Editor’s Note: Entrepreneurship at Any Age

Over a period of two months this winter I was proud to be a mentor of a middle school student entrepreneur in the Young Entrepreneurs Academy (YEA!), a program sponsored by the local chapter of the National Association of Women Business Owners (NAWBO). Once a week we would meet and work on developing her business plan for an enterprise of her own making and concept which will culminate in a pitch to investors this March. YEA! is a program that teaches students in grades 6-12 how to start and run their own businesses by helping to brainstorm ideas, write a business plan, pitch their plan to investors for funding, and actually launch their own business.

As an attorney specializing in taxation and corporate transactions, my clients have years of business experience behind them. Working with young people in the YEA! program was an experience that brought me back to my earliest motivations as an attorney: to help others fulfill their own dreams. Helping my young mentee create a new enterprise from start to finish was an education for me as well. I was impressed by the infinite number of creative business ideas and the contagious energy of young people. I am aware that for most of us our time is our most precious commodity. Let me say that working with a young woman these past few months turning her ideas into a real business plan was for me richly rewarding.

The Insider is an opportunity to share updates on our section activities, our personal achievements and news of interest to business lawyers. The Business Law Section is very active throughout the year with speakers, awards, and social networking. I hope to hear from you in our next edition.

Phyllis Horn Epstein, Esquire, Epstein, Shapiro & Epstein, PC, 1515 Market Street, Philadelphia, PA 19102. Phyllis@eselaw.com

Business Law Section's 2013 Award Recipients

The Business Law presented the Dennis H. Replansky Memorial Award to Morgan Lewis partner, Howard L. Meyers at the Section’s Annual Dinner on February 4, 2014. Howard Meyers, through his years of accomplishments and service, continues the line of award
recipients who exemplify the abilities and qualities that honor Dennis Replansky’s memory, and whose lives are exemplars to other lawyers.

Ballard Spahr partner, Leslie E. John, received the inaugural Albert S. Dandridge, III Business Law Section Diversity Award intended to publicly acknowledge, recognize and honor an individual or entity that (i) has demonstrated a strong commitment, and has made a substantial contribution, to diversity; and (ii) promotes full and equal participation and inclusion in the legal profession. Ms. John's advocacy for women and diverse lawyers demonstrates her outstanding commitment to diversity and full and equal participation and inclusion in the legal profession.

The 2013 Chair of the Year is Jeffrey L. Vagle. Jeff is Chair of the Cyberspace and E-Commerce Committee (now known as the Cyberlaw Committee). His commitment, leadership and industry are deeply appreciated by the Section and by those who have directly benefitted from the many programs offered by the Committee.

The 2013 Committee of the Year is the Small Business Committee, chaired by Katayun I. Jaffari. The Committee has put on fascinating and well attended seminars that are a genuine boon to the Bar. The Section is enriched by such an active and productive committee.

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On January 29, 2014 the Pennsylvania Board of Governors, acting in lieu of the House of Delegates, approved the following resolutions:

**RESOLVED**, that the Pennsylvania Bar Association opposes any proposed legislation, regulations, or other governmental measures, which would require law firms and other personal service businesses that now compute taxable income on the cash receipts and disbursements method of accounting to convert to the accrual method of accounting, including but not limited to Section 212 of the House Ways and Means Committee’s “Tax Reform Act of 2013” discussion draft bill;

**FURTHER RESOLVED**, that all officers, staff, and other authorized representatives of the Association are hereby authorized and directed to take any and all actions as may be necessary or appropriate to make known to Congress, the Internal Revenue Service, the Treasury Department and all other appropriate persons the opposition of the Pennsylvania Bar Association to the proposed Section 212 of the draft bill and all similar proposals.

