Ohio Northern University Law Review

Volume 41 | Issue 1 Article 3

Deals or No Deals: Integrating Transactional SkillsIn the First Year Curriculum

Lynnise Pantin

Deals or No Deals: Integrating Transactional Skills In the First Year Curriculum

LYNNISE PANTIN*

I. INTRODUCTION

In the wake of criticism of legal education from both outside the academy and within, the mandate for developing and graduating practice-ready attorneys has never been clearer.[1] There is a strong desire for law schools to begin graduating students who are practice-ready, meaning that these new attorneys would be prepared for the real practice of law upon graduation.[2] The question of what type of practice remains. At least half, if not more, of all attorneys engage in some form of transactional practice, rather than litigation, or other form of dispute resolution.[3] Transactional practice refers to the art of "planning, negotiating, documenting, and closing

* Lynnise E. Pantin is an Associate Professor of Law at New York Law School where she teaches Legal Practice and is the Director of the Transactional Law Clinic: Start-Ups and Non-Profits. B.A., Pomona College; J.D., Columbia Law School. I would like to thank Heidi Brown, Patience Crowder, Steve Ellman, Jennifer Fan, Michael Haber, Sushil Jacobs, Conrad Johnson, Gerry Korngold, Gowri Krishna, Kate Kruse, Alicia Plerhoples, Amanda Spratley and Paul Tremblay for their invaluable comments, support and assistance in shaping this article. This article was presented at the 2013 Clinical Law Review Writers' Workshop at New York University Law School. I thank the facilitators and participants for their insightful comments and suggestions. Many thanks also go to my research assistant, Antonio Perotto for his assistance and contribution to the writing of this article.

1. *See* Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 BERKELEY BUS. L.J. 187, 188 (2012) (noting that the practicing bar wants skills training in law schools to be more practical and they want law schools to offer more training in practical skills); *see* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 11-12 (Clinical Leg. Educ. Assn. 2007) [hereinafter BEST PRACTICES]; WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR T HE PROFESSION OF LAW 194-97 (Jossey-Bass 2007); 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 234-37, 240-41, 245, 254 (1992), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf__(last visited Sept. 29, 2013) (hereinafter NARROWING THE GAP); *see also* Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES (Feb. 10, 2013), http://www.nytimes.com/2013/02/11/us/lawyers-call-for-drastic-change-in-educating-new-lawyers.html?_r=0.

2. *See* MICHAEL WORONOFF, WHAT LAW SCHOOLS SHOULD TEACH FUTURE TRANSACTIONAL LAWYERS: PERSPECTIVES FROM PRACTICE 2-4 (2009), *available at* http://ssrn.com/abstract=14 30087.

3. *See* David V. Snyder, *Closing the Deal in Contracts: Introducing Transactional Skills in the First Year*, 34 U. TOL. L. REV. 689 (2003) (stating that half or more than half of law students are going to be transactional lawyers); Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS'N LEGAL WRITING DIRECTORS 118, 119 (2008).

the deal."[4] The fact that so many practicing attorneys engage in transactional work indicates that, in order for law schools to produce truly practice-ready attorneys, law schools must train students for practice in both transactional and litigation fields.[5] If law schools are not teaching transactional skills, then law schools are failing to teach over half of all lawyers the skills necessary to practice law.[6] By changing the status quo, students may leave law school with both a more productive set of lawyering skills and a broader view of how they can contribute to the profession and the communities lawyers serve.[7] If not changed, law schools will have failed in any effort to graduate practice-ready students.[8]

As law schools undertake the tasks of changing and restructuring legal education to meet the demands of the current economy, they must consider the role and necessity for teaching transactional lawyering in both theory and practice.[9] To comply with the practice-ready mandate and engage with any efforts to reform curriculum, the Academy must, as a part of those endeavors, begin preparing students for transactional practice.[10] Thus, the law school curriculum must evolve in efforts to develop law students into attorneys who are ready for both transactional practice and litigation practice.[11]

Law schools have generally answered the call to include more skills teaching in their curricula.[12] New initiatives have been launched across the country to integrate legal skills and professionalism into traditional Legal Research and Writing ("LRW") courses.[13] Several law school programs have begun to incorporate the instruction of "real lawyering" skills into the

---

4. Snyder, *supra* note 3, at 689.

5. *See* WORONOFF, *supra* note 2, at 1.

