TEACHING TRANSACTIONAL LAWYERING*

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I. INTRODUCTION

Over the years I have developed a habit. Whenever I meet a "deal lawyer" of some experience and the opportunity presents itself, I ask this question, "what makes a 'great' deal lawyer better than a simply 'average' one?" While my interlocutor is pondering his or her answer, I clarify my inquiry in two ways. First, I explain that I want to discount for experience. So in answering the question, I ask my interlocutor to have in mind two lawyers of roughly comparable vintage. Second, I ask him or her to keep in mind that my second question will be, whatever they identify as the critical components of this difference, are the components teachable?

I've been asking these questions for close to 25 years.[1] In that time, I've expanded my sample from lawyers to business persons who frequently work with deal lawyers. In my own effort to become a better practitioner, as well as a better consumer of legal services, I've asked myself the same questions over and over. My opinion is that in order to begin to become better teachers of transactional lawyering, these are the questions with which we must begin.[2]

 I am indebted to the students who were members of the Law & Finance of Transactional Lawyering class during the Spring of 2008 for their enthusiastic participation and to the members of the bar and the business community who so generously gave of their time and talent. I am also grateful to Adam Benforado, Tecla Borick, Roger Dennis, Rob Illig, Anthony Luppino, Jay Mitchell, Natalie Pedersen, Terry Seligmann, Tina Stark and Emily Zimmerman for their comments and suggestions about this Article. The usual disclaimers apply.

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1. I have spent much of that time working as a transactional lawyer, including service as a partner in two large, international law firms, working in Philadelphia, New York, and London. I also served as a chief legal officer and as part of the management team at an internet start-up, a private equity investment firm and a hedge fund. I have served on several public and private company boards of directors. In all those capacities, I have had the privilege of working with and learning from some of the world's greatest deal lawyers.

2. In one of the most interesting articles I've found on the subject, Professor Gary Blasi be-

In collecting answers over the years, I have not attempted any type of scientific data collection. The answers I've received have varied from the very vague ("they just get it") to the very specific ("an attention to detail"). Unscientifically, however, I can report a common theme among all the answers I have collected. This theme can be summarized as follows:

There do exist differences between transactional lawyers, with a select few being truly "great," many being "more than competent," and some being "less so," and all having some difference that makes them more or less attractive as a source for legal services for any particular client in any particular matter.

Many of the components that lead to "competence" are teachable; most of the components that lead to "greatness" are not. But "competence" is in many ways the *sine qua non* for "greatness." Other differences vary from being utterly innate to being completely learned; most are some combination of both.

The notion of "components" of difference is an oversimplification. For example, a "teachable" component of competence, like knowledge of the law, can become a non-teachable component of greatness when that knowledge leads to innovation. It is common for my interlocutors to resort to sports analogies in trying to elucidate this point. You can know the rules of the game, you can practice every day for hours on end, but most of us will never be Michael Phelps or Tiger Woods. But even Phelps and Woods need to know the rules. And each practices every day. More importantly, while many of us will never be a Phelps or a Woods, much of what will differentiate us comes from how well we can "learn" to be more like them (within the limits of our innate capabilities).

What do these answers offer for becoming better teachers of transactional lawyering? The one result I have not been able so far to extract from this survey is some theoretical insight into the nature of transactional expertise. Indeed most of the lawyers I have spoken with resist the idea that there exists some meta-theory of transactional lawyering that would in-

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gins his inquiry into legal expertise with very much the same questions. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 314 (1995). I strongly agree with him that any attempt to teach lawyering must come with an attempt to elucidate the theoretical underpinnings of expertise. *Id.* at 360-80.

form an inquiry into what separates a great deal lawyer from a merely competent one. My own view is that they are only partially correct. I certainly agree that no abstract set of principles exists that if simply learned leads to expertise. Just like no one can turn a theoretical understanding of the physics of a golf swing into a Masters championship, no one becomes Marty Lipton or Joe Flom after reading a book (or all of them for that matter) on doing deals. Nevertheless, Phelps and Woods do benefit from a very close study of what they do by people who understand the physics of golf and swimming. Similarly, I see the same potential for transactional lawyering. My purpose here, however, is to take up the one clear lesson that comes from my years of conversation with the profession. The best way to learn to be a better deal lawyer is to watch really good deal lawyers work. If that is the case, how can law schools participate in educating the next generation of transactional lawyers?

Law schools are giving more and more attention to this question of how to prepare students to become transactional lawyers.[3] Once relegated to a single course on "business planning," supplemented here and there by adjunct-taught electives in real estate transactions or the like, law school curricula at every level of law school are being pushed to include a new focus on teaching future practitioners how to do deals.[4] One

3. For example, the upcoming Mid-Year Meeting of the Association of American Law Schools is being dedicated to the subject of teaching transactional lawyering. *See generally* Ass'n of Am. Law Sch., Mid-Year Meeting, http://www.aals.org/events_midyear.php (last visited Feb. 24, 2009). In May 2008, over 170 law professors from all over the country (and abroad) gathered at Emory University School of Law for a conference entitled "Teaching Drafting and Transactional Skills: The Basics and Beyond." http://www.law.emory.edu/programs-centers-clinics/transactional-law-program/teaching-drafting-and-transactional-skills-conference.html (last visited Feb. 24, 2009). Even the bloggers are taking up the issue. *See, e.g.*, Posting of Tina Stark to The Conglomerate, http://www.theconglomerate.org/ 2008/08/towards-a-new-t.html (Aug. 4, 2008) ("[I]n the last three years, there has been a sea-change, and transactional education is hot."); Posting of Rob Illig to The Conglomerate, http://www.theconglomerate.org/2008/08/teaching-transa.html (Aug. 22, 2008) ("It may be the Carnegie Foundation report, or perhaps just the growth of a critical mass of former dealmakers entering legal academia, but I feel as if the teaching of what is generally thought of as transactional law is finally getting some serious attention.").

4. *See, e.g.*, Emma Schwartz, *Getting Business School Skills While in Law School*, U.S. NEWS & WORLD REPORT, Mar. 26, 2008, *available at* http://www.usnews.com (typing "Emma Schwartz, Business Skills" in the "Search" box retrieves the article) (noting how law schools across the country are expanding their offerings in transactional law in response to greater demand for graduates with business acumen) (last visited Feb. 24, 2009). One survey suggests

can speculate on what underlies this new level of interest.

Perhaps it is simply a natural part of the evolving effort to make legal education more effective in training "practice ready" lawyers?[5] Perhaps as more and more "skills" courses have made their way into the standard course list, law schools have been forced to acknowledge that the skills required in a transactional practice are often quite different from those required in litigation.[6] Perhaps our clinicians, having succeeded finally in establishing the importance of "live client" experience in law school using the traditional litigation setting, have now turned to the new frontier of giving students a taste of contract drafting, negotiation, client counseling, and planning and structuring.[7] Perhaps legal writing teams have come to see "contract drafting" as a different challenge from memoranda and briefs, necessitating an expansion of the legal writing offerings.[8] Perhaps, having spent the last two decades exploring Professor Ronald Gilson's[9] and others' attempts to elucidate a theory of transactional lawyering, corporate law scholars have begun to see the need to incorporate an under-

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that most law schools offer some kind of transactional courses. Kenneth N. Klee, *Teaching Transactional Law* 7 (UCLA Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Paper No. 03-17, 2003), *available at* http://ssrn.com/abstract=445823 (last visited Feb., 24, 2009) ("[T]ransactional courses have penetrated the legal curriculum to a significant extent.").

5. This is one of the central themes in the recent Carnegie Foundation report on legal education. *See* WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 6 (2007) [hereinafter THE CARNEGIE REPORT] ("Most law schools give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice.").

6. *See* Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223, 223 (2004) ("[D]oing deals is fundamentally different from litigating.").

7. A casual review suggests that the majority of the literature on teaching transactional lawyering has come out of the clinics. *See generally* Eric J. Gouvin, *Foreword: Law, Business, and Economic Development – Current Issues and Age-Old Battles*, 29 W. NEW ENG. L. REV. 1 (2006) (describing the activities of the Western New England College School of Law and School of Business's Law and Business Center for Advancing Entrepreneurship); Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195 (1997-98) (analyzing the activities of small business and community economic development clinics); Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 WASH U. J.L. & POL'Y 195 (2003) (examining literature on clinical transactional legal education).

8. *See, e.g.*, Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59, 100-01 (2007) (arguing that transactional drafting should become a part of the required legal writing curriculum).

9. *See generally* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984) (discussing the value transactional lawyers add to deals).

standing of the "craft" of corporate lawyering into their teaching of the black letter law and economic theory.[10] Perhaps students (and/or their future employers) have simply come to demand it.[11] Whatever the reason, it is a fact that law schools and the academy at large are giving the issue greater attention.

I welcome this new interest.[12] I believe it is long overdue. I also believe that I have had a unique opportunity to explore the question of how to incorporate a focus on transactional lawyering into a law school curriculum. By no means do I assert I have found the "best" answer. I have not. But I have had an ideal setting in which to begin to explore. My purpose here is to share what I have learned so far.

Drexel University's Earle Mack School of Law opened its doors to its first class of students in the fall of 2006. From its inception, Drexel's law school was going to take seriously the challenge of providing a legal education that offered a rigorous foundation in legal analysis and traditional legal doctrine, while incorporating a greater exposure to writing, skills training, and "experiential learning." Starting with a blank slate, we were free to experiment and to be guided (within resource constraints) by our view of an ideal program.

The biggest experiment we undertook in introducing Drexel's first class of law students to the world of business entities and transactional lawyering was a new course entitled "Law & Finance of Transactional Lawyering."[13] In this new course, we

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10. It is no surprise that one of the earliest and one of the most ambitious attempts to do so in the law school setting is found at one of Professor Gilson's home institutions. (It is also no surprise that the study of transactional lawyering should find its earliest efforts in New York City.) *See generally* Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475 (2002) (describing the "Deals" course at Columbia University School of Law).

11. *See* Klee, *supra* note 4, at 10 ("These data show high student demand for transactional courses.").

12. Perhaps I should say "expanded interest." There has been a longstanding community of law teachers pushing for a greater attention to transactional lawyering. Professor Tina Stark at Emory University School of Law maintains a comprehensive bibliography that she calls her "Transactional Training Resource Guide." http://www.law. emory.edu/programs-centers-clinics/transactional-law-program/trans-law-resources.ht-ml (last visited Feb. 24, 2009). Nevertheless, it was ten years ago that one professor wrote, "law schools should not try to pass the buck with respect to teaching young lawyers transactional skills." Debra Pogrund Stark, *See Jane Graduate. Why Can't Jane Negotiate a Business Transaction?*, 73 ST. JOHN'S L. REV. 477, 490 (1999).

13. I regret this choice of course name. At some point we hope to change it to something less imposing, like a simple "Transactional Lawyering." We began our planning of the course with the intent of forcing students to learn more about finance. As I conclude at the end of

managed to give twenty-five members of our first graduating class one of the most intensive exposures to business law practice I am aware of at any law school. We also began our efforts to construct a "keystone" course that could serve to link the traditional doctrinal courses of the early years of law school with the "experiential" and "skills" courses that come in the upper years. Our goal is to teach transactional lawyering in a manner that melds practical knowledge with theoretical insight, "hands on" experience with structured demonstration, and skill mastery with vision and judgment. Our goal is to educate experts.

I proceed as follows. In Part II, I provide a description of the Transactional Lawyering class and its pedagogical context. In Part III, I share a few of the lessons learned from my first experience with the Transactional Lawyering course and share the reactions I have received from students, lawyers, and business persons who participated in the course. I then make some concluding remarks about teaching transactional lawyering in law schools.

II. THE TRANSACTIONAL LAWYERING COURSE

A. A More Leveraged Model

Some fifteen years ago,[14] I attempted to teach a class on transactional lawyering.[15] At the time, I stated that my goals for that course were:

- To provide a simulated practice context in which students can learn and apply theoretical models of corporate law practice;
- To give students an opportunity to reexamine corporate law doctrine with an ex ante, problem-solving perspec-

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this Article, it is my belief that finance is the "science" that underlies the craft of effective transactional lawyering. Therefore, my harangue to prospective business lawyers is to learn to deal with numbers and at least the rudimentary mathematics of business. Thus, the insertion of the word "finance" in a required course in the school's business law track was my effort to advertise this point. Of course, having forgotten the important lesson from Mary Poppins (regarding spoonfuls of sugar), we probably managed to simply scare off all the liberal arts majors who might have otherwise had some interest in exploring the subject.

14. At the time I was a faculty member at Rutgers University law school in Camden, NJ.

15. For a description of that course, see Karl S. Okamoto, *Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School*, 45 J. LEGAL EDUC. 498 (1995).

tive;

- To introduce students to the teamwork and production aspects of transactional lawyering; and
- To illuminate the ethical and "human" problems inherent in teamwork and client representation.[16]

In explaining my ambitions for the course, I wrote:

> Unlike law firms, law schools are not well structured for providing practice opportunities to students. Nor should the goal of providing an experiential base in law school be to supplant the traditional "apprenticeship" in the law firm. Rather, what law schools can provide is a tool kit—a set of understandings about experiential learning—that will enhance self-learning skills once the student is in the real world. Having taught our students how to learn substantive law through legal analysis, we should also teach them how to learn about legal practice through experience. And the key to providing this tool kit is the presentation and demonstration of theoretical insights into law practice in the form of simulation.[17]

The course I was writing about was called "Advanced Corporate Practice," and was offered twice to a limited number of students (once to twelve; another time to six). In this course, the students were asked to engage in a series of role-playing exercises based on a hypothetical corporate transaction. As teams, students were asked to perform various tasks such as drafting a legal opinion, negotiating provisions of a stock purchase agreement and a credit agreement, and organizing a closing. Interspersed among these exercises were presentations by me on various topics like the purpose of legal opinions, representations and warranties, and financial covenants. We also had a number of guest lecturers from practice who attempted to provide some "real world" perspectives. Students were very positive about the course and the opportunity they saw to "experience" transactional practice. All in all, I thought the course was a reasonable success, but with one major flaw.

