

## INTERDISCIPLINARY TRANSACTIONAL COURSES

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**ERIC J. GOUVIN & ROBERT STATCHEN**

### Introduction

This is the panel on interdisciplinary work. I am Eric Gouvin from Western New England College School of Law, and this is my colleague Bob Stachen. Bob teaches our Small Business Clinic, which I founded in 2002. One of the first things I realized when I set up the Clinic was that our clients had business problems that were at least as significant, perhaps more so, than their legal problems. So, almost from its inception the Clinic and, later, the Center that grew up around it, have been interdisciplinary projects that we have undertaken with colleagues from the College's School of Business. This panel will address the lessons we learned along the way.

When I first started the Small Business Clinic it quickly dawned on me that I needed to get the business school involved in helping these low income entrepreneurs get up off the ground. Luckily, I found a couple of colleagues in the business school who thought this was a great idea and they joined me and we did a co-listed, team-taught class for a few years. I'm

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going to be talking about this class and then Bob will talk about what happened when he took over. Once we got the Clinic going, it became a successful learning experience for the students. For those of you who do clinics, you all know how valuable the experience is and what a real chance it is for the students to finally appreciate what business lawyers do.

The Clinic was also a wonderful advantage to our clients who felt they got a lot of value out of it. It was a great public relations tool with community groups and alumni/ae loved it, too. We were able to raise 1.6 million dollars, which allowed us to turn the Clinic into the cornerstone program of a larger Center that I now direct. Bob does the clinical part of that Center and I direct the educational programming part. So we're going to go a little bit beyond courses because one of the things that I think is important to talk about is co-curricular offerings as well as in the interdisciplinary opportunities they offer.

### **Interdisciplinary Work and the Classroom**

Let's first talk about why we do interdisciplinary work. I think the short answer -- and probably most of us know this in our gut-- is that we have to do it because transactional lawyers and practicing attorneys do it. You can't engage in the practice of business law without knowing something about business. When I was getting prepared for this talk, I did a quick look in the blogosphere and a year or two ago there was a huge storm blowing across academic blogs talking about interdisciplinary work. There were passionate threads being written about who should and shouldn't be doing it, and whether it should be limited to just the "elite" institutions.

I just had to chuckle. An ongoing beef of mine is that we in the legal academy are out of touch with what lawyers actually do. Here's a fact that most people just don't even know: 70 percent of lawyers in private practice are in firms of 10 or fewer lawyers. Now, most of us in the academy practiced at big, huge firms where somebody did this little special piece and somebody else did another esoteric piece. In reality, most business lawyers are helping mom and pop businesses do mom and pop kind of legal work: things like forming a corporation, getting a loan from a bank, drafting an employment handbook. These "legal" matters straddle the line between the law and business. The lawyer who is doing this work needs to have some sense of the business issues that the legal decisions will affect. So, in order for a local business lawyer to be a good business lawyer, that lawyer has to know something about business. Interdisciplinary education can't be limited to the best and the brightest because it applies to 70 percent of the lawyers out there -- from all the schools.

The next question must be: Who in this room is competent to go into the classroom and teach a business course? I know I'm not. I know quite a bit about business. I've learned it over the years by accretion, but I'm a little reluctant to stand in front of the class and say, "here's the business side of this deal." That is why I reached out to our School of Business and found a couple of colleagues to help me teach the class. That was my first lesson: that you really need somebody in the business school who is going to be there with you, committed to the project. If you try to dragoon somebody into it or get the business school dean to appoint someone to do it, it won't work. But, if you find somebody in the business school who genuinely thinks the program is a really cool idea, then it has a chance of success.

David Chavkin has a nice discussion in his book on clinical teaching about models of working together.<sup>5</sup> He discusses three models: the parallel model, the input model, and the collaborative model. My business school colleagues and I always aspired to the true collaborative model: the synergistic, metaphysical, occurrence that happens when you put two and two together and somehow get five because together the two of you have looked at every problem in ways that neither of you had the tools to deal with alone.

What happens more often than not, however, is more along the lines of the parallel model. Under the parallel model, I would go in and teach the legal side of an issue, my colleague would teach the business side of the issue, and then we would move on to the next topic. Or maybe –a little bit more collaborative – we would slip into the input model, where I would teach the legal side and invite comment and input from my colleague from the business school and he would supply it, we would kick it around a little bit, and then we would move on to the next topic.

In a few rare situations we had this beautiful thing going on where the legal issues and the business issues really informed each other. Those classes were works of art. I have no idea how to replicate them.

#### **ROBERT STATCHEN**

My joint appointment at the law and business schools was an attempted solution to the collaboration goals. My background with both an MBA a JD degrees was meant to give both schools a level of comfort. I would like to talk a bit about the benefits, limitations and problems with this structure.

One concrete example of an effective JD/MBA collaborative process involves advising small businesses regarding their use of trademarks. The MBA students work on the marketing issues and the law students address the availability issues as to whether the client can use that trademark. It really adds value to the client because the client, who may only have \$2,500 to do a marketing plan, can know whether they should put their money into marketing that trademark. So you have the business students working on a way to begin the branding process and, at the same time, you have the law students giving them the confidence to take that same step. This is one of the examples of where JD/MBA collaboration can work very effectively.

#### **ERIC J. GOUVIN**

Another time the collaborative teaching worked well was when we were talking about expanding a business through franchising. It was an amazing teaching experience for the teachers, as well as the students. But, it's hard to pull it off. It takes a lot more work and a lot more coordination between the teachers than you might think, at least in my experience.

Anyway, that's the classroom part. Actually just getting the course to go is surprisingly fraught with more pitfalls than you might expect. There are administrative barriers, culture clashes, and even some ethical dilemmas. Administrative barriers are many. It could be anything relating to the operations of your school. For example, one of our main problems was being on different calendars – the business school operates on quarters and the law school is on a semester. In addition, the classes in the law school and the business

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<sup>5</sup> See DAVID CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS (Anderson Publishing Co. 2002).

school met at different times. Just getting the people together at a particular time of day was hard. We have day and evening divisions at the law school. The MBA program at our institution primarily is in the evening.

Different modes of delivery may also be an issue. The law school has serious restrictions on how we can use distance learning or technology based learning. Business schools don't have those restrictions. So, we have found over the years that remote delivery of content is a big issue. When we started out the law school and the business school were both doing live, in-class courses, but the business school started migrating towards online courses, which really affected our ability to work together with them.

Different credit allocations also present issues. Our school gives six credit hours for our Clinic. When I was teaching it, it was four credits, but there were no four credit courses in the business school and we didn't have four credits worth of work for them to do any way. So they would get one or two credits. Tied in with credits, the registration processes in the two schools were on different timetables.

I think it matters where your course is located. If it is going to be a truly interdisciplinary course but it's actually being taught in the law school, people are probably going to think of it as a law course. And that may be cool for them or it may make them say: "I'm not going to do it."

Which of the faculty members is responsible for all the administrative stuff that goes along with running a course? You probably ought to have a conversation with your co-teacher early on before you get into serious misunderstandings.

Now, in the Clinic we had an interesting issue. If we're giving legal and business services to our clients, we're okay on the legal side, because we have malpractice insurance at the Clinic. But do we run up against Rule 1.1 –competence -- on the business side? If so, does our malpractice insurance cover business?

**ROBERT STATCHEN**

### **Professional Liability and Competency Issues in Rendering Services Through a Clinic**

When I began working at the Clinic, I reviewed our professional liability coverage. There are rules of professional responsibility for attorneys that are not similar for business consultants. So, while I felt comfortable having appropriate disclaimers in the retention agreements with the businesses we worked with, I recognized that such disclaimers for legal clients was inappropriate. These types of differences become apparent throughout the semester. For example, I believe that the initial client meetings should be separate so that the business students could meet with the client and talk about their business issues and the JD students could meet with the clients and talk about their legal issues. While perhaps highly unlikely to become an issue in representing the small businesses in non-litigation matters, combining the meetings could impact issues relating to confidentiality and attorney-client privilege.