6. Penland, *supra* note 3, at 118-19.

7. *See* Gerald Korngold, *Legal Education for Non-Litigators: The Role of the Law Schools and the Practicing Bar*, 30 N.Y.L. SCH. L. REV. 621, 621-23 (1985).

8. *See id.* at 621-22.

9. The goal of achieving "practice-readiness" is a complex issue, since it is open to some doubt whether it is possible for law schools to fully prepare students for all of the possible choices that are open to them after they are admitted to the bar. While acknowledging the complexity of the practice-ready goal, the value of a degree of practice-readiness may certainly be preferable, if indeed, full practice-readiness is not achievable. *See, e.g.*, WORONOFF, *supra* note 2, at 14.

10. *See* Korngold, *supra* note 7, at 621, 629.

11. *See* Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten "Dirt Lawyer*," 62 U. PITT. L. REV. 335, 335-36 (2000).

12. *See* Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 Drexel L. Rev. 69, 71 (2009).

13. *See Curriculum and Course Descriptions*, N.Y.L SCH., http://www.nyls.edu/academics/j_d_course_of_study/curriculum/course-detail/?course=1456 (last visited Oct. 1, 2014); *Curriculum and Course Descriptions,* N.Y.L SCH., http://www.nyls.edu/academics/j_d_course_of_study/curriculum/course-detail/?course=864 (last visited Oct. 1, 2014); *Course Description*, TEX. TECH L. SCH., http://www.depts.ttu.edu/official publications/courses/LAW.php (last visited Sep. 19, 2014).

course such as client interviewing, counseling, and negotiation.[14] To the extent law schools are attempting to include lawyering skills in their first year coursework, these programs are not including transactional skills teaching among those skills taught.[15] In fact, surveys of a cross-section of American law schools' required LRW courses show that there is a litigation bias contained within the typical LRW course.[16] Currently, if law schools are developing practice-ready attorneys, they are likely developing students into attorneys trained for litigation practice, because litigation-oriented skills dominate the law school curricula.[17] In other words, since the process of imparting transactional knowledge and skills to developing lawyers differs from the traditional methods used to train litigators, and many law schools are continuing to teach the traditional methods for training lawyers, law schools and legal writing programs are preparing students to be litigators.[18] In addressing the skills gap between law school and practice, whether transactional skills are being taught has not been fully addressed yet.[19] In 2010, in recognition of the importance of teaching transactional skills, the Association of American Law Schools created a new Section on Transactional Law and Skills, which focuses on transactional law pedagogy and scholarship, as well as the substantive business, financial, and lawyering skills needed to consummate business transactions.[20] The Section moved from provisional status to permanent status in 2014.[21]

Whether legal education currently includes the teaching of transactional lawyering skills is debatable.[22] However, in an attempt to respond to the

14. *See* Praveen Kosuri, *"Impact" in 3D—Maximizing Impact Through Transactional Clinics*, 18 CLINICAL L. REV. 1, 11 (2011).

15. *See* Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59, 60-61 (2007).

16. *See id.* at 60-61 (finding that law schools accredited by the American Bar Association and the Association of American Law Schools overwhelmingly focus students' attention on litigation by means of their required LRW curriculum).

17. *See* Bogart, *supra* note 11, 335-36 (critiquing the law school curriculum's traditional focus on litigation at the expense of students with future transactional careers); *see* Penland, *supra* note 3, at 118-32.; *see also* Korngold, *supra* note 7, at 621.

18. *See* Jonathan Todres, *Beyond the Case Method: Teaching Transactional Law Skills in the Classroom*, 37 J.L. MED. & ETHICS 375, 375-76 (2009) (arguing that, with the casebook method, law schools historically have done little to introduce students to transactional thinking, practice, or skills); *see also* Schulze, *supra* note 15, at 71 (finding that litigation assignments constitute 66.46% nationwide, while transactional assignments constituted 4.59%.); *see also* Korngold, *supra* note 7, at 621.

