

Law 249.3 – Lec. 001
Selected Topics in Venture Capital
Spring 2021
Syllabus

Instructor Information

Instructor: Herb Fockler
Email: hfockler@wsgr.com
Phone: 650-714-8504
Office Hours: Generally from 4:30 p.m. to 6:15 p.m. on class days, but email in advance to schedule a meeting.

Instructor: Kei Nishimura Drake
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Phone: 415-947-2086
Office Hours: Generally from 8:00 a.m. to 9:00 a.m. on Wednesday, but email in advance to schedule a meeting.

Course Information

Classes: 6:25 p.m. – 8:15 p.m., Tuesdays
Location: Online
Credit Hours: 2

**Textbook/Course
Materials**

Required: ***Venture Deals: Be Smarter Than Your Lawyer and Venture Capitalist***, Brad Feld & Jason Mendelson.

Materials and links posted on *bCourses* for each week.

Optional/Background: From time to time, separate optional materials and links may be posted on *bCourses* as Optional Materials for background and

additional information. They will not be tested on and can be read later.

bCourses

Site: <https://bcourses.berkeley.edu/courses/1473957>

Content: Class website containing class information, syllabus, weekly reading assignments (other than in textbook), copies of lecture slides, answers to exercises and other class handouts (after class), etc.

Course Description

It's been said that Silicon Valley is the greatest creation of wealth in the history of the planet. This is a practice-oriented course focusing on the legal and business aspects of the day-to-day life of corporate attorneys who advise technology and emerging growth companies and their founders and investors.

The course covers key events in the life-cycle of a startup company:

- An entrepreneur's considerations in starting a technology development business;
- Choices and details in forming an entity to hold that business;
- Corporate structure and governance;
- Incentivizing employees;
- Seeking early stage funding;
- Raising venture capital;
- Fundamental concepts and basic mechanics of a venture capital financing; and
- Dealing with conflicts among the various constituents in the venture

-- all pointed toward a liquidity event, such as an acquisition or IPO.

In each case, the emphasis is on business realities and practical solutions, such as:

- What makes a good business to attract venture capital funding?
- How can entrepreneurs attract investment?
- The pros and cons of different investment sources.
- How founders and investors interact to allocate rewards of the venture between them.

The course is taught using many examples taken from the real world (to the extent you can describe Silicon Valley as the "real world").

Learning Outcomes

The ABA requires that the Berkeley Law as a whole, as well as individual instructors, adopt learning outcomes for students. Learning outcomes are not only required, but they are also an important step in creating an effective course.

Berkeley Law Learning Outcomes

Students in the course will be expected to achieve the following general Berkeley Law Learning Outcomes:

- (a) Knowledge and understanding of substantive law;
- (b) Legal analysis and reasoning, problem-solving, and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system;
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession; and
- (e) Using the law to solve real-world problems.

Course-Specific Learning Outcomes

Students in the course will also be expected to achieve the Course Specific Learning Outcomes for each class listed on Attachment A, as may be updated in the Detailed Syllabus page for that class.

Exam

Students will be evaluated substantially based upon a three hour, open-book, take-home exam. We will provide additional details midway through the course and during the Review Session discussed below. The date, time and method of holding the exam will also be announced as soon as they are determined, given the current pandemic. **Check with the Registrar late in the semester for confirmation.**

There will be a Review Session prior to the exam on Wednesday, May 5, 2021 from 6:25 p.m. to 8:15 p.m. online through Zoom. **Note that, even though the time of day is same as for regular classes, the day of the week of the review session is different.**

Grading

Students will be graded on a combination of performance on the Exam and performance on out-of-class group exercises, with the Exam counting for 80% and the exercises counting for 20%.

On the group exercises, all members of a group will be given the same performance evaluation. If lack of participation by one group member makes you feel that this is unfair for a particular exercise, include a note in the email by which you turn in the exercise. The performance evaluation for any exercise that is turned in late will be reduced automatically.

Class participation will also be taken into account, though generally only to resolve borderline cases. Failure to attend classes regularly without consulting with one of the professors may also detrimentally affect your grade notwithstanding good performance on the exam.

