

Law 255.11S – Venture Capital in Practice Summer 2022

Syllabus

Instructor Information

Instructor: Herb Fockler
Email: hfockler@wsgr.com
Phone: +1-650-714-8504
Office Hours: After each class session, either in the classroom or at Strada across Bancroft. Feel free to stay after class or email me in advance to reserve a time.

Course Information

Meetings: 2:00 p.m. – 4:30 p.m., Tuesday and Thursday, May 17, 19, 24, 26 and 31.
Location: Room 244
Credit Hours: 1 – credit/no credit
Zoom Information: See **Attachment B** (only if classes cease to be in-person)
Technical Support: Email studentcomputing@law.berkeley.edu (both *bCourses* and Zoom help)

Course Description

It's been said that Silicon Valley is the greatest creation of wealth in the history of the planet. This course will focus on legal and business aspect of what goes on here in the day-to-day life of a corporate attorney advising technology and emerging growth startup companies. The course will touch on key events in the life-cycle of a startup: considerations in starting a technology-based business; choices and details in forming an entity to hold that business; seeking early stage funding; raising venture capital; the fundamental concepts and basic mechanics of a venture capital financing; all pointed toward a liquidity event, such as an IPO. In each case, the emphasis will be on business realities and practical solutions, such as what makes for a good business to attract venture capital; how should entrepreneurs seek investment and the pros and cons of different investment sources; and how founders and investors interact to allocate rewards of the venture between them. The course will be taught using many examples taken from real life.

Textbook/Course Materials

Required: *Venture Deals: Be Smarter Than Your Lawyer and Venture Capitalist*, Brad Feld & Jason Mendelson, Fourth Edition (2019). You may be able to find an online version through the library.

There will also be a number of podcasts and other multimedia items assigned – some required, some optional (see Syllabus). Links to these are on *bCourses*.

bCourses

Site: <https://bcourses.berkeley.edu/courses/1514849>

Content: The class *bCourses* site contains reading assignments, copies of lecture slides (after class), and other class information. I will also use the *bCourses* **Announcements** function to communicate with the class, so check it regularly.

Learning Outcomes

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

Berkeley Law Learning Outcomes are the competencies that students will develop by the conclusion of their legal education. 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 listed on **Attachment A**.

Exam and Grading

This course is Pass/Fail. Students will be evaluated primarily based upon a multiple choice, open-book, take-home exam. The exam will be available for download on June 4, 5 and 6. Students will have a maximum of two hours to complete it before they must upload their answers.

Class participation will be taken into account in borderline cases. You can earn class participation points in a number of ways, including the following:

1. In class, answering one of my questions, asking a thoughtful question, or making a substantive comment about the course material or personal experiences of yours that are relevant to the subject of the class.

2. Attending office hours and asking a thoughtful question or engaging in a discussion of a substantive issue related to the course material.

School-wide Policies

- 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, disability, or for religious observance, should contact [Student Services](#), 510-643-2744, kvalenti@berkeley.edu.
- The Academic Honor Code ([Academic Honor Code](#)) governs the conduct of all students during examinations and in all other academic and pre-professional activities at Berkeley Law. We expect students to adhere to this code scrupulously. If you have any question about whether your conduct may violate the code, please contact your professor before you act. You may face severe consequences, including a failing grade in this class or removal from the program, if you violate the code, even if similar conduct is not considered wrong in your home country.
- A common and serious form of misconduct and Honor Code violation is plagiarism. You must cite the sources of any words or ideas that are not your own. Cite all sources — hard copy, web-based, and others — in proper academic format.
- If you are in need of economic, food, or housing support, you can find basic needs information [here](#). You may be eligible for money to buy groceries via [CalFresh](#) or our Food Assistance Program. If you need food immediately, please visit our [UC Berkeley Food Pantry](#).
- 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 [Sexual Violence and Sexual Harassment Policy](#).
- 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 at (510) 642-1988.

