be entirely empty.

If you're good at this kind of analysis you can actually feel your own ambivalent, switch hitting, go-any-direction capacity. Policy can be used to show that every rule is necessary, should be the way it is, has been the way it is for a good reason, or it can be used to show that any part or even the whole system should be junked.

*Id.* The sense of emptiness engendered by this method can lead the student to a search for the bedrock in the system.

<sup>6</sup> To present sharply the contrast between the points of view of the advocate and the counsellor, our description ignores a problem that often faces the counsellor: determining the direction in which the law is heading and the effect any changes in this direction may have on his position.

<sup>7</sup> As a corollary, it often seems that the better the law school, the less the school offers the

The law school education is thought of as supplying an apperceptive mass of information to facilitate the future accumulation of knowledge. The school may offer a course that is called "counselling," but that is likely to be practical training, akin to moot court. Courses in transaction planning also miss the mark for they are, as will be seen, only tangentially related to the counsellor's role.<sup>8</sup> The intellectual aspects of counsellor's law are not fully explored.

The legal training that we have described is not the training of planners or troubleshooters or wise counsellors.<sup>9</sup> Law school education, according to received wisdom, trains people to think like lawyers. A description of what it means to think like a lawyer is a reiteration of the training process. It is assumed, however, that in teaching the student to think like a lawyer, legal training covers the role of the counsellor and that there is not much difference between applying rules to the facts in a historical context and applying them prospectively. After all, rules can be applied to facts whether the facts are about what happened yesterday or what will happen tomorrow. In reality, however, there is a great deal of difference. When one is dealing with historical facts, most facts can be known. When one is planning for the future, many facts may be known, but many may never be known. From any course of action consequences arise for which there will be responses and counter responses and so on: there is a limit to the vision of the planner.

Troubleshooting and planning go hand in hand. The troubleshooter comes in where planning has not worked or may not work, where the planning must be redirected. Important to both the planner and the troubleshooter is the intelligent application of experience: understanding the likely consequence of a course of action. The essence of planning is the positioning of the parties so that problems, even though unantici-

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student in terms of intellectual content in third-year courses. This may be one reason for the sense of ennui with respect to certain aspects of legal education that manifests itself in students' restlessness in the third year of law school. See Gorman, *supra* note 2, at 617-19. Nearly 15 years ago, Robert Stevens observed that

[i]n short, the popular conception of law student life as a mixture of long hours pouring over casebooks and endless discussions of the contents of those books is more myth than reality. By the fifth semester, many students have the equivalent of a two-day work week and discuss their studies rarely, if at all.

Stevens, *Law Schools and Law Students*, 59 Va. L. Rev. 551, 653 (1973).

<sup>8</sup> One observer has noted that traditional planning courses are often stigmatized as "how to" courses, lacking in intellectual rigor. See Korngold, *supra* note 2, at 624.

<sup>9</sup> Professor Robert A. Gorman notes that the most prevalent criticism practitioners level at legal education is that "law school seems to cripple the capacity for reaching a single constructive solution and for implementing it." Gorman, *supra* note 2, at 611. He observes that legal education often seems to concentrate on sniping at the opinions of others, while practitioners spend much more of their time "eliciting facts, formulating issues, sketching alternative courses of action, choosing among them, structuring transactions, and counseling others." *Id.*

pated, will not destroy the desired result, including the devastation that can be wrought by changes in the law or the imposition of judicial discretion.

### SUBJECT MATTER FOR REFLECTION

The case system has long been a model for teaching advocacy. The cases deliver arguments and convey rules and, for the most part, that is the reason they are used for teaching. But the cases also convey experience about how people act and how they deal with each other, about what went wrong or what often goes wrong in particular situations. With some thought on the student's part, the cases also convey information about how to fix the problem or cut the losses. The experience of the cases is often the richest part of the law school education, but we are not taught how to seek out or use that experience. The experience of the cases, along with an understanding of the limitations of the analysis of argument, is what really supplies the maturity that we associate with the completion of legal education.

It is worth comparing what we read in law school and what we are taught from the cases with the intellectual content that the counsellor, as the master of the experience of the cases and the law (and thus as planner), distills from them. In Karl Llewellyn's words, "[T]heory does well to keep its feet on the earth."<sup>10</sup> Corporate law is our field and, accordingly, we will use cases we know as illustrations.

Cases involving the close corporation have content that conveys experience. They generally involve more than one area of the law and thus require the integration of legal knowledge. Also, an analysis of these cases looking for the "fair result" yields surprises. If you have confidence in your understanding of the subject matter, which you can gain after reading a few cases, you have a window on our society. The subject matter reflects the stresses of capitalism. These are stresses that every business lawyer comes to know. Let us start with something as basic as entering and leaving the corporate form, using the close corporation with a limited number of stockholders as a model. We will restrict the illustrations to four cases, review them from the conventional analytic point of view, and then assess them from the planner's perspective. This review will give us a basis for reconsidering the types of courses offered in law school, the course materials, and, finally, the counsellor's role.

### *Illustrative Cases*

Indigenous to the close corporation are the problems of the illiquid-

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<sup>10</sup> Llewellyn, *supra* note 1, at 167 n.

ity of its securities and the possible death of one or more of its stockholders. These are fundamental problems that must be addressed by anyone contemplating business in the corporate form.

### Case 1

Ideal as a first case for analysis is *Allen v. Biltmore Tissue Corp.*<sup>11</sup> In *Allen*, the corporation's bylaws provided that, in the event of the death of a stockholder, the corporation would have the right to buy the deceased stockholder's shares at the price the stockholder originally paid when he acquired them from the corporation.<sup>12</sup> This bizarre arrangement approaches the classic tontine<sup>13</sup>—pure economic Darwinism in which the survivor takes all. In *Allen*, upon the death of one of the stockholders, the corporation proffered an amount that was more than the original purchase price of the stock but significantly less than its fair market value.<sup>14</sup> The estate contested the price and the trial court found for the corporation.<sup>15</sup> The Appellate Division reversed because of the "unfairness" of the price specified in the bylaws.<sup>16</sup> The Court of Appeals, in an opinion by Judge Fuld, found for the corporation and reinstated the trial court's opinion.<sup>17</sup> Simply stated, the court did not want to encourage litigation over the formula that had been chosen. Litigation would destroy the utility of such arrangements.

The *Allen* decision is atavistic in its purity, looking back to an earlier age of doctrine. Freedom of contract is treated as absolute in this context. The court had an opportunity to equivocate and open the door to altruism,<sup>18</sup> for the estate raised an issue of waiver on the part of the cor-

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<sup>11</sup> 1 A.D.2d 599, 153 N.Y.S.2d 779 (1956), rev'd, 2 N.Y.2d 534, 141 N.E.2d 812, 161 N.Y.S.2d 418 (1957).

<sup>12</sup> Id. at 600, 153 N.Y.S.2d at 781.