The flaw lay in my course design. I was attempting to pro-

16. *Id.* at 503.

17. *Id.* at 501-02 (emphasis omitted).

vide a meaningful "simulation" of transactional practice in a setting and with resources that simply could never have met the task. Even with only twelve students, I needed the active participation of two colleagues[18] in order to mount even the most rudimentary simulations. While students could play the roles of lawyers, to provide some sense of transactional law practice I needed to provide two sets of "live" clients—the buyer and the seller, the lender and the borrower, etc. Much of what was to be "experienced" depended on the interactions between the students/lawyers and their clients. Even with the active assistance of two experienced teachers with deep practice experience, it was very difficult to provide a realistic taste of what it means to be the legal architect of a client's business objectives. All of us agreed we accomplished something better than simply reading cases. But it was also not supportable in terms of the ratio of faculty hours per student.[19] We needed a better model.

Fifteen years later, we decided to try something different. While our goals remained very much the same as the four set out above, our approach was very different. This time, while creating a simulated practice context remained an important aspect of the course design, demonstration became the crux, and the demonstrations were provided largely by a roster of practicing lawyers.

Our initial plan called for us to meet as a class nine times, twice at our assigned classroom in the law school, and seven times somewhere else. The somewhere else were spaces provided by a series of hosts who allowed us to hold class in a conference room or similar space at their offices. The hosts were several of the leading law firms in Philadelphia,[20] a local bank,[21] a venture capital firm,[22] a local real estate developer,

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18. Roger Dennis, the Founding Dean of Drexel, was at the time the Dean of Rutgers. We were joined by the head of Rutgers' career services office who had been a deal lawyer at a big firm before coming to Rutgers. Both spent many hours "acting their parts" in and out of class.

19. *See* Klee, *supra* note 4, at 10 (noting that based on a survey of law schools offering transactional law courses "teaching transactional law is hampered by high cost").

20. Our law firm hosts were (in alphabetical order): Cozen O'Connor, http://www.cozen.com; Pepper Hamilton LLP, http://www.pepperlaw.com; Morgan, Lewis & Bockius, http://www.morganlewis.com; and Woodcock Washburn LLP, http://www.woodcock.com.

21. Our bank host was the Valley Green Bank, http://www.valleygreenbank.com, and its President, Jay Goldstein. Before founding the bank, Mr. Goldstein was a practicing transactional lawyer.

and a restaurant entrepreneur.[23] Much to the great disappointment of the class, our plans to hold class at one of the fastest growing micro-brewers in the region[24] was scuttled by construction scheduling (while we held class at the law school instead, we still managed to have the beer). The reason for holding class away from the law school was two-fold. First, it was exciting for the students.[25] It brought them into a real world setting where they were encouraged to look and act like real lawyers. Second, and more importantly, it was easier for our hosts.

Steve Goodman, a senior partner at Morgan, Lewis & Bockius,[26] is widely viewed to be the "guru" of venture capital lawyering in Philadelphia. While both he and his partner, Jeff Boddle, have been more than generous with their time in supporting the new law school, asking them to come to our class and teach, even if only for a couple of hours, is asking a great deal. Asking them to allow us to use one of their firm's conference rooms for the day, and to drop by for a couple of hours was a lot easier. Here lies the key to the new model—finding a way to leverage the expertise of practicing lawyers and business people in a pedagogically effective and time-sensitive way. The answer, I believe, is to simply ask them to do what they do best anyway. The challenge for those of us who teach for a living is to create an educational infrastructure that allows this to happen, that "leverages" these volunteers' expertise and participation in the most powerful way possible. The answer to that challenge was to bring the class to them.

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22. The VC firm was Internet Capital Group, http://www.internetcapital.com, a publicly-traded investment firm. Our host was Suzanne Niemeyer, ICG's General Counsel and an experienced deal lawyer. She was joined by Henry Nassau, who is the co-chair of the Business Law Group at Dechert LLP, http://www.dechert.com, a prominent law firm based in Philadelphia.

23. One of the several non-lawyers to "demonstrate" for us was Ken Weinstein, founder of Weinstein Properties and owner of the Trolley Car Diner, http://www.trolleycardiner.com.

24. Bill Covaleski, a founder, President and Brewmaster at Victory Brewing Company, http://www.victorybeer.com, served as a panelist at one of the class sessions.

25. Despite the hassle of traveling, the student surveys were uniform in their approval of the non-law school settings. The comments included: "it felt more authentic"; "one of the best parts of the class"; "makes it more realistic"; "this added to the excitement and nervousness that the class thrived on"; "more of a motivating factor to take the sessions seriously"; and "helped the illusion."

26. Morgan, Lewis & Bockius, Stephen M. Goodman, http://www.morganlewis.com/ index.cfm/personID/256165c1-d746-4cf2-9ae8-e81c246d374d/fromSearch/1/fuseaction /people.viewBio

B. Bringing the Class to Them

We "bring the class to them" in several ways. First, as already noted, we bring it to them physically—we meet in their offices. In addition, as I describe below, instead of asking our hosts to come prepared to "teach," we endeavor to structure the class so that we can simply say to our hosts, "come prepared to be yourself and do what you do best." Several of the host lawyers had experience as adjunct professors at other law schools. While many found that experience to be professionally and personally gratifying, many complained about the time commitment. As the practice of law has become more grueling, practitioners, especially the most successful among them, can little afford the trade-off between the satisfaction that comes from teaching their craft and the time required. So these busy professionals are genuinely intrigued when you propose a course design that allows them to contribute to the project of educating the next generation of deal lawyers by simply walking down the hall and being themselves for a couple of hours.

But to make this effective—something more than an invitation to tell "off the cuff" war stories—we needed to find a way to "bring the class to them" in the third sense, to make the students active learners ready to take full advantage of the precious time with these experts. The job was to create an environment, a setting in which a meaningful exchange could occur between a group of students who, of course, knew very little about transactional lawyering, and a group of experts who did. The strategy was to rely on a very simple notion: A great way to learn how to do just about anything is to watch someone who is good at it. Better yet, is to watch after having tried yourself a few times so that you have begun to engage the challenge and begun to understand what to look for. The notion was to try to provide a "demonstration of expertise" that simulated (and perhaps distilled and enhanced) the traditional apprenticeship model of learning.[27]

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27. I use a phrase like "apprenticeship model of learning" with great hesitation. I believe, however, that it is useful to attempt to place both the Transactional Lawyering course and the larger curriculum described here within a pedagogical framework—at least tentatively. True, in the end, the course and the curriculum must be judged empirically for their effectiveness. Did they work? But by situating what we are attempting to do within a larger literature we gain certain benefits. It gives us a language to describe what we are doing on the level of the

C. *The Pedagogical Context*

The Transactional Lawyering course was conceived as the "keystone" course in a transactional lawyering and business law curriculum.[28] I use the term "keystone" and the obvious allusion to the increasingly popular idea of "capstone" courses purposefully.[29] The course is the "keystone" in that it holds together two arcs in the curriculum—the traditional doctrinal courses that dominate the earlier years and the "experiential" and increasingly "practice-oriented" offerings that have become more popular as upper-class offerings.[30] It is distinct from a "capstone" experience in that its breadth remains general and its assumption regarding the level of preparation of

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pedagogical design and as something separate from the subject matter being taught. The mere attempt at articulating this in terms of a pedagogical theory forces us to recognize the choices we are making and to be more purposeful in them.

We are also asking ourselves to fulfill the ambition that these labels imply. When we speak of what we are attempting in terms like "experiential learning," "cognitive apprenticeship," "mastery learning," and so on, we mean to suggest we are doing something big here. We also gain points of access to a broader base of experience and thought on what we are doing.

Although it is changing, legal education has been particularly remiss in incorporating educational theory into its own self-study. As Professors Feinman and Feldman once famously put it, "[m]ost legal educators are anti-intellectual about the area of their primary professional concern: the content and method of legal education." Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 875 (1985). Other disciplines have been more fruitful.

In many instances, the experience of one discipline (such as medicine) will translate poorly into the law school setting (as in using medical clinics as a metaphor for conceptualizing legal clinics). This does not, however, eliminate the value of these other experiences. However, to make them useful we must have a common language with which to compare our different experiments and opinions. To this end, it is useful to try to explain what we are doing in terms of a more universal pedagogical theory. *See* Blasi, *supra* note 2, at 348 (arguing that while the content of expertise may be domain specific, the nature of expertise is sufficiently general as to allow meaningful analogies to be drawn from the study of other professions).

In addition to Professor Feinman and Feldman's article, I found two other pieces particularly illuminating. *See generally* Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347 (2001) (critiquing the pedagogical model of law schools through the lens of contemporary learning theory and instructional design); Susan M. Williams, *Putting Case-Based Instruction Into Context: Examples from Legal and Medical Education*, 2(4) J. LEARNING SCI. 367 (1992).

28. For a description of another, similarly sequenced curriculum, see Tina L. Stark, *My Fantasy Curriculum and Other Almost Random Points* (Emory Univ. Sch. of Law, Law & Econ. Research Paper Series, Paper No. 08-29, 2008).

29. Of course those of us from Pennsylvania hold special fondness for the term "keystone," as well.

30. *See generally* Mitu Gulati, Richard Sander & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235 (2001) (discussing reforms to the third-year curriculum to address the long-standing criticism among students that it is a waste of time).

its participants remains modest. Its goal is less to provide a transitional experience, bridging law school and practice, than as to bridge doctrine and traditional legal analysis with experiential learning.

Other than the Transactional Lawyering course, the components of the first arc are very much the stuff of traditional law school curricula. Students take the basic business, commercial law, and tax courses. Once armed with this basic exposure, they then take the Transactional Lawyering class. This provides a taste of transactional lawyering provided by simulation and demonstration, setting them up for the opportunities they have in their capstone and other third year classes to sample the "live client" setting, and to fill-in their substantive knowledge with more specialized upper-level courses. The simple logic of the sequencing is that it allows the curriculum to offer not only greater breadth of coverage (through expanded subject matter), but, what I believe to be even more important, greater depth.[31]

Take a simple example. In Business Organizations we learn that absent provisions to the contrary, decisions regarding the management of a company are made by its board of directors, who can act by majority vote at a meeting at which a quorum of members are present. In a traditional Business Organizations course, students are exposed to many such "rules" about various forms of business entities. They discuss them as black letter law, and they examine their application in legal disputes and their explication in judicial opinions. Often, they debate their value from an economic efficiency or other policy perspective. This is certainly true of the introductory course at Drexel (and I imagine most other law schools). In the Transactional Lawyering course, we ask students to take what they have learned about these rules of governance and apply them in order to solve typical problems. So, we ask students to role-play a meeting to explain the issues that voting rules address for a hypothetical client, to discuss what these "legalities" might mean for them, and how the "legalities" may differ from the client's expectations. Having tried that challenge on for size, and having demonstrated an "expert's approach," we

31. The Carnegie Report speaks in terms of an "integrated curriculum." THE CARNEGIE REPORT, *supra* note 5, at 88. By conceptualizing the curriculum as an ordered progression, we are trying to achieve just that.

then give them the job of "providing to the contrary"—of drafting the governance provisions of the Member Agreement for a start-up LLC, for example, which allows them to set the rules in any way they choose. Next, we put them in front of a group of MBA students looking for help organizing themselves in order to win funding for their new business plan, or in front of the general counsel of an international multi-unit retailer asking for comments on a proposed joint venture agreement. At each stage we were addressing what was essentially the simple question of "who gets to decide?" At each stage, we are teaching them how sophisticated the answer can be when, ex ante, it will be up to them to dictate the answer. Instead of asking them to resolve a legal dispute through application of a rule of law to a set of historical facts, we ask them to use law to design structures that anticipate, maybe even shape, the multiplicity of potential outcomes that a client may face.

This progression—the greater and greater depth—is important because it makes experiential learning more likely to succeed. "Youth is wasted on the young" or so the aphorism tells us. Similarly, experiences can be wasted on the uninitiated.[32] For this reason, we leave what may be the most powerful learning opportunity in our sequence—the capstone experiential classes like co-op or clinic—for the end. By doing so, we hope to offer a taste of "real" lawyering to students who are indeed ready to get something meaningful out of it. What precisely this "readiness" ought to entail is for me still an open question. At a minimum, however, the Transactional Lawyering course—the keystone class—is designed with the assumption that students would get the most from trying to draft commercial agreements in a externship placement, or to counsel a group of would-be entrepreneurs from the MBA program on choice of form in a clinic, only once they had studied the basic rules of business entities and tax.[33] Better yet, we wanted

32. *See, e.g.*, Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Legal Problem Solving*, 11 CLINICAL L. REV. 149, 155 (2004) (arguing that substantive knowledge is an important prerequisite for experiential learning).

