

TEACHING METHODS: COLLABORATION BETWEEN SCHOOLS AND OTHER SIMULATIONS

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Jay Finkelstein

Welcome everybody. I am Jay Finkelstein, and David Gibbs and I will be collaborating on this presentation. We are going to discuss what the two of us have been doing independently and how our philosophy and approach to experiential learning in collaborative teaching is both similar and complimentary. David will give you more about his background shortly.

I am a full-time transactional lawyer. My legal practice focuses on international transactions, mostly: mergers, acquisitions, joint ventures, and other complex transactions. I have been an adjunct professor for about the past 12 years, and I am currently a member of four adjunct faculties: Stanford, Berkeley, American, and Georgetown. The vehicle I use for teaching transactional law is a class called International Business Negotiations. We will explore the methodology and pedagogy of that class during my part of the discussion.

The class is profiled by Educating Tomorrow's Lawyers:
<http://educatingtomorrowlawyers.du.edu/course-portfolios/detail/international-business-negotiations>. It is one of their course portfolios focused on practical skills training and implementing the Carnegie report recommendations for modifying the legal curriculum.

The textbook developed for this class, *Negotiating Business Transactions* (Aspen Coursebook Series; Wolters Kluwer 2013) was published last year. There is a full teacher's manual that supplements the text, along with other support materials available on the Aspen website: http://www.aspenlawschool.com/books/negotiating_business/default.asp.

For today, we will first talk about the international business negotiations class, which is a semester-long, collaborative simulation of an international business transaction. David will then talk about the practice foundations class that he has developed that uses experiential learning to introduce law students to transactional practice. Following those presentations, we hope to engage in a discussion with you,

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through questions and answers, as to how this approach to teaching transactional law can be implemented at your law schools.

Teaching transactional law through collaborative and experiential learning is a perfect pairing of substance and practice – a perfect match. Transactional practice is highly interactive, very engaging, and very much focused on practical skills. The transactional practice is what I call a “hub and spokes practice.” It is the aggregation of inputs. It’s not one distinct area. I often times say that the corporate lawyer is at the center, and she is integrating all of the inputs from the various specialty lawyers, such as those focused on intellectual property, environmental, antitrust, labor, and tax. In a way, the transactional lawyer is the conductor of a symphony, and the transaction and the relevant documentation emerges from the harmonization of the inputs that create the symphony. It is all these components coming together. And that is what I try to impress upon law students in teaching the International Business Negotiations class.

Through experiential learning we demonstrate to law students how to analyze a transaction, how to develop a process for working through it, how to determine what the legal components are, and how to translate the business deal into the ultimate transactional documents. In addition, we focus on the concept of dispute avoidance as a cornerstone to preparation of successful transactional agreements, emphasizing that it is critical to anticipate where problems may arise and develop contract provisions that try to avoid or mitigate disputes.

In the classroom I try to replicate transactional practice as closely as possible by putting a deal in the classroom so that we can analyze it, put it under a microscope, and watch it develop real time. We will discuss the collaboration component in a moment, which further enhances the experiential learning aspects of the class. We will also discuss what has been learned over the years that helps provide a roadmap for how you can actually implement this type of teaching methodology.

The International business negotiations class is taught using a semester-long, simulated transaction. The key element of the class is experiential learning. It also uses collaborative teaching to enhance the experiential learning; paired classes at one law school or paired classes between two law schools represent the two opposing sides of the transaction and work together to negotiate the transaction. Regardless of the model you use -- paired classes at one law school or two classes at separate law school’s – the students work in teams, so they have to work among themselves in order to be able to succeed. This is also true in actual practice. Most transactional lawyers do not practice alone. We interact with other lawyers to complete the transaction. I tell students that in transactional law we don’t practice in the library; we practice in each other’s offices because we are always comparing thoughts, notes and suggestions on how to accomplish a successful transaction.

At the moment, teaching transactional law, international law, negotiation skills and other practical skills, as well as using technology to enhance the classroom are key components in discussions about enhancing and reforming the law school curriculum. Although the International Business Negotiations class was not aimed specifically at these issues when I first started teaching over 12 years ago, the class has evolved in a way that serves as an example of how these components can be successfully incorporated in the classroom and demonstrates successful integration of both practical skills and transactional law in the curriculum.

The IBN class involves immersion in a simulated business transaction for an entire semester, start to end. Student “live the deal,” and participate in and direct its course, just as a practicing transactional lawyer/practitioner. I live with my deals, and I get totally immersed in the business and the transaction, and I have to make the transaction work in the context of a contract. And that is what I want the students to experience in the classroom environment as we study the deal as it evolves and discuss the legal, business, social and political factors that drive the transaction.

Another aspect that I endeavor to introduce through the class is the key practice aspect of negotiating with someone you do not know. In two school pairings, you introduce the unknown. The students are not negotiating with someone with whom they just had lunch. Until they engage in the negotiations with the other class, they do not know how the other students are approaching the transaction because the instructors may be teaching different aspects and their thought process may be different. The whole agenda may be different, and the students need to prepare their strategy in the midst of this uncertainty. In the classroom, they learn how to understand and manage this uncertainty, which of course is a key aspect of legal practice.

Every aspect of the deal is studied and addressed in “real time,” as it evolves based on the deal that the students are negotiating. The issues encompassed in the simulation are known because the simulation and facts are “given.” What the instructor does not know is when, or in what order, or how fast the issues will arise. Some students and classes progress rapidly. They get through the issues very quickly. That just means they can go further in the transaction. Other classes don’t get to some of the issues at all. The instructor is teaching real time to the deal. It’s a different style of teaching because you have to really understand the deal and be able to be reactive and to help the students at the time that they are encountering the issue.

The simulation exercise requires students to apply, and integrate, all aspects of their legal education in a practical context. This is why this class works very well as a capstone. The students are integrating their entire legal knowledge.

The class also introduces the many aspects of business that a transactional lawyer must understand. We introduce business concepts that are part of a business student’s

curriculum so that law students can begin to understand how business and law have to communicate. The real takeaway from the class is the framework by which they analyze any deal and can apply what they are learning in their future practice. Upon completing the class, the progress and process of a corporate transaction will no longer be a mystery. What we are doing is building that bridge between curriculum and practical skills.

Law students are, admirably, very idealistic. They have lofty objectives, which we can all applaud. They want to have an impact on and change the human condition. When they hear “transactional law,” they often think Wall Street, capitalism and the ugly profit motive. Through the IBN class, I try to introduce the students to the concept that every deal has a social, political, and economic context, particularly in the negotiation of international transactions and particularly when such transactions involve developing countries. The important point is that you can do good by doing business, if you focus on the broad context, particularly where the transaction will help build or redirect the economy and involve local labor and businesses. That is what social entrepreneurship is all about, and that is international business.

The concept is ratified by an article from the Tanzania, press, where I was teaching a year ago. To quote: “It is economic growth and wealth creation that will pull the majority of Tanzanians out of poverty, not some welfare or poverty reduction programs.” Consider China, which is a recognized case of how foreign direct investment has moved an economy and created a middle class. This really strikes a chord with students. It is something that they generally have not thought about insofar as how transactional practice fits within their objectives to impact the world. Social entrepreneurialism and smart development investment actually can change the human condition, and it changes it very quickly.

We don’t have time to discuss a lot of anecdotes, but I can tell you that literally in the space of 30 days certain investments can have dramatic impacts on a population by generating new income sources that alter lives. This is a tangential, and very real aspect of international business negotiations that is often overlooked.

Let me describe the simulation model that is used in the international business negotiation class. We have two parties: a multinational corporation based in the U.S. but operating around the world, and a government-owned cooperative in an African-developing country. The multinational has a patent on a new process for a key ingredient for a drug that treats arthritis, and the African co-op has an ample supply of the raw material needed for this process to provide the key ingredient to the drug. There’s a rationale for the two parties to work together. There is also a second product line that serves as an extra marketing component for the deal: the waste product of the extract process can be used as a productive fertilizer.

The students enter the transaction after the business teams have concluded that a deal is viable, but no structure has been agreed. It could be structured as a joint

venture, a license agreement, or a supply agreement. The students know that a deal is possible, and it makes sense from the perspective of both parties.

The students are introduced to the deal with narrative and financial information on both parties, the information on their key objectives, their constraints, their conditions, the social, economic and political conditions of the developing country, each party's strengths and weaknesses, and how they could potentially profit from the deal. Each party has independent negotiating structures, which are not shared with the two negotiating sides.

We are teaching students how to use the law, while also teaching legal concepts. What is a joint venture? What are the aspects of a joint venture that you would probably have to negotiate? What is a license agreement? What about those agreements could meet the objectives of each of the parties? How do we evaluate the form of agreement that this deal should take and memorialize it?