School-wide Policies

- 1) A “credit hour” at Berkeley Law is an amount of work that reasonably approximates three to four hours of work per week for 15 weeks, including:
 - (a) Classroom time;
 - (b) Time spent preparing for class;
 - (c) Time spent studying for and taking the final exam; and
 - (d) Time spent working on the out-of-class group exercises.

For the purposes of these calculations, 50 minutes of classroom instruction counts as one hour, and the 15 weeks includes the exam period. Expect to spend this amount of time per unit per week on in-class and out-of-class course-related work as described above.

- 2) Students who need classroom accommodations or want to discuss implementation of their accommodations for this class should contact the Director of Student Services as soon as possible.

Student Services schedules all exams, including accommodated exams, as the law school is committed to anonymous grading. PROFESSORS DO NOT HAVE THE AUTHORITY TO RESCHEDULE EXAMS. Any student who seeks an accommodated or rescheduled exam for documented medical reasons or for religious observance should contact Student Services in 280 Simon Hall, 510-643-2744.

- 3) The Academic Honor Code (<https://www.law.berkeley.edu/academics/registrar/academic-rules/academic-honor-code/>) governs the conduct of all students during examinations and in all other academic and pre-professional activities at Berkeley Law.
- 4) If you are in need of economic, food, or housing support, you can find help at basicneeds.berkeley.edu. You may be eligible for money to buy groceries via calfresh.berkeley.edu or our [Food Assistance Program](#). If you are in need of food immediately, please visit our UC Berkeley Food Pantry at pantry.berkeley.edu.

- 5) The University of California is committed to creating and maintaining a community dedicated to the advancement, application and transmission of knowledge and creative endeavors through academic excellence, where all individuals who participate in University programs and activities can work and learn together in an atmosphere free of harassment, exploitation or intimidation. Every member of the community should be aware that the University prohibits sexual violence and sexual harassment, retaliation, and other prohibited behavior (“Prohibited Conduct”) that violates law and/or University policy. The University will respond promptly and effectively to reports of Prohibited Conduct and will take appropriate action to prevent, to correct and, when necessary, to discipline behavior that violates this policy. For the complete UC Policy, definitions, compliance and procedures, please access the full text at: <http://policy.ucop.edu/doc/4000385/SVSH>.

Resources: If you have further questions or concerns about reporting behavior related to sexual harassment, sexual violence, and/or protected category discrimination, please contact the Office for the Prevention of Harassment and Discrimination (OPHD) by phone 510-643-7985 or email ask_ophd@berkeley.edu.

Path to Care Center Confidential Advocates provide affirming, empowering and confidential support for those that have experienced gendered violence, including: sexual harassment, emotional abuse, dating and intimate partner violence, sexual assault, stalking and sexual exploitation. Advocates bring a non-judgmental, caring approach to exploring all options, rights and resources. They can be reached by phone (510) 642-1988 or email <http://sa.berkeley.edu/dean/confidential-care-advocate>.

Course Policies

Many of the matters covered in this course cannot be found in books, including the assigned materials, or even on the Internet. The transactions and solutions to issues that we will be discussing almost always have to be learned by doing or by learning from someone else who has done it.

Attendance

Most of the substantive law school content of the course will be provided in the lectures, class discussions and group exercises. Given the foregoing, class attendance is extremely important. We strongly urge all students to attend every class and participate as an active listener and contributor, though we understand that present circumstances may make that difficult at times.

Preparing for Class

Given our combined experience, we can easily talk for the full 110 minutes for 15 weeks. Nonetheless, we -- and we hope you too -- will find it more interesting if things are more

interactive. Accordingly, we strongly hope you will respond to our questions, ask your own questions, and generally engage in discussion with the professors and your fellow students.

We therefore expect all students to prepare well for all classes. Understanding some course topics will require you to have gone through the assigned materials in advance. We expect everyone to be familiar with what is in the assigned materials, also so that we can refer to them during lecture with a minimum of back-filling and explanations. **If, because of an unusual circumstance, you are unable to prepare for a particular class you attend, please let one of us know by email before the start of that class.**

Electronics

Students will need to use laptops or other devices to access the course via Zoom, and may also use these devices to access reading assignments during class. However, Berkeley Law encourages you to take handwritten notes, as research has shown that students absorb information better this way.