19. *See* Penland, s*upra* note 3, at 118.

20. Susan Jones, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L.& POL'Y 85, 94 (2013).

21. Gordon Smith, *It's Official: AALS Section on Transactional Laws and Skills* (June 5, 2014), http://www.theconglomerate.org/2014/06/its-official-aals-section-on-transactional-law-and-skills.html.

22. *See, e.g.*, Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 234-35 (2012) (citing George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. L. 279, 318 (2009) ("[Professor] Gilson and others have discussed legal education for business lawyers. They vary in their prescriptions, but all

demand for increased transactional training, many law schools have recently moved toward taking measures to teach and promote transaction-oriented skills generally.[23] While many law schools have made great strides in introducing the teaching of transactional practice into their curricula, it is typically limited to upper-level courses, which are likely taught as electives rather than required courses, such as "Deals" or "Business Planning" courses.[24] Additionally, although many law schools are directing their efforts to train their students for the practice of transactional law by adding centers, clinics, externships, and other transactional components to the overall curriculum,[25] very few law schools have included such training in the first year curriculum.[26] Additionally, casebooks used in doctrinal courses are rife with cases involving disputes—even in a transactional subject such as contracts; and as a result, exposing students only to litigation, rather than transactions, since the courses are generally taught using the case method.[27] Although there is evidence that some first year contract courses are introducing transactional skills, a broad spectrum of schools certainly are not integrating them.[28] The effect of these approaches is the continued marginalization of transactional thinking within the larger

---

agree there is a crisis."); *see also* CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU 2 (Prac. L. Institute 2d ed. 2008) ("[L]aw schools do a woefully inadequate job of preparing non-litigation lawyers—corporate, financing, commercial and real estate lawyers—to perform the most fundamental tasks that are expected of them."); Eric J. Gouvin, *Teaching Business Lawyering in Law Schools: A Candid Assessment of the Challenges and Some Suggestions for Moving Ahead*, 78 UMKC L. REV. 429, 430 (2009) ("I fear that to the extent law schools are attempting to provide their students with professional skills and values, they are doing it in a way that is skewed toward litigation practice and gives short shrift to transactional practice."); Okamoto, *supra* note 12, at 71 ("Once relegated to a single course on 'business planning,' supplemented here and there by adjunct-taught electives in real estate transactions or the like, law school curricula at every level of law school are being pushed to include a new focus on teaching future practitioners how to do deals."); Wayne Schiess, *Legal Writing is Not What it Should Be*, 37 S.U. L. REV. 1, 6 (2009) ("Law schools do not adequately train students in legal drafting").

23. *See* Okamoto, *supra* note 12, at 71 (discussing the fact that law schools and the academy at large are giving transactional lawyering greater attention); Statchen, *supra* note 22, at 234 (discussing the recent and rapid growth of transactional clinics).

24. Emory Law School is an example of a law school that has introduced the teaching of transactional practice into their curricula. Emory has a certificate problem that incorporates transactional skills classes such as contract drafting, "Deal Skills," and other business courses. *See* Circo, *supra* note 1, at 227; *see also* BEST PRACTICES, *supra* note 1, at 109.

25. *See* Circo, *supra* note 1, at 218, 227 (noting that "a few law schools started to introduce comprehensive skills programs to expand the traditional business curriculum").

26. *See* Snyder, *supra* note 3, at 689.

27. *See* Christina L. Kunz et al., *Incorporating Transactional Skills Training Into First-Year Doctrinal Courses*, TRANSACTIONS: TENN. J.BUS. L. 331, 331, 336-37, 340 (2009). Arguments could be made that the case method is failing both transactional lawyers and litigators and that professors need to teach doctrine in addition to showing how such doctrine relates to lawyering, but discussion of these issues are outside the scope of this article.