We are putting the students in the first chair negotiating position. One of the sides actually has to make the first proposal. They have to write to the other side and say something in preparation for the first meeting in the negotiation. That something maybe as little as 'We are looking forward to meeting you as we begin our negotiations.' Such a communication might be a wasted effort, and we talk about the strategy of a first communication and how much information do you want to put in it. I have even had classes that draft a full letter of intent and submit it prior to the first negotiation. Different classes take different approaches. No one is wrong. It is just a different way of thinking about the deal.

The simulation represents a controlled environment guided by the professor, and I really do look upon myself as a guide. This is the student's deal. I am there to help them navigate but not necessarily to avoid every obstacle. Sometimes I want them to hit the obstacle because mistakes become lessons and they are remembered, and they are not malpractice in the context of a classroom.

Alright, we know what experiential learning is all about. My favorite summary of it is actually over 20 years old and it is from Professor Donald A. Schon. You learn by doing in the presence of a senior practitioner with others trying to learn in a virtual world. That is the ideal to which we all aspire. . It is more engaging and deepens thinking. It improves retention. It facilitates application in new contexts, and that is exactly what I want to achieve. The next time the students are involved in a deal, it will not be a new experience. They will know what a deal is and what the moving parts are.

There are a lot of academic studies now about the way people learn and how we retain information. We recently learned that hand written note taking is better than typing on a laptop. The statistic that I find fascinating is that the attention span during a

lecture is something like 12 seconds, and that if you don't reengage the student every 12 seconds, you lose them.

However, regarding experiential learning, I like to consider an allegory. If you throw somebody off the deep end of the pool, they would need to learn to swim quickly, and you certainly have their attention. That is what we are doing here. The international business negotiations class is deep immersion and it is taking students where they have not been. Most of them have no context for appreciating this. I am shocked and dismayed that most graduating JDs have never seen a merger agreement, a lease, or any other business transactional agreements. They have not been introduced to transactional documents during their entire legal education!

The reason I started teaching was because that realization frustrated me. When I was interviewing prospective lawyers for my law firm, they had no idea what I did. I really was concerned about that, and that is why I wanted to try to find a means for getting a deal into the classroom that we can actually study.

Simulations enable students to progress beyond clinics. Clinics are limited by two things: First, they are dependent on the client that walks in the door and the problem the client presents. Second, the matters that can be handled within the clinic are limited by the capability of the students. In a simulation, we have no boundaries. We create the issues because we draft the simulation, and we push the students, as a learning exercise, beyond their current level of understanding. We can make them wrestle with issues that they might not otherwise encounter or be capable of addressing in a clinical environment. The two work extraordinarily well together. The clinical experience provides client contact and the real life interaction. The simulation allows us to take it further and to shape that experience and skills that are derived from a clinic.

And of course collaboration replicates reality. There is a list of areas of law that I often show at the end of the class to demonstrate the areas of law that the students have had to apply, knowingly or unknowingly, in approaching the simulation problem and to develop a deal solution.

These areas include corporate finance, tax, environmental, labor law and more. A lot of the classes in the Emory Transactional Certificate Program are the areas of law that the students actually apply in the simulation. And by the way, I assume no knowledge of any of these topics for students that take the class. I recommend a business organization's class as a prerequisite, but I do not require it. I am there to teach each of the components that the students will need as they progress through the simulation. We add additional detail as appropriate.

Students are also surprised by how many areas of business that we discuss and apply in addressing the negotiation. We talk about cash flow analysis and accounting. I should state that I do my accounting lecture as my third lecture. It is deliberately

positioned after the add-drop period. Law student's eyes glaze over when we talk about accounting and financial analysis. The simulation module is actually designed in a way that if you look at the numbers it actually illuminates aspects that you don't see by just reading the text. By working with the numbers the students discover some amazing things that lead them in different directions in this negotiation. And we work through them. I don't expect them to come up with that on their own. I take them through it and show how finance can lead them to realizations that are important to a legal negotiation and therefore underscore the value of having financial knowledge as part of their toolkit as a transactional lawyer.

Understanding how the transaction fits in the overall business of the client is important, so that the negotiator understands where problems may occur, which may lead to contract provisions to avoid the impact of such disruptions. We discuss these concepts in class, and it's an engaged discussion because the class is completely interactive as we try to figure out how to address these very practical problems in a legally binding, contractual context.

So, let's assume that there is a drought, in the developing country and therefore the supply of the raw materials is unavailable, so we can't produce the drug. Some students may say "Well, we can get business interruption insurance." Well, that is a potential solution, but what do we tell the patient that shows up at the pharmacy who wants the drug to alleviate their arthritis symptoms? Insurance may cover lost profits, but what does that do for the reputation of the company which now has dissatisfied consumers?

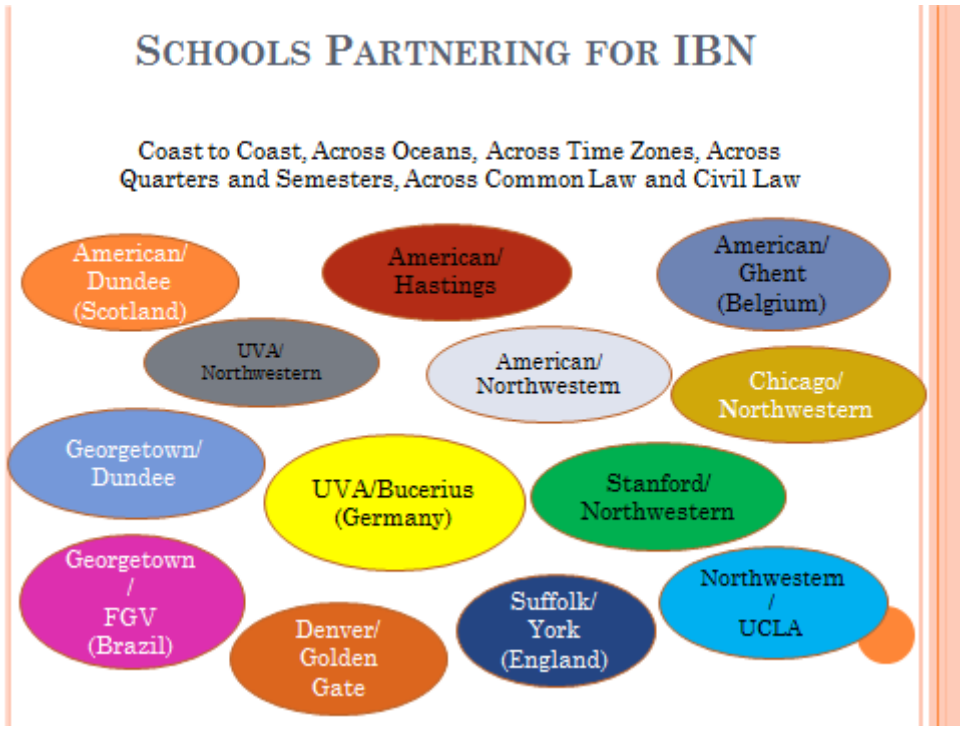
The students quickly realize that insurance is not an adequate solution since it doesn't protect the multinational client from the failure to meet critical needs of patients, so the students need to re-examine the issue and determine alternatives for mitigating the potential risk through contract provisions that endeavor to alleviate the impact of a supply interruption? They need to devise a business solution, which may involve accessing other sources of supplies or maintaining inventories that can cover a shortfall, and then they have to translate that business solution into contract provisions. It's a very informative discussion that shows that you have to be creative and think outside the box to be an effective transactional lawyer. But most importantly, you need to understand the business context of the transaction in order to understand and mitigate risks. The transactional lawyer's highest value-add is the creativity and knowledge of business that he or she can then translate into a deal content.

One thing I stress is that there is a link between business and law, and that link is "common sense." You can draft the most eloquent agreement, but if it doesn't work for the business parties, it is useless. The provisions have to work in reality. And so we tell them, "Make sure you think through what you are suggesting and that is can work in practice because otherwise you are actually doing the client a disservice."

Now let us shift our focus to the collaborative aspects of teaching, both with and without technology. This is one of the key distinguishing factors of this particular capstone class. The class can be structured with teams of students within one class or with multiple parallel classes within the same school. You can have multiple classes at different schools, either in the same geography, such as two schools in Atlanta or two schools in San Francisco, or different geographies, which may be domestic or international. We have offered this class in each of these formats.

