



# Proceedings

A monthly newsletter from McGraw-Hill

August 2010 Volume 2, Issue 1



The McGraw-Hill Companies

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## Dear Professor,

Welcome to McGraw-Hill's August 2010 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. As your author, I am very excited to return for the 2010-2011 academic year, and I pledge to offer you readily available, topical, and informative resources for your business law students! Volume 2, Issue 1 of Proceedings follows the same format as editions of the newsletter offered during the 2009-2010 academic year, incorporating "hot topics" in business law, video suggestions, a hypothetical and ethical dilemma, teaching tips, and a "chapter key" cross-referencing the August 2010 newsletter topics with the various McGraw-Hill business law textbooks.

You will find a wide range of topics/issues in this publication, including:

1. Intel Corporation's recent antitrust settlement with the Federal Trade Commission;
2. Hewlett-Packard CEO's recent resignation after a sexual harassment investigation;
3. Missouri's "Proposition C" and the challenge to federal health care reform law;
4. Videos related to a) the controversy surrounding plans to build an Islamic cultural center just blocks away from the "Ground Zero" site in New York City and b) a federal judge's recent ruling that California's "Proposition 8," which bans gay marriage, is unconstitutional;
5. A "case hypothetical and ethical dilemma" related to the question of what legal and/or ethical obligation a landowner owes to those who visit property with either the express or implied invitation of the landowner; and
6. "Teaching tips" related to a) Article 2 of the "Hot Topics in Business Law" Section of this newsletter ("HP CEO Resigns after Sex Harassment Investigation"); and b) the "Hypothetical and Ethical Dilemma" presented in this newsletter.

Here's to an enjoyable and productive 2010-2011 academic year...May it be your best year ever!

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## Of Special Interest

This section of the newsletter covers three (3) topics:

- 1) Intel Corporation's recent antitrust settlement with the Federal Trade Commission;
- 2) Hewlett-Packard CEO's recent resignation after a sexual harassment investigation; and
- 3) Missouri's "Proposition C" and the challenge to federal health care reform law.

## Hot Topics in Business Law

### Article 1: "Intel Makes Concessions to Settle FTC Antitrust Lawsuit"

[http://www.usatoday.com/money/industries/technology/2010-08-04-intel-antitrust-settlement\\_N.htm?loc=interstitialskip](http://www.usatoday.com/money/industries/technology/2010-08-04-intel-antitrust-settlement_N.htm?loc=interstitialskip)

This article indicates that recently, in a settlement with the Federal Trade Commission (FTC), Intel Corporation agreed to never again offer computer makers and retailers hefty rebates in return for exclusive agreements to use its chips.

That concession brought closure to a FTC antitrust lawsuit. As part of a settlement, the world's largest computer-chip maker also said it would not redesign its products mainly to harm a competitor, nor retaliate against computer makers for using chips from rivals Advanced Micro Devices, Nvidia, or Via Technologies.

"Any steps that lead to a more competitive environment for our industry are good for the consumer," says Nvidia spokesman Hector Marinez.

Further, Intel agreed not to seek patent-infringement claims against rival chipmakers who form joint ventures that might include pieces of Intel technology. The settlement should prevent Intel from creating "new ways to undermine competition," says FTC Chairman Jon Leibowitz.

The company expects the settlement "to put an end to the expense and distraction," from the case, says A. Douglas Melamed, Intel's general counsel.

The FTC lawsuit echoed claims in a similar lawsuit AMD filed against Intel several years ago. The case was settled in November. Intel agreed to pay AMD \$1.25 billion.

Intel has been defending itself for years in Asia, Europe and the United States against similar complaints. At issue were practices it used mainly from 2003 to 2006. That is when AMD came out with a line of chips many analysts said were superior to Intel's products. The legal cases revolved around Intel unfairly granting rebates and other discounts to discourage personal computer (PC) manufacturers from building computers with AMD chips, and retailers from selling those PCs.

In May 2010, the European Commission fined Intel \$1.45 billion for hampering competition in the chip market. South Korea and New York state still have antitrust cases pending against Intel.

Because Intel stopped the questionable practices years ago, the only impact on consumers might be fewer retail promotions. PC makers and retailers often pumped



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rebates from Intel back into their marketing campaigns, says Jack Gold, tech industry analyst at J. Gold Associates.

The settlement is the latest in a wave of antitrust enforcements the FTC has taken under President Obama, following eight years of comparative inactivity under the Bush administration, says Charles King, principal analyst at Pund-IT tech consultancy.

"The FTC is being much more vigorous, and this has been good for consumers and for the companies competing against each other," King says. "No one is well served by allowing one company to tilt the playing field in its favor."

## Discussion Questions

1. In terms of vigorously pursuing antitrust action against Intel, is the federal government, in effect, "punishing success?" If so, does it make sense to punish success in a capitalistic system? Explain your answer.

*These are opinion questions, so student opinion will vary. The purpose of antitrust law is to prohibit near or complete control of a market/industry; in that sense, antitrust law is designed to foster competition. Those who are against vigorous enforcement of antitrust action claim that the law, in effect, punishes success, and that the creator of a widely-demanded good or service should be allowed to "reap the spoils" of such success.*

2. Focus on the specific practice that gave rise to the FTC's lawsuit against Intel; namely, Intel's practice of offering computer makers and retailers hefty rebates in return for exclusive agreements to use its chips. Do you view such arrangements as unfair trade practices warranting antitrust litigation? Why or why not?