The American Bar Association previously adopted the following resolution:

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**ACCURUAL ACCOUNTING FOR LAW FIRMS?**

Section 212 of the House Ways and Means Committee’s Tax Reform Act of 2013 would require all pass-through entities with annual gross receipts in excess of $10 million to use the accrual method of accounting rather than their customary cash receipts and disbursements method of accounting. Because of the negative impact this law would have on law firms, the American Bar Association, as well as the Pennsylvania Bar Association, have expressed their opposition to such a proposal.
RESOLVED, that the American Bar Association opposes Section 212 of the House Ways and Means Committee’s “Tax Reform Act of 2013” discussion draft bill, and any other similar proposed legislation, regulations, or other governmental measures, which would require law firms and other personal service businesses that now compute taxable income on the cash receipts and disbursements method of accounting to convert to the accrual method of accounting;

The difficulties with accrual accounting involve a range of issues including the uncertainty of collection, the uncertainty as to when an attorney must report, particularly if a matter is on appeal, and the inherent conflict in accounting with clients who remain on a cash basis. Some predict that law firms, in response, would require clients to prepay their legal expenses. In any event, the likelihood of paying tax on income that is delayed or never received can inevitably change the practice of law. ……Phyllis Horn Epstein, Esquire

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Governance of Academic Institutions  
By Dan Larkin, Esquire  
Part I

Colleges and universities provide an invaluable contribution by transmitting “the heritage of millennia”i and serving as a “major national asset for this country in the global ‘knowledge economy’”.ii The observations and suggestions that follow value those contributions, are derived from many years of litigation experience, and meant as a litigator’s call to academic faculties, administrators, and trustees alike to value each other’s expertise, acknowledge each other’s authority, and work collaboratively to further those contributions without wasting financial resources and good will in adversarial proceedings undertaken with unsupported assumptions of the obtainable results.

Colleges and universities hurt themselves by overestimating the degree – and nature – of deference that courts will grant them in legal disputes challenging academic decisions. For years I’ve seen academic institutions -- and their faculties advance arguments grounded in misguided assumptions about the rights and privileges they enjoy in court. I say this in the service of the academy’s mission, not as opposing counsel. I regard the judicial system as a great bastion of civilized order. There are disputes on matters of great importance, between men and women of equal good will, that only a neutral forum can resolve. But as lawyers we have the opportunity and the obligation to counsel our clients – faculty, administration, trustees – against the exaggerated sense of the strength of their case that lead to more, not less rancor, and less, not greater, contributions to the common good.

1. “It’s not a contract” Faculty actions against universities frequently cite the university’s handbook as a source of contractual rights. The university often takes the position that even if the institution did not comply with provisions of “the handbook”, those provisions are “not a contract” and the university breached no duty owed to plaintiff. Often that argument rests upon these words from Martin v. Capital Cities Media, Inc.iii:
“Pennsylvania law holds that . . . handbooks are not legally binding on the employer who distributes them. . . . ‘Appellant's unilateral act of publishing its policies did not amount to the “meeting of the minds” required for a contract. The terms of the handbook were not bargained for by the parties and any benefits conferred on it were mere gratuities.”

The university’s difficulty begins when plaintiff’s lawyer fills in the ellipses with the court’s own words – it is “such handbooks” – i.e., “such handbooks” as the very one in question, under the very circumstances present, in Martin, that “Pennsylvania law holds . . . are not legally binding on the employer”. Plaintiff’s lawyer should, with merit, argue that Martin is limited to its own facts and circumstances. The difficulty worsens farther into Martin:

”It is the intention of the parties which is the ultimate guide’, and in order to ascertain that intention, the court may take into consideration the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject matter of the agreement.”

The difficulty increases when plaintiff’s counsel looks beyond Martin. See, for example, The Baltimore and Philadelphia Steamboat Company v. Brown, reaffirming what almost sixty years ago was already long established, clearly settled law that although

“The general rule undoubtedly is, that parole evidence is not admissible to contradict, vary or alter a written instrument . . . But not so where the evidence is not to contradict or vary, but to explain the contract, as when something is omitted, and the like, so as to qualify the tribunal passing upon the writing to interpret it truly according to the intent of the parties.”

