

# TRANSACTIONAL EDUCATION: WHAT'S NEXT?

TINA L. STARK<sup>1</sup>

## WELCOME & OPENING REMARKS

Before we leave for the panels, I would like to spend a couple of moments talking about the state of transactional education.

When we were putting together our first conference two years ago, we asked for proposals discussing best practices. We received not a one. In retrospect, it was not surprising. It was premature. I was giving a talk on my Fantasy Curriculum<sup>2</sup> – something not yet in place. It was a time when many of us were just beginning to implement curricular change. Best practices were for the future. In two years we have come a long way. Many more schools now have transactional skills courses or courses with a transactional skills component. But I still do not think we are at a stage when we can talk about best practices. So many of us are still experimenting. We are creating our pedagogy. But today and tomorrow you will learn about the strides we have made.

That we have made strides is a tribute to all of you here because we have made these strides despite significant challenges, and it is these challenges that I would like to talk about for the next few minutes.

Perhaps our biggest challenge is convincing our schools that they should expand their transactional skills curricula. We have for years labored in the shadows of litigation skills training – something our colleagues understand and, therefore, support. Deal work they do not get. No one is researching cases, and appellate briefs are nowhere to be seen. Most of our colleagues are not quite sure what we do or why it has anything to do with law, but they know they do not want anything to do with it.

The problem is not just a lack of understanding, but that we labor anonymously. We are nearly invisible within the academy.

The MacCrate<sup>3</sup> and Carnegie<sup>4</sup> Reports gave transactional education short shrift, not recognizing that the skills we use differ from those used in litigation and that therefore our pedagogy differs. Moreover, it seems that *U.S. News & World Report* does not know we exist. They report on the best legal writing programs and the best litigations skills programs, but they are silent about transactional skills programs. The silence and invisibility hurt us and

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<sup>1</sup> Tina L. Stark is a Professor in the Practice of Law at Emory University and Executive Director of Emory's Center for Transactional Law and Practice. She received her A.B. from Brown University in 1975 and her J.D. from New York University in 1980. She may be reached at [tina.stark1@gmail.com](mailto:tina.stark1@gmail.com).

<sup>2</sup> Tina L. Stark, *Conference Introduction: My Fantasy Curriculum & Other Almost Random Thoughts*, 10 TRANSACTIONS: TENN. J. BUS. L. 3 (SPECIAL REPORT 2009).

<sup>3</sup> ROBERT MACCRATE ET AL., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

<sup>4</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (San Francisco: Jossey-Bass 2007).

our students. It makes it harder to argue to our schools that they should allocate scarce resources to our programs. To use a somewhat worn term, we need “validation.” Toward that end, I am delighted to report that the Association of American Law Schools (“AALS”) has granted permission for us to apply for status as a provisional Section that would be known as the Section on Transactional Law and Skills. To obtain that status we must, among other things, submit a petition with at least 50 signatories from 25 schools. To sign on the dotted line, please come to the Open Program on Transactional Law and Skills at the AALS Annual Meeting on Wednesday, January 5 from 3:30 to 5:15 p.m. (Don’t worry about the date and time. You can be sure that I will send multiple reminder e-mails.) At that time, we can also talk about how the Section can take a leadership role in transactional law and skills education.

Transactional skills education is 20 years behind litigation skills training. The reasons are many, but one not often talked about is the difficulty we have had in creating a pedagogy. Litigation is visible, audible, and takes place in a forum where the lawyers’ actions are recorded. Professors can show students what litigators do and teach them how to emulate them. We cannot. Deal work takes place on the 22<sup>nd</sup> floor in a conference room or an office with the doors closed. How do we articulate for students a deal lawyer’s internal thinking process? We must somehow make our thinking visible. We need to create vocabulary and analytic frameworks that students can use.

Let me give you two quick examples. Teaching students about business issues has long meant taking them through an agreement and pointing out the business issues recumbent in each provision. But that does not teach students to think about business issues independently. At Emory, we teach our students a five-prong framework of business issues that recur in transactions, although they show themselves differently in each deal. With this framework, students can look at a provision they have never seen before and analyze it. Finding business issues no longer requires a sixth sense; instead students have a methodology that they can apply.