Though not mandatory, we strongly encourage students to turn on their video as much as they feel comfortable during classes, especially during small group discussions or when volunteering to speak.

Professors' Biographies

Professor Fockler

Herb Fockler is a partner in the Corporate and Securities Department of Wilson Sonsini Goodrich & Rosati, the leading legal adviser to technology and emerging growth enterprises worldwide. He has been with WSGR for over 35 years, representing entrepreneurs and the businesses they create at all stages of development -- from newly formed companies seeking their initial VC funding to multibillion-dollar global enterprises. He has worked with hundreds of public and private companies across the technology industry, from computers, software, Internet and semiconductors through biotechnology, medical devices and clean technology. During the first half of his career he handled many large transactions and relationships with many leading technology companies, including Dolby Laboratories, Autodesk, Netscape, Sun Microsystems, Silicon Graphics, WordPerfect, Flextronics and Philips Microelectronics. Since 2000, however, he has focused on representation of entrepreneurs and early stage startups. He is also a leader in WSGR's internal education and development on internal firm forms, standards and knowledge. He is a member of the California State Bar's Advisory Committee of Legal Opinions and a former chair of the ABA's Venture Capital Transaction Issues and Documents Committee. He has taught courses and lectured on venture capital, startup companies, initial public offerings and acquisitions at Berkeley Law for many years, as well as at Santa Clara University Law School and Business School, the Wharton School's San Francisco campus, Harvard Law School and the Harvard iLab, and Stanford University's Ignite Program. Outside of law, he was a computer programmer before and during law school, he holds an undergraduate degree in physics, and he doesn't ski as much as he'd like to.

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Professor Drake

Kei Nishimura Drake is a senior associate in the Corporate and Securities Department of Wilson Sonsini Goodrich & Rosati. She began her corporate career at Wilson Sonsini Goodrich & Rosati in 2013 and practiced for 4 years before joining the legal team at Zymergen, a Softbank-backed company specializing in the genetic engineering of microbes. After her stint at Zymergen, she joined Atrium LLP, a hybrid law firm/legal technology startup, working to make legal practice more efficient. She returned to WSGR in April 2020, where her practice covers a broad range of general corporate, securities and transactional matters, with a focus on emerging company and private

company representation. On weekends, you can find her walking her dog around the Presidio or at the beach, and enjoying dinner and good wine with friends (now over zoom!).

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Summary Course Schedule

The following is a summary of dates and topics for each class in the course. Learning outcomes for each class as set forth in Attachment A. The topics, learning outcomes and assigned materials for each class are set forth in a separate Syllabus Details document for that class. Note that minor changes may be made to the foregoing as the class progresses, so be sure to check the Syllabus Details document posted on *bCourses* the week prior to each class.

Class	Date	Topics
1	<i>January 19</i>	<i>Introduction to the World of Venture Capital Companies</i> <ul style="list-style-type: none">○ <i>What makes Silicon Valley different?</i>○ <i>Silicon Valley and Venture Capital history</i>○ <i>The “Silicon Valley Venture Capital Model”</i>
2	<i>January 26</i>	<i>Starting a New Venture, part I</i> <ul style="list-style-type: none">○ <i>What makes for a good startup business?</i>○ <i>Pre-formation issues</i><ul style="list-style-type: none">▪ <i>Leaving prior employers</i>▪ <i>Intellectual property matter</i>▪ <i>Initial organization of the new venture</i>○ <i>Exercise #1 – Creating a Business Plan (due January 29)</i>
3	<i>February 2</i>	<i>Starting a New Venture, part II</i> <ul style="list-style-type: none">○ <i>Organizing the business</i><ul style="list-style-type: none">▪ <i>Forms of business entities</i><ul style="list-style-type: none">– <i>Typical structure of VC-backed companies</i>▪ <i>Corporate naming issues</i>▪ <i>Incorporation mechanics</i><ul style="list-style-type: none">– <i>Choice of domicile</i>– <i>Basic formation documents and process</i>
4	<i>February 9</i>	<i>Starting a New Venture, part III</i> <ul style="list-style-type: none">○ <i>Ownership of the New Venture</i><ul style="list-style-type: none">▪ <i>Allocating among Founders</i>▪ <i>Stock and options</i>○ <i>The Cap Table</i>○ <i>Exercise #2: Building the Capitalization Table (due February 19)</i>