33. Professor Krieger reported on a study comparing two medical school programs. The first followed a traditional curriculum that began with an introduction to basic science and only later put students into the clinical setting. The second began with the clinical setting from the beginning, expecting students to acquire the basic science principles in the context of their practice. The study found that students who were given a doctrinal foundation were

them to have tried out these chores under the watchful eye of a faculty member before sending them out to try with "live clients." Better still, we wanted to give them a chance to learn by watching real experts do it first. At each successive stage, our goal was to make them not only better lawyers, but more importantly, better learners.

Underlying this pedagogical design is a view, albeit a tentative one, of the nature of expert knowledge and how such knowledge is acquired. My attempt fifteen years ago was inspired by the work of Donald Schön,[34] whose work on educating professionals has had significant impact on the literature in the legal academy.[35] In a speech at the Annual Meeting of the Association of American Law Schools, Professor Schön advocated for the so-called "deviant tradition" of professional education:

> [T]he basic pattern of . . . the 'deviant' tradition, which I have dubbed 'the reflective practicum,' is, I think, the following: First, you learn by doing . . . In other words, you do the thing before you know what it is. Second, you begin to do it [in] the presence of a senior practitioner who is good at doing it and whose business is to try to help you learn how to do it. Third, you are doing it with other people who are also trying to learn to do it. Fourth, you do it in what I call a virtual world which represents the practice . . . It's cheaper. It's also less risky.[36]

In a sense, the business law curriculum overall, and the Transactional Lawyering course in particular, are our attempts to meld the "deviant" with the "traditional" in legal education. They are also our attempts to begin exploring some of the themes that a few legal scholars—particularly those in the

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more successful in becoming expert problem solvers. *Id.* at 178-84.

34. *See generally* DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983); DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS (1987).

35. Professor Richard Neumann notes that Professor Schön's work is the most oft-cited by a non-lawyer in the clinical legal education literature. Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401 (2000). Professor Neumann's article is a wonderful exegesis of those parts of Schön's work that are relevant to the project of legal education.

36. Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231, 249 (1995).

world of experiential legal education—have brought from education theory and cognitive science to legal education. I summarize those themes as follows:

- The essence of lawyering is "creative problem solving" under conditions of uncertainty and complexity. This conception of lawyering as problem solving has become commonplace.[37] It certainly rings true to me.
- Experts solve problems with reference to an "internal vocabulary" of mental schemas, which allow them to match a situation to a pattern, and to retrieve an associated solution. In other words, experts are good at solving problems because they recognize in new situations what "they have seen before."[38]
- When problems are novel or complex, various mental models and strategies allow experts to "visualize" potential solutions based on accumulated experience, and to create solutions for previously unseen problems.[39]
- The mental processes of experts involve both explicit and tacit knowledge and both conscious and unconscious thought. These processes are based upon the accretion of individual experience in practice. If asked to articulate the content of these processes, the expert cannot;[40] but when

37. *See, e.g.*, Blasi, *supra* note 2, at 318 ("[T]he core activity of lawyers entails problem-solving and making decisions."); Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 104-05 (2001) (arguing that creative problem solving is a better way to envision legal negotiation); ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

38. *See, e.g.*, Blasi, supra note 2, at 318 ("The knowledge of experts is organized in ways that permit the expert to recognize patterns that are entirely invisible to novices in complex situations. In routine cases, this organized knowledge permits an expert merely to match a problem situation to a stored 'problem schema,' and to retrieve from memory the associated solution procedure."); Krieger, *supra* note 32, at 167-69 (describing cognitive theory of expertise).

39. Blasi, *supra* note 2, at 318 ("In more complex and uncertain situations, the schematic knowledge permits experts to construct mental models that capture much of the complexity of the situation, and to 'run' the mental models in simulation in order to evaluate the likely consequences of alternative courses of action."); Brook K. Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 CLINICAL L. REV. 1, 42 (1999) ("The true adept [the expert] has developed an idiosyncratic but highly effective set of cognitive resources, relational strategies, operational protocols, and practical competencies that permit him or her to perform complex tasks with simplicity and grace.").

40. Baker, *supra* note 39, at 52 ("[R]epeated studies have revealed that expert practitioners are frequently incapable of retrieving and accurately articulating many aspects of their thinking and acting.").

faced with an actual problem, the expert automatically brings to bear an intuitive knowledge.[41]

- Mastery is characterized by goal-oriented, "forward thinking" and an aggressive engagement with the domain of expertise and its most challenging problems.[42]
- The most effective way to acquire these cognitive capacities—the building blocks of expertise—is through meaningful participation in actual practice. Simply put, to learn it, you must do it.

General and open-ended as they are, I suspect none of these assertions is particularly controversial. In the jargon of cognitive psychology and education theory, they say pretty much what I have been hearing from practitioners in my informal survey. However, by linking our attempt at designing a curriculum for training a new generation of deal lawyers with the broader inquiry into the nature of expertise, we can begin to appropriate for ourselves some of others' efforts to design a better professional education.

In doing so, we have tentatively accepted some more controversial refinements of the general themes set out above. They are:

- While participation within real practice settings provides the most effective learning environment,[43] it should be preceded by an introduction to doctrinal knowledge.[44]
- Theory, in the sense of general rules abstracted from experience, serves a subsidiary role to experience as the student progresses.[45] It provides the outline of a cognitive

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41. *Id.* at 43-44 ("The original pattern recognition is an intuitive seeing; this intuition necessarily precedes the articulation of a more formal theoretical explanation of coherence of the pattern.").

42. *See* Baker, *supra* note 39, at 43-45 (describing mastery versus simple repetition).

43. Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report – Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 619 (1994) ("[P]articipatory learning (role-playing, problem methods, skills exercises) is what makes learning stick and illuminates how the law is effectuated, it would be used in virtually every course in legal and continuing education.").

44. In addition to the benefits to experiential learning that come from having a basic understanding of the substantive principles, the simple issue of cognitive overload – it simply being too much to absorb both law and practice simultaneously – militates towards a progression in the curriculum. *See* Krieger, *supra* note 32, at 184-85.

45. *See* Baker, *supra* note 39, at 60-61 (arguing that "theory is over-rated" but nevertheless can serve as a useful resource largely as a language for describing expert heuristics and metacognitive skills, allowing for description, transfer from context to context and discourse with others. It gives the novice at least the traces of a mental map with which to begin to develop

map before a student has the opportunity for the richer understanding that comes from experience. It serves as the means for analogical reasoning when transferring schemas and mental models from one context to another, new but analogous one. It provides the language for discourse on expertise.

- Participation should be knowledge/experience-appropriate, allowing students to enjoy both a sense of mastery and of challenge, mandating a sequence of greater and greater complexity across the curriculum.[46]
- With guidance, students are capable self-learners.[47] Self-learning has greater impact.
- Meaningful participation in lawyering settings dictates collaboration and team work. Students learn from peers and from working as teams.[48]
- For the novice, apprenticeship is an effective model for learning by participation, allowing the neophyte to learn by watching an expert's example and participating vicariously in the expert's mental processes.[49]
- Techniques for offering "apprenticeship learning" in law school include clinical offerings and simulations (assuming the teacher adopts the stance of senior lawyer rather than solely that of the traditional educator or supervisor).[50] Another technique is the demonstration model we describe here.

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practice-based understanding). *See also* Blasi, *supra* note 2, at 360-61 (theory coupled with multiple experiences enhances problem solving by analogy).

46. Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 326 (1994) [hereinafter Baker – 1994] ("Learners should perform tasks within their 'zone of proximal development,' tasks within the reach of their present competence but slightly beyond their level of total comfort and mastery.").

47. *See* Baker, *supra* note 39, at 3 ("[S]tudents are capable of being relatively independent and self-directed learners; when they are given freedom and sufficient guidance to participate meaningfully in the authentic activities of a practice, they do not necessarily need to be controlled by an educator.").

48. *Id.* at 38 (noting importance of peers).

49. *Id.* at 27 ("Placing learning *in* practice and locating learning *in* participation contextualizes learning and encourages students to enter a cognitive apprenticeship with senior practitioners and workplace colleagues where they can collaborate to resolve authentic dilemmas within contours of an established social practice.").

50. *See generally* Paul S. Ferber, *Adult Learning Theory and Simulations – Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417 (2002) (using cognitive theory to design effective simulations).

- Expertise is domain specific.[51] Even within the law, specific types of lawyering require specific domain knowledge.
- Once an introduction to basic doctrine and legal analysis has been given, the goal of legal education should be to: 1) provide a basis for narrowing a student's choice of primary domain interest (e.g., transactional versus litigation work, private versus public law); 2) offer a variety of increasingly sophisticated apprenticeship learning opportunities in increasingly nuanced practice settings within the chosen domain; 3) offer the basic vocabulary, analytical and theoretical constructs, and knowledge bases needed for the specific domain (for example, I think every future business lawyer should understand basic finance and accounting concepts); and 4) expose students to a variety of schemas by presenting them with rich, engaging, and meaningful experiences of problems and their potential solutions within a learning environment designed to grow a student's cognitive capabilities.

It is not my purpose here to provide a fulsome account of these themes or to justify the choices we have made in accepting, for the moment, some of the more contested refinements. My purpose is to identify, for those readers who are already familiar with the literature, where we see our program fitting in and from where we took some of our inspiration.

We designed a sequenced program that begins with a traditional doctrinal introduction to the basic business law subjects. We end with a capstone experience that contemplates students spending a substantial portion of the third year fully-immersed in a practice setting, working in a law firm, corporation, clinic, or other real world transactional law practice. In the middle, in the Transactional Lawyering course, we attempt to empower the student who has chosen transactional law as her domain with the basic vocabulary and a core set of schemas and mental models that will allow her to begin her journey as a solver of the kinds of problems a transactional lawyer faces. We do this by showing her a variety of problem situations, embedded in a rich and complex factual setting, and by asking her as part of team to engage the problem and attempt its solution. We ask her to learn by doing. We then demon-

51. Baker, *supra* note 39, at 42 (describing characteristics of mastery).

strate for her the associated solution sets of an expert. We do all this in a setting that feels "real," while balancing the continuing need of second year students for guidance and explanation and the realities of the law school setting.[52]

D. Structuring the Class for Realism and the "Ah Ha" Moments

The Transactional Lawyering course offers demonstrations of transactional problems and their expert solutions by posing a series of discrete challenges within an overarching hypothetical "case" or fact pattern.[53] An entrepreneur named SaraBeth Rollins has developed a novel "away from home" dining experience that she believes can grow into a large, international, multi-unit, franchise business. She has succeeded in building a prototype and is now seeking venture capital financing to move to the next stage of growth. At the beginning of the course, the students are given a copy of the "business plan" for SaraBeth's Kitchen.[54] The plan is a typical PowerPoint "pitch" book that was prepared by SaraBeth and her colleague Clyde Johnson. It comes with a set of financial projections in an Excel workbook.

While the business concept is a bit fanciful, it is by no means unrealistic. In fact, we shared the pitch book and financial model with a few venture capitalists who invest in start-up multi-unit retailers without first telling them of its fictional nature. While none of them leapt to provide the financing sought by the fictional SaraBeth, none of them guessed the business plan came from a fictional law school exercise. The financial model is based on the economics of a sample of existing operating businesses.

The course met once a week for four and a half hours for nine weeks. Drexel follows a quarter system, allowing for this

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52. As Professor Menkel-Meadow once put it: "An organized program of education would build on sequences of knowledge acquisition and skills development to be practiced in thought, writing, simulations and then in the real world." Menkel-Meadow, *supra* note 37, at 138. We are trying to put on such an "organized program of education."

53. I am happy to provide a copy of the course syllabus to anyone who is interested.

54. Anyone from New York will realize that there is a trademark issue in this choice of name. I am happy to provide a copy of the business plan, including the PowerPoint slides and the Excel workbook, to anyone who is interested. I also plan to deposit them at the repository for transactional teaching materials that Tina Stark is building at Emory. *See* Tina Stark, Transactional Training Resource Guide, http://www.law.emory.edu/programs-centers-clinics/transactional-law-program/trans-law-resources.html (last visited Feb. 24, 2009).

relatively intense time frame. Under the Drexel system, the course carries four credits (roughly equivalent to a three credit course under a traditional semester system). Having now taught the course, I believe it should have been a five credit offering (my students agree). While I think the syllabus can be adapted to a fourteen week semester, the ability to set aside a large block of time during a single day was very important. I'll discuss below some refinements to the schedule that I hope to be able to try next time.

With the exceptions of the first and last two class sessions, each class meeting followed a similar pattern. Having been divided into teams and given an assignment, each team was required to submit some form of written work product before each class session. Then, during the first part (usually two hours) of the class session, each team took turns role-playing an exercise. I usually played a role in these exercises (as the client or counter-party). Typically (although there was some variation), our hosts did not attend this first part of the class session. Once this morning session was complete, our hosts would join us for lunch. Over lunch, we would ask questions of our hosts related to the morning's exercise and allow our hosts and the students to engage in a more general discussion of our hosts' professional lives. Then, we would turn to the "demonstration" by our hosts of the very same exercise the students had attempted in the morning. Typically, I played again the same role as client or counter-party, leaving the students free to observe.