More recently, although still more than eighty years ago, In re Porter’s Estate, 110 Pa. Super. 27, 30 (1933), recognized "implied contracts", holding such contracts to be “such as reason and justice dictate, and which the law presumes from the relations and circumstances of the parties.” But perhaps the frailty of the “it’s not a contract” defense is most dramatically seen in a respected trial judge’s response to the plaintiff’s own signature a few fractions of an inch below these words:

“My signature below indicates my acceptance of this appointment . . . I acknowledge that this is not an employment contract . . .”

Defendant’s preliminary objections in the nature of a demurrer were denied. Its subsequent motion for summary judgment did not prevail. (continued on page 9)

COMMITTEE NEWS AND REPORTS AND ACTIVITIES

Editor, Bridget Heffernan Labutta, Esquire, Eckert Seamans Cherin & Mellott, LLC

The Bankruptcy Committee is co-sponsoring a Judges’ Luncheon with the PBA Young Lawyers Division and the Eastern District of Pennsylvania Bankruptcy Conference on May 5, 2014 from Noon to 1pm at the offices of Dilworth Paxson, 1500 Market St, 3500E. The luncheon is brown bag.
The event is intended for first-year through sixth-year associates specializing in the consumer and corporate bankruptcy sectors. The luncheon format provides an informal environment for younger bankruptcy attorneys practicing in the Eastern District of Pennsylvania to converse with the district’s bankruptcy judges. Judges will be available to provide “best practices” tips for younger bankruptcy practitioners.

The luncheon format is designed to keep the event close knit and with a relaxed tone that encourages conversation. As such, admission will be limited to the first 20 attorneys who register. Please RSVP to Evan Miller at emiller@bayardlaw.com.

The CyberLaw Committee will be hosting a two-part symposium at the National Constitution Center this spring, entitled Worthwhile Tradeoffs: Surveillance in a Constitutional Democracy.

Part One will take place on April 17 from Noon to 6:30pm, and will consist of three panels addressing issues arising out of revelations over the past year of formerly secret surveillance programs being conducted by U.S. government agencies, principally the National Security Agency (NSA). These programs have raised fundamental questions about the place of surveillance in a democratic society. Among the topics to be discussed will be: Surveillance, the Constitution, and Reciprocal Trust; Whistleblowing, Leaks, and State Secrets in a Transparent Society; and Digital Civil Disobedience.

Part Two will take place on May 28, 2014 from 6:00pm to 8:30pm, and will host an advance screening of the new film 1971, a documentary which tells the story of the 1971 burglary of the FBI office in Media, Pennsylvania which led to the exposure of the domestic FBI spying operation known as COINTELPRO. A discussion panel featuring the filmmaker, three of the Media burglary team, and their attorney, will follow the screening. Registration details for this program will be available soon.

The Small Business Committee assists business lawyers in Philadelphia and the surrounding counties with the practical delivery of high-quality legal services and relevant counseling to business enterprises. The Committee recognizes that small business leaders rely on their attorneys for advice on a wide range of subjects—from structuring an initial business plan to counseling on exit strategies and our programs keep our members up to date on current, relevant issues.

The main value drivers of the reinvigorated Small Business Committee under the stewardship of former Committee Chair Katayun Jaffari, are solid programming, networking opportunities and member participation. The SBC arranged a series of CLE presentations relevant to the small business attorney for the year 2013. In May, Jodi Bromberg and Kristen Hopkins spoke at a CLE on Benefit Corporations: When the Bottom Line Includes People and the Planet. They explained the benefits of organizing as a benefits corporation, the processing of electing to be a benefits corporation and the distinction between a benefit corporation and a certified B corporation. In September, John Gough presented a CLE on Mediation of Business Disputes Involving Small Businesses. This CLE presentation explored the advantages of mediation to resolve disputes involving small businesses, and described basic elements of the typical
mediation process. In December, Dennis Reardon and Steve Rosard delivered a CLE on *Choice of Entity Issues*, which addressed the tax and non-tax implications of choosing an LLC or an S corporation. In addition to the 2012 kick-off meeting, the Small Business Committee meeting held meetings on topics like *Sales and Acquisitions of Small Businesses*, led by investment banker Susan Freemean. Under Katayun Jaffari’s leadership, 2013 was banner year for the SBC, which was presented with the Committee of the Year Award by the Business Law Section of the Philadelphia Bar Association. The Committee wishes her continued success as a contributing member of the Business Law Section Executive Committee and appreciate the leadership, strength and enthusiasm she has provided to our committee throughout her tenure as chair.

