

TRANSACTIONAL SKILLS EDUCATION: MANDATED BY THE ABA STANDARDS

Tina L. Stark*

Good evening. I'm so delighted to be here.

As you know, and not surprisingly, I'll be speaking about transactional education. Other than saying that, I couldn't decide how I wanted to begin. I confess, I vacillated.

My first thought was to say, "We've come a long way." But I kept hearing the echo of the old Virginia Slims cigarette commercial: "You've come a long way, baby." For obvious reasons, that wasn't going to work.

My next thought was to say that although transactional education has achieved an undisputed increase *in attention*, we still get *no respect*—alluding of course to comedian Rodney Dangerfield's iconic punchline. But, I quickly remembered I was 60-plus and that the allusion might not resonate with all in the audience.

So, I chose, instead, to tell you my thought process. That put both opening lines out there, but with sufficient context that I have the vain hope that I will not be pilloried.

With that, I want to turn to the substance of my talk this evening: the future role of transactional pedagogy in the legal curriculum.

Some in the Academy have long thought me subversive. I could regale you with some astounding war stories, but suffice to say, it has been a long trek to today. That said, today is the day when I arm the Academy with the ammunition to corroborate their deepest fears. Tonight, I will say that which has not been said before, except between friends. And, it is this:

* Professor in the Practice of Law (retired), Emory University School of Law. This is a transcript of Professor Stark's remarks given at the Dinner and Presentation of the Tina L. Stark Award for Excellence in the Teaching of Transactional Law and Skills on June 1, 2018.

The time has come for us to say out loud that transactional education should be part of every student's law school education. It's time for parity.

For clarity, I'm not advocating that the ABA change its Standards tomorrow. We all know that's not happening. Instead, let's call parity part of a ten-year plan. Although the change will be incremental, I see no reason to amend the ABA Standards. As I read them, they already mandate transactional education.

Let me start with Standard 301(a).¹ It states in pertinent part as follows:

A law school shall maintain a rigorous program of legal education that prepares its students . . . for . . . responsible participation as members of the legal profession.

I submit that to comply with this Standard, the Academy must give every student a foundation to practice transactional law. Why? Because any graduate might join the estimated 50% of lawyers who spend all or part of their time doing transactional work.²

How can we possibly claim that we have complied with this Standard if we do not teach these future lawyers even the rudimentary skills of transactional practice? We are not in England where the legal system differentiates between barristers and solicitors. America doesn't have that system. We long ago ceased to be English colonies. Yet, despite that reality, our rigorous programs of study train students to be barristers, not both barristers and solicitors.

Why do we construe the ABA Standards so narrowly? It seems legally incorrect. I have some general recollection of a canon of interpretation that says something like the following: General terms are to be given their general meaning and should not be arbitrarily limited.³

¹ *ABA Standards and Rules of Procedure for Approval of Law Schools, Chapter 3, Program of Legal Education*, Standard 301(a) (2017-2018) (hereinafter, *ABA Standards*).

² 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 (2008).

³ Antonin Scalia & Bryan A. Garner, *Scalia and Garner's Reading Law: The Interpretation of Legal Texts*, Semantic Canon 9, 35 (2012).

But let me go beyond statutory interpretation to the reality of pedagogy. Learning both litigation and transactional skills create a synergistic dynamic. Each delivers insight into the other, creating value for both.

The other ABA Standards similarly speak to a broad-based education, not just the Academy's litigation-oriented curriculum. For example, Standard 302(b) requires competency in "[l]egal analysis and reasoning. . . ."⁴

I believe that most in the Academy would now agree that doing deals requires sophisticated legal analysis—albeit an analysis unique to transactions. To state what I hope is obvious, just because two things differ doesn't mean that one is of lesser worth or relevance.

That same standard requires competency "in written and oral communication in the legal context."⁵

Teaching students predictive and persuasive writing is a must. I don't begrudge legal writing professors a single credit, whether it's four or twelve. Surveys repeatedly list written communication skills among the most important skills for a lawyer to have. But communication in a legal context means more than writing memos, motions, and briefs. It also means writing contracts. Unfortunately, only a handful of schools *require* drafting. Not even Emory is among that few.

I console myself by remembering that more and more of Emory's future litigators voluntarily enroll in what can be a grueling course. When asked why they take contract drafting, students often reply that learning this material will make them better litigators. Specifically, knowing how to draft contracts will improve their ability to take them apart and then argue drafting-related issues more persuasively.

Part of the ten-year plan necessarily includes incremental change, that is, change that occurs school by school. Towards that end, I call on schools to add *at least* one credit to the Contracts course.

Before explaining why I believe the credit or credits should be added, I would like to address the visceral, possibly overwhelming,

⁴ *ABA Standards* at Standard 302(b).

⁵ *Id.*

objection to my proposal that some may have. I can already hear the hue and cry that the first-year curriculum has no room for an additional credit.