The goal was to provide what I call the "ah ha" moment, the epiphany. Having spent the week preparing for the exercise, attempting to undertake the challenge themselves in the morning, and watching their classmates do the same, the students were then allowed to observe how an expert would attempt the very same task and immediately compare what they saw the expert do with what they and their classmates did. Following the demonstration, we would regroup and attempt to isolate the group's "ah ha" moments. Although we had some expectations as to how these would unfold, and as to what they might teach us, we were routinely surprised by how powerfully the lessons of each day came through. While each session had different successes, each offered a very rich learning experience for the class. To my much greater surprise, on many days, I think our hosts may have gotten just as much

from the experience.

Realism was important. It made each week's assignment meaningful and engaging for the students.[55] Equally important, it provided a platform that allowed our hosts to demonstrate their expertise by simply engaging the hypothetical as if they were addressing a task in their practices. The constraints of a classroom necessarily imposed certain artificiality into the exercises. However, each class assignment and the larger fact pattern were sufficiently rich to offer the students a taste of real transactional lawyering. The assignments were also designed to offer the experts sufficient material with which to demonstrate a significant look into what they actually do.

The course uses several techniques to achieve this sense of reality. For example, to impress upon the students this sense of realism early on, we sent to each of them before the first class meeting a form of confidentiality agreement and asked them to return a signed copy before they could receive the class materials. We explained to them that this form was being required because the materials for the course were coming from a "real" transaction and the principals wanted to ensure the confidentiality of their idea. I am not certain how many of the students actually believed this ruse, but all signed and returned the confidentiality agreement. None realized it was to be their first lesson in transactional lawyering. The form we used was from a form of employee confidentiality agreement one might typically find used at a technology company. It contained very onerous provisions regarding competition, non-solicitation of employees and customers, and ownership of intellectual property. None of these provisions are found in the type of confidentiality agreement one typically would be asked to sign in advance of receiving a confidential business plan. Read literally, for example, it gave me ownership of all intellectual property (of whatever type) each student created during the term of the course. Most of the students simply printed the form out, signed it, and put the signed copy in my mailbox. Two did attempt to negotiate some of the more outrageous provisions, but only slightly. During the first class we distributed a form of confidentiality agreement that one might expect to sign in this context and spent some time reviewing

55. Ferber, *supra* note 50, at 445 ("The more a simulation creates a world into which students will enter with a willing suspension of disbelief, the more effectively they will learn.").

the differences. The class was, of course, a bit miffed. We had tricked them. We also had a powerful opportunity to stress the importance of reading and understanding any agreement before it gets signed, especially when you yourself are the client. Holding up their signed copies of the agreements which I ceremoniously placed into my briefcase to take away with me, I got their attention. We might be playing, but it was, at least a little bit, "for real."

We used other tricks. The rule for each class meeting was to follow the dress code of our hosts. There is nothing like putting on a tie or business suit to add "realism" to playing lawyer. Trivial, yes. But sitting in wood-paneled boardroom atop a skyscraper looking over the city through floor-to-ceiling panoramic windows is a different experience than sitting in jeans and a tee-shirt in a law school classroom. It feels real.[56]

More substantively, we made it more "real" in three important ways. First, students worked in teams. Second, students were left more or less to themselves in finding reference material. While I think we will change this a bit, our message was and will remain essentially, "here's the library (or precedent file or practice manual, etc.), use it." Third, we tried to make the work both as real and as contained as possible. We did well with the realism, but we will need to do better on keeping the assignments manageable.

E. Teaching Teamwork

One of the most controversial aspects of the class was the requirement that students work in teams. The week before each class session, we assigned each student to one of six teams. Assignments were rotated to ensure that each student worked with all of the other students in the class and in as many combinations as possible. The only exception to the requirement of team work was in two final projects: the so-called "Challenge" and the final Portfolio. Overall, the students, in the end, favored the team approach. They recognized that as teams, they could share the burden of the workload, that they were in some cases more comfortable presenting in front of the class each week, and that in some cases different team members brought valuable experience to the

56. The students' comments reflected the importance of this. *See infra* note 85.

work (such as a background in finance or accounting). Most importantly, students acknowledged that team work was a better reflection of how real lawyers actually work.[57] The biggest downside (beyond the expected interpersonal issues that some students noted), was the need to coordinate outside of the scheduled class time.[58] Most students found the team selection process to be acceptable. Randomness was preferred, as was rotation. Some students, however, bemoaned the fact that this resulted in the need to resolve a new set of team dynamics each week. They also felt that team configurations from week to week sometimes left them at a disadvantage when they found themselves with "weaker" colleagues. All in all, other than endeavoring to keep teams to no more than four and trying to facilitate coordination by adding a class session mid-week as I describe below, I think the team approach worked well.

F. No Casebook

During our first class session, we received a presentation from a member of Drexel's library staff. The librarian had prepared a bibliography of the various resources available in or through our library (the majority are available on-line) as background material for the various subjects we would be discussing in class.[59] Organized by topic, it provides (usually with links to the appropriate web address) a list of the various kinds of reference materials a practicing lawyer might consult, including treatises and the all-important form books. As we went through the term, we did encounter a few bald spots (especially around bankruptcy planning). Overall, however, we felt that this bibliography provided ample materials from which the students could begin to "teach themselves" enough

57. As one professor put it, "we are providing our students with a simplified and somewhat incomplete picture of the full role of the transactional attorney if we do not also expose them to transaction team lawyering." Schlossberg, *supra* note 7, at 201 (arguing that small business clinics should include interdisciplinary teamwork). As some of our students put it, "[i]n the real world, I think that we will be in a team setting so it is important to develop some of those skills"; or "it seemed to emulate the real world a bit more than reading a casebook and regurgitating information on a law school exam"; or "real law work involves teamwork."

58. Based on our survey of the students, the most significant complaint centered on coordinating team meetings and activities. We hope to ameliorate this next time by adding a scheduled midweek class session that can be used to facilitate team coordination.

59. I am happy to provide a copy upon request.

of the law, context, and practice affecting each assignment. In fact, other than providing the business plan documents, the only other materials we provided to the class were a statement of each week's assignment and whatever documents went along with it.

In the end, we provided very little by way of background either through reading materials or class presentation. To a large degree this was the by-product of the time required to do everything else in putting on the course. In retrospect, students would benefit from a bit more direction. But the balance need not be tipped much away from leaving the students on their own. If anything, what will help most is to limit what outside materials we direct them to. Given that they have so little exposure to the issues they are presented with, they cannot even sort effectively the sources they should draw on in attempting solutions. So often they will spend enormous amounts of time reading in areas that turn out to be inapposite or misapplied. While some of that frustration provides a worthwhile experience, it can be cut back. The general approach, however, worked very well. Left on their own with just a bit of direction, students managed quite well to find the legal background materials they needed to do a credible job each week "practicing law."

G. Real Work in Manageable Bites

To give a sense of how the class went week by week, I give a brief description of each session.

Session One. During our first class meeting, we tried to introduce several themes for the course. Once we made the class aware of the "trick" around the confidentiality agreement, we divided them into teams, giving them a precedent example of a more appropriate form of agreement and sending them out to prepare a set of comments. When we regrouped, we asked teams to present their "big issues" and suggested changes. Given the limited opportunity for preparation, the exercise was less than successful (having lost the element of surprise, I will distribute these materials in advance of class next time). Nevertheless, it was a good introduction to the basic rhythm of the course. Real documents, a written work product, a class presentation, team work followed by a group assessment, and review.

Session Two. Our first out-of-school session was held at the offices of Pepper Hamilton LLP, a leading national corporate law firm. The assignment was to prepare for a "first meeting" with the client. Each team was simply told that SaraBeth Rollins, the founder of this start-up restaurant concept, was coming in to meet with her lawyers. She had said that she was confident she would soon secure the equity financing for her project and she now wanted to consult with the legal team about "next steps." As part of the assignment, the teams were asked to prepare "some form of written product" that "spells out and organizes your thoughts on the issues that need to be considered." This written product was due by 5:00 PM the night before class. By 5:01 PM all six were in, and I had a big grin on my face.

Obviously at great effort, what each of the teams had done was to prepare a lengthy presentation (either in memo or PowerPoint format) on the various issues faced by a start-up. There was discussion of the choice of entity and the pros and cons of corporations over limited liability companies, etc. There was a discussion on taxation and subchapter S. There were lengthy treatments of intellectual property issues, especially patent protection (part of the fact pattern includes a new type of oven that is critical to the entrepreneur's plans). Most teams also included a form of engagement letter, as well as some discussion regarding the ethical concerns that stem from the need to separate the entity-client from the various individuals involved in a venture. I was impressed with the effort and anxious to see how the presentations would go.

We met in one of the law firm's large conference rooms (aptly endowed with a panoramic view of the law school and its environs). There was a table in the front of the room at which the presenting team sat. The remainder of the class sat in front of them in a horseshoe configuration. I sat at a small table facing the presenting team and with my back to the remainder of the class. By and large this is the layout we used for the other class sessions (where possible) and it worked well—the focus was on the team presenting. There were video screens if the team wanted to use PowerPoint or other audio-visual props. About half did. During the morning, each team was asked to conduct twenty minutes of a meeting with SaraBeth Rollins

(played by myself). The challenge in this was the time constraint.[60] Although they varied in which areas they chose to focus, the teams all presented what can be described generally as a panel discussion of the various topics set out in the written presentations. A great deal of ground was covered in twenty minutes by each team. Had SaraBeth been listening, she would have learned a lot (most of it correct) about business association rules and taxation and patent law and such, but little about what she cared about.

We were joined at lunch by three partners from the firm—Joan Arnold, Howard Goldberg, and Lisa Jacobs. After a sandwich and some general discussion, our hosts took the same spots that the teams had occupied in the morning. The contrast between the two sessions was striking. While I had not asked the Pepper lawyers to prepare a written presentation like the students, they did come armed with some prepared materials (marketing brochures and slides on choice of form). But unlike the student presentations, these never formed part of the meeting. The nature of the discussion was starkly less formal and structured. It became a mantra for the class—the "90/10 rule" for client meetings. Let the client talk ninety percent of the time while you simply ask questions for ten. That is precisely what the Pepper lawyers did. They elicited from SaraBeth what every entrepreneur loves to give—an enthusiastic and detailed recitation of the story of her idea and her plans for turning this idea into a business success. Through a series of carefully placed questions, the experts extracted an enormous sum of information that allowed them to

60. We suggested that each team should "start where the last had stopped," thus allowing for a full two-hour meeting to take place across the six teams. But, as should have been obvious, each successive team tended to start anew. Since they had no idea where they would need to focus, they had planned an entire meeting. And, of course, they went with their plan. This was one problem with the course design I have not solved well. Especially with six teams, it is impossible to give each team a full opportunity to role-play the exercise, while the afternoon usually provides plenty of time for the expert to conduct a full exercise. I think students were sometimes frustrated by the truncated opportunity they were given, believing that some of the mistakes they made were driven by their attempts to do in twenty minutes what the "real lawyers" were free to take hours to get done. It is a fair criticism of the design, but it is more important to give each student the chance to "have a taste" of the exercise each week. The alternatives all appear to require some sort of rotation – allowing some students each session to be mere spectators. As I describe below, my belief is that one of the most powerful aspects of the course was that each student came to the demonstration each afternoon only after having prepared to conduct the full exercise the week before and after having some opportunity to try it out that morning.

reach very definite conclusions about best next steps, allowed them to simply ignore reams of information regarding irrelevant alternatives, and allowed them to demonstrate their expertise and judgment, all the while building a relationship with the client.[61] It was masterful, and the mastery was palpable to the students. But it was a lesson I cannot imagine reducing to some case study or textbook chapter. You had to see it to understand it. To be able to see it, you had to have tried it yourself first.

Session Three. This session held a couple of very valuable lessons for the instructor (and a few for the students). The big lessons for the class design was "do not over schedule!" and focus on demonstration as the primary class dynamic. We began our class session at the headquarters of a two-branch community bank that had been recently started by our host, Jay Goldstein. The agenda for the morning was for the student teams to attempt to negotiate with Jay a proposed loan commitment letter. In the afternoon, the focus shifted from a bank loan to a commercial lease. Because Valley Green Bank was located just a few blocks from the Trolley Car Diner, and because Ken Weinstein, the Diner's owner, was not only a restaurant entrepreneur but an experienced landlord, I was intent on squeezing exposure to both Jay and Ken into one trip to their neck of the woods. In the end, we were doing too much in one day, and because we gave up the normal pattern of morning exercises followed by demonstration to try to incorporate both hosts into the class exercises, we learned how beneficial it is to allow the students the opportunity to watch rather than only engage the experts.

