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# See Jane Graduate. Why Can't Jane Negotiate a Business Transaction?

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# SEE JANE GRADUATE. WHY CAN'T JANE NEGOTIATE A BUSINESS TRANSACTION?

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One of the peculiar memories I have of law school is the following refrain from a song created by John Henry Wigmore: "Old Northwestern! That's where we learned our law. Ex delicto, ex contractu, This Oh! This is law."[1] I have always imagined that when it was originally sung back in 1914, it was sung with great gusto following a few too many gin and tonics.

At the time that John Henry Wigmore wrote the song, Langdell's case law approach to teaching law, premised on a view of the law as a set of rational and predictable rules,[2] was in vogue at Northwestern and other law schools and had not yet

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[1] *See* Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More into the Void*, 67 B.U. L. REV. 9, 9 n.** (1987) (explaining that the song "Old Northwestern" is played "every day at high noon in the lower lobby of the Law School").

[2] Christopher Columbus Langdell introduced the case method of instruction while Dean at Harvard Law School in the late nineteenth century. His approach assumed that cases and their precedents provided the bases for all legal holdings. *See* Carl N. Edwards, *In Search of Legal Scholarship: Strategies for the Integration of Science into the Practice of Law*, 8 S. CAL. INTERDISC. L.J. 1, 15–16 (1998); Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legalists and Jurists*, 83 MINN. L. REV. 377, 378–79 (1998) (explaining that Langdell created the case method of study while at Harvard Law School and wrote the first casebook in which he characterized the law as a science). Langdell believed that law students should learn from the written decisions of the courts, which he called original sources of the law. He also has stated that full-time teachers, not practitioners should teach law. *See generally* W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1 (1997).

been challenged by legal realism, which emphasized the uncertainty and unpredictability of the law.[3] By 1983, when I was a law student at Northwestern, legal realism, premised on a view of the law as heavily influenced by the personal experiences of judges, had been followed by numerous other "isms."[4] In light of all the theories of how the law truly developed and operates or should operate, the "law" seemed to me to be incredibly malleable and uncertain.

Indeed, with so much emphasis on deconstructionist theories[5] (and scant attention to developing many of the skills necessary to the practice of law), was law school really the place where students "learned the law?" If one were to ask lawyers whether their legal education adequately prepared them for the practice of law, many would indicate that they were not well prepared.[6]

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[3] *See* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 38 (1998) (stating that while legal realism has had its successes, American legal thinking continues to proceed from Langdell's approach); *see also* Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 474 (1988) (asserting that law is based on human experience, policy and ethics, and thus legal realism is a pragmatic movement); Christopher Wolfe, *The Senate's Power to Give "Advice and Consent" in Judicial Appointments*, 82 MARQ. L. REV. 355, 366 (1999) (explaining that legal realism means that judges are basically "politicians in robes" and that judicial decisions are the result of the social and political views of judges, rather than a mere interpretation of the law). *See generally* Bailey Kuklin & Jeffrey W. Stempel, *Continuing Classroom Conversation Beyond the Well-Placed "Whys?,"* 29 U. TOL. L. REV. 59, 64 (1997) (explaining that legal realists don't use the casebook with unabridged opinions, but rather they edit cases and provide commentary and other secondary sources of the law).

[4] Other "isms" include law and economics, critical legal theories, critical race theories, and feminist theories, to name a few.

[5] *See* Arthur Austin, *A ~~Primer~~ on ~~Deconstruction~~'s "Rhapsody of Word-Plays,"* 71 N.C. L. REV. 201, 206 (1992) (explaining that deconstructionist theorists believe that the meaning of every word changes as it is used in each new context). *See generally* J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987) (explaining the philosophical underpinnings of deconstruction and how deconstructive techniques offer a new way to interpret legal texts); Madeleine Plasencia, *Who's Afraid of Humpty Dumpty: Deconstructionist References in Judicial Opinions*, 21 SEATTLE U. L. REV. 215, 215–16 (1997) (explaining that the theory of deconstruction originated from the philosophy of French philosopher and literary theorist, Jacques Derrida).

[6] *See* Talbot Sandy D'Alemberte, Keynote Address, *in* THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM 4, 16–17 (1994) [hereinafter CONFERENCE PROCEEDINGS] (discussing schools' attention to and capacity for teaching skills and areas of knowledge); *see also* Timothy W. Floyd, *Legal Education and the Vision Thing*, 31 GA. L. REV. 853, 871–72 (1997) (stating that the majority of credit hours are spent in courses that cover a body of legal doctrine, while courses that focus on law practice make up less than 20% of a student's course load); Rodney J. Uphoff et.