*Again, student opinions will vary in terms of whether such arrangements constitute unfair trade practices. Those who favor antitrust litigation in response to such arrangements would claim that they impede the ability of smaller computer chip manufacturers to compete, since no smaller chip manufacturer would likely be able to afford to offer such rebates. Those who oppose antitrust litigation in response to such arrangements would likely contend that Intel's rebates to computer manufacturers and retailers are nothing more than financial incentives designed to foster and/or maintain strong business relationships.*

3. As the article indicates, "the (FTC-Intel) settlement is the latest in a wave of antitrust enforcements the FTC has taken under President Obama (a Democrat), following eight years of comparative inactivity under the Bush administration (a Republican)." During the eight years of the Clinton (a Democrat) administration, there was also a "wave" of antitrust enforcement, the most notable being then-Attorney General Janet Reno's lawsuit against Microsoft Corporation for violations of antitrust law. Why should the enforcement of antitrust law depend upon which political party controls the White House? Is not the law "the law?" Explain your answer.

*There does appear to be a clearly-defined "split" between the Democratic and Republican parties in terms of antitrust ideology and the enforcement of antitrust law; generally speaking, Democrats view enforcement of antitrust law as a means to foster competition, with the ultimate goal being consumer benefit (i.e., cheaper product prices, and more product choices), while Republicans view antitrust law as punishment for success. As described in the wording of this Discussion Question, this ideological split is best-identified by the historical*



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*record, which demonstrates vigorous enforcement of antitrust law by Democratic presidents, and lax enforcement of antitrust law by Republicans. This is not to say that one particular political view is "better" than the other; instead, the divergent views represent diametrically-opposed views concerning the need for government intervention in the economy. Again, generally speaking, Democrats believe that government intervention is sometimes (often?) necessary for the successful functioning of the United States economy, while Republicans favor more of a "laissez-faire" approach.*

## Article 2: "HP CEO Resigns after Sex Harassment Investigation"

<http://www.reuters.com/article/idUSTRE6754TB20100806>

This article indicates that Hewlett-Packard Development Company, L.P. (HP) chief executive officer (CEO) Mark Hurd unexpectedly resigned recently after a sexual harassment probe found he had a "close personal relationship" with an HP contractor who received improper payments.

The shocking announcement from the world's top personal computer maker sent its shares plunging 10 percent, as Hurd is one of the most admired chief executives in Silicon Valley and credited with reviving the company after the tumultuous reign of former HP CEO Carly Fiorina.

HP said one of its former contractors, involved in marketing activities from late 2007 to the fall of 2009, had levied sexual harassment allegations at Hurd.

HP said Hurd, who is 53 and married, had a "close personal relationship" with the contractor. An investigation found no violation of HP's sexual harassment policy, but did find that Hurd violated standards of business conduct, HP said.

There were instances where the female contractor received compensation or reimbursement without a legitimate business purpose, HP said.

A source familiar with the situation told Reuters that Hurd never had sex with the woman and that the expense account issues stretched over two years and amounted to no more than \$20,000.

"The board investigation found that Mark demonstrated a profound lack of judgment that seriously undermined his credibility and damaged his effectiveness in leading HP and Mark agreed," HP General Counsel Mike Holston said.

Hurd will be replaced by Chief Financial Officer Cathie Lesjak on an interim basis. Lesjak has taken herself out of consideration as the permanent CEO, HP said.

Hurd said the decision to step aside was a "painful" one.

"I realized there were instances in which I did not live up to the standards and principles of trust, respect and integrity that I have espoused at HP," Hurd said in a statement.



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News of the shake-up stunned the technology world. HP is the largest technology company in the world on a revenue basis, and is a major player in personal computers, servers, services and printers.

"Shock and puzzlement, that's how it's going to go down," said Russell Hancock, president and chief executive of Joint Venture Silicon Valley, an area business group. "There wasn't anybody who criticized his handling of the company."

The buttoned-down Hurd brought stability to HP after Fiorina resigned in February 2005 in the wake of a controversial deal to acquire personal computer (PC) manufacturer Compaq.

"Mark Hurd was extremely instrumental in turning this company around," said Susquehanna Financial Group analyst Jeffrey Fidacaro. "There's going to be a serious gap in leadership at the top of this company."

HP, a Silicon Valley icon that was founded in a Palo Alto garage in 1939, has experienced a fair amount of turmoil in recent years. In 2006, former HP Chair Patricia Dunn resigned after reports surfaced that the company had hired private investigators to spy on board members and journalists to plug media leaks.

Hurd will be well compensated as he departs HP. According to a regulatory filing, he will receive a severance payment of \$12.2 million.

Shares of HP have more than doubled since Hurd, the former CEO of NCR Corp, took the helm five years ago, cutting costs and expanding HP's footprint in the services market with acquisitions like the 2008 purchase of EDS Corp for \$13.9 billion.

In a bid to reassure investors that its financials are healthy despite the departure of Hurd, HP raised its outlook for the full year, saying it now expects profit, excluding items, of \$4.49 to \$4.51 per share, compared with a previous outlook of \$4.45 to \$4.50.