For example, the morning's exercise was salvaged only by Jay's natural gifts as a teacher. The students had been instructed to prepare a memorandum to the client highlighting the significant issues in the proposed bank commitment. Beyond the usual issues surrounding personal guarantees, the

61. In short, they displayed precisely the attributes that Professor Anthony Luppino identified as distinguishing the "can do" business lawyer. Anthony J. Luppino, *Minding More Than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations*, 30 W. NEW ENG. L. REV. 151, 152 (2007) ("Some of the key characteristics they share, in addition to thorough knowledge of the letter and theory of the law in their practice areas . . . are familiarity with business concepts and related jargon that allow them to ask important questions about the business deal; appreciation of the businessperson's perspectives; and an exceptional ability to explain complex laws in terms understandable to non-lawyers.").

various fees, and the restrictiveness of various terms, there was buried in the proposed terms a fundamental disconnect between the entrepreneur's and the Bank's expectations regarding the proposed loan. Our hope was that students would identify this issue. If they had, the meeting with the bank could then have been simply to ensure that the language meant what it said and whether it could be modified. If not, there simply was no room for a deal. We had already agreed that (as was likely to be the case in a real world context) the issue did in fact pose a fundamental difference and a "deal killer." So Jay knew our purpose was to see if the teams could get to that realization effectively. In the end, everyone learned the lesson that no bank loan was going to be possible. Unfortunately, they learned this when we explained to them after the exercise how each team, if this had been a real meeting, had wasted everyone's time.[62]

But this was the fault of the lesson plan, not theirs. One of the most difficult distinctions to teach young lawyers is when and where to negotiate, especially on terms that are essentially deal points. The line that separates a client's business decision from business-sensitive, "take charge" legal advice is never a fixed one. But one thing is always true: before you start asking a bank to lower its proposed interest rate on a loan, something most business clients can readily understand and negotiate themselves, you had better first understand and explain how the loan agreement works. Few clients have the comfort with intricate contract terms that allows them to analyze how these provisions will work without their lawyer's help. So while some lawyers may be comfortable taking the lead on the "business deal," all business lawyers must be responsible for dissecting how a proposed deal works and ensuring that this comports with the clients' expectations.

This challenge presented itself most often whenever we placed students in some form of negotiation. I am pleased to say they got demonstrably better at it week after week. But in this session, the tendency of the teams was to come and haggle over the financial aspects of the deal. Instead of taking apart

62. Professor Tina Stark thinks I was kidding myself to think students would succeed in parsing even the most rudimentary loan agreement on their own. I have to agree. The accounting terminology alone was a big challenge for the students. I needed to provide some preparation for this exercise to have succeeded. Live and learn.

the terms of the proposed loan facility in order to explain how it worked (which would have led them to discover that it did not when set side-by-side with the client's business plan), they simply identified those terms they viewed as "unattractive" and argued for better terms. Much to their dismay, Jay, in the most polite way possible, simply said "no." When each team had finished their futile assault on the wall, we asked if, now that they had discovered it was a "take it or leave it" deal on guarantees, fees, and covenants, they were ready to advise their client on how to move forward. In the end, they had to acknowledge the client did not have any leverage with which to improve the terms, so took solace in whatever small accommodations Jay had given. None had seen that there simply was no basis for a deal. If we had asked the student team to role play a client meeting rather than a negotiation, we might have seen greater success. We then could have demonstrated how a sophisticated practitioner like Jay (who came to banking from law practice) would deconstruct a term sheet and analyze its implications in relation to the client's business plan. Instead we had to leave the teams having accomplished little. But even this had value. The teams tried very hard the next time not to make the same mistake.

Session Four. The subject of this session was intellectual property. The premise was that the client was asking for the teams to come up with an "essential items" only IP strategy that covered only those steps that must be addressed before the entrepreneur received sufficient funding to pay for more fulsome IP protection. The assignment was to prepare for a meeting with a group of IP experts who are offering some free consultation. In other words, we were asking our student teams to prepare for a meeting where they would have to be intelligent and efficient consumers of legal advice. Our hosts were a group of lawyers from Woodcock Washburn LLP, a boutique IP firm.

For several reasons, this was a very successful session. For one, the students came away with a more comfortable command of the subject of the day. This is not to say that they were well-versed in intellectual property law. However, having dedicated much of their work for Session Two to IP issues and then preparing again for this session, they all came with a good grounding in the various "checklist" type issues. In the morning, their exercise was to meet with two Woodcock law-

yers and attempt to vet their ideas for an IP strategy "on the cheap." In those conversations, they all held their own, able to converse reasonably well on patents, trademarks and the like. Our hosts were impressed with the degree of knowledge and sophistication the teams brought to the challenge. The students enjoyed a feeling of competence. So by the afternoon, when we allowed some senior partners to demonstrate how they would address the question with the client, the students were fully ready to appreciate how they handled the discussion.

We had thrown in a few red herrings for the teams. There was a clear trademark problem with the proposed name for the new venture. Most teams caught that and then struggled with how to "cheaply" come up with a trademark strategy they could be confident would be bulletproof. The fact pattern also suggested that a newly-invented type of oven was central to the entrepreneur's concept. So the teams spent substantial effort in their patent strategies without first thinking through whether a patent was either likely or really valuable. When the senior lawyers' turn came, what struck us all was their practicality. Their advice was infused with cost-benefit analysis, and with humor. One example will give you an idea. One of the senior partners suggested to the client to always add the copyright symbol to any unique phrase or image the business used. As he put it, "It's like the chicken soup of IP law. It can't hurt, and you never know if it might help." I'm sure he didn't come up with that line that moment. I'm also certain it meant a great deal more to my class at the end of the day (and the week) than if they had heard it during some classroom lecture.

Session Five. To my surprise, this session was one of the most popular among the class. In this session, the students were given a term sheet for a "Series A Preferred Stock" financing proposed by a local venture capital firm. Their assignment was to review the term sheet and prepare to discuss with the client the critical issues, in anticipation of a meeting with the VC to finalize the deal. We met at the offices of Internet Capital Group (ICG), a publicly-traded venture capital investment firm located in the Philadelphia suburbs. Our hosts were Suzanne Niemeyer, ICG's General Counsel and Henry Nassau, co-chair of the corporate department at Dechert LLP and the former general counsel at ICG.

In the morning, the teams role-played the meeting with the client (played by me). In the afternoon, we had a two-part demonstration. In the first part, Henry took the students' role and met with the client. In the second part, Henry then met with counsel for the venture capital firm played by Suzanne. We learned four important lessons from this session.

First, it was very helpful to use a form of document that came with an extensive and easily accessible gloss. We adapted the term sheet from the National Venture Capital Association's form.[63] More importantly we told the class where it came from, allowing them to quickly highlight the differences and then use the extensive practitioner commentary that tracks the form to teach themselves about anti-dilution, liquidation preferences, restrictive covenants and the like. Did they make a lot of mistakes? Yes. Was it much easier to then explain what these concepts are and how they work having had the class first struggle through themselves? You bet. From that day forward we looked for standard forms to use as the basis for the class assignments, and we will look harder for similar forms this coming year.

Second, it is very valuable to repeat challenges. The students recognized that the task here was very similar in nature to the one they faced in reviewing the bank loan proposal. Seeing the similarity (an achievement unto itself), they all strove not to repeat the flaws of that exercise. They struggled with where to draw the line on "deal terms" and the "lawyer's job." They attempted to work through the terms to make sure they fit with the client's business plan. They tried to prioritize and give the client direction as to what issues really mattered. I was very happy to see that, as a group, they had learned a great deal about doing their job from the prior experience. More importantly, they saw themselves as getting better. While there was a great difference between Henry's performance and theirs, much of that difference came from Henry's decades of experience. The students could see that, and see that this was very different from their shortcomings in the prior session.

Third, while I have always believed in the value of role-models, I have never encountered the tangible proof I saw in

63. The form can be found at the National Venture Capital Association, http://www.nvca.org/model_documents/model_docs.html (last visited Feb. 24, 2009).

this class. There are several women who serve as host experts for the course. All of them have, as part of their motivation, the desire to see more women join their ranks.[64] Suzanne, perhaps because she is one of the youngest of the group, perhaps because she did such a good job handling Henry (who has graying hair, a deep baritone, and many years' seniority), had a demonstrable impact. Both after class and in subsequent conversations, several female members[65] of the class pointed out how impressed they were with how such a "normal" woman could be so effective negotiating against an older, more experienced male while retaining her "demure composure." Too often the message is that women cannot succeed in the "man's world" of deal lawyering, or they can only succeed if they take on a man's demeanor first.[66]

Fourth, it is thrilling to watch people who are truly good at what they are doing, especially if you have the "eyes" to see it. It's like the Olympics! While it worked well in the preceding sessions, now that the students were accustomed to the class routine and were less stressed about their own morning exercises, they came to the afternoon better prepared to see what was being offered. They felt reasonably competent with the material. So when presented with the *tour de force* exposition that Henry and Suzanne provided (by simply doing what they can do almost without thought, having drafted, reviewed, and negotiated countless of these term sheets), the students were really ready to be as fascinated as I was.

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64. *See, e.g.*, Sacha Pfeiffer, *Many Female Lawyers Dropping Off Path to Partnership*, BOSTON GLOBE, May 2, 2007, at A1 (reporting that in Massachusetts, only seventeen percent of law firm partners are women). Despite some notable exceptions, it continues to amaze me how few women appear in the senior ranks of the business world, whether at law firms or as their clients. Of course in a world where the "network" effect is so important, this has broad implications. *See generally* DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM (2006) (discussing the paucity of women on public company boards). This was the subject of a recent conference held at Drexel. Drexel University Earle Mack School of Law, No Seat at the Table, http://www.drexel.edu/law/conference-11-29-07.asp (last visited Feb. 24, 2009). For an extremely interesting article on women corporate law professors, see Margaret V. Sachs, *Women in Corporate Law Teaching: A Tale of Two Generations*, 65 MD. L. REV. 668 (2006).

65. I did not try to find out how any of the men felt but would be interested. In any event, they certainly will leave law school having met quite a few very successful, high-powered corporate lawyers who happen to be women.

66. Another very effective role model in our group was Lisa Jacobs, who, in addition to being very committed to teaching others her craft, tells some great stories about her work representing a National Hockey League franchise.

Session Six. For the sixth session, the teams were asked to review a proposed acquisition agreement. The client had identified a small restaurant chain that held a portfolio of attractive leased locations. The client had come to the conclusion that she could convert these locations to her concept at a lower cost than if she started from scratch, thus jump-starting the growth of her company. In preparation for the class session, each team was to review the draft agreement, paying particular attention to certain specified sections in the representations and warranties, closing conditions, termination, and indemnification sections. Then, they were asked to mark-up the draft as they saw necessary in preparation for a meeting with the seller's attorney. As we did with the Preferred Stock term sheet, we used a well-annotated form as the basis for the proposed draft and directed the teams to the original form. This allowed them to quickly see the differences between the draft we gave them and the standard form, as well as to have ready access to commentary on the purpose of each of the provisions. By and large, the teams did an admirable job marking up the draft. It turned out, this was largely because we had made it too easy for them.

In the morning, each of the teams took turns attempting to negotiate their mark-ups. I played the attorney for the seller. This was the first and only time that I played an "adversarial" role, and the reaction was interesting. Generally, they were taken aback by how roughly they were treated. It was interesting to see how offended they were by how they were treated. Of course, I never raised my voice, nor was I impolite, or disrespectful. I just knew what I was doing, and they didn't. And I let them feel it. It was interesting, but I'm not sure it was the best choice.

In the afternoon, our hosts, Steve Goodman and Jeff Boddle from Morgan, Lewis & Bockius, joined us. Instead of asking them to take the students' role (and perhaps giving the students an opportunity for some kind of vicarious revenge), we asked these experienced lawyers to explain how they would address a series of post-execution events using the mark-ups the student teams managed to negotiate in the morning. Of course, this was just rubbing in the salt.

For example, the hypothetical involved a stock purchase. Only one of the teams had managed to identify the need for a restriction on dividends before closing. During the morning, I

had simply said to this team that my client wanted an exception for "cash" dividends since, after all, "the buyer was buying the business as of the closing, so any interim earnings should belong to the seller." The team accepted this "compromise," only to learn from our hosts that in their view this mistake (which was revealed by a massive post-signing effort to bleed the entity dry) was probably malpractice.

Every team had put some of the covenants related to "ordinary course" operations back into the mark-up. But none really understood why. Therefore, most missed one of the biggest issues, and none had thought through why it mattered.

The one upside of the day was how quickly everyone understood the mistake. I do not think the power of this should be underestimated. While I plan to revisit how we attack this session next time, the give and take that occurred between our hosts and the class over how their drafting mistakes translated into real issues and how they could have been avoided was very sophisticated. The students did not know enough to do it right the first time, but they did have a very impressive ability to see the mistakes and how to correct them.

Session Seven. With the seventh session, we went too far afield. In this assignment, the teams were told to assume the client was facing a liquidity crisis. They were to prepare for a board meeting at which it was expected that the original venture capital backers would come with a "rescue" package. In retrospect, the learning objectives for this session were ill-defined. Beyond creating an opportunity for the students to gain some exposure to bankruptcy and restructuring, it was not really clear what they were meant to get out of the session. Our host, Neal Colton, the head of the bankruptcy practice at Cozen O'Connor, and several of his colleagues did provide a very interesting overview of the restructuring process and lots of insight into the role of the lawyer in crisis management. We had buried some conflicts of interest and ethical issues into the fact pattern for the assignment, and they generated some good discussion. But overall, we learned from this session that breadth of subject matter coverage should not be a goal of the course.