Drawing the distinction between meetings can present an effective teaching moment. For example, we had one client come who had a technical issue relating to proprietary information. In the MBA meeting the client wanted to sign a non-disclosure agreement and as business consultants this is often appropriate. However, when the clients came in and met with the JD students it is a different relationship. We have the rules of

professional responsibility that provide for attorney-client confidentiality. Contrasting those issues is a great learning experience.

**ERIC J. GOUVIN**

**Culture Clash**

The next thing we encountered was culture clash. We're trying to find the inter-disciplinary overlap because we are obviously from different academic disciplines and professional experiences, but those different disciplines and professions have different cultures and norms. For instance, the clinical teaching method is, at least in our experience, kind of unusual in the business school setting and it took a little time for people to get their heads wrapped around it.

**ROBERT STATCHEN**

This clash is especially apparent in working with small businesses. Generally, MBA programs place students in large companies. MBA students don't often have the opportunity, or desire, to work with small businesses. It's not what the students enter an MBA program for.

**ERIC J. GOUVIN**

Classroom preparation. The way a law student does it differs from the way an MBA student does it. Just different strokes, different approaches. The students themselves are quite different in the way they look at the world and what they are expecting to get out of their classroom experience.

The level of rigor expected in classroom discussion and the type and caliber of course deliverables may be different in the two schools. Dealing with student expectations of what the course is going to deliver and how you are going to deliver it is something that you just need to be thoughtful about. Sometimes it helps to make expectations and assumptions explicit.

**ROBERT STATCHEN**

Collaboration between the different pedigrees in the classroom portion of a clinic provides a great opportunity for cross-disciplinary learning. I would tell the students at the beginning of semester, we're going to have a few nights when we are going to focus on legal cases and the MBAs are going to be out of their comfort zone. Conversely, we are going to have a few nights when we use business school case studies, which are fantastic tools to use, and which are going to put the JDs out of their comfort zone. The JDs are exposed to how the business people learn and the MBAs learn how lawyers are educated. It is usually a really positive experience letting each of the other disciplines learn how the other person learns to become a professional.

**ERIC J. GOUVIN**

Bob's comments touch on one of the great values of having these different folks in the same room. When we decided to go forward with this, one of the things we thought would be good for both law students and business students would be to sit in the same room and think together. That exercise forces them to realize that there is another perspective on how to analyze and address problems. One of the bad things about law school is that law students get to their third year and they think it is all about the law. Well, it's not all about the law – for business lawyers it's all about the deal. The business students

kind of know that, but they also tend to be ignorant or just oblivious to the legal ramifications of what they want to do. So getting the law students and MBA students to bounce off each other is really valuable. There can be some real synergies there. Even with the business school professors, we found that we were kind of running into each other's professional culture as well. And Bob, you made an interesting point about how entrepreneurs are a culture unto themselves which aspiring lawyers and MBA-types are not necessarily attuned to. The Clinic exposes the law and business students to these business people and helps acculturate the students to the future clients they will serve.

**ROBERT STATCHEN**

Yes. When you're in any graduate school, you're not a risk taker. Entrepreneurs who may have quit their job to pursue a dream epitomize risk takers. The culture clash is often from the graduate students not understanding how these people have just quit their job and are trying to run their own business. The students think that their clients are, for lack of a better word, insane, and you have to say no, they are not insane. It is a different culture and we approach the discussion from the context of as if you were going to another country and were learning that person's culture and be sensitive to their needs. That's something that we try to get them to do as well – to understand that this is a new culture to learn.

**ERIC J. GOUVIN**

**Ethical Dilemmas**

Ethical dilemmas, in the clinical context, are something that you need to think about. You've got the law students in your course. The way I always thought of it was our little law firm and the rules of a law firm apply. You start bringing in outsiders and that could change the whole dynamic.

**ROBERT STATCHEN**

First, it's difficult because when you have the JDs and the MBAs in the class, you have to get comfortable doing case rounds and talking about what's going on with specific clients. This educational mandate can often be addressed in the client's retainer letter. Additionally, we have guest speakers come into our class who answer questions from the students. In this situation, I discuss with students that they should not identify their clients but they can certainly ask questions that are specific to your client. Over time, we've had less MBA students in the class because their program has transitioned to an online program, so I haven't had to consider the problem as much. However, these are issues to consider when MBAs and JDs share the same room and serve live clients.

**ERIC J. GOUVIN**

**Ups and Downs of the Clinic**

The Clinic, as a co-listed course, has had its ups and downs. Bob just alluded to the fact that our MBA program has morphed over time from live in-class sessions to a mostly online delivery model. That means we have a harder time getting MBAs to take the Clinic as an elective because they have got to show up for class in person and they've got to meet with the clients a couple of times during the semester. We're going to have a four plus one program where students get both their undergrad degree and their MBA in five years and maybe some other folks will do it – we likely will get some international students as well. Trying to deliver something of value to the clients and also having something of value for our law students to get from the interdisciplinary part has led us to experiment with other

models. The MBAs in our co-listed course are mostly students pursuing our joint JD/MBA program.

We have a fairly good number of students who take the joint JD/MBA route. So that amounts to a handful of students every year. But Bob has been working on a couple of alternative ways to have interdisciplinary collaboration.

#### **ROBERT STATCHEN**

A lot of the collaboration is because when you have small businesses, their needs revolve around marketing. They don't know what their market is and that's really the primary business need. And so we work with marketing courses. We go to an undergraduate course that's currently being offered that does feasibility studies and we give them a live client.

Now, you don't get the same level of collaboration that you get between law students and business students, but it is part of our mission to provide a service to the community and finding a way to do that through an educational experience. And I have found that a lot of the small businesses have a real need to understand their market and this provides a method to do that.

There are also many undergraduate business courses for developing business plans. Usually, they are fictional business plans that students work on, and at some point during the semester they will come in and our law students will interview them as clients. The undergrad students prepare their legal questions and the JD students provide legal advice.

Additionally, we've also used JD students on engineering competitions where they help the engineering students identify the intellectual property issues and work with the students in that fashion.

#### **ERIC J. GOUVIN**

##### **Delivering Professional Products to the Client**

One of the big challenges is when we started the interdisciplinary work in the Clinic was our commitment to deliver professional products to our clients. We've always been confident on the legal side that nothing goes out of the Clinic except over my signature or Bob's signature. Believe me; nothing's going out unless we would send it out to a client ourselves.

But on the business side, making sure of the quality is more challenging. If you end up going to an undergrad course to do the work, it becomes even more imperative that there be someone riding shotgun on quality assurance at the business school to make sure that the work product is what it should be.

##### **Co-Curricular Opportunities**

I want to spend two seconds talking about co-curricular opportunities. We think of interdisciplinary work as being something that's valuable not only for us professionally but for our students to have those competing perspectives that work off each other. We shouldn't forget about other things that are happening in the law school outside of the classroom. For professors, there may be scholarship opportunities for interdisciplinary work or service opportunities. I direct our Law and Business Center for Advancing Entrepreneurship and it consists of two components. The clinical side, which we've talked about, is Bob's daily work. In addition to the regular Clinic, he runs something called "office hours" where businesses in the community that have issues can come in to get some

guidance. Not an attorney-client relationship, but it is more like a program our local bar runs called “dial-a-lawyer,” which is a quick one-off consultation.

**ROBERT STATCHEN**

The office hours is also a modeling opportunity in the clinical pedagogical structure. Students watch me providing the advice. The students review the client applications before the meetings, we discuss approaches to answering these questions, and then the clients come in. But it is only an hour. So it is a modeling exercise with a live client.