The interaction between classes, or between teams in the same class, is both written and verbal. The verbal component can be face-to-face or can involve using technology. The types of technology that we use can use are email, G-Chat, teleconferencing, Skype, videoconferencing, and Telepresence,-- the Cisco Telepresence system. Most frequently, with classes at schools in different geographies, we use videoconferencing for distance connections. Students are shocked to learn that 98% of the negotiations that I do are actually by teleconference, not videoconference, so no visual component. Although we do provide at least one opportunity during a class for students to experience negotiations via teleconference, the students much prefer interacting via video conference so they have the visual component and can observe the other side's body language and facial expressions. However, most transactional negotiations today are still done solely by voice communications.

These are many law schools actively collaborating to offer the international business negotiations class, both in the US and abroad. In the slide below, you can count 17 different law schools that have partnered to offer the class. Many of the schools have done different pairings at different times. Some schools offer the class twice, once each semester, in a different pairing. You will also note that there are a number of international schools listed there: Burcerius (Germany), University of Dundee (Scotland), Ghent (Belgium), York (UK) and FGV (Brazil), each of whom has partnered with a US law school. Of course it is international business negotiations, so obviously there's an appeal to the international schools, and the pairing of a US and international law school creates a very real transactional environment in which to conduct the class, with US students working directly with international students on the transaction.



As in a real transaction, the international students may have a different approach from US students. Some of the international law schools are in civil law jurisdictions, so they have a different perspective from the US common law context, which is something else that law students need to be aware of as they go beyond the safe harbor of the U.S. borders. The students must be aware that in practice, they will encounter different legal systems, different philosophies, and lawyers and opposing parties with different baggage and burdens. If the transaction involves negotiating with a lawyer who comes from a developing country, that lawyer may be reflecting on the history of their country in dealing with Western interests, and much of that history may show that in prior transactions the developing country has been abused by multinationals. Many law students are surprised by the impact that previous bad transactions may have on a pending negotiation. The vehemence by which certain foreign students pursue points, and the antagonism that emerges when they are negotiating with US law students can make the simulated negotiation both very real and very personal over the 12 weeks of the course. Different relationships develop. The two teams have to grow more comfortable with each other if a deal is going to be negotiated. There have been circumstances where no deal is reached, which is just as useful pedagogically as reaching an agreement. It allows us to analyze why and how we might do things differently. So, there is nothing wrong with not reaching an agreement so long as the students understand what went wrong and how they can possibly avoid a similar result in the future.

Other law schools are offering the international business negotiations class in a divided class format. Current law schools using that format are Boston University,

Washington & Lee, and Hebrew University, Sometimes law schools like to start out using a divided class format to develop experience with the class before they go to a collaborative domestic or international pairing.

I would like to show you a short video of an actual class negotiation. This was from my class at Georgetown. The Georgetown class was taught in collaboration with a class at the University of Dundee in Scotland. The International Business Negotiations class is designed for three credits. About 20 hours, 2 hours a week, 10 to 12 weeks is allocated to the classroom analysis portion of the class. Fifteen hours, 3-hour sessions, five times during the semester, is allocated to the live negotiation sessions. I am going to show you a three-minute clip. What they are negotiating is the allocation of joint venture ownership interests, and you will see that the five Georgetown students in the front of the screen are the team that is leading this negotiation. The student teams rotate the responsibility of leading each negotiating session. All of the students are connected by an interactive G-Chat, so even the students not negotiating are providing comments real time, and I am also connected to that G-Chat, so I am providing guidance or comments as well. The key negotiators from the University of Dundee class are sitting at the center of their table, with contributions from the students on either side. It's a highly interactive experience.

This is a Saturday morning class, starting about 9:30 AM. We use Saturdays in order to have a 3-hour block of unconflicted time. I have done Thursday evenings and I am now experimenting with Friday afternoons, as those times also seem relatively free of classes at many law schools. The module is flexible to the time periods most suitable to the schedule at the particular schools participating in the negotiation.. So, let's play the video.

[Plays clip]

This negotiation obviously went on for an extended period of time. This was the third negotiation out of five for these classes. You will have heard a reference back to a prior negotiation. There was a mention of a draft letter of intent. The students were talking about joint venture ownership, dividing profit streams resulting from production of two different products, and capital contributions. You really start to see the students' owning the elements of a business transaction. What they actually agree on is irrelevant, it is the process of immersion in a business transaction that they are negotiating and applying their legal and other skills to function as would a practicing transactional lawyer. In the end, they actually agreed on a 72½ -27½ ownership split for the joint venture and a pro rata funding of capital. The specific terms of the transaction evolved over the several weeks. Various things were traded. Different elements of the deal that were more important for the multinational were traded away for elements that were much more important to the developing country and the government-owned entity.

But you can see how the students were involved in this negotiation. They were intensely engaged in this process of developing an agreement. You saw 3 minutes of a 3-hour session out of 15 hours of actual negotiation.

You also saw that the students had to negotiate with students of multiple nationalities and accents. For some of the Dundee students, English is not their first language. These components represent the real world. This is what a lawyer negotiating an international transaction must anticipate and address. This is the actual experience that you will have if you enter international transactional practice, and there is almost no transaction that you see today that does not have an international component to it. Yes?

Audience: How did they decide who was going to speak, especially on the American side? There were quite a number of students there. Three of them spoke.

J. Finkelstein: Well, first of all, the team that was actually assigned to lead that negotiation was a team of five. Within themselves, they tend to allocate responsibility for particular topics, but they are not constrained from speaking on other topics. The woman who was sitting in the center of the front, was leading her team, and she was orchestrating the other people speaking. It could have occurred through the G-Chat where somebody said "I would like to say something," and she responded, "Go ahead." So, they have to work out among themselves as part of their collaborative effort within their team who is going to cover what topic and who is going to speak to what issues. But when it happens real time, the experience intensifies, and sometimes organization breaks down. The main thing is decorum and not to cut somebody off or to contradict your fellow teammate, which has happened and creates issues. What we talked about during the classroom portion of the course is focused on preparing the students for the negotiations, but they only truly appreciate it once they actually have the experience at the negotiating table.

Audience: Again, I don't know if you were going to talk about this, but are they supposed to be simulating business people as well, because I have done a lot of simulation and it seems like the tricky part for us is always having a sane business client.

J. Finkelstein In the class, we treat the students as lawyers acting on behalf of business clients. You saw in the video that they said they would have to take certain issues back to their board of directors. I tend to act as the client and resolve any disputes from a client perspective. But I

tell them that they actually have to understand enough of the business to be able to speak about the business, even though they are negotiating as lawyers. And, as I will explain further in a moment, we deal with technical issues that impact on the transaction. But our principal approach to the exercise is as lawyers, either as an in-house lawyer or outside counsel, so we don't make a clear distinction between that. Of course an in-house lawyer would be part of the business team that has been considering this transaction. As a transactional lawyer, there is always a blending of law with business. However, we discuss our role as lawyers and acknowledge that when a decision is made, we act as the lawyers, and the business decisions have to be made by business people even if the lawyer provides input to that decision.

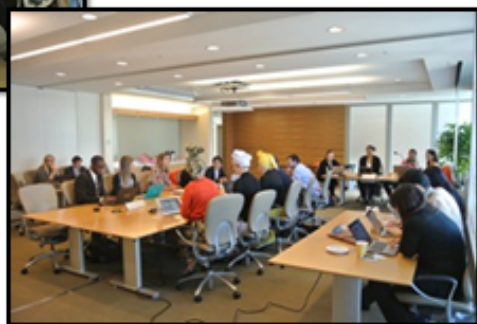
Dundee/Georgetown



Icons by Jay Cary Finkelstein

The above slide is what you just saw. This was the class at University of Dundee (at the top) negotiating via video conference with the class at Georgetown. Those are the screenshots from the video link. But the next slide is the one that I really wanted to show you.

Stanford/Berkeley



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This is Stanford and Berkeley negotiating face-to-face. They meet in San Francisco midway between the two campuses in a conference room on a Saturday morning. Stanford is on the left. Berkeley is on the right. They are all interconnected on their respective G-Chats, so they are interacting with each other. As you will see in the lower picture, the Berkeley team, which is representing the African-developing country, came in costume, the headdresses, to add a little more reality to the experience. This was a very spirited negotiation.

The interesting thing is, just like we have negotiations that continue in real life outside the actual negotiating room, students are encouraged during the class to engage with the other side outside these formal negotiations. Normally in a collaboration between two schools, that interaction is by email. As email conversations are opened, many issues start to get discussed and resolved in what we call “backchannel negotiations.”

