## Fall 2015

### First Assignment

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<tr>
<th>Name</th>
<th>Prof. Robert Talbot</th>
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<td>Course</td>
<td>Investor Justice Clinic (IJC)</td>
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**Required Text/Reading**

We need to “frontload” on assignments to be able to handle cases within the first weeks. So, these initial readings will be more than you are used to from other courses.

**ENTREPRENEURIAL VENTURES LEGAL SERVICES PROJECT Readings (see attached)** - Since IJC is helping to choose proper EVLS entities and setting up the cases, you should read everything in the EVLS Project Readings. Required before the first class is sections #1-5.

**Securities Arbitration with FINRA.** I would prefer you to look at the following before the semester but the Securities Arbitration reading assignment is not due until September 2. We will probably not discuss securities arbitration until the second or 3rd week of class.

“Securities Arbitration Procedure Manual” by David Robbins  
(available on LexisNexis)  
Chapter 5; Pages 5.1 through 5.52


**Code of Arbitration Procedure:**


- PART III ... INITIATING AND RESPONDING TO CLAIMS
- PART V ... PREHEARING PROCEDURES AND DISCOVERY
- PART VI ... HEARINGS; EVIDENCE; CLOSING THE RECORD
- PART VIII ... SIMPLIFIED ARBITRATION AND DEFAULT PROCEEDINGS

**1st Assignment**

Read/review all EVLS materials prior to first class on **Wednesday, August 26**

Read/review all Securities Arbitration materials by **Wednesday, September 2**

- For access to Practical Law Company materials go to the website [http://us.practicallaw.com](http://us.practicallaw.com) and set up a free account using your USF email.

**Note to Students**

Please contact the Clinics office at 415-422-6752 if you have questions.
One of the problems for students with any clinical work is that a problem does not come to you in small, logical organized chunks of material as many of your substantive classes do. A client come into a Clinic with a problem and you have to have a pretty good picture of an entire area of the law to be effective. Working with a startup company is even more challenging than working in the average clinic and is probably different from any other work you have done in Law School. Each startup is in many ways unique. For example, the people setting things up—the founders—themselves are very different from company to company. These founders have different amounts and sources of capital available, expertise, interests, goals and skills that they bring to the venture. Another example of great variation is the industry. Besides people differences, the various businesses themselves will require a different approach to succeed depending on the location, industry, costs and competition to name just a few of the variables.

Because of the range and scope of possible areas you will need to work with, a reading list to cover all of the legal and practical questions would be overwhelming, to say the least. This particular list is to make you aware of some problems and some basic solutions that come up when advising startup ventures about what it’s like to set up. When you have an actual case, you will have to research any problems you foresee from what you learn from your interviewing, and what you know from class and any other sources you have explored. The list of readings here is far from comprehensive, but a good start.

I have chosen readings that I hope will give you a basic understanding of many of the legal challenges that come in setting up a new company. I’ve given you parts of some CEB publications, materials from the Practical Law Company data base and Nolo books which are in the Clinic. These should be pretty good to introduce you to and give you answers for many of the real life problems you will be facing. But, on a particular topic you will probably need to go beyond the readings here.

The Nolo books are in the Clinic and the library. You will have access online to all the Practical Law Company information. How to get into the CEB publications online will be described below.

BOOK (AND OTHER) ABBREVIATIONS

A. Nolo, “How To Form Your Own California Corporation”, hereinafter “Nolo Corporation.”
B. Nolo, “Form Your Own Limited Liability Company, hereinafter “Nolo, LLC.”
E. CEB, Forming and Operating California Limited Liability Companies, hereinafter “CEB LLC’s.”
F. (Limited Liability Company will hereinafter be called “LLC”)

1. **Choosing the Right Entity.** An immediate question is choosing the right entity for the new venture. Even if a client or company says “This is what we want” that choice may not be in their best interests under all of their circumstances. As attorneys you should be discussing (or at least able to discuss) the various options before a decision is made about the choice of entity. Read the “Business Entity Comparison Tables” that highlight and compare general and specific legal
and tax traits of each type of business entity. These tables are in both Nolo, LLC and Nolo Corporation. A thorough discussion of the comparison of entities is in CEB LLC’s—Chapter 3— “Choosing Appropriate Business Entity.”