<sup>13</sup> A financial arrangement, named after its creator, the seventeenth-century banker Lorenzo Tonti, in which a group shares in some advantageous arrangement or fund, such as an annuity, on terms such that upon the death or default of any member, his share is distributed among the remaining members of the group, until the last survivor receives all. The tontine may be familiar to some from the plot of the 1966 movie, *The Wrong Box*, based on a story by Robert Louis Stevenson.

<sup>14</sup> *Allen*, 1 A.D.2d at 602, 153 N.Y.S.2d at 782.

<sup>15</sup> Id.

<sup>16</sup> See id., 153 N.Y.S.2d at 783.

<sup>17</sup> See *Allen*, 2 N.Y.2d at 543-44, 141 N.E.2d at 817, 161 N.Y.S.2d at 424-25.

<sup>18</sup> Altruism is a term that Duncan Kennedy uses to describe the "socialization of our theory of contract." Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1687 (1976) (quoting F. Kessler & G. Gilmore, *Contracts, Cases and Materials* 1118 (2d ed. 1970)); see id. at 1717-22. Kennedy posits the substantive dichotomy of individualism and altruism and adopts the dialectical method (or method of contradictions) to explore the positions. This is the Hegelian dialectic of thesis and antithesis from which emerges a synthesis. See id. at 1712 n.73. While Kennedy explores individualism and altruism brilliantly, no synthesis emerges.



poration in an all-out effort to have an equitable argument insinuated into the situation. The court, however, dismissed this argument. Freedom of contract is given full measure, even if the parties have embraced a tontine, not often sensible in a business context.<sup>19</sup> Accordingly, rock-solid legal doctrine is established.

The firmness of Judge Fuld in this 1957 case, and of the New York Court of Appeals, appeared to set a clear path for guidance in the close corporation from a court that was, at the time, the country's leading arbiter of corporate law. How reliably would that firmness be maintained? One case, as we all know, does not inevitably set the law.

## Case 2

*Nelkin v. H.J.R. Realty Corp.*<sup>20</sup> provides a vantage point from which to observe the issue from another perspective and in greater depth. The problems inherent in this situation are apparent from a simple recitation of the facts.

In *Nelkin*, three groups of stockholders incorporated a building (the realty corporation), and the three corporations they respectively controlled became the building's tenants at a substantially discounted rental, well under fair market value.<sup>21</sup> The realty corporation issued fifty-four shares, which were held by the stockholders of the three tenant corporations or, in one case, by the tenant corporation itself. The corporations were Chatham Metal Products, Inc. (Chatham) (the three stockholders of which, Nathan Horowitz, James Horowitz, and Charles Richter, each individually received six shares of the realty corporation), National Machinery Exchanges, Inc. (National) (the sole owner of which was Irving Epstein, who individually received eighteen shares), and Henry Nelkin, Inc. (Nelkin) (the sole owner of which was Henry Nelkin, and which

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<sup>19</sup> It is difficult to determine from the *Allen* opinion what purpose the buy-back provision was intended to serve. The Appellate Division noted that Biltmore Tissue Corp.'s stock appeared to be widely held, as the company's bylaws provided that no individual or corporation was entitled to hold more than 20 shares, and 5,538 shares were outstanding. *Allen*, 1 A.D.2d at 601, 153 N.Y.S.2d at 782. Since Judge Fuld identified the stockholder whose estate contested the provision as having been a paper jobber and one of Biltmore's customers, 2 N.Y.2d at 538, 141 N.E.2d at 813, 161 N.Y.S.2d at 419, one can speculate that it may have been intended that the corporation would be owned exclusively by its customers. Conceivably, the stockholders were meant to benefit by having access to the company's products and were not intended to profit from any increase in the value of their stock ownership. Unless there were some such collateral benefit from stock ownership, it is difficult to understand why anyone would have purchased the stock on the terms offered. If such a corporate purpose was intended, however, the bylaws were apparently silent on the matter, and by the time the matter reached the court the purpose was no longer documentable.

<sup>20</sup> 25 N.Y.2d 543, 255 N.E.2d 713, 307 N.Y.S.2d 454 (1969).

<sup>21</sup> *Id.* at 546, 255 N.E.2d at 715, 307 N.Y.S.2d at 456.

held eighteen shares as a corporate asset).<sup>22</sup> The building was apparently incorporated in 1941, and until 1961 Chatham, National, and Nelkin occupied most of the space in the building.<sup>23</sup> In 1946, Charles Richter sold his interest in Chatham but retained his shares in the realty corporation, and in 1961, Nelkin terminated its tenancy in the building.<sup>24</sup> After Nelkin vacated the building, Chatham and National took additional space,<sup>25</sup> and at the time of litigation, Chatham intended to take additional space upon the vacancy of an unrelated tenant.<sup>26</sup> Charles Richter and Henry Nelkin, who controlled four-ninths of the issued stock but no longer rented any space, tried to convince the stockholders of Chatham and National, who controlled the other five-ninths, to disregard the stockholders' agreement that permitted the discounted rentals and reform the agreement by paying a fair rent for the space leased or, alternatively, either to sell the building and distribute the proceeds or to buy the minority shares at a reasonable price.<sup>27</sup> In response, the majority offered to pay Richter and Nelkin what they had paid for the shares in 1941, a proposal that is reminiscent of the buyout arrangement in *Allen*.<sup>28</sup>

Nelkin and Richter instituted an action seeking judicial dissolution of the corporation as deadlocked in accordance with section 1104(c) of the New York Business Corporation Law.<sup>29</sup> The majority of the court found that Nelkin and Richter had not stated a cause of action for judicial dissolution, because there was no deadlock.<sup>30</sup> Judge Fuld dissented. Fuld attempted to imply a condition in the arrangement: that the existence of the corporation was conditioned upon each stockholder's continuing as a tenant in the building.<sup>31</sup> Judge Fuld was of the view that if the corporation no longer fulfilled the function for which it was organized, that is, to serve all the tenants, then the court should not hesitate to direct dissolution.<sup>32</sup> Judge Fuld had been the author of a line of opinions endorsing judicial dissolution: *Leibert v. Clapp*<sup>33</sup> and *Kruger v.*

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<sup>22</sup> Id. at 546 n.1, 255 N.E.2d at 714 n.1, 307 N.Y.S.2d at 456 n.1.

<sup>23</sup> See id. at 546, 255 N.E.2d at 715, 307 N.Y.S.2d at 456.

<sup>24</sup> Id.

<sup>25</sup> See id. at 550, 255 N.E.2d at 717, 307 N.Y.S.2d at 460 (Fuld, J., dissenting).

<sup>26</sup> Id. at 547, 255 N.E.2d at 715, 307 N.Y.S.2d at 457.

<sup>27</sup> Id. at 546, 255 N.E.2d at 715, 307 N.Y.S.2d at 456.