Technology Help

If technical difficulties prevent you from completing course work, please alert me immediately. However, please understand that I cannot assist you with technical problems. Please use the tech support listed below.

- As a Berkeley Law student, you are entitled to general software support for your computer from the law school, and certain free software downloads from UC Berkeley, while enrolled. UC Berkeley does not provide hardware support. Information, links, and instructions for many common computer/technical questions can be found in the law library's online computing guide:

<http://libguides.law.berkeley.edu/computing/home>

- For *bCourses*, Zoom and other technical support questions, please contact studentcomputing@law.berkeley.edu or you can use the [Student Computing Chat](#). In both cases, someone will respond to you during our regular business hours. You can also find information, links and instructions for many common computer/technical questions in the [law library's online computing guide](#).
- If you have research-related questions, please contact the reference librarians by filling out the form here:

<https://www.law.berkeley.edu/library/dynamic/students/researchRequest.php>

- You can also reach reference librarians during business hours by using our chat service at:

<https://www.law.berkeley.edu/library/dynamic/internal/chat.php>

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 content of the course will be provided in the lectures. Given the foregoing, class attendance is extremely important. I strongly urge all students to attend every class and participate as an active listener and contributor, though I understand that in some cases that may be difficult.

Subject to technical issues, each class meeting will be recorded and posted on *bCourses* at some point after class. The recordings will typically capture my presentation and all screen-shared materials, and they may also capture images of individual students. Copies of each class's slides will also be posted on *bCourses*.

If you are not able to attend at the time the class takes place, then you must view the entire class recording. Whether you attend in real-time or view the recording, you are responsible for all content covered in each class meeting.

Preparing for Class

All students are expected to prepare well for all classes. Understanding some of the materials discussed in the lectures will require you to go through the assigned materials for that class in advance. Accordingly, you should read, review and be familiar with what is in the assigned materials so that you can respond to questions, ask your own questions, and generally engage in class discussions.

Electronics

Students will need to use a computer to access the course materials and administrative items relating to the course. You 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. Further, accessing the Internet or apps during class—except for class-related activities—is prohibited.

Professor Biography

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 37 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.

Over this time, Professor Fockler 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.

Professor Fockler is actively involved in WSGR's internal programs to maintain high quality legal services for clients and provide advanced education to WSGR attorneys to assist them in pursuing long-term careers at WSGR. He is also one of the leaders of WSGR's initiatives to revolutionize the provision of legal services to clients in cost-efficient ways, though the use of technology, automation and standardization.

Outside of WSGR, Professor Fockler is a member of the California State Bar's Advisory Committee of Legal Opinions and is currently one of the drafters of the Bar's official advice regarding such opinions. He is also the Co-Chairman of the Private Equity and Venture Capital Affinity Group of the nationwide Working Group on Legal Opinions, and was formerly the chair of the America Bar Association's Venture Capital Transaction Issues and Documents Committee. He has taught courses on venture capital, startup companies, initial public offerings and acquisitions at Berkeley Law and Santa Clara University Law School for many years, as well as lecturing at 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 nearly as much as he'd like to.

Herbert P. Fockler
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
hfockler@wsgr.com
650-714-8504 cell

Course Schedule

Class Date	Topic	Assigned Materials
May 17 Part A	<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>○ <i>Structures of Venture Capital Funds</i>	<i>Feld pages 1-16, 167-185</i> Optional: <i>Silicon Valley Documentary</i> (posted on bCourses)
May 17 Part B	<i>Starting a New Venture</i> <ul style="list-style-type: none">○ <i>Characteristics of a good business for VC investment</i>○ <i>Threats to a successful venture and getting funding</i><ul style="list-style-type: none">▪ <i>Issues with current employers</i>▪ <i>Issues with prior employers</i>▪ <i>Intellectual Property ownership</i>○ <i>Things to try to uncover in a new client interview</i>	<i>Feld pages 259-271</i>
May 19 Part A	<i>Organizing the New Venture</i> <ul style="list-style-type: none">○ <i>Typical corporate structure</i>○ <i>Choice of name</i>○ <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>Feld pages 129-136</i>