HP said its board of directors has formed a search committee to find a new chief executive and board chair.

"It's a negative because the positive leadership that HP has had under Hurd is identified with his name," said Nehal Chokshi, an analyst with Technology Insights Research-Southridge Research Group.

## Discussion Questions

1. As the article indicates, "Hurd is one of the most admired chief executives in Silicon Valley...(.) credited with reviving (HP) after the tumultuous reign of former HP CEO Carly Fiorina." Further, "shares of HP have more than doubled since Hurd...took the helm five years ago." How significant a factor should Hurd's successful leadership be in terms of the company's decision as to whether to force him to resign (assuming that he was forced to resign after HP's internal investigation revealed that he had violated the company's standards of business conduct?)

*Although the gravity of the sexual harassment in this case may never be known (This case has settled; see the article presented in "Teaching Tip 1" of this newsletter), HP's internal investigation in fact revealed that Hurd*



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*had violated the company's standards of business conduct (This determination most likely relates to HP's determination that Hurd misappropriated up to \$20,000 in expense account funds, and that the subject female had received compensation or reimbursement without a legitimate business purpose.) From a purely ethical perspective, if Hurd violated the company's standards of business conduct, his successful leadership of the company should not be taken into account in terms of deciding whether to oust him. Disregarding Hurd's violation of HP's standards of business conduct would send the "wrong message" to the thousands of others of HP employees.*

2. Was Hurd's resignation the result of a violation of law, or a violation of business ethics? Explain your answer.

*Hurd's resignation was due to his violation of business ethics, and directly related to HP's internal investigation concluding that Hurd had violated the company's standards of business conduct. At this point, one cannot conclude that Hurd violated the law, since no court has made such a determination (Again, there may never be judicial findings of fact and conclusions of law, since the sexual harassment case associated with Hurd's resignation has been settled—See "Teaching Tip 1" of this newsletter.)*

3. According to the article, "a source familiar with the situation told Reuters that Hurd never had sex with the woman and that the expense account issues stretched over two years and amounted to no more than \$20,000." Assuming that these are factual assertions, if Hurd never had sexual relations with his female associate, does that mean he did not commit sexual harassment? If the expense account "issues" extended over two (2) years and amounted to "no more than" \$20,000, does that mean there are no violations of law and/or business ethics? Explain your answer.

*In terms of the first question (... (If Hurd never had sexual relations with his female associate, does that mean he did not commit sexual harassment?), the clear answer is "No!" There are many forms of sexual harassment: 1) offensive touching/unwelcome sexual advances; 2) "quid pro quo" ("This for that," where the dominant figure in an employment relationship promises benefits in return for the subordinate's submission to sexual advances, or where the dominant figure threatens punishment for the subordinate's refusal to submit to sexual advances); and 3) "hostile work environment" (usually related to inappropriate comments and/or materials in the workplace.) Clearly, Hurd could have committed sexual harassment even if he did not have sexual relations with his female associate; the sexual harassment could have resulted from "quid pro quo" sexual harassment, and/or "hostile work environment" sexual harassment.*

*In terms of the second question ("If the expense account "issues" extended over two (2) years and amounted to 'no more than' \$20,000, does that mean there are no violations of law and/or business ethics?"), the clear answer is again "No!" Why would anyone consider \$20,000 to be "de minimus" (and therefore inconsequential) pilfering? What if an average employee embezzled \$20,000? Why should the time frame (two years) associated with the misappropriation of funds have any bearing on whether there have been violations of law and/or business ethics in this case? In your author's opinion, it matters not whether the misappropriation of funds occurred over the course of two years, or two minutes.*



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## Article 3: "A Clear Health Care Message in Missouri?"

<http://firstread.msnbc.msn.com/news/2010/08/04/4815544-a-clear-health-care-message-in-missouri>

According to this article, Missouri voters recently had their first chance to directly weigh in on the federal health care reform law, and they overwhelmingly rejected one key component of the overhaul.

Missouri's Proposition C, which calls for the state to be exempt from requiring health care insurance for individuals, passed by a whopping 71 percent. The large margin was a politically symbolic win for opponents of the law.

But the result does not necessarily mean that health care reform is growing more unpopular nationwide.

For starters, the turnout for Missouri's primary was about a third as large as the electorate that turned out in 2008, a presidential year. And more Republicans voted overall in the state, partly because the GOP featured more competitive primaries than Democrats. (Indeed, the Republican Senate primary drew over 260,000 more voters than the Democratic Senate primary did.)

And while President Obama came with a few thousand votes of winning the state in 2008, he was still unable to prevail in a landslide electoral win that saw him take states like Indiana and Virginia, showing that Missouri remains a red state in presidential elections.

Democratic pollster Celinda Lake did focus groups in Missouri on Prop C and said her work indicated that voters viewed the proposition as a protest vehicle.

"Voters, first of all, did not believe it would overturn health care," she said. "They believed the courts would throw it out. It was a way of expressing frustration at a less-than-perfect bill and process. They do not like the mandate and being told what to buy with their money."

Lake did focus groups for the Herndon Alliance, which describes itself as a "non-partisan coalition of more than 200 minority, faith, labor, advocacy, business, and healthcare provider organizations" – it includes AFL-CIO and other unions as well as the Mayo Clinic.

