

## SPECIFIC TRANSACTIONAL LAW PROGRAMS AND COURSES

Jay Gary Finkelstein<sup>1</sup>

*One Size Does NOT Fit All:  
Reflections on Successful  
Implementation of an Experiential  
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*One Size Does NOT Fit All: Reflections on Successful  
Implementation of An Experiential Education Class*

Jay Gary Finkelstein

“[I]f law schools are to prepare students to meet the demands of their roles . . . they will have to give students more theory and practice—and, more importantly, more integration between the two.”

“[O]ne important barrier has been that few current faculty members have either the interest or experience to build such bridges.”

“[T]here is a need for more faculty with experience in the institutions and organizations, beyond the academy, which play important roles in our society—and the ability to use that experience to inform their teaching and scholarship.”<sup>4</sup>

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<sup>4</sup> BEN W. HEINEMAN, JR., WILLIAM F. LEE, & DAVID B. WILKINS, LAWYERS AS PROFESSIONALS AND AS CITIZENS: KEY ROLES AND RESPONSIBILITIES IN THE 21ST CENTURY 53-55 (2015) (hereafter, “The Harvard Report”).

The reform of the law school curriculum has been a constant topic of discussion for more than two decades.<sup>5</sup> The law school curriculum, as crafted over a hundred years ago by Charles Langdell, has been mostly focused on legal theory and not on practice. Consequently, full-time law school faculty at most law schools are largely divorced from practical legal training and more focused on doctrinal legal issues.<sup>6</sup> Law school education has been mired in the debate of how to implement change to reflect the growing need for more practical skills training. The dilemma posed is that, as indicated by the opening quotes, those who are generally responsible for the legal curriculum lack the ability to teach the practical application of law and, also, disdain the inclusion of more practitioners to augment the ability to make legal education more practical.

I entered this debate both inadvertently and naively nearly 15 years ago when I started teaching as an adjunct faculty member. As a transactional partner in a major law firm, I started teaching with the assistance of a colleague and friend who was a member of the tenured faculty at American University, Washington College of Law. He had developed an extended simulation module and an initial collaboration with another law school to teach an

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<sup>5</sup> See The Task Force On Law Schools And The Profession: Narrowing The Gap, *Legal Education And Professional Development – An Educational Continuum*, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B., 5 (1992). See generally WILLIAM M. SULLIVAN ET. AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007). Countless additional articles, blog posts, conferences, and other academic discussions have ensued, followed by actions by the American Bar Association to require more practical skills classes as part of the accreditation process of law schools. See *ABA Standards and Rules of Procedure for Approval of Law Schools 2014-2015, Section 303(a)(3)*, AM. BAR ASS'N, [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf). (mandating six hours of experiential courses). State bar associations, such as California and New York, are also working to redefine the requirements for admission to the bar by requiring additional practical training by law schools. See *CLEA outlines reasons the New York Bar's Task Force on Experiential Learning and Admission to the Bar should adopt a clinical training requirement for all graduates*, LEGAL SKILLS PROF. BLOG (Nov. 17, 2015), [http://lawprofessors.typepad.com/legal\\_skills/2015/11/clea-outlines-reasons-the-new-york-bars-task-force-on-experiential-learning-and-admission-to-the-bar.html](http://lawprofessors.typepad.com/legal_skills/2015/11/clea-outlines-reasons-the-new-york-bars-task-force-on-experiential-learning-and-admission-to-the-bar.html) (last visited June 18, 2016); Mary Lynch, *What's going on in California? "TFARR- recommended" 15 credits of competency training*, BEST PRACTICES FOR LEGAL EDUC. (Aug. 13, 2015), <https://bestpracticeslegalea.albanylawblogs.org/2015/08/13/whats-going-on-in-california-tfarr-recommended-15-credits-of-competency-training/>. The author has also written on this topic. See, e.g., Jay G. Finkelstein, *Barriers to Entry: Putting it Together, School by School*, J. EXPERIENTIAL LEARNING (forthcoming Fall 2016); Jay G. Finkelstein, *Practice in the Academy: Creating 'Practice Aware' Law Graduates*, 64 J. LEGAL EDUC. 622 (2015).

<sup>6</sup> See generally Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105 (2010).

innovative class in International Business Negotiations. I joined with this professor in 2003 to co-teach and add practical skills components to the class (reflecting exactly the type of bridge between faculty and practitioner as later recommended in *The Harvard Study*). Since then, I have been teaching the class solo, further developing the structure and pedagogy that is used today. With my colleague, we authored both a journal article on the class<sup>7</sup> and a textbook and teacher's manual for the class.<sup>8</sup>

The International Business Negotiations class was intended to enhance the law school experience through creative pedagogy. It was originally designed as a typical, semester-long class to introduce law students to the manner in which a transactional lawyer approaches a complex business problem, including the multi-disciplinary nature of transactional practice that integrates law and business concepts to implement the objectives of a business client. Rather than teach students “the law,” the class was intended to teach students how “to use” the law to achieve client goals. While certain doctrinal elements regarding corporate law and negotiations would be discussed in the class, these topics would be addressed in the context of understanding the simulation facts and achieving the client's intentions. The class was designed, therefore, as a “practical skills” class even before that concept became in vogue.

Moreover, since the class focused on transactional law, it introduced students to an aspect of legal practice generally neglected in the law school curriculum. My motivation to teach in the academy evolved from this particular void in my own legal education,<sup>9</sup> and I wanted to afford students the opportunity to be introduced to the type of legal work in which over half of the practicing lawyers are engaged<sup>10</sup> and which is completely different from the

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<sup>7</sup> Daniel D. Bradlow & Jay G. Finkelstein, *Training Law Students to be International Transactional Lawyers – Using an Extended Simulation to Educate Law Students about Business Transactions*, 1 J. BUS. ENTREPRENEURSHIP & L., 67-87 (2007).

<sup>8</sup> DANIEL D. BRADLOW & JAY G. FINKELSTEIN, *NEGOTIATING BUSINESS TRANSACTIONS – AN EXTENDED SIMULATION COURSE* (2013). The teacher's manual that accompanies the textbook is available at [http://www.aspenlawschool.com/books/negotiating\\_business/default.asp](http://www.aspenlawschool.com/books/negotiating_business/default.asp) under the tab “professor materials.” The password to access the teacher's manual is available from either the author or the publisher.

<sup>9</sup> Although I graduated from Harvard Law School in 1978, *magna cum laude*, none of my classes provided the skills and insights I needed to be a successful transactional lawyer. Like most of my contemporaries and law students to this day, I graduated without any exposure to actual transactional agreements or the process by which they are created. The International Business Negotiations class became a vehicle to rectify this.

<sup>10</sup> Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS'N LEGAL WRITING DIRECTORS 118, 118-32 (2008) (“At least half, if

dispute resolution aspect of law that is the focus of the traditional law school curriculum. As the introductory quote in the textbook for the class published in 2013 indicates, I wanted the opportunity to have students “[s]tep into my world, and welcome [them] to it!”<sup>11</sup>

Another nuance of the International Business Negotiations class is the focus in a business transaction on the “win-win” solution. With most of law school involving the study of dispute resolution, and since most legal disputes are perceived as “win-lose” encounters, the concept of utilizing legal skills to achieve a “win-win” result is often a novel concept for students to learn in applying law to business transactions. It generally takes students time to understand that a business transaction is consummated only if both parties perceive it as beneficial; that a lawyer can represent a client “zealously”<sup>12</sup> and, at the same time, both parties can walk away content that the transaction has achieved at least most of their respective objectives.<sup>13</sup>

The International Business Negotiations class is based on an extended simulation of a business negotiation between two companies: a multinational pharmaceutical company and a company in a fictitious developing African country that has a secure supply of a key raw material needed by the pharmaceutical company to produce a new medication. Each party has specific objectives. The developing country is in need of new markets, new employment opportunities, technology transfer, and similar benefits of foreign direct investment. The pharmaceutical company needs, *inter alia*, a reliable source of the raw material and access to new markets for products in Africa. All of the basic criteria for a potential mutually beneficial transaction exists, and the lawyers have been asked to begin the negotiations. The students encounter the complexity of the transaction and the challenges for the lawyers as they

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not more, of all lawyers engage in transactional practice”); *see also* Sheila F. Miller, *Are We Teaching What They Will Use? Surveying Alumni to Assess Whether Skills Teaching Aligns with Alumni Practice*, 32 MISS. C. L. REV. 419, 426 (2014) (survey results show 48% of the alumni surveyed practice transactional law, either exclusively or in combination with litigation).