Ask employers if they believe that recent law school graduates have been adequately prepared to practice law and you will find many who indicate that graduates lack training in some of the essential skills needed to practice law.[7] Most importantly, ask any lay person and you will find that too frequently lawyers are perceived as unscrupulous problem makers rather than ethical problem solvers.[8]

## I. AFTER THREE YEARS OF LAW SCHOOL, WHY DOESN'T JANE OR DICK KNOW HOW TO HANDLE A BUSINESS DEAL?

To the extent that some professors of law believe that the law is predominantly irrational and unpredictable, it is not surprising that these professors would be unlikely to try to teach core practice skills, since one of the key functions of being a

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al., *Preparing the New Law Graduate to Practice Law: A View From the Trenches*, 65 U. CIN. L. REV. 381, 394 (1997) (arguing that law schools have to drastically change their curriculums to prepare students for the practice of law and explaining that many law students "disengage from law school, claiming they need not bother to prepare for class because they are not really learning anything about the practice of law").

[7] *See* D'Alemberte, *supra* note 6, at 16–17; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 38 (1992) (arguing that a law student who takes only theory courses will lack basic doctrinal skills and "will not understand how to practice as a professional"); Harry T. Edwards, *A New Vision for the Legal Profession*, 72 N.Y.U. L. REV. 567, 569 (1997) (stating that law schools have not met their obligation to teach students the skills necessary to practice law); *see also* Martha M. Peters, *Bridging Troubled Waters: Academic Support's Role in Teaching and Modeling "Helping" in Legal Education*, 31 U.S.F. L. REV. 861, 861 (1997) (asserting that without communication skills, "perceptual sophistication," and adequate training, law students will lack the skills essential to operate in the legal profession).

[8] *See* Kathleen Ridder, Perceptions by the Public, *in* CONFERENCE PROCEEDINGS, *supra* note 6, at 20–21 (explaining that lawyers lack basic skills in communicating with their clients and counseling their clients leading to a negative public perception of lawyers); *see also* Walter H. Bithell, *Successful Lawyers Are Not Rude and Unprofessional*, ADVOC. (Idaho), Sept. 1998, at 4 (stating that the lay community sees lawyers as unethical and greedy); Judge J. Thomas Greene, *A Kinder, Gentler Justice System?*, 181 F.R.D. 559, 561 (1998) (arguing that the business of practicing law, rather than the nobility of the practice has contributed to the public's negative perception of lawyers); Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367, 372 (1996) (asserting that when lawyers need business, they will encourage lawsuits and bring suits that lack merit); Stephen Wizner, *What is a Law School?*, 38 EMORY L.J. 701, 703 (1989) (claiming that the bad reputation of lawyers is partially the fault of how they are taught).

"counselor at law" is to be able to advise clients whether their proposed actions will comply with the law.[9] If the law is predominantly irrational and unpredictable then it is impossible to serve as a useful "counselor at law." However, some professors who espouse deconstructionist theories argue that these theories can be used as a tool to predict how judges will rule in light of their biases and unique experiences. While I suspect that there are law professors who ascribe to this view of the law, most professors, while acknowledging that the personal experiences and biases of the judges may impact judicial decision making to some extent, still believe that precedent is generally followed and thus the law is not completely unpredictable.

So why are core practice skills (particularly transactional rather than litigation skills) largely ignored in typical law school classes? Before answering this question it would be helpful to review what is currently taught in law school and what I mean when I refer to "core transactional skills."

In a typical law school class today, students learn the law and "how to think like a lawyer" principally by analyzing appellate court decisions and the relevant codes or statutes which may apply to a particular area of law. This analysis often includes a heavy dose of some "ism" or other.[10] While many critical lawyering skills are developed through this traditional approach (such as learning basic legal principles, developing the ability to analogize and distinguish cases, and cultivating a sense of what forces and policies have influenced the evolution of the law), other important lawyering skills that students will need after they graduate are typically not developed.[11]

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[9] *See* George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 299 n.106 (1998) (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 1 (1998)) (noting that "[o]ne of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights"); Lawrence Lederman & Jay Levenson, *Dealing with the Limits of Vision: The Planning Process and the Education of Lawyers*, 62 N.Y.U. L. REV. 404, 426 (1987) (explaining that lawyers are both advocates and counselors who have to advise clients of projected outcomes, risks of litigation, and results that may follow from any given settlement or solution).

