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George Kuney

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Joan MacLeod Heminway*; Howard Katz; and George Kuney*****

George Kuney:

Good morning, my name is George Kuney, and I'm from the University of Tennessee College of Law. The first speaker is going to be Joan Heminway, also from the College of Law, but she's not actually here, so you'll be seeing a video tape presentation of her so that we could bring her in. She's driving off to go and teach in a B-school and cover some of that stuff today. She is a whirlwind of energy, as those of you who know her can attest.

This is a panel called "Where Do We Go from Here? An Agenda of Advocates of Transactional Skills Instruction," and as such it's not really focused all that much on any particular technique, but it's looking a little bit more globally at things. And you will get our various takes on this.

Joan Heminway:

Hi, everybody! Sorry that I can't be there in person to talk to you today about "An Agenda for Advocates of Transactional Skills Instruction." I want to thank Howard for suggesting this panel. I want to thank Howard and George for inviting me to be part of it via Memorex since I can't participate. I'm off teaching professional MBA students in Knoxville today. Hopefully, I saw many of you yesterday before I had to leave the conference.

I want to talk about four things this morning to kick off the panel. The first one is my view of the evolution of transactional law and skills education. It may not be yours, but it is at least a framework that I like to work with. The second is some rationales for transactional law

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and skills instruction in the law school curriculum. Third, I want to talk specifically about methodologies, how one might think about incorporating transactional law and skills into the law curriculum. And then last, but not least, I want to talk a little bit about some challenges and unknowns.

Let's start with my view of the world: where are we in transactional law and skills education? I see this as an evolution from courses to culture through (in the middle) curriculum. What do I mean by that?

Courses are the bare minimum of how we introduce transactional law and skills to our students—by putting course offerings in the curriculum that fill needs and gaps in transactional law and skills knowledge. So, for example, an accounting for lawyers course, or something like that, would be the kind of course I am talking about.

Curriculum is a series of courses that are connected within the larger law school program, in terms of my trajectory here—my evolutional trajectory. And so, for example, UT Law has a Business Transactions concentration that consists of a number of courses and also has a center for entrepreneurial business law that has a larger number of courses. Some of the courses are electives (i.e., not concentration requirements), if you will, within the transactional law curriculum.

The courses are very united; we meet and we talk through them periodically. There's actually, from a former Emory transactional law conference, a nice piece on our transactional business law curriculum and curricular process, if you're interested.[1] But that's the difference between just courses, sort of a loose set of constructive gap-filler type things, and a curriculum that's an interwoven, interconnected set of courses.

And then last (but not least), we're, I think, we're moving to—some of us, maybe not all of us want to move here—having transactional law and skills as part of the law school educational culture. In referring to moving to "culture," I intend to evoke the sense that a school's plan of legal education is embedding transactional law and skills education as a more critical and more essential component. We'll come back to that a little bit later.

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[1] *See* Brian K. Krumm et al., *A Case Study in Transactional Centers and Certificate/Concentration Programs: From Program Design to Student Experience, the Clayton Center For Entrepreneurial Law*, 14 TRANSACTIONS: TENN. J. BUS. L. 569 (2013).

So why do we have transactional law and skills in the curriculum? Why is it important, and if you need to argue for more, what arguments can you use? The first answer is always jobs. There are jobs for students in transactional business law, and jobs that will engage transactional business law. I couldn't find any current data, but based on 2014 data, the demand for litigation declined just under 1% in 2014. At the same time, transactional practices grew 3.3%. That data was from a Thomson Reuters study.[2]

The growth, by the way, occurred mostly in the Am Law Second Hundred, so not the top 100, but just beyond that. And so maybe there's also a trend away from transactional practice in elite firms and into that second tier of firms the Am Law Second Hundred. Also, a 2016 Thomson Reuters report was published as a case study using some focus groups.[3] The researchers interviewed third-year law students, law firm hiring managers, and new attorneys, and found that law schools could and should focus a lot more on transactional law and skills, specifically incorporating more experiential learning programs that focus on drafting documents, regulatory research, and structuring a deal.

And so those are, I think, important things for us to remember, that employers, and those who are seeking employment, or have just gotten employment, actually find transactional law skills important.

What about the bar? The bar assesses transactional law skills now–little known fact, perhaps, among a lot of us who try not to teach to the bar. But we have to teach to the bar, right? The bar is the gateway to jobs for most of our students.

That being the case, we want to make sure that our students pass the bar. We should teach them the foundational skills they need for that, which moves me to foundations. And here I'm talking about foundations for law practice, not for the bar. Specifically, the use of transactional knowledge occurs outside of just transactional business law. I think we tend to think of transactional knowledge only in that limited context, but

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[2] *See Rise of the Transactionals*, https://peermonitor.thomsonreuters.com/wp-content/uploads/2015/06/Transaction-Practices-Spotlight_2015.pdf (last visited Nov. 20, 2018).

[3] *See Six Ways Law Schools Can Make Students More Practice Ready*, http://lscontent.westlaw.com/images/Practice_Ready_Case_Study_2016.pdf (last visited Nov. 20, 2018).

in fact, for example, trust and estates attorneys need to know about transactional law and skills because of the devolution of an estate that might include contracts, transactions, and instruments of finance which are things that one would learn about in a transactional law and skills setting . . . . The same would be true for family law in a divorce and the devolution of the marital estate. It is important to know transactional law and skills for a lot of law practice backgrounds, not just advocacy, dispute resolution, and transaction planning and drafting in a business law area.

What about problem solving? That's also a rationale for teaching transactional law and skills . . . . We try very hard to use our litigation-oriented curriculum to teach problem solving, and the same is true on the transactional business law side. It's just a different output that we have the students producing. It's the same legal reasoning process; it's the same legal analysis. It's one more way to try to teach our students how to use good legal reasoning and how to engage in an appropriate and effective legal analysis. Designing a provision in a contract requires the same type of analysis—in looking at a rule and applying that rule to a client's facts and drawing a conclusion—as any litigation issue requires. In order to give them a broader experiential base (and perhaps more of a reason, in some cases, to learn to use statutory law in legal analysis in the beginning of the second year), the transactional law curriculum is important in helping the students to reason through legal problems—which is, after all, the art of lawyering.

And last but not least, assessment provides a rationale for teaching transactional law and skills. The American Bar Association ("ABA") assessment process has required us to look at the learning outcomes of our students.[4] Those learning outcomes engage transactional law and skills, I would hazard a guess, at almost every law school in the country. They were the reason for the three of us making an argument through this panel for the continuation of movement along the trajectory toward culturally embedding transactional law and skills education.

With those rationales under our belts, how do we engage transactional law and skill education in law schools? We do it in a

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[4] *See* Am. Bar Ass'n, Section of Legal Education and Admissions to the Bar, *2018-2019 Standards and Rules of Procedure for Approval of Law Schools*, Standard 302, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.pdf (last visited Nov. 20, 2018).

number of different ways, and no two law schools are likely to adopt the same pedagogy or the same type of curriculum. But I would assert that we all should be teaching transactional law and skills early and often. That starts with the first year, and we have introduced a program at UT Law that teaches transactional law in the first year, currently featuring property and contract law, two things that are taught in the first-year curriculum. And that teaching should extend all the way through LL.M. studies, if you have an LL.M. program at your law school, making sure that students get transactional law and skills all along the way.

That brings me to my "big idea," which is that we should have transactional law and skills across the curriculum. This expression of the idea is cribbed from my former colleague, Carol Parker, who now works in university administration and is no longer working in the law school setting. She wrote an article[5] years ago that many of you are familiar with about legal writing across the curriculum. And the idea here is that we infuse the entire law school curriculum with transactional law and skills education so that it's not just a separate set of courses or a sub-curriculum but, rather, part of the legal education culture—so that it becomes part of the fabric of the law school to understand that transactional law and skills are so critically important they need to be embedded within and across courses. Maybe not within every course, but within many of the courses in the law school curriculum. That's a big thought for us all to chew on; however, I think moving in this direction will help us to solve some of the problems and the challenges that we have in legal education, and to confront better some of the unknowns.

For example, we know that the job situation for our students is constantly changing. The titles and the nature of jobs in law are transforming, and so we have to keep an eye on that. A flexible, more comprehensive approach to teaching transactional law and skills may be a key to navigating those uncertain waters.

Also, we have some challenges and unknowns with respect to law schools, particularly in their curricula. In the law school setting right now, we have some challenges that are related to, yes, continuing ABA challenges, but also to other things, like resource acquisition and apportionment. Getting and allocating resources in the law school setting is tricky, especially if you want to teach lower enrollment courses (which

[5] Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEBRASKA L. REV. 561 (1997).

typically include experiential learning courses). The expense of providing those offerings can be a significant resource issue.

What does a cultural shift toward transactional law and skills across the curriculum do for that? If properly executed, it may save on transaction costs. You don't have to hire a bunch of new faculty to create new courses or to enmesh those courses in a separate curriculum. You can accomplish the desired learning objectives with pre-existing faculty.

A naturally occurring real-life example seems to be in order here. I have a colleague who had a healthcare class, he's an expert in healthcare, right next door to my mergers and acquisitions class this past semester. After some discussion of common learning objectives for our respective students, we decided to make our own little educational Reese's Peanut Butter Cup by putting his chocolate and my peanut butter together—his course in Health Law Regulation and Quality and my Mergers and Acquisitions (M&A) course, respectively. We co-taught a healthcare M&A class during one of our class meetings, since our classes were at the same time and in adjacent classrooms. The students thought that it was the greatest thing; we thought it was the greatest thing. We learned from each other. He learned about my transactional law and skills background and M&A, and I learned about health care regulation. We did something that related to a hospital in the State of Tennessee. It was a really great moment. We should create more moments like that in the law school educational setting, where transactional business lawyers and people teaching either doctrinal classes or clinical law classes or other skills offerings can actually work together to create transactional law opportunities for our students and skills opportunities for our students.

That brings me to my endpoint, which is that it is our burden as faculty to make these kinds of arguments for the forthcoming agenda, if you will, for transactional law and skills education. We can use the kinds of rationales I've identified here to do it. We should be thinking about the relationship of transactional legal education to the kinds of challenges and unknowns that I've just outlined for you. The key for me is thinking about transactional law and skills across the curriculum—not to the exclusion of introducing transactional law and skills courses and curricula (for the schools that desire to do that and have the resources to do that), but as a core institutional value, part of the law school culture. Each law school has an option—really, an opportunity—to infuse its entire curriculum in a more meaningful way with transactional law and skills.

Thanks for the opportunity to share these ideas with you today.

Howard Katz:

I'm Howard Katz. I'm the legal educator in residence at Cleveland-Marshall College of Law at Cleveland State University. I appreciate the opportunity to be able to share some observations with you today.

Let me begin with three disclaimers. The first disclaimer is that, no matter how certain I sound about a particular issue, I may not really be. Anything that I say is preceded by an implied Quaker query: "have you considered this?" My second disclaimer is that I'm going to use conventional terminology, even though I'm not particularly fond of some of the connotations, particularly the use of the terms "doctrine" and "skills." It suggests a dichotomy that arguably does not exist and suggests a hierarchy that in fact does exist but shouldn't. The third disclaimer is that I'm going to speak quickly, and I may not be able to fully caveat or flesh out the implications of everything that I say. We can do some of that perhaps in question and answer. Also, you can work through some of the implications yourself from points that I'm making: I'm trying to give people something to think about.

At the first Emory Transactional Law conference that I attended, which was the second one that they held in 2008, I ended my presentation with this observation: "keep in mind, that with some persistence, some vision, and some strategy, legal education could be better a year from now than it is today." Well, I believe that has happened. It is, in part, thanks to people who are in the room today, and it's obviously up to us to continue that progress.

In our world of TED talks, it is now very conventional to begin a talk with a five to ten-minute story. Since I only have fifteen minutes or so, I'm not going to be able to start with a story. Instead, I'm going to give you a profound quote (which doesn't mean me quoting myself, as I just did a minute ago). The quote is from someone far wiser, the comedian Steven Wright. "Someone asked me if I were stranded on a desert island, what book would I bring? …*How to Build a Boat*."

In one sense, the proposition that we are making to our faculties and to our deans is very simple. The first time one of our graduates needs to draft some sort of document, they are going to feel like they are on a desert island, or they may wish they were on a desert island. And so our proposition, at one level, is merely to suggest that law school provide to our students one or two chapters of that book on how to build a boat.

Obviously, there is more to it than that, and George and I will talk a little more about that.

I want to first quickly address some of the very common obstacles or objections to incorporating more transactional law and skills in the curriculum. The common ones are inertia and resistance to change, bar results, and cost. Now, I can't possibly know what is going on at each of your individual schools. However, I can probably predict the nature of the debate that is going on in your curriculum committee at your faculty. I can tell you all the arguments that will be made. You just have to fill in the names of which of your colleagues would be raising which of these objections. I leave that to you for when you go home.

Let's take the first common objection: resistance to change. Let's face it, law professors are not adept at and do not embrace the notion of change in law school, even though in their professional roles they are often advocating for change in the real world. We need to take that into account. I have three suggestions.

The first is that sometimes we need to take yes for an answer. We can't expect every one of our colleagues to be comfortable addressing transactional issues in their class. Sometimes the most we can do is to encourage a professor to just bring a little bit of it into their class. In a contracts class, while our ideal might be for our contracts colleague to actually do a drafting exercise that is fully graded, we might have to settle for encouraging that colleague to ask, at the end of covering one or more of their cases, "Class, how could the attorney have avoided this problem?" even if they don't spend a lot of time giving an answer.

The second suggestion is that we need to pay attention to design issues. Sometimes the success or failure of any curricular reform depends on how it is designed and implemented. The course on legislation and regulation is one example where people have thought about and implemented different models (with, by the way, varying degrees of success). They have the advantage of having a single, specific course, which they advocate for adding to the first-year curriculum, whereas (as Joan Heminway indicated in her presentation) we are suggesting multiple ways of introducing transactional law and skills.

One example would be, as she suggested, the pervasive model through the curriculum. Another might be add-on laboratories, not necessarily taught, sometimes, by the same person who is teaching the doctrinal course. At another school, it might be a separate course that pulls together skills from a variety of areas in the curriculum into one skills course or perhaps just a transactional skills module. Another model

might be a full-time faculty member devising a game plan, which is then implemented primarily by adjunct faculty. And there was a discussion yesterday by two faculty members—I believe from Arkansas—presenting a model where they have a separate track of assessment exercises involving skills, administered by their academic support person. So we need to think about what the facts on the ground are at our school and what method might be most likely to be accepted and to also be successful.

The third point is that law schools are not Silicon Valley startup companies. Just ask any dean if he or she even has the power of a baseball manager, let alone that of a corporate CEO. The idea that you can transform the entire culture of a school may be commendable, and it may be an ultimate goal. But sometimes, in fact most of the time, that is not going to be realistic. Rather than the corporate ideal of "buy-in" across the organization, you may have to settle for holding certain faculty members harmless—making clear to them that they do *not* have to change, while at the same time emphasizing that what they do is valuable and that it allows other people to do other things. That may be the best that we can achieve at some institutions.

Another common objection: bar results. Again, this is something that Joan referred to. There are two common arguments. First, we can't reduce the number of hours devoted to each first-year course (although, granted, some schools obviously have already done that). I've heard of one or two schools that are actually going back and adding hours back in. Second, we can't distract students from taking upper-level courses that are relevant to the bar.

In addressing this concern, I'm not talking about the MPT, although many states have it. The last two states where I taught before assuming my current position at Cleveland Marshall didn't have the MPT, didn't have a skill section, and therefore the relationship of transactional law or skills to the MPT was not an issue at all. So first we should remind our colleagues in jurisdictions that have the MPT that when we talk about bar results, we also mean that section of the bar exam, and that transactional skills training may in fact relate to performance on that part of the exam. But more importantly, I think we should recognize it is very difficult to refute "faith-based arguments" for and against reducing or adding hours to first-year courses. Many faculty members either believe reducing hours has an effect on bar exam performance or that it doesn't. And it's very hard to get good empirical

data. There have been a couple of articles, and I've heard of a few schools that are trying to study this internally. Also keep in mind that it's very hard to prove a negative. So even if there is data showing that there has been no significant change since the school semesterized year-long courses or reduced hours, someone can always say, "But your data isn't robust enough," and therefore the argument continues. We also should question whether taking one, or two, or three transactional skills courses in the second or third year really does squeeze out bar courses students might otherwise take. At most schools, obviously, students have a variety of choices and lots of hours to play with, so it's hard to say that a student doesn't have enough time to take bar courses.

But there's a more important point, and I was reminded of this in a conversation I just had with some students of mine who recently graduated from a school where I used to teach. There was a common theme in several of my conversations with these graduates. I was congratulating them, and as we know, graduation day is just the happiest day of law school. The first day of orientation is great because everyone is so eager. Graduation day is great because they have finished their three or four years of study. What several of them were saying was, "We came here to law school so enthusiastic about what we were going to do with our law degrees. And then for three years they squeezed all of that out of us. It became a slog. Now at least we have our degree, and we can go back out in the world and accomplish something." I would suggest that this feeling they expressed is partly because, while they were in law school, they saw very little of what real attorneys do in the real world. I think that it is important to remind our doctrinal colleagues that if students see the context for the doctrinal courses, it will make their learning in the doctrinal courses more effective. And as a very important article by Debbie Maranville suggests, it may energize students. The doctrinal courses are benefited when students are energized and motivated by seeing what real lawyers do, whether it is a transactional simulation or a live client context or an externship. This point is important to bear in mind, in part because it is often the most traditional colleagues on a faculty who most bemoan the lack of engagement by their students. And so transactional law and transactional skills are one way of addressing a concern held not just by faculty members who we would consider as more reform or change oriented but also by faculty members who we would characterize as more traditional.

The third common objection is the law school's budget: cost. You would think that this argument would have more or less faded away over time. Most schools have lower enrollments than they did, and therefore many upper-level courses and seminars are no larger than the

enrollment-capped contract drafting or negotiation course. Nevertheless, we should think about continuing to develop transactional materials that are particularly useful in larger classes, whether for a large section of a first-year class such as contracts or for a contract drafting class (or some other upper-level course) where the school is unwilling to impose an enrollment cap. The assessment people have done some interesting work in this area, creating modes of formative assessment that can be utilized in large classes. As another example, there was a very good presentation at an earlier Emory transactional law conference, suggesting how legal drafting can be taught effectively and efficiently to a large class. You can find those ideas in a *Journal of Legal Education* article by Jamison Wilcox. While you might think the cost objection would go away, we also should address it by thinking about the kind of materials we can provide to the rest of the law school and to professors who might want to teach transactional skills to larger classes.

Embedded in the cost issue is an opportunity. Deans aren't just looking for more first-year students to fill the entering class. Of course, they are all looking around for those 1Ls, and if you could add 5, or 10, or 15 more who are paying full tuition, that's a good thing. But more and more, if you talk to deans, the action is in finding other sources of revenue. I think that programs that come out of the transactional world can be a piece of that puzzle. So for example, a module or a course for non-lawyers on contract management that would be taken by students in the business school or people who are in business is one way of enhancing revenue and expanding the reach of the transactional curriculum. Maybe that will get the attention of your dean.

All of this leads to a general suggestion, which is that we need to better explain why someone would want to be a transactional lawyer. Many 1Ls come to law school wanting to help other people, and in the context of the litigation focus in law school, the connection is very clear: you're going to go into an immigration hearing to fight for those people, or you're going to go into court and fight for some person's rights. But what about the individual who has an idea for a business? Maybe they developed a product or process in their garage. It might be an idea that would serve an unmet need in the community. It might be a way for that person to change their situation in life. It is the transactional lawyer who will make that dream a reality. But that connection is not often spelled out by transactional law people. I think we need to make that connection clear, both to prospective students (to attract them to the school you are

at and to do transactional law) and to current students within your school (who might not otherwise think about taking a transactional law course).

In her earlier presentation, Joan talked a little bit about jobs. I want to talk about jobs, and more generally employability, and the characteristics of the graduates that we produce. One aspect of this is obvious (and was mentioned by her): if this is a growth area of the law, we should be training our graduates to do it. But let's look at some other aspects of it. One is the issue of higher order skills. As more and more of lawyering either gets off-shored or mechanized, lawyers who are problem solvers will always be in demand. As Michael Hunter Schwartz talked about in his plenary, "where in law school do we teach, in any rigorous way, decision making? Where in law school do we teach, in any rigorous way, problem solving?" I would suggest that transactional courses, particularly transactional skills courses, including simulations, are an excellent place to do that.

Let me address the topic of so-called "soft skills." My first point is this: some things that we call "soft skills" aren't really soft skills. Knowing how to negotiate is not a soft skill; it is a skill that every lawyer, and in fact every human being, needs to know. And I'm an advocate for law schools making more available, and in some cases requiring, a course in negotiation. I gave that presentation at a previous Emory transactional law conference. Drafting a business agreement is not a soft skill. It is a skill. It is a thing. We should think a little more carefully about the terminology we use, even if we sometimes fall into using conventional terminology.

There's another aspect to teaching soft skills, and I'll use something done in architecture schools to make my point. Architecture schools have a signature pedagogy. Yes, the law is not the only discipline to have a signature pedagogy. Architecture schools do as well. It's the studio and the critical review or "crit," as it is commonly referred to, and it's basically a combination of what we would call "simulation" and "clinical." The studio is central to their curriculum. Other courses feed into it, and the studio is where the materials from various other courses are synthesized and pulled together. One of the interesting things about that model is that they use the studio to teach some skills—some of them might be called "soft skills"—in addition to the central skills such as design and structures. They teach their students skills such as public presentation, project management, and interpersonal skills indirectly through the studio, not in separate courses. Law school transactional courses, particularly those with a simulation component, are an excellent

vehicle to teach those so-called "soft skills." (By the way, there's a section going on right now on teaching communication skills in transactional courses, which demonstrates this point about teaching a skill indirectly rather than in a separate course. I appreciate the fact that you're here and not there. But you might want to go and pick up the handouts from that session, which is going on next door.)

Another trend that is going on is the use of technology. I don't have a lot to say about this. But I would suggest to you who are on the front lines of teaching transactional law that you should think about ways of integrating technology into transactional law because technology is an area that draws attention.

I'll address another subject—whether it's a soft skill, or a discipline, or whatever you want to call it—which is the increased emphasis at many schools on professionalism and the formation of professional identity. Let me suggest that transactional courses, particularly simulations, are an excellent place to develop those ideas. One great advantage of a simulation is that students can manifest their professional behavior (or lack thereof) in context, rather than just passively receiving a lecture about the nature and history of our profession.

This all leads to three more general suggestions. The first is to make curriculum mapping and your institution's focus on learning objectives your friend. As schools think more about those sorts of things, there is a place for the things that transactional law does in that scheme.

The second is to think about bringing some practicing lawyers into your building to speak with your faculty—not only about what they do in their practices but also about the attributes they look for in the people they hire.

The third is a more general observation. Often, simulation seems to be the stepchild in discussions about curriculum and teaching methods. The clinicians, of course, favor and advocate for live clients. Professors who are inclined towards more experiential learning in law schools tend to think primarily about live clients and externships. Simulation often is treated with less respect or importance. Here is where I quote a second wise individual, Yogi Berra. Apparently, this is something Yogi Berra really did say because, as we know, he didn't really say everything that he supposedly said. What Yogi Berra did say was, "I

don't want to make the wrong mistake." This makes an obvious point about simulation. The reason why we have simulation in our curriculum—in addition to live clients, in addition to externships, let alone in addition to the traditional doctrinal courses—is that we can do things in a simulation class that we can't do in a clinic with a live client without risking the future of that live client and risking malpractice. Simulation is taken seriously by students if done correctly, and it gives the student a chance to try things out and make those beginner mistakes while still in law school. We need to be stronger advocates for simulation as a valuable pedagogical technique in and of itself.

Let me mention a few other trends and their potential connection to transactional law instruction, and then I'll finish. "Interdisciplinary" is obviously a buzz word at more and more law schools. It seems to be a growing trend. The obvious question is this: why doesn't that concept include business schools and the world of business as one of the disciplines that law schools intersect with? And why shouldn't it also include people at your university doing interesting entrepreneurial things, whether they are in the business school, the tech space, or in the arts? I think we need to be more diligent about looking to make those kinds of connections across the university.

Here are three other possible intersections with transactional law to consider. One is the low bono movement—the attempts to find ways to deliver legal services at a lower cost so that more people can have access to an attorney. If the low bono movement can be successful, it makes transactional law more attractive to our students because it then becomes something that more of them will be able to do, particularly in solo and small practices, when they graduate.

The second is the legal education reform movement. I don't know if anyone has officially labeled it as a reform movement as such, but I think you understand the shorthand terminology. If transactional law must fight for space in the curriculum, particularly in the first year, we need to be supportive of methods of instruction in doctrinal courses that can make that instruction more efficient and therefore create the space to include other things in the first year. So in a sense, the movement to include more transactional law in law schools is both a reform movement as well as one that benefits from the success of other reform movements.

The third intersection I would point out is with clinicians. It is true that clinicians often come from different backgrounds from those who teach transactional law. But they share a common objective of bringing more of practice into the law school. We need to be mindful of

a difference in perspective—they favor live clients as opposed to simulation (as I mentioned earlier). But there is also the opportunity to point in a common direction, in terms of bringing more of what lawyers do into the law school.

In conclusion, let me say that with some persistence, some wisdom, and some strategy, legal education could be better a year from now than it is today, and even better two, and five, and ten years from now.

Thank you for your attention. I'm going to turn it over to George, and then we're going to have time for question and answer, and hopefully an opportunity to hear some of the perspectives of the people in the room. Thank you.

George Kuney:

I am George Kuney, and I teach at the University of Tennessee College of Law in Knoxville, Tennessee. I am going to focus my talk at a more micro level than Howard Katz's. He has laid out some broad conceptions across the academy that could be done. I will certainly touch on that, but to understand what I am going to address, which is where my agenda has been, and where it is going, it is a highly personal story, so I have to give you a little background on me, so that you understand where I come from and why my agenda is what it is.

I was born and raised in San Francisco, California. I went to University of California schools back in the 1980s when it was free or almost. In fact, law school at UC Hastings cost me about $1,000 a year, not counting room and board. You could get a summer job doing just about anything and put the proceeds in a CD and pay for your living expenses and go to law school. It is an entirely different environment today. I did very well in law school—law school smarts—and went to practice with Morrison & Foerster in San Francisco doing bankruptcy and reorganization work.

And the first thing that I learned as a first-year associate was that I was not prepared to practice law. I was prepared to do research memos. I was an excellent research memo guy. Question presented, statement of facts, analysis/discussion, conclusion; we can do this! And I could write basic motions and things like that. As far as transactional documents went, I was fairly clueless beyond simple leases and the like. But as far as master credit agreements for syndicated loans used by large

banks and large businesses, which is the kind of stuff that associates at Morrison Foerster got fed in the beginning of their career, I had no clue. But I found them fascinating, really fascinating. And when I found the online form bank—wow! All these documents that created complex legal relationships: limited partnership agreements, loan syndication agreements, merger agreements, and, of course, plans of reorganization. I mean that was something. It was a Fantasia-like moment when Mickey Mouse opens the book that the wizard has got on his desk.

But I had seen Fantasia, so I had also realized that you ought not to start reading that spell because all kinds of stuff can happen, and soon it is raining, and the mop buckets are coming and it is just a horrible nightmare set to a symphony. So, you do not want to do that. But it is very empowering. And at that time I remember thinking it would be really great if law students got to have this kind of an empowering peek into the magic book that documents relationships, instead of just reading cases about little portions of the magic book that went wrong.

That was my big thought as a second-year associate. I went back to Hasting and I said I would like to teach legal writing and research. Hastings is located about a block from the federal building in San Francisco. So, at the time, they staffed the legal writing and research program with federal attorneys who had the time to do it and are barred from most legal side hustles. So, you got a lot of people who have a good criminal background, a good litigation background, but as far as transactional background, not much. I am from a mixed litigation and transactional background.

And I did it. It was fun. And I kept on doing it after I moved to San Diego to join another firm, where I made partner. I was then teaching at Cal. Western doing the same kind of thing. Having a real blast at teaching advanced legal drafting and bankruptcy and working it into my schedule that included billing 2,000+ hours a year. (I am kind of a nut, as my colleagues would tell you.) Around that time I was a fifth-year associate.

I thought, okay, I love what I am doing, but I do not want to be doing this when I am 50. This is great experience for a young guy, and especially the time that I was in San Francisco at Morrison & Foerster and the Howard, Rice firm when I was a bachelor with no family commitments and conflicts. I got interesting assignments that involved flying to Dallas, Delaware, Denver, all over and standing up and objecting to things, moving for relief, negotiating, and all kinds of that stuff. Staying in the Brown Palace in Denver for two months working on retail bankruptcies which were all the rage in Denver for a bit. It was all

really cool for somebody who had never had that sort of experience at all coming up. But, for lack of a better way of putting it, I wanted to switch my night job as an adjunct professor with my day job as an attorney. And so, I started looking around. I went to the AALS Hiring Convention a couple of times. Interviewed around, got some interest, nothing really came of that. I ran up against the, "Well he is got a lot of practice background" academic cold shoulder a bunch. By now I was in my eighth or so year of practice and a partner in a Cal. 50 law firm's San Diego office.

I realized that I was going to have to make the move to academia soon, if at all, because hiring committees view prospects that are over, say, 45, as folks trying to retire into teaching and as if they are not going to be a productive go-getter. So they get passed over in the process. I would call it age discrimination, but that is a nasty word. But, those forces are out there.

So, one of the goals which has been annunciated by Howard and by Joan is to get experienced people into teaching students, and there is a natural barrier in the system there: Discrimination against those with substantial experience. We can get them in as adjuncts—that is easy. And we can sometimes get them in as "lecturers in the practice of law," and other similar terms. But to bring them on and fully integrate them into tenure-track faculty is a difficult thing.

So, I got lucky. Really lucky. The associate who was my supervising associate at Morrison & Forester when I first went there was named Nancy Rapoport. She exited MoFo as a fifth-year to join the academy and was doing the deaning circuit. She was interviewing for the deanship at Tennessee and came in second but was well liked. They told her they had come up with a means to hire somebody to direct a Center for Entrepreneurial Law (This was back when "Entrepreneurial" was first a hip buzzword coming out of B school and the popular press).

Tennessee found a graduate of the law school who had actually gone into business rather than law, Jim Clayton, who was the founder of Clayton Homes, a manufactured housing company, which is now a wholly owned subsidiary of Berkshire Hathaway. He had done quite well for himself, and he needed continuing education credits. So, they brought him in as a lecturer in practice, and he got to know the students, and he got to see what they were doing, and he got interested about it. And after a bunch of discussions, the University agreed to create a

faculty line if Mr. Clayton would endow the center and the new faculty member could pursue this kind of practical education, getting it into the curriculum.

So, with that they went out looking for somebody to fill the position of the director, and asked Nancy Rapoport if she knew anybody who wanted to do this. Well, I had been talking with Nancy and said I would like to make the change. And she put my name in for the job. I ended up being one of two finalists, and I ended up winning, and that was great. So, I quit my job as a mid-level partner in a large California firm, and packed half of our household goods in a Ryder van and drove across country in the late fall of 2000. I had never been to Knoxville in my life before except for the interview for the position. It looked nice—but everything looks nice when you are interviewing—and got there, and moved in. My wife stayed behind in San Diego. She was finishing up some responsibilities that she had. She is a lawyer, too. She came out two years later.

I got there, and the dean said to me "Well, George, good. Great to have you on board and everything. We have got your computer set up and your office set up. We have announced that you are the director of the newly endowed Clayton Center for Entrepreneurial Law." And then he said, "Okay George, we are going to have to go get that endowment funded." There was no money there at all beside the faculty line! And I told the dean, "Wow, okay. Do me a favor and do not mention this to my wife." Of course, Mr. Clayton funded—that all came through. It was an interesting transactional experience for me, right, one that I had not had. So, note to self: always look for what they mean by the term "endowed" before you accept the position. That was in 2001.

So that is my background, I guess the part I left out was that I have an MBA from USD. When I was going up for partnership at my last law firm—you know, you are always nervous about whether or not the firm is really going to express thanks for all the good work that you have done in the past and all those hours you billed—I decided that I would go out and get some extra skills so that I could make it clear to the firm that I was going job hunting if I did not make partner, and I would be able to flip over to the B side, or whatever they wanted to imagine. And in the end—I do not know if that shifted anything, but it certainly made me feel more confident going into the process—they made me partner. So, I have an MBA as well, and that is helpful in terms of, in terms of practice it is great because I work for and with a lot of MBAs, so I know their lingo, just like your students know the lingo of

the lawyers who are going to hire them, and so they can communicate more effectively.

So that is the person who took over this job at Tennessee. And it is a real center, we have a suite of offices, we did not just slap the plaque on a faculty member's door and say this is The Howard Stern Professor of Legal Economics or whatnot. We have got a little suite. We have a full-time administrative assistant, also paid for by the law school. And I have a little line of about $40,000 a year that the endowment spits off, which, surprisingly, goes an awful long distance in Knoxville. Adjunct budgets are covered by the law school itself rather than the Center so we do not have dissipation there. The $40,000 gets channeled into special projects, including bringing back practitioners who want a little break from practice and funding a law journal (the one that published this article and has co-sponsored this conference at Emory over the years). Our visitors have been varied and many were seeking to transition into the academy—and some have been successful in that regard, but all have had a strong practice background.

The visitors' backgrounds have included AMLaw 100 firms that do not have offices in Tennessee. This is the kind of lawyer that our students are not necessarily exposed to on a day-to-day basis, and the visitors pick up courses and teach them, usually one traditional course, like Business Associations, and one of their own design, like Unsecured Lending and Managing Credit Facilities or Agribusiness Regulation, for example. So, we have got that, we have the Concentration in Business transactions, which is a linked, Joan mentioned it, it is a linked series of courses. They are courses that pretty much everybody ought to take anyway if they are interested in practicing business law as a transactional lawyer or a litigator. But we packaged them up and said, "This is a good chain of courses to take if you want to get in and do this kind of work." And then we have the capstone or capstone courses at the end of the Concentration that are simulation courses. They generally run as four- to six-week modules involving distinct transactions, and the modules are taught by full-time faculty with substantial practice backgrounds. We also have our Business Law Clinic, for live client work on a smaller scale, which I have worked on with Professor Brian Krumm and others.

I also developed the contract drafting program at Tennessee. I created the materials—The Elements of Contract Drafting, published by West. I worked with Tina Stark in doing some of that: we kicked stuff back-and-forth. And we have probably a total of about 10 initial contract

drafting classes annually across the two semesters. We do an out-of-class assignment every week, and then an in-class assignment every week. They are all taught by group of really great and committed Adjunct Professors, most of whom are alums.

We also have a series of courses on top of that, which are advanced contract drafting courses. Software licensing, commercial leasing, mergers and acquisitions, construction law—specialized subject matter areas. Those courses tend to get enrollments of about eight to 10. We would take up to 15. I do not let them go over 15 because that just ruins the dynamic, and it overworks the instructor handling them. We staff these courses with me and a dedicated cadre of Adjunct Professors.

With that background, my agenda for 2018 is roughly three main bullet points with smaller ones: (1) Increase specialization and integration of doctrine and skills, (2) Teaching skills across the curriculum, putting them into other courses, rather than putting them on the side in separate courses as much as possible, and (3) Pulling back learning from the associate years into the 3L year at a minimum. This came out of my experience at Morrison Foerster. I really wish that I had been exposed to the stuff I was exposed to as a first- and second-year associate when I was in law school. When we are successful with that, when the students arrive at their law firms, they are able to perform at a level that far exceeds those of the people who came in looking like I did, and to ride the learning curve at the firm faster. And when that happens, people give them more work. If people give them more work, they are wasting less time and they find it easier to bill their 1800 plus hours on a decent basis and have a better quality of life. It also helps them down the road in terms of being lateral hires, in terms of opportunities for partnership, et cetera, et cetera. So, it just makes sense to me to send our students out ready to actually play the game. It is competitive out there—that does not mean they have to be trying to knock down other people—they just have to do good work and have the ability to do good work from day one.

Legal education is too important to be left to traditional doctrinal law professors. There is a place for traditional doctrinal law. I teach Contracts I and Contracts II in the first-year of law school, and I love it (and I try and build transactional stuff into those courses). There is nothing like the parole evidence rule once you illuminate it with integration clauses. And how do you draft a really good integration clause that is a merger-no-modification-unless-in writing clause? You can really tease that out with very little effort in that class. It actually makes them understand, by the way, that the parole evidence rule is a great

thing! If it was not there, it would be necessary to create it in your document, and say "this document is a full and complete statement of the parties' agreement with respect to its subject matter and it supersedes all prior and contemporaneous discussions. The parties agree that extrinsic evidence will not be used to construe or interpret this document," right? Now students react with, "Oh, okay, I get it. I understand what this thing is about." Without the rule they would have to design the doctrine into their documents in the first place. From this comes the notion that they can draft their documents to capture the doctrine by making it clear that the document is a complete or partial integration, or not.

I also encourage developing alternatives to independent adjunct professors, getting people to team up, like Joan did with our colleague Zach Buck, in the healthcare MBA program. We have done that with a number of adjuncts. We have adjuncts who team-teach. Adjuncts who team-teach after we have a doctrinal person come in and sort of lay the groundwork on real estate finance for two classes. And then it is time for them to do a simulation with a coach/client doing a real estate transaction. Buyer-seller, we like to mix it up a little bit and get a bank in there, so that the bank is driving part of the deal, say with regard to title insurance.

Additionally, we have forged partnerships with the private bar, in terms of teaching, mentoring and externships. I supervise about eight of those a year through Y12 National Security Complex, Oak Ridge National Lab, and UT's athletic department, which is always looking for compliance folks.

On the subject of developing an ideal curriculum, I am going to take issue with something that Tina said last night in order to provide balance. I think the worst thing that we can do to further the teaching of transactional law and skills is to get a big flag, a really big flag, like they have at the start of an SEC football game, that says, "Transactional Skills Training Is A Must," and go running at the faculty with that. You do not get there, in my experience, by going through the front door and demanding change—for all the reasons that Howard Katz pointed out. However, I guess the watchword of my life and a lot of my practice has been guided by one word: Infiltrate. We are going to infiltrate, and we are going to get where we need to go by subtly making changes around the corner, out of sight, a little at a time, and when we get there, nobody is going to realize that we have created a sea change in legal education.

I started out as the junior contracts professor at UT Law. At that time the senior contracts professor had arrived at UT the year I was born—1964—and had been teaching contracts the whole time. There was no point in talking to him about integrating skills into contracts class. That just was not going happen, and that is okay, because he served other purposes.

But, now I am the senior contracts professor. It took only 18 years for me to get here. The others have dropped by the wayside, and now the junior ones who are coming up they often adopt my book. So, I have already infiltrated their class by providing the written materials that they are keying off of. And even if they go into another book after that, they are going to carry some of that with them, right? It is a virus, and so I have planted it, and it is going to spread. It is a way to make it work. That is why I say that to advance the agenda you do not need structural change at the macro level. We do not have to announce "Curricular Reform" and go and make a big deal out of it. That is a recipe for endless and continued faculty meetings, which devolve into somebody then debating whether or not this is a better thing to have as a faculty forum, not a meeting, because parliament action is not proper in a forum, and we then start getting into parliamentary rules about helpful and friendly amendments, and all the like. That is just a nightmare.[6]

So, my big push is to incorporate practice-based problems into all courses. This is where I think there is a lot of hope. For a lot of instructors, you want to create the problems. You want to give them a rubric, you want to make this as easy as possible, and you want to make it a rubric that potentially can be pre-graded by a research assistant, so that then it gets pre-chewed and passed along to the instructor who can quickly go through it. We are not talking about a grade determinative or a largely grade determinative component of the course, so it is not as important that they get it absolutely totally right in terms of evaluation. It is just got to be good enough. "The perfect is the enemy of good," right? Let us start with good and then we can dial it up to perfect.

Increase the amount of mid-semester written work product that is evaluated. In my Contracts I course, we have two writing assignments

[6] I do not know if any of you know this, but the scene in The Lord of the Rings in Fangwood Forest where the hobbits are being held by Treebeard, and he is going to raise and rally the Ents to assault the White Tower, is rumored to have been based upon Tolkien's memories as an Oxford Don of faculty meetings and the rest. So next time you read or see that scene you will know where it came from, and I think you will see the similarities. The version in the book is the better version and more true to faculty life. It is longer and more tedious.

during the semester, and two midterms, and then a comprehensive final. They do not have to wait until January to realize they did not get what was going on. They get that right up front, and it is nice, it clarifies things and, boy, I tell you, it makes the final examination so much more fun to grade, because the student responses are so much more coherent. You do not have to search for those issues and the analysis that is in there.

Promote group and teamwork. This is, I think, getting kind of hackneyed these days. When I started, it was kind of foreign, outside of legal writing classes and that sort of thing, and even there, there was great concern that you were not able to evaluate whose contribution to the document it was, and people thought that was unfair, etc.

But, as I said I went to B school, and, there, after you get out of finance and accounting, everything you do in B school is a group project. They understand, and the B school profs all understand the concept of leverage, and if they get you into a working group of five to produce a single piece of work product that the instructor can then evaluate and grade, they have just cut their workload down to 1/5 of what it had previously been. So, they are all over it.

Is group work a good technique for teaching? Yes and no. It teaches many of the soft skills that really are essential. How do you organize a group, how do guard against people who will let you down? Because in the Restatement of Kuney (First) section 1 is "people will let you down." And so, we build off that. So, you can design those projects so that they have to come up with work schedules. The same kind of thing that they would do in a firm where associates are parsed out separately to handle things that are deliverables to a supervising attorney.

It just makes good sense, and it is a set of soft skills that a lot of law students do not have. The saddest part is that the people who do not have them the most are people at the top of the class. They are the ones who are really, really gunning for success, for big firm jobs, and we are going to really make it, da-da-da-da-da-da. They do not want to mix their work with other peoples because it is a way for those people to let them down. They have got to figure out a way to work in the team, because you cannot do this stuff alone in the real world. It does not work at all.

Okay, so my agenda for the future is more limited, laid out as for the next five years. I have done 18 at UT, and spent 12 years in private practice before UT. I figure I have got five more years before I go to sea,

and if I get more than that out of me, that is great. I have got a 2000 Chevy Blazer that is got 150,000 miles on it. If I can get it to 200,000, I am happy. If it goes to 250,000, great. I would like to be treated like my Blazer.

From casebooks to textbooks. Casebooks. Langdell and his ideal of laws as a science created in 1860s. What a pitch he made to Harvard. You take somebody, we'll get about five somebodies. They have got to be kind of knowledgeable people—or at least appear knowledgeable. And we will have them stand up in the front of the classroom with lots of fee-generating students in it and we will have them assign to people things that other people, judges, have already written, and we will put those into case books. So, you do not have to write a textbook at all. We will give you something that appellate judges wrote. The students are going to then read it, and the instructor is then going to ask questions about it. But the instructor never really has to give any answers. And then, once, at the end of the semester, the students will take an exam.[7]

Langdell's method was that students study the text to derive the meaning, to extract the rules. Now I understand this because many of my 1L first-semester students do not know what they are reading, and they do not have those basic skills of being able to find the key standard and then to take the standard and break it up into elements or factors. And then go down through a series of facts and say, "Yep, that is there. Yep, that is there. Yep, that is there." Right? It is really hard to get them to believe that that is what a lot of the practice of law is. (Part of this is because success in the real world, to the extent that your students have real world experience, comes to those that can jump to the right conclusion fast. That is not what legal analysis entails.) We explode the standard into its elements or factors, and we make it into a check list, and then take the facts and go down the list.

This approach demystifies some of this stuff. But for the first semester of contracts, there was another presenter at this conference, I do not think he is here today in this session, who said we should abolish

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[7] How it morphed to where it is, is a long story I will not get into today, but it is kind of interesting. It parallels the development of the traditional law review article, which started out as law professors feeling that they needed to write something because everybody else in the academy was writing something in the university. So, they did case notes. And then case notes started to grow, because I want my case note to be more notable than yours, so I will do two cases on that one. And then I will trace the evolution of the cases, and now I will throw some policy on top of it. And boy we have got the traditional law review article with a colon in the center of its title. Maybe we are getting away from that now. I keep seeing titles getting a little bit shorter, a little bit more directed. But that is an aside to this presentation.

first-year contracts. Just do away with it, scrap it. I do not buy it. Especially for Contracts I. Contracts II, I have some ideas about, which I am going to get to on the next slide, but that first semester is so foundational, and it teaches them legal analysis through the subject matter of contracts. It is not really teaching them about contracts, because most of the fun stuff in contracts that people actually fight about is in Contracts II. It is not really in offer, acceptance, and consideration, right? Maybe you start to get to it in the formation defenses, fraud, misrepresentation, unconscionability all that kind of stuff.

There is a role in legal education for *textbooks*, where we examine the law of things like covenants. Not casebooks, but books that say "Do it like this because this." Here is an example of an actionable transactional drafting skill: if you want to provide that somebody has to do something, you use a covenant. You do not use a condition or any other type of provision. You make them affirmatively promise to do it. So, we were going to have a section in the contract called "Buyer's Covenants" and then a section called "Seller's Covenants" and we will organize it, and that is how we work with this. At that point you can blend in skills with the doctrine because it looks like doctrine, because you are telling people how to do the act of contracting.

So, in a textbook, we focus the reader on where these sources of law are coming from, but we are not making them read the whole case or cases. Unless they think they need to, in which case, they can go look it up on their own. I give you the basic facts, parenthetical style, and then I am giving you the law statement that we would traditionally have you extract from the case and put into your outline and then carry on towards the final. It makes it a lot faster to cover this stuff, which means you can cover it in more depth. And you can get to some of the stuff that we traditionally have in transactional drafting classes. So that is the goal, that is what I am trying to do. That is this third bullet point, think treatises with examples, cases or excerpts, and problems.[8] You have to give them problems to work with. It is the problem-solving concept and it gives them something to really engage with. Not just engaging with issue spotting and doing the analysis.

[8] It is probably no accident that I favor this textbook approach, as I am a co-author of the treatise California Law of Contracts (CEB, updated annually), which does just this without the problems.

Howard Katz brought up at the start of his talk the notion of curricular reform, and titles and "skills" versus "transactional law" versus "litigation," and what all these things mean. Labels are really important, and the people, especially faculty members who do not want to do any thinking on their own, tend to glom onto a term and ascribe too much meaning to it. So be careful with the labels you slap on things. And do not use one if you do not have to when you are talking about curricular reform. Even, or perhaps most importantly, the "experiential learning" stuff. Just talk about giving somebody an exercise that they can insert into their class, especially to junior colleagues. That is a great way of having creeping change move through the curriculum. And hopefully, that kind of evolutionary change can take hold and be stronger than when we grab that banner and charge the front of the castle and get mowed down by the defensive, well-entrenched forces that are inside.

I have taken my time. So, we will open this up to discussion. I hope it will be a discussion because I will bet that, if you have got a question, people other than Howard and I might have a response.