<sup>28</sup> See text accompanying notes 12-15 *supra*.

<sup>29</sup> N.Y. Bus. Corp. Law § 1104(c) (McKinney 1986).

<sup>30</sup> See *Nelkin*, 25 N.Y.2d at 549-50, 255 N.E.2d at 715, 307 N.Y.S.2d at 459.

<sup>31</sup> See id. at 551, 255 N.E.2d at 718, 307 N.Y.S.2d at 460 (Fuld, J., dissenting).

<sup>32</sup> Id. at 552, 255 N.E.2d at 718, 307 N.Y.S.2d at 461.

<sup>33</sup> 13 N.Y.2d 313, 196 N.E.2d 540, 247 N.Y.S.2d 102 (1963). The complaint in *Leibert* sought dissolution, alleging that the directors and other control persons of the corporation had for many years been looting its assets with the goal of forcing the minority stockholders to sell out to the majority. Judge Fuld, adopting a style and tone reminiscent of a celebrated opinion on fiduciary duty by Judge Cardozo, see *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928), determined that the complaint should not be dismissed. "Settled beyond peradventure

*Gerth*.<sup>34</sup> Continuing this theme, in his dissent in *Nelkin*, Judge Fuld stated that, when changing circumstances render fulfillment of the purposes for which the enterprise was organized impossible, a court of equity could and should dissolve the corporate entity.<sup>35</sup> Judge Fuld encouraged a position that would permit the court to review bargains to determine whether they have become onerous and to terminate them if they have become unfair as a result of changes over time.<sup>36</sup> Neither the Fuld dissent nor the *Nelkin* court tries to reconcile its views with those expressed in *Allen*, and, in all likelihood, neither was aware that the cases are related.

It is interesting to examine Judge Fuld's analysis in light of the dilemma of Charles Richter, who was the longest-suffering nontenant stockholder. Richter sold his interest in Chatham in 1946. His problem was that the shares in the realty corporation were held by the individual stockholders of Chatham and not by Chatham itself. If the shares had been held by Chatham when Richter severed his interest in Chatham, he would not have found himself a stockholder in the realty corporation without any ability to reap the benefits of the undermarket rental. The lawyer who drafted the agreement probably made a planning error in the original decision as to how the Chatham shares should be held.<sup>37</sup> Judge Fuld's argument works best when directed solely toward Nelkin's dilemma, but Nelkin was not as long-suffering as Richter and, standing alone, might not have tipped the balance in favor of judicial dissolution, even in Fuld's view.<sup>38</sup>

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is the proposition that, in cases such as this, directors and stockholder majorities—constituted, as we have said, guardians of the corporate welfare—are cast in the role of fiduciaries and must exercise their responsibilities as such with scrupulous good faith.” *Leibert*, 13 N.Y.2d at 316-17, 196 N.E.2d at 542, 247 N.Y.S.2d at 105.

<sup>34</sup> 16 N.Y.2d 802, 806-07, 210 N.E.2d 355, 357-58, 263 N.Y.S.2d 1, 3-5 (1965) (Fuld, J., dissenting). Judge Fuld dissented in *Kruger*, which involved a corporation whose majority stockholder, also an officer, drew, over a period of years, salary and bonuses that were several times greater than the net corporate earnings that remained after their payment. The majority found no grounds for dissolution. See *id.* at 804, 210 N.E.2d at 355, 263 N.Y.S.2d at 2. Fuld argued in dissent that a majority stockholder's fiduciary obligation to the minority is substantially greater in the context of a close corporation, where management and ownership are substantially identical, than it would be in a larger or less closely held enterprise. A close corporation, he suggested, could be treated by a court of equity as a partnership or joint venture, and, to reach a fair result, a court had the power to dissolve the entity or find a less drastic remedy, perhaps by itself imposing a buy-sell arrangement upon the parties. *Id.* at 806, 210 N.E.2d at 357, 263 N.Y.S.2d at 4.

<sup>35</sup> *Nelkin*, 25 N.Y.2d at 552, 255 N.E.2d at 718, 307 N.Y.S.2d at 461 (Fuld, J., dissenting).

<sup>36</sup> See *id.*

<sup>37</sup> It is also possible that Richter had his own reasons for retaining the shares in the realty corporation when he left Chatham. See note 61 *infra*.

<sup>38</sup> While it is easy to understand Judge Fuld's irritation with the manifest unfairness of the situation, his attempt to correct a failure of planning by providing for dissolution is a heavy-handed substitute for a buyout of Nelkin's and Richter's shares by the corporation, a mecha-

In 1979, the New York legislature, responding in part to Judge Fuld's position, added section 1104-a to the Business Corporation Law,<sup>39</sup> which allows the holders of twenty percent or more of the outstanding shares of a corporation to seek dissolution if the directors or those who control the corporation are guilty of illegal, fraudulent, or oppressive actions against the minority, or if the property of the corporation is being looted, wasted, or diverted for noncorporate purposes.<sup>40</sup> The courts are directed, in determining whether to proceed with the involuntary dissolution, to take into account whether liquidation is the only feasible means to secure fair return on investment and whether liquidation is reasonably necessary for the protection of the rights and interests of the minority stockholders.<sup>41</sup> The 1979 legislation, however, probably would not have provided a remedy for either Richter or Nelkin, because the case did not present oppressive actions, looting, or a diversion of assets for a noncorporate purpose.

### Case 3

The next case, *Lewis v. Steinhart*,<sup>42</sup> is similar to *Nelkin* in that it concerned certain stockholders who were seeking to dissolve the corporate form. In *Lewis*, the corporation was formed by the merger of two companies. The Lewis brothers owned the stock of one of the companies, and Steinhart and Simon owned that of the other. Each of the two groups held fifty percent of the stock of the corporation resulting from the merger, and the four stockholders were the sole directors. There was an agreement that provided that if any one of the four decided to withdraw from the business, he was required to offer his stock, pro rata, to the other three. If not accepted by one of them, the stock was to be offered to the corporation. If the corporation did not accept, it was to be dissolved.<sup>43</sup>

According to the court, a major difference arose between the two groups, and one of the Lewis brothers, Martin Lewis, offered his stock proportionately to the other three. His brother refused his proportionate

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nism that would ordinarily be provided for in such a situation.

<sup>39</sup> N.Y. Bus. Corp. Law § 1104-a (McKinney 1986).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* A companion provision, N.Y. Bus. Corp. Law § 1118 (McKinney 1986), allows the corporation, or one or more other stockholders, to respond to the petition for dissolution by purchasing the petitioner's stock at fair value within 90 days of the filing of the petition and also allows the court to determine fair value if the corporation or other stockholders and the petitioner cannot agree. For an analysis of the legislative solution, see Davidian, Corporate Dissolution in New York: Liberalizing the Rights of Minority Shareholders, 56 St. John's L. Rev. 24 (1981).