28. *See* Scott J. Burnham, *Drafting in the Contracts Class*, 44 ST. LOUIS U. L.J. 1535, 1535-36 (2000); Kunz, *supra* note 26, at 331; Snyder, *supra* note 3, at 689; Penland, s*upra* note 3, at 120.

curriculum,[29] which is problematic because transactional thinking enhances lawyerly thinking in general.[30]

Transactional teaching broadens a student's ability to learn and understand substantive concepts in addition to developing much needed transactional lawyering skills.[31] In doing so, a student can develop the skill of "transactional thinking." Yet, rarely does a first year course teach transactional writing activities such as drafting basic agreements, writing contracts, composing settlement agreements, negotiating deals, or creating a will.[32]

This article joins a growing body of scholarship on the pedagogy of transactional law and skills.[33] This article challenges the traditional pedagogy of teaching law students to think like a lawyer and argues that law schools should shift the analytical framework of a litigation-dominated model, which is typically taught in the first year, to a model that incorporates transactional skills teaching into the first year law school curriculum.[34] This approach will (1) create a greater balance of skills taught in the first year and (2) address the mandate to train more practice-ready lawyers.[35] This article argues that the best place to begin incorporating transactional skills training is within the first year skills curriculum.[36] Part II of this article defines transactional skills.[37] Part III makes the argument that transactional skills generally should be incorporated throughout the law school curricula, including, in the first year.[38] Part IV explains why transactional law should be taught in the first year of law school.[39] Next, Part V explains how transactional skills teaching can be integrated into the traditional framework of first year skills by adding transactional components to the existing framework.[40] Finally, Part VI addresses several challenges that may arise in connection with such integration.[41]

---

29. *See* Penland, s*upra* note 3, at 120. Transactional legal clinics are filling the gap in teaching transactional skills. *See, e.g.*, Susan Jones, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L.& POL'Y 85, 92-93 (2013) (tracing the evolution of the transactional law clinics nationwide from the mid-1990s, where there were only a handful of small business clinical programs to today where there are nearly 150 clinics in nearly 200 ABA-approved law schools).

30. Michelle M. Harner, *The Value of "Thinking Like a Lawyer,"* 7 MD. L. REV. 390, 417 (2011).

31. *See* Bogart, *supra* note 11, at 336-37.

32. *See id.* at 337 (proposing a basic strategy for transactional training).

33. *See, e.g.*, Circo, *supra* note 1, at 190-201.

34. *See infra* Part IV.

35. *See infra* Part VII.

36. *See infra* Part IV.

37. *See infra* Part II.

38. *See infra* Part III.

39. *See infra* Part IV.

40. *See infra* Part V.

41. *See infra* Part VI.

II. WHAT ARE TRANSACTIONAL SKILLS?[42]

This section articulates a definition of transactional law skills. "'Transactional law' refers to the various substantive legal rules that influence or constrain planning, negotiating, and document drafting in connection with business transactions, as well as the 'law of the deal' (i.e., the negotiated contracts) produced by the parties to those transactions."[43] In the petition for provisional status, the AALS Section on Transactional Law and Skills defines transactional skills as "the lawyering skills required to consummate a transaction."[44] The Section further describes 'Transactional skills,' as a broad-brush term that refers to both the skills and tasks required to consummate a transaction.[45] 'Skills' are competencies that lawyers use in more than one context, such as negotiating, drafting, risk analysis, contract analysis, and collaboration.[46] A 'task' is specific work that a lawyer does and generally involves the use of multiple skills; for example, due diligence, third party opinion letters, resolutions, and transaction management."[47] A common misperception is that transactional work means only facilitating corporate deals.[48] However, transactional skills are broader and more diverse than simply facilitating a deal.[49]

"[T]ransactional skills are not [always] inherently connected to the business and commercial law fields, but rather are one application of a broader theory of preventative law practice."[50] Transactional skills include those lawyering skills that are required for an attorney to successfully practice transactional law.[51] Generally, these skills are the same ones needed for a lawyer to close a deal—these can be as basic as a one-page transfer of a car title between average citizens, or as complex as a multi-million-dollar power plant construction project.[52] Transactional skills can include, but are not limited to: (1) client interviewing, (2) communicating

---

42. *See* Snyder, *supra* note 3, at 689-90.