Under the leadership of current Committee Chair Kate Tepper, this year’s Small Business Committee planning meeting was held in February, and its members have put together a promising itinerary for the upcoming year. In connection with Philly Tech Week during the first week of April, the Small Business Committee will host a panel presentation entitled *What Keeps Entrepreneurs Up At Night: A Talk on Legal Aspects of Seed Financing & Other Funding Options*. The panel will discuss the basics of debt and equity financings for early-stage technology companies. Guest panel members will include: Richard Cohen, a partner in the corporate and venture capital groups at Duane Morris, LLP, Robert Borghesi, a corporate and transactional attorney in private practice in Pennsylvania and New York, and Neil Cooper, a partner of Royer Cooper Cohen Braunfeld LLC. Each of the guest panelists regularly counsel emerging growth companies on new venture structuring and formation, corporate strategic planning, and private equity and debt financings. The event is open to entrepreneurs, investors and Philadelphia Bar Association Members. To register for the event, please visit our webpage: [http://www.philadelphiabar.org/page/BLSSmallBus](http://www.philadelphiabar.org/page/BLSSmallBus). *The SBC Philly Tech Week Event will be held from 6:00 pm – 7:30 pm on the evening of April 8, 2014, at the Morris Café, United Plaza Building, 30 South 17th Street, Philadelphia, Pennsylvania 19103.*

In May 2014, the Small Business Committee will hold a CLE titled *The Rise & Fall of Small Empires: Legal & Ethical Issues Surrounding Closely-held Companies at Times of Formation & Distress.* This is a live CLE program that will include ethics credit. The panel will discuss legal considerations in the organization and dismantling of small businesses, with a special focus on ethical issues such as “Who is the Client?” and “Effective Management of Potential Conflicts of Interest.” Panel members include: Michael Adler, Michael Molder, Joanne Murray and Steve Rosard. *The CLE is scheduled for Tuesday, May 13, 2014 from 12:30 pm – 2:00 pm at the Philadelphia Bar Association, 1101 Market Street, 11th Floor, Philadelphia, PA 19107-2911.* To register for the event please visit the webpage: [http://www.philadelphiabar.org/page/BLSSmallBus](http://www.philadelphiabar.org/page/BLSSmallBus).

Additional anticipated Small Business Committee Events for 2014 include a fall meeting in September and an end-of-year CLE on *Accessing Capital Markets Post-Jobs Act: A Discussion of Crowd-Funding and Other Innovations in Fundraising.*

The Small Business Committee has been fortunate and successful engaging its membership such that the bulk of its programs have been organized and presented by its own members. They leverage the expertise within its committee by providing a platform from which its members can engage our legal and business communities through relevant and lively presentations. They have been successful in increasing our membership numbers and our diversity. Most notably, they’ve
observed increased interaction and engagement with regional law schools and their student populations. In an effort to increase awareness, engagement and membership, the committee keeps itself open to member suggestions for new presentations and topic discussions. They continue to engage in meaningful ways that assist local business and to work with other committees within the Business Law Section to attain common objectives.

To keep members in the communication loop, the Small Business Committee maintains a robust website, http://www.philadelphiabar.org/page/BLSSmallBus, which keeps members informed of upcoming events, allows them access to the materials distributed during its programs and provides a sense of connectedness through the posting of photographs and other materials from its events. The committee also provides frequent email communication about our initiatives and community opportunities.