**ERIC J. GOUVIN**

We also have a referral service if there is a matter that we can't handle either because it is out of our expertise or because it is litigation. We don't deal with litigation, so we save clients a lot of search costs that way.

But the educational side is the other side of the Center's house. We have a number of different educational programs that we run. Every year we do an academic conference and that generally draws from both the legal side and the business side. Students get to come for free. Hopefully they walk away with a richer understanding of the issues because of that interdisciplinary work.

We have a how-to conference, which is more geared towards the actual entrepreneurs and less to the students. We have a speaker series where we bring in four speakers a year – two from the legal side, two from the business side. These are held in the law school. The idea, again, is to germinate interdisciplinary thinking.

Another program we host is called the extreme business plan make-over, which is kind of fun. We bring in an entrepreneur and she presents her business plan to a panel of experts. They critique it in front of a live audience – it's not for the faint of heart, but it's a fun program. It is usually well attended.

We also have information sessions throughout the year where we present topics like how to sell your business and things like that. Anyway, it is more than just a classroom. On the scholarship side you can do classic interdisciplinary work, but I refer to you that blog debate that I referenced earlier. There are some legitimate points about whether someone who is not trained in another discipline can really pull it off. I will leave it to the bloggers to hash that out.

It's hard to write about a business law topic without bringing some knowledge of business to the issue, though. This spring I had a nice experience working with a colleague in the business school to develop a business school case study that really tries to find business and legal issues for start-up companies. It is based on a client that we had at the Clinic. My colleague is going to present this at a conference and get it published.

Finally, there are service opportunities that we can do in the academy. Tony, Helen, myself, and others have been involved in the Kauffman "e-law" web site.<sup>6</sup> You can check it out – it is a nice resource. Tina's resources are also excellent. We hope they are complementary when working together.

Also, the community outreach that we do through the center to partner with support organizations in the city of Springfield is important. The Latino Chamber of

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<sup>6</sup> <http://www.entrepreneurship.org/en/Entrepreneurship-Law.aspx>



Commerce and the Black Chamber of Commerce are all good partners for us. I think it sets a good example for students to see you doing work with community organizations. It is important to remember that as we teach we are also modeling professional behavior. That's something that lawyers should be doing. We should be giving back. We should be reaching out across boundaries, not just operating within our own legal boundaries.

**ROBERT STATCHEN**

And it is key for students to learn they can do pro bono community service as a transactional attorney. Many of my students want to be transactional attorneys and they learn that they can do this, but, at the same time, they can also work on community development and other worthwhile projects.

**ANTHONY J. LUPPINO**

**Specific Interdisciplinary Courses**

I am Tony Luppino, from the University of Missouri-Kansas City School of Law. I am going to split my time with the second half being a little bit about two interdisciplinary courses with which I'm involved. In the first half I want to talk about some great things that are happening at law schools across the country. I think the legal academy involved with transactional work is doing perhaps a better job than we are getting credit for in terms of truly interdisciplinary and effective means of training our students to be great counselors to business people, and training students from other disciplines to understand the legal frameworks and highly regulatory environments in which their transactions arise.

I was lucky to be in a position to become something of a score keeper on this. I practiced for about 20 years before I joined the academy full time in 2001. I was teaching Business Planning in a law school, and Business Organizations and other courses, wondering why we weren't interacting very much with our business school, which was about 50 feet away. It seemed to me that, especially in my Business Planning class, where we were talking about valuing businesses, and we were talking about the business contexts in which legal issues arise, as Eric alluded to, I was always wondering why we didn't do more of that in an interdisciplinary manner.

I realized location is important. Our university is adjacent to the Ewing Marion Kauffman Foundation, which sponsors entrepreneurship globally. They started a program to develop interdisciplinary courses in entrepreneurship across campus. There were 11 faculty members from different disciplines in the program, and I was the only one from a law school.

So early on, having been a practicing lawyer, I knew I should look for templates and forms. I started looking around at what other law schools were doing across the country. I found quite a bit, so I initially published an article in the *Western New England Law Review*, addressing a lot of what was already out there in 2007.<sup>7</sup> The Kauffman Foundation then asked me to address the topic in a report on how law schools are training students interested in practice careers that would involve advising entrepreneurs. They asked me to publish that

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<sup>7</sup> 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 (2007).

report in the Social Sciences Research Network.<sup>8</sup> It has appendices listing many amazingly innovative, clinical and regular classroom courses.<sup>9</sup>

Recently I had a third opportunity to keep score, which was the Kauffman Foundation's "e-law" web site<sup>10</sup> that Eric alluded to today that he and I are involved with, along with Helen Scott from N.Y.U., Lisa Lesage from Lewis and Clark, Praveen Kosuri from the University of Pennsylvania, Laura L. Hollis from Notre Dame, Esther Barron from Northwestern, and Tom Morsch from Northwestern (emeritus).<sup>11</sup> So, if you want sources to look at what people are doing, there is literature cited in the first footnote in my three page outline.<sup>12</sup> I don't use PowerPoint.

The e-law web site is the living and breathing one. The other things I've posted are what existed in 2007 and 2008. E-law is meant to continue and there is a section in it under Resource Links called Interdisciplinary Programs and you will see many features there. What we've been finding is that we are way beyond just JD/MBA programs and a certain number of cross-listed courses that a student can take from the faculty in another building. In fact, what we have now are many jointly taught courses, law and business faculty in the same room, with students from both of those disciplines. Vanderbilt, for example, has a whole panoply of courses like that. They have several such courses, some seven or eight, and there are some courses of these types at a number of other schools as well. We see collaborations between law school transactional clinics and business and other academic units. There also are many instances in which law schools are involved in cross campus interdisciplinary programs in entrepreneurship education, where not only are they working with the business schools but also with engineering schools, health sciences schools, and sometimes the arts.

Also, interestingly, there are a fair number of examples of law school involvement with business incubators. Western New England and many schools are involved with local SBDCs and other business incubators. We also have a lot of programs where the law schools are involved with university technology transfer. This is the process by which faculty inventions sometimes get commercialized.

We also have centers being established for these kinds of collaborations. Helen Scott, for example, runs the center at N.Y.U. A lot of this is in some of the literature I have cited, and I tried in my writing to cite many other very good pieces by folks who have looked at the underpinnings of interdisciplinary education, including the pros and cons that Eric addressed.

You'll find a lot of it started with some ambitious programs by clinics at law schools, and with the deals courses. Professor Gilson and others started to see the incredible value of understanding business clients and their objectives. That's what good transactional lawyers

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<sup>8</sup> Anthony J. Luppino, Research Report, Can Do: Training Lawyers to be Effective Counselors to Entrepreneurs, Report to Ewing Marion Kauffman Foundation (November 15, 2007, as revised January 30, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1157065](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157065).

<sup>9</sup> *Id.* at Appendices 5 and 6.

<sup>10</sup> See *supra* note 4.

<sup>11</sup> See <http://www.entrepreneurship.org/en/Entrepreneurship-Law/About-eLaw/Editorial-Team.aspx> (last visited March 20, 2011).

<sup>12</sup> See Anthony J. Luppino, *Conference Handouts*, EMORY LAW: MORE THAN PRACTICE: CONFERENCE MATERIALS, [http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010\\_Conference\\_Speaker\\_Materials/Luppino/Luppino\\_Conference\\_Handouts.doc](http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Luppino/Luppino_Conference_Handouts.doc).

do. And at the same time, people being trained in science and business and other disciplines need to know about the legal constraints in getting from point A to point B in their business plans.

### **Specific Examples of Inter-Disciplinary Programs**

Now, I want to mention just a few examples of what I think are some of the more interesting programs. Some of them are cross-institution efforts. I'm not trying to leave anybody out. In fact, the whole idea of the e-law website is to catalog as much of this as possible. So if any of you are involved in interdisciplinary programs that you would like to share information about with others in the academy, please send us that information. You can submit it directly through e-law, or you can e-mail myself or Eric or Helen. But here are a few that I find particularly interesting.