43. THE ASS'N OF AM. L. SCH., WORKSHOP ON TRANSACTIONAL LAW, THE IMPROVEMENT OF THE LEGAL PROFESSION THROUGH LEGAL EDUCATION 2 (2009).

44. TINA STARK, ASS'N AM. LAW SCH., PETITION FOR PROVISIONAL STATUS: PROPOSED SECTION ON TRANSACTIONAL LAW AND SKILLS 1, *available at http://www.theconglomerate.org/2010/12/aals-section-on-transactional-law-and-skills.html* (last visited November 25, 2014).

45. *Id.*

46. *Id.* at 1-2.

47. *Id.* at 2.

48. *See* Todres, *supra* note 18, at 375.

49. *See id.*

50. Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 449-50 (2009).

51. *See id.*at 460.

52. *See id.* at 461.

with clients in writing, (3) legal drafting, (4) client counseling, and (5) negotiating a transactional agreement.[53]

Transactional lawyers will engage in a wide variety of transactional practices, including: (1) real estate transactions, (2) tax matters, (3) corporate transactions, (4) property management, (5) complex deals (such as mergers), (5) acquisitions, (6) initial public offerings, and (7) estate planning.[54] Transactional work ranges broadly from corporate lawyers, doing deals at large Wall Street firms, to solo practitioners, providing legal counsel in negotiating a lease agreement.[55] Government and public interest lawyers may also engage in transactional work through community economic development and other practices.[56] Even some litigators may engage in transactional work through negotiating, drafting discovery, settlement agreements, and plea deals.[57] Indeed, having a basic understanding of transactional skills makes a lawyer a better litigator because he or she can get involved in the client's business early and prevent later disputes.[58]

III. THINKING LIKE A LAWYER AND OTHER REASONS TO TEACH TRANSACTIONAL SKILLS

The first year of law school is commonly described as the year when first year students are taught to "think like a lawyer."[59] Typically, first year law professors teach the litigation model of analytical thinking.[60] "[T]hinking like a lawyer means analyzing existing case law, starting from the point where there was an injury, and finding a way to apply and manipulate the case law to remedy that injury."[61] Students learn how to analyze legal rules from cases and statutes, and this requires students to read

53. Kosuri, *supra* note 14, at 11; Lynnise E. Pantin, *The First Year: Integrating Transactional Skills*, 15 TRANSACTIONS: TENN. J. BUS. LAW 135, 139 (2013).

54. *See* Penland, *supra* note 3, at 122, 127.

55. *See id.* 122.

56. In fact, one of the dangers in not educating students about transactional law is that a cadre of public interest minded lawyers who are not interested in litigation might be overlooked, and mistakenly think they must be able to litigate in order to contribute to the public interest. *See* Todres, s*upra* note 18, at 375.

57. Although to be clear, the work that litigators engage in may not necessarily be the same thing. It is related transactional work, but it is arguably of a different kind because such work is typically undertaken in the adversarial context. *See generally*, John Lande, *Lessons From Teaching Students to Negotiate Like a Lawyer*, 15 CARDOZO J. CONFLICT RESOL. 1, 2 (2013).

58. *See* Circo, *supra* note 1, at 210; s*ee* Todres, *supra* note 18, at 375.

59. *See, e.g.*, Lisa Penland, *The Hypothetical Lawyer: Warrior, Wiseman, or Hybrid?*, 6 APPALACHIAN J.L. 73, 77 (2006).

60. *See* Penland, *supra* note 3, at 120-21.