Class	Date	Topics
5	<i>February 16</i>	<i>Seeking Funding for a New Venture, part I</i> <ul style="list-style-type: none"> ○ <i>Sources of funding generally</i> <ul style="list-style-type: none"> ▪ <i>Advantages and disadvantages of Venture Capital as a funding source</i> ▪ <i>Other sources of funding</i> ▪ <i>"Lifestyle Companies"</i> ○ <i>Seeking VC Funding</i> <ul style="list-style-type: none"> ▪ <i>The VC mating dance</i> ▪ <i>Business plans and other solicitation materials</i>
6	<i>February 23</i>	<i>Seeking Funding for a New Venture, part II</i> <ul style="list-style-type: none"> ○ <i>Securities laws</i> <ul style="list-style-type: none"> ▪ <i>Private placement exemptions</i> ▪ <i>Other potential exemptions</i> ▪ <i>State "blue sky" laws</i> ○ <i>Initial funding</i> <ul style="list-style-type: none"> ▪ <i>Convertible Notes</i> ▪ <i>SAFEs</i>
7	<i>March 2</i>	<i>Venture Capital Financings, part I</i> <ul style="list-style-type: none"> ○ <i>Dual-class stock structure</i> ○ <i>Valuation and pricing</i> ○ <i>Exercise #3: Calculating the Price per Share in a Venture Capital Financing (due March 12)</i>
8	<i>March 9</i>	<i>Venture Capital Funds</i> <ul style="list-style-type: none"> ○ <i>Guest lecturer: TBD</i> <ul style="list-style-type: none"> ▪ <i>Structure and objectives of venture capital funds;</i> ▪ <i>Current state of the venture capital business</i>
9	<i>March 16</i>	<i>Venture Capital Financings, part II</i> <ul style="list-style-type: none"> ○ <i>Control mechanisms</i> ○ <i>Termsheets and specific terms</i> <ul style="list-style-type: none"> ▪ <i>Rights inherent in the Preferred Stock</i> <ul style="list-style-type: none"> – <i>The liquidation preference</i> – <i>Conversion and anti-dilution protection</i>
10	<i>March 30</i>	<i>Venture Capital Financings, part III</i> <ul style="list-style-type: none"> ○ <i>Termsheets, and specific terms, cont.</i> <ul style="list-style-type: none"> ▪ <i>Contractual rights</i> ▪ <i>Other terms</i>

Class	Date	Topics
11	<i>April 6</i>	<i>Venture Capital Financings, part IV</i> <ul style="list-style-type: none"> ○ <i>Documents and mechanics</i> <ul style="list-style-type: none"> ▪ <i>Basic documents</i> ▪ <i>Corporate approvals</i> ▪ <i>Due diligence</i>
12	<i>April 13</i>	<i>Venture Capital Financings, part V</i> <ul style="list-style-type: none"> ○ <i>Termsheet negotiations exercise</i> ○ <i>Exercise #4: Allocation of Acquisition Proceeds (due April 23)</i>
13	<i>April 20</i>	<i>When Things Go Wrong</i> <ul style="list-style-type: none"> ○ <i>Board fiduciary duties</i> ○ <i>Conflicts between Founders and Investors</i> <ul style="list-style-type: none"> ▪ <i>Alantec</i> ○ <i>Conflicts between Old Investors and New Investors</i> <ul style="list-style-type: none"> ▪ <i>Benchmark</i> ○ <i>Conflicts between Common and Preferred</i> <ul style="list-style-type: none"> ▪ <i>Trados</i>
14	<i>April 27</i>	<i>Exits</i> <ul style="list-style-type: none"> ○ <i>Initial public offerings</i> ○ <i>Acquisitions</i>
	<i>May 5</i>	<i>Review session</i>
	<i>Week of May 10-19</i>	<i>Exam</i>