First is Emory's own TIGER program. Some of you here will obviously know about it. "Technological innovation generating economic results" leads to the acronym TIGER. It is a program at Emory Law that works with the Georgia Institute of Technology. Charlotte School of Law Business Clinic partners with the institute for entrepreneurship of Central Piedmont Community College. Lewis and Clark Law School, in its clinical program, partners with University of Portland MBA students and with students from the Oregon Health and Science University working on technology entrepreneurship for emerging businesses. The University of Connecticut Business School runs the Connecticut Center for Entrepreneurship, and combines with intellectual property faculty in their law school.

Suffolk University has another classroom and clinical setting involving the business school and the law school. University of Oregon collaborates with its tech transfer office. The law school program collaborates with the northwest national laboratories of Washington. The University of Washington Entrepreneurial Law Clinic similarly crosses lines with local business lawyers and with the business school and university tech transfer operations in the Institute for Translations in Health Sciences. As a final example, the William Mitchell College helps support community entrepreneurs by working with their small business development center.

So we have many, many examples of interdisciplinary collaboration happening across the country. Not just in clinical settings, but also in regular classroom settings and in some hybrid programs that involve initial simulations and then live client work.

So I think there is a fair amount to study in terms of what other people are doing. The academy is doing a generally good job and we can always do more and do it better.

### **Entrepreneurship and New Venture Creation Course**

In that spirit I will talk a little bit about two courses that I'm involved with where I have been trying to learn from mistakes. That's obviously one way to learn.

The first one is called Entrepreneurship and New Venture Creation. It started as a collaboration between our law school, our business school and our school of engineering. This year we added students from the pharmacy school. The program involves the students working in teams, essentially to write business plans for start-up ventures using some core technology. We get some projects from students, some from faculty at our university, some from faculty at nearby universities, and some from the Midwest Research Institute. Tech transfer offices at schools in our system has sent us some potential projects. So the team projects come from many different places. The course has some individually graded components as well.

The entire syllabus, which is very detailed, is in the conference materials.<sup>13</sup> Initially the course was co-designed with an engineering professor who knew a quite a bit about project planning. You will see each of the classes is laid out in multiple bullet points because his approach was very detailed.

I have taught this course with others from the business school and the engineering school for five years now and I think the team selection process we used for the first four years was wrong. In our most recent offering of the course, we had 52 students. 14 were law students and about twice as many, give or take, were MBA students, and then the rest were from engineering and pharmacy. We had four person teams with roughly one law student on each team for a total of about 13 teams. The first four times we offered the course, the way we made the teams was we had the students share some information about themselves, their personalities, their background, their interests—not only their academic training, but any experiences they had with business operations; and then we let them sort of self-select into teams.

We found there were really two problems with that. One was that it didn't ensure many would be on the same page in terms of which project they wanted to work on. Two, it was kind of unseemly. It was much like choosing sides in basketball when you were younger. When somebody was near the end it wasn't good for anybody's ego, so we really think we had the team selection process kind of upside down.

What we did this last time around was have the people who were offering projects to the course come in first, and pitch their projects as if they were pitching to venture capitalists. We then had the students rank the projects they were most interested in and then the faculty got together and made the teams. This way we were able to accommodate almost all of the students in terms of their first or second choice. We had a project menu that probably had 30 potential projects, roughly, and we made sure we had multiple disciplines together on each team. So that's one thing we definitely have changed and we're kind of glad we changed that.

We do have an individual, graded midterm in the course. We found creating a test for law, business, engineering and pharmacy students was somewhat challenging by itself. One of the things we learned was that outside the law school students did not seem to warm up to the notion of any kind of long essay questions. They didn't want to write those. I had been kind of oblivious to this and maybe should have realized, for example, that our engineering school had quite a few international students, with English as a second language, who were concerned with reading those long fact patterns and then having to write in a time-compressed fashion. So we switched the midterm to more short answer questions, and I think we are happy with that.

One of the things we do that I would not change at all is what we call the “founders term sheet” exercise. This is one of the first things the teams do after they are formed. One of the things you learn about entrepreneurs is that they are so focused on their business plan—how are they going to get market share?; how are they going to price their product?; how are they going to beat the competition?—that their internal issues and questions can be neglected. So if the students are presented with the founders' internal

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<sup>13</sup> See Anthony J. Luppino, *Additional Materials*, EMORY LAW: MORE THAN PRACTICE: CONFERENCE MATERIALS, [http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010\\_Conference\\_Speaker\\_Materials/Luppino/Luppino\\_Additional\\_Materials.docx](http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Luppino/Luppino_Additional_Materials.docx)

issues, the law student will kind of quarterback the situation and take the other students on their team through the process of outlining the deal terms – the fundamental terms that you would you put in any kind of ownership agreement, whether it be corporate documents, partnership or limited liability company documents, etc. Who is putting in what, who is taking out what, and can I transfer my interest? Can I transfer voting rights? What are the economic rights? Are there buyouts? Is there an exit strategy? They have to go through these issues and I think it is healthy in a number of ways.

First, they have never seen this before. They don't know what a term sheet is. They don't know it is something that people use in practice. When they first start their career, if they start in larger firms they might not be the one doing the term sheet. But, as Eric pointed out, most people don't start in larger firms. They have to understand the deal themselves and getting it down in some kind of non-binding description of the terms is a very good thing for them to do.

It also shows the students from the other disciplines what value a lawyer can bring to this kind of process. For the law students this may be the first time, unless they have been in the clinic setting, where somebody looks at them and asks: “What would you do?” You haven't really experienced being a lawyer until somebody asks what you would do if it were your call and how you would take them through it. Do you just tell them what you would do or do you try to understand their objectives and really talk to them in terms that are not technical and figure out where they are trying to get to and what they think is reasonable? So, we wouldn't change the term sheet exercise at all.

Our particular course has as its culmination a business plan competition. There are many business planning competitions. If you Google the topic you will find them at universities across the country. But, you may not find law students all that involved in them, so we wanted to make sure they were on these teams and could see that process.

These business planning competitions tend to have prizes at the end. They have start-up packages if the winners are going to start a new business, and that gives rise to a host of issues about who owns what. A lot of people are familiar with the intellectual property issues regarding who the inventor is or who the author is. But what I found when I researched this is that people tend to neglect basic partnership law. What is the definition of partnership under the Uniform Partnership Act? It is essentially two or more people joining together to conduct a current enterprise for profit. So what does that mean? If you're student on a team and you are competing to win a \$50,000 prize in a business planning competition, ask yourself: “Are you a partner?” So we work through those kinds of issues; and when we have outside project providers, the students get exposed to other documents like non-disclosure agreements and pieces of paper that say these outside project technology providers are just letting our students play with their technology, not own it.

I think that as a whole the course has been the most fun course that I have taught, because you learn about new technologies all the time. Just to see law students working on the kind of teams they are going to work in when they graduate is a healthy thing for them to do and it's fun to watch the process happen.

We do have issues about whether there is a “free loader” on the team. Any time you have a team project you may have this issue. What if somebody is not carrying their weight? We have a crude, but somewhat effective system for that at the end. There is a self-assessment which students are told about at the beginning. Each team is told if you had a certain amount of money to bonus out, tells us how you would share it among these four

people. To their credit, we get pretty good, candid responses. Occasionally some team will say they would simply divide it by four and that's the end of that. But more often than not they will actually think it through and it helps us with our class participation grade. It may not be all that necessary because the business planning project in this course is a lot of work that they are doing in a 14-week period. The project is assigned by the second or third week of the semester and then in the remaining 11 or 12 weeks they have to write a business plan of the type you would give to venture capitalists to take a look at. It's not an easy process. So, there is a lot of peer pressure to do the necessary work. They tend to ride each other to do their parts of that and get it done.