61. *See* Penland, *supra* note 59, at 79 (finding that because the first year is so heavily litigation-oriented, "thinking like a lawyer" becomes the sole province of litigators).

for understanding and think with clarity and precision.[62] Students learn how to work with facts. This requires students to recognize the central nature of facts, appreciate the lawyer's role in developing facts, and sift through facts to identify those that are material, and identify persuasive facts.[63] Additionally, they are taught to build effective arguments by applying legal rules to facts and reason by analogy and reach a conclusion.[64] In order for students to learn to write with clarity and precision, they learn to answer legal questions through research, requiring students to frame issues, identify sources and levels of authority, select which authority to use, and understand their findings.[65] In the above model of teaching analytic thinking, the student is dealing with facts that have already occurred and rules that, although dynamic as the law changes, can be stagnant and fixed.[66] The above-described skills, generally taught in first year skills courses, are the same set of analytic skills generally needed for successful litigation.[67]

Students are often told that it does not matter whether they end up practicing litigation or corporate work because the methodology taught in the first year, which helps students to learn how to "think like a lawyer," is a useful universal skill applicable to any practice area.[68] However, transactional lawyers and teachers disagree.[69] They argue that training students for transactional practice requires a different approach to analytic thinking, because transactional lawyering is different from litigation.[70] According to Professor Tina Stark, "doing deals is fundamentally different from litigating, in terms of both the skills used and the substantive knowledge required. . . , [a]lthough the academy prides itself on teaching students to think like a lawyer, for the most part we teach students to think like litigators."[71] Transactional practice differs from litigation in many fundamental ways, as "[t]he analytic skill that litigators use is different from the one that deal lawyers use."[72] The context of how each type of lawyering performed is important because key differences between transactional

62. *See id.* at 81.

63. *See* Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 289, 311-13 (1980); *see* Penland, *supra* note 3, at 125; *see* Snyder, *supra* note 3, at 691.

64. KEVIN D. ASHLEY & VINCENT ALEVEN, TOWARD AN INTELLIGENT TUTORING SYSTEM FOR TEACHING LAW STUDENTS TO ARGUE WITH CASES 43 (1991); Gale, *supra* note 63, at 308.

65. *See* Michael R. Smith, *Alternative Substantive Approaches to Advanced Legal Writing Courses*, 54 J. LEGAL EDUC. 119, 122-23 (2004).

66. *See* Tina Stark, *Thinking Like a Lawyer*, 54 J. LEGAL EDUC. 223, 224 (2004).

67. *See* Todres, s*upra* note 18, at 375.

68. COURTNEY LEE & TIM NACCARTO, LEGAL SKILLS FOR LAW SCHOOL & LEGAL PRACTICE 1, *available at* http://www.mcgeorge.edu/Documents/week1LegalSkills.pdf (last visited Oct. 5, 2014).

69. Stark, *supra* note 66, at 223-24.

70. *Id.* at 223.

71. *Id.*

72. *See id.*

lawyering and litigation are subsequently revealed.[73] Generally in a transaction, parties are in negotiation, and the transaction is accomplished in order to prevent or avoid the adversarial process.[74] In the litigation context, the litigator is looking back on past events to review and determine what went wrong, and who is responsible for that wrong.[75] The transactional lawyer is forward-thinking, planning the deal when there is no conflict or dispute to resolve.[76] Another difference between litigation and transactional practice is that the former is about procedure, and the latter is about the substance of the law.[77] The two types of lawyering differ, therefore the approach to teaching transactional lawyers must differ from the approach to teaching litigation, the model that dominated the first year. Professor David Snyder argues that much of the difference comes down to planning.[78] Much of thinking like a transactional lawyer comes down to "thinking as a planner: issue spotting as a matter of planning a transaction, as opposed to issue spotting in preparation for litigation, which [law schools] tend to emphasize."[79] The argument is not that the transactional model is the correct model and that it trumps the litigation model, but rather that the transactional model should be included in the teaching of analytical thinking in law school, more specifically, in the first year of law school.[80]

What does it mean to think like a transactional lawyer? In the petition for provisional status, the AALS Section on Transactional Law and Skills defines transactional lawyering as follows:

> Transactional lawyering is a distinctive form of legal practice that focuses on the creation of—a law of the deal rather than on the interpretation of legal texts, or the litigation and resolution of disputes. This sort of lawyering—often called—private ordering—depends on the parties (not the Government or the courts) to create the rules that will govern their relationship.[81]

"Transactional lawyering means 'understanding the parties' deal and then translating the business terms into a transactional structure that uses contract, commercial, and other business law principles to govern the