[10] *See supra* notes 3–4 and accompanying text for a brief discussion of legal realism and other "isms".

[11] *See* Colonel Donald L. Burnett, Jr., *Twenty-Second Edward H. Young Lecture in Legal Education: Professionalism: Restoring the Flame*, 158 MIL. L. REV. 109, 117 (1998) (asserting that a lawyer's ability to serve the client enhanced by

I speak of the cluster of transactional skills necessary to competently represent a client in a business transaction, which many traditional law school classes ignore completely, perhaps with the mistaken notion that these skills should only be covered in specialized skills courses. In order to represent a client well, a lawyer needs to develop skills in effective client communications, such as client interviewing, fact gathering, and counseling. Equally important skills are those involving negotiation, drafting, and problem spotting and solving. This core cluster of skills can be successfully introduced in traditional courses, including first-year courses. These skills can be further refined in special skills-oriented courses, in law school clinics where live clients are represented, or through a law school organized program of pro bono representation of clients by a team comprised of private attorneys, law professors, and law students.[12]

Perhaps the most significant reason why law schools generally fail to integrate transactional skills into traditional law school classes is due to the background of the professors hired to teach the classes. The table, attached hereto, contains statistics gathered with respect to the number of years law professors engaged in the practice of law before teaching at twenty law schools in the United States.[13] As the table indicates, many law

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broad-based learning); William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 237 (1996) (noting that law schools have traditionally ignored teaching lawyering tasks); Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409, 411–15 (1986) (asserting that substantive law courses do not adequately equip students with the skills they will need to practice). *See generally* Joanne Martin & Bryant G. Garth, *Clinical Education as a Bridge Between Law School and Practice: Mitigating the Misery*, 1 CLINICAL L. REV. 443, 443 (1994) (discussing the need for law schools to teach practice skills).

[12] *See infra* Part III for a discussion of a proposal to simulate the apprenticeship model.

[13] *See infra* Table. The twenty law schools were chosen to be a representative sample of the many types of law schools in the United States. The schools surveyed include law schools consistently rated as top law schools and schools not rated within the first or second tiers. The sample also includes schools affiliated with a major university and schools not affiliated with any university ("free standing law schools"). Also included are schools located in urban and rural areas and schools located on the east coast, the midwest, the south-east, the south-west, and the west coast. *See generally* AMERICAN ASS'N L. SCH., DIRECTORY OF LAW TEACHERS (1994) [hereinafter DIRECTORY].

professors have had very little if any experience practicing law.[14] For example, 45% have practiced law less than three years, and 24% had not practiced law at all prior to becoming a law professor.[15] One cannot comfortably teach that which one does not truly know. If a professor has not had sufficient personal experience handling litigation or transactional matters, it will be very difficult for that professor to attempt to teach the skills necessary to handle these matters. It is far easier for a practitioner to become versed in legal theories than it is for a person whose sole legal experience is law school, and perhaps a judicial clerkship for a year, to become versed in the practice of law.

One reaction to this criticism is the assertion, echoed from the leadership of the legal academia, that it is not the proper task of law schools to teach their students core practice skills.[16] These academicians view core practice skills training as something the students should pick up after graduation.[17] Just be-

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[14] To the extent that professors have practiced law after becoming full-time faculty, e.g., handling matters on a pro bono basis, this not reflected in the DIRECTORY, and is, therefore, not reflected in the Table either. Some professors do engage in such activity, but the amount of such activity is required to be of a limited nature. A full-time professor, by definition, must devote a substantial amount of time to teaching and scholarship unless on leave or sabbatical. However, such activity should be encouraged and valued. Perhaps future editions of the DIRECTORY should add this as a category.

[15] *See infra* Table.

[16] *See* Cecilia Bryant, *The Fork in the Road: The Bifurcated Purposes of Legal Education*, FLA. B.J., May 1997, at 54 (stating that the lukewarm reception for skills courses by law schools may be attributed to money issues and the abilities of the professors); John Sexton, *The Academic Calling: From Independent Contractor to Common Enterprise*, NEWSLETTER AM. ASS'N L. SCH., Feb. 1997, at 1; *see also* Anthony J. Sestric, *In Defense of Law Schools*, 53 J. MO. B. 232, 233 (1997) (explaining the goals of today's law schools); Trail & Underwood, *supra* note 11, at 240–42 (explaining why law schools are ill-equipped to teach practice skills to students).