One of the things we found in terms of what we were not doing very well relates to our compressed time frame. We really weren't doing enough teaching about financial projections, about the numbers parts of these business plans. The way we cured this last time was through the MBA program. The entrepreneurship segment of it had a venture finance class, so we borrowed students from their class. They had a graded assignment to be consultants to our teams on the financial aspects of their business plans and it worked out great. One of the things I've learned in doing these interdisciplinary excursions is that there is a lot to be said for reciprocity. I mean, I will guest lecture to the MBA students about some areas of business law that they may encounter. They will then send people back to do this kind of thing. And it's worked out very well. Anyway, if anybody wants to know more about that course, you can find me any time, and again there is a detailed syllabus in the conference materials.

### **Legal Context of Real Estate Decision-Making Course**

I have just a few minutes left and I just wanted to touch on a brand new course we offered for the first time last year. It is called Legal Context of Real Estate Decision Making. We were approached at our business school by some local real estate developers who generously donated money to start the Lewis White Real Estate Center. The business school at UMKC is the Henry Bloch School of Business and Public Administration. Henry Bloch of H&R Block and other folks in the community support business school initiatives and embraced this real estate center. The law school was approached by the real estate program to have a law course that was geared toward MBAs who are learning about commercial real estate development.

This course was totally staffed by law faculty in a sense. We had Pat Randolph, who is a property law expert you may know if any of you are involved in real estate. He is the one who maintains the "dirt" listserv--appropriately enough named. We also had one of my former practice partners who is a commercial real estate development attorney, and then I taught the tax and joint venture aspects of the course.

We had about 12 MBA students and 6 law students this first time around. They very much like the sort of practical approach we took – looking at what actually happens if you are trying to do real estate development. So there was a certain amount of doctrine around basic property law, and law of landlords and tenants because there was a lease involved but, by and large, the course was about how real estate development deals get done.

I think in terms of what worked and what didn't work, we were again criticized a little bit for the exam. They wanted shorter answer exams. I am finding some of the students from other disciplines want a little bit more guidance on exactly what you're going to test them on. Not that I have never been approached by a law student who didn't say the

same thing, but we are finding maybe higher incidents of the that from other disciplines, so we are still working on the exam part.

One of the parts we would keep was the review session at the end. We had sort of a complete story – starting with just the ground - on how we get to this development, and all three professors were there to talk about it. I thoroughly agree with Eric that these classes tend to work best when all the faculty are in the room, especially when you have the faculty from the other disciplines or areas of experience from practice, and you throw questions back and forth and see different perspectives. So that's kind of what has been going on with that course. It was an experiment. We think it worked fairly well absent the test part.

We certainly have used the business-case-study method – which some of you have mentioned – in the Entrepreneurship and New Venture Creation course and we will eventually use it in the real estate course as well. There was recently an article written about using more business school-type cases in legal education.<sup>14</sup> One of the ones we have used is the ZipCar case. I saw when we drove in here there was a ZipCar in the parking lot. It is an interesting case. Having lived in Boston, I particularly liked the part of the case where they initially didn't really budget sufficient money to park the cars, which doesn't work so well in Boston.

The final thing I will say is that I actually started at this backwards. Before I got into interdisciplinary education, the second article I wrote when I got to the academy was about multidisciplinary practice.<sup>15</sup> It seemed to me when I was in practice I was forever working around accountants and business consultants and other people in the sciences, but so far we are not allowed to “partner” with such other professionals. It is arguably protectionism. I think at the time the ABA voted down liberalizing Model Rule of Professional Conduct 5.4 to allow multidisciplinary practice, there was much fear of the so-called “Big Five” or “Big Six” accounting firms taking over the practice of law. Now some people call them the “Final Four” accounting firms. Well, that tended to be a big firm view of the world. And, again, most lawyers are not in big firms. So, could it make sense in a different kind of practice setting to have professionals from different disciplines? I believe it actually does. I think the rules ought to be changed. I'm not necessarily buying that we are the only ones with ethics. I hope that's not the case, but that was part of the argument. I think Bill will talk about the rest of that.

So, in the scheme of things, if you have an opportunity to teach one of these courses, they tend to be very interesting. I think I have learned more from these courses than anything else I do. I enjoy all my courses, but I enjoy these more than the others.

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<sup>14</sup> Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study As Course Materials for Transaction Oriented Elective Courses: A Response to the Challenges of the MacCrate Report and the Carnegie Foundation for Advancement of Teaching Report on Legal Education*, 11 *TRANSACTIONS: TENN. J. BUS. L.* 9 (2009).

<sup>15</sup> Anthony J. Luppino, *Multidisciplinary Business Planning Firms: Expanding the Regulatory Tent Without Creating A Circus*, 35 *SETON HALL L. REV.* 109 (2004).

**WILLIAM A. KELL****Teaching Ethics in the Multidisciplinary Clinical Classroom**

It's ironic, but not a surprise that Eric, Tony, and I all emphasize the importance of law students learning to "play well with others," i.e., work with professionals of other disciplines when needed. It's an apt way of describing a shared, almost parental concern that our law graduates are going out to practice in an interdisciplinary world without adequate guidance. We worry that they won't know how to form effective working relationships with MBAs and other professionals, or even know that good transactional lawyering and client needs often require it.

For context, I should note that UC Berkeley's New Business Practicum is a relatively new program, operating only since 2007. The curriculum, teaching, and services offered to clients mirror substantially those aspects of Eric's and Tony's programs already described. However, because our state bar still has on the books a relatively groundbreaking MDP report, we have also designed the Practicum to operate close to the edge of where an interdisciplinary law office can go. In sum, my talk today will describe how we use the interdisciplinary format to help address the ethical educational needs of our students.

So first, I will introduce our clinic, which was originally developed out of a simulation program at Berkeley, and also from a small business clinic I founded at Cornell. Then, because of how it has shaped our design, I want to at least recap what came of the 2001 ABA debate on multidisciplinary practice, as it has left in place ineffective and incomplete ethical guidelines for transactional lawyers.<sup>16</sup> Finally, I want to highlight key parts of California's MDP Commission report and recommendations, which we've used to create a vibrant laboratory for ethics education – hopefully providing more effective guidance for our transactional law graduates.

**UC Berkeley's New Business Practicum**

Our clinic focuses exclusively on involving students in assisting start-ups. We have found that start-ups, not surprisingly, present common challenges at the beginning as they try to navigate the legal landscape and achieve sustainability.

We emphasize a diagnostic approach, referred to as "the Medical Model." At the first interview, of course we try to address the important issue(s) that brought the entrepreneur client to us in the first place. But we feel it is consistent with our duty of loyalty and competence to ask other questions at the first interview, questions that might seem more appropriate to business planning. "Who is going to be working to help you pull this off?", "Have you done anything to try and protect that software you designed?", "What is your business model, particularly, how will you raise capital and generate the ongoing revenue needed?" All of these questions seem pretty intelligent and commonplace, but might seem superfluous at first if the client just came in looking to form a corporation.

What we've found with start-ups, not surprisingly, is that all a good attorney (or law student) needs to do is scratch the surface of a client's initial request, in order to find important law-and-business-related issues that also need attention. We use an acronym for this more comprehensive diagnostic that you might find of use: the word BECOME. We start each term playing a clip from a well-known Gloria Gaynor song "I Will Survive" because we want the students to make business viability their priority focus for the clients,

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<sup>16</sup> See *id.*, for Tony Luppino's comprehensive article critiquing the ABA's debate about multidisciplinary practice.



something we see as consistent with their duty of loyalty.<sup>17</sup> For a start-up client to BECOME successful, we urge the students to inquire about the following in any diagnostic interview:

**B:** Business Planning

**E:** Entity Formation

**C:** Capitalization

**O:** Operational Relationships (setting up legally effective relationships with creditors, investors, employees, volunteers, independent contractors, suppliers, consumers, and others)

**M:** Managing Risks

**E:** Extra Permits/Licenses Needed (e.g., zoning, alcohol license, 501c3 tax exempt status)

So right off the bat, at the initial interview, we're entering MDP land here, because we treat business and other non-legal aspects of the client's case as relevant, even essential information that a law student should feel duty-bound to ask about. We emphasize that, while gathering this information is part of the duty of loyalty, this is only a first step -- students have to also consider what skills or background might be required to competently address these non-legal issues.