<sup>11</sup> The quote is from “My World . . . and Welcome to It,” a 1969 television show based on the life and cartoons of James Thurber. *See My World and Welcome To It*, WIKIPEDIA, [https://en.wikipedia.org/wiki/My\\_World\\_and\\_Welcome\\_to\\_It](https://en.wikipedia.org/wiki/My_World_and_Welcome_to_It).

<sup>12</sup> *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2016) (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”)

<sup>13</sup> To underscore this point, I often cite the quote from J. Paul Getty: “My father said: ‘You must never try to make all the money that's in a deal. Let the other fellow make some money too, because if you have a reputation for always making all the money, you won't have many deals.’” *J. Paul Getty Quotes*, QUOTES.NET, <http://www.quotes.net/quote/51459>.

study the facts of the deal and the goals of the parties. In order to negotiate the transaction effectively, the students need to learn the key aspects of the respective businesses as well as the major legal issues involved in structuring the various forms of agreements likely to govern any deal.

The course is designed so that each of the two sides to the transaction may be represented either by a class at two different law schools (introducing the “unknown” counter-party), or by two sections of the same class at a single law school. Each class or section continues to represent its client throughout the entire simulation. Class discussion focuses on the substantive legal and business issues presented by the module that need to be understood to negotiate effectively (the “doctrinal component”), as well as negotiating strategy, tactics, and psychology (the “practical skills component”). The negotiations proceed via both written communications and live negotiating sessions (which may be conducted by video conference or, where geography permits, face-to-face). The negotiations are cumulative and evolve from week to week. The students work to resolve issues and develop collaborative solutions, and it is often not clear until the final negotiating session whether all issues will be resolved and a transaction successfully concluded.

The class, from the outset, truly resonated with students who provided enthusiastic evaluations. Several recent student comments capture the themes and sentiments expressed by students through the many classes that have been taught:

“It was amazing to see what kind of creative solutions that we found to the problems we were facing. My critical thinking and problem solving skills were greatly enhanced by this course, and I am grateful to have been a part of it.”

“The skills that are being taught are very important for lawyers and this course should become mandatory in my opinion. It is hard and demanding but it is an amazing experience.”

“I really think I learned more about corporate law than I could have learned in any classroom environment, and it was truly an unforgettable experience. By far my favorite part of law school thus far.”<sup>14</sup>

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<sup>14</sup> These quotes are from the anonymous class reviews of a class taught in 2016 between Tel Aviv University and Northwestern University law schools. The class is discussed *infra* in the text of this article.

The International Business Negotiations class started as a traditional semester-long class taught in the two-school, paired class format with each class representing one side of the transaction.<sup>15</sup> Written communications between the parties have always been a core means of communication in the negotiations. The original format of the class required weekly written exchanges and a single, final videoconference negotiation. The student reaction to the live inter-active negotiation was so positive that in the next couple years we experimented with adding additional video conferencing sessions. We first tried three, then five, and ultimately six live interactive sessions. The process was largely trial and error, working to perfect the model in a way that achieved the learning objectives of the course and to create the best student interactive experience. Student comments to each format were a key driver of the changes, with each change being monitored by the professors at each of the two participating schools. Over a period of about five years, it became evident that the semester-long class with five interactive videoconference sessions proved most effective. At this juncture, my colleague and I published an article about the class and its success.<sup>16</sup>

Once the most effective format was identified and the article published, the process of expansion of the class to other law schools commenced. Naively, I believed that an experiential learning, practical skills class proven to be successful in introducing transactional law and popular with students would be welcomed at each law school. Rapidly, albeit reluctantly, I learned about law school politics and the process for new class approval. While it took approximately two years to navigate all of the committee and faculty reviews, Northwestern became the first U.S. law school (other than American where it was originated) to offer the class.

Once Northwestern offered the class in partnership with American, Stanford soon became the second additional U.S. law school to adopt the class, and thereafter, with proof of concept and multiple participating schools, it became far easier to gain access to, and acceptance by, a number of additional law schools.<sup>17</sup>

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<sup>15</sup> The original paired schools were American University, Washington College of Law, and University of Dundee, Scotland.

<sup>16</sup> See Bradlow & Finkelstein, *supra* note 5.

<sup>17</sup> There is a YouTube video that was showcased at a recent Educating Tomorrow's Lawyers conference that analyzes how a "movement" begins. It is applicable to the expansion of the International Business Negotiations class. The video can be found at <https://www.youtube.com/watch?v=fW8amMCVAJQ>, or by doing a search for "shirtless dancing guy."

The full history of the class and its subsequent adoption at multiple U.S. and international law schools, has been recounted in other articles<sup>18</sup> and need not be repeated here. Rather, the focus here is the evolution of the structure and formatting of the class to fit the needs of the multiple academies that have added it to their curricula.

There was, however, another significant, and relevant, obstacle to the expansion of the class. As stated in The Harvard Report, “one important barrier has been that few current faculty members have either the interest or experience to [teach practical skills classes].”<sup>19</sup> Current faculty have their own teaching commitments and are often not interested in assuming responsibility for a new class developed by someone else.<sup>20</sup> Recognizing that I personally could only teach a limited number of classes each year, and even before The Harvard Report’s directive that “there is a need for more faculty with experience . . . beyond the academy [i.e., practical skills],”<sup>21</sup> it became apparent that a primary way to expand the offering of International Business Negotiations to additional schools would be to present the class *along with a capable instructor to teach it*.

Many practitioners, particularly those who have practiced for a number of years, contemplate the opportunity to teach. While not every good practitioner would be a good instructor, many would be effective in the classroom, but they lack both the patience to develop a class and the knowledge of how to get a class accepted by a law school to teach. Presented with the opportunity to teach a developed class, they are eager to do so. Knowing this, I have approached numerous friends and senior colleagues at both my law firm and other law firms throughout the country to invite them to teach at law schools in their area, and they have enthusiastically embraced the opportunity to teach the International Business Negotiations class. With this available corps of practitioner/teachers (embodying the prescription in The Harvard Report for “for more faculty with experience”<sup>22</sup>), the ability to open doors at additional

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<sup>18</sup> See sources cited *supra* note 3.

<sup>19</sup> The Harvard Report *supra* note 2, at 54.

<sup>20</sup> There are, fortunately, a growing number of exceptions to this statement. Law schools offering IBN taught by full-time faculty include: University of Chicago, University of Dundee (Scotland), University of Denver, IDC (Israel), Suffolk University, Bucerius (Germany), Boston University, FGV (Brazil), and York (UK). Adjunct faculty collaborate with full-time faculty at University of Chicago, IDC (Israel) and Bucerius (Germany).

<sup>21</sup> The Harvard Report, *supra* note 2, at 55.

<sup>22</sup> *Id.*

schools to offering the International Business Negotiations class has been vastly eased.