MEMBERSHIP NEWS

Lee Applebaum, former Section Chair (2010), will be moderating a panel of 6 judges at the ABA Section of Business Law’s Spring Meeting, for the program: “The Nationwide Innovation of Business and Commercial Courts for Effective Resolution of Business Disputes”; and will be on the panel “Innovations in Resolving Complex Business Disputes,” for which he has also contributed an original paper. In September, Lee will become co-chair of the ABA’s Ad Hoc Committee on Judges Initiative.

***************UPCOMING EVENTS***************

Second Annual Giants of the Business Bar
On April 23, 2014 the Business Law Section recognizes legal giants who have had a significant impact on the practice of business law in Philadelphia and beyond. The program will feature William H. Clark, Jr. Drinker Biddle & Reath, LLP who is known for his work writing the Pennsylvania business corporation and other entity laws. This program will take place at Eckert Seamans Cherin & Mellott, LLC, Two Liberty Place, 50 South 16th Street, 22nd Floor, Philadelphia, PA 19102 This event will be held from 5:00 - 6:30 pm. The formal program will run from 5:30 - 6:15 pm. Before and after the program a selection of craft beers along with hors d'oeuvres will be available for everyone to taste and enjoy. There is no cost for members of the Philadelphia Bar Association to attend however registration is required by April 17th.

Commerce Program Judges Forum
The Business Litigation Committee will feature The Honorable Patricia A. McInerney, Coordinating Judge, Commerce Program, Court of Common Pleas, Trial Division-Civil and The Honorable Pamela Pryor Dembe Judge, Commerce Program, Court of Common Pleas, Trial Division-Civil at this program held on Tuesday, April 01, 2014 at 12:30 pm at the Philadelphia Bar Association’s 11th Floor Conference 1101 Market Street. Michael L. Kichline
Dechert LLP, Chair, Business Litigation Committee will moderate a program featuring recent changes in the Commerce Case Management Program of the Philadelphia Court of Common Pleas including the appointment of Judge Dembe to the Commerce Court and the appointment of Judge McInerney as Coordinating Judge of the Commerce Program. The forum will include a short presentation regarding the Commerce Program. The forum presents an opportunity for the business litigation bar and Commerce Program judges to meet in an informal setting. All lawyers who practice or anticipate practicing in the Commerce Program, should enjoy and benefit from this program.

Small Business Committee Panel Presentation

On Tuesday **April 8, 2014** the committee will present a panel on “What Keeps Entrepreneurs Up At Night: A Talk on Legal Aspects of Seed Financings & Other Funding Options” to be held at 6 pm at the United Plaza Building, 30 South 17th Street, Morris Café, Philadelphia. This presentation coincides with Philly Tech Week and is oriented toward the founders of tech start-ups and other high-growth model companies. The panelists will discuss the basics of debt and equity financings for early stage companies. See Committee Reports (above) for more information about this event.

**Steven Goodman: Jazz and Rainmaking Event held March 13, 2014**
Not every document, set of “surrounding circumstances”, “situation of the parties”, or “objects they apparently have in view” will be held to create contractually obligations. But enough will – or will if plaintiff’s case is well argued – to make me believe that “the heritage of millennia” will be more fully and richly, and less expensively, transmitted, if colleges and universities less often relied on the “it’s not a contract” defense and with more nuance and creativity engaged their opponents in conversation before as well as during litigation.

2. “[T]he court does not have the jurisdiction to reconsider the factual determinations of the college's governing body”

If the “it’s not a contract” defense fails, institutions turn to the words above from Osman. Those words seem fairly dispositive. They are not. The sentence from Osman quoted in its entirety reads:

“In such a situation, the Court has no jurisdiction to review the factual determinations of a college’s governing body unless it can be clearly demonstrated that that body violated its own procedures.”

