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# What Law Schools Should Teach Future Transactional Lawyers: Perspectives from Practice

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## **What Law Schools Should Teach Future Transactional Lawyers: Perspectives from Practice**

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Abstract: Since at least the 1980's, law schools have been chided for doing a poor job at teaching skills. This criticism has been accompanied by pressure to increase their emphasis on skills training. The pressure increased with the publication of the McCrate Report in 1992, and then again with the publication of the Carnegie Report in 2007.

This article is based on my remarks given on June 10 at the 2009 mid-year meeting of the AALS Conference on Business Associations. In those remarks, I respond to the questions “*Are law schools teaching students adequate transactional skills?*” and “*From the standpoint of preparing students for a transactional practice, what would you like to see law schools change?*”

To answer these questions, I first describe different categories of knowledge a successful lawyer should have, and examine what people mean when they refer to skills. I then discuss which of these categories of knowledge law schools can and should teach, and which should be left to law firms (based on the comparative advantages of each). Finally, after noting that the heavy focus of law school critics on skills training mask some more significant issues, I share my thoughts on how law schools can change to better prepare students for a transactional practice.

## What Law Schools Should Teach Future Transactional Lawyers: Perspectives from Practice

Michael A. Woronoff\*

Since at least the 1980's, law schools have been chided for doing a poor job at teaching skills.<sup>1</sup> This criticism has been accompanied by pressure to increase their emphasis on skills training. The pressure increased with the publication of the McCrate Report<sup>2</sup> in 1992, and then again with the publication of the Carnegie Report<sup>3</sup> in 2007.<sup>4</sup>

This article is an edited version of my remarks given on June 10 at the 2009 mid-year meeting of the AALS Conference on

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<sup>1</sup> N. William Hines, *Ten Major Changes in Legal Education Over the Past 25 Years*, AALS NEWSLETTER (Ass'n of Am. Law Sch., Washington, D.C.), Nov. 2005, available at [http://www.aals.org/services\\_newsletter\\_presNov.05.php](http://www.aals.org/services_newsletter_presNov.05.php) ("Throughout the decade of the 1980s . . . the practicing bar continued to pressure law schools to do even more to prepare graduates to enter practice with higher levels of practical skills. This pressure gained focus and momentum with the publication of the McCrate Report in 1992.").

<sup>2</sup> SECTION ON LEGAL EDU. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MCCRATE REPORT].

<sup>3</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

<sup>4</sup> See, e.g., Katherine Maigan, *A Plea for Real World Training in Law Schools*, 53 THE CHRONICLE OF HIGHER EDUCATION, Jan. 19, 2007, at A6, available at <http://chronicle.com/weekly/v53/i20/20a00601.htm>; LexPrep, Getting Educated in Law School (Jan. 23, 2007), <http://lexprep.blogspot.com/2007/01/getting-educated-in-law-school.html>; Robert J. Ambrogi, Law Schools 'Should Be Ashamed,' (Jan. 19, 2007), [http://legalblogwatch.typepad.com/legal\\_blog\\_watch/2007/01/law\\_schools\\_sho.html](http://legalblogwatch.typepad.com/legal_blog_watch/2007/01/law_schools_sho.html).

Business Associations. In those remarks, I respond to the questions:

*“Are law schools teaching students adequate transactional skills?”* and

*“From the standpoint of preparing students for a transactional practice, what would you like to see law schools change?”*

To answer these questions, I first describe different categories of knowledge a successful lawyer should have, and examine what people mean when they refer to skills. I then discuss which of these categories of knowledge law schools can and should teach, and which should be left to law firms. Finally, I share some thoughts on how law schools can change to better prepare their students for a transactional practice.

### **I. What do we mean by skills?**

To address the assertion that law schools do an inadequate job at teaching practical skills one must identify what someone means when they say skills.