In the class between Stanford and Berkeley, due to geographic proximity, these students actually developed a personal relationship. They went out to meals together where they continued the negotiation, and if the meal preceded the negotiation, the spirit of collaboration developed during their informal meeting continued right into the negotiating room. You could actually see how their interaction at a personal level translated to business productivity. Again that is something that is hard to isolate and

just teach, but when the students experience it, they understand how important it is that the negotiations do not end when they leave the negotiation table.

Stanford/Northwestern



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This next slide demonstrates the Cisco® Telepresence system, which is virtual reality for video conferencing. This slide shows a class at Stanford negotiating with a class at Northwestern in 2012. Telepresence is a wonderful teaching device. The Telepresence room can only accommodate 12 to 14 students, so it is necessary to limit the class size. You are seeing the Stanford team at the front table; the rest of the class is in the room but not in the camera frame. The Northwestern class appears life-size on the screens in front of them as if they are sitting in the same room..

More and more schools are installing the Telepresence system. This particular class was using the system in the DLA Piper Palo Alto office. I just want to underscore that this is about as close as you can get to personal interaction by video conference.

There are certain challenges to teaching a class focused on experiential learning. First of all, what are we trying to accomplish? There is a rumor that classes focused on teaching practical skills will result in law schools graduating practice ready lawyers. We are not going to accomplish that. I like to set the objective as creating “practice aware” law graduates. I want students to have some context by which they can understand transactional legal practice. They are not going to be ready after a capstone class, even after an Emory certificate from its transactional program, to go out and practice transactional law without some guidance. But we can make them practice aware, so the

first time they encounter transactional issues and a transactional negotiation, it is not completely new to them.

I look at collaborative teaching as having two components: vertical and horizontal. Vertical collaboration is faculty and practitioners working together, using simulations and problem solving exercises to enlighten doctrinal instruction. Horizontal collaboration is the pairing of classes, either between schools or at the same school, and having students working in teams to assess problems.

The International Business Negotiations class represents both types of collaboration. The concept was originally conceived by professor Daniel D. Bradlow at American University, Washington College of Law. I joined with Professor Bradlow to add the practice components to the simulation exercise and to contribute to the teaching pedagogy related to the practical skills. We co-authored the textbook for the class, "Negotiating Business Transactions" (Wolters Kluwer, Aspen Coursebook Series, 2013), along with the teacher's manual. The IBN class is now, as I stated earlier, offered by over 20 law schools around the world. Each school offering the IBN class is using horizontal collaboration, whether they teach the class as a collaboration between schools or using paired classes at the same school.

So which professors should teach an international business negotiations class? Who should teach transactional lawyering skills? Well, most of that time it is adjunct professors. However, faculty members that are already teaching transactional law subjects, such as business associations, are also inclined to adopt this type of teaching and this type of class. At several of the schools offering the International Business Negotiations class, full time faculty are leading the class, sometimes in collaboration with adjunct professors who are also transactional law practitioners. Vertical and Horizontal collaboration are combining to enhance the classroom experience

Negotiations faculties also find adopting this class to be a natural step. In addition, faculty members who are interested in collaborative pedagogy or teaching using technology are attracted to this type of class, as it provides the opportunity to teach in an innovative way. Some of these faculty are already focusing on the "reverse classroom" or using video delivery of lectures. All of these faculty are candidates for taking on a teaching assignment like the International Business Negotiations class, particularly if they are willing to collaborate with practitioners.

Of course, many adjuncts are interested in teaching classes like this, since it replicates the world of the practitioner. The key is transitioning practitioners to the classroom. They must first know that there is an opportunity for them to teach at the law school, and then they need a roadmap of how to join the academy and enter the classroom. It is not an obvious transition. To get practitioners to teach, you need practitioners with both the time and the capability of teaching. Not every good lawyer is

a good teacher, and they may need support to integrate them into the classroom. Having materials such as the textbook and teacher's manual for the International Business Negotiations class provide the guidance for structuring and teaching a class that an adjunct needs to facilitate the transition. If law schools provide additional training on developing and teaching classes and can pair practicing lawyers with experienced instructors, many more practitioners would feel comfortable embarking on teaching endeavors.

There are also challenges involved with Horizontal collaboration. If you offer the International Business Negotiations class using a two-school model, you first, need to have the class adopted as part of the curriculum at both schools. You need to collaborate on the timing of the classes, since they need to meet on different days to facilitate the flow of written communications. You may need to coordinate between semester and quarter schools. For example, Stanford is a quarter school. Berkley is a semester school. If the schools are not in the same geography, time zones must be considered. Georgetown is in the Eastern time zone, and the University of Dundee with whom they were negotiating, is five hours ahead in Scotland. And, of course, you must consider technology, which does not always work as expected.

We have had times when video conferencing breaks down for some reason. The solution is to shift to a telephone conference. We have a Plan B, and that is another important lesson that the students need to learn.

Every one of the potential obstacles, however, is able to be overcome, and has been overcome. That is why the partnered schools offering the International Business Negotiations class are oftentimes across many time zones, in different countries, and using quarter and semester systems. We have developed a model that is flexible enough to meet each of the challenges.

Ten Competencies Essential for New Lawyers

- * Judgment
- * Problem-Solving
- * People Skills
- * Teamwork
- * Organizational and Time Management Skills
- * Business Savvy
- * Business Development
- * How to Supervise Others
- * Focus on the Big Picture
- * Using Common Sense

DERIVED FROM EXPERIENCE – NOT DIRECTLY TAUGHT

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Let’s focus on some of the competencies we are trying to teach. I am not going to dwell on this topic because David Gibbs has more on this. My point on the above slide is that every one of those competencies, which is from a list published about a year ago by one of my colleagues, Neil Dilloff, is not actually taught but is derived from experience. I do not know how to teach judgment in a lecture. I do not how to teach business savvy or even common sense. However, each of these competencies is capable of being acquired through experiential learning. Using a simulation like the International Business Negotiations class, I can put students in a situation where they have to exercise judgment, and they will take away the lessons of learning and applying judgment from that experience. There are practice aspects that we certainly can teach, such as the multidisciplinary aspects of law and business, the use of accounting in transactional practice, contract drafting, and how to think like a “deal lawyer.” In the International Business Negotiations class, we use the classroom time to focus on those practice aspects that can be explained in the classroom and we build the other critical competencies through the experience of studying and negotiating a transaction.

Ethics and Professionalism in Transactional Practice

- * Legal ethics and transactional practice
 - * White, “Machiaveli and the Bar **Ethical Limitations on Lying in Negotiations**, 1980 Am. B. Found. RES.J. 926.
 - * Wetlaufer, **The Ethics of Lying in Negotiations**, 76 Iowa L.Rev. 1219 (1990).
 - * M. Rubin, “**The Ethics of Negotiation: Are There Any,**” Association of Commercial Finance Attorneys, January 2009
- * International transactional practice – Whose ethics govern?
- * Developing a personal/professional standard

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I like to talk to students about ethics and transactional practice, particularly in international transactional practice. I put three articles on the slide, which I cite to students. I think the titles alone say it all: “Ethical limitation on Lying in Negotiations,” “The Ethics of Lying in Negotiations,” and “The Ethics of Negotiations: Are There Any” Those three articles at spans nearly 30 years of legal academic writing by acknowledged legal scholars. Then you need to consider international practice. Whose ethics govern? I like to posit the situation of a U.S. firm negotiating for drilling rights in Uzbekistan, with meetings in Paris for the negotiations. Try to discern what set of ethics govern and how the ABA Model Rules will address the situation. We do have some really interesting discussions about this. The bottom line is that the international transactional lawyer has to develop a sense of personal professionalism and conduct himself or herself by that standard.

There are significant rewards from teaching transactional skills and enabling students to learn while experiencing what it is like to be a transactional lawyer. One of my students summarized it very well. “How can I describe in words the sensation of actually going through a negotiation? How can I detail the sinking feeling at the pit of my stomach when I was caught off guard with a new set of facts in the middle of a video conference? How can I really share those feelings of nervousness, confidence, dismay and victory that went through my mind during this entire ordeal? The truth of the matter is that I can say what it is I felt and thought, but that you, the reader, cannot really know until you have been in the same position.”

Another one of my students actually captured it more succinctly. ““You can read about how to drive your whole life, but you wouldn’t really know how to drive unless you get in a car and turn it on. This [class is] putting you in that driver’s seat.”