73. *See* Todres, *supra* note 18, at 375.
74. *See id.*
75. *See id.*
76. *See id.*
77. *See* Stark, *supra* note 66, at 223.
78. *See generally* Snyder, *supra* note 3, at 689.
79. *See id.* at 689-90.
80. *See* Stark, *supra* note 66, at 223-24, 228 (making the point that in order "[t]o teach our students to be deal lawyers, we must teach them to think like deal lawyers.").
81 . *See* STARK, *supra* note 44, at 2.

parties' relationship."[82] According to Professor Tina Stark, "The terms of the business deal are the deal lawyer's facts. The lawyer must then find the contract concepts that best reflect the business deal and use those concepts as the basis of drafting the contract provisions."[83]

Transactional drafting is "the writing of documents that memorialize and effectuate a client's intentions in connection with business and financial events and transactions."[84] The drafting process requires several steps for a lawyer to journey from inception of an idea to an actual executed agreement.[85] Lawyers must:

> (1) Investigate the facts (including related documents); (2) Investigate applicable law as needed; (3) Develop a contact list and task schedule according to deadline date and responsible party; (4) Check exemplars and other resources; (5) Prepare initial drafts; (6) Circulate drafts for comments—which may lead the drafter back to earlier steps in the process before moving ahead**;** (7) Negotiate and document the final, definitive documents; (8) Execut[e] (signing) . . .the final, definitive documents; (9) Prepare for closing and closing; and (10) [Facilitate] [p]ost-closing adjustments and clean up.[86]

The above activities require analytical skills that transactional lawyers use.[87] Aspects of thinking like a transactional lawyer include: (1) translating the business deal into contract concepts, (2) adding value to the deal, which means looking at a transaction from a client's perspective, and finding and resolving business issues, and (3) understanding the business deal.[88] These skills are fundamentally different from those required of a litigator.[89]

This is not to say that first year law students should only learn to think like transactional lawyers.[90] Rather, when we tell law students that they will learn to think like a lawyer in the first year of law school, we need to be sure that both transactional lawyers and litigators are represented in the idea of what a lawyer is, and that we are teaching skills that require students to think like both a litigator and a transactional lawyer.[91] If at least half of

---

82. Deborah A. Schmedemann, *Finding a Happy Medium: Teaching Contract Creation in the First Year*, J. OF ASS'N LEGAL WRITING DIR. 177, 178 (2008).

83. *See* Stark, *supra* note 66, at 224.

84. Smith, *supra* note 65, at 124.

85. *See* GEORGE W. KUNEY & BRIAN K. KRUMM, THE ENTREPRENEURIAL LAW CLINIC HANDBOOK, 67 (Thomson Reuters ed., 2nd ed. 2013).

86. *Id.*

87. *See* Stark, *supra* note 66, at 224.

88. *See generally id.*

89. *See id.* at 223.

90. *See id.* at 223-24, 228.

91. *See* Arnow-Richman, *supra* note 49, at 459-60; *see* Stark, *supra* note 66, at 223.

students practice transactional law after graduation, then law schools need to teach law students to think like a transactional lawyer in addition to thinking like a litigator.[92] Teaching students to think analytically from both a transactional and a litigation-oriented perspective about clients' issues or legal matters is essential to producing graduates who will excel in any type of practice.[93] This is analogous to developing the left-brain and right-brain in early childhood development.[94]

The current status quo is what Professor Rachel Arnow-Richman refers to as the "transactional thinking gap."[95] She writes that "[w]hat is missing from the curriculum is not merely the opportunity to draft documents or negotiate deals, but exposure to a transactional mindset—a framework for viewing the law as a factor in planning interactions and managing risk, rather than in resolving disputes and crafting arguments."[96]

IV. WHY TEACH TRANSACTIONAL SKILLS IN THE FIRST YEAR?

There are several reasons for teaching transactional skills in the first year, including complying with the ABA standards,[97] combating the popular myth of lawyer as litigator,[98] and opening up new vistas to beginning law students.[99] In accordance with the ABA standards, students learn in their first year what lawyering skills are and learn what lawyers do.[100] Nearly every ABA-accredited law school offers some type of LRW instruction in the first year to introduce students to legal writing, research, and analysis.[101] These courses traditionally begin with teaching the skills of researching and writing an office memorandum assessing the likelihood of success of a

92. *See* Snyder, *supra* note 3, at 689 (stating that half or more than half of law students are going to be transactional lawyers); *see*, Stark, *supra* note 66, at 223.