Class Date	Topic	Assigned Materials
May 19 Part B	<i>Seeking Funding for a New Venture</i> <ul style="list-style-type: none"> ○ Sources of funding generally <ul style="list-style-type: none"> ▪ Advantages and disadvantages of Venture Capital as a funding source ▪ Other sources of funding ▪ "Lifestyle Companies" ○ Seeking Venture Capital Funding <ul style="list-style-type: none"> ▪ Business plans and other solicitation materials ▪ Approaching Venture Capital investors ○ Securities laws 	<i>Feld pages 17-40, 137-144, 209-214</i> <i>Startup Podcasts #1, 2 and 3 (posted on bCourses)</i>
May 24 Part A	<i>Initial Funding for a New Venture</i> <ul style="list-style-type: none"> ○ Convertible Notes ○ SAFEs 	<i>Feld pages 113-128</i> Optional: <i>Forms of Convertible Note and SAFEs</i>
May 24 Part B	<i>Venture Capital Financings</i> <ul style="list-style-type: none"> ○ Dual-class stock structure ○ Valuation and pricing ○ Control mechanisms 	<i>Feld pages 41-54, 77-90, 253-258</i> <i>Startup Podcasts #4, 5 and 6 (posted on bCourses)</i> Optional: <i>Forms of Termsheet and major VC Financing agreements</i>
May 26	<i>Venture Capital Financings, cont.</i> <ul style="list-style-type: none"> ○ Termsheets and specific terms ○ Documents, process and mechanics 	<i>Feld pages 54-75, 91-112, 215-220</i>
May 31 Part A	<i>Termsheet Negotiations</i>	<i>Feld pages 187-208, 275-294</i> <i>Startup Podcast #7 (posted on bCourses)</i> <i>NPR Podcast (posted on bCourses)</i>
May 31 Part B	<i>Exits – The Initial Public Offering</i>	
June 4, 5 or 6	<i>Exam</i>	

ATTACHMENT A

Course-Specific Learning Outcomes

Class 1 – Tuesday, May 17, 2022

Part A – 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 Venture Capitalists, their funds and their portfolio companies
- Describe the basic structure of the Venture Capital fund
- Begin to understand what makes a Company attractive to Venture Capitalists

Part B – Starting a New Venture

- Understand what features of a business make it suitable or not suitable for Venture Capital investment
 - Differentiate among ideas that are apps, products, technologies or actual companies
- Spot common issues and problems in starting a new technology venture, including with respect to:
 - Leaving prior employers
 - Creating a clean IP pedigree
 - Relationships among founders
- Suggest possible solutions to the foregoing
- Understand things to uncover when meeting with entrepreneurs as potential new clients

Class 2 – Thursday May 19, 2022

Part A – Organizing the New Venture

- Describe the typical structure of a Venture Capital-funded venture
 - Recognize the effects of US federalism on incorporation
 - Recognize factors affecting the choice of business entity
- Understand the three different regimes affecting business names
- Describe the steps in initial organization of a corporation
- Describe factors to be considered in initial allocation of equity among Founders
- 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 among stock, restricted stock and options
- Understand what a Capitalization Table is and how it builds up for a new venture through successive rounds of financing

Part B – Seeking Funding for a Startup Company

- 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
- Understand the steps in seeking Venture Capital funding
 - Describe the elements of a Business Plan
- Describe the principal elements of U.S. securities laws, as they apply to Venture Capital-backed companies

Class 3 – Tuesday, May 24, 2022

Part A – Initial Funding of a New Venture

- 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 Convertible Notes 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

Part B – Venture Capital Financings

- Explain the reasons for the dual-class stock structure of VC-backed companies.
- Understand the terms "Fully Diluted Shares," "Pre-Money Valuation" and "Post-Money Valuation" and how they are used
- Discuss various ways Pre-Money Valuation may be arrived at in a VC financing
- Understand how the various economic terms of a VC financing affect the Founders' share of the Company afterwards
- Discuss the different ways that 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

Class 4 – Thursday, May 26, 2022

Part B – Venture Capital Financings, cont.