In addition, there is some evidence that the health care law has grown more popular overall in recent months. A recent poll by the Kaiser Family Foundation found approval for the health care reform law at its highest point since passage. Fifty percent of respondents in the poll said they had a favorable view of the law, while 35 percent said they viewed it negatively. In April, the poll found 46 percent favoring the law and 40 percent opposing it.

Still, it is far from a settled issue, and opponents of the law have plenty of vehicles to pursue in attempting to strip key elements -- all of which are destined to be settled in the courts.

Two separate lawsuits have been filed by states challenging the constitutionality of the law. One, filed by Virginia, received a boost in court last week, when a federal judge ruled that the suit, which challenges the



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law's provision requiring all Americans to have health insurance, can proceed. While the judge did not rule on the specific merits of the suit, it was a procedural victory for the state's argument.

Legislators in almost 40 states have proposed state laws or constitutional amendments that would negate parts of the health care law, although those efforts have either failed or stalled in the majority of statehouses nationwide. But at least two states – Virginia and Idaho – have signed state laws that expressly forbid individuals from being forced to purchase health insurance; the Virginia law is the subject of the state's federal suit. Twenty other states, led by Florida's attorney general, have signed on to a separate lawsuit challenging the constitutionality of the individual mandate.

Those efforts will ensure that the law will be a fixture in the courts, and the campaign trail, for a long time to come.

## Discussion Questions

1. What is the strongest constitutional argument in favor of the federal health care reform law? Conversely, what is the strongest constitutional argument against the federal health care reform law?

*Arguably, the strongest constitutional argument in favor of the federal health care reform derives from the Supremacy Clause of the United States Constitution (Article VI, Section 2), which states, in pertinent part, that "...the laws of the United States...shall be the supreme law of the land..." As interpreted and applied over the years, the Supremacy Clause has been used as a tremendous source of federal power. Essentially, if state law should contradict or conflict with federal law, the federal law will "reign supreme."*

*Arguably, the strongest constitutional argument against the federal health care reform law derives from the Fifth Amendment to the United States Constitution, which states, in pertinent part, "...nor (shall any person) be deprived of ...liberty...without due process of law..." The argument here would be that in compelling a person to carry some form of health care insurance, the person is being deprived of his freedom to choose whether to be insured.*

*Another constitutional argument against the federal health care reform law derives from the Tenth Amendment to the United States Constitution, which states, in pertinent part, that "The powers not delegated to the United States by the Constitution...are reserved to the States respectively..." In applying the Tenth Amendment to the debate over health care, the argument would be that since our Founding Fathers did not specifically grant the federal government the power to regulate health care, that power is reserved for the states.*

2. In your reasoned opinion, who will prevail in the legal "tug-of-war" between the federal government and the states? Explain your answer.

*Usually, when the federal government asserts power by way of the Supremacy Clause to the United States Constitution, the federal government wins such an argument. Historically, whenever "inferior" state law conflicts with or contradicts prevailing federal law, federal law wins.*





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*In countering the constitutional arguments against the federal health care reform law, the arguments would be as follows:*

*a. In terms of the Fifth Amendment "due process" argument, citizens did have due process in terms of our representative form of government, and the fact that our representatives in the United States Congress enacted health care reform on our behalf. In a representative democracy, all opinions/viewpoints cannot prevail; and*

*b. In terms of the Tenth Amendment "states' rights" argument, there is no way our Founding Fathers could have envisioned the massive health care system we have in the United States today and the need for the federal government to oversee such a system. Our Founding Fathers were incredible visionaries, but they did not have "20/20 vision" in terms of precisely assessing the needs of a nation with a present population of over three hundred million people, and how those needs could be exactly met.*

3. In your reasoned opinion, is the federal health care law "good" or "bad" for United States businesses? Is the federal health care law "good" or "bad" for the people of the United States? Explain your answer.

*This is an opinion question, and student views will most likely be affected and/or determined by their political ideology. In terms of the political divergence of opinion in our country, Democrats generally favor health care reform, while Republicans generally oppose it. In terms of whether the federal health care law is "good" or "bad" for United States businesses, the argument that it is "good" for them derives from the fact that if the federal government provides health care insurance for those who cannot afford it, that may be a benefit that businesses (for example, small businesses) may not need to provide in terms of a benefit of employment. The argument that the federal health care reform is "bad" for United States businesses derives from the fact that they may be subject to higher taxes to pay for such a system.*

*In terms of whether the federal health care law is "good" or "bad" for the people of the United States, the argument that it is "good" for them derives from the fact that if the federal government provides health care insurance for those who cannot otherwise afford it, those people will no longer be "tied" to a company simply for the health care insurance benefit; instead, they will have job flexibility, and have the freedom to move from one job to another without having to worry about health care insurance. The argument that the federal health care reform is "bad" for the people of the United States derives from the possibility that 1) they may be subject to higher taxes to pay for such a system and 2) if the federal government regulates health care, it will in some way affect adversely the quality of health care in the United States.*



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## Video Suggestions

### Video 1: "Outrage over Ground Zero Mosque"

<http://www.cbsnews.com/video/watch/?id=6740886n>

**Purpose of Video:** To discuss the controversy surrounding plans to build an Islamic cultural center just blocks away from the "Ground Zero" site in New York City

### Discussion Questions

1. What is the strongest legal argument in favor of building the Islamic cultural center? Is there a legal argument against building the center?