a. Here’s a reading (Not assigned but very helpful particularly if you haven’t had Corporations. In Nolo, Corporation there is a chapter on “What Corporations are All About”

b. Here’s another reading not assigned but helpful. Chapter 4 in Nolo’s Corporation, there is a chapter on Corporate taxation. For this chapter, I would at least look at headings and subheading so you are aware of the impact of taxes. As a Clinic we DO NOT give tax advice and if a tax issue comes up either refer or advise the client to get a tax advisor. But, the headings and subheading here will help you to become aware of the tax issues that startups might need to deal with.

2. Selecting a Name. Another immediate question is checking the availability and reserving a legal name for the business with the Secretary of State in California. This sounds simple but actually selecting a name that works and doesn’t create legal problems might be a crucial and complex choice, particularly if you want to trademark the name for the success of the venture and avoid trademarks that others have. CEB Business Entities, Section 3.15 lays out the simple steps to follow to own a business name. As an initial question—to see if a proposed name is already in use go to http://Kepler.sos.ca.gov/ IIP will spend a great deal of time with the trademark aspects of a name.

3. Dealing Early with Potential Problems. It is often easiest for your client to deal with business and relationship problems before they actually come up. A number of these potential problems can be handled in Founders Agreements, Shareholder (Stockholders) Agreements and Subscriber Agreements. Practical Law Company has a “Stockholders Agreement Checklist” and a “Stockholder’s Agreement Commentary” that point out many of the issues that might be decided before money and time are spent on a business. See also CEB, Corporations, at Section 2.6 and a checklist at Section 7.55.

4. Limits on Transferability of Ownership. As part of your preliminary work, one of the most important issues to discuss with clients is limitations on transferability of ownership interests. This is a delicate topic at that start of a venture when the founders are enthusiastic about the business and about working together. But think about it. If any founder is able to easily transfer ownership, will other founders trying to create a new business want to be tied to a stranger. Remember, when a company is just starting founder have to depend upon, work with and relate to each other about important decisions. Generally small startups will want serious limitations on transferability, both for personal reasons and for securities exemption reasons, as you will see below. Here are some materials to look at.

a. See CEB, Corporations—Buy-Sell Agreement. 1.167

b. CEB, Corporations, Sections 2.62 and 2.63. Here transferability is discussed in terms of the Articles of Incorporation. You will probably NOT want the transferability language in the actual Articles.

c. Also, If you do have a limiting buy-sell agreement, each share certificate must have an appropriate legend on it. There’s an example of a legend in Section 2.63—CEB, OCC) Here’s another example SHARES REPRESENTED BY THIS CERTIFICATE.. SUBJECT TO AN
OPTION...IN AGREEMENT BETWEEN COMPANY AND REGISTERED HOLDER....ANY TRANSFER...IS VOID WITHOUT PRIOR EXPRESS WRITTEN CONSENT OF COMPANY
d. See CEB, Corporations 7.48, and 7.49 Transfer restrictions plus drag along and tag along rights
e. CEB LLC’s, 9.66-9.73 Transfer of Interests;
f. A California limited offering exemption Legend is at 4.14 CEB, Corporations

5. “Securities Issues.” Ownership interests in the corporations, (and maybe the LLC), you are setting up are probably “securities.” Whether or not the sale of corporate stock or an LLC membership interest violates the federal or state securities laws, should be of critical concern for you and your clients. Here are some readings related to securities laws.
a. Corporate shares and sometimes LLC membership interests as securities. See CEB Corporations Sections 1.55; 4.2
b. Our clients will generally want to take advantage of the “private offering exemptions.” Here’s what this is about, and actions to advise so that the private offering exemption will apply.
   a. For the federal exemption see CEB, Corporations—4.9—4.14
   b. For the California exemption see CEB, Corporations 4.61;
   c. Forms to help meet the requirements for these exemptions are in CEB Corporations 4.11-4.14. (Make sure the appropriate forms are signed by all those who are investing to show investment intent; investor knowledge, lack of advertising and other indications that meet the requirements for a small offering exemption.)
      i. Also, make sure the correct LEGEND regarding securities is on all STOCK CERTIFICATES issued. Essentially the legend will say the securities are Not Registered and can’t be sold unless certain requirements are met. Here’s part of an example: SHARE REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED UNDER SECURITIES ACT F 1933...MAY NOT BE SOLD IN THE ABSENCE OF AN EFFECTIVE REGISTRATION...