- Review and comment on the major terms in a Termsheet for a Venture Capital Financing
 - Differentiate between rights inherent in the Preferred Stock and rights granted by contract and implications of the difference
- Differentiate between those terms that really matter and those that don't
 - Identify the crucial terms in an Upside Exit and in a Downside Exit
- Identify what is typical in Silicon Valley deals for each major term
- Understand how Liquidation Preferences work
 - Discuss the three different types of Liquidation Preferences and explain how each works
 - Recommend which type of Liquidation Preferred is better for holders of Common Stock, holders of early series of Preferred and holders of later series of Preferred
- Understand the various implications of Preferred Stock being convertible into Common Stock
- Understand what Anti-dilution Protection is
 - Recommend which type of Anti-dilution is better for holders of Common and which is better for holders of Preferred
- Explain what Registration Rights are and whether they really matter
- Explain possible effects and relative importance of Pre-emptive Rights
- Describe typical limitations over Founders' sales of their stock
- Discuss whether a Company should agree to an Exclusivity clause
- List the major documents used in a Venture Capital Financing and explain the general role 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

Class 5 – Tuesday, May 31, 2022

Part A – Termsheet Negotiations

- 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

Part B – Exits – The Initial Public Offering

- State the purpose of the registration provisions of US securities laws
 - State what the difference is between “merit-based” and a “disclosure-based” regulation of securities offerings, and which the US federal system uses.
- Describe some of the benefits and drawbacks of going public
- List some of the prerequisites – business and structural -- for going public
- Explain the overall process of going public, including major events, phases and timeline
 - Describe the role of the underwriter in an IPO
 - Describe the key elements to be covered about the Company in drafting a Registration Statement
 - Explain the limitations of Company publicity outside of the Prospectus during the IPO process and the consequences of violating them
- Explain the liability for misstatements and omissions in a Registration Statement under US securities laws
 - State who can be held liable
 - Describe how any of them can attempt to reduce their liability
 - Give examples of the types of information that could lead to liability if incorrect or omitted

ATTACHMENT B

Zoom Meeting Information (only if Class Sessions cease to be in-class)

NOTE: All participants and hosts are required to sign into a Zoom account prior to joining meetings hosted by UC Berkeley. See "How to sign into your UC Berkeley Zoom account" https://berkeley.service-now.com/kb?id=kb_article_view&sysparm_article=KB0013718 for how to sign in. Participants who are not eligible for a UC Berkeley-provided Zoom account can use a Zoom account provided by their institution, can create a free, consumer Zoom account (at <https://zoom.us/freesignup/>), or can dial in via phone.

Topic: Herb Fockler's Personal Meeting Room

Join Zoom Meeting

<https://berkeley.zoom.us/j/4240237670>

Meeting ID: 424 023 7670

One tap mobile

+13017158592,,4240237670# US (Washington DC)

+13126266799,,4240237670# US (Chicago)

Dial by your location

+1 301 715 8592 US (Washington DC)

+1 312 626 6799 US (Chicago)

+1 470 250 9358 US (Atlanta)

+1 470 381 2552 US (Atlanta)

+1 646 518 9805 US (New York)

+1 646 558 8656 US (New York)

+1 651 372 8299 US (Minnesota)

+1 786 635 1003 US (Miami)

+1 267 831 0333 US (Philadelphia)

+1 213 338 8477 US (Los Angeles)

+1 253 215 8782 US (Tacoma)

+1 346 248 7799 US (Houston)

+1 602 753 0140 US (Phoenix)

+1 669 219 2599 US (San Jose)

+1 669 900 6833 US (San Jose)

+1 720 928 9299 US (Denver)

+1 971 247 1195 US (Portland)

+1 206 337 9723 US (Seattle)

Find your local number: <https://berkeley.zoom.us/u/aXv5t7YwL>