In sum, we focus a spotlight at the beginning -- in the curriculum and in all client interactions -- on what the duties of loyalty and competence require. As to the latter, we emphasize that it is the lawyer's responsibility to bring in other professionals, when needed, to competently address the client's need for business strategy, marketing advice, finance planning, and other non-legal, but essential matters related to business success.

### **A Quick Recap – the MDP Debate**

Sometimes when I talk about injecting interdisciplinary aspects into teaching lawyers, I get a response like this: "MDP is DEAD – why bring up something that the ABA and state bars have moved on from?" My response is that the issue isn't dead, it's only that our profession has chosen to ignore it. Like wet-blanket lawyers too squeamish to advise clients about risks, our professional leadership apparently has decided it's not time to be innovative in response to an unmet client need – instead it would be better if these client needs didn't exist. But the multidisciplinary needs of start-up clients and veteran business clients have not changed -- in fact, in the current economic climate, businesses will need to become even more business-and-law-savvy to survive.

Tony Luppino's critique of the ABA's MDP debates early this century is essential reading here.<sup>18</sup> As described, multidisciplinary practice has been pretty common outside of the United States for many years – prompting the ABA in and around the turn of the century to try and improve its practice guidelines for U.S. lawyers. If you review the ABA website archives around 1998 you'll see a slew of stuff in there – interesting debates, issue

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<sup>17</sup> Current research describes that seven out of 10 new employer firms survive at least 2 years, half at least 5 years, a third at least 10 years, and a quarter stay in business 15 years or more. See U.S. Small Business Administration's Office of Advocacy at: <http://www.sba.gov/sites/default/files/files/sbfaq.pdf>

<sup>18</sup> See Luppino, *supra* note 15.

papers, committee discussions, and draft revisions for the Model Rules. So before I came for this talk today, I checked out what's been posted on the ABA site about MDP since then. The answer: Nothing. It appears that the once-pressing interdisciplinary needs of our clients that needed our attention have magically disappeared. Multidisciplinary practice appears to no longer exist as a going concern, except for a little updating about a few state bar tinkering in this area.<sup>19</sup>

This was a rich, essential discussion that was cut short. But a number of important points and aspirations for the profession were found in the related writings. California, for example, developed a groundbreaking report on MDP, which identified different types of interdisciplinary law offices consistent with existing guidelines. That report also flagged four “core values” of the legal profession implicated in multidisciplinary practice:

- Avoidance of Unauthorized Practice of Law
- Avoidance of Conflicts of Interest
- Protection of Client Confidentiality and Privileged Communications
- Preservation of Independence of Judgment

This set of values was an important takeaway from that discussion, and it is something we have spent some time and effort integrating thoroughly into the Practicum’s interdisciplinary curriculum.

Bottom line, we discuss these core values affirmatively in our interdisciplinary clinic, and note also that it is not just the lawyers who care about these values – other professionals have these concerns as well. No accountant wants to see a consumer misled by an inadequately trained accountant. No engineer wants to be told by a lawyer that his structural analysis is “flawed” and needs to be changed. Policing conflicts of interest and confidentiality are also essential aspects of creating an environment in which great entrepreneurial designs can be developed. Yet, the clear message in the ABA’s discussion about MDP, and the Enron-era accounting scandals, is that only lawyers truly care about ethics. I’m happy to say this message could not be more wrong, at least as shown in the many and hearty ethics discussions participated in each term by the Practicum’s law and MBA students.

### **Improved Ethics Teaching in the Interdisciplinary Clinic**

So what do the students learn in our interdisciplinary clinic re: MDP and the relevant core values? First, the existing ethical rules, as well as the California Bar Association’s Report on Multidisciplinary Practice, together set the overall boundaries for our non-profit law firm. First, any non-lawyers present cannot have a role in the firm’s leadership. There can be no sharing of client fees, consistent with the ABA’s treatment of profit-sharing as a proxy for determining lawyer control and independence. The Practicum satisfies both of the above guidelines in that a lawyer (me) oversees all work, and there are no client fees or profit sharing of any kind.

As to the first core value -- unauthorized practice -- I oversee this carefully throughout the term. After interviewing the client and identifying the business’s needs, the students work with me to formulate and assign client deliverables according to each

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<sup>19</sup> See ABA website: [http://apps.americanbar.org/cpr/mdp/mdp\\_state\\_summ.html](http://apps.americanbar.org/cpr/mdp/mdp_state_summ.html)

student's discipline and expertise. We use this opportunity to carefully consider, together, what work assignments should be avoided as constituting potential unauthorized (aka incompetent) practice. Because of this, the students benefit from exceptionally good role definition from the outset of their client work. Consequently, the law students express relief that they are not required to act like MBAs or generate business strategy advice where their relevant experience is wanting. Similarly, the MBA students don't feel the need to engage in such things as legal drafting of contracts, because their teammates and supervisor clearly have that need covered. But then there are areas of gray that prompt additional discussion and learning: what about entity formation? What about business planning? What about capital formation? Aren't there roles for each of the disciplines to play in each of these analyses?

As to the value of avoiding conflicts of interest – we discuss this frequently in the context of helping groups of individuals form a start-up. With each new potential set of founders comes an opportunity to ask both law students and MBAs about the level of shared purpose required to warrant treatment as an organization. How much conflict is too much between co-venturers?<sup>20</sup> What role can a helping professional validly play in mediating between a group of founders, suggesting terms of negotiation, calling on everyone to harken to each other's interests? In this discussion we do get interesting views from each student as to what are potential conflicts, and what level requires separate representation. I would point out that here there has been little difference between law and non-law students. In fact, the MBAs are usually better at anticipating and helping the law students understand how a business might develop over time in ways apt to foment conflict between the founders.

As to protecting confidentiality and privilege – this is a more complex issue, given that privilege is the evidentiary rule (aka “shield”) that a lawyer can raise to protect his or her duty of client confidentiality. MBAs and other non-lawyers, usually steeped in the practice of signing non-disclosure agreements, readily understand the need to protect confidentiality, but do not have this evidentiary tool available. This has required two things for our clinic: first, a clear commitment to client confidentiality anchored by state bar ethics rules and also NDAs. Second, we liberally take advantage of both state and federal cases that recognize non-lawyers as often required in a law office to help lawyers “understand” a client's situation. Like a translator or psychologist brought in to help a lawyer overcome barriers of language or competency, we set up clear client expectations through our retainer that the MBAs are here to help the law students understand the needs of businesses and do their job better. In contrast, we clarify in our client retainer that privilege cannot attach to primarily non-legal documents, e.g., business plans, and the discussions that go into forming one. In sum, to the extent that we can, consistent with state law, we establish reasonable expectations of privacy with the clients, so that they understand that the non-lawyers are not unrelated third party strangers, but members of the firm's confidentiality circle. The discussions we have with the students throughout the term about these issues have helped them gain a deeper understanding of confidentiality and the limits of privilege.