Nevertheless, having a successful, highly acclaimed practical skills class model in the under-served area of transactional law, even with the ability to provide an able instructor, may be persuasive, but not sufficient. Many law schools already feel that they have an abundance of classes being offered, and any additional class creates the risk that students in already declining class sizes will be drawn-away from classes offered by traditional faculty. In this environment, not even a compelling class is likely to pass the scrutiny of the academic review committees. The traditional, semester-long class may find no room in the schedule.<sup>23</sup>

Law schools are wrestling with ways to accommodate conflicting interests, including offering practical skills classes through non-conventional models. Inter-session offerings of short-form classes (usually one to two weeks) are being added to allow students more opportunities to take a wider variety of subjects without interfering with traditional classes. In addition, weekend classes, summer programs, and two to three week intensive classes offered during the regular semester are being introduced. While adding more opportunities to enhance the traditional curriculum, such “short-form” class models also appeal to practitioner-instructors, who may not have sufficient time or flexibility in their schedules to commit to teach for an entire semester class.

Successful innovative programs need to be able to morph to the alternative timeslots in the curriculum in order to be considered as a potential new offering and to pose less of a threat to existing or traditional courses (as well as the faculty teaching them). Presenting a class in an intensive or abbreviated timeslot also enhances the likelihood of experimentation, and if a new class concept fails to attract sufficient students, garners less favorable reviews, or needs to be dropped due to an instructor conflict, the disruption to the curriculum is minimized. Flexibility enhances potential acceptance and success while minimizing downside risk. To meet the needs and be accepted as an offering at multiple schools, multiple models of a class must be available.

Such has been the evolution of the International Business Negotiations class. From its original incarnation and development as a successful experiential, collaborative, semester-long class offered in partnership with

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<sup>23</sup> Another reason expressed by some schools for not offering the IBN class is the lack of funds to pay an additional adjunct professor. Even though adjuncts are the lowest cost instructors in any academy, and even if IBN fills a needed niche, the budget constraints may be insurmountable.



classes at two separate law schools, the course has been offered in multiple flexible formats, opening opportunities for the course to be considered and added to the curriculum at numerous law schools.

In addition to the traditional semester- or quarter-long class, among the formats in which IBN has been offered are (i) nine 2.5-hour classes over three weeks, (ii) four 3-hour classes over one week, and (iii) six 2.5-hour sessions over two weeks, with each version of the class covering all substantive areas necessary to understand and conduct the negotiation. The negotiating sessions, which generally are three hours each in a traditional semester long class (15 hours total), are reduced to one and a half to two hours each and are generally limited to four sessions in the shorter format classes. The time for class discussion of the progress of, and strategy for, the negotiation is also reduced to fit the limited hours available.<sup>24</sup> The reduced sessions are intense and the students must work hard between sessions to make the experience work, but such condensed formats are successful in achieving the goal of introducing both transactional law and practical negotiations skills. While more time is always desirable, we can work with the framework provided to create an efficient “87-percent solution” to the need for more transactional law and practical skills training.

Flexible modeling has resulted in something extremely rare for the International Business Negotiations class: A law school class replicated in its entirety at over 30 law schools around the world, including six of the top 14 law schools in the US and eleven international law schools. At least a third of the offerings are in non-conventional formats designed both to meet time available in the curriculum and not to compete with other offered classes. The below table identifies the multiple formats and offering law schools (as indicated, some schools have used more than one format or changed from one format to another):

FORMAT	LAW SCHOOLS OFFERING
<b>Traditional, Semester- or Quarter-long, collaborative class</b> (3 credits, 39 hours)	<ul style="list-style-type: none"> <li>• <b>American/Dundee</b> (Scotland)</li> <li>• <b>American/Ghent</b> (Belgium)</li> <li>• <b>UVA/Northwestern</b></li> <li>• <b>Georgetown/Dundee</b></li> <li>• <b>Stanford/Northwestern</b></li> </ul>

<sup>24</sup> In order to afford more time for class preparation and discussion, I have used a pre-recorded introductory lecture on negotiations (key issues, strategies, tactics, etc.) to be viewed by students prior to the first class session. I also underscore to students (generally via emails) the importance of having read and studied the simulation facts prior to the first class.

<p><b>Negotiations via video conferencing</b></p>	<ul style="list-style-type: none"> <li>• <b>Suffolk/York (UK)</b></li> <li>• <b>Georgetown/FGV (Brazil)</b></li> <li>• <b>UVA/Bucerius (Germany)</b></li> <li>• <b>UCLA/Northwestern</b></li> <li>• <b>Western Ontario/Ghent</b></li> <li>• <b>Fordham/Hebrew University (Israel)</b></li> <li>• <b>Chicago/Tel Aviv University (Israel)</b></li> </ul>
<p><b>Traditional Semester- or Quarter-long, collaborative class</b> (3 credits, 39 hours)</p> <p><b>Face-to-Face Negotiations</b></p>	<ul style="list-style-type: none"> <li>• <b>Stanford/Berkeley</b></li> <li>• <b>American/Georgetown</b></li> <li>• <b>Hastings/UC Davis</b></li> <li>• <b>Chicago/Northwestern</b></li> <li>• <b>Northwestern/Loyola</b></li> </ul>
<p><b>Single Law School Semester-long, Divided Class</b> (3 credits, 39 hours)</p> <p>Face-to-Face Negotiations</p>	<ul style="list-style-type: none"> <li>• <b>Boston University</b></li> <li>• <b>Hastings</b></li> <li>• <b>Washington and Lee</b></li> <li>• <b>American University</b></li> <li>• <b>Hebrew University (Israel)</b></li> </ul>
<p><b>Intensive Classes Divided Class Format</b> (credit varies by length and school)</p> <p>Face to Face Negotiations</p>	<ul style="list-style-type: none"> <li>• <b>Baltic Federal University (Kaliningrad)</b> (Two weeks – Summer School)</li> <li>• <b>Sun Yat-sen University (China)</b> (Two weeks, during semester)</li> <li>• <b>Indiana University</b> (One week - Winter Intersession)</li> <li>• <b>Berkeley</b> (One week, Summer Intensive LLM Program)</li> <li>• <b>IDC (Israel)</b> (Two weeks – during semester)</li> <li>• <b>Western Ontario (Canada)</b> (Three weeks, Winter Intersession)</li> </ul>

Most new concepts go through a process of modification and improvements. Software is refined, corrected, and improved through iterative

offerings (e.g., Windows 10); and products evolve (e.g., iPhone 7). Innovative pedagogy is no exception, and innovation to gain acceptance actually never ends. In the past two years, another new model of the International Business Negotiations class has been initiated with great success. Referred to as the “traveling class,” it appeals to the need for students at US law schools to gain exposure to the international aspects of legal practice. The “travel class” has partnered Northwestern Law School with Tel Aviv University. Offered by Northwestern immediately following the end of its Spring semester exam period and prior to the beginning of summer clerkships, the three-credit class is taught in a two-week intensive module that begins with separate preparatory classes at the respective law school campuses for the two groups of participating students. After the initial preparation, the Northwestern students and faculty travel to Israel to conduct one week of negotiations in a cross-cultural, face-to-face format that completely replicates the negotiation of a private international business transaction. The class is taught from 9:00 a.m. to 5:00 p.m. each day with morning and afternoon negotiating sessions interspersed with separate team discussion, strategy, and planning sessions with faculty. The immersive experience is extraordinarily effective in achieving the goals of the course. Student reactions have been overwhelmingly positive and have stressed both the cross-cultural impact and intensity of the experience, both of which affirm the pedagogic objectives of the class:

**“The condensed nature of the course places the students in an atmosphere that brings a practical experience that is unattainable in other courses.** We all feel as though we're learning what the real-world negotiation would be like.”

“Definitely the greatest strength is the fact that the course **gives students from different countries and cultures [the opportunity to] get together and negotiate.** It enabled all of us to get a real life experience in what international negotiations look like.”