ATTACHMENT A

Course-Specific Learning Outcomes by Class

Class 1 – January 19, 2021

Introduction to the World of Venture Capital Companies

- Describe key elements underlying Silicon Valley that differentiate businesses here from traditional businesses
- Understand the historical context in which today's Silicon Valley, and the technology industry in general, developed
- Begin to understand basic structures and motivations of VCs, their funds and their portfolio companies
- Begin to understand what makes a Company attractive to VCs

Class 2 – January 26, 2021

Starting a New Venture, Part I

- Understand what features of a business make it suitable or not suitable for Venture Capital investment
 - Differentiate among ideas that are apps, technologies or full-blown companies
- Spot common issues and problems in starting a new technology venture, including with respect to:
 - Leaving prior employers
 - Creating a clean IP pedigree
 - Building the team
- Suggest possible solutions to the foregoing

Class 3 – February 2, 2021

Starting a New Venture, Part II

- Recognize factors affecting the choice of business entity
 - Suggest entity type(s) that might and might not be suitable/attractive for a venture, based upon its business characteristics
 - Suggest when non-corporate entities might be more appropriate
- Understand the three different regimes affecting business names
- Describe the steps in the initial organization of a corporation

Class 4 – February 9, 2021

Starting a New Venture, Part III

- Discuss elements Founders should consider in allocating ownership of the new venture among themselves
- Understand what stock is and the multiple terms used to describe various aspects of it
 - Explain what vesting is and why it is used
 - Differentiate between options and restricted stock
 - Explain the differences between an ISO and an NSO
- Understand how the Capitalization Table for a new venture builds up through successive rounds of financing
- Build an actual Cap Table for a new venture through formation events and subsequent financing rounds

Class 5 – February 16, 2021

Seeking Funding for a New Venture, Part I

- Explain the advantages and disadvantages of Venture Capital as a financing source
- List other sources of funding and the advantages and disadvantages of each
- Describe what a “Lifestyle Company” is and identify businesses that might better be structured as one
- Discuss the steps in seeking VC funding
 - Describe the elements of a Business Plan

Class 6 – February 23, 2021

Seeking Funding for a New Venture, Part II

- List the various exemptions available for private issuances of securities.
 - Identify which exemptions are most useful for a VC financing and why.
 - Describe the required elements of Rule 506(b).
- Understand the core principles underlying the federal securities laws.
- Explain why Companies may choose to raise their initial funding with Convertible Notes or SAFEs rather than going straight to a Preferred Stock financing.
- Describe the typical terms of a Convertible Note used by a startup.
- Explain what a SAFE is and how it differs from a Convertible Note, both in theory and in practice.
- Explain the risks to both Founders and Investors in using Convertible Notes or SAFEs and why each might prefer one over the other.

Class 7 – March 2, 2021

Venture Capital Financings, part I

- Explain the reasons for the dual-class stock structure of VC-backed companies.
- Distinguish Venture Capital Preferred Stock from Public Company and Private Equity Preferred Stock
- Understand the terms "Fully Diluted Shares," "Pre-Money Valuation" and "Post-Money Valuation," how each is used and how the latter two differ.
- Discuss various ways the Pre-Money Valuation in a VC financing might be arrived at.
- Calculate the price per share in a VC financing.
 - Calculate the price where the Post-Money Option Plan Reserve is expressed as a percentage of the post-deal Fully Diluted Shares.
- Understand how the economic terms in a VC financing affect Founders' percentage ownership of the Company afterwards.

Class 8 – March 9, 2021

Venture Capital Funds – Guest lecturer: Neil Wolff, VantagePoint Venture Partners

- Understand the basic terms used in the Venture Capital industry
- Understand the typical organization, structure and objectives of a Venture Capital fund and how they affect the funds actions in investing and dealing with its portfolio companies
- Understand the current state of the Venture Capital industry
- Understand the different types of VC funds, in terms of such things as size, industry focus, typical stage of company and typical size investment
- Understand the different types of VC funds, in terms of such things as size, industry focus, typical stage of company and typical size investment

Class 9 – March 16, 2021

Venture Capital Financings, part II

- Discuss different ways VCs can exert control over a VC-backed company.
 - Describe the typical allocation of Board of Director seats.
 - Describe typical corporate actions that require stockholder votes, either by law or as negotiated terms.
 - Discuss why Series votes of Preferred stockholders are to be avoided.
- Review and comment on a Termsheet for a Venture Capital Financing
 - Recognize all the standard terms
 - Differentiate between rights inherent in the Preferred Stock and rights granted by contract and the implications of the difference