The real critical one, I think, is the core value of maintaining independence of judgment. And this is where the clinic is particularly able to teach about ethics – by having

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<sup>20</sup> See William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent? An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003), for a very useful article we assign regarding managing potential conflicts of interest with organizational clients.

students experience, probably for the first time, what it's like to take a stand as a lawyer and make recommendations to a client. Here in the clinic we have an opportunity for students to feel what it's like to exercise independent judgment under safe conditions. We make it a practice to press students from all sides as they develop their research findings and recommendations – they hear criticism and competing ideas in every team meeting and case conference from their teammates (law and non-law), as well as from their supervisor (me). Of course, there are quality controls in place – I review all work, and bring in other mentors when specialized knowledge is needed. But probably more than any standard law firm we have the time and drive to make sure students have heard from all relevant bodies of knowledge as they formulate their final advice (not just thumbs-up or thumbs-down from their firm's senior partner).<sup>21</sup>

### **Teaching about Multidisciplinary Practice – The Future of Transactional Lawyering**

For your own programs, I would encourage you all to find ways to keep talking with students and preparing them for the interdisciplinary world of business in which they will practice. I've talked at length above about how greater guidance can help our graduates, and you should note that this can be done in non-clinical courses too: the Practicum began originally as a pure simulation course. Indeed, law schools often are more willing to try new simulation courses these days given the often-higher costs associated with establishing a full clinic. However, I should note that next year we plan for formal clinic status at Berkeley, so starting as a more modest simulation course can be a reasonably effective trajectory toward a full clinical offering as well.

In this talk I've tried to highlight ways that a lack of adequate guidance about MDP creates problems for us all: for our clients, and our graduates. In closing, I'd like to say a bit more about each – first, the effects for clients – speaking from our particular vantage point in working with start-ups.

With new businesses, we see that most clients don't know where to start. The tasks involved in successfully launching a new venture are not identified by one particular discipline – business success will depend on addressing both law and business management-related needs. If the new entrepreneur has enough money to consult a lawyer first, they are likely to hear the attorney focus myopically on entity formation. Isn't that the way you start a business, by forming the legal entity? Well, maybe, if the other major questions about the business have mostly been solved. But what if instead the entrepreneur should be focusing right now on identifying potential capital sources, or on protecting a unique piece of intellectual property, or they have some other important issue on the radar screen? What if they have yet to really test whether there is a business opportunity to be seized here?

In contrast, for a lawyer, it's such an easy, quantifiable deliverable to form a limited liability entity for a client. So a client might well go away from that interaction facing a decision on a legal issue that they didn't even see originally as priority. Unfortunately, by this point, many entrepreneurs have already blown what little money they had set aside for consultation. They go away frustrated, unsure whether solving one of their legal problems at this point (limiting legal liability) will ultimately help them successfully solve the many other non-legal issues they need to consider.

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<sup>21</sup> Arguably, the biggest danger to a lawyer's independence of judgment is to work as corporate counsel, where every day they are subject to a non-lawyer's supervision from the top. Our clinic discusses this risk and encourages young lawyers to begin to trust themselves, and to recognize when their research and analysis is sufficient to support a strong sense of independent judgment.

Even worse, some entrepreneurs won't even go to lawyers at the start, because they see lawyers as wet blanket deal-breakers who lack creativity. They see lawyers as focused on avoiding risk at all costs. What we've seen in the Practicum is young lawyers getting used to working in teams with MBAs, and thereby, seeing more ways that risks can be managed. Lawyers graduating from the Practicum are more likely to stay in touch with their entrepreneurial side, seeing business opportunities as something to be studied and developed, and noticing that risks can be diminished by taking time to assemble the right talents, resources, and co-venturers.

Finally, I would argue that this lack of MDP guidance for practitioners has halted an important conversation within the profession. As Tony noted in his article, one thing that was missing from that ABA MDP debate was a real discussion about what our ethical duties require. What is required by the duty of loyalty? What does the duty of competence require in terms of our own development? Each of these concepts should continually evolve in light of client needs and the demands of modern life. Transactional lawyering, in this economy, demands a level of loyalty focused on promoting business success, not just the solving of legal problems.

And what does the business landscape require of lawyers to be competent? If you contrast lawyer training with that of the medical profession, clearly medical school students graduate more prepared to recognize a wide range of factors related to patient health. Medical students become acquainted with the way that one's family, job, finances, mental health, and relationships all impact patient health. Then they look for ways to triage – clearly their duty of loyalty is to promote patient health, and fulfilling their duty of competence doesn't stop with what they themselves can provide. They feel an obligation, as our young lawyers should, to work with other professionals to help their clients overcome the many barriers to success and health in this complex world.

In closing, the legal profession's failure to point the way on MDP has led to a stifling of innovation within our profession. We are practitioners of a particular discipline, but we are also entrepreneurs as well. As client needs evolve, our practice also needs to evolve to help our clients keep ahead of the game. What we saw in the MDP debate is that, instead, our leadership embraced the traditional "wet blanket" attorney model -- we saw risk to these four "core values" and instead of innovating to preserve them, we ran from the discussion, claiming that the risk was too great. I think we all have a role to play in urging our professional association back into its leadership role. But in the meantime, as law teachers and mentors, we can and should do more to ready our law graduates for transactional lawyering: helping them understand truly what their duties of loyalty and competence require, and how to infuse those four core MDP-related values into their practice. Only then can they be truly effective advocates for business client success in this modern, interdisciplinary world.

## **QUESTION AND ANSWER SEGMENT**

### **QUESTION FROM JEFFREY LIPSHAW**

I wanted to ask the panel a question that provoked me when I saw Eric's slides earlier today. There is a concept in business called boundary-lessness, which is a G.E. Jack Welch concept, and it has to do with how you break down unnecessary disciplinary

boundaries between any discipline, not just law, but any discipline with competing objectives. For example, take design engineers versus manufacturing engineers. Design engineers are willing to make a Rube Goldberg device but the manufacturing engineer says we can't build it. The manufacturing engineers, on the other hand, have to accommodate the things that the design people want to do. To what extent do the clinics help in dealing with unnecessary disciplinary boundaries? To what extent do they help discover what they are between lawyers and business people? For example, Bob, when I was listening to your discussion of the trademark and the licensing work, are the legal issues binary? Is it a yes or no, or is it an issue of appetite for risk? At what point are the lawyers by virtue of their discipline retreating back to the comfort zone and saying, you can't take any risk at all? To what extent is it open to discussion? To what extent is there an interdisciplinary judgment between the purely legal and the business that has to be made, and how do you address it in the clinics?

#### **ROBERT STATCHEN**

In regards to the trademark issue, we don't tell them yes or no as far as use of the mark but rather we advise them of the risk. The clients are the risk takers. For example, we will tell them that there are three similar marks that could possibly create confusion in the marketplace. They could either get rejected by the USPTO or get a cease and desist letter. Furthermore, we advise them they could spend money on a full search, but again, our clients generally don't have the money. We advise them to take these issues into account and then we let them assess the risk and decide how much risk they want to take in that particular situation.

#### **ERIC J. GOUVIN**

The idea of boundaries is a huge problem. I think legal academicians in general have a background where they believe they have a pretty narrow area of expertise. This may be because most law professors practiced law in big law firms with highly specialized practice areas. In smaller shops, however, there are competent small business lawyers out there who do IP, securities offerings, private offerings or raise money, and all kinds of employment stuff. They wear lots of hats that many of us would feel uncomfortable wearing. We'd say: "I'm not an employment lawyer. I'm not an IP lawyer. I'm not a securities lawyer. I am a whatever lawyer I am." And so, we're all trapped in our own boundaries.

In the Clinic, if it's going to be a small business clinic that is catering to small businesses that are getting off the ground, you've got to find those resources or develop those resources yourself. Find your comfort zones. We found that making sure that the engagement letter is clear about what we can do and what we can't do is very important for our malpractice carrier. But, on the business side, it is a very significant problem because our business school has departments. The law school doesn't formally have departments but we all have our own mental department that we put ourselves in. But over there, there is an accounting department. There is a finance department. There is a marketing department and they've been trying to develop an entrepreneurship program, but that requires crossing all the departments and they have been wrestling with it, not entirely successfully.