In my mind, legal training consists of the transmission of three categories of knowledge:

1. Substantive knowledge—for the future transactional attorney this includes subjects such as corporate law, securities law and administrative law, as well as non-legal subjects such as accounting and finance.<sup>5</sup>
2. Practical skills—this category has two parts. The first is the ability to perform tasks necessary for the

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<sup>5</sup> Gordon Smith includes in his definition of substantive law “the skill of legal analysis, which is the primary skill taught in many substantive law courses.” Gordon Smith, *The One-Year Law School* (July 3, 2009), <http://www.theconglomerate.org/2009/07/the-oneyear-law-school.html>. I agree and also include the skill of statutory construction, which “does not come easily to most law students.” CARNEGIE REPORT, *supra* note 3, at 67.

practice. For the future transactional attorney, this includes things such as contract drafting and negotiation techniques. The second is an understanding of the context of the practice. For the future transactional attorney this encompasses the ability to understand the language and structure of transactions and the rationale behind these structures.<sup>6</sup>

3. For lack of a better word, Expertise—what the Carnegie Report describes as the ability “to think, perform and conduct [oneself] like a professional.”<sup>7</sup>

This last category is a bit general, but it is difficult to describe it in more detail.<sup>8</sup> Commentators often point to qualities such as emotional intelligence, empathy, the ability to read personalities, judgment under pressure, and a knack for gaining the trust of one's peers and co-workers.<sup>9</sup>

The Carnegie Report identifies two aspects to expertise. The first is a highly structured knowledge. This structure is

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<sup>6</sup> As Stephen Bainbridge notes,

Transactional lawyers . . . must understand the business, financial, and economic aspects of deals so as to draft workable contracts and disclosure documents, conduct due diligence, or counsel clients on issues that require business savvy . . . .

Stephen Bainbridge, *Reflections on Twenty Years of Law Teaching: Remarks at the Rutter Award Ceremony*, UCLA SCH. OF LAW RESEARCH PAPER NO. 08-16 (Apr. 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1122577](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1122577).

<sup>7</sup> CARNEGIE REPORT, *supra* note 3, at 27.

<sup>8</sup> *Id.* at 26 (“[M]uch of what experts know is tacit. It can be passed on by example, but often cannot be fully articulated.”).

<sup>9</sup> See, e.g., Bruce MacEwen, *Legal Education Reform?* (May 20, 2008), <http://www.adamsmithesq.com/archives/2008/05/legal-education-reform.html>. The McCrate Report identified things such as problem solving, client counseling, negotiation, law office management and ethics. MCCRATE REPORT, *supra* note 2.

important because it allows the expert to access his or her knowledge with remarkable speed and accuracy.<sup>10</sup> The second is an ability to perceive aspects of situations in ways that are relevant to deploying their knowledge in ways beginners cannot.<sup>11</sup>

Most commentators are unclear on what they mean when they say law schools should spend more time teaching skills. In general, I think they are combining practical skills and expertise under an umbrella term like “skills” or “practical skills”. But expertise and practical skills are very different in a way that I hope is either clear by now, or will become clear by the time I’m done.

## **II. What should law schools teach? What should be left to law firms?**

So having identified the three things an individual should learn to become a successful transactional lawyer, the question becomes: which of these law schools can or should teach and which should be left to law firms.

To me, this is just a question of comparative advantage: that is, which entity can transmit the requisite knowledge at a lower opportunity cost than the other.<sup>12</sup>

### **A. Teaching Substantive Knowledge**

Is there anyone who doubts that law schools have the comparative advantage when it comes to teaching substantive

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<sup>10</sup> CARNEGIE REPORT, *supra* note 3, at 25.

<sup>11</sup> *Id.*

<sup>12</sup> Library of Econ. and Liberty, Comparative Advantage, <http://www.econlib.org/library/Topics/Details/comparativeadvantage.html> (last visited July 1, 2009). Comparative advantage is different than absolute advantage. Economist Milton Friedman provided a well known example of this difference: Suppose a lawyer can type twice as fast as his secretary. Does that mean he should do his own typing? Well, if he’s twice the typist but five times the lawyer, both the output of the lawyer and that of the secretary would increase if this lawyer focused on the task of being an attorney instead of pursuing both occupations at once. Milton Friedman and Rose Friedman, FREE TO CHOOSE: A PERSONAL STATEMENT 45 (1980).

knowledge? As the Carnegie Report notes, “[t]he strengths of academic training lie in its efficiency in the systematic transmission of ideas and information.”<sup>13</sup>