<sup>42</sup> 40 A.D.2d 817, 338 N.Y.S.2d 552 (1972) (per curiam).

<sup>43</sup> *Id.* at 818, 338 N.Y.S.2d at 554 (Steuer, J., dissenting).

share, probably by plan, which apparently frustrated that option.<sup>44</sup> In accordance with the agreement, Martin then offered his stock to the corporation. At the meeting called to accept or reject the offer, neither of the Lewis brothers attended, and therefore a quorum could not be obtained.<sup>45</sup> In the action, Steinhart and Simon challenged the intentional paralysis of the business and the frustration of the corporate purpose.<sup>46</sup> The Appellate Division sustained the right (with one judge forcefully dissenting) of the Lewis brothers to frustrate the purposes of the contract and to compel dissolution.<sup>47</sup>

From the brief decision, one can only speculate that the Lewis brothers felt they would be better off either dissolving the corporation and taking back the business they had contributed (which would be the corporate equivalent of a divorce) or forcing the sale of the business to third parties than they would be selling out to their co-venturers, Steinhart and Simon.<sup>48</sup> The case is interesting because the parties made a series of moves, as in a chess game, to get to the corporate equivalent of a stalemate: deadlock, with only one remedy, corporate dissolution. There are innumerable cases in which the parties make a series of moves to effect a change of relative position. While only some have precedential value, all are enlightening.<sup>49</sup> The complexity of the corporate form, even in such a small business, often frustrates contractual arrangements.

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<sup>44</sup> See *id.*

<sup>45</sup> *Id.*

<sup>46</sup> See *id.* at 817-18, 338 N.Y.S.2d at 553-54.

<sup>47</sup> *Id.*

<sup>48</sup> See *id.* at 817, 338 N.Y.S.2d at 552.

<sup>49</sup> For example, in *Katzowitz v. Sidler*, 24 N.Y.2d 512, 249 N.E.2d 359, 301 N.Y.S.2d 470 (1969), there were three stockholders who had been doing business together in various corporate ventures for more than 25 years when personal disputes affected their business relationships. There were \$2,500 in fees owing to each of the stockholders, which two of the partners wanted to reinvest in the business. The third refused to reinvest the fees. See *id.* at 516, 249 N.E.2d at 362, 301 N.Y.S.2d at 474. Two of the principals caused the corporation to declare a dividend to each of the stockholders of \$2,500. The two then caused the corporation to sell common shares, subject to the preemptive rights of all stockholders to participate ratably. The price of \$100 for the shares was substantially under the book value of the outstanding shares. *Id.* The dissident stockholder director took the dividend and did not reinvest the money, as the other two stockholders knew he would. One year later the stockholders liquidated the corporation, and the two principals received \$18,885 for their shares; the stockholder who had refused to reinvest received only \$3,147 for his shares. *Id.* at 517, 249 N.E.2d at 362, 301 N.Y.S.2d at 474. A series of clever strategic moves by the two principals, reflecting their psychological assessment of the third party's reactions, led to an interesting lawsuit about the scope and limits of preemptive rights. The New York Court of Appeals, however, seeking a fair result, held that when the issuing price for shares in a close corporation is markedly below book value and when certain stockholder-directors, but not others, would benefit from such issuance, the directors must show that the price is within a range justifiable by valid business reasons. *Id.* at 520, 249 N.E.2d at 364, 301 N.Y.S.2d at 477. This case created unsophisticated and troublesome law in the area of corporate finance.

*Case 4*

The three cases described above concern stockholders trying to get out of the corporate form or to get cash for their investment. The final case deals with a stockholder trying to remain a stockholder. In *Bryan v. Brock & Blevens Co.*,<sup>50</sup> Robert Bryan was employed by Brock & Blevens for approximately fifteen years, rising from his entry position to Executive Vice President and a member of the Board of Directors. He resigned in a management dispute.<sup>51</sup> He was determined to maintain his status as a stockholder, although the company management insisted that there was a long-standing policy of having only active employees as stockholders.<sup>52</sup> Pursuant to this policy, the management and all other employees formed a shell corporation, merged it into Brock & Blevens, and squeezed out Bryan at what they regarded as a fair price.<sup>53</sup> Bryan challenged the merger transaction in federal district court under section 10(b) of the Securities Exchange Act of 1934<sup>54</sup> as a fraudulent device and a manipulative use of the Georgia merger statute,<sup>55</sup> which was patterned after the New York merger statute.<sup>56</sup> The gravamen of the complaint was breach of fiduciary duty.<sup>57</sup> Finding that there was no business purpose for the merger, the court held for Bryan and forced the corporation to retain him as a stockholder.<sup>58</sup>

## THE TROUBLESHOOTER'S ANALYSIS

Analysis of the cases described above need not end at the point of litigation, leaving the student to parse through the reasons for the dispute and determine which side had better arguments for a fair resolution. Each case is subject to a further analysis—that of the hypothetical troubleshooter who is called in by one of the parties after problems have developed. This analysis looks to the reasons why the parties first came together and the objectives they tried to achieve by entering their arrangements, and explores the risks the parties and their counsel consciously assumed and the rewards they perceived the arrangements would bring. Such an analysis exposes the problems that the parties faced when they entered into their arrangements and scrutinizes the reso-

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<sup>50</sup> 490 F.2d 563 (5th Cir.), cert. denied, 419 U.S. 844 (1974).

<sup>51</sup> *Id.* at 565.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 567.

<sup>54</sup> 15 U.S.C. § 78j(b) (1982).

<sup>55</sup> *Bryan*, 490 F.2d at 567-68.

<sup>56</sup> N.Y. Bus. Corp. Law § 623 (McKinney 1986); see *Bryan*, 490 F.2d at 569.

<sup>57</sup> *Bryan*, 490 F.2d at 570-71.

<sup>58</sup> *Id.* at 571. The holding in *Bryan* was subsequently rejected in *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977), which held that there is no federal cause of action under § 10(b) of the Securities and Exchange Act of 1934 for breach of fiduciary duty.

lutions they chose. The compromises resulting from negotiated solutions are often evident, including the use and abuse of negotiating leverage or changes in such leverage in the course of the transaction.<sup>59</sup> This analysis allows one to determine whether the dispute occurred because the parties had an inherently limited vision of future events (or treated certain of the risks as too remote to provide for in the arrangements) or whether the dispute could have been anticipated. Our perspective in a trouble-shooter's analysis is that of the sophisticated, knowledgeable counsellor examining matters after the fact. If the problem that arose could have been anticipated, there may have been a failure of planning. If the problem could not reasonably have been anticipated (or was too remote a risk to provide for specifically), one has to explore whether other procedures customarily adopted by parties entering into similar arrangements would, in a meaningful way, have allowed the parties to avoid the problems that later led to the dispute or have resolved the dispute itself once it arose.