*The strongest legal argument in favor of building the Islamic cultural center is that the center reflects religious freedom and religious tolerance in the United States, consistent with the First Amendment to the United States Constitution ("Congress shall make no law...prohibiting the free exercise (of religion).")*

*Your author is not aware of any legal argument against building the center. As the video indicates, the New York City Landmarks Preservation Commission has already approved of construction of the Islamic cultural center. The Landmarks Preservation Commission is the New York City agency that is responsible for identifying and designating the City's landmarks and the buildings in the City's historic districts. The Commission also regulates changes to designated buildings.*

2. From an ethical perspective, should planners refrain from building the Islamic cultural center so close to "Ground Zero," even though the New York City Landmarks Preservation Commission has approved of its construction at the proposed location? Explain your answer.

*Obviously, the strongest ethical argument against building the Islamic cultural center is that such a building (and such an Islamic presence) so close to "Ground Zero" would be an insult to those who lost loved ones on September 11, 2001. Whether the nineteen (19) terrorists who were involved in 9/11 were truly representative of the "core" of Islamic principles and beliefs, as opposed to an extremist, "fringe" element, is an entirely different issue altogether.*

*The ethical argument in favor of building such a center is that it represents true religious freedom in the United States, regardless of the controversy surrounding a particular religion. "Green lighting" construction of the center represents religious tolerance.*



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3. According to New York City Mayor Michael Bloomberg, "(we) would betray our values, and play into our enemy's hands, if we were to treat Muslims differently than anyone else." Appraise this statement.

*Like so many other issues, student responses to this question will likely depend on their political views and ideologies. By way of his statement, Mayor Bloomberg is essentially underscoring our country's commitment to religious freedom and tolerance in the United States, as set forth in the First Amendment to the United States Constitution. Mr. Bloomberg is essentially contending that if this nation's reaction to 9/11 results in a substantial compromise of those guarantees set forth in the United States Constitution, the terrorists have "won."*

## Video 2: "California Judge Overturns Gay Marriage Ban"

<http://abcnews.go.com/WNT/video/california-judge-overtorns-gay-marriage-ban-prop-8-eight-federal-judge-overtorns-law-11327656>

**Purpose of Video:** To discuss a federal judge's ruling that California's "Proposition 8," which bans gay marriage, is unconstitutional

### Discussion Questions

1. What is the strongest legal argument in favor of California's "Proposition 8," which bans gay marriage? What is the strongest legal argument in favor of Judge Vaughn Walker's ruling that Proposition 8 is unconstitutional?

*In terms of the strongest legal argument in favor of California's Proposition 8, there are essentially two (2) "contenders":*

*a. States have traditionally regulated the terms and conditions of marriage in their jurisdictions (i.e., marriage is a "states' rights" issue); and*

*b. In the state of California, "propositions" are proposed laws that are voted on directly by the citizens of California directly at the "ballot box". The people of California voted in favor of Proposition 8; arguably, the voice of the people represents the truest form of democracy (i.e., "The people have spoken.")*

*In terms of the strongest legal argument in favor of Judge Walker's ruling that Proposition 8 is unconstitutional, there are again two (2) possibilities:*

*a. The Fourteenth Amendment to the United States Constitution, known as the "Equal Protection Clause," decrees that "(No state)...shall...deny to any person within its jurisdiction the equal protection of the laws." In his decision, Judge Walker concludes that denying gay men and lesbians the right to marry is a denial of equal protection.*

*b. Article VI, Section 2 of the United States Constitution, known as the "Supremacy Clause," states that "... (T)he laws of the United States ...shall be the supreme law of the land..." The argument here is that if a state law (like California's Proposition 8) conflicts with the Fourteenth Amendment to the United States Constitution's "equal protection" guarantee, the federal law "reigns supreme." Obviously, since Judge Walker's*



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*decision was rendered at the Ninth Circuit federal district court level, the federal appeals court and the United States Supreme Court will have the right to opine on the matter; ultimately, if the United States Supreme Court decides to review the case (and most legal experts believe the Supreme Court will exercise its right of "certiorari"), the Supreme Court's decision will "trump" Judge Walker's decision. Finally, the United States Congress has legislative power in this matter, should it choose to pass a law (through constitutional amendment or otherwise) banning gay marriage. For years, opponents of gay marriage have called for such congressional action, but as of yet, to no avail. Envision a scenario in which the United States Supreme Court legalizes gay marriage through judicial decision, but the United States Congress chooses to outlaw gay marriage by way of legislative enactment; this would result in a "classic confrontation" in terms of the appropriate "balance of power" between the judicial and legislative branches of government!*

2. Comment on the following statements by Judge Walker:

"Because California has no interest in discriminating against gay men and lesbians...The court concludes that Proposition 8 is unconstitutional."

In passing Proposition 8, voters were driven by "nothing more than a fear or unarticulated dislike of same-sex couples."

"Opposite-sex couples are not better than their same-sex counterparts; instead, as partners, parents and citizens, opposite-sex couples and same-sex couples are equals."