**“Overall [it] was one of the most significant courses I've had and that inspired me to reach out for negotiations as a lawyer, which I'm grateful for.”**

The need for change in the law school curriculum has been apparent for some time to achieve better results for students entering the legal profession. As The Harvard Report clearly states, there is a need to create more bridges between the academy and the practicing bar to augment

conventional law school offerings.<sup>25</sup> It is also important to acknowledge the challenges of creating and offering new classes to respond to the new demands: (a) the threat of competition with other classes, (b) the willingness or ability (and possibly the resistance) of existing faculty to teach such offerings, (c) the challenge of getting more practitioners into the classroom, and (d) the ability of the law schools to balance multiple competing interests. By designing classes that can be offered in multiple flexible formats, it is possible to enhance the ability of law schools to find a creative space for classes that will respond to the demands for reform in the curriculum and make it possible for more practitioners to contribute to the educational environment while balancing other competing concerns. Varying formats accommodate multiple needs and facilitate finding solutions while minimizing disruption and fostering needed change.

***PRACTICE FOUNDATIONS: TRANSACTIONS – LESSONS LEARNED  
FROM IMPLEMENTING AN INTRODUCTORY TRANSACTIONS COURSE***

**David Gibbs**

**Introduction**

Good afternoon. Thank you for attending and thanks to my co-panelists Jay Finkelstein and Brad Starker. My name is David Gibbs. I teach at Dale E. Fowler School of Law at Chapman University in Orange, California. Today I will be discussing the development and implementation of an introductory simulations based course on transactional practice at the Chapman University Dale E. Fowler School of Law.

My background includes practice, clinical teaching and teaching simulations based courses. I practiced law for 30 years in corporate law firms in Boston. I began my career as a trial lawyer, became a mediator and later practiced corporate law. In January 2010, I founded and then directed for three and half years a securities clinic at Suffolk Law School in Boston. In the summer of 2013, I became an associate professor of practice at Chapman and began to work to develop Practice Foundations: Transactions.

Jay, with whom I have spoken previously and Todd, with whom this is the first time I am privileged to work with, and I have developed three different approaches to introducing students to transactional practice and, to lawyering for clients. My agenda today is to outline the structure, learning goals and teaching methods of my course. I will discuss some of the choices I made, the

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<sup>25</sup> See The Harvard Report *supra* note 2, at 53-55.

lessons I learned and missteps along the way. I will conclude by posing questions that we may want to discuss after Todd has described his course.

Before I begin, I want to say a note of appreciation to those who shared their time and insights with me: Tina Stark who authored the textbook we use, George Kuney from Tennessee, Danny Bogart, the Associate Dean of my school, Ken Coit who runs the Transactions Program at Boston University, and Michael Bloom who teaches at Michigan. I also want to recognize the adjuncts, student fellows, research assistants and most of all our students who make the course come to life. While I could not have done this alone, it is important to note none of my friends and colleagues endorse what I have done or are responsible for my mistakes.

Practice Foundations: Transactions is an introductory transactions course. It is a three-credit course that law students take in their second year. Practitioners teach the course in small sections, with 12 students in each class. The course introduces students to transactional law practice by exploring the role of lawyers in executing business-related transactions. Students acquire a foundation for practice by participating in exercises and simulated transactions that lawyers handle in practice. Students learn how transactional lawyers add value and solve problems for clients by identifying client objectives, understanding the business context, spotting issues, evaluating options, drafting documents and working with a client, and other counsel, to close a deal. Students learn values, practices, and knowledge to begin to develop their identities as effective and ethical lawyers.

### **Structure of the Course**

The faculty at Chapman Law School voted to establish the course and require all students to take the course in the second year before I started working at the school. I was given the freedom to design the course as I wished. Initially, I focused on the challenges, options and goals of the course.

### **Development of the Course**

I needed to design a course that would work for both the students and the practicing attorneys who would teach it. The challenges included:

- Most students have limited, or no experience in business or working on transactions.
- As a required class, the students have varying levels of interest in transactions, ability levels and time available. Some students want to be transactional lawyers while others would have no interest in the subject.
- This class is different than first year classes and most other classes at the law school in that students work on simulations of problems lawyers encounter in practice, receive continuous feedback and deal with limited information.

- The practitioners who teach must provide continual assessment on weekly work and detailed comments on a series of contracts even though they are adjuncts with many other commitments.
- I would have to hire adjuncts, create simulations, exercises and other materials and coordinate 12 sections of the course each year.

After reviewing more than a dozen courses, I found that contract drafting and transactions courses fell into the following 4 categories:

1. Contract drafting in which students learn to draft contracts but not how to handle transactions.
2. Contract analysis in which students analyze contracts but do not learn how to draft.
3. Transactions courses in which students learn how to prepare the documents involved in a transaction, such as forming a company with articles, by-laws, buy-sell agreements, and other documents.
4. Transactional clinics, which provided me with key guidance.

I chose to develop a course based on simulations of transactions and problems lawyers experience in practice. Working on simulations of transactions requires students to not only understand the law and the goals of a client, but also how to effectively manage client and opposing counsel relationships, while still representing their clients' interests. Simulations allow the teacher to control the nature, complexity, and sequence of the issues the students address.

I believe that students learn the most from integrating the law, skills, and values to problems they will encounter in practice. I wanted the course to provide a foundation for all students and prepare those interested in transactional practices for clinics, externships, summer jobs, and advanced courses in more sophisticated and specialized areas.

### Teaching Approach

In designing the course, I relied on the following principles:

1. The class, methods, and approach to teaching should be transparent so that students understand the goals, methods of instruction, and what's expected of them.
2. Students need constant feedback on their work and progress from their professor but students also need to develop their own ability to self-assess, and set and monitor their goals.
3. It is the responsibility of the teacher and students to establish a supportive community in the classroom. Students who feel respected and supported by their teacher and peers are more able to learn from their mistakes, take risks and offer assessments of their work and the course.

4. Active learning, where students learn by carrying out transactions with supervision, followed by a discussion reflection and repetition, produces a deeper understanding of the law and process, better retention, and enhanced transfer to practice. This means written preparation, work and reflections.
5. The course and assignments should be structured to aid learning and build habits that will be of use to students in practice. (For example, submitting class work 24 hours in advance of class helps students learn the habit of advance preparation.)
6. The teacher must lead by example both inside and outside of the classroom. This includes availability, concern, and service to the school and society.

### Learning Goals and Objectives

The learning goals are the understandings I want students to acquire while in this course. The learning objectives are what I want students to be able to do after this course on which they will be assessed. The learning goals and objectives provide for different levels of mastery.

- I. Roles of Transactional Lawyers - Students will learn how transactional lawyers add value and solve problems for clients in a variety of roles.
  - To identify client goals
  - To spot business, legal, and practical issues
  - To determine the business and legal context of client issues
  - To develop options to help accomplish client goals
  - To develop and implement strategies to accomplish client goals
- II. Contract Drafting – Students will acquire the basic ability to draft contracts and other documents that accomplish client goals and reflect the deal between the parties.
  - Translate a business deal into contractual language
  - Understand the parts of a formal contract used in transactional practice and their interrelationships
  - Have the ability to spot issues
  - Understand the legal and practical implications of each provision of a contract
  - Draft clearly and consistently without ambiguity and unnecessary legalese

- Incorporate comments and revise their work
- Analyze, comment on, and redraft a draft of a contract
- Prepare a contract with a professional appearance and attention to detail

III. Transactions - Students will acquire a foundation in the handling of basic transactions that lawyers encounter in practice.

- Working with a client to obtain information, provide legal counsel, and aid decision-making, by understanding and analyzing the risks of proposed contract provisions
- Developing and implementing a plan for a transaction in light of the client's goals, the applicable law, and business context
- Effectively, professionally, and ethically negotiating with transactional lawyers through the exchange of written drafts, in person meetings, and over the phone discussions.
- Closing a transaction

IV. Professional Identity - Students will begin to learn values, practices, and knowledge to develop their identities as effective and ethical lawyers.

- Learning professional standards and best practices
- Balancing their roles as advocates, officers of the court, and individuals with their own interests
- Dealing responsibly and effectively with issues about which they have varying degrees of knowledge
- Developing the ability to self-assess and improve
- Developing habits of successful professional practice

I consider Practice Foundations: Transactions to be a “lawyering” course in which the students practice thinking and acting like lawyers. I do not agree that Practice Foundations is a “skills” course, although it involves learning skills.