[17] *See* Sexton, *supra* note 16, at 1. However, such "on the job" training is a luxury that many law school graduates do not experience. Many graduates hang out a shingle, while others join small firms or corporations with small legal departments and hence, they may find it difficult to find a mentor who can train them. Even lawyers who practice law with a larger firm or with a larger in-house legal department for a company or governmental entity, find that with the transformation of the practice of law from a profession to a business, focusing on the bottom line in the form of billable hours, and the frenetic pace of the practice today, there is far less on-the-job training at these jobs than ten or twenty years ago. *See* Chris Klein, *Goodbye, Summer Camp; Hello, Boot Camp*, NAT'L L.J., June 17, 1996, at A15 (noting that law firms and clients do not want to pay for on-the-job training); Wallace J. Mlyniec, *Internship: A Nice Idea, but It Wouldn't Work*, NAT'L. L.J., Jan. 27, 1997, at A24.

neath the surface of this view lies the unexpressed but palpably felt view of academicians that such practice skills are not worthy enough to be taught in law school.

Difficulties arise even if one recognizes the value of teaching transactional skills in law school. As previously mentioned, if law schools attempt to teach core practice skills, they would need to recruit and hire more practitioners to better integrate the teaching of these skills.[18] This would be costly since the best transactional attorneys are typically well paid in private practice. Such transactional attorneys would seek greater compensation, prestige, and job security than is typically offered at law schools to practitioners who teach skills-oriented courses.[19]

Even with a commitment to teaching transactional skills, and sufficient faculty with the necessary background to teach these skills, difficulties in integrating these skills into substantive law courses remain. One such problem is trying to achieve too many goals in a course, i.e., not just teaching legal principles and rules, but also legal theories and practice skills. Indeed, this concern may explain why, to the extent transactional skills are taught in law school, they tend to be taught in separate courses, such as counseling and negotiations, alternative dispute resolution, and business planning and drafting. These difficulties, however, can be overcome and law professors can in fact integrate the teaching of core transactional skills to varying degrees in many substantive law courses.[20]

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[18] *See* Bryant, *supra* note 16, at 54 (explaining that practice skills require a low student-to-teacher ratio, and thus have a large financial impact on schools); Martha Neil, *Teaching Transactional Skills a Must*, CHI. DAILY L. BULL., Nov. 27, 1998, at 3 (discussing a need for law school administrators to spend more money on teaching transactional skills in law schools).

[19] Most clinical positions at law schools are not even on the tenure track. *See* Suellyn Scarnecchia, *The Role of Clinical Programs in Legal Education*, 77 MICH. B.J. 674, 674 (1998) (asserting that although clinical programs are becoming more popular, clinical faculty need to be offered some sort of security " 'reasonably similar to tenure' " (quoting STANDARDS FOR APPROVAL OF LAW SCH. Standard 405(c) (1996))).

[20] Among the standard substantive law courses that can readily be taught in a manner that also develops students' transactional skills are: Agency and Partnership Law, Contracts, Corporations, Employment Law, Entertainment Law, Environmental Law, Ethics, Family Law, International Business Transactions, Land Use, Medical/Legal Jurisprudence, Property, Real Estate Transactions, Sales, Secured Transactions, Trademark and Copyrights, Trusts and Estates (especially an advanced estate planning course), and Unfair Competition and Trade Regulation. In

## II. PROPOSED METHODS TO INTEGRATE CORE PRACTICE SKILLS INTO TRADITIONAL SUBSTANTIVE COURSES

By introducing and incorporating transactional skills into "substantive" classes, law professors can better prepare law students for the practice of law. This will also enable the students to see how the legal principles covered in class apply to real world situations.

There are a few simple techniques that I utilize when I teach property law and real estate transactions to achieve the goal of introducing basic transactional skills. First, I ask my students to consider how the attorneys representing the parties in the case may have been able to avoid the dispute by better structuring and negotiating the terms of the transaction that led to the dispute. I further ask how the parties could have drafted the legal documents for a more favorable ruling from the court being asked to give effect to their agreements.

Second, I supplement some of the topics that I teach with simple legal forms which are utilized in practice and ask students to analyze them in light of the cases they have read and the legal principles they have learned. For example, in my Property course, I supplement the assigned readings with a simple utility easement agreement, and a slightly more complicated easement agreement which provides for the sharing of rights of ingress and egress and covenants regarding the sharing of the maintenance costs of the easement area. I ask the students to review these forms and evaluate whether the forms adequately address all of the likely future issues and problems that may arise during the relationship of the parties.