Exactly. Take securities law as an example. If you have a sophisticated corporate transactional practice, you need to have a deep understanding of the securities laws.<sup>14</sup> Clients want quick answers to complex questions, providing little time to look up and absorb the material. Yet it is an intricate field, with a complicated statutory scheme, a plethora of administrative rules, regulations and guidance, a substantial body of case law, and an incredible amount of lore.<sup>15</sup> As a result, one needs to be steeped in securities law to practice in the area.<sup>16</sup>

Law firms simply cannot teach securities law the way a law school can (if at all). A thorough understanding of complex material like this requires voluminous outside readings and in-class

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<sup>13</sup> CARNEGIE REPORT, *supra* note 3, at 95. Why is this so? “The strength of [cognitive training in the classroom] lies in its ability to abstract concepts and principals from situations and to compress learning into controlled components that can be mastered more or less independently of any knowledge of the situations to which the concepts apply.” *Id.* at 81.

<sup>14</sup> THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* v (6th ed. 2009). And it’s not just Wall Street specialists who need this expertise, a wide variety of business lawyers will encounter significant securities law issues. *Id.* at v-vi. Indeed, “[b]ecause of the widespread possibility of federal remedies that exist for investors who are injured in the securities markets, every lawyer should have at least a passing familiarity with the federal securities laws.” *Id.*

<sup>15</sup> *Id.* at 1 (“Securities regulation is an extremely complicated field. At the federal level, it is implemented by a myriad of statutes and regulatory rules. The statutes and rules are extremely complex and detailed. The case law is particularly perplexing because of the degree of detail and complexity the law imposes.”).

<sup>16</sup> I use securities law as an example, but it is by no means unique. *See, e.g.*, Posting of Sarah L., to The Conglomerate <http://www.theconglomerate.org/2009/07/the-oneyear-law-school.html#c6a00d8345157d569e2011570dea156970c> (July 7, 2009, 8:56 EST).

lectures for a concentrated period of time.<sup>17</sup> I am not saying that law schools can teach students to master the securities laws. Mastery requires years of practice.<sup>18</sup> Rather, in today's world, law school training is necessary (even though not sufficient) to ultimately master this subject.<sup>19</sup>

So do law schools do a good job in conveying substantive knowledge to the transactional lawyer?

Well, I run a relatively sophisticated transactional practice in Los Angeles. As a result, I see a large proportion of the 2L and 3Ls in the marketplace who want to do sophisticated corporate transactional work. I made an anecdotal observation at the Emory transaction skills conference last year that a large percentage of these students, well over half, never take a course in securities regulation.<sup>20</sup>

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<sup>17</sup> See Usha Rodrigues, *The Horse's Mouth*, (June 11, 2009), <http://www.theconglomerate.org/2009/06/the-horses-mouth.html> (“Several speakers stressed the importance of taking Securities Regulation. . . . I cannot echo this enough. My students know that I am adamant on this point. My spiel goes like this: ‘you can’t learn everything in law school, but you should take classes that it would be difficult to pick up on the fly. Securities Regulation is just such a class.’”). Indeed, securities law is so complex a topic that if a student thinks his or her practice will include the area, a single three or four credit class is not enough.

<sup>18</sup> See *infra* note [29].

<sup>19</sup> Cf. CARNEGIE REPORT, *supra* note 3, at 13.

<sup>20</sup> Michael A. Woronoff, *Using a Venture Capital Class to Teach Transactional Skills at the Emory Law Conference: Teaching Drafting and Transactional Skills* (May 30, 2008), in *TENN. J. BUS. L.*, (forthcoming n.d.), available at <http://ssrn.com/abstract=1292477>. To confirm my observation, this summer I had 8 summer associates (each from a different law school) call their law schools to get me data. Unfortunately, law schools do not keep information on what percentage of a class (a) go on to practice transactional law or (b) takes certain courses. While there is wide variation among schools, using data that was available and some rough estimation, what I found seemed to confirm my view. At some of these schools, less than 10% of a graduating class had taken securities regulation.