For me, thinking like a lawyer means solving problems and adding value to help clients accomplish their goals. I believe that legal reasoning is a critical “skill” and necessary component of thinking like a lawyer but it does not alone constitute thinking like a lawyer.



The process of deeply understanding client goals, putting together documents negotiating and closing a deal offers students the opportunity integrate their learning and think like lawyers. Working through transactions allows students to begin to acquire judgment and start to build a professional identity. Students make their rookie mistakes at school rather than at their first job.

### Course Work

The course work consists of exercises and simulations done each week and the three transactions that student will submit in five contract drafting assignments. Students submit written exercises the day before class in weeks when a major transaction is not due. One purpose of the weekly work is to provide students with an opportunity to draft and receive feedback on the parts of the major contract assignments on which they will be graded. Attendance, homework and class participation is credit/no credit other than for timeliness, preparation and good faith effort.

The weekly assignments and classroom work are organized in phases that roughly match the work on the three transactions. The transactions are organized as follows:

- The first transaction is a simple sale (such as a Zamboni) that is completed in Week 3.
- The second transaction is a major acquisition of an object (such as a scoreboard for a sports stadium) that is submitted, in part, in Week 6 and resubmitted in Week 10 after the students receive comments on the 1<sup>st</sup> draft.
- The third transaction is an employment agreement in which students comment on a draft in Week 12 and then negotiate with another student to submit a final agreement in Week 14.

The schedule put enormous pressure in the adjuncts to provide detailed comments on the drafts of the major contracts in short periods of time so students can incorporate them into their next major assignment.

The classroom work is organized in a similar phases.

- In the first two weeks, the students are introduced to the building blocks of contract, issues of client concern, the sections of a final agreement and the use of samples are introduced.
- In weeks 3-9, the class essentially marches through the sections of the formal agreement based American Bar Association model agreements.
- In Weeks 10-14, the students are introduced to client counseling and transactional negotiation as well as additional topics including, financial statement, ethics of transactional practice, working with other professionals and dispute resolution.

I have outlined timing of the weekly work and major transactions in more detail in the handout that you can review. (I have included the handout in the text below.)

#### Weekly Subjects

Week 1 The building blocks of contracts and the issues of concerns to clients

Week 2 Translation of business terms into contractual provisions, the sections of a formal agreement and the responsible use of samples

Week 3 Introductory provisions, Definitions and Signatures

Week 4 Business and actions sections

Week 5 Representations and Warranties and Conditions to Closing

Week 6 General Provisions and Due Diligence

Week 7 Termination

Week 8 Indemnities and Remedies

Week 9 Related agreements, plain English and vagueness and ambiguity

Week 10 Introduction to negotiation and commenting on an agreement

Week 11 Financial statements and drafting financial provisions

Week 12 Transactional negotiation and client counseling

Week 13 Ethical issues and dealing with other professionals

Week 14 Dispute Resolution

#### Major Contract Assignments

##### Unit 1-Simple agreement (Due Week 3-returned Week 4-not graded)

- Introduction to the roles of transactional lawyers
- Work with the building blocks of contracts and on issues of client concern
- Translation of business terms to contractual provisions
- Introduction to the parts of a formal agreement
- Responsible use of forms
- Modeling and diagramming of transactions

Unit 2 Part 1-1<sup>st</sup> Draft of Major Acquisition Agreement (Due Week 6 returned Week 8)

- Introduction to handling a deal
- Drafting the parts of a formal agreement
- Developing of a deal from a term sheet
- Issue spotting
- Introduction to dealing with supervisors and clients

Unit 3 Part 2-2<sup>nd</sup> Draft of Major Acquisition Agreement (Due Week 10 - returned Week 12)

- Learn to incorporate comments and redraft
- Include termination, indemnities, remedies and general provisions in the agreement
- Introduction to due diligence and disclosure schedules

Unit 4 Part 1 – Revising an employment agreement and email to client (Due Week 12)

- Analysis of an agreement prepared by other counsel
- Preparation of a revised draft
- Introduction to client communication and counseling
- Email to client regarding draft

Unit 5 Part 2 –Negotiating and closing a transaction (Due Week 14)

- Negotiating through redlined drafts, meetings and phone
- Reaching final agreement and closing the deal

## **Key Components**

### The Model for Classes

1. Students receive an assignment and submit a draft in writing 24 hours before class.

2. In class, students work on problems or exercises individually or in teams with a written work product that can be shown to the class.
3. Student discuss as a group their answers or drafts.
4. Students reflect individually on their work. (Suggested reflection questions are provided for each class.)

Preparing in writing has significant benefits:

- Students who prepare in writing learn more.
- Classroom discussions are more productive
- Students are comfortable participating
- Preparing in advance in writing is a crucial habit for success (Which lawyer would you want to represent you—the lawyer who prepares in writing in advance of the lawyer who is just winging it)

The majority of the class time is spent working on problems lawyers encounter in practice followed by discussions rather than lecture or Socratic dialogue. Students enjoy working in teams and groups. Students can learn so much from working with each other. The ability to work with colleagues and in teams will be key to most of their careers. As I mentioned, students are not graded on their weekly written submissions or class work other than for timely and good faith participation. The goal is to encourage students to create a class environment where students will participate, take risks and ask questions without fear of lowering their grades.

### Special Topics

One key question was whether to include subjects that are key parts of transactions but to fully cover would require more time than can be allotted in an introductory course. I chose to do so varying the level of the learning objectives. Topics, such as due diligence, financial statements or dispute resolution, could each be a separate course. I decided that students should be introduced to students to these topics so that they would gain an understanding their role and importance in transactions.

### Professional Identity, Good Habits and Leadership

I am frequently asked how often lawyers in practice think about their roles as professionals and how often this should be discussed in class. My answer is “only every day and every class.”

The class is conducted to build good professional practices and habits. Class begins on time. Students receive credit for attendance, timely submission of assignments and preparation. Students are not allowed to eat or wear ball caps. Students are not allowed to use laptops unless it is part of an educational activity, such as videotaping a negotiation. Studies show that students learn more from taking notes by hand. Careful listening and taking notes by hand are skills that students will need in practice. Most importantly, studies show that

30-40% of law students using laptops are off topic during classes. I consider this to be rude and unprofessional. We try to encourage good habits.

The issue of what it means to be a professional is discussed throughout the semester. We look at professional behavior at multiple levels and dimensions. We consider how lawyers balance their three duties:

- an advocate for a client;
- an officer of the court: and
- for his or her own the interests or those of his or her firm or organization.

When considering professional responsibilities we discuss three levels:

1. Compliance with the Canons of Ethics that are the minimum rules and standards required to prevent disbarment.
2. What works and how you need to deal with others to be effective and successful
3. Your identity—Who you are? Who owns your reputation?

Finally, we talk about leadership. I believe that lawyers practice leadership at different levels:

1. Self-leadership
2. Leadership with clients and colleagues
3. Leadership with other counsel and tribunals
4. Leadership by service to the legal profession and society

### Additional Challenges for Students

I was fortunate to have time to develop and test the course. In doing so, I identified additional challenged for students:

- Students need to learn that transactions practice and documents are typically about planning for the future. This is in contrast to most of their courses that focus on litigation, appellate decisions and past events.
- Students need to practice careful reading documents. Careful reading is as important and may be a prerequisite for careful writing.
- Students have difficulty with the fact there are often several ways a provision can be drafted and several wrong ways as well.
- Students are unaccustomed to receiving incomplete, conflicting or inaccurate information, figuring out how to obtain more information and verify what is received. Students need to learn

what questions to ask and what documents they will need for a deal.

- Students resist working off multiple documents and dealing with several sources of information.
- Students assume that for one party to win, another party must lose rather than both parties must be satisfied for a transaction to close.
- Students need to learn that clients decide the business issues and lawyers deal with legal issues and try to protect the clients by minimizing risks.