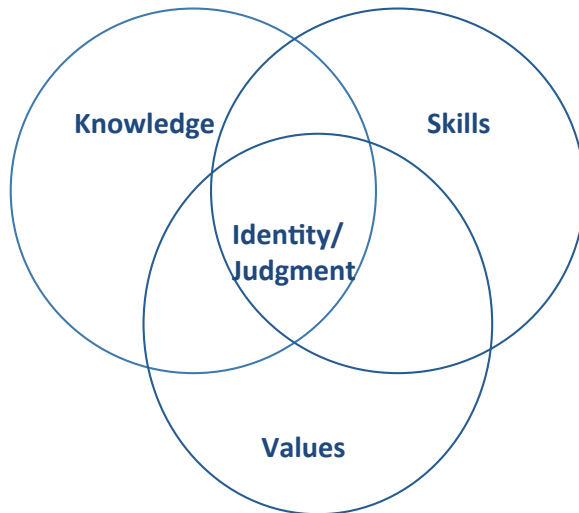
The goal is to create the “practice-aware” lawyer, who can actually enter our world as a transactional lawyer with some degree of comfort and not be shocked by the first deal document they see.

If you want more information, I am available to discuss the International Business Negotiations class or any of the topics included in this presentation. You can reach me by email at jay.finkelstein@dlapiper.com. Thank you.

David H. Gibbs

Practice Foundations: Transactions
An Experiential Learning Course

**Learning Transactional Practice to
Develop Effective and Ethical Lawyers**



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Thank you Jay. You have a great program and your presentation will stimulate our discussion. Jay and I have spoken together before. Next time I would like to speak first because the course I am going to describe might be taken to prepare for Jay’s course and because he is a difficult presenter to follow. Since I agree with almost everything Jay just said, I can shorten my remarks.

The challenge I have at the Dale E. Fowler School of Law at Chapman University and what I will discuss today is the design and implementation of a mandatory introductory course to introduce second year students to transactional practice and contract drafting. The class is part of a strategic plan adopted by the faculty. Practice Foundations: Transactions will be based on simulations of transactions that lawyers might encounter in practice and will be taught in small sections by practitioners. I view this an opportunity to apply what I have learned in practice, running a clinic and from colleagues and friends to help develop young lawyers.

What I am going to describe is still a work in progress that I am trying to develop into a textbook with a teaching manual. I would appreciate your comments and input.

Background

I practiced law for over thirty years primarily in corporate law firms. Like many of my generation, I went to Berkeley Law School to “change the world.” I took a leave to work for the United Farm Workers during Jerry Brown’s first term as governor. After law school I joined Peabody, Brown Rowley & Storey in Boston, which had 40 lawyers and grew into Nixon Peabody, which had 675 lawyers. In 2004, I helped start the Boston office of Bowditch & Dewey, which had a total of 65 lawyers in its offices. I was a trial lawyer initially, became a mediator and arbitrator in 1990 and later focused on corporate transactions, governance and leadership.

My approach to practice and teaching has been influenced by my experience in business. In addition to being involved in law firm management and working with leaders of businesses and non-profits, I founded two businesses, a small real estate company and a mortgage brokerage. I was a co-founder of an internet marketing trade association, the Massachusetts Innovation and Technology Exchange, which today has over 10,000 members.

In 2002, I began teaching Negotiation in the MBA program at Babson College as an adjunct and later taught Negotiation at Suffolk University Law School. In January 2013, I became a practitioner in residence at Suffolk and established an Investor Advocacy Clinic. In August of 2013, I joined the faculty at Chapman as an Associate Professor of Practice.

The Chapman Strategic Plan and Practice Foundations: Transactions

My work and Practice Foundations: Transactions is a part of the strategic plan adopted by the faculty and administration of Chapman in May 2013 to increase the readiness of students to practice. The plan includes:

- Practice Foundations: Transactions - an introductory transactions and contract drafting course for second year students that will be mandatory for all second year students beginning in the 2014-2015 school year.
- Practice Foundations: Criminal Litigation - an elective course that will be offered in the Spring of 2015.
- A one credit litigation “lab” offered in the 2014-2015 school year.
- One-credit “lab” courses taught by practitioners added to selected elective courses after the first year.
- Advanced simulations and practice based courses that will focus on areas of practice of interest to students.

The strategic plan builds on the existing practice oriented courses, clinics and externships offered by the school.

Practice Foundations: Transactions is a three-credit course that will introduce students to transactional practice and contract drafting. Students will learn how to identify and achieve client goals, translate the business terms of a deal into a contract, solve problems and add value as effective, ethical and reflective lawyers. The course will lay a foundation for students who are interested in business and transactional courses to take more advanced simulation courses, participate in clinics, externships, part-time and summer employment and help them transition to practice. Jay’s course that I hope will be offered at Chapman, would be an example of the type of course that would follow. Currently, we have at Chapman practiced oriented courses, mergers and acquisitions, real estate transactions and commercial leasing, as well as an entertainment law clinic. Practice Foundations: Transactions is intended to aid students interested who are not interested in careers transactional law to learn to analyze and prepare agreements as well as understand practice from a client’s point of view.

Design-- Challenges and Opportunities

In designing the course, I took into account a number of factors including:

1. The course will be required and will include students with varying levels of ability, experience and commitment.
2. Many students have little or no business experience, preparing contracts or working on a deal. Most courses they have taken in the first year of law school are not focused on solving problems for clients.
3. Students need to write and receive feedback on their work constantly since the course builds on what is covered each week.
4. The course will be taught by adjuncts who are part-time and have other commitments.

To develop the course, I surveyed the courses taught at law schools. I found many contract drafting courses. Most courses cover the fundamentals of drafting and do not include transactional skills or the development of professional identity. There were many “how to” courses where students would learn by working with and using forms to prepare specific documents, often without understanding *why* a particular structure, form or practice was used. Clinics were more helpful models because they often focused on the development of transferable skills and the complete lawyer. Some schools had programs where students take a preparatory class before the clinic, such the Entertainment and Mediation clinics at Chapman.

A number of schools follow the program at Emory Law School model where students take Contract Drafting followed by Deal Skills and complete a capstone course based on simulation of major transactions. For a number of reasons, I determined that a three-course program would not work at Chapman.

I chose to develop a course based on simulations that introduces students to contract drafting and handling transactions, as well as helping them develop their professional identities. My belief is that students learn the most from applying their knowledge of the law, skills and values to problems they will encounter in practice. The course should provide a foundation for practice for all lawyers and prepare lawyers interested in transactional practices for advanced courses in more sophisticated and specialized areas.

Learning Goals, Assumptions and Approach

A course on transactions offers students unique opportunities to learn to integrate their knowledge of the law, skills and ethics in the context of deals. Students learn to work from the big picture to the detail work of putting a document together and to work as problem solvers for clients. Students develop their knowledge of the law, critical thinking skills and deal with ethical and business issues of practice. Working on simulations of transactions requires students to understand the goals of a client, the law, manage relationships with a client, deal cooperatively with another attorney while still effectively representing their client, draft contracts and attend to details. Simulations allow the teacher to control the nature, complexity and sequence of the issues the students address.

Experiential learning is a bridge between school and practice and can be accomplished in clinics, externships or simulation classes. Working on problems in context and from the perspective of clients can aid students in acquiring judgment and developing their identities as professionals in addition to enriching their knowledge of the law and skills.

**Experiential Learning Helps Bridge the Gap
Between Law School and Practice**

Law School

Student focused

Students work individually

Students Rely on Professors

Presentations are often multi-modal

Focus on theory and appellate cases

Assessment of learning of the student

Practice

Client/supervisor focused

Lawyers collaborate with other lawyers and professionals

Clients rely on lawyer for advice

Incomplete information

Timing is dictated by client

Results are measured by client satisfaction

**Experiential Education: Bridging the Gap
Between Law School and Practice**

Traditional Law School

Courses

- Student focused
- Students work individually
- Students rely on Professors
- Presentations are often multi-modal to help learning
- Professors focus on theory and appellate cases
- Assessment of learning of the student

Practice

- Client/supervisor focused
- Lawyers collaborate and often with other professionals
- Client relies on lawyer for expertise
- Incomplete information
- Timing dictated by client and supervisor
- Results are measured by client satisfaction

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As a result, I have never accepted the description of my work as teaching “skills courses” but consider my work as helping students learn “lawyering.” My goals are two-fold. Students should learn about the subject of the course, transactions, negotiation or securities claims. Equally important, students should learn to be effective, ethical and reflective lawyers who solve problems and add value for their clients.

This poses the question of “what is thinking like a lawyer?” I do not agree with Christopher Columbus Langdell that law is a science. That’s why we call it practice. While the Carnegie Report is a seminal document that will guide the development of legal education, I do not agree that most law schools do a good job teaching students to think like lawyers in the first year by the Socratic method. In my view, schools that rely in the first year primarily on the Socratic method teach the skills of legal reasoning and analysis. While it is clear that a person cannot practice law, if he or she cannot understand and critically analyze the law, “thinking like a lawyer” is much more. I believe that “thinking like a lawyer” is solving problems and adding value in an effective and ethical manner using and integrating knowledge of the law, legal analysis, communication advocacy and other skills.