And it's not just securities—accounting, administrative law, antitrust, bankruptcy, commercial transactions, corporate finance, entity taxation, IP and a host of others. Time and time again I talk to students who KNOW they want to practice transactional law and yet they have not taken, and have no plans to take, courses that contain information that is very important to their careers.

Now schools may argue that I am too focused on specific courses and that, in reality, students take other courses that convey the very same information. For example, I teach a venture capital course at UCLA.<sup>21</sup> We spend a fair amount of time talking about the securities laws, so I guess you could say we cover them. Obviously that is simply insufficient for someone who wants to practice in the area.

To make matters worse, even when students take basic corporate and securities classes these courses generally do not cover enough of the key material. For example, according to a survey conducted for this conference, the basic Business Associates (BA) course is most often a 4 hour course.<sup>22</sup> A four hour course does not provide enough time to cover the substantive law of corporations and other business entities,<sup>23</sup> let alone all the other things people try to fit in, such as skills, case studies,

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<sup>21</sup> See Michael A. Woronoff, Course Description: Venture Capital and the Start-Up Company, <http://law.ucla.edu/home/index.asp?page=245> (last visited June 1, 2009).

<sup>22</sup> Robert B. Thompson, Who We Are and What We Teach: A Survey on the Basic Course at the AALS Conference on Business Associations (June 8, 2009), available at <http://www.aals.org/documents/2009BusAssoc/Thompson.pdf> (“The Business Associations course is most often a 4 hour course and the 4 hour share of the market has grown . . . to 68% . . .”).

<sup>23</sup> As Bill Carney said in his opening remarks, you just “can’t do justice to corporations and LLC’s in the same course.” William J. Carney, The Role of the Basic Course: What is it and Where is it Going? at the AALS Conference on Business Associations (June 8, 2009), available at <http://www.aals.org/documents/2009BusAssoc/carney.pdf>.

corporate social responsibility (CSR), finance, globalization, and the like.

And, so far, the answer hasn't been to offer a second course to cover the material that is left out of the basic course, because (again) a sufficient number of students do not take the additional course. For example, at UVA, something less than 13% of the class takes agency and partnership compared to almost 100% taking corporations.

So my bottom line is, I don't believe law schools do an adequate job of teaching substantive knowledge to students who want to be transactional lawyers. Not because professors do a bad job teaching the transactional courses. The problem is that, first, the basic courses do not have a sufficient number of hours to adequately cover the material. And second, students are offered too many electives, no sense of their relative importance to their future practice, and too little guidance. As a result, more often than not, students don't take enough of the courses they should to allow them to become true experts in their future field of practice.

I'm not minimizing the institutional or political problems of expanding the number of hours in a basic course or of getting tenured professors to teach a course that may be undesirable from the academic's point of view. I'm just pointing out the weakness in the current system in providing adequate substantive training.

### ***B. Teaching Expertise***

With respect to methods of transmitting expert knowledge, the Carnegie Report notes:

Research suggests that learning happens best when an expert is able to model performance in such a way that the learner can imitate the performance while the expert provides feedback to guide the learner in making the activity his or her own.<sup>24</sup>

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<sup>24</sup> CARNEGIE REPORT, *supra* note 3, at 26.

It seems to me, law firms have the comparative advantage here.

First, as the saying goes: to be an expert, model an expert—and most law schools simply do not have a faculty with the requisite experience. That’s not just me talking—here’s Steven Bainbridge:

most law professors (at elite schools, anyway) come into practice with only a few years of practice experience. Being bottom man on a deal or litigation team for a couple of years doesn't translate into meaningful knowledge.<sup>25</sup>

Law firms, of course, are filled with people (at least in theory) who are experts at practicing law.<sup>26</sup>

Second, becoming an expert in any domain requires experience and effort over a long period of time after having gained the requisite base level of knowledge.<sup>27</sup> The general

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<sup>25</sup> Stephen M. Bainbridge, Are Junior Professors Better Teachers? (July 28, 2008), <http://www.professorbainbridge.com/professorbainbridgecom/2008/07/are-junior-professors-better-teachers.html>. See also Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J. L. REFORM, 191, 217-19 (1991) (reporting that over 20% of law professors had no practice experience and that the average length of practice for those who had practice experience was 4.3 years and concluding that “the vast majority of professors teaching law have had very little experience practicing law”).