The majority of students are unable to identify these issues and problems because they lack exposure to such real-life issues in both everyday life and law school. I suggest that they look to the very cases we have covered in class to identify some of the typical issues and problems that can arise. The cases we cover in class involve issues relating to the intended location of the benefited and burdened land, the intended scope of the ease-

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order to incorporate the techniques I describe in this article, professors must either drop some of the substance that they cover or be willing to cover some of the material in lecture format.

ment, the remedies available if the easement agreement is breached, and the circumstances in which the easement rights and burdens will terminate. I also ask the students to evaluate whether, in light of the cases we have covered, any of the terms of the easement agreements (which contain, inter alia, covenants to pay for the maintenance of the easement area) may not be enforceable. I then ask them to think through and be prepared to address in class what changes they would make to the legal form if they represented either party to the transaction in light of the principles of law covered in the cases assigned.

While some students are hesitant, at first, to address the unusual questions and issues related to the legal forms, many warm up to the task and offer revisions that are quite perceptive. These revisions typically reflect not only an understanding of the legal principles covered in class, but also how those principles can be applied when actually representing a client. Our review of these legal forms also offers the students an opportunity to integrate the principles of law they have learned in other classes as well. For example, one of the students in my Property class noticed from the terms of the hypothetical easement agreement that both the land benefited and the land burdened by the agreement were being used for automotive services, e.g., car washes, oil changes, and detailing. The student suggested that the easement agreement be revised to contain indemnities in the event that one property owner caused environmental contamination to spill over onto the other owner's property. Asking students to review certain form legal documents utilized in practice provides students with an opportunity to synthesize the legal principles that they have learned and to thoughtfully review these forms in light of their expanding knowledge of the law.

The third technique I utilize is to present to the class realistic hypothetical situations that detail a hypothetical client's goals and proposed method to achieve those goals. I distribute these hypotheticals to the students prior to the class session and as part of their assigned work so that they have an adequate amount of time to review and think about the questions I have posed. I ask the students to counsel their client as to whether there are any legal impediments that exist in light of the case law and statutes we have covered in class. I also ask the students to come up with possible solutions to any problems they

have spotted. As I explain to my students, clients not only expect an attorney to advise them of any legal impediments to accomplishing their goals, they also expect counseling as to alternative ways to achieve those goals. Many law professors ask students to answer hypothetical questions that are sprung upon the students in class. While students should experience the challenge of thinking on their feet, they should also experience the challenge of analyzing a complicated situation and developing the critical skill of problem spotting and solving.

The fourth and final technique that I utilize is a drafting and negotiation assignment. In my Real Estate Transactions class, I create a fairly simple hypothetical purchase and sale of a residence and ask the students to draft a purchase agreement for the buyer. They accomplish this by using the standard form of purchase agreement that has been reviewed in class, in conjunction with the topics covered. I also ask them to prepare a letter to their client communicating what has been done and asking the client for any further information that they need to handle the transaction. This develops skills in fact-gathering and client communications. I always include a special wrinkle or two in the fact pattern to make sure that the students do some original drafting and thinking (the students must prepare a rider to the form contract containing revisions and supplements to the form related to these wrinkles). When students complete their agreements we review them in class. I place a transparency of the standard form on the screen and I call on students to explain what changes they made to the form (they have all been assigned to represent the buyer) and require them to justify their changes (I negotiate with them on behalf of the seller). After I receive their form contracts and riders, I copy some of the riders and make transparencies of them. At the next class I show some of these riders (I delete the students' names from the transparencies) and we discuss drafting issues as well as the various ways one could address the special issues posed by the hypothetical transaction. I have found that while students are generally skilled in issue spotting, they rarely are able to draft provisions that provide for all of the details and contingencies that arise. No doubt because they have had little or no practice at developing this skill in law school.

The assignment provides an opportunity to: (i) teach many of

the core practice skills usually ignored in a traditional law school class; (ii) integrate and synthesize a large amount of the material covered in class, and; (iii) make the legal principles and theories we have covered in class come to life for the students. This assignment takes about one week. Consequently, one week's worth of substantive material is not covered.

In addition to encouraging law professors to employ these techniques when teaching substantive law courses and offering specialized courses teaching transactional skills like counseling and negotiations, alternative dispute resolution and business planning and drafting, I also recommend that law schools devote resources towards developing apprenticeship style opportunities for their students.