Examined from this perspective, the cases presented here for the most part represent failures of planning. Failure in each case is related to the lack of thought, at the time the initial arrangements were made, given to what would happen to the parties over time. In each of the cases the dispute arose from the limits of the parties' vision—but more skillful planners would have anticipated the problems. There is a simple remedy in each case (apparent even without the benefit of hindsight) which, had it been applied at the outset, would have achieved a reasonable result. For example, the relentlessness of the tontine in the *Allen* case and the years of unproductive investment in the *Nelkin* case could have been substantially ameliorated by placing a time limit on the arrangements, such as five or ten years.<sup>60</sup> In *Nelkin*, Charles Richter could have avoided the problem he was later to face if his shares in the realty company had been held as an asset of Chatham so that he would have received value for the realty shares when he sold his interest in Chatham.<sup>61</sup> In *Lewis*, Steinhart

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<sup>59</sup> In all the cases, access to the courts can be looked upon as a negotiating lever in situations in which the plaintiff (in *Bryan*, the defendant) has lost substantial bargaining power.

<sup>60</sup> Even if one views the stockholder arrangement in *Allen* as indicating that the parties intended the rewards of stock ownership to come from a favored position as a customer in dealing with Biltmore Tissue and realized that such favored dealing would limit the value of the stock, one must determine whether the arrangement reflected the parties' limited perception. Were the original stockholders unable to perceive the possible independent value of the company or was this value one that they were willing to forego in favor of the interests of those continuing as stockholders in the corporation?

<sup>61</sup> It is possible, of course, that Richter's problem reflected his own incorrect perception of likely future events. An alternative interpretation of the facts of the case is that in 1946, when Richter sold his stock in Chatham and retained his stock in the realty company, he intentionally held onto the stock of the realty corporation, speculating that a post-World War II rise in real estate values would make the sale of the building likely. (There may always have been an

and Simon obviously could obtain the money needed to buy out the Lewis brothers (otherwise they would not have sued to prevent dissolution), but the arrangement either did not allow them to pool their capital with the corporation's capital, did not provide for non-pro-rata purchases if one of the parties declined to purchase, or did not provide for purchases within groups of stockholders to avoid a change of control.

These failures could have been corrected. In *Bryan*, the corporate purpose of having only active employees as stockholders could easily have been implemented by providing that the employee had to sell to the corporation or the other stockholders all stock held, at its appraised value, at the time of termination of employment. Management probably articulated this corporate purpose only after Bryan had resigned. Advance planning would have avoided the creation of bad law.

### THE PLANNER'S APPROACH AND ANALYSIS

For the planner, the cases are not only the subject matter of retrospective analysis, but also an opportunity to explore a problem of organization or a type of transaction that others have faced, and to derive from their experience a guide to future planning. The cases become a means of exploring the problems of limited vision, and, as such, each of the cases yields rules of application. Some of these rules are procedural and others substantive, but each conveys legal experience and provides guidance for dealing with limited vision. To the student of planning, these rules are as important as the holding in each case.

We have extracted a number of rules from the cases, both primary guidelines and correlative ones. None of the rules are definitive; they are merely suggestions for responding to complex situations. No one rule or guideline is more important than any other, nor are they presented in a sequence in which any one rule is meant to be derived logically from any other. The importance of any rule depends upon the purpose the parties seek to achieve.

*Rule 1.* The law's view of the degree of oppression that constitutes behavior for which a remedy will be provided is much higher than any shareholder would ordinarily tolerate as the threshold for a remedy.<sup>62</sup> Accordingly, the parties should determine the limits of their tolerance and provide contractually for the appropriate remedies once that thresh-

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expectation among the stockholders that the building would eventually be sold.). In that case, the limits of his vision explain the dispute. Richter, in effect, held a warrant on a portion of the equity of the realty corporation. The dispute arose later, because Nelkin had received no compensation on the termination of his tenancy and was left having to rent space elsewhere at fair market value.

<sup>62</sup> See, e.g., *Nelkin v. H.J.R. Realty Corp.*, 25 N.Y.2d 543, 255 N.E.2d 713, 307 N.Y.S.2d 454 (1969).



old is reached.

*Rule 2.* Any arrangement that lasts forever will eventually cause mischief.<sup>63</sup> Accordingly, time limits should be considered in all arrangements.

*Rule 3.* Joint ventures with equal ownership require a mechanism to break a deadlock.<sup>64</sup> If no such mechanism is provided at the outset, the venture will become merely a temporary arrangement similar to a tenancy at will, and the parties must accept eventual corporate dissolution, which will limit the scope of the enterprise and the capital committed to it.

*Rule 4.* If the parties can dissolve the corporate arrangement by being deadlocked, contractual arrangements linked to the corporate form will be totally frustrated.<sup>65</sup> This rule can be considered a corollary to Rule 3 above, although it has a larger scope. Moreover, there is an additional corollary: If there is a significant loophole in any arrangement, that loophole will in time be discovered and thereafter exploited.<sup>66</sup>

*Rule 5.* Unless an enterprise is prepared to have stockholders who have no connection with the business, there must be buyout arrangements.<sup>67</sup>

*Rule 6.* A shift (even a slight shift) in need, loyalty, or point of view in any member of a group can cause a change of corporate control. Inevitably, people die. Accordingly, members of the majority can become members of the minority.<sup>68</sup> (If one of the Lewis brothers had had a falling out with the other, corporate control would have changed, or if Chatham had sided with Richter,<sup>69</sup> control would have changed.) In all cases, the rights of the minority must be fully understood, for in some cases those rights may become the rights of former members of the majority. As a corollary: In counting heads among stockholders, you have to count the number of shares held by each group, not the number of shares

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<sup>63</sup> See, e.g., *Bryan v. Brock & Blevens Co.*, 490 F.2d 563 (5th Cir.), cert. denied, 419 U.S. 844 (1974); *Nelkin*, 25 N.Y.2d 543, 255 N.E.2d 713, 307 N.Y.S.2d 454; *Allen v. Biltmore Tissue Corp.*, 2 N.Y.2d 534, 141 N.E.2d 812, 161 N.Y.S.2d 418 (1957).

<sup>64</sup> See, e.g., *Lewis v. Steinhart*, 40 A.D.2d 817, 338 N.Y.S.2d 552 (1972) (per curiam).

<sup>65</sup> See, e.g., *id.* at 817-18, 338 N.Y.S.2d at 553-54; *Nelkin*, 25 N.Y.2d at 545, 255 N.E.2d at 715, 307 N.Y.S.2d at 456.

<sup>66</sup> See, e.g., *Lewis*, 40 A.D.2d at 818, 338 N.Y.S.2d at 554.

<sup>67</sup> See, e.g., *Bryan*, 490 F.2d at 566-67.