<sup>26</sup> When I make this point, I am often told that, as a “Big Law” partner, my view is too narrow, and that “many students will not go the Big Law route and thus will never experience all that great training.” Rodrigues, *supra* note [17]. I think this does a disservice to small and midsize firms and other types of employers. As I mention in the text, expertise is learned through modeling. In my experience, it is often true that the smaller the environment the better the opportunity to model. That’s one reason why I have always chosen to work in smaller offices of larger firms.

<sup>27</sup> RICHARD E. MAYER, THINKING, PROBLEM SOLVING, COGNITION 390 (2d ed. 1992). (“[R]esearch on expertise suggests that expert problem solvers must acquire a great deal of *domain-specific knowledge*, a fact that requires many years of intensive experience.”).

consensus is that even gifted performers require at least 10 years (or 10,000 hours) of relevant experience and deliberate practice for reasonably complex domains to have the *possibility*<sup>28</sup> of being an expert.<sup>29</sup>

Even if law schools had the experts, they don't have sufficient time during a three year program to provide this many hours of experience AND convey the necessary substantive information.<sup>30</sup>

Third, almost any attempt by law school to replicate real practice will necessarily be much too artificial. This is one area where attempts to compare legal education to medical education

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<sup>28</sup> Of course putting in the requisite time is not sufficient by itself. One also needs the requisite level of ability. As Malcolm Gladwell notes: "Achievement is talent plus preparation." MALCOLM GLADWELL, *OUTLIERS* 38 (2008).

<sup>29</sup> See K. Anders Ericsson et al., *The Making of an Expert*, HARV. BUS. REV. (July-Aug. 2007), available at <http://www.washingtonbaseballinstruction.com/TheMakingofAnExpert.pdf>. Neurologist Daniel Levitan has summarized the current state of the relevant research:

The emerging picture from [studies of expertise] is that ten thousand hours of practice is required to achieve the level of mastery associated with being a world-class expert—in anything. . . .this number comes up again and again. . . .[N]o one has yet found a case in which true world-class expertise was accomplished in less time. It seems that it takes the brain this long to assimilate all that it needs to know to achieve true mastery.

GLADWELL, *supra* note [28], at 40.

<sup>30</sup> CARNEGIE REPORT, *supra* note 3, at 115. Some might argue that, while law schools can't provide 10,000 hours of experience, any practice counts towards the ultimate number and therefore is worthwhile. This thinking ignores the comparative advantage law schools have in providing substantive training. Let's say a student participates in a small business clinic for a full year. Assume for argument's sake that the experience is relevant (a not insignificant assumption). How many hours of experience is that? At 10 hours a week it is around 300. That still leaves 9,700 hours to go, so maybe you've knocked 1/3 of a year off the ten year goal. Given the fact that law schools are a much more efficient means of transmitting substantive knowledge, that time would have been better spent in substantive courses. *Cf. supra* note [12].

break down.<sup>31</sup> A teaching hospital is a real hospital. A medical student is able to imitate the performance of an expert doctor in a real life situation on a real patient while the expert provides feedback to guide the student in making the activity his or her own. This is simply not the case at law schools.

Some point to transactional legal clinics as the solution.<sup>32</sup> I would argue, however, that given (i) the limitation on the legal services provided by most transaction law clinics to only the simplest of matters, (ii) the vastly different nature of the clients, (iii) the limited time commitment of the students, and (iv) the fact that, due to the very low student-to-faculty ratio required,<sup>33</sup> very few students can participate in any one semester,<sup>34</sup> these clinics have only limited value.

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<sup>31</sup> Another area where the analogy breaks down is that, to get into medical school, a student has to have already taken a significant number of substantive courses. For example, most medical schools require applicants to have completed at least one full year of each of Biology and Physics and two full years of Chemistry (including Organic Chemistry), together with associated lab work. Ass'n of Am. Med. Colleges, Admission to U.S. Medical School, <http://www.aamc.org/students/applying/about/start.htm> (last visited July 1, 2009). In law school, many students are, in effect, starting from scratch, with no prior legal or business training or experience. As a result, more substantive training is necessary, leaving less time for practical training. In addition, those holding medical school up as a model of hands-on practical training that law school should follow often skip over the fact that medical school is four years, the first two of which are devoted to teaching substantive courses. CARNEGIE REPORT, *supra* note 3, at 6.