6. LLC Operating Agreements. To make sure everyone is on the same page about important legal and procedural questions, “operating agreements” for LLC’s, though not legally required, should be drafted before filing for the LLC. These operating agreements spell out various choices that “members” of LLC’s have to make about details concerning running the venture. See CEB LLC’s, Chapter 10 up to section 10.70 for an annotated short form of operating agreement. Even though it’s a “short form”, it’s not all that short, the form will probably have most of the agreement that you will be using.
   a. Even if you are setting up a corporation, this chapter will also make you aware of operating issues that you may want to handle explicitly in your corporate bylaws or shareholder agreement. (The way the chapter is written is a little confusing when it comes to numbers.
      i. The CEB book section has a different number than the section of the model agreement discussed) For example 9.65 of the book will also indicate 8.1 of the actual short form of operating agreement. Hope that doesn’t confuse)

7. LLC and Corporate kits. You probably should advise you client to purchase a kit sometime after a name is secured and you are pretty sure they are going ahead. These kits have record books,
ownership certificates with appropriate legends, and other items that are extremely convenient and official looking. They are less than $100. Take a look in the ones we have in the Clinic.

8. Filing and Setting up Your Business Entity. The next readings are quick and convenient ways to actually set up corporations and LLC's from the Nolo books. In some cases, it may be most of what you will need to get the entity going—at least legally.
   
   a. In Nolo Corporation, see the chapter on 7 Steps to set up your corporation. This book is in the Clinic and the library (but there is no online access to the text though there may be to forms.) A more comprehensive look at how to set up is in the CEB Corporations, Chapter 2 “Formation” Even if you go strictly with Nolo, you should have a look at what CEB says here.
   
   b. In Nolo LLC's, Chapters 4 and 5 describe how to set up an LLC. This book is in the Clinic and the library and is not specific to California. Online Nolo has a page or two with a short description of the steps to set up an LLC in California. CEB LLC's has chapters on Operating Agreements, both a long a short form.
   
   c. Filing corporate documents with California Secretary of State. Online, go to Cal. Secretary of State Corporate Filing Tips
   
   d. Filing LLC documents with California Secretary of State. Online, go to Cal. Secretary of State Limited Liability Company Filing tips.

9. Post Set Up You should also give some advice to the entity, on what steps will probably need to be taken after the entity is created and basic ownership and management decisions are in place. For a list of what to do after the initial tasks are complete see “Post incorporation checklist.” CEB Corporations Chapter 3
   
   a. Also, at CEB Corporations 3.31 is a model Memo to client about Corporate Operations

10. *Particularly for employment issues, see Labor Law and Personnel practices (on pages 3-50 to 3-55 of OCC Corporation Chapter 3)

11. Delaware. Basic Documents can be found at “Founders Workbench” and "Cooley Go" Check with Supervisor.

HOW TO GET INTO CEB BOOKS FROM OUR LIBRARY ONLINE

ON CAMPUS ACCESS:

1.) Go to the law library home page:  [http://www.usfca.edu/law/library/](http://www.usfca.edu/law/library/)
2.) On the right-hand side of the home page, you will see a box labeled "Resources," directly underneath the "Ask a Librarian" box. Click on the "Resources" box.
3.) A pull-down menu will appear directly under the "Resources" box. Click on the link in the pull-down menu for "OnLAW (CEB Practice Guides)."
4.) The OnLAW home page will appear. On the left-hand side of the page, click on the "+" sign next to "Business Law." When you click on the "+" sign, the titles of all of CEB's business law publications will appear.
5.) Go down the list of titles to "Forming and Operating California Limited Liability Companies." Click on the "+" sign next to this title.
6.) Next, click on "Contents" directly underneath the title, for example, "Forming and Operating California Limited Liability Companies."
7.) The chapter titles will appear in the page's main frame. Click on a chapter title, such as "Annotated Long-Form Operating Agreement," to view the contents of that chapter.