### Helping Teachers with a Course in a Box

One of the major challenges was not only to hire practitioners as adjuncts, but also to ensure that students received feedback on their work each week and detailed comments on the major transactions. Teachers use a variety of techniques, pairing students, student presentations, model answers and others to ensure that students can assess their work, without the necessity of individual written comments, each are required for the five major contracts that students submit.

To aid the teachers and students I created a “course in a box” which includes a detailed lesson plan; agenda with learning goals; exercises with answers for each teacher; a PowerPoint, additional reading materials and reflection questions. For each of the five major assignments I created simulations, instructions, and guidelines for grading and other supporting materials.

### **Lessons Learned and Missteps along the Way**

- You teach the students you have. Initially, I made the problems too complicated and did not take into account that students have the varying levels of experience, abilities and motivation. In the first class the first major contract assignment was an engagement agreement. The students had to understand the intersection of complicated areas of law, the fiduciary law, the Canons of Ethics and the law of contract as well as many terms of art. I agree with Tina Stark’s approach in which the first contract has to be simple to allow students to focus on the basic elements. Since then, I have learned to start with the basics and build from there.
- Do not assume the students know what you know or you think is obvious. Students ask in every class what is a closing, an escrow or due diligence. Does anybody have to tell a lawyer to ask a client what his or her goals are? Or you’re meeting with a client and he or she gives you a document, or an agreement, or a term sheet, does anyone need to tell you to ask, “Are there any other agreements that haven’t been mentioned?” To be effective,

teachers have to help the students with each step—sometimes baby steps.

- Teaching at a law school is not the same as training at a law firm. In practice, serving the client is the focus. In law school the goal is student learning. In practice time is money and must not be wasted. For teaching, taking time and letting students learn at their own pace and exploring questions is key. In practice mistakes can be, in the professional sense, “fatal or near death experiences”. In teaching mistakes are learning opportunities.
- Be respectful and realistic of the time of your adjuncts and students. Students and teachers are bombarded by so many inputs that you have to be selective and prioritize. Sometimes covering less is more.
- You can’t be too clear with directions, deadline and requirement. The directions should be outlined in writing and reviewed in class as well as any changes.

I try to keep these points in mind to orient the adjuncts who typically practice at a high level of expertise so that they can communicate effectively to students.

### **Questions for Discussion**

- Is it better to cover a few subjects in depth or to cover more, especially if you believe that the students will not be exposed to the subject in other classes?
- What should be the balance between teaching about law and specific transactions versus skill and values?
- Should student work with documents and transactions if they don’t know or learn the underlying law involved?
- What use should be made of forms or services like Bloomberg and Practical Lawyer and rubrics if one of the goals of the course is to expose them to the realities and uncertainties of practice?

### **Conclusion**

I look forward, after Todd’s talk, to hearing about your experiences and sharing ideas. I would like to leave you with following thoughts:

Experiential education is a bridge between school and practice for students, faculty and practitioners. School is student-oriented and practice is about clients. I believe that classes like the ones Jay, Todd, I and many of you teach should be part of an integrated curriculum that includes clinic, externships and other programs. This requires a partnership between the academics and practitioners who need to work together if we are to provide the

best education for our students. The courses we are discussing today are part of that collaboration.

Please feel free to contact after the panel to discuss and share your ideas. Thank you for your time and attention.

## **Scaling Transactional Skills Education to the Masses**

**Todd Starker**

Thank you—I'm excited to be here. I realize I'm the last speed bump before cocktail hour. I would love to be pacing and walking around, but I'm told that I need to stay near this microphone, so I will dutifully stay behind here.

I promise to be brief and I promise to be enthusiastic. This class is so much fun to teach. I am grateful to my dean, or perhaps he's a lunatic, for letting me develop this course completely out of thin air. I listened to David talk about all the people he consulted as part of designing his course and I thought, wow that would have been a good idea. I didn't consult anyone. I came from practice to teaching, and my overarching design principle was: what do I wish I had known?

I want to give a bit about my background only because it informs how I developed this course and how I teach it. I entered law school as a second—really it was more like a fourth—career. I was an actuary; I was a Microsoft Systems Engineer trainer. I purchased a construction company with a partner and at one point we got sued, and later had to sue another party, and my lawyers were terrible. One was thrown off the case for malpractice. So, I thought, I better go to law school and learn some of this stuff if I'm going to succeed in business.

I did get a chance to clerk for the Sixth Circuit for a year. Then I eagerly joined a big law firm; Squire Patton Boggs is what it's called now. I joined the corporate group, focused on mergers and acquisitions. Nothing I was ever asked to do resembled anything that I did in law school. I had this feeling of helplessness. I have an MBA as well. I got really good grades at a decent law school, Ohio State. And nothing applied. I used to joke, and it really wasn't a joke, but I kind of chuckled afterwards nervously. The skill learned in law school that most applied to transactional law was bluebooking for law review. That might seem like it doesn't make sense, but practicing that attention to detail was helpful.

I was asked to develop a class that would serve students more interested in transactional law as an alternative to a required appellate litigation class. Currently every student must either take the appellate litigation class or my transactional class. And so, it's pretty popular. I have ninety students signed



up for the fall, plus twenty-six on the wait list. I'm not so naïve as to think that every student is interested in transactional law, but it does satisfy an upper-level writing requirement that is otherwise satisfied by a quite difficult litigation course.

Something I remember like it was yesterday, on that first M&A deal at the law firm, a partner gives me an assignment to review hundreds of contracts—they were in an electronic data room but imagine a big box of dusty contracts. The partner said, "I need you to review these." I'm like okay cool. What am I reviewing them for? Just look for "red flags." What the hell does that mean? I luckily had the confidence to say I don't know what you're talking about. I don't know what you want me to look for, look for big contracts? That made sort of common sense to me, big contracts versus little contracts. You know, unless someone's pasted red flags in there, "red doesn't get it done for me. So, he laughed and explained a little bit. Over time and repetition, I eventually put the pieces together and gained some level of competency, but the complete lack of preparation afforded by law school was, in my view, inexcusable.

In my opinion, when law students graduate they're not ready to try a case, but they can hit the ground running and at least contribute to a litigation team. Senior lawyers can break off a piece of a brief, or some research. Newer associates can do a memo—that's something they were trained for in law school. In my experience, I had little to contribute. Not only could I not contribute, I was a drain on the corporate department because somebody had to take the time to teach me even the very basics. So, that frustration was a big driving force to create this class.

As I designed this from scratch, I didn't know about other schools that might be doing something similar, so I just made it up. Certain design principles guided me in the design, with the largest being to have the class be as practical as possible. I am not an anti-academic. At Ohio State we teach some amazing, cutting-edge, thought-leading business law topics, and that's great. But, that's not me. I wanted to teach something that was absolutely practical and also from a bottom-up perspective. In a lot of law courses, the student plays the role of partner. You're the main lawyer calling all the shots. What are you going to do? What about the client? I'll be honest. In my class I don't worry that much about the client. At the end of the day of course it ultimately comes down to serving a client, but if you're in a larger or even midsize law firm, who's your client? It's the partner or senior associate that gave you the assignment. I think I may have been a third-year associate before I spoke to a client, and so that's just not my focus. There are lots of courses that focus on client relations, and I'm not saying that's a bad thing. But, for this class, it's more focused on what are you going to be asked to do when you walk in the door of a law firm, up through the first few years of practice.

Another design principle is to cater to the widest possible audience. If I were king, I would make this a required class and everyone would have to take it. I didn't want to have any prerequisites that would preclude participation.

This is a first semester, second year course. Students have had only the first-year curriculum. They haven't had business associations. Some may be taking it at the same time. They haven't had tax, but we touch on all those things.