Session Eight. The eighth session also taught us something about what we need not do, although it was popular with the students. The assignment was for each team to prepare a presentation on their "single best idea" for improving a stan-

dard franchise agreement. The presentations were made during class to a panel of entrepreneurs, who then gave comments and assessments. The students enjoyed putting on the "show." But the nature of the assignment was too open-ended and the results too incomparable, and the activity was not all that similar to what lawyers really do (one panelist did liken it to giving a client pitch, but that is not saying much more than public speaking is something lawyers need to learn to do). Here again, I was lured by a desire to add substantive coverage of the topic of franchising at the expense of sticking with the class design. Having tried it, we are going to stick to the basic pattern of a morning of class exercise followed by an afternoon of expert demonstrations. We are also going to focus on a smaller range of issues, but explore them more intently and with a greater attention to repetition and mastery.

Session Nine. The final Challenge was held during our last class session. The challenge was to prepare a mark-up of the terms of a Series A Preferred Stock (e.g., a certificate of designation) to reflect a novel business deal that altered the typical "waterfall" of distributions. This assignment was based on a discussion that had taken place in an earlier class. The assignment was distributed just a few days before the day of class. The first task was to prepare a "mark-up" that needed to be handed in the night before class. Second, the students were to prepare for a meeting with the opposing counsel to discuss their mark-up (as I discuss below, we later changed the "setting" to be a meeting with a senior attorney to review the mark-up to remove some of the anxiety that came from the prospect of an adversarial "negotiation"). Unlike the other class sessions, this time each student was expected to perform the in-class exercise alone. Students were free to work together as teams to prepare their mark-ups, and several students did collaborate. A few even turned in an identical work product. But the final score was based on individual effort. For the most part, students seemed happy to have this opportunity to perform "solo." The idea of a final challenge remains compelling, but we want to experiment further with its structure.

First, this past year we underestimated the difficulty of the challenge we used. As one of the judges, a partner in one of the city's large corporate law firms noted, it was an assignment that she would not have expected any lawyer, no matter how seasoned, to have attempted without consultation with

several of her peers. This was not our intent. Second, we need to solve the problem of giving each of twenty-five students a meaningful opportunity for an individual performance of the exercise, while assuring uniformity of feedback (and evaluation). Last year, we divided the class among three judges and, when everyone had finished their performance, regrouped to discuss the problem as a class. I recorded several of these individual performances and can attest that each judge had a different approach to the exercise (although I think the scoring was reasonably consistent). Also, by holding each Challenge away from the group, we cheated the class of the opportunity to learn by observing each other.

In addition, at the last session, each student was required to turn in a "Portfolio." Originally, we had described this project as a re-write of the various written work product that had been prepared by teams in advance of each class session. The notion was to give each student an opportunity to reflect on what they learned during the class sessions and to synthesize that learning by rewriting the written product they had prepared in advance of the class sessions. The portfolio was also intended as a means for evaluating each student's individual performance. In the end, the nature of the various writings that each team prepared for each week was so varied and so voluminous, we decided to change the Portfolio into something more of a journal. Instead of revising the team submissions, each student was asked to reflect on what lessons he or she learned from each class session. This turned out to be a fairly meaningful exercise for many of the students (and many of these Portfolios provided very helpful information to us in evaluating and revising the course).[67] As several students suggested, next year we will ask students to write drafts of these journal entries after each session, as well as a final overall reflection at the end of the course. This will facilitate reflection as we go along and not only at the end (and will provide the instructor some "real time" data on the student's performance and reactions). It will also retain what one student described as "the opportunity to fully reflect on what I learned this quarter."

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67. The students' reactions ranged from "actually helpful because it forced me to think about what I learned and solidified it," a "really good round up," and an "opportunity to fully reflect on what I had learned," to "just busy work."

H. Grades and Such Less Important Stuff

Students' grades in the Transactional Lawyering course were based on five, equally-weighted factors: Attendance, Participation, Performance, the final Portfolio, and the final Challenge. Attendance was, of course, the simplest to measure. As we stated upfront, attendance and participation were required elements of the course. They were required as a matter of simple courtesy to the many prominent members of the bar and business community who were giving their time to its success and because of the simple fact that the efficacy of the course design depended on the active engagement of the students. To our great pleasure, we found little difficulty in applying this component of the grading scale; we had perfect attendance. The other four factors proved more difficult to apply.

Participation was meant to assess a student's participation in the preparation for and performance of the team's exercise in the class session. This was judged by the other members of the team. A student's score for each class session was the average of the scores given by the other members of that student's team for that week. While individual scoring was confidential, each student did receive his or her weekly average score. We used a scale of one to five, with five being the high score. It was very interesting to see how the scoring began as universal scores of "five," with the occasional and notable outlier, only to end with lower averages as students became both more strategic and more critical in their assessments.

The same dynamic was even starker in the Performance ratings. This score was meant to judge a given team's performance in each class exercise. This score was based on the average of the scores given by the members of the other teams and the professor, weighting the professor's score as twenty-five percent of the average and the class members' scores as seventy-five percent.[68] The same one to five scale was used, and the average score was reported each week. In addition to their individual Participation score and the Team score for

68. There was one big difference in the use of the one to five scale between Participation and Performance grading. In Participation, you were free to give as many fives and fours as you wished. In Performance, you could only give up to one five and two fours (although you did not have to give any). Here, we wanted to force students to truly compare the teams' performances.

each week, the class received periodic updates on the range of total points in the class as a whole without identifying individual total scores. Even more than with Participation scores, the average Performance scores fell quite significantly as the course progressed.

Based on my observations and feedback from the students, these two aspects of the grading system were the most troubling for the students and posed the greatest challenge for the class dynamic. First, even though they were given only the average score of their fellow teammates, students found it difficult to score another student on their team harshly. An average among three or four students did not provide enough anonymity for most students' comfort. We saw some exceptions for students who apparently were particularly remiss in carrying their share of the team's burden for the week. Since these examples tended to repeat week to week, I suspect that certain individuals were in fact more consistently "slack" in their efforts than others. In this way, this component of the grading worked by penalizing those students who put in less effort to the non-classroom portion of the participation required.

On the other hand, there was some concern that social dynamics may have skewed these outcomes, allowing some members of the class to "skate" at some points with less penalty than was imposed on others. Second, several students expressed concern that their classmates were trying to game the system. Their concern was that students had begun to purposefully grade other teams poorly to give themselves an advantage in the curve. While I did notice that Performance grades fell over the course of the term, I did not see any pattern of abuse. Certain individuals did adopt a more strident standard, giving fewer high scores and tending to a lower mean than others, but I have to say they were consistent in their approach, leaving me unconcerned about their motives. I believe much of the concern among students evaporated once we announced that the course would be less strictly curved than previously thought, and once students saw how the points were coming out over the course of the term. The truth was that none of Attendance, Participation, or Performance

had much influence on a student's final grade.[69] While it was important to "keep up with your peers," this appeared to require simple participation—very much what we had hoped. To differentiate herself, a student needed to excel in the two non-team aspects of the grading.

The Challenge and Portfolio scores were like more traditional law school grades. Each student was judged individually. The grades were given by either a practitioner-judge or by the professor. I purposefully graded the Portfolios with an eye to the curve, assigning scores between 75 and 100, in an attempt to achieve a normal distribution. I also tried to grade in the same manner I would with anonymous examinations, basing each score simply on the four corners of the work in front of me and on how it measures up in relation to a fixed standard of performance I applied across all of the submissions. As I am each time I grade a set of papers, I was again surprised to find that my results fell comfortably into a normal distribution. I asked the judges to try and do the same. Obviously they had a much smaller sample to work with, and each calibrated her score differently. I tried to convert these disparate scorings into comparable results by translating each set of scores into a common distribution using standard deviations, but this obviously had its limits.

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69. The reason for this is that although each of the five categories of scores offered a total opportunity of 100 points for a grand total of 500, I did not figure final grades by simply adding up the five scores. Instead, I calculated the standard deviation of the scores in each category and used them to measure how each student performed in each category relative to the average. Each of these relative performance scores were then used to calculated how that student did overall, relative to the average performance, and that overall score was used to place him or her on the curve. Therefore, because the average Attendance score was 100 and the deviation was zero, an individual student's Attendance score had no effect on her grade. But had one student scored ninety by missing one class, that student's grade would have felt a significant negative impact.

We can get a sense of the impact of a category on the grades overall by noting the deviation within that category. Generally, the lower the deviation, the less of an impact (not to say that an outlier individual could not feel a significant impact in her particular case). The standard deviations ranked as follows: Attendance, zero; Performance, 2.31 (with a mean of 69.91); Participation, 3.71 (mean of 94.45); Challenge, 5.2 (mean of 84); and Portfolio, 6.08 (mean of 83.4).

The average Participation grade for the term was 94.45 out of a possible 100 points. While the lowest total was 82.3, the standard deviation for the class was only 3.71. The 82.3 was 6 points lower than the next lowest score, so it heavily affected the distribution. If you exclude this student's score the standard deviation was only 2.77. As one might expect, since the teams were shuffled week to week, the Performance grades tended to bunch closely around the average. Other than for two outliers in the Participation category, neither a student's Participation grade nor her Performance score had a big effect on her final grade.

In the end, I was confident about the high grades and the low ones. I am not particularly certain any of the break points among the middle have great objectivity to them. I tend to feel the same way about law school grades in general. Given the nature of this course and my desire above all else to promote active participation, I decided to set the bottom quite high. No one received less than a "B" (Drexel's mean GPA range in the upper-class years for classes of seventeen to thirty-nine students is 2.9-3.1, with fifteen to twenty-five percent of all students receiving A or A- grades). I was comfortable doing so, even for those students who were outliers in the Participation score. Even they came to every class and had something worthwhile to say.[70]

III. LESSONS LEARNED

My purpose for this article is to share the lessons I have learned so far in attempting to design a "keystone" course within a transactional lawyering curriculum. The lessons have been many, large and small, but I have set out below the few I think most important to share. They are:

- If you ask, they will come.
- Don't assign a textbook, but give a good roadmap.
- If you make it "real," you can keep the assignment "small."
- *Repetitio est mater studiorum.*
- Don't worry too much about making grading "objective" (just be generous).
- Don't feel nervous about saying very little (you don't have to be talking to be teaching).
- This course is an enormous amount of work.
- 4 x 4 is an ideal if unrealistic class size.
- The model is good, but far from perfect.

Recruiting Help. When I have described the Transactional Lawyering course at Drexel to other law professors, invariably someone asks how we managed to get so many lawyers and

70. I cannot honestly claim the more attractive explanation of having seen across the board "mastery." *See* Feinman & Feldman, *supra* note 27, at 899-900 (arguing that the goal of every class should be to get students to a level of mastery that earns a good grade). Not to say that I wasn't genuinely impressed with the entire class' effort. We simply had not given enough attention to designing the assessment process to measure "mastery." This is a failure we need to address.

business folks to help. The answer is simple. We asked. When I first conceived of the course, I was quite nervous that I would find myself once again trying to play multiple roles in various simulations having failed to recruit an adequate number of "hosts." I could not have been more wrong. Not one person we asked turned us down (although getting a schedule that worked for everyone was no easy feat). I believe the key to the success in recruiting "hosts" stems from "bringing the class to them."

Everyone we spoke with expressed enthusiasm for the overall project. No business lawyer (or user of business lawyers) I know does not want to see a greater exposure to practical learning for new law graduates. Everyone's inclination is to assist. Equally pervasive is an inability to commit serious time to that project. So our pitch was particularly appealing. When we asked for help, we did so stating upfront that one of our goals was to use our host's time in the most "leveraged" way possible. This was not a simple "guest lecture" or free-form attempt to substitute their time for that of a full-time faculty member. Instead, we were designing a program that consciously sought to turn their expertise into a pedagogical tool. We were only asking for what was relatively easy to give—access to space and maybe three hours of time with little need for preparation. Just come and do what comes naturally. As I discussed above, it is my belief that one of the great opportunities for curricular reform in legal education is finding more effective ways to leverage the expertise of the practicing bar. I also believe that our experience last year shows that indeed, if you build it, they will come.

No Casebooks. One of the biggest differences between the Transactional Lawyering course and a traditional law school class was the absence of an assigned text. I noted earlier my hesitation in not at least suggesting a textbook. As I discussed, I am now fully convinced that there is adequate material in readily accessible form available to students. I do think they still need some assistance in finding it. Because they are so unfamiliar with the subject matter, they often do not know how to even begin to look. Terms that would form the basis of a search are not yet in their vocabulary. So to simply send them to the library without the least direction is unduly frustrating and wasteful. To that end, we will continue to use the Bibliography we described. However, we will change it in two

ways.

First, we will add some easily digested overview of the subject (either our own or reference to an existing one if we find something appropriate). I think this will go a long way in helping students feel less adrift each week while not sacrificing the value that came from the struggle to figure things out themselves.[71] Second, we will limit the number of references we provide to delimit better the range of sources students need to sort through. Once freed of the limitations of an assigned casebook, the students' biggest challenge was what not to read.

Less breadth, more depth. Another change to the Bibliography will come from the biggest change in the nature of next year's class. Instead of moving from topic to topic, we will spend multiple classes tackling different aspects of a single kind of transaction. So rather than moving from loan agreement, to equity financing, to lease, to acquisition agreement, we will spend more time working with just one kind of document. I still want to expose the students to the variety of transactions, but I think that goal should be secondary to the goal of mastery.[72] The series of sessions that led up to the very successful session on the Preferred Stock term sheet varied in their success and approaches. But one aspect that made the final session in that series so successful was the accretive experiences from the prior sessions. The details were different, but the nature of the work, of the analysis, and of the priorities was very similar.[73] This allowed the students to feel progress and greater mastery. We lost much of this when we switched gears to cover new subjects with very different dynamics and approaches. I think if we had stuck with two "objects," say the equity financing documents and the acquisition, and designed our sessions as a sequence of exercises around just these two,

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71. As one student noted: "Part of the Challenge of this class was the real experience of finding the appropriate sources from wherever we could."