OFF CAMPUS ACCESS:

All of the above steps are the same, but if you are not on the USF network when you click on the OnLAW link on the library home page (Step #3 above), you will be prompted to enter your USFConnect username and password in order to access OnLAW content off-campus.

When this prompt appears, simply enter the same USFConnect username and password that you use to access your USF email account. When you have entered this authentication information, you will be taken to the OnLAW home page (Step #4 above). All of the remaining steps are the same.

**Downloading Forms from CEB Publications**

Most forms contained in CEB publications are available in a digital form through OnLAW. To find and download forms simply follow the instructions below:

1. Go to OnLAW using the instructions for on campus or off campus access.

2. From the **Welcome to OnLAW** screen use the list of available publications to drill down to the publication you are interested in.

3. Scroll through the chapter headings in the far left hand column. Click on the **Table of Forms**.

4. Scroll through the Table of Forms for the publication and click on the blue hypertext link to open the appropriate form.

5. To open the form in your word processor, click on the appropriate icon:
1. After assignment of case to you:
   a. Make Immediate Contact with client(s)
   b. Conduct Initial Interview (See Boot Camp materials)
      i. Divide tasks with partner
   c. ***Open file in Network—NEEDS TO BE ON Clinic Computer
      i. EVLS Active cases
      ii. Note every contact with everyone in case
      iii. Enter all documents
2. Summarize initial interview
   a. Email to supervisor
   b. Enter into file
3. Discuss interview with Supervisor (and class if asked to)
4. If case not accepted
   a. Contact client generally with standard declination letter
   b. Enter letter in file
   c. Move file to declined cases in EVLS
5. If case accepted
   a. Representation Agreement (MUST BE IN FILE)---California
      i. Customize Agreement if necessary
      ii. Discuss with Supervisor
      iii. Offer to explain Representation Agreement with clients
   b. Representation Agreement ----other
      i. Delaware case might be a little different (e.g. might say drafted, for use with
         Delaware but will do less for client than with California
      ii. Representation Agreement to nonprofit or public benefit corporation may need
         to specify limits to our services.
      iii. Generally shouldn’t take nonprofits.
   c. Minimum documented weekly contact with client
6. With Client—Ask about whether they have a business plan. Discuss business plans and help of
   business students that is available.
   a. Use document in startup materials to explain what the help will be
   b. If Business help is wanted, get client document “Detailed Business Planning Status” Get
      this document from Boot Camp materials or Nikki
   c. Tell client to contact Prof Nguyen. You should also contact Prof. Nguyen to let her know
      what is going on. Business School starts same week as Law School, in fall, I believe.
   d. Once a week documented contact with Business School students, if they are on case.
   e. At designated contact with Client, inquire about business plan
7. Jessica assigns IIP students to the case and gives IJC students names and contact info of these
   students
   a. Possible tasks of IIP student
      i. Trademark clearance/Register trademark
ii. Nondisclosure agreement
iii. If client will have website: Terms of use/privacy policy
iv. Assignment of IP rights from Founder to company (Delaware form)

b. Put IIP student info in file
c. Contact IIP student IMMEDIATELY
   i. Give each other info and good times to call or contact.
d. **Once a week documented contact** with IIP is minimum

8. ***Mail Questionnaire to client as soon as Representation Agreement is signed and in the file***
   (this is done before you send out the questionnaire) ****
   a. We may use this instead of stockholder agreement to get basic information in writing.
   b. Crucial step where they must think out basics of management, capitalization,
      distributions, transferability and other important features of their entity
   c. This should be used to customize their company
   d. This customization is your **most important and time consuming** job.
   e. Tell client to contact you by email with questions as they come up
   f. Tell them one week limit to get back to you with any questions