Also, I unapologetically embrace breadth over depth. I feel like transactional law is half of law. People characterize law as either advocacy or transactional. Law school traditionally is far more focused on advocacy. And so I feel like it is my responsibility to touch on as many topics as possible. So, I am very much about breadth. It's not a bar course. I don't expect them to memorize all this and be able to regurgitate it in a year. They're not going to be able to do that, but this experience has proven to dramatically shorten that future learning curve if students go on to a transactional practice.

When I learned transactional law I was absolutely thrown into the deep end. The first transaction I thought, "wow this is crazy." This must be a totally unique experience and then the next one you realize is really, really similar. And then you do a credit agreement, and you're like, well that's not all that much different from a purchase agreement. Turns out most "transactional" agreements have similar building blocks—who knew? When students get out of school and start to practice I want them to say: "hey wait I remember doing something just like this." That's good enough for me. Like I said, I don't expect them to remember everything. It is far more important (and attainable) to shoot for exposure over mastery.

I use adjunct professors in a different way than David, which I will discuss, but hearing them say that this class would have shaved three years off of their learning curve is great.

And finally, a goal for our graduates is that when they join a law firm in a transactional department, and that law firm expects them to know nothing as I knew nothing, the student is going to say, "yeah, I've done one of those." So far it's really been successful and very well received by employers. I don't want to give myself too much credit. I'm like a blind pig who found an acorn. It really has resonated with employers more than I'd even hoped. I've got multiple anecdotes where students have gone to even their summer associate position. An attorney asks our summer associate, could you do a closing checklist? "Oh, sure, I did one of those in class." The firm is like "how do you even know what that is?" So, that is another thing that was motivating this class—watching that first group of folks go out and hit the firms, and see if they could knock some socks off.

The class is taught in two 45-student sections. It could be one 90-student section, but having two sections allows for more scheduling flexibility for the students. The size of the class is not important once you get above a certain number; it's simply not going to be an intimate thing anymore.

I have six adjunct professors who are assigned approximately 15 students each, and they assist with the class in a limited role. They are paid \$1,250, which is embarrassing, honestly. I'm embarrassed that that's what we pay them because they do work harder than that, frankly. But, they love it. I've

got several law firm partners who are happy to come back and do it year after year. To be clear, I ask way less of them than David's setup. They're not teaching the course.

I preside over a weekly lecture. We go over a number of things. We have lots and lots of small assignments, to which I provide global feedback. I can't give 90 students individualized feedback on some of the pretty simple assignments we do. So, we go over it in class. This is what you should have found. This is what you should be worried about.

Students do two documents that are worth 70% of their grade. They get individualized feedback from these adjunct professors who are all expert practitioners in the field. The adjunct professors see it as an honor to be able to teach and give back to the school. They are definitely not doing it for the money. The adjunct professors provide feedback on those two assignments and they also hold one or two small group sessions with their small groups. These sessions can be directly helpful to our project, or could highlight the adjunct professor's specialty.

My goal is to replicate the early part of my career learning how to do M&A. I learned by just going through transaction after transaction. So, if I can simulate doing that once, and guide them through it, that will provide a strong foundation for them going forward.

So, how would an M&A deal go? By the way, one could teach this same class using a real estate transaction. The skills are transferrable –I'm positive that's true. My practice was more in M&A, so I use that vehicle to teach transactional law more broadly. I bring in experts in other fields: healthcare law, environmental law, labor and employment, municipal bonds, and business valuation. Those guest speakers help to cover the areas where I'm weaker. But the M&A part is where I feel comfortable so that's the sort of vehicle we use to teach. But, I definitely try to make the class more broadly applicable by focusing on transferable skills.

Modeling a real transaction, we start with a confidentiality agreement. I start with a quality form. This isn't a contract drafting class. Certainly some drafting skills are required, but we have a contract drafting class. My class is separate and I don't want to be duplicative.

Students must go through the NDA form and figure out what applies. Is it too expansive? Should it be bilateral? Should it be unilateral? Who's giving information? What's necessary for this particular deal?

Next students create a due diligence request and it's really, really easy. There are forms that students can essentially paste into a Word document, but then again they must go through it and ask themselves, does this make sense? The due diligence request list provides a whole host of discussion topics. One could probably teach a whole class using the due diligence request as the syllabus. What are all those things? What are organizational documents? How do you review a contract? What are the environmental concerns? Or

employment? Or taxes? Etc. But, we don't dig in. We spend a week on it. Go, go, go—this whole course is like that. Exposure, not mastery.

Students write a small research memo. Typically, I have them form it as an email to a partner. I tell students the partner will add the niceties at the beginning and the end, just focus on the substance.

I've changed the memo subject from year to year. If we are doing an asset purchase agreement, we would probably form a new subsidiary, so I might ask, "Should that new sub be a corporation? Or an LLC?" Or, compare and contrast doing a stock transaction versus an asset transaction. Of course I've already decided the transaction structure, but I want them to go through that process. And thinking through the tax and logistical differences might sound widely complex, right? Remember students at this point have not had tax or business associations. But, I provide resources that are very accessible and much of what they're doing in these first couple of assignments is just paraphrasing and parroting some pretty easy sources. That requires students to digest the information and actually understand it. If you can take something that's reasonably complex and put it into your own words, that mental process is powerful in having the concepts sink in.

We do a deal benchmark study. That's really an odd assignment that I want to talk more about, and so I'm going to skip it for right now.

They conduct some due diligence. I will draft 6 to 8 standard contracts. I intentionally do NOT throw curveballs—there is enough to learn from quality, ordinary contracts. We do a personal property lease, a real property lease, an employment agreement, a credit agreement, a software license, etc. And, again, unlike "look for red flags" I teach them exactly what to look for. Students produce a diligence report, including details but also an executive summary to say, okay, here are the 6 biggest things we need to worry about. This helps build that skill and judgment. When they have to go do due diligence for their employer they will be able to say, "yeah I've done that before. I know what I'm looking for."

Students create a closing checklist. This is a really tedious task that nobody wants to do in the real world, so it typically falls to a junior associate. They never get it right, and that's okay. It's still a starting point. If you've done transactions, a closing checklist is a living, evolving document that is the hub of the whole transaction. But, creating that first draft makes them comb all the way through the transaction document to figure out what are the deliverables. What certificates need to be delivered, including officer certificates, closing certificates, FIRPTA affidavits, etc. Likely students might not even know what they mean, but they can tell from the agreement that each is a required element—it's a start.

Here's where I think I differ from a lot of what have heard from other presenters. I don't care if students don't fully understand what they are doing or why. That's fine. Most of my practice I didn't understand 100% of what I was doing. Some will say, you should understand every word of every provision in

every document. Really? Is that really how you think new associates learn? I don't think so. So, I'm okay with them taking from the closing deliverables section, which says that a FIRPTA affidavit has to be delivered as part of closing, and students putting that on the closing checklist without understanding its purpose. So, that's one sort of difference that I would highlight, that I'm okay with simulating what it's like to be in practice and students being in over their head. It is important for them to get comfortable being uncomfortable.

Tina Stark talked about tasks versus skills, and she's exactly correct. Many times what I ask students to do is the task, and students need to exercise the skill to get to the task. Undoubtedly some students get further than others. I definitely give students the opportunity so that the most sophisticated student could go very, very far and learn a lot. But, the student that gets through the tasks without a firm grasp of everything has still grown a great deal through the experience.

The document that is worth the most points is typically either a stock purchase agreement or asset purchase agreement. Students do an interim draft, starting with a form. Their tasks are significant, but limited. I don't just say make this better. They start with a term sheet generated by our client. From my experience, that's how it usually happens. Typically, with middle-market or larger M&A deals, there's an investment banker involved and the business often already have a deal term sheet available. So, the first task is simple. Customize the form by putting the names and other details in the agreement. Make the signature block work, things like that.

I also have them look at reps and warranties. Make them more favorable for our client (usually the buyer). I take care to ensure that the form is too seller-friendly. So, their goal is to make that more buyer-friendly. Remove some knowledge qualifiers. Remove some of those materiality qualifiers in the reps and warranty section.