In response, I suggest creative problem-solving—perhaps moving something else to the second year. Where is it written that what is a first-year course this year must be a first-year course next year? I know that some have even suggested that the semester-based system is outmoded.⁶ But that is for another day.

I suggest that if a school were to add a credit or credits to the Contracts course, professors not use the time to teach interpretation, negotiation, and drafting. Instead, I propose that we allocate that time to teaching foundational knowledge that builds the infrastructure for additional transactional education.

Of course, that raises the question of what is “foundational knowledge” in the context of the 1L Contracts course. I believe it has multiple components.

First, I believe that students should learn about contract structure and the commonality among contracts. To me, and admittedly, that’s to me, the reason seems intuitively obvious. For a law student, not learning the parts of a contract is akin to a medical student not learning anatomy by dissecting a body. It’s the singular building block for that student’s future education.

Second, I believe that students should learn the translation skill, the ability to determine which contract concept or concepts should be used to memorialize a business term. This core analytical skill undergirds all deal work.⁷

Let me draw another analogy. Few would dispute that a litigator must be able to apply the law to the facts to write a persuasive brief. Similarly, a deal lawyer must be able to translate the business deal into contract concepts to draft or negotiate a contract.

Third, I believe that adding at least one credit to the Contracts course would give professors the opportunity to teach students how to

⁶ Tina L. Stark, *What Cornell Veterinary School Taught Me about Legal Education*, 15 Transactions: Tenn. J. Bus. L. 533, 540 (2014).

⁷ Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. Legal Educ. 223, 224 (2004).

read and analyze contract language. Imagine the heightened level of class discussion when students understand the meaning and implications of a contract provision in a case.

But that's not possible if we don't teach students the ABCs of reading a contract.⁸ It's really not that hard or time-consuming. To test my pedagogy, I tried it out on my millennial research assistant, someone not planning to attend law school. At the end of about two hours, she had grasped the fundamentals.⁹

The dividends are manifold. In addition to improving students' understanding of doctrine, students begin to gain a transactional perspective, an absolute imperative of transactional education.

A transactional perspective, in its narrowest sense, is an understanding of the intersectionality of contracts and business. As such, it looks forward to the deal that will be, not backwards at the causes of a dispute.

When students read a contract provision in a Contracts or Property case, they need to understand its business context. What was driving the parties? Was it money, risk, control, or something else? Is the case really about the rule against perpetuities, or was the landlord trying to break the contract so it could increase rents?¹⁰

In considering the place of transactional education in the legal curriculum, it's good to remember that what yesterday seemed frippery is

⁸ Tina L. Stark, *Learning to Read Contracts: It's More Than Your ABCs. It's Do Re Mi* in a panel entitled *At the Heart of the Matter: Reading Contracts and Dealing with Risk*, 14 TENN. J. BUS. L. 309 (2012-2013). In this article, I suggest that it might take parts of two semesters to teach students to read a contract. That assumed that professors did not focus on reading as a salient skill, but instead gave it only tangential emphasis. Realistically, a 1L Contracts professor would probably need to devote three to five class hours for students to achieve proficiency. The number of students in a class will affect the required time.

⁹ I also gave it a modest tryout by teaching my son the veterinary student the difference between representations, covenants, and conditions. He did his mother proud, learning the contract concepts fairly quickly through a series of e-mail explanations and mini-tests.

¹⁰ *Bleecker St. Tenants Corp. v. Bleecker Jones LLC*, 2008 WL 4411822, 2008 N.Y. Slip Op. 32263(U) (N.Y. Sup. Ct. 2008), *rev'd sub nom. Bleecker St. Tenants Corp. v. Bleecker Jones LLC*, 65 A.D.3d 240, 882 N.Y.S.2d 42 (2009), *rev'd*, 16 N.Y.3d 272, 945 N.E.2d 484 (2011).

today considered essential. Twenty-five years ago, legal writing and experiential education had not yet become part of the legal education firmament. Today, law schools require as many as 12 credits of legal writing, and students cannot graduate without 6 credits of experiential education.

I say this now from the safety of retirement:

It astounds me that the Academy has not yet recognized the unqualified need to teach an area of law that has existed since at least Babylonian times. Indeed, the Code of Hammurabi recognized the salience of contract law. According to that unimpeachable source, Wikipedia, at least half of the Code of Hammurabi is devoted to contract law.¹¹

The struggle to validate the need for transactional education endures. Therefore, whenever offered a platform to promote transactional education, I intend to take that platform and use it to the best of my ability.

So, this year, I state—for the record—it's time for all the stakeholders in transactional education to advocate loudly, clearly, and in one voice that the law school curriculum must include an education in transactional law and skills. It's time for parity.

Thank you.

¹¹ *Code of Hammurabi*, https://en.wikipedia.org/wiki/Code_of_Hammurabi, (last visited Jul. 1, 2018).