Learning Goals and Objectives

Practice Foundations: Transactions has the following learning goals.

- I. Roles of Transactional Lawyers - Students will learn how transactional lawyers add value and solve problems for clients in a variety of roles.
- II. Contract Drafting - Students will acquire the basic ability to draft contracts and other documents to accomplish client goals and reflect the deal between the parties.
- III. Transactions - Students will acquire a foundation in the handling of basic transactions that lawyers encounter in practice.
- IV. Professional Identity - Students will learn values, practices and knowledge to begin to develop their identities as effective and ethical lawyers.

I have revised the learning goals and objectives and have calibrated them by the level of proficiency expected. Some topics are introduced, while a basic or solid foundation is expected for others. This course is designed to provide a foundation for those seeking to pursue a career as a transactional lawyer and a basic introduction to transactions and contract drafting for students pursuing other career goals.

Approach and Course Structure

These concepts are the foundation of my work:

1. Teachers must be leaders both inside and outside of the classroom. This includes availability, concern and service to the students, school and society.
2. Teaching should be transparent so that students understand the goals, methods of instruction and the expectations of them.

3. Students need constant feedback on their work and progress and to develop their ability to self-assess, set and monitor goals.
4. It is the responsibility of the teacher to establish a supportive community in the classroom where students feel respected and supported by their teacher and peers. Students need to feel comfortable that they can learn from mistakes and offer their assessments of the teaching of the course. Students need to learn that everyone makes mistakes, but the effective practitioners are the ones who learn, grow and improve from their mistakes. I tell my students that this class is a much better place to make mistakes than when they have started at their first job.
5. Active learning where students learn by doing produces a deeper understanding of the law as well as enhances the transfer of skills learned to practice. As summarized in a statement often attributed to Confucius:
“Tell me and I forget, show me and I remember, involve me and I understand.”
6. The course and assignments should be structured to aid learning and build habits that will aid students in practice. (For example, submitting class work 24 hours in advance of class helps students learn the habit of advance preparation.)

The coursework is organized as follows:

- Students receive the goals, readings, and materials for every simulation or exercise.
- Students submit the preparation for the simulation or the exercise a day before class.
- Students work on the exercise or simulation in class often in teams.
- Students discuss and often present to the class their work.
- Students reflect individually.

Each class is typically divided into two parts. In the first part we work on contract drafting, analysis and issue spotting. In the second half we work on the transactions that comprise the following major assignments.

1-Draft of simple asset purchase agreement (not graded)

- Translation of deal points to contractual language
- Introduction to the parts of a formal agreement
- Responsible use of samples
- Modeling of transactions
- Introduction to role of transactional lawyers

2-Major asset purchase agreement

- Full development of parts of the agreement
- Introduction to due diligence

- Introduction to dealing with supervisor and client
- Learn to incorporate comments

3-Redo Asset purchase agreement

- Learn to incorporate comments and redraft
- Include remaining parts of formal agreement
- Assumption of liabilities
- Indemnities and remedies

4-Revising an agreement and email to a client

- Analysis of an agreement prepared by other counsel
- Preparation of a revised draft
- Memo to client regarding revisions and next steps

5 -Introduction to transactional negotiation (using the transaction from #4)

- Negotiation through redlined drafts, meetings and phone calls
- Final agreement to close the deal

I have structured the work and assignments on the basis of increasing difficulty based on the following model of learning that I developed from the work of Harold Bloom, Carol Dweck and my experience:

1. Remembering
2. Personal understanding
3. Closed field where students prepare a document based on a defined issue from a set of facts. This is the first unit where students draft a simple agreement.
4. Open field where the students have to identify and resolve the issues from incomplete facts. These are the focus of the second and third units where students work developing the facts and spotting the issues to draft and revise the agreement.
5. Moving field where the student must handle the deal with another party and a client. This is the final unit where the students negotiate a simple agreement in meetings, phone calls and through the exchange of redlined drafts.

Providing Feedback and Working with Adjunct Faculty

Students benefit from and need constant assessment of their work in any course and especially for one involving learning to act as a lawyer and contract drafting. In addition, a key learning objective is to help students develop their ability to assess their work. I have tried to address this objective and balance the limited time that adjunct faculty, who are part-time teachers with other commitments, can devote.

A Course-In-A Box

What I have done is essentially created a course-in-a-box so that the adjuncts can focus on teaching and commenting on the major assignments. This includes an agenda,

lesson plan, a PowerPoint and exercises for each class as well as instructions, role-plays with documents for the major assignments and rubrics for grading.

Multiple Methods of Assessment

There are many ways to provide assessment and build the ability of students to assess themselves. I do not expect the adjunct faculty will be able to comment on the weekly assignments. However, another advantage of requiring students to submit work 24 hours in advance of class is that teachers can review the work and quickly get a sense of how the students are progressing.

We use model answers, peer review and student presentations of their work typically done in teams of two. Students enjoy work in teams and benefit from presenting their work to the class.

Opportunities for Reflection, Input and Feedback

At the outset of the course I ask students to write out their goals for the course. On the back of the Agenda for each class there are a number of questions each week to aid the students in reflecting on their work and providing feedback on their experience. Finally, at the conclusion of the course, I ask students to prepare a short reflective paper to tie together their learning. I also poll students on the hours that each assignment takes and over the course of two semesters. I try to calibrate the amount and difficulty of the work. I was initially too ambitious initially and needed to simplify the problems so students could get the most out of working on them.

Special Challenges for Students

Students are often initially thrown off when they are not provided all the facts at the outset of problem. Student sometime miss the certainty that there is no single “right answer” and quickly learn that there are often a number of ways to handle an issue depending on the circumstances. Other skills that students need to practice include:

- Understanding the perspective of others
- Anticipating
- Careful reading
- Attention to detail
- Listening and note taking

Why don't we cover more advanced transactions such as buying a company?

There are two principal reasons and I know others proceed differently. First, we focus on the fundamentals—understanding the client's goals; translating the deal into the document; drafting carefully and effectively and negotiating through redlines, meetings

and phone calls. Students report that the class is challenging. My hope is that we have given the students the opportunity to practice using the tools that will enable them to learn any type of transaction. Second, as a practicing lawyer I believe that using a form without knowing what the provisions mean is not good practice. A lawyer who uses a provision in a contract without knowing the implications may not only be embarrassed if a client or the other counsel ask about it, but may also commit malpractice. Thus we use what is essentially an acquisition agreement without the securities, tax and corporate law that students will learn later in law school.

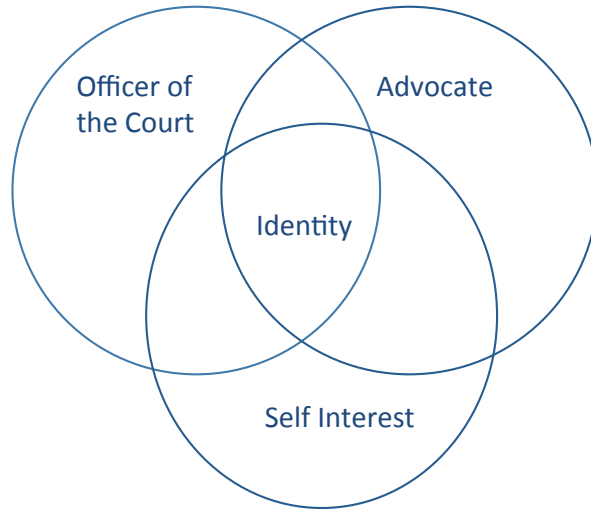
When I was in practice I called upon to solve or at least setup a process to solve difficult problems in weeks or less. I started the pilot for the Investor Advocacy Clinic at Suffolk on three and one-half weeks' notice. *Developing Practice: Foundations Transactions* has been more challenging than I expected. When I interviewed for the position at Chapman, Dean Campbell said to me that creating this course would give me the opportunity to pull together what I had learned in over 30 years of practice and teaching and he was right. I love this work and yet it is still a work in progress. After I review what I call *Paradigms of Practice*, I would welcome your input during the question and answer part of the program or later.

Paradigms of Practice—What remains when the class ends?

Studies show that experiential education helps students learn, retain and transfer to practice what they have learned at law school. I developed these paradigms for students to use throughout the semester and to hopefully give them tools that they can use in practice.