<sup>68</sup> See, e.g., *Nelkin*, 25 N.Y.2d at 544-45, 255 N.E.2d at 714-15, 307 N.Y.S.2d at 455-56; *Lewis*, 40 A.D.2d at 818, 338 N.Y.S.2d at 554 (Steuer, J., dissenting). There may also be family ties to contend with. See, e.g., *Lewis*, 40 A.D.2d at 818, 338 N.Y.S.2d at 554 (Steuer, J., dissenting) (the Lewises); *Nelkin*, 25 N.Y.2d at 544 n.1, 255 N.E.2d at 714 n.1, 307 N.Y.S.2d at 455 n.1 (the Horowitzes).

<sup>69</sup> This did not happen, but it helps to explain National's willingness to allow Chatham to occupy additional space in the building shortly before the start of litigation. See *Nelkin*, 25 N.Y.2d at 547, 255 N.E.2d at 715, 307 N.Y.S.2d at 457.

held by individuals.<sup>70</sup>

*Rule 7.* The majority can oppress the minority, and in an infinite number of ways.<sup>71</sup> For example, the majority can siphon off earnings through salary increases<sup>72</sup> and dilute the equity of the minority by granting options. Claims of breach of fiduciary duty may not always provide a remedy when a remedy is needed.<sup>73</sup> Also, as a corollary, the majority can always feel justified in eliminating the minority and is capable of doing that at times convenient to the majority (in terms of value of the enterprise) and not convenient to the minority.<sup>74</sup> The minority's planning strategy must take into account the areas of the minority's greatest vulnerability.

*Rule 8.* The minority can oppress the majority, but only in a limited number of ways.<sup>75</sup> It is therefore often possible to anticipate the strategy that will be followed by the minority. Failure so to anticipate can result in a failure of planning.

*Rule 9.* Any arrangement that does not provide for changes in the value of an enterprise over time will become oppressive to someone.<sup>76</sup>

*Rule 10.* Parties differently situated require different treatment.<sup>77</sup> In *Nelkin*, most of the parties held the stock of the realty corporation separately, which caused a significant problem. As a corollary, if there is more than one point of view, which there usually is in these arrangements—for example, the difference between the money and the management—there should be more than one lawyer representing the points of view rather than one lawyer trying to seek neutral principles for all.

*Rule 11.* Objectives that are fundamental to the organization of the

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<sup>70</sup> See *Lewis*, 40 A.D.2d at 818, 338 N.Y.S.2d at 554 (Steuer, J., dissenting). The stockholder agreement in *Lewis* mistakenly assumed that four 25% stock holdings needed to be balanced. In fact, there were two groups of 50% that required balancing. As a result, the stockholder agreement was doomed to fail from the start. If a member of one group was obliged to offer his shares pro rata to all the other stockholders, by being bought out he would be transferring control to the rival group.

<sup>71</sup> See, e.g., *Bryan*, 490 F.2d at 564-67; *Nelkin*, 25 N.Y.2d at 544-45, 255 N.E.2d at 714-15, 307 N.Y.S.2d at 455-56; *Kruger v. Gerth*, 16 N.Y.2d 802, 210 N.E.2d 355, 263 N.Y.S.2d 1 (1965); *Leibert v. Clapp*, 13 N.Y.2d 313, 196 N.E.2d 540, 247 N.Y.S.2d 102 (1963). See generally F. O'Neal & R. Thompson, *Oppression of Minority Shareholders* (1985) (two-volume treatise focusing on squeeze-outs and other oppressive conduct in incorporated business enterprises).

<sup>72</sup> See, e.g., *Kruger*, 16 N.Y.2d at 802, 210 N.E.2d at 355, 263 N.Y.S.2d at 1.

<sup>73</sup> See text accompanying note 62 *supra*.

<sup>74</sup> See, e.g., *Bryan*, 490 F.2d at 567 (describing one method of freezing out the minority).

<sup>75</sup> See, e.g., *id.* at 566-67 (minority shareholder refused three buyout offers from the company).

<sup>76</sup> See, e.g., *Nelkin*, 25 N.Y.2d at 544-45, 255 N.E.2d at 714-15, 307 N.Y.S.2d at 455-56; *Allen v. Biltmore Tissue Corp.*, 2 N.Y.2d 534, 535-36, 141 N.E.2d 812, 813-14, 161 N.Y.S.2d 418, 419-20 (1957).

<sup>77</sup> See, e.g., *Nelkin*, 25 N.Y.2d at 544-45, 255 N.E.2d at 715, 307 N.Y.S.2d at 456.

enterprise should never be changed without the consent of all parties.<sup>78</sup> This rule can be considered a corollary of Rule 7.

*Rule 12.* The manager of the corporation has no legal obligation to distribute the wealth of the corporation.<sup>79</sup> The corollary: if the parties are not equally situated, there is room for oppression.

*Rule 13.* Employment is controlled by the majority.<sup>80</sup>

*Rule 14.* If the parties do not provide a means for the corporation or for other stockholders to buy the shares of minority stockholders, there may never be a market for the shares.<sup>81</sup> This is exemplified by the dilemma into which Richter and then Nelkin fell.<sup>82</sup> Contrast Rule 5, where the minority neither needs nor desires a market for the shares.

*Rule 15.* Any solution that looks to the courts is a lengthy and costly process. Moreover, the parties rarely go to court when the shoe first begins to pinch. All the cases illustrate this rule. A corollary: agreements rarely succeed in documenting the parties' arrangements fully. By the time the controversy reaches the courts, the documents often seem opaque with regard to what the contracting parties were attempting to accomplish. All the cases illustrate this point.

#### THE SCOPE OF THE SUBJECT MATTER

We have only scratched the surface with respect to the issues raised by the four cases. They represent an introduction to the subject matter and a point of departure for further study. The cases that would logically follow *Bryan* explore going-private transactions and stockholder squeeze-outs and thus anticipate Rule 13e-3 under the Securities Exchange Act of 1934,<sup>83</sup> which marks the coming together of fiduciary standards under state corporate law and administrative oversight under federal law.<sup>84</sup> Going-private transactions, such as leveraged buyouts,

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<sup>78</sup> See *id.*

<sup>79</sup> See, e.g., *id.* at 545-46, 255 N.E.2d at 716-17, 307 N.Y.S.2d at 456-57; *Kruger v. Gerth*, 16 N.Y.2d 802, 802, 210 N.E.2d 355, 355, 263 N.Y.S.2d 1, 1 (1965).

<sup>80</sup> See, e.g., *Bryan v. Brock & Blevens Co.*, 490 F.2d 563, 565 (5th Cir.), cert. denied, 419 U.S. 844 (1974).

<sup>81</sup> See, e.g., *Nelkin*, 25 N.Y.2d at 545, 255 N.E.2d at 715, 307 N.Y.S.2d at 456.

<sup>82</sup> See *id.* (when Richter and Nelkin offered to sell their stock to majority shareholders, majority offered to pay only what Richter and Nelkin had originally paid for the stock, 27 years earlier).