This too is often quoted in support of absolute immunity to judicial scrutiny:

“The court may not conduct a de novo review of the college's decision not to grant tenure, and cannot re-evaluate the decision-making function of the governing board such as how much investigation is necessary and how much weight should be accorded to various evidence”. ibid

That deferential statement too is asked to carry more weight than it can bear. Deference to specialized knowledge used with demonstrable good faith and intellectual rigor to assess performance under agreed criteria by relevant evidence is not deference on the question that should be put – that I put – before the court: is that how the decision was reached?

The cases to which I’ve referred cite Superior Court’s split decision in Baker, affirming the trial court’s entry of summary judgment for the College. Academic institutions focus on the sentence I’ve quoted above from the Supreme Court’s affirrnance of the Superior Court order. By focusing on a truncated version of one sentence and a fundamental misreading of another, institutions miss the general rule announced by in Baker and so miss Baker’s true implication:
“We hold that the College had a limited duty to evaluate Baker in good faith which is defined by the terms of the College's contractual undertakings. This is consistent with the general duty of contracting parties to perform their contractual obligations in good faith set forth in the Restatement (Second) of Contracts at section 205: ‘Every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement.’ . . . the College's contract with Baker contained certain undertakings by the College pertaining to the evaluation of faculty members and the faculty member's right to review of unfavorable decisions. The College was required to render a sincere and substantial performance of these contractual undertakings, complying with the spirit as well as the letter of the contract. . . . the evaluation and review process must be honest and meaningful, not a sham formality designed to ratify an arbitrary decision already made.”

Pennsylvania law defines an “arbitrary decision” as one “based on random or convenient selection or choice rather than on reason or nature.” Thunberg v. Strause, et al., 545 Pa. 607, 615, 682 A.2d 295, 299 (1996 Pa); see, Black's Law Dictionary 104 (6th ed., reprinted 1993). In common English usage, an “arbitrary and capricious action” refers to action taken without basis in fact or reasoned judgment. Almost thirteen years after Osman, just shy of twenty seven after Baker, the Supreme Court succinctly stated the applicable law of contract: a faculty member’s allegation that the university’s adverse decision failed to follow in good faith (see, Baker) the university’s own procedures states a claim for breach of contract; an allegation that the “decision was wrong” is not justiciable.

Intellectually rigorous scrutiny of all, and only, the relevant evidence, based on the criteria for judgment set forth by the institution, is required. Simply passing documents through the proper hands, and announcing an appropriate – but not supported – ground for an adverse decision, should not be expected to survive judicial appeal.

Part II

Courts routinely adjudicate allegations that a “professional” or “academic” judgment was made arbitrarily, without examination of the relevant evidence, or without reasoned inquiry. But faculty miss the mark in asking courts to adjudicate the accuracy of an institutional decision on student or faculty discipline or faculty tenure and renewal, or the wisdom of decisions by administrators or trustees shaping the underlying mission or curriculum of the institution.

Editorial Policy: The Business Insider is a publication of the Business Law Section of the Philadelphia Bar Association. The purpose of the publication is to facilitate communication among the membership of the Section on topics and events of general interest to business law practitioners. The editors of The Insider reserve the right to accept or reject any submission and to edit any submission to ensure its suitability for publication, its adherence to the Mission Statement of the Communications Committee, and its furtherance of the objection of the Business Law Section.
The rule stated in *Baker v. Lafayette College*, “We decline Baker's invitation to reexamine the merits of the College's decision”, is indeed the law. Just as institutions harm their cause by overlooking the “good faith” requirement in court decisions, faculty groups harm theirs by overlooking the courts’ steadfast unwillingness to substitute their judgment for that of the institution on what should be taught, what the institutional mission should be, or what merit lies in a faculty member’s teaching or scholarship.

Claims that an institution has violated a faculty member’s “academic freedom” should be carefully scrutinized before resting a case on that ground. Justice Frankfurter’s strong defense of the “four essential freedoms” that constitute academic freedom in his *Sweezy* concurrence continues to resonate, as it should:

"'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (concurring in result).