In the first class I show the students the diagram below which has three intersecting circles showing the three roles of a lawyer: (1) advocate; (2) officer of the court; and (3) self-interest. This is my favorite paradigm because how a lawyer or student balances these roles determines their identity as a lawyer. We refer to the balancing of these three roles in almost every class. When I gave my job talk at Chapman and a future colleague asked if we addressed ethics in my courses, I replied, "I refer to this diagram almost every class, and I tell the students you need to think about how to balance your roles as a lawyer every day you practice."

Three Roles of a Lawyer



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Professional identity is more than a commitment to the Canons of Ethics. I tell the students that they should not listen to messages they hear from the profession and even at law school that the “ends justify the means” and whatever is not prohibited by the Canons of Ethics is permitted—regardless of whether it is dishonest, misleading or shameful. The Canons of Ethics are only the standards you must uphold to avoid being disbarred. I suggest they consider three questions:

1. What is required by the Canons of Ethics?
2. What will work to help their clients and their practices?
3. Who are you—your identity?

Following the Canons of Ethics is simply the first step of the process. Students should ask what works as a transactional lawyer or in any area of practice. What is going to work for you when your reputation is on the line? The final question poses the issue of identity. Who owns your reputation? “Why did you go to law school?” You want to be able to look at yourself in the mirror every morning.

Professional Identity



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Students learn in the course that lawyers play a variety of roles for the client depending on the transaction, relationships and other circumstances. These roles include:

Consigliere who is a trusted advisor

Dealmaker who structures a transaction

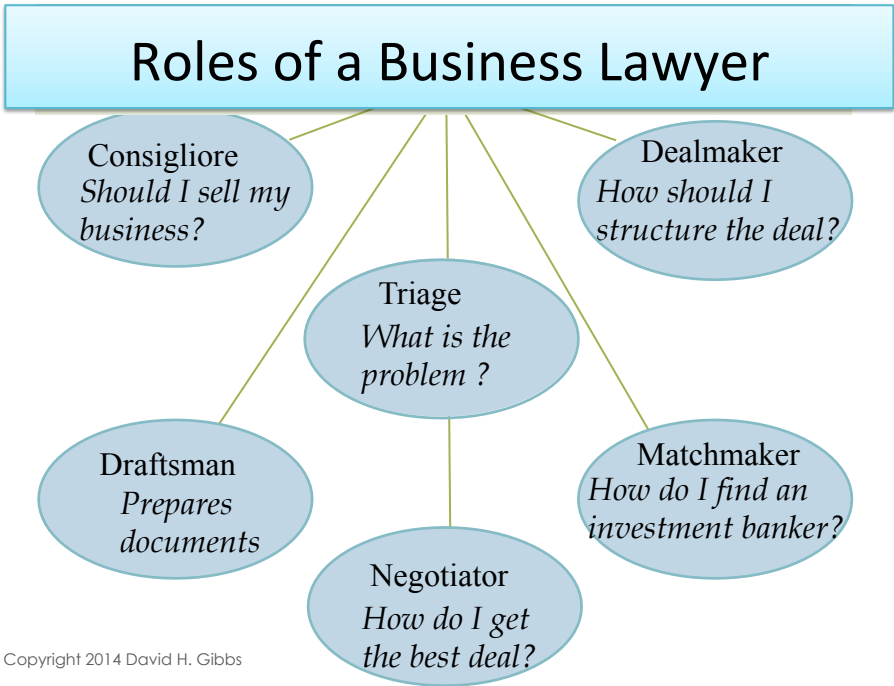
Draftsman who prepares documents

Negotiator who works to get the best deal

Matchmaker who refers the client to other professionals they need

General practitioner who does triage to help the client identify the problem

(For example, if employees are leaving a company is the problem the pay, benefits, a hostile work environment?)



We discuss that transactional lawyers are rarely told all the facts they need to know and that doing a transaction is often like navigating among icebergs.

Doing a Deal is Like Navigating Icebergs

What we see from the surface:

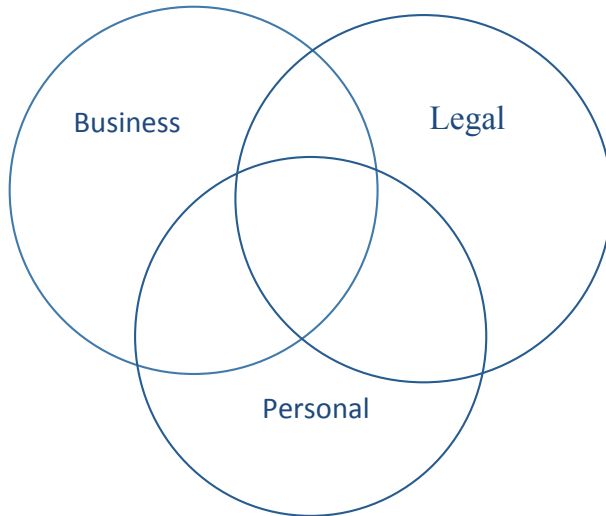


What lies below:



We use a number of tools to approach handling transactions. First we focus on issue spotting. We look for (1) business issues the clients decides; (2) legal issues that the lawyers need to determine and then advise the client; and (3) personal issues that must be considered.

Issue Spotting is the First Step



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Lawyers cannot possibly know all the issues that will be involved in their deals. We work with students about how to deal with all types of issues about which they don't know of or are not familiar. For law students that is almost everything. We divide the issue into three groups:

- I. Core competency
- II. Issue spotting
- III. Lack context/Need help (or get hit by a truck)

What does a lawyer need to know? A lawyer needs to know what they know and what they don't know.

We emphasize the importance of asking questions and listening. A lawyer may pose questions for many purposes. A question can aid a client by identifying an issue or problem even if the lawyer is not the person to handle it.

When approaching a transaction, I suggest to students that they begin by looking at the following questions that I modified from the Harvard Law School Problem Solving Course.

1. Who is the client?
2. What are the goals of the client?
3. Understand the deal
 - terms
 - signatories and other parties
 - context— business, legal and personal
 - state of play
4. Review the documents and communications
5. Determine the options, what must be done to proceed—information and actions, etc.
6. Assign responsibilities, set deadlines and confirm with client (who, what, how and when)

Questions for a Transaction

- Who is the client ?
- What are the goals of the client?
- Understand the deal
 - terms
 - signatories and other parties
 - context— business, legal and personal
 - state of play
- Review the documents and communications
- Determine the options, what must be done to proceed —information and actions, etc.
- Assign responsibilities, set deadlines and confirm with client (who, what, how and when)

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With the answers to these questions, we make diagrams, models and look at what has to happen for a deal to move from a discussion, to term sheet, to agreement and finally to closing and beyond.

Finally, I believe that a lawyer must be a leader. This involves

- Self-leadership
- Leadership with clients and colleagues
- Leadership with other counsel, parties and courts
- Leadership by service to the legal profession and society

A Lawyer must be a Leader

- Self-leadership
- Leadership with clients, colleagues and other professionals
- Leadership with other counsel, judges and other parties
- Leadership by service to the legal profession and society

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Conclusion

A few final thoughts.

I would not be able to do this work without the wise counsel and help of a number of people to whom I am deeply grateful—Tina Stark, George Kuney, Kent Coit, Danny Bogart, Kathy Heller, Jay, David Bloom, Katlin Ritchey, my colleagues at Chapman and friends and former clinical colleagues and at Suffolk Law School and most of all my students.

In closing, I tell you what I tell my students that it has been my privilege to serve as a lawyer in what I still believe to be a noble profession and to serve them. And I thank you for your time and attention. Before opening the program to questions, I would like to share an email I received from a student- the type that makes this all worthwhile:

“Hi Professor Gibbs,

So, I had my second day of work at my summer job (I'm working at an in house legal department in Irvine) today and I had to review and comment on an Asset Purchase Agreement. I turned in my comments and revisions and the supervising attorney told me I did a great job and had excellent attention to detail. So, I just wanted to say thanks because had I not taken your class, I definitely would have been lost and it would have taken me way longer.

Already putting my transactional skills to work! Thank you.”

Thank again for your time and attention.

I can be contacted at dgibbs@chapman.edu and would welcome your thoughts.

So, can I open the discussion for questions either for Jay or me or comments?