## III. BACK TO THE FUTURE: A PROPOSAL TO SIMULATE THE APPRENTICESHIP MODEL

Many law schools already have legal clinics that law students can participate in for course credit.[21] Most of these clinics handle litigation matters rather than transactional matters.[22] There is no reason why legal clinics can not be developed that handle transactional matters on a pro bono basis. There are numerous types of legal representation that are needed to develop affordable housing that can be handled by law students under the supervision of a law professor. These include establishing the 501(c)(3) entity; negotiating, drafting and closing the acquisition of the real property, the construction of the housing, and the finance of the acquisition and construction and; assisting in obtaining any necessary land use approvals and zoning relief.[23] Law students can also assist the development of affordable housing by simply representing, pro bono, the purchasers of the

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[21] *See* Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1463–74 (1998) (detailing the development of clinical legal education).

[22] *See* Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121, 1141–42 (stating that many law school clinics focus primarily on litigation training, rather than on planning skills).

[23] *See* Karl Gotting & Frances Hamermesh, *Working with Nonprofit Organizations and the Michigan State Housing Development Authority*, 73 MICH. B.J. 1172, 1178 (1994) (explaining that "the University of Michigan Law School offers the assistance of its second- and third- year students" to small non-profit groups "with articles of incorporation, § 501(c)(3) qualification, and other matters").

affordable housing after it has been built. The concept of creating transactional clinics is not limited to the setting of affordable housing. Students can, under the supervision of a law professor, handle the representation of other types of 501(c)(3) non-profit corporations in their endeavors. The students can advise these entities with respect to the various types of contracts they enter into, tax issues, and other legal issues.

There is another, less expensive, way to simulate the apprenticeship model of training and to teach transactional skills in law schools. Entities already exist that receive requests for free legal assistance and screen appropriate cases for referral to volunteer attorneys.[24] These entities are sometimes special committees operating under a bar association or are otherwise affiliated with or working with the local organized bar association.[25] Law schools can establish a program where its practice-oriented faculty work with these entities and volunteer attorneys in the handling of appropriate pro bono matters. The law students would learn through observing and doing the work under the supervision of the professor and volunteer attorney ("pro bono partnerships"). The students should receive course credit for the work and the law professor should receive credit for working on these matters and supervising and grading the students involved in the program.

## IV. TEACHING TRANSACTIONAL SKILLS WILL ENHANCE THE PUBLIC'S PERCEPTION OF LAWYERS

By refusing to spend time on transactional skills, law professors send a subliminal message to their students that these skills are not valued or valuable. Law schools send a similar message by offering more courses that develop litigation skills

[24] *See* Laurie Meier, *Pro Bono Spotlight*, R.I. B.J., Dec 1998, at 17 (describing a Rhode Island volunteer lawyer program that has not denied assistance to anyone qualified to receive help); Angela McCaffrey, *Pro Bono in Minnesota: A History of Volunteerism in the Delivery of Civil Legal Services to Low Income Clients*, 13 LAW & INEQ. J. 77, 92–93 (1994) (describing a project developed by the Minneapolis Legal Aid Society which provides volunteer attorneys to low income persons in an effort to prevent homelessness).

[25] *See* Quintin Johnstone, *Bar Associations: Policies and Performances*, 15 YALE L. & POL'Y REV. 193, 223–24 (1996) (stating that many bar associations have strongly supported legal aid and pro bono organizations).

than transactional skills. This is the wrong message to be sending and it contributes to poor lawyering. Litigation is a "win-lose" proposition and some would even argue that litigation is a "lose-lose more" proposition.[26] Settlement of differences (a transactional model) can be a "win-win" proposition. By recognizing the value of transactional skills and making the efforts to teach these skills on par with the other skills taught in law school, attorneys will be better trained to be ethical problem solvers who communicate well with their clients. An emphasis on cooperation and other skills focused on finding a way for both parties to achieve their goals is also consistent with the feminist approach to the law.[27] Thus, the teaching of transactional skills can dovetail with the teaching of theories of how the law should evolve. The typical law school experience still emphasizes the adversarial nature of the law based upon the subject matter taught (skills in the subject of negotiation and cooperation are marginalized into a single course)[28] and the mode of teaching the law (calling on individual students employing the Socratic method).[29] Students that entered law school predisposed to handling legal matters in a cooperative fashion may lose that inclination by the time they graduate.[30]

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[26] *See* Gary Mendelsohn, *Lawyers as Negotiators*, 1 HARV. NEGOTIATION L. REV. 139, 161 (1996) (describing negotiators' ability to see litigation's lose-lose potential).