<sup>32</sup> See, e.g., CARNEGIE REPORT, *supra* note 3, at 24 (“[T]he underdeveloped area of legal pedagogy is clinical training . . .”).

<sup>33</sup> As the Carnegie Report notes “teaching of practice is time-intensive and requires low student-to-faculty ratios.” CARNEGIE REPORT, *supra* note 3, at 94.

<sup>34</sup> For example, one of “the largest small business clinics in the country” averages 4-5 (and takes at most 9) students per semester. Posting of Stefan Padfield to Akron Law Café, [http://www.ohioverticals.com/blogs/akron\\_law\\_cafe/2009/07/teaching-transactional-law-skills-in-law-school-is-more-really-better/](http://www.ohioverticals.com/blogs/akron_law_cafe/2009/07/teaching-transactional-law-skills-in-law-school-is-more-really-better/) (July 10, 2009, 15:49 EST).

Now, my argument that law schools can't teach expertise doesn't mean that students need not be taught practical skills, context or intuition about deals. Only that we have to be realistic on what can be accomplished at the law school.

Which leads to . . .

### ***C. Teaching Practical Skills***

So this is where the skills focus of law schools should be—teaching the ability to

- perform certain tasks of the practicing transactional attorney and
- understand the context in which these tasks are performed.

Let's discuss these in order.

#### **1. Teaching the Ability to Perform Tasks**

Should law schools offer transaction oriented students courses in contract drafting and negotiation techniques? Absolutely.

Now admittedly, these topics share characteristics of both substantive knowledge and expertise. Teaching these subjects is time-intensive and requires low student-to-faculty ratios.<sup>35</sup> On the other hand, for both of these subjects there is a substantial body of rules and theory that can best be taught in a relatively short period of time in an academic environment.<sup>36</sup> And of course, it has long been a widely held view that law students graduate with insufficient drafting and negotiation skills.<sup>37</sup>

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<sup>35</sup> CARNEGIE REPORT, *supra* note 3, at 104.

<sup>36</sup> *Cf. id.* at 105 (noting the acceptance by academics of negotiation as an academic subject and that “negotiation can claim a body of theory”).

<sup>37</sup> *See* MCCRATE REPORT, *supra* note 2.

What about proposals to integrate training of these skills into existing substantive law courses instead of offering separate courses?<sup>38</sup> Again, there is just not enough time. I think Gordon Smith addressed this very well:

People both inside and outside the academy are forever complaining about various supposed shortcomings of legal education. The complainers seem to have no concept of opportunity cost. More this and more that inevitably means less of something else. So this is what I want to know . . . if you want . . . more skills training, what are you going to sacrifice to get that thing?<sup>39</sup>

I've made this same point myself:

In most courses, as it is, there is barely enough time to teach the substantive law adequately. While skills training exercises are useful in developing skills, they are inefficient in transmitting knowledge. . . . So, substituting exercises for other material in a traditional class would necessarily decrease the amount of substantive knowledge taught. Compounding this problem is the fact that, for skills training to be effective, using one exercise (or even a few) is insufficient. Repetition is essential. So, unless extra class time is added, much is sure to be lost by merely adding skills training to an existing course.<sup>40</sup>

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<sup>38</sup> See, e.g., Joint Plenary Session with Conference on Business Associations and Workshop on Transactional Law, *Integrating Transactional Law in the Traditional Courses*, [https://memberaccess.aals.org/eWeb/Dynamicpage.aspx?Site=AALS&WebKey=9efff27b-7614-458f-9afd-759dd0133f00&RegPath=EventRegFees&REg\\_evt\\_key=a6bf30e8-0a1b-4133-b2bd-f4c9c5cf5b3d](https://memberaccess.aals.org/eWeb/Dynamicpage.aspx?Site=AALS&WebKey=9efff27b-7614-458f-9afd-759dd0133f00&RegPath=EventRegFees&REg_evt_key=a6bf30e8-0a1b-4133-b2bd-f4c9c5cf5b3d) (follow “Joint Plenary Session with Conference on Business Associations and Workshop on Transactional Law: Integrating Transactional Law in Traditional Courses” hyperlink).