*In your author's opinion, these quotes confirm Judge Walker's strong belief the California's Proposition 8 represents an unconstitutional infringement on the entitlement of gay men and lesbians to "equal protection" under the law.*

3. Are you surprised that Judge Walker was a Republican appointee (he was nominated to the federal bench by President George H.W. Bush in 1989)? Are you surprised that Ted Olsen (who represented George W. Bush in the 2000 presidential election dispute) and David Boies (who represented Al Gore in the 2000 presidential election dispute) joined together to argue for the overturn of Proposition 8? Explain your answer.

*If students are surprised that Judge Walker decided in favor of gay marriage and against Proposition 8, they are probably of the opinion that federal judicial appointees should "toe the line" in terms of following the political ideologies of the president (more particularly, the president's political party) responsible for the appointment. Here, the argument would be that if Judge Walker was appointed by a Republican president, in light of the fact that the Republican Party traditionally opposes gay marriage, Judge Walker himself should be against gay marriage, and his decision should reflect such opposition.*

*A philosophy opposing the beliefs indicated above would suggest that judicial appointees should not follow the ideology of the president (and political party) responsible for their appointment; instead, they should follow the law. Consistent with this line of thinking, judicial decisions should be based on objective applications of law, not subjective political beliefs.*

*In terms of Ted Olsen's legal maneuverings designed to overturn Proposition 8, a lawyer is legally and ethically obligated to represent his client zealously, even if his client's interests are diametrically opposed to his own.*



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*Purely and simply, if Ted Olsen chose to establish an attorney-client relationship with clients opposed to Proposition 8, he has a legal and ethical obligation to fight for the overturning of Proposition 8, as he did in this case. The fact that Mr. Olsen represented a "high-profile" Republican, George W. Bush, ten (10) years ago should be irrelevant.*



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## Of Special Interest

This section of the newsletter addresses the question of what legal and/or ethical obligation a landowner owes to those who visit property with either the express or implied invitation of the landowner.

## Hypothetical and Ethical Dilemma

This issue's case hypothetical and ethical dilemma arises from a recent family vacation your author took to the "wild and wonderful" west. While traveling through the mountains of southern Colorado in the San Isabel National Forest, I (along with my wife, my nineteen-year-old daughter, and my fifteen-year-old son) came upon Bishop Castle, a one-man, ongoing construction project initiated by builder Jim Bishop in 1969. Mr. Bishop bills his castle as the biggest one-man construction project in the country. You truly have to see this edifice to appreciate it; barring a personal visit, I recommend that you view pictures and reviews of the castle, as well as a brief documentary, at the following internet sites:

<http://www.roadsideamerica.com/story/2047>

<http://www.post-gazette.com/pg/06211/709125-37.stm>

[http://en.wikipedia.org/wiki/Bishop\\_Castle](http://en.wikipedia.org/wiki/Bishop_Castle)

<http://www.youtube.com/watch?v=ZDQsy7aiVDO> (Warning: This video contains some offensive language.)

While on-site, I was determined to climb some of the highest reaches of the castle. Before beginning my ascent, I read the following sign:

**CAUTION**  
**NOT RESPONSIBLE FOR ACCIDENT OR INJURY**  
**IF YOU DO NOT AGREE DO NOT ENTER**

I also signed a guestbook, which Mr. Bishop claims also doubles as a waiver of liability. My nineteen-year-old daughter (the only other "brave soul" in my family who chose to accompany me in the ascent of the tower!) also signed the guestbook.

Early on in my climb up one of the castle towers, I noticed that the structure was, for the lack of a better description, "less than safe." The staircase wobbled, some window openings were not covered (not even by glass), and in some areas, there were no railings. Although I am not normally afraid of heights, I soon developed such a fear! I began to wonder...If I or my daughter should become injured, would either of us have any recourse?



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## Discussion Questions

1. Evaluate the premises liability of Jim Bishop. Is Mr. Bishop legally and/or ethically liable if a guest should become injured due to a defect on his premises? Explain your answer.

*Bishop Castle is a tourist attraction. In the opinion of your author, for most people (one of Jim Bishop's signs on the property does say "No Drunks!") on-site from "dawn to dusk" (the purported open hours of Bishop Castle), those people are Jim Bishop's "invitees." By law, an invitee is someone who is on property at either the express or implied invitation of the property owner. For invitees, the property owner has the highest obligation. He/she must either warn invitees of known defects on the property, or cure the defects. Further, the property owner must inspect the property to discover hidden defects, and either warn invitees of the defects, or cure them.*

*From a legal standpoint, regardless of whether Mr. Bishop is aware of the legal obligations he has to make the property safe for those who visit his property, he is charged with the responsibility of fulfilling those obligations. Even Mr. Bishop himself admits: "It would be a good idea if I had insurance, but there ain't no insurance company that will insure an open construction site."*

*In terms of the ethics issue associated with Discussion Question 1, the ethics obligation is associated with the legal obligation described above; a landowner is ethically obligated to keep his/her property safe for those invited to the property, since he/she is in the best position to know whether there are any defects on the property, and to remedy the defects.*

2. In terms of premises liability, should/does it matter that Mr. Bishop does not charge an admission fee for access to his property? Explain your answer.