[27] *See* Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 618 (1981) (explaining the feminist emphasis on cooperation). *See generally* Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249 (1998) (explaining various feminist legal theories).

[28] *See* Harrison Sheppard, *American Principles & the Evolving* Ethos *of American Legal Practice*, 28 LOY. U. CHI. L.J. 237, 256 (1996) (noting that fewer than 5% of law schools require students to take courses in negotiation).

[29] *See* J. Harvie Wilkinson III, *Legal Education and the Ideal of Analytic Excellence*, 45 STAN. L. REV. 1659, 1666 (1993) (noting that only 9% of classroom instruction is devoted to professional skills training and that the more popular Socratic method emphasizes qualities that have little to do with daily practice); *see also* Elizabeth G. Thornberg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225, 253 (1995) (discussing the adversarial nature of the Socratic method). *See generally* Cynthia G. Hawkins-León, *The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues*, 1998 BYU EDUC. & L.J. 1 (examining the positive and negative aspects of the Socratic method).

[30] *See* Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459, 459 (1993) (asserting that law schools fail to teach students the importance of cooperation); Jeffrey P. Smith,

## CONCLUSION

Law schools should make stronger efforts to teach the often neglected core transactional skills necessary to adequately represent clients, including hiring as professors on tenure track more attorneys who have had significant experience in private practice and creating transactional legal clinics, "pro bono partnerships," or both. Law schools should not try to pass the buck with respect to teaching young lawyers transactional skills. It is important, however, to note that law schools need the cooperation of the private bar to accomplish these worthwhile goals. As previously recommended, law schools and bar associations can work together to further facilitate this training through the joint handling of appropriate matters. In addition, law professors should attempt to better incorporate techniques to develop transactional skills in the substantive courses that they teach.[31]

The creation of transactional law school clinics, the implementation of "pro bono partnerships," and, most importantly, the development of this new breed of attorney, will improve the quality of the legal profession and the public's perception of lawyers. With this enhanced reputation, perhaps lawyers can once again sing with enthusiasm of their alma maters where they "learned the law!"

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*Civility Between Lawyers is Good Practice*, RES GESTÆ (Ind.), Oct. 1997, at 41 (noting that in law school, prospective attorneys are not taught cooperation); *see also* Catherine Cage O'Grady, *Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer*, 4 CLINICAL L. REV. 485, 485 (1998) (stating that clinical programs teach students to work together collaboratively).

[31] They should not rely on the few specialized skills courses or clinical offerings since these courses are usually not required and, consequently, many students do not take these courses.

# APPENDIX

| # OF YEARS IN PRACTICE[1] | TOTAL # OF PROFESSORS (837) | | UCLA (58) | | UNIVERSITY OF DENVER (48) | | DETROIT COLLEGE OF LAW (25) | | EMORY UNIVERSITY (36) | | UNIVERSITY OF IOWA (47) | | JOHN MARSHALL LAW SCHOOL (54) | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 0 | 202 | 24%[2] | 21 | 36%[3] | 11 | 23% | 4 | 16% | 5 | 14% | 12 | 26% | 5 | 9% |
| 1 | 78 | 9% | 5 | 8.5% | 5 | 10.5% | 4 | 16% | 3 | 8% | 3 | 6% | 5 | 9% |
| 2 | 98 | 12% | 8 | 14% | 4 | 8.5% | 3 | 12% | 6 | 16.5% | 6 | 13% | 10 | 19% |
| 3 | 90 | 11% | 3 | 5% | 2 | 4% | 5 | 20% | 7 | 20% | 8 | 17% | 12 | 22% |
| 4 | 77 | 9% | 5 | 8.5% | 10 | 21% | 3 | 12% | 4 | 10% | 6 | 13% | 2 | 4% |
| 5 | 63 | 7.5% | 3 | 5% | 2 | 4% | 2 | 8% | 2 | 5.5% | 5 | 11% | 6 | 11% |
| 6 | 41 | 5% | 1 | 2% | 2 | 4% | 2 | 8% | 1 | 3% | 2 | 4% | 4 | 7% |
| 7 | 41 | 5% | 4 | 7% | 3 | 6% | 0 | 0% | 1 | 3% | 1 | 2% | 1 | 2% |
| >7 | 147 | 17.5% | 8 | 14% | 9 | 19% | 2 | 8% | 7 | 20% | 4 | 8% | 9 | 17% |
| Total | 837 | 100% | 58 | 100% | 48 | 100% | 25 | 100% | 36 | 100% | 47 | 100% | 54 | 100% |
| Median | 3 | | 2 | | 4 | | 3 | | 3 | | 3 | | 3 | |

[1] Judicial Clerkships have not been included in this calculation.