93. *See* Arnow-Richman, *supra* note 50, at 459.

94. Allan N. Schore, *Attachment, Affect Regulation, and the Developing Right Brain: Linking Developmental Neuroscience to Pediatrics*, 26 PEDIATRICS IN REVIEW 204, 205 (2005).

95. *See* Arnow-Richman, *supra* note 50, at 460.

96. *See id.*

97. *ABA Standards and Rules of Procedure for Approval of Law Schools (2014-2015)*, PROGRAM OF LEGAL EDUCATION, *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.authcheckdam.pdf (stating that learning outcomes include competency in substantive and procedural law as well as legal analysis and reasoning which arguably includes transactional skills as well as litigation skills); *see* Schulze, *supra* note 15, at 61.

98. *See* Robert C. Illig, *The Oregon Method: An Alternative Model for Teaching Transactional Law*, 59 J. LEGAL EDUC. 221, 224-26 (2009) (noting several media sources that perpetuate this myth).

99. *See* Okamoto, *supra* note 12, at 121.

100. *See* Schulze, *supra* note 15, at 60-61 (describing LRW curriculum focused on establishing basic skills essential to becoming a lawyer).

101. *See* George Mader & Marci A. Rosenthal, *2013 National Survey Results*, ASS'N LEGAL WRITING DIRECTORS (2013), *available at* http://www.alwd.org/wp-content/uploads/2013/08/2013-Survey-Report-final.pdf; *see* Penland, *supra* note 3, at 121 (illustrating this point by a review of commonly used Legal Writing textbooks).

forthcoming lawsuit. They then move on to instruction in how to research and write a persuasive brief, and conclude with requiring students to perform an oral argument.[102] These are primarily litigation skills.[103] Yet, as stated above, a significant percentage of lawyers engage in some form of transactional practice.[104] Therefore, law schools must place greater emphasis on training law students to be transactional lawyers.[105]

The first year skills course is arguably the best opportunity to infuse the first year curriculum with transactional skills teaching, because it is intended to introduce students to what it is that lawyers do. As such, it should recognize that students, when they become practicing attorneys, will be both litigators and transactional attorneys.[106] Law schools should prepare students to understand all facets of practicing law.[107] In a fully "integrated transactional curriculum," most or all students would be exposed to fundamental principles of transactional practice and, after the first year, interested students could pursue additional instruction for developing transactional skills for use in practice.[108]

A less important reason to teach transactional skills in the first year is to combat the popular myth that lawyers are predominantly litigators.[109] Based on the portrayal of lawyers in popular culture as litigators and nothing else, students have a general idea upon entering law school about what it is that litigators do.[110] Popular television shows such as *Law & Order*, *The Practice*, *Ally McBeal*, *The Good Wife*, and *Boston Legal* portray lawyers as litigators and mainly show the practice of law in the adversarial context.[111] "Mergers and acquisitions, it turns out, just doesn't make for very good television."[112] If pre-law school exposure of lawyering through television and movies results in students wanting to become litigators, then law schools must do more to provide a reference point for students about transactional lawyering.[113] The point here is not

---

102. Schulze, *supra* note 15, at 91.

103. *See* Todres, *supra* note 18, at 375 (describing litigation as the kind of post-hoc, adversarial process inherent in brief-wiring and oral argument).

104. *See* Penland, *supra* note 3, at 119-20; *see also* Circo, *supra* note 1, at 208 (stating that "[t]o large segments of the practicing bar, law school seems barely relevant to transactional work").

105. Circo, *supra* note 1, at 187-88.

106. *See* Penland, *supra* note 