72. I'm considering either using the midweek class or perhaps a long class in the middle of the quarter to give some "perspective" presentations, which could include an introduction to the other kinds of transactions, their structure, and terminology.

73. Professor Stark has identified five issues that she finds cut across all basic transactional agreements. *See* Stark, *supra* note 6, at 229-32. I agree that a handful of basic analytical structures recur in the transactional setting and that it is far more important to understand and recognize these than to have broad exposure to the multiplicity of contexts in which they appear.

we may have lost some of the breadth of discussion but gained a much greater success in teaching the lessons that really matter.

"Repetition is the mother of learning." The reason I remember this one phrase of Latin is that I was forced to repeat it *ad nauseum* (learned that one later) during my middle school years. My usual association for learning by repetition is rote memorization. So I learned my multiplication tables because my mother forced me to flip through a deck of flash cards every meal every day until I could answer without hesitation. Generally, this is not something I associate with any form of "higher" learning. However, as I have already suggested, I am convinced that certain kinds of higher knowledge come only from repeated experiences—from practice.[74] I am willing to sacrifice breadth for depth because I want to offer a greater opportunity for mastery. I mean that not only in the sense of mastery of the specific subject (like preferred stock terms or stock purchase agreements), but in the sense of the higher order skills—judgment, "what if" thinking, etc. What I am hoping to see develop can only come once the student obtains a certain level of basic mastery and then begins to enjoy it. So, while I do not want to create the equivalent of the "bucket of balls on the driving range" that a golfer uses to get the "feel" she needs to bring her swing to the next level, the most important lesson I learned from last year is that we need to focus on doing just a few things better and better. Fortunately, we can avoid the monotony of the driving range or the lap pool, and keep things interesting because we can find those same few challenges in so many different places within a given transactional setting.

Grading. Initially, we planned to treat the Transactional Lawyering course as a "normal" upper-class course for purposes of applying the law school's grading curve. This would have required me to achieve a mean grade of 2.9 to 3.1, basically a "B". Early on, both the students and I became concerned that this curve requirement was becoming more and more of an impediment to the class dynamic. As I described above, some students tried to be "strategic" in their grading of their fellow students as time went on. Overall, as the student surveys re-

74. *See* Schwartz, *supra* note 27, at 415-16 (discussing the value of repetition and sequencing).

vealed, the whole idea of peer grading was challenging. Students were uncomfortable grading others and perhaps more uncomfortable being evaluated by their classmates. As I noted above, this portion of the assessment process did not have a significant impact on final grades, other than for those few students who appeared to be particularly remiss in carrying their share of the work. In that respect, I think the system worked.

In the end, as I detailed above, a student's final grade depended primarily on her individual performance on two tasks that were evaluated by more typical appraisers—the professor and a practitioner-judge. Personally, I have no great faith in the accuracy of either of these assessments, except in identifying the ends of the curve. As in all law school grading, it is relatively easy to identify the best and the worst. The great middle, however, is truly difficult to separate into slightly better and slightly worse.

In the end, the one change in the grading system we will implement, which we did towards the end of the quarter, is to abandon the need to adhere to a strict curve. Drexel offers a less rigid curve for so-called "skills" courses, and by designating the Transactional Lawyering course as a skills course, we were able to offer a simple curve that only required a mean of 3.3 to 3.5, basically a B+. It was noteworthy that this simple change did in fact affect student grading (and anxiety).[75] For our part, we decided to heed a common theme in the students' comments. As one suggested: "Put it on the skills curve and be generous if students are putting in a good faith effort." Another was more specific: "I don't think anyone in this course deserves lower than a B. Everyone has worked really hard and unless there's someone that really has not been doing their work, there's no reason why anyone should get a poor grade." We followed this advice and set the bottom at a 3.0. We felt comfortable doing so because in the end, despite a few outliers in the team grading, based on class attendance and participation, every student made a significant effort in the course. We were very discerning in giving out the "A"s and "A-"s, which had the effect of bunching lots of folks in the "B"s, but given the nature of the class and our misgivings

75. After it was announced in class, we noticed a rise in performance grades.

about differentiating among the group in the middle, this seemed both fair and appropriate. Our view is that two things are important—participation and effort should be recognized (and if necessary, the reverse), and exceptional performance needs to be identified. Everything else is just noise. So other than adopting a less restrictive curve, the grading system we adopted worked adequately. We were able to be generous overall, discerning at the top and doing the best we can about how the rest fell out.

The Professor's Job. Like many law schools, Drexel's annual review process for faculty includes visits to our classes by other faculty to evaluate teaching. So when one of my colleagues suggested he would like to sit in on the Transactional Lawyering course,[76] I hesitated for a moment when I thought about what he would encounter. Unlike the typical law school class, I do not stand in the front of the class, I rarely pose questions to the students, and I almost never lecture. The closest analogy I could come up with to describe my role in the "classroom" was a talk show host (and more Montel Williams (crossed with a little James Lipton) than Jay Leno)—something far from the typical law professor.

But just like a talk show host (or so I assume) and a law professor, I was "on" every moment of class. Of course, every class required significant preparation, both in terms of preparing materials, designing each assignment and simply orchestrating what amounted to a "class trip" each week. Although the promise to each set of hosts was that they simply needed to "walk in and be themselves," each at some point during the preceding week wanted to be prepped to some degree. During each session, I often played a role—usually the client—in the exercise. Throughout the week, I also served as the client with teams lined up outside my office to "meet" with their client to prepare for the class exercises. I had tried to insist that any discussion with the client come via email. My hope was that in this way I could more efficiently answer common questions by responding to the class as a whole. But teams quickly discovered that one-on-one interaction was more likely to lead to unique insights and competitive advantage. In the end, I gave up discouraging students from coming to ex-

76. He ultimately chose to watch the video tape.

plore their ideas on a "confidential" basis. Finally, the professor is the "conductor" of each session, trying to achieve those "ah ha" moments from what comes from the students and the experts, much of which is unknown beforehand. It is a difficult process to describe,[77] but it is palpable when a class comes together in these moments of epiphany, and the hardest job of the professor is to find them in the miasma of the days' events.

Hard Work. I will admit that when I first proposed the Transactional Lawyering course, I was a bit sheepish. After all, the course was going to meet only one day a week for nine weeks. There was no casebook. No final exam to grade. After putting together the basic fact pattern materials, all I planned to give out was a weekly assignment. I was going to recruit other people to "teach" every session, with student exercises taking up the remainder of class time. So while I was quite sure the first time around was going to be time-consuming, particularly because of all the logistics that needed attention, I was somewhat hopeful that the first year's investment would pay dividends in terms of future years' workload. Looking ahead now to the second year, I was wrong.

While I still hope that the logistical tasks around recruiting hosts will stabilize, I am confident it will be still a couple of years before I have a consistent and reliable coterie of volunteers. People come and go, their commitments change and their level of interest wanes. Some prove to be better than others. For all kinds of reasons, it takes time to have a stable group of supporters who have come to see their participation as part of their professional lives year to year.

Certainly, the next time around it will be easier to construct the hypothetical, having done it once before. But it will not be adequate to simply dust off last year's hypothetical and change the dates. First, having done it once, we have found the need for some improvement in spots. That was to be expected. More importantly, we have discovered the need to refresh the material every year. It simply did not occur to me to think about the fact that this coming year's students will have access to last year's students and their work product. Now, each time the class dynamic depends on some element of sur-

77. It is very similar to the role of "supervisor" that Professor Hoffman describes as a central learning dynamic in a clinic. *See* Peter Toll Hoffmann, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277, 279-81 (1982).

prise, we will need to do something new since at least some students will come knowing what is inside the cake unless we change it. So, for example, I am not counting on "tricking" the students into signing confidentiality agreements for the first day of class. Indeed, I have to assume they have my suggested mark-up. I would be disappointed if that was not what I got back in response to my request. So I have to come up with something else—every year.

Finally, I underestimated the importance and time commitment of two roles the instructor has to play—the role of the client and the role of "conductor" during class. The client is key to two critical class dynamics. One of the most critical learning dynamics in the course is the ability for students to interact with a "client." They get this opportunity during the exercises in class, but also need the opportunity to have these interactions at other times during the week. And they need these opportunities to be more informal and "confidential." Class interactions, because they are seen very much as the culminating performances after a week's preparation, do not lend themselves to the kind of give and take in which students have the opportunity to test alternatives. This kind of iterative discussion has enormous value. In playing the role of client (and to a large extent we add in the role of "more senior lawyer") during these mid-week sessions, the instructor is able to guide the teams in their thought process, and model for them the kind of judgment and decision-making that goes into the task at hand.

One modification I plan to make to next year's course is to add a second scheduled class meeting. We expect to expand the course to meet five hours each week, and one hour will be devoted to this class held mid-week. The purpose of this class will be to provide a more structured opportunity for the teams to ask questions of the "client" and to discuss issues with the "senior lawyer." We will still have the issue of the desire for "confidentiality" (and therefore still need to hold one-on-one meetings), but my hope is that this will prove to be a more efficient means of fulfilling the role of "client" outside the classroom.

During the class exercises and the expert demonstration, the person playing client has the responsibility of adding the "realism" to the discourse. At the same time, she or he must keep in mind the pedagogical goals of the session. In her

choices of answers, questions and remarks, she or he can steer the discussion towards a given goal. I have described this task as being the "conductor." While not necessarily the most time consuming task, it is the most challenging. I fretted the most about this aspect of conducting the class, and it was why I found the course more exhausting than others. Because of the nature of each session, you have little on which to predict how any class will go. True, every law school class has days that "gel" and others that fall flat, but the range of uncertainty here is quite large compared to the typical classroom experience. Much like the conductor of an orchestra, it makes an enormous difference what energy and moment to moment finesse the instructor brings to the table. Bottom line, I do not think the course succeeds if you simply start with great materials, some motivated students, add some dedicated experts and stir. The instructor needs to add his or her direction to bring it all together (sometimes better than others).

Class Size. In our first experiment with the Transactional Lawyering course, we had a total of twenty-five students, resulting in five teams of four and one of five. For a number of reasons, the ideal configuration would be four teams of four for a total class size of sixteen. The outer limit is six teams of four, or twenty-four students. This small class size does pose some significant curricular challenges.

Team work required a great deal of coordination by the students outside of class. So, the larger the team, the harder the scheduling. Also, team members were all anxious to have their individual opportunity to demonstrate their contribution during the team exercise. This was difficult in the time allowed. On the other hand, students were quick to learn how to better manage each week's workload by dividing it up amongst themselves. Also smaller teams raised the risk of a poor team dynamic. Four provided enough buffer from the possibility that any one member was either difficult to work with or simply lazy.

It was also a challenge to maintain the energy level for the entire morning session. Six iterations by six teams of what usually was essentially the same exercise became tedious for the class. Four would have been better and would have allowed more time for each team's efforts.

A Better Model. We did manage to teach a class of twenty-five with good success. As I noted above, having one team of

five was not ideal, and having only four teams would have made for a better class dynamic. But if twenty-four students is the limit for this course, have we really built something that can serve as a "keystone" course in a law school curriculum? Or is a twenty-four-student class doomed to be nothing more than a niche elective for a small portion of the student body? Our goal was to build a course that was not only available, but as we have set it up, is in fact required of every student interested in transactional lawyering. Even at smaller schools like Drexel (with around 150 students in each class), we would need to offer more than twenty-five spots each year if we are serious about making this course part of a core curriculum.

Offering multiple sections is an option, but this raises a whole series of issues. As discussed above, although supported by an entire cast of host experts, this course is by no means less work for the professor. Over time, much of the work associated with recruiting and orchestrating the various participants should decline. But so long as the professor is required to both "conduct" each session, as well as role-play, she or he is getting little leverage out of the use of host experts, certainly not enough to allow him or her to carry multiple sections of the class. Nor should we gainsay the ongoing organizational demands of maintaining and servicing a larger coterie of hosts.

I will admit this is the one issue that I see as having the potential to "sink the boat." My assumption is that the solution must be found within the following constraints. First, there will never be more than one full-time, tenure-track member of the faculty involved at any given time in delivering this course.[78] Second, while it is essential to have a full roster of host experts, at some point the diminishing returns overwhelm the benefits of adding more. So, while a sufficient number of volunteers is needed to ensure you can avoid overtaxing any one host from year to year, to have sufficient planning flexibility, and to address the inevitable fall off, it is probably more work than value to build a group that can cover multiple sections. Given these two constraints, my current

78. Of course, this need not be true. Transactional Lawyering could be treated as a course similar to Legal Writing or Contracts, courses, which many law schools offer as "small section" courses and are taught by several different instructors at the same time. But this still would not solve the problem of needing so many "experts" to participate.

thought on "Model 2.0" is to experiment with and invest heavily in the use of technology. My hope is that this same solution may offer an answer to the question of how to offer a course like this outside of a large urban center. The other option, of course, is to add back more traditional class sessions that do not rely on outside participants.