[2] This is the percentage of total professors.

[3] This is the percentage of professors within each school.

| # OF YEARS IN PRACTICE | UNIVERSITY OF MAINE (18) | | UNIVERSITY OF NEW MEXICO (36) | | NORTHWESTERN UNIVERSITY (52) | | OHIO STATE UNIVERSITY (40) | | UNIVERSITY OF OKLAHOMA (40) | | PEPPERDINE UNIVERSITY (38) | | ST. LOUIS UNIVERSITY (37) | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 0 | 6 | 34% | 8 | 22% | 13 | 25% | 10 | 25% | 11 | 27.5% | 5 | 13% | 11 | 30% |
| 1 | 1 | 5.5% | 3 | 8% | 5 | 10% | 3 | 7.5% | 4 | 10% | 5 | 13% | 6 | 16% |
| 2 | 1 | 5.5% | 6 | 17% | 7 | 13% | 8 | 20% | 3 | 7.5% | 0 | 0% | 4 | 11% |
| 3 | 4 | 22% | 3 | 8% | 5 | 10% | 4 | 10% | 4 | 10% | 2 | 5% | 2 | 5% |
| 4 | 0 | 0% | 5 | 14% | 7 | 13% | 4 | 10% | 3 | 7.5% | 8 | 21% | 3 | 8% |
| 5 | 1 | 5.5% | 3 | 8% | 5 | 10% | 3 | 7.5% | 6 | 15% | 5 | 13% | 1 | 3% |
| 6 | 1 | 5.5% | 0 | 0% | 4 | 7.5% | 1 | 2.5% | 2 | 5% | 3 | 8% | 1 | 3% |
| 7 | 0 | 0% | 2 | 6% | 0 | 0% | 2 | 5% | 1 | 2.5% | 1 | 3% | 1 | 3% |
| >7 | 4 | 22% | 6 | 17% | 6 | 11.5% | 5 | 12.5% | 6 | 15% | 9 | 24% | 8 | 21% |
| Total | 18 | 100% | 36 | 100% | 52 | 100% | 40 | 100% | 40 | 100% | 38 | 100% | 37 | 100% |
| Median | 3 | | 3 | | 3 | | 2 | | 3 | | 4 | | 2 | |

| # OF YEARS IN PRACTICE | STANFORD UNIVERSITY (49) | | STETSON UNIVERSITY (33) | | UNIVERSITY OF TENNESSEE (39) | | UNIVERSITY OF TEXAS (58) | | TOURO COLLEGE (38) | | WILLAMETTE UNIVERSITY (24) | | YALE (67) | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 0 | 15 | 31% | 4 | 12% | 9 | 23% | 17 | 30% | 9 | 24% | 2 | 8% | 24 | 36% |
| 1 | 4 | 8% | 4 | 12% | 3 | 8% | 6 | 10% | 2 | 5% | 3 | 13% | 4 | 6% |
| 2 | 7 | 14% | 2 | 6% | 4 | 10% | 4 | 7% | 3 | 8% | 4 | 17% | 8 | 12% |
| 3 | 4 | 8% | 2 | 6% | 4 | 10% | 7 | 12% | 2 | 5% | 2 | 8% | 8 | 12% |
| 4 | 2 | 4.5% | 3 | 9% | 3 | 8% | 2 | 3% | 1 | 3% | 2 | 8% | 4 | 6% |
| 5 | 2 | 4.5% | 3 | 9% | 2 | 5% | 4 | 7% | 2 | 5% | 4 | 17% | 2 | 3% |
| 6 | 3 | 6% | 2 | 6% | 1 | 3% | 1 | 2% | 4 | 10% | 2 | 8% | 4 | 6% |
| 7 | 4 | 8% | 4 | 12% | 4 | 10% | 4 | 7% | 1 | 3% | 2 | 8% | 5 | 7% |
| >7 | 8 | 16% | 9 | 28% | 9 | 23% | 13 | 22% | 14 | 37% | 3 | 13% | 8 | 12% |
| Total | 49 | 100% | 33 | 100% | 39 | 100% | 58 | 100% | 38 | 100% | 24 | 100% | 67 | 100% |
| Median | 2 | | 5 | | 3 1/2 | | 3 | | 5 | | 4 | | 2 | |