<sup>83</sup> 17 C.F.R. § 240.13e-3 (1987).

<sup>84</sup> Among the cases that lead from *Bryan* to Rule 13e-3 are *Santa Fe Indus. v. Green*, 430 U.S. 462 (1976) (Supreme Court reluctant to use Rule 10b-5 to federalize body of state corporate law dealing with securities transactions); *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977) (parent corporation may not effect merger involving subsidiary for sole purpose of eliminating minority without valid business purpose); *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (business purpose requirement with respect to parent-subsidiary mergers no longer in effect in Delaware), and two Securities and Exchange Commission proceedings, *In re Woods Corp.*, Exchange Act Release No. 15,334, 16 SEC Docket 166 (Nov. 29, 1978) (enforcement

raise, often on a much larger scale, the issues of organizing close corporations with complex capital structures.<sup>85</sup>

The four cases also introduce transaction planning concepts, the various methods of organizing entities around the money and the brains (common structuring problems in leveraged buyouts). Inherent in all these cases is an understanding of the risks that are involved and the problems that ensue when the parties have different objectives and different capital commitments. Exploring this subject matter could lead one to other cases, which would reveal further experience and develop additional guidelines and correlative rules.

### A NEW PERSPECTIVE

The four cases are considered here as cases involving the close corporation. Each, however, involves at least one other subject matter: *Allen*, from the plaintiff's perspective, can be seen as a lesson in estate planning; *Nelkin* is a real estate transaction or a case involving tax plan-

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proceeding finding substantive violation of Federal disclosure rules in public filings relating to going-private transactions structured under state corporate law); *In re Spartek Inc.*, Exchange Act Release No. 15,567 [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,961 (Feb. 14, 1979) (enforcement proceeding finding substantive violation of Federal disclosure rules in public filings relating to going-private transactions structured under state corporate law). *Bryan* can also profitably be seen in the context of cases involving partnership arrangements. Partnerships provide a legal context different from that of the close corporation. As a result, similar problems in the partnership context, such as the illiquidity of the investment and the death of one of the principals, can often have solutions different from those in the corporate context. This, in turn, provides an insight into the effect of various rules on the planning and thus the negotiations of the parties.

<sup>85</sup> We note that very few major law schools continue to teach close corporation or partnership law, and yet these courses are ideal for teaching students the elements of planning. Moreover, these cases are as important for practice as the latest pronouncements of the Delaware Supreme Court on the business judgment rule. The traditional subject matter of such courses does not readily indicate that partnerships and close corporations have become structures that encompass more than small businesses; they are often the vehicle of choice for entities that have capitalizations in the hundreds of millions or billions of dollars and, as a result, are significant for the most sophisticated corporate practices. Perhaps a change of course title would attract more attention from law schools as well as from students.

In a close corporation form of organization, the capital structure of a typical leveraged buyout reveals the problems in planning that confront the counsellor in devising stockholder arrangements. For example, in a leveraged buyout, the stockholders of the continuing corporation following the buyout often consist of members of senior management of the company, the investment bank that structured the buyout, and the institutional lenders to the transaction who have provided subordinated debt. Thus, in the 1985 leveraged buyout of Levi Strauss & Co., the equity of a major corporation was purchased by fewer than 60 persons. The executives are likely to have some sort of stock option program, and the subordinated lenders may have convertible securities. There may be several classes of common stock and preferred stock. A detailed stock subscription agreement or stockholders' agreement is required to provide for the many future events that will affect these parties' relationship as stockholders. For example, executives will retire or otherwise terminate employment, the company may be sold as an entirety, its stock may again be offered to the public, or it may again be recapitalized.

ning;<sup>86</sup> *Lewis* is a case study in mergers and acquisitions involving the failure of a merger of equals; and *Bryan* can be seen as a study in executive compensation from the management's point of view, with the attempted squeeze-out of the minority stockholder revealing the failure of the compensation policy. *Bryan* also demonstrates how a plaintiff could take advantage of then-existing interpretations of federal securities laws to pursue a claim in federal court, a forum he evidently thought would be more sympathetic to his position than state court.

The problems these cases address, therefore, are common to such far-ranging subjects as estate planning, taxes, corporate organizations, real estate financing, domestic relations, and federal jurisdiction. All future-looking matters have common planning elements.<sup>87</sup> The cases we have chosen should be seen as examples and are not meant to suggest limits to the applicability of the analysis. Accordingly, the analysis that we have made of the cases in the close corporation can be made in other areas of substantive law.

If the cases are analyzed from the perspective of the legal experience they convey and are explored from the troubleshooter's perspective, looking back from the onset of litigation, and the planner's perspective, looking to the time the agreements were first negotiated and searching for rules of application, they lead to an appreciation of the difference in quality between well and poorly thought out arrangements.

Unless you examine the cases for their planning content, you may find contracts documenting common business arrangements to be completely indecipherable. The troubleshooter's and planner's analyses of the cases admit one to the world of those who negotiate contractual arrangements that are meant to document and apportion the risks that the parties face. They also admit one to the world of counselling and the problems caused by the planner's limited ability to foresee all possible risks and the practical constraints on his drafting, such as the conscious decision not to provide for risks that are perceived as remote.<sup>88</sup>

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<sup>86</sup> By holding the stock of the realty corporation as individuals, Epstein, the Horowitzes, and Richter may have intended, in the event the building was sold, to avoid paying tax on the gain at the intermediate corporate level.

<sup>87</sup> Louis Brown has suggested that "[t]hinking like a lawyer in the realm of future facts" is an undeveloped opportunity for the legal curriculum to explore. Brown, *supra* note 2, at 1347 n.9; see also Brown & Dauer, A Synopsis of the Theory and Practice of Preventive Law, in *The Lawyer's Handbook* § A, ch.3, at A3-1 (A.B.A. rev. ed. 1982 Supp.). Brown and Dauer, in proposing a discipline of "preventive law," note that planning concerns cut across various areas of practice. "Although drafting wills is in substance a very different thing from forming multiple-corporation joint ventures, there are nevertheless techniques of planning (and of thinking about planning) common to all future-looking transactional matters." Brown & Dauer, *supra*, at A3-2.

<sup>88</sup> Creating any arrangement that entails the parties' exposure to risks from changing circumstances can be viewed as a process of attempting to encompass and account for such risks.

The cases provide something more for both the counsellor and the advocate: procedural experience. For example, they provide an understanding of what constitutes the irreparable injury necessary to obtain an injunction and the delay inherent in trying to obtain relief from the courts.<sup>89</sup> Implicit in the guidelines listed above is a series of judgments about the way the courts function, an understanding that is essential to counselling.

The text of an agreement is rarely, if ever, examined in law school. Courses in contracts deal with the construction of contractual obligations and remedies for breach.<sup>90</sup> The type of analysis of the cases that has been offered in this Essay is a necessary predicate for any course on counselling or negotiation. Without such analysis, counselling and negotiation have no content; they are merely procedural subjects. And, as such, they are not very meaningful.