*The charging/non-charging of an admission fee for access to the property is largely irrelevant in this case. In terms of the law, a landowner owes the obligation described in response to Discussion Question 1 above regardless of whether the person is a "business" invitee, or a "non-business" invitee.*

3. Discuss Mr. Bishop's liability to children (defined by law in most jurisdictions as those less than eighteen years of age) who visit his property.

*Mr. Bishop owes the highest legal (and arguably, ethical) obligation to children who come onto his property. In many jurisdictions (including North Carolina, your author's home state), the "attractive nuisance" doctrine means that even if children are not invited or permitted to be on property (i.e., even if children are trespassers), the landowner has a legal obligation to make the property "reasonably" safe for those children. The line of thinking behind the law is that it "takes a village" to raise a child, and that children are accordingly owed a special obligation in terms of making property safe for them.*

*In the present case, the children (at least those who come onto the property at any time between "dawn and dusk") are not even trespassers; instead, they, along with their parents, are invitees. For those children, Mr. Bishop has an obligation to warn them of known dangers, or cure the defects. For unknown defects, Mr. Bishop must inspect his property to discover them, and either warn the children of the dangers, or cure them.*



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*In most jurisdictions, the fact that parents are inattentive to their children does not reduce or eliminate the landowners obligation to the children; again, "it takes a village" to raise a child.*

*Even if Mr. Bishop is unaware of his obligations to the children who come upon his property, such lack of awareness is not a defense to legal liability.*





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## Of Special Interest

This section of the newsletter will assist you in covering:

- 1) Article 2 of the "Hot Topics in Business Law" Section ("HP CEO Resigns after Sex Harassment Investigation"); and
- 2) the "Hypothetical and Ethical Dilemma" presented earlier in this newsletter.

## Teaching Tips

### Teaching Tip 1:

As a follow-up to Article 2 ("HP CEO Resigns after Sex Harassment Investigation"), you might want to have your students read the following "update" article:

#### **"AP Source: Ousted HP CEO Settles with Accuser"**

<http://www.google.com/hostednews/ap/article/ALeqM5gucvDk0fKaa5DFCujxhcJMbhULJgD9HFCEG000>

According to the article, ousted Hewlett-Packard Co. CEO Mark Hurd has settled allegations of sexual harassment lodged against him by a female contract worker for HP, a person with knowledge of the case told The Associated Press.

The harassment accusation set off a chain of events that led to the discovery of allegedly falsified expense reports for dinners Hurd had with the woman and culminated in Hurd's forced resignation Friday from the world's largest technology company.

The person familiar with the case told the AP late Saturday that Hurd agreed to pay the woman but would not reveal the size of the payment. The deal was reached Thursday, a day before Hurd's resignation. The settlement was between Hurd and his accuser and did not involve a payment from HP, this person said.

This person was granted anonymity because they were not authorized to speak publicly about the issue.

The nature of the harassment complaint could not be learned. Hurd and a lawyer representing the woman, whose identity could not be learned, said the relationship was not sexual.

The woman was paid up to \$5,000 per event to greet people and make introductions among executives attending HP events that she helped organize.

HP's board of directors said its investigation found that Hurd listed other people as his dinner partners on expense reports when he'd been out with the woman. HP also claimed Hurd arranged for her to be paid for work she didn't do.



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There was only one instance in which that occurred, the person close to the case said, but it was for an event that was canceled at the last minute and the woman's contract required that she would be paid unless an event was canceled 30 days in advance.

The amount of money in question could not be learned.

Hurd, 53, insists they were legitimate business expenses. Hurd says the errors in the reports may have been entered unwittingly by an assistant, according to the person close to the case.

The company determined Hurd didn't violate its sexual harassment policy but broke its rules of conduct and irreparably harmed his credibility and integrity.

HP now must find a new leader to keep HP on the course he mapped out.

Hurd engineered a stunning turnaround of the Silicon Valley stalwart.

Under Hurd, HP has spent more than \$20 billion on acquisitions to transform itself from a computer and printer maker dependent on ink sales for profits to a well-rounded seller of hardware and lucrative business services. HP's market value nearly doubled during his five years.

The company stands at a turning point to integrate some of those acquisitions, the most recent of which was the purchase of smart phone maker Palm Inc. for \$1.4 billion in June.

HP's stock fell nearly 10 percent to \$41.85 in after-hours trading, when the news was released after the close of markets Friday.

The company has a deep bench in management and the stock drop was reactive and doesn't reflect the company's prospects, an analyst said.

"I don't view his departure as catastrophic," said Dinesh Moorjani, an analyst with Gleacher & Co. "The strategy is working fine. The level of uncertainty for me is relatively low just given the circumstances. This wasn't a one-man company."

Hurd, who spent 25 years at ATM maker NCR Corp. before coming to HP in April 2005, became a Wall Street darling. The \$13.9 billion acquisition of Electronic Data Systems made HP a major player in technology services, challenging archrival IBM Corp.

HP also now offers computer networking, helped by the \$2.7 billion takeover of 3Com Corp., ratcheting up the rivalry with Cisco Systems Inc. The Palm acquisition catapulted the company into the fast-growing smart phone business.