9. Immediately begin work on names.
   a. Does client intend to use entity name as a brand/trademark or just legal name.
   b. Ask for choices----check with Cal Secretary of State.
   c. Have client see if domain name available
   d. MAKE SURE ONE OF FOUNDERS APPLIES FOR NAME---not law student.
   e. Have IP student assigned do trade mark search

10. Go over questionnaire: Thorough interview with clients after you get questionnaire back and
    have studied it
    a. Spend at least 5 hours preparing for this interview
       i. Consult with supervisors if necessary
    b. **MAKE SURE TO HAVE INTERVIEW WITHIN ONE WEEK.** Document the interview
    c. Interview at Law School if possible
    d. This interview should include follow through questions and details
       i. Research any questions that come up which you cannot answer at interview
       ii. Going through what they have written and what they want to know
       iii. They should be telling you before interview what problem areas are
    iv. Maybe, also, in questionnaire have them mark where they have problems
    e. Write up interview for Prof. Talbot/Supervisor

11. Founders (Shareholder’s; Stockholder’s) Agreement  Depends on case
    a. For Stockholder Agreement
       i. Check Practical Law
          1. See Commentary
          2. Stockholder Agreement with checklist
    b. Go over Restricted Stock Purchase Agreement
       i. We have a good one with assignment of IP rights in same document

12. Make sure basic decisions are organized
    a. Type and name of entity
    b. How many shares and cost per share (for corporation)
i. Generally 10 million shares
ii. Generally .0001 cent a share

c. Division of equity among Founders
d. Cash and job responsibility of Founders
e. Directors
f. Officers
g. Who makes what decisions
h. Decisions for First Director’s Meeting

13. Corporate Documents to prepare
   a. You prepare----have client file
   b. Articles of Incorporation: CEB, Nolo or Cal SOS
   c. By Laws.
      i. CEB; See YC
   d. Restricted stock purchase agreement
      i. This is essentially a vesting agreement
         1. MAKE SURE to include that must be 83(b) elections w/l 30 days and
            must be done by purchaser.
         2. This election makes taxes due on immediate value of non vested shares
            and makes any increase in value taxed at capital gains value (Delaware
            form)
      ii. (YC)
      iii. (DB)
   e. Exemption from securities laws Cal Corp code 25102 (f)
   f. Action of incorporator appointing Board of Directors and resigning
      i. (Adopting By Laws?)
   g. Obtain EIN if needed
   h. Get Corporate (LLC) kit with Legends on stock (ownership)
      i. Subject to restricted purchase
      ii. Subject to By Laws non-transferability
      iii. Subject to Securities exemption rules
           1. Must hold for investment;
           2. Hasn’t been registered
   i. Minutes of First Directors meeting
      i. Document stating Unanimous Consent of Board of Directors which all sign
      ii. (DB; Practical Law)
      iii. Authorize issuance of Founder’s shares (to sell to purchaser)
           1. Confidential information and invention assignment as consideration
      iv. Appoint the officers of the Company
           1. President, Secretary, Treasurer
      v. (Approves stock option plan----if any)
      vi. Approves opening of bank accounts
      vii. Determines fiscal year
      viii. Determines corporate headquarters address
      ix. Enter into Founder’s stock purchase Agreements
x. Enter into Founder Inventions Assignment and non-disclosure agreements
xi. Approves qualification as a foreign entity in other jurisdictions to the extent necessary or desirable

14. Have Company issue stock
   a. Make sure proper legends on stock
      i. Subject to Agreement and/or By Laws; shares may be transferred only in accordance with term of the agreement or by laws; securities warning---securities have not been registered under the SEA
   b. Have purchaser (probably Founder) sign (Restricted) stock purchase Agreement
   c. Arrange exchange of shares and consideration for shares---simultaneous best.
   d. Have accountant or company treasurer enter info into company books

15. Employment Agreements
   a. For Founders
      i. Consulting Agreement is generally used (DB)
      ii. Assignment of IP rights part of this
      iii. Work Made for hire
   b. For Other employees