- Differentiate between those that really matter and those that matter less
 - Identify the crucial terms in each of an upside exit and a downside exit.
- Identify what is most common in typical Silicon Valley deals for each of the major terms
- Understand how Liquidation Preferences work
 - Discuss the three different types of Liquidation Preference and explain how each works
 - Recommend which type of Liquidation Preferred is better for the holders of Common Stock, the holders of early series of Preferred and the holders of later series of Preferred
 - Calculate how the proceeds from an acquisition are distributed to stockholders as a result of various types of Liquidation Preferences
- Understand the various implications of Preferred Stock being convertible into Common Stock
- Understand what Anti-dilution Protection is
 - Differentiate between Structural Anti-dilution and Price-based Anti-dilution and describe the purpose of each
 - Describe the different types of Price-based Anti-dilution Protection
 - Calculate Price-Based Anti-dilution adjustments under each of the different types of such protection
 - Recommend which type of Anti-dilution Protection is better for the holders of Common Stock, the holders of early series of Preferred Stock, and the holders of later series of Preferred Stock

Class 10 – March 30, 2021

Venture Capital Financings, part III

- Explain what Registration Rights are, what the typical types are, and whether any of them really matter
- Explain the possible effects and relative importance of Pre-emptive Rights
- Describe the typical limitations over Founders' sales of their stock that Investors require
 - Explain what Co-Sale Rights are
- Discuss whether a Company should agree to an Exclusivity clause

Class 11 – April 6, 2021

Venture Capital Financings, part IV

- Describe the multiple documents used in a Venture Capital Financing and the purpose and general contents of each
- Understand what goes on in the Due Diligence process and why it is important
- Explain the corporate approvals necessary for a Company to complete a Venture Financing and how the process works to obtain these

- Explain the purpose of obtaining a Legal Opinion from the Company's counsel in connection with a financing
 - List some of the matters commonly covered in such Opinions and those that should not be

Class 12 – April 13, 2021

Venture Capital Financings, part V

- Understand more deeply the economic, control and other terms in the Preferred Stock sold in Venture Capital Financings
- Understand which terms are important and which terms matter less
 - Understand how business considerations may cause some terms to be more or less important
- Develop strategies for negotiating a Venture Capital Financing Termsheet

Class 13 – April 20, 2021

When Things Go Wrong

- Identify the various types of conflicts that can arise among the various groups in a VC-backed company
- Describe the two main Fiduciary Duties of Directors
 - Distinguish between Fiduciary Duty issues and Standard of Review issues
 - Discuss the Business Judgment Rule and the conditions for obtaining its protections
 - Describe why the protections of the Business Judgment Rule are important and what happens if they are lost
- Identify the main legal issues in a Down-Round Financing
 - Recommend ways to address these issues, reduce risk to the Board and protect the interests of the Common stockholders
- Understand the different interests that may arise between Old Investors and New Investors
 - Understand what duties a Board owes to Preferred stockholders in contrast to the duties it owes to Common stockholders
- Describe what a Pay-to-Play is, when it might be used and what issues it raises
- Identify the issues that arise when a Company is sold for proceeds below or barely above the aggregate Liquidation Preference of the Preferred Stock
 - Recommend ways to address these issues, reduce risk to the Board and protect the interests of the Common stockholders

Class 14 – April 27, 2021

Liquidity and Exits

- Understand the motivation of each of the stakeholders – investors, founders, management and employees – to seek (or not seek) a liquidity event
- Discuss concepts of time to liquidity, certainty of liquidity and certainty of value in relation to potential “exit events” – that is, a sale of the company versus an IPO
- List the key participants and key steps in the IPO process
- Describe the benefits and drawbacks of going public
 - Explain whether certain stakeholders disproportionately experience the benefits/drawbacks
- List the key steps in the sale process
- Describe the key considerations in how to structure the sale transaction
 - Explain how structuring considerations may benefit certain stakeholders relative to others