The additions also broadened the pool of people who could replace Hurd. It's a deep bench, and internal candidates could have an edge, given that Hurd and predecessor Carly Fiorina — who got the boot in 2005



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over concern about her management style and her decision to buy Compaq Computer — both came from outside HP.

Inside candidates could include Todd Bradley, who oversees personal computers and mobile devices at HP; Vyomesh Joshi, who leads the printer division; Ann Livermore, in charge of servers, services, software and storage; and Shane Robison, leader of HP's corporate strategy and marketing. Chief Financial Officer Cathie Lesjak, now interim CEO, took herself out of the running for the permanent job.

In recent weeks, Hurd was in talks for a three-year contract that could have been worth \$100 million, the person close to the case said. Those went off track when the woman accused him and HP of sexual harassment, this person said.

The woman's lawyer, celebrity attorney Gloria Allred, declined to describe the alleged harassment. Allred would not identify her client or make her available for an interview.

Hurd will get about \$28 million in cash and stock in severance.

Hurd's ouster is the third in five years at HP's top echelon. First was Fiorina's in 2005, then former Chairwoman Patricia Dunn was ousted in 2006 amid a boardroom spying scandal that involved spying on reporters' and directors' phone records to suss out the source of leaks to the media.

"It says they're off track in some fundamental way," said Stephen Diamond, associate professor at Santa Clara University School of Law and an expert on business law.

"The first thing is, they have to find the right kind of CEO," he added. "And I think what that CEO needs to do is come in and say, 'How many board members were here during the last two scandals? If you were, please resign now.'"

In terms of discussing the article with your students, ask them the following questions:

1. Is Hurd's settlement with his accuser an admission of liability on his part? (Normally, settlement of a lawsuit is not an admission of liability on the part of the defendant.)
2. Should Hurd's involvement in a sexual harassment case compromise (reduce) the amount of his severance package? (Ordinarily, an executive's severance package is contractually guaranteed, and is not compromised by such litigation.)

## **Teaching Tip 2:**

In terms of discussing the Case Hypothetical and Ethical Dilemma with your students, it would be a good idea for them to research premises liability law in their state of residence. To use North Carolina (your author's home state) as an example, there are three (3) types of individuals who can be on property, regardless of whether the property is a business or a residence: 1) an invitee; 2) a licensee; and 3) a trespasser. Under North Carolina law, an invitee is someone who is on business or residential property with the express or



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implied invitation of the property owner. A licensee is someone who is on business or residential property with the express or implied permission of the property owner. Finally, a trespasser is someone who is on business or residential property without the express or implied invitation or permission of the property owner. A property owner owes the highest obligation to an invitee; for invitees, the owner must inspect his/her property to discover hidden defects, and either cure the defect, or warn invitees of the problem. For licensees, the owner must either cure defects of which he/she is aware, or warn licensees of the problem (in other words, for licensees, the property owner has no obligation to inspect his/her property to discover hidden defects). For trespassers, the only obligation the property owner owes is to not commit intentional physical harm to them.

Applied to the Case Hypothetical and Ethical Dilemma, it would appear that most people who visit Bishop Castle are invitees, on the property either due to the express or implied invitation of the owner. As invitees, they are owed the highest obligation in terms of keeping the property safe, and in the analysis of your author, Jim Bishop's liability exposure is immense.



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## Chapter Key for McGraw-Hill/Irwin Business Law texts

	Hot Topics	Video Suggestions	Hypothetical or Ethical Dilemmas	Teaching Tips
<b>Kubasek et al., Dynamic Business Law</b>	Chapters 5, 43 and 47	Chapter 5	Chapters 8 and 9	Chapters 8, 9 and 43
<b>Kubasek et al., Dynamic Business Law: The Essentials</b>	Chapters 4, 23 and 24	Chapter 4	Chapter 5	Chapters 5 and 24
<b>Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition</b>	Chapters 3, 49, 50 and 51	Chapter 3	Chapter 7	Chapters 7 and 51
<b>Barnes et al., Law for Business, 10th Edition</b>	Chapters 4, 25 and 45	Chapter 4	Chapter 7	Chapters 7 and 25
<b>Brown et al., Business Law with UCC Applications Student Edition, 12th Edition</b>	Chapters 2, 35 and 40	Chapter 2	Chapter 6	Chapters 6 and 35
<b>Reed et al., The Legal and Regulatory Environment of Business, 15th Edition</b>	Chapters 6, 16 and 20	Chapter 6	Chapter 10	Chapters 10 and 20
<b>McAdams et al., Law, Business &amp; Society, 9th Edition</b>	Chapters 5, 10 and 13	Chapter 5	Chapter 7	Chapters 7 and 13

## This Newsletter Supports the Following Business Law Texts

- Barnes et al., Law for Business, 10th Edition, 2009© (007352493X)
- Brown et al., Business Law with UCC Applications Student Edition, 12th Edition, 2009© (0073524948)
- Kubasek et al., Dynamic Business Law, 2009© (0073524913)
- Kubasek et al., Dynamic Business Law: The Essentials, 2010© (0073377686)
- Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition, 2010© (0073377643)
- McAdams et al., Law, Business & Society, 9th Edition, 2009© (0073377651)
- Reed et al., The Legal and Regulatory Environment of Business, 15th Edition, 2010© (007337766X)