One cannot become a planner without engaging in planning, in facing problems and solving them. Experience does not develop without trial and error as necessary elements of the process: we have to see and experience the limits of our vision. This explains the strong interest on the part of students in clinical education.

But there must first be an understanding that people's objectives directly affect the applicability and meaning of the rules they use. For example, determining whether a corporate structure should transcend the

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One can think of the process, metaphorically, as creating a series of concentric circles, with the more remote risks in the arrangements encompassed by the outer rings. The greater the number of circles, the more complex are the arrangements, and the more difficult are the terms to negotiate. Every circle reflects compromises, and the greater the number of compromises, the more likely one or more of the parties will become dissatisfied. Arrangements that cover certain remote risks and ignore others can be seen metaphorically as ellipses. A student should be given the opportunity to explore the outer rings and make perfect circles of the ellipses presented by the cases. In practice, the most elegantly executed arrangements cover only real risks and have a small number of perfect circles. The ability to construct such arrangements comes with experience.

Even an apparently minor concern, such as the use of a severability clause in a contract, opens up options for the planner and admits the student to a view of the series of concentric circles that the planner manipulates in defining the essence of the bargain or the arrangement (whether the solution is contractual or legislative). The severability clause is a device to save part of an arrangement when other parts are determined to be unenforceable. How effective is the clause? How adventuresome can a planner be in drafting these clauses without jeopardizing the whole? How deep can you cut and still not cut out the essence of the contract? All of these are issues the planner must confront in making his arrangements.

<sup>89</sup> See, e.g., *Nelkin v. H.J.R. Realty Corp.*, 25 N.Y.2d 543, 255 N.E.2d 713, 307 N.Y.S.2d 454 (1969).

<sup>90</sup> The typical first-year contracts course, it has been noted, is an abstraction dealing with principles of contract law and with little reference to the particular types of contracts being discussed. See Gorman, *supra* note 2, at 612-13. We are not suggesting here that such an approach should change the first-year course. It is in the advanced courses that the content of the contracts—in other words, their substance—deserves further consideration.

impermanence of the parties' relationship or whether it should terminate at the whim of any one party requires a resolution of points of view and an accommodation of the parties to various competing rules. In every arrangement one has to account for the fact that people die, they may change their homes and their businesses, they make friends and enemies, they fall in and out of love, and they are subject to the economic forces that affect everyone, like the rise and fall of oil prices. The cases provide experience as to these matters and more. It is the awareness that change affects arrangements that makes lawyers worldly. A law school education should open the young lawyer's eyes to the consequences of change. That kind of intellectual awareness creates the apperceptive mass for the knowledgeable planner, allowing an extension of the limits of vision.

In law school, courses rarely explore the way different objectives interrelate with rules and the various kinds of strategies and resolutions that can be developed where parties have competing desires. And that is what students often look for when they seek clinical experience, for it is what will occur in practice. However, without the intellectual analysis of the layer of experience offered by cases looked at from the troubleshooter's and the planner's point of view, clinical experience provides only limited data. There is often not enough understanding of the context of the problem faced in the clinic to make the problem a real learning experience.

A course directed at troubleshooting and planning may require new textbooks. The experience students require is set forth in the cases. But the cases in typical law school texts are often edited extensively, to emphasize the conflicts in the arguments. They rarely contain the underlying documents, the materials that form the basis of contention. A coursebook designed for the teaching of counsellor's law might well provide the agreements themselves following the cases so that the subject matter that formed the arrangement and caused argument can be understood. Disputes, as we have shown, focus attention on the objectives of the parties and thus on their planning. The documents show the risks that were covered and the risks that were taken in the initial planning stages. In finding the objectives and re-creating the planning process, we learn from the failures of others.

Law schools have for years been trying to develop a viable curriculum for the third year, when the core courses have been mastered and summer jobs have given students a taste of the profession. The suggestion made in this Essay could furnish significant content for the end of the second year and part of the third year of law school. Whereas the typical first-year course presents a large number of cases heavily edited to stress particular legal points, a course in planning would present a relatively small number of cases to be analyzed in detail, so that the situa-

tions can emerge in the round. Viewed from the counsellor's perspective, the cases hold a rich vein of experience that can provide intellectual content and give the student a sense of what can make the practice of the profession rewarding. One can also begin to sense the excitement of dealing with the limits of one's vision in making arrangements and seeking solutions.<sup>91</sup>

This brings us to the point of redefining the role of the counsellor and counsellor's law. The counsellor's role is misunderstood in the traditional legal curriculum. In the definitional model, based on advocacy, the counsellor (or office lawyer, to use the more derogatory term) has little role in the evolution of law. In fact, the counsellor can be bold and aggressive and can choose to pursue litigation as well as try to avoid it.<sup>92</sup>

All lawyers function as both counsellors and advocates. Advocates have to advise clients as to projected outcomes, the risks inherent in pursuing a litigation solution, and the possible results that follow from a negotiated settlement or solution. The advocate in that role first takes up the troubleshooter's position and then becomes a planner. The counsellor, regardless of whether he ever goes into court, is guided in creating the arrangements by his view of the development of the law in the legislature and in the courts and the consequences of court action. He is also an advocate for the client in a variety of contexts. There is thus a cross-over in terms of function. The good litigator is a sensible counsellor, and the good counsellor is sensible as to the potential benefits and detriments of litigation. There is much more overlap than would appear on the surface or in the law school classroom. And for both the counsellor and the advocate, the cases provide the experiential data (as well as the rules) for decision making.

### CONCLUSION

The dichotomy between advocate's law and counsellor's law that is expressed and experienced in law school is a construct of legal education and is never so starkly experienced after the student graduates. The reason is that the cases read in law school are studied mostly for the quality of argument and not for the content and data that are essential for the

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<sup>91</sup> Robert A. Gorman has stressed the need for truly advanced law school courses, noting that the typical "advanced" course deals with more of the same kinds of materials handled in the introductory course. According to Gorman, a "[t]ruly 'advanced' study of a field must offer a sense of progressive challenge, and of increased methodological diversity and sophistication." Gorman, *supra* note 2, at 612.

<sup>92</sup> While it is the conventional view that the litigator, rather than the counsellor, makes law, in practice it is often the reverse. The counsellor can make law by choosing to pursue litigation, with the litigator merely carrying out the chosen course. Planners thus make law not only as reformers through the legislative and law-reform-commission routes, as has been noted, see Korngold, *supra* note 2, at 623, but also as corporate practitioners.



lawyer who uses the law. When the cases are used as a source of experience, the dichotomy between advocate's law and counsellor's law is revealed as an arbitrary construct. When the cases are so used, the lawyer becomes a troubleshooter and a planner (more worldly than his fellows) with the ability to get things done.