Students must work on the indemnification section. They got to set what should the cap be. What should the basket be? How should it work—tipping or deductible? How long should the reps survive? Carveouts? Things like that.

Students do their best and turn in a draft with a redline comparison document to their adjunct professor, who provides detailed comments. Making comments was a challenge for the adjunct professors at first because, in practice, what would they do? They would just fix everything. If you were a partner, you wouldn't write in the margin, "did you think about X?" and give it back to an associate. One thing I had to explain is not to just fix it. Be a little bit Socratic in making comments. That was a learning process for the adjuncts.

So, students get those written comments, 48-72 hours to digest them, and then they sit down with a half-hour, one-on-one conference with the adjunct professor to really walk through the purchase agreement and get lots of straightforward advice and feedback: here's where I think you need to focus;

this doesn't seem to work, things like that. And then students get another crack at it and then they go back to sort of implement the suggestions and make their improvements and then turn in their final draft. And then the adjunct grades the final document. That's another beautiful thing about this course, while my colleagues are up to their eye balls in exams or papers, I'm just chilling out and waiting for the grades to come by email. It's wonderful.

The other piece I do is an oral argument. And again, I'm just going to leave it at that for now. I want to talk about it a little bit more and so it's on a later slide.

Some of the resources we use include a PLI book called *Working With Contracts—What Law School Doesn't Teach*. When I presented the course for approval to the faculty, I just said *Working With Contracts*. One of the professors approached me after the meeting and asked, "didn't you leave sort of a subtitle off of there?" I felt like I was caught, but he laughed and said, "don't worry man. It's a great book." He was a big firm transactional lawyer and he said his firm gave every single new associate a copy of that book and made everyone read it.

But I don't lecture from it. I don't use the *Working With Contracts* structure. I assign reading based on topics. If they choose not to read it at all, I would never know other than their work product would suffer.

I use Practical Law Company extensively. It's probably our most used resource. Many of the readings are assigned right out of Practical Law Company.

My firm Squire, Sanders and Dempsey at the time (now Squire Patton Boggs) adopted the Practical Law Company resources around 2008 or 2009. It was not part of WestLaw then; it was a standalone product, a really, really helpful product, with good forms. It has now been acquired by WestLaw. So far they haven't screwed it up. I was worried. I'll be honest. It now just looks more like WestLaw. The content is all still solid.

I also use Bloomberg Law. Bloomberg loves us. I think I'm the only one at my school pushing Bloomberg on the students. Bloomberg has great resources. The whole text of *Working with Contracts* is actually available for free in Bloomberg along with lots of other things. I still recommend students buy a hard copy. It's like \$17 on Amazon. Who wants to read a book on a computer screen to save \$17?

So, just a little bit more about Practical Law Company and how I use it. First, there are "practice notes." These are written for lawyers that are doing the job. Here is how you do it. Here are the things you should worry about. There are model forms with drafting notes; One could almost make a whole course out of the model forms. A form will have a provision and then the note below it will have here's how it works, here's what buyers would like to see, and here's what sellers would like to see.

On the slide is an example. I'm not going to go through the substance. You likely can't read it anyway, but this is a sandbagging clause, titled Effect of Investigation. This is from a pro buyer form, so it says our rights to indemnification are not diminished even if we had knowledge of a breach at the time of closing. We can still collect. This drafting note expands below the provision. It says here's what it does, here's what buyers would want, and here's what sellers would want. Throughout the drafting note are hyperlinks to examples. You can click on this part of the circle here to see an example anti-sandbagging provision where the effect of investigation is meaningful. You can't collect if you already knew about the breach.

Alright, let me run through the unique elements in my 5 minutes remaining. First, broad and unrestricted use of forms—if students are drafting big chunks of language from scratch, they are not doing it right. That's not how lawyers do it in practice. I teach them how to get to EDGAR documents (Bloomberg is a helpful tool). Practical Law has great forms, but students are still using drafting skills. To take a clause or a paragraph from an EDGAR document that was drafted by a big firm for a public-company deal, and then paste it into our document sounds easy but it just doesn't work that way. You still have to make sure it's consistent. That it uses the same defined terms. Does it flow? Does it conflict with anything else? I make them find it. And I emphasize that it's not a bad thing. It's a solid, practical way to draft a transaction document. I do ask that students drop footnotes in the purchase agreement and explain where they found the language they used, and the thought process about why it works. There isn't any Bluebook form for these footnotes: "from EDGAR, Company A bought Company B in June 2013" is fine.

The one requirement for the class to count as a writing requirement is that it had to include original research and writing. So first I thought it would be pretty easy to craft a business-law topic and make students research Delaware cases or something, but I was pretty determined that we wouldn't read any cases.

The idea I came up with, which I think is not terribly practical but it really turned out to be pedagogically very effective is to create a deal study. You may have seen deal studies and I'll show you an example of one in a second. But I make them do their own. Let's say we're doing a \$40 million deal in the chemical industry. I ask them to go out and find 8, 10, 12 deals on EDGAR. They should find closed deals with an asset purchase agreement or stock purchase agreement as an exhibit. In picking the representative deals, newer is better, similar size is better, and same industry is better. It is similar to picking the right case—a very similar idea.

For transparency, I explain to students, "What you're doing is not super practical, you now have read like 12 of these agreements and you've digested a little bit each time." Reading, understanding, and summarizing a dozen complex deals is really educational. But I then introduce commercial deal studies and we use some in class. I make sure they understand that their

handful of deals do not fairly represent what “the market” is doing with respect to the studied terms. So we go through bigger studies. The ABA has a study as an example. This slide is from a private consulting company where they studied 500 deals. For example this says 37% of deals have tipping baskets.

The final unique element is the oral argument piece. That was another requirement imposed on me but I actually love it. I run it more like a thesis defense than an appellate oral argument. Because of having so many students, I don't do it one-on-one. I bring in four or five students at a time and I just grill the stars out of them. What did you do? What choice did you make? The other side is going to object to that. How are you going to convince them you are right? So, this was a stock deal. What if the client called at the last minute and said it was an asset deal? What are the tax implications of that? Is that better for us, worst for us? What would you have to change in terms of our due diligence? Are we now worried about changing control or only assignment provisions?

It's a lot of fun. The first time I did this I practically had a tear come to my eye out of pride to hear this 2L rambling about indemnification caps and baskets and demonstrating a decent beginning understanding of very complex tops. It really helps confirm their effort and understanding.

Allowing them to use forms, I always worried that somebody could just paste some crap in there and, let's face it, at a glance it might look pretty good. Defending the draft orally really separates those students that were thoughtful about their revisions and those that were less so.

I have to touch on one obvious possible extension missing from what I do, and that's actual negotiation. I emphasize the posture of buyers and sellers on several points of contention, but we don't actually have half the class be buyer and the other half seller. That would be terrific, but I am limited to two credit hours.

If this was structured as a four-credit class, I think adding in negotiation would be an excellent improvement. However, in only two credit hours there's nothing I would cut to make room for negotiation. For one reason, Moritz has been named the number one school in the country in alternative dispute resolution. We have a million classes on negotiation or with negotiation as a component. I don't need to teach it because it would be somewhat duplicative.

And the other thing is, with all due respect, it's not usually something a first, second, or even third year associate is doing. So it's not a skill that fits into what I was trying to serve—preparing students for the first few years of a transactional practice.

And my summation is this. It's a really simple class to implement and teach. The fact that I did have some experience in mergers and acquisitions is a bonus, but honestly anybody could teach it using the resources that I use. And by the way, there are over 1,000 pages of materials on the jump drive you received as part of the conference. Of course I don't expect anyone to read



them all, but included are all the reading assignments, representative student work, my syllabus; and the assignments. I would be thrilled if anyone is able to make use of those things. I'd be happy to help. My contact information is easy to track down.

So, that's it for me. And now I guess we're going to open it to questions for anyone on the panel.