- J. Finkelstein: One thing I should add because David touched on it in his context, is how do you evaluate students in the International Business Negotiations class? I use a three-part evaluation. Forty percent is participation, based on discussion in class and discussion at the negotiating table. There are also two written products, each of which is 30% of the grade. The first written product is a contemporaneous diary of each stage of the negotiation; the second is a final retrospective paper on a topic relevant to international business negotiations. Usually, this paper is on a topic of their choice. I give them some guidelines, and it's to integrate the process of doing international deals and to reflect upon what we did in the classroom. So, it is two written components and one class participation component that comprises the grading basis.
- D. Gibbs: Grades in my class are 50% based for the major assignments; 40% for weekly assignments and class participation; and 10% for a reflective paper about the negotiations. The weekly assignments and class participation is credit/non-credit for timely and proper submission and speaking at least once in each class. My classes are discussion based so participation has not been a problem.
- J. Finkelstein: Right, and I've had students who have been very silent in class but produce such stellar written work and analysis that you know that

they got it. And grading in a class like this is in a relatively narrow grading range. The lowest grade is probably a B-. Most of the grades trend higher because the students really demonstrate that they have learned what I intend them to derive from the class.

Audience: What is the assessment process that you applied for participation? How do you grade students in that?

J. Finkelstein: It's subjective. It's the quality of the questions and the way they conduct the negotiation. Did they lead their team? If they led their team, did they lead them well? I can't tell you I have a checklist. I can tell who has done a good job. I can tell you who has been engaged in the discussion.

Audience: And presumably it's accumulative as you go along so that somebody who starts off not being so participatory can make up for it?

J. Finkelstein: I actually don't try to grade it sequentially. I basically look at it in retrospect. It's a whole. So if somebody starts off slow and really blossoms, sure, they'll do just fine.

Audience: And is it controversial to students? Do they challenge that?

J. Finkelstein: I only once or twice in 12 years have had a student challenge a grade. Most of the time a lower grade is a result of deficiencies in the student's written work, such as poor grammar, typographical errors, or just poor writing. But generally speaking, students haven't had a problem with their grades.

D. Gibbs: I am interested in the systems that others use for grading. I use an objective based system where I review each major assignment, make numerous comments and then award points for each section based on a rubric. I don't know if anybody has any comments about grading that they could share with us.

Audience: How many students are in your classes?

J. Finkelstein: I normally have about 15 to 18 students in my classes, so I'm looking at mine as a seminar.

D. Gibbs: Our current plan is for 10 sections of sixteen or less students. Some of the more experienced teachers in the field have recommended 12 as the class size.

- Audience: You would have a mandatory meeting with 12 students?
- D. Gibbs: Yes. We have midterm conference, but I don't think this will be practical when the course is taught by adjuncts. How many are in the classes you teach where you do these contracts?
- Audience: At Emory they had 12.
- Audience: I teach contract drafting, and it's capped at 16. And I teach a business planning assimilation course, and I never capped it. I used to have a lot of students in it, and I'm actually going to transition it to what's called a workshop. And our workshops have a separate curve than our other classes. So, median is a B+ so that everyone could get a B+. I don't know how you would implement a mandatory meeting for 12 students in that type of class. That's really hard.
- Audience: I teach contract drafting in the fall. I have over 50 students.
- D. Gibbs: Over how many?
- Audience: Fifty, and a mandatory curve, which is much easier to me for that size.
- D. Gibbs: Other questions?
- Audience: How do you guys assess a reflection memo? What are the criteria you use to judge?
- D. Gibbs: That is difficult because I get some students who give me analytic papers and other students describe their personal growth. One wrote to me that she was the first person in her family to go to college and that she had been raised never to speak unless asked a question and never thought she would go to college, let alone law school.
- I provide guidelines and have a number of required topics. Students have to discuss the videos of their negotiation. The discussion has to be in an analytic framework and not just a narrative of what happened. But it is difficult. I let the class decide whether they want to use anonymous grading for all of the assignments. However, the redo of the major agreement, can't really be anonymous.

One question I have is about the midterm conference. I have them set goals at the beginning of the class. At the midterm conference, I ask five questions:

1. What do you think your doing well in the class?
2. What do you want to improve? And that could be strength?
3. Are you meeting your goals or do you want to reassess them?
4. Do you want my assessment of your work and suggestions for goals?
5. What could we do to improve the course and help you meet your goals?

J. Finkelstein: I basically have that as well. The teacher's manual has every issue embedded in the simulation outlined. What cannot be scripted is the order in which they're going to come up. The class instruction needs to follow the students. I have complete outlines of my course, three lectures, which I do in sequence as an introduction and then the other issues are outlined. After the initial lectures, faculty need to be prepared to address the other issues at such time that the students need guidance on that issue.

Part of this class is a layering process. I have to decide how much information to give them at what point in time and not to overload them. There are times when they go into a negotiation and if an issue surfaces, sometimes I will suggest that they table it for the following session. Or, we'll take a sidebar break and have a discussion and then return to the negotiation and maybe exam the issue further in the next class period. It is part of the transactional process. We can't control the timing on everything, so we do as best we can and I provide them as much information as I possibly can in the timeline that they need it.

Audience: How distracting do you find G-Chat?

J. Finkelstein: Actually not distracting at all because it is very good for the students who are not negotiating. The ones negotiating don't pay as much attention to it, because it is very difficult to monitor G-Chat and negotiate at the same time. I've now adopted the process of suggesting that one person on the negotiating team should monitor the G-Chat and if there's something relevant, send it to the leader so that it can get mentioned. It is way too confusing to read G-Chat and negotiate at the same time. So, I caution the negotiating team away from that.

The G-Chat's really intended to keep the students who aren't negotiating that week engaged. And you would be amazed at some of the things that get said in G-Chat. It also allows me to inject thoughts and instructional points during the negotiation, so it is a very helpful tool pedagogically.

Audience: They can be very lengthy in their G-Chat.

J. Finkelstein: They can be lengthy and they can also be brutal. Most comments are, however, short and to the point.

Audience: Yes, but if you're trying to read that, you're not listening to the negotiation.

J. Finkelstein: Yes. That is why the negotiating team designates a person who's trying to synthesize it in the event there's something that needs to be injected.

Audience: Do you observe every negotiation?

J. Finkelstein: Yes, absolutely.

Audience: And do you give feedback?

J. Finkelstein: Yes, we do discuss it either in the next class or sometimes during the course of a negotiation we may discuss what has happened, why it happened, and how best to respond. There are times when I will tell them, using the G-Chat, that they should take a break so we can have a sidebar conversation, or I'll send a suggestion by G-Chat as to how they might address a topic that has surfaced. But, yes it's definitely a supervised and monitored negotiation. And the first portion of the class following the negotiation is devoted to debriefing and reflecting on what we have learned.

At the first negotiation, for example, you know they're meeting each other for the first time. My students at Georgetown are shocked when the negotiation goes live and they see the students from Dundee whom they expect to have red hair and be wearing kilts but turn out to be predominately from developing nations.

So, all of the sudden there is something that they've not anticipated, and I've not given them any clue that that's going to happen because,

in real practice, I don't know who's going to show up at the negotiating table when I first walk into the negotiating room. I do tell them the first negotiation is predominately getting to know the other side and that they should not expect to have any significant substantive agreements coming out of the first negotiation. That's why we've got our cumulative process of a series of negotiations.

On the other hand, you do live with your mistakes in this negotiation. And if you had something that went awry in negotiation two, maybe you can correct it in negotiation three, but otherwise you're building your deal based upon that, if a deal can be had. And there are mistakes made. There are clearly mistakes that are made.

D. Gibbs: Students like the course because they start to think like attorneys and learn things they believe will be useful. I received the following email one day last summer from a student.

J. Finkelstein: They love it. They spend a tremendous amount of time learning. I do get a comment occasionally; actually it was one Georgetown student who commented that it was too much effort for a 3-credit class. I don't get it too frequently. Most of them understand and they spend a tremendous amount of time outside of class preparing. And I see emails being sent at all hours. Midnight, 1 AM. I've also gotten comments from students about how anxious they were leading up to the first time they were leading the negotiation. Only once in 12 years have I had a student who actually felt the pressure so much that they couldn't speak when they actually went to speak. But most of them are fine. They say that they were so anxious but that once they started negotiating they realized that they could actually do this. I am able to watch students mature over the course of a semester. They go from tentative to confident.

The last negotiating session is often a rapid fire exchange. They know they're running out of time. Every deal times out even in real life, and sometimes it becomes a drafting session where the students are precisely editing as section of the letter of intent. They will put the document on the screen and start working on the language. It becomes an amazing process, and it never ends the same way twice. No two negotiations end the same, which is a marvelous part about teaching this class. With each new set of students, you know that the class is going to have a significant impact on them and you don't now how it's going to come out until it ends. So, it's a lot of fun in the classroom with the simulation.

What David and I are doing gets you highly engaged with the students. They are inquisitive. They engage with themselves. They engage with the students in the other class, where they actually work out issues. They build personal relationships across the negotiating table, and that is what happens in real life.

So, thank you everybody. Thank you for your attention.

End of Session