In addition, we have created a vocabulary for talking about business issues that we use throughout our transactional skills curriculum. Although we teach this framework and vocabulary in contract drafting, the professors throughout the transactional skills curriculum also all use it.

For a second example of how an analytic framework can be used, tomorrow morning, go hear Joan Heminway<sup>5</sup> discuss how she uses the legal writing construct IRAC to teach her students how to draft sophisticated contract provisions in corporate finance agreements.

We also face the challenge of finding and hiring qualified professors to teach transactional law and skills. Ten years ago the academy included among its number very few faculty who had any transactional practice experience and even fewer who had substantial transactional experience. That has changed. Today, there are not a lot, but there are more experienced transactional practitioners who are members of the academy.

But they are not inclined to teach transactional skills courses. Many are refugees from practice who want to be more traditional members of the academy; that is, they want to focus on more traditional, doctrinal issues. They are adamant about including a

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<sup>5</sup> Joan MacLeod Heminway is a Distinguished Professor of Law at the University of Tennessee College of Law. J.D., New York University, 1985; A.B., Brown University, 1982. She may be reached at [jheminwa@utk.edu](mailto:jheminwa@utk.edu).

transactional component in their doctrinal courses, but they do not want to teach transactional skills. It remains professional suicide: a sure-fire way to make tenure difficult if not impossible to obtain.

So who will teach transactional skills? We are dependent on two groups. The first is adjuncts. At Emory, our transactional skills curriculum is heavily dependent on adjuncts. They teach almost all our drafting, deal skills, and simulation courses. We would not have a transactional skills program without them.

We are not alone. Most schools rely on adjuncts. If this is our reality, then we cannot be laissez-faire about their hiring, training, teaching, and supervision. We must find ways to help them excel because the quality of our skills curriculum depends on it. Their role in the transactional curriculum is a mini-theme of our conference. Tomorrow it will also be a topic of one of the lunch roundtables. I encourage you to attend.

The second group that has become an integral component of the transactional faculty is legal writing professors. Their schools have said, "You teach writing, so go teach drafting. It's just another kind of writing." To me, these professors are intrepid and a little *meshugeh*. For those of you who do not speak Yiddish, meshugeh means a little crazy – like your somewhat-off favorite uncle. These intrepid, meshugeh professors deserve our support and our thanks. Our conference is devoting two programs to them.

Our challenges also include the relative dearth of teaching materials. Five years ago, I might have said the dearth of teaching materials. We are better off than we were five years ago. Now, there are probably a dozen textbooks that have some transactional skills focus or that use exercises, simulations, or problems. But this is still a relatively limited selection. It would be easy to blame it on the publishers, but it is not really their fault – and I would say that even if they were not sponsors of the conference.

As I suggested at the beginning of my talk, many of us are experimenting with our materials, working them through to see what works. Published textbooks, in reality, must be postponed until the materials are ready. But what do we do until then? We must as a community trade materials amongst ourselves so that we do not reinvent the wheel. As I mentioned before, Emory has created an electronic database of materials. So too has the Kauffman Foundation. These are not panaceas. They are stopgaps; but they will only be as good as the materials you contribute. So please contribute to these databases.

Before I conclude, I would like to give you some information that we gleaned from the survey that some of you responded to when registering. As an initial caveat, only about one-third of you responded and then not all of you to all of the questions. So these numbers are highly unreliable. Nonetheless, here are the highlights.

The news with respect to the first year is not encouraging. Only about 15% of schools have a contract drafting component in their legal writing courses, while approximately 18% have some transactional skills component in their first year curriculum. Of the six contracts professors who responded, three spent only 1-2 hours on drafting or other transactional skills. One professor spent between seven and eight hours.

The news was better for upper-level courses. More than 85% of respondents had at least one upper-level contract drafting section, and nearly 50% had a transactional clinic. In addition, nearly 80% of respondents had upper-level courses devoted exclusively to teaching transactional skills; and just over 80% offered transactional simulation courses.

Unfortunately, these “good” numbers undoubtedly do not reflect what is happening in the academy overall. Those who attend this conference are self-selected from the group of professors and schools already committed to teaching transactional skills.

Despite this, I am encouraged. In the midst of a recession and battered budgets, more than 90 of you are here, and many of you have come a long way. So, let the conference begin.