<sup>39</sup> Gordon Smith, The ABA’s “Out of the Box” Committee on Legal Education (May 16, 2009), <http://www.theconglomerate.org/2009/05/the-abas-out-of-the-box-committee-on-legal-education.html>.

<sup>40</sup> Woronoff, *supra* note [20].

## 2. Teaching the Ability to Understand Context

Should law schools teach students the ability to understand the language and structure of transactions and the rationale behind these structures?

Of course. The question is: How can this best be done?

In a pair of blog posts about a year ago, Rob Illig suggested that we simply change what and how we teach upper-level business law courses:

To my mind, the key to approaching the question of how to teach students to think like a dealmaker is to conceive of the discipline more as craft than science. We must read cases - if indeed it is cases that we read - not to identify or assess the law, but to ask questions like why did the parties end up in this mess? and how can we help our clients avoid this and other similar messes? . . . [T]he law has only partial interest for me.<sup>41</sup>

I agree with suggestions that we need to make sure students in the basic business courses receive sufficient business, finance and economic instruction to understand context. And I like Professor Illig's suggestion that this probably means placing a greater emphasis on hiring faculty members who have enough experience to have developed some deal sense of their own.<sup>42</sup>

But as I noted earlier, the law isn't ancillary to me. It is of vital importance. After all this is one of (if not the) largest value adds the transaction lawyer brings to the table, his or her understanding of the law.<sup>43</sup> And students don't learn enough of it

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<sup>41</sup> Rob Illig, Teaching Transactional Law (Aug. 22, 2008), <http://www.theconglomerate.org/2008/08/teaching-transa.html>; Rob Illig, Teaching Transactional Law 2 (Aug. 25, 2008), <http://www.theconglomerate.org/2008/08/teaching-tran-1.html> [hereinafter Illig, Teaching Transactional Law 2].

<sup>42</sup> Illig, Teaching Transactional Law 2, *supra* note [41].

<sup>43</sup> See, e.g., Stephen M. Bainbridge, The Function of Transactional lawyers, (June 8, 2009),

as it is. So I'm concerned about anything that will take significant time away from teaching the law in a substantive class without adding hours to the class.

This is why I disagree with the philosophy behind Gordon Smith's blog post discussing the new edition of his Business Organizations casebook, which includes a number of business school style case studies. Professor Smith has the goal of having at least one case study per chapter in the next edition of the casebook.<sup>44</sup> So you're talking about something like 14 class sessions spent on business case studies.

I'm a big believer in business school case studies in law classes, and have spoken on their value before.<sup>45</sup> But these cases are just not an efficient means of transmitting knowledge,<sup>46</sup> and as I mentioned earlier, there is insufficient time to teach enough of the substantive law in the basic BA course as it is.<sup>47</sup> So unless you add hours to the course (again, which I would be in favor of), I think

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<http://www.professorbainbridge.com/professorbainbridgecom/2009/06/first-kill-all-the-transactional-lawyers.html>:

For the most part, lawyers increase the size of the pie by reducing transaction costs. One way of lowering transaction cost is through regulatory arbitrage. The law frequently provides multiple ways of effecting a given transaction, all of which will have various advantages and disadvantages. By selecting the most advantageous structure for a given transaction, and ensuring that courts and regulators will respect that choice, the transactional lawyer reduces the cost of complying with the law and allows the parties to keep more of their gains.

<sup>44</sup> Gordon Smith, Case Studies in Business Associations (June 8, 2009), <http://www.theconglomerate.org/2009/06/case-studies-in-business-associations.html>.

<sup>45</sup> See Woronoff, *supra* note [20].

<sup>46</sup> *Id.* (citing Benson P. Shapiro, *Hints for Case Teaching*, HARV. BUS. SCH. NOTE 9-585-012, at 2 (1985)).