Safeguarding these freedoms was emphasized in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967):  

"'Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' United States v. Associated Press, 52 F.Supp. 362, 372.'"
Chief Justice and joined by justices Black, Douglas, and Brennan, might appear to support – or require – that reading:

“The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. Sweezy 354 U.S. at 250.”

In fact, it is not the law that the individual professor – or collective faculty – prevails over the institution. Here in our own Third Circuit, for example, a unanimous three judge panel wrote in Brown v. Armenti, 247 F.3d 69 (2001)\textsuperscript{viii}:

“... we held in Edwards v. California University of Pennsylvania, 156 F.3d 488, 491 (3d Cir. 1998), that ‘a public university professor does not have a First Amendment right to decide what will be taught in the classroom.’

In Edwards, a university professor alleged that the university violated his First Amendment rights when it disciplined him after a series of disputes with the administration over course curriculum. Id. at 490. The court concluded that no violation occurred because in the classroom, the university was the speaker and the professor was merely the university’s agent for First Amendment purposes. Id. at 491. In support of this conclusion, the Edwards opinion quoted from the Supreme Court opinion in Rosenberger:\textsuperscript{9}

‘when the state is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message’.

Thus even in the matter of grading, the institution, not the instructor, is permitted to make the final determination of what appears on a student’s transcript – and the instructor can be dismissed if he or she protests at too great length or with too much force.

In a private institution, Justice Frankfurter’s iconic words -- “Who has the right to determine who may teach, what may be taught, how it shall be taught, and who may be admitted to study” -- do not control the division of authority between instructor and institution. Each private institution is fully at liberty to determine contractually how such authority will be shared. And indeed a state institution is free by contract to cede its right, or some element of it, to the faculty. But absent a contractual provision lodging authority in the faculty, state corporate law vesting the trustees with the authority and the obligation to govern the corporation will always trump faculty claims of entitlement to a greater voice in such decisions.

To say that this can lawfully be the result is not to call for such a result. Rather, it is to point to the urgent need for all the participants in the governance of the university to work collaboratively. Each body within the institution best serves its students, each other, and the wider community by using its peculiar expertise, granting to others and itself being granted such
deference as that expertise counsels, in the service of guiding the university as a public trust, pursuing the common good.

Dan Larkin's legal and consulting practices embrace litigation, transactional matters, and policy formulation. He has represented small businesses, civic groups, charitable organizations, and individuals. For more than a decade a major focus of his practice has been on matters arising within colleges and universities, including the issues addressed in these articles.

Disclaimer: The articles and reports contained in The Insider reflect the views of the writer and do not necessarily represent the position of the Business Law Section or The Philadelphia Bar Association or the editors.

1 Drew Gilpin Faust, Presidential Inaugural address, Harvard University Cambridge MA October 12, 2007

 iv 54 Pa. 77 (1867), citing five of its earlier holdings from the two decades preceding Brown, to wit, Lauchner v. Rex, 20 Pa. 464 (1853); Miller v. Fichthorn (1858); Ingersoll et al., Trustees v. Lewis, 11 Pa. 212 (1849); Buckley's Appeal, 48 Pa. 491 (1865); and McCready v. Topper, 10 Pa. 419 (1849).

iv 354 Pa. Super. at 216-217, 511 A.2d at 839

b 54 Pa. 77 (1867), citing five of its earlier holdings from the two decades preceding Brown, to wit, Lauchner v. Rex, 20 Pa. 464 (1853); Miller v. Fichthorn (1858); Ingersoll et al., Trustees v. Lewis, 11 Pa. 212 (1849); Buckley's Appeal, 48 Pa. 491 (1865); and McCready v. Topper, 10 Pa. 419 (1849).

 vii Ibid, and Baker, 516 Pa. at 300
 viii In Brown a "tenured professor alleged that he was suspended from teaching a class after he refused the university president's instruction to change a student's grade and that he was discharged after submitting a written criticism of the president to be presented to the university board of trustees. According to the complaint, these were acts of retaliation which violated the professor's rights to academic freedom and free speech protected by the First Amendment." Brown, 247 F.3d at 71-72.