#### **TONY LUPPINO**

Well there are clear situations. They can't do things that are against the law. But in terms of everything else that has some subjective discretion, it is just educating them on what you know and then trying to put them in touch with other people who have done this before in the business community. So we have a lot of networking with other help centers

for start-up businesses and then we get some people who have done this before and lived it and we have to make these judgments.

It is very hard for the law students to understand the concept of “close enough.” I have had a colleague come in and lecture to my Business Planning class from an entrepreneur’s perspective and he will march in and say to students that “as an entrepreneur, I am comfortable with ambiguity.” We spend a lot of time telling our students not to draft anything ambiguous. We don't want to draft anything like that; but in term of business judgments, the batting average doesn't have to be a thousand. It is an educational experience for start-up clients. It's harder because they haven't done it before so they are almost as risk adverse as the law students. So you've got to find some business mentors.

#### **QUESTION**

You talk about working with interdisciplinary people from the business school. Are your students licensed in your state law and do you give them malpractice insurance? If so, do you disclose the breadth of what you're doing in obtaining the malpractice insurance?

#### **BILL KELL**

At my university, before starting up I had a number of conversations with the insurance group there, and with the state bar as well. Actually, you have to check the bar rules for your particular state, because sometimes they don't cover non-litigation practice. In California that's very much the case -- students don't have to be certified by the bar to be doing this kind of work.

As to malpractice, I am covered by our university’s policy, but again, at the beginning, I needed to disclose what we were going to do in terms of practice areas. Our university's counsel also wanted to know that we were in compliance with any applicable certification rules. In our disclosure to the university, I also noted especially risky practice areas, like patents and litigation and a few other things that we don't do. Then I sent them our retainer to review. The counsel’s office response was that they thought we had things covered pretty well, given our more limited practice focus on start-up businesses.

#### **ERIC J. GOUVIN**

In Massachusetts the student practice rule doesn't seem to govern this either, but we still get the students approved by the Supreme Judicial Court. It is pretty routine and we do it just to cover our bases. This is from the Supreme Judicial Court. On the insurance, Brian, I just bat this into the general counsel's office and let her figure it out. She said that it was okay.

#### **QUESTION**

The presentation is about clinics. I just wanted to make a comment. There is another side to these courses from a nonclinical view, which we have done. I have been doing it since the 1980s. I came to this point where, in a sense, what we seem to be doing is preparing the students from the context of the mindset of a business client, and then taking them through various states with various simulated projects to the end. I have been doing this since the 1980s. It has produced quite a few problems but I take the view that as long as a business objective is lawful, you can't say no. You must find the lawful solutions and you have to give your client three alternatives. So it is a clinical class but it is not taught in the clinical context.

**TONY LUPPINO**

I don't think we need to pigeonhole these. Actually, my courses aren't clinical. I am involved with our Clinic, but the other ones I described really aren't. I think the real key to me is in law schools one thing we don't do well, unless we work at it, is to teach the students how to gather facts. In a business context, no client is going to come in and say "I hereby guarantee you that I'm going to tell you all the material facts so you can counsel me on my business plan." As previously mentioned, the trouble is that the law students have read appellate cases where the facts are not in dispute. So, the best thing we can do for them – whether it's a simulation, a clinical course, or interdisciplinary classroom course – is to teach the law students how to ask some "why" questions. Why do you want to do that? And to gather the facts. I think that's a common theme in all we're doing here.

I think we're coming along with that. Most of us learned this from practice by watching other people do it. I don't agree with everything in the Carnegie report. But one of the things it says I do agree with is that it seems there's not as much apprenticeship as there used to be in law firm practice settings. We have a little bit more of an obligation to do some apprenticeship on fact gathering and I think courses like you are teaching are doing that. And if you can get to the point where you're training your students to look for solutions, I think if you read the literature on this, it is a problem-solving thing if done right and that's what I think you're trying to do.

**SPEAKER**

Just want to throw in. This was something we discussed at the Drexel conference a couple months ago, which is not only do you have to gather the facts but the facts are dynamic, unlike a litigation case, in which they've all happened. The facts are occurring in real time and so these simulations are even better as you throw in curve balls as you move along.

**ERIC J. GOUVIN**

I want to put in a plug for Frank Gevurtz's book<sup>22</sup> which I used for years when I taught Business Planning. It has a richly textured hypothetical which provides lots of opportunities for students to play lawyering roles and you can achieve a lot of these goals with the simulation like Bill was saying. In fact, I transplanted a lot of work from my Business Planning course into the Clinic when I made that transition. But I made the transition because the simulation will only take you so far. And like Tony is saying, the fact gathering skills and the soft skills that lawyers develop on the job – it's hard to develop those in the simulation. Plus, the simulation gets a little boring for the professor at around the twelfth time through.

But with the Clinic you don't know what's coming in the door and here are real people with real problems. These aren't academic exercises and it's a real shot in the arm because, honestly, you can get cynical over time. But here are people living the American dream. These people have an idea and they are going to set the world on fire if only you can give them a little help. And it sounds really corny but it made me feel very good to go down to parts of the city that I hadn't been in before and give a hand to people who were trying to live the dream. And I know how it's going to turn out for a lot of them. But while we are doing it together there is a chance, and that's good for the students to have that perspective,

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<sup>22</sup> FRANKLIN GEVURTZ, BUSINESS PLANNING (Foundation Press, 4th ed. 2008).



too. It reminded me of all the good things about practicing law. The problem solving part – the helping part.

#### **TONY LUPPINO**

I am also a big fan of the Gevurtz book. There was one particular example in prior editions within excerpts from an article by Frederic Corneel<sup>23</sup> that has helped me a lot with my students in the past, which is where the client comes in and essentially says: “I want to give an employee some stock. What are the tax implications?” Now, a lot of lawyers will go find out the tax implications and tell the client the answer to the tax questions. I think a good business lawyer says: “Why do you want to give the employee some stock? I need to know because some baggage comes with that.” Now maybe they have made an informed decision and somebody else told them the consequences of making somebody an owner. Maybe somebody on the golf course said I gave my employee stock and it's worked out great. You don't know which of those it is unless you are willing to get involved in finding out the business objectives.<sup>24</sup> So I love that example.

#### **BILL KELL**

One other quick point is if you do simulations like this, the other business law faculty often would love to have you offer it as an exercise to add to their classes. It is a good way to build support among the more classroom-focused business law teachers – you can provide a fact-rich simulation that connects to the more book-learning they are doing in an area like entity formation.

#### **QUESTION**

I'm curious, Eric, just going back to your point in terms of this debate over the efficacy of clinics versus simulations. Clinics, when they work, are great and they aren't boring. The problem is success is variable. For example, Tony you referred to the Clinic with the business school in which they had four teams. Two of them worked well, two of them didn't. Do you have some methodology within the clinics of trying to pull the plug on representations if they are not serving a pedagogical need or are you then bound by your professional responsibility to the client?

#### **ROBERT STATCHEN**

To ensure, as much as possible, an appropriate experience for the students and clients, we have a client screening process. The clients fill out an application, I review them, and then the students have an initial meeting. And the initial meeting does not guarantee representation at that time. We may determine that it is not an appropriate fit for the Clinic. If we do take the client on, then we have a representation agreement in which we highlight two or three things that we're going to do during the course of the representation. But we also say in the agreement that if the client does not cooperate with us, we will withdraw from representation. And to be honest with you, we haven't had a client that's unresponsive in that way.

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<sup>23</sup> Frederic G. Corneel, *Tax Planning: Teaching and Practice*, 22 *Tax L. Rev.* 221, 229 (1967).

<sup>24</sup> Corneel explains in the example the importance of framing good questions to identify the goals, and then perhaps be able to offer the client alternatives to consider. *Id.*

**ERIC J. GOUVIN**

We try to screen matters on intake to make sure that the case is worth giving to the students. The Clinic is first and foremost a teaching exercise and if the case has little to offer as a teaching opportunity, we decline the representation.