I tried to record (video and audio) every moment of last year's class. I did so with the vague thought that these recordings might serve at some future date as a growing archive of teaching materials. In other words, if so much of the learning dynamic of the course comes from watching others, why can't that watching come in a form most students understand well? Why can't they watch the video? My initial concern was that to be effective, the production values needed to be very high. But having seen so many very effective YouTube infomercials lately,[79] I am convinced that we can even further "leverage" the participation of our host experts. If we intelligently record and collect these "live" demonstrations, we will soon have a significant library collection. In addition, having recorded the various student exercises, we now have the fodder for creating multimedia teaching tools that juxtapose common mistakes, commentary and example. The technology that allows us to do all this is becoming cheaper and easier to use every day.[80]

The dream, of course, is to create a platform that allows multiple instructors (at multiple schools) to create and share a common set of teaching tools.[81] When I get really futuristic, I see this as a new kind of "casebook," which serves as a shared space and platform, allowing us all to upload, much like we now upload video to YouTube, the mixture of exercises, reading materials and experiences (live or recorded) that have combined to create "ah ha" moments for our students.[82] While

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79. My favorite is the "Will It Blend" series. *See* Blendtec's Videos: Will it Blend?, http://www.youtube.com/user/blendtec?ob=4 (last visited Feb. 24, 2009).

80. I have been playing with a software called "Camtasia." *See* TechSmith.com, Camtasia Studio, http://www.techsmith.com/camtasia.asp (last visited Feb. 24, 2009). Gordon Smith recently reported on his experiments with Adobe Presenter. Posting of Gordon Smith, *Adobe Presenter*, to The Conglomerate, http://www.theconglomerate.org/2008/08 (Aug. 30, 2008).

81. Apparently I am not alone in this dream. Seattle Univ. Sch. of Law, Workshop on the Future of the Legal Coursebook (2008), http://www.law.seattleu.edu/Faculty/Workshop_on_ the_Future_of_the_ Legal_Coursebook.xml (last visited Feb. 24, 2009).

82. But these ideas will not materialize any time soon. Others, however, we can use today. Let me give one example. I am a big fan of Skype, the voice over internet protocal (VoIP) service from Google. Skype Homepage, http://www.skype.com. Using Skype or similar VoIP

every opportunity for "live" engagement should be pursued, there is no reason we cannot mix in recorded material. This would allow us to expand the number of students we can expose to the material, both in number and in geography.[83] It may also allow us to create an even better demonstration than the raw footage alone provided. After all, as law teachers, we add value by bringing out the lessons to be learned from experience. Or so I hope.

Every practitioner who has been involved in the Transactional Lawyering course has been enthusiastic about the course. They all agree about the need for such kinds of legal education. They like the self-conscious effort to use their expertise in an efficient way. They all say they wish they had had such a course available to them when they went to law school. But, then again, what would you expect them to say?

I take the greatest satisfaction from the student response. Despite a recurring complaint about the disproportionate amount of work required (something we hope to correct, but only a bit, next time),[84] when asked if they thought the course was effective, they responded with a unanimous "yes."[85] Of

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service, one can easily launch a video teleconference in any law school classroom enabled with web access, an audio system and a projector (a typical configuration these days). So a lawyer in London sitting in front of her computer with a webcam and Skype up and running can appear in your classroom (much like the Klingon captain appears to the bridge of the Starship Enterprise on the screen in front of Chekov and Sulu!). Just stick an inexpensive microphone (I got mine for $15 at Radio Shack) and you and your class can "invite" just about anybody, just about anywhere in the world, to join you. For example, I routinely ask Dan Bacine to "pop in" to my Business Organizations class to explain how he differentiates direct from derivative litigation. Dan is a partner in one of the plaintiff firms that led the litigation against Worldcom (a case many of us teach). I can tell you, it is much more interesting to listen to Dan (who, having to evaluate all his cases as if they were a personal investment, thinks about these issues in a very different way than most legal academics) talk about the difference than to just read the cases.

83. It might also be part of the solution to the issues posed by the rising cost of a legal education. *See* Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254, 263 (2006) (describing the costs of recent improvements in legal education, their implications and the potential for technology to address them).

84. The comments on workload ranged from "comparable . . . no final" to "by far the most work I have ever done," "spent about 20 hours per week preparing for class," "overwhelming at times," and "far greater than any other course."

85. The students' verbatim responses (excluding the handful who responded with a simple "yes" or the like) were:

- This course was incredibly effective. As much as I often found myself DREADING it, I think I learned a ton. I got on the phone with different lawyers at different times and generally the feedback was along the lines of the fact that I had a very practical knowledge of what I was talking about — much more than they had as

course, I take this enthusiastic response with a big grain of salt. My fear is that until I have more objective evidence of success, the student response may be more a measure of how little they enjoy their other classes than how truly effective Transactional Lawyering may be. For that, I'll want to see how their experience translates into their becoming "experts" in the years to come.[86] I look forward to asking them again at

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law students, and much more than I thought I actually had. I learned so much as far as my abilities in public speaking, having confidence in myself, dealing with stress. I also learned how much I actually liked being in nice conference rooms making presentations, reviewing documents, etc. I know that I know nothing, and that makes me want to pursue this as a career. Plus, I think I would be good at it once I do learn more.

- Very much so. Not only did I improve my knowledge base, but I feel like I improved in areas such as public speaking, and being able to think on my feet. Also, I felt that this method of learning will be more conducive to maintaining this information for years. Often I find that when I take finals, half the information exits my brain one week after the final.
- Yes, I hate learning from cases.
- Yes. I think this was an invaluable method of learning about transactional lawyering.
- Yes, this course was effective. Each week we had to work hard to achieve a real world assignment. [I]n [n]o other course do you learn information that can be applied to the real world scenarios. [I]n [n]o other course do you get to actually see form documents and mold them to your client's wishes.
- Yes. I learned a lot about being a transactional lawyer. I feel that I could advise a small business tomorrow!
- Yes in my opinion, this is the best way to learn.
- Yes, I actually thought this course was more effective than any other course I have taken in law school. I finished the business organizations exam, still not understanding what hedge funds truly were. However, upon the conclusion of this course, I understand the hedge fund conflict, as well as several other important corporate law concepts, simply because I ran into these things when advising my client.
- Yes, by the end of it I was able to apply the lessons I learned in earlier sessions.
- Extremely. It could just be that I was unexposed to so much of this, but I definitely feel that I have taken more out of this class than any other.
- Yes! Finally! A class that talks about the real world!
- Somewhat. I learned things and that was great, but the frustration was also high.
- This course was extremely effective in terms of teaching us how a transactional lawyer operates and teaching various subject matters. However, I felt like I didn't get a chance to full[ly] grasp one subject matter.
- Yes, I learned a ton, a lot of work though.
- Yes. Forced us to dive in head first into the material which added much more depth to our learning experience.
- Yes, I thought it was very effective. I loved this course.
- Yes, this class was the most rewarding and challenging class I have had the opportunity to participate in since being in law school.

86. I did ask the question again at the end of the summer, wanting to see how the students

their five-year reunion.

IV. CONCLUSION

One conclusion of the Carnegie Report on legal education is: "legal education should . . . more fully complement the teaching and learning of legal doctrine with the teaching and learning of practice."[87] One response to this challenge has been to expand the opportunities for students to "experience" law practice, to give them an earlier and broader exposure to the variety of tasks that will make up their professional lives. From such foundational elements like legal writing to the more particular like drafting for real estate transactions or tactics in appellate advocacy, law schools have expanded the traditional doctrinal curriculum to include a larger portfolio of "skills" training. The bar appears to be demanding it as it tries to shift more of the training burden onto schools (to counterbalance the rising salaries of new lawyers). Students appear to demand and enjoy these kinds of courses, seeing them as "more relevant." This movement has spawned an interest in adding a new focus on the lawyering aspects of transactions to the traditional doctrinal business law curriculum. Having decided it is insufficient to simply teach students how to analyze cases or interpret statutes, but also needing to teach how to draft legal briefs and argue appellate cases, we are finally taking on the challenge of teaching not only the rules (and the policy or economic theory that underlie them) of business entities or securities offerings, but also some of the practice that forms a greater part of a transactional lawyer's professional life. Taking on this challenge, we must ask ourselves how to do it well.

Although I certainly favor curricular changes like those I describe here, I see a greater challenge that goes beyond simply expanding our curriculum. It is difficult to teach "lawyering" of any kind in the law school setting. It is particularly difficult to do so for transactional lawyering. This stems from a fundamental difference between being a business lawyer on the

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judged the class after their summer jobs. The response was again uniform. One example gives the flavor. "[I]t's rare in law school to see the direct application of class learning to practice. I only wish there were more classes like this one."

87. THE CARNEGIE REPORT, *supra* note 5, at 8.

one hand and a judge or litigator on the other. While overstating the case to some degree, it is meaningful to say that those involved in law as litigators or judges are standing in an ex post position. They are seeking to reach a determination of a legally-determined outcome based on a state of facts that has occurred. While there is all kinds of variability, the basic challenge can be stated as follows: given the following state of facts, how does (or should) the law allocate rights among the parties involved. For a business lawyer, the ex ante position is far more common.[88] In other words, she is asked to attempt to allocate rights among the parties involved, often through a mixture of public and private ordering, in a world where the facts remain to be determined. Rather than deal with the past, she is asked to help plan the future. It is easier to teach ex post legal analysis than to teach ex ante legal planning. It is easier because law schools are good at providing the tools needed to identify and evaluate the panoply of alternatives of legal outcomes stemming from a fixed state of facts. We as law professors are all well-versed in the methods of legal analysis and argumentation that structure the debate as to what the outcome is likely to be (and perhaps why that outcome should be changed). We are not good at providing tools for dealing with uncertainty about the future.[89] And yet that is exactly what transactional lawyers do for a living.

At least one opinion of mine has changed a bit after last year's experiment. I once wrote that "[l]aw professors shun corporate practice because corporate practice is not a 'serious subject.'"[90] "[T]o be serious, a subject must be the stuff of legal science and legal theory which can be articulated using generally recognized legal paradigms,"[91] I asserted. My opinion has changed in that I no longer see the question of seriousness as an impediment to curricular change. And that actually concerns me a bit. I also do not believe that the answer to a theory

88. *See* William J. Carney, *Preparing the Corporate Lawyer: Teaching Problems in Corporate Law: Making It Real*, 34 GA. L. REV. 823, 824 (2000) (noting that law schools often fail to expose students to the *ex ante*, problem-solving perspective).

89. As Dean Roger Dennis once put it, "we are training our graduates to exercise judgment in the context of uncertainty." Roger J. Dennis, *Commentary: The Epistemology of Corporate - Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 BROOK. L. REV. 677, 677 (1999).

90. Okamoto, *supra* note 15, at 498.

91. *Id.*

of corporate practice lies within legal theory. We need to go outside for that.

There remain many of my colleagues in the academy who continue to question the "seriousness" of transactional lawyering as a subject, but they, like those before them who opposed clinical education or skills training, are not stopping curricular innovation. But, while we may no longer need a theoretical foundation in order to take our curricular reform forward, it remains very much a critical prerequisite to our success. Even more than our colleagues who till in the litigation-oriented fields, we lack a theoretical underpinning for our project.[92] When we ask what makes the work of one litigator or one judge better than that of another, every meta-theory or analytical construct we find among ourselves in the legal academy has something to say. That decision was better because it yielded greater economic efficiency. That reading of the case is more distributively just. This form of argument is more socially aware (or less culturally biased). And so on. While it is not easy to make our legal writing or litigation skills curriculum effective, it is not hard to see how they fit within well-established intellectual paradigms in law schools. The same cannot be said for transactional lawyering. Even Law & Economics offers a meager tool kit with which to answer the question of what makes one deal lawyer better than another.

So, while we may no longer need to articulate an underlying theoretical framework of professional expertise to justify our curricular expansion into transactional lawyering, we do ourselves and our students a disservice if we pursue this effort without marrying it to a concurrent effort to elucidate theories of transactional lawyering. While I leave it for another day to spell this out, my belief is that this theory will be found in the world of finance—a discipline that has as its center the need to operate in a world of uncertain outcomes. I admit the choice of "Law & Finance of Transactional Lawyering" was an unfortunate and awkward name for the keystone of Drexel's transactional lawyering program. But it reflects my belief that the analytical tools of finance are what law schools will need, not only to make transactional lawyering a "serious subject" but in fact to allow us to successfully teach what it means to be good

92. *See* Dennis, *supra* note 89, at 682 (noting that "our efforts at skills training are informed and enriched through explicit reference to academic research").

at doing deals. It provides a set of analytical tools for dealing with uncertainty. It also offers paradigms which lend themselves to comparing choices under uncertainty from the ex ante perspective. Finally, it provides much of the language used by business clients (and thus by their lawyers). The challenge, of course, is that unlike history, philosophy, literary theory, or similar humanities disciplines, the world of finance, particularly its mathematical aspects, are foreign, if not horrifying, to most law students (and law faculty). I suspect, however, if we can simply teach our students how to analyze a borrowing base provision or a preferred stock liquidation preference with reference to a set of financial projections—an exercise every English major among our students (and ourselves) can master—we will have taught them a skill that will set them apart from most business lawyers in practice today. More importantly, we will have taught them how to begin to think like a "deal lawyer"—something very different from what we have traditionally meant by "thinking like a lawyer."