<sup>47</sup> See *supra* notes [23-24] and accompanying text.

you will lose too much by adding case studies. I thought that was the point of Professor Smith's post I quoted earlier.<sup>48</sup>

So rather than add things like case studies or drafting exercises to existing substantive courses, we should add new courses, which allow students to see how to practically apply substantive law they have already learned. Indeed that is exactly what Professor Illig has done with his M&A course at Oregon. While students are enrolled in his doctrinal M&A course, they also have the option to take a one-credit transactional skills lab taught by practitioners.<sup>49</sup> As Professor Illig notes, this solution "successfully navigate[s] the tension between teaching doctrine and teaching skills . . . ."<sup>50</sup>

I also like the idea of adding a first year "Introduction to Business" course, in which students can learn basic business, accounting, finance and economic concepts early in law school to provide better context for future substantive courses. And of course, law schools should offer future transactional lawyers rigorous substantive classes in business courses such as accounting and finance.

### **III. What should law schools change?**

As you can tell from my remarks, while I think law schools can and should do a better job of skills training, I think there is a danger that the heavy focus on this aspect of legal education masks some more significant issues. So here are some suggestions:

First, focus on the thing law schools do better than law firms: transmitting a complex body of substantive knowledge.

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<sup>48</sup> Smith, *supra* note [39] and accompanying text. In his own defense, Professor Smith says he "did not suggest that adopters of the casebook teach every case study. . . . The point, rather, is simply that [he and his co-author] would make case studies more available." Gordon Smith, Teaching Skills by Teaching Naked (July 24, 2009), <http://www.theconglomerate.org/2009/07/teaching-skills-by-teaching-naked.html>. I'd be curious to see what adopters actually do.

<sup>49</sup> Illig, Teaching Transactional Law 2, *supra* note [41].

<sup>50</sup> *Id.*

Among other things, this can be done by adding more time to basic classes and focusing in those classes primarily on teaching whatever the particular class is about. In addition, add additional substantive classes, not just in legal subjects, but in business and finance subjects as well.<sup>51</sup>

Second, distinguish between the types of skills that law schools can teach and those they cannot. Accept the fact that law schools cannot turn out expert lawyers in three years. But don't use that fact as an excuse not to teach practical skills (like drafting and negotiation) in new class offerings or in hours added on to substantive classes.

Third, recognize that having the right courses does nothing if students don't take them. So provide better guidance. Most students have no idea what knowledge they need to practice transactional law. Yet they are either told they can learn the substantive knowledge on the job,<sup>52</sup> or given no guidance at all. Even schools with corporate or business law programs often emphasize the skills courses over important substantive ones. As John Steele has noted "it's tough to beat an informed market for making choices that involve trade-offs. So why not let the students decide these issues? They have plenty of motivation . . . ."<sup>53</sup>

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<sup>51</sup> This recommendation to add courses may seem inconsistent with my belief that students are offered too many electives. Of course it is not. Just because you have too much of what you don't need doesn't mean you have enough of what you do need.

<sup>52</sup> See, e.g., Stefan Padfield, Teaching Transactional Law Skills in Law School: Is More Really Better?, (July 9, 2009), [http://www.ohioverticals.com/blogs/akron\\_law\\_cafe/2009/07/teaching-transactional-law-skills-in-law-school-is-more-really-better/](http://www.ohioverticals.com/blogs/akron_law_cafe/2009/07/teaching-transactional-law-skills-in-law-school-is-more-really-better/) (Noting that he used to advise students who came to him with a desire to practice transactional law but uncertain as to what courses are best to advance that goal "that they would have time (and indeed be expected to) learn the specific law of their particular area of practice once they started working and that they should use law school as an opportunity (perhaps the last) to study as many different areas of the law as interest them").

<sup>53</sup> Posting of John Steele to The Conglomerate, <http://www.theconglomerate.org/2009/05/the-abas-out-of-the-box-committee-on-legal-education.html#c6a00d8345157d569e201156f9c9a8d970c> (May 18,

Thank you.

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2009, 18:05 EST). While I agree with John Steele that students have “sufficient intelligence to choose their courses wisely” and that “given the ability to choose, information about the utility of the courses, and the motivation of their heavy debt loads, students would make terrific choices,” I disagree with his notion that they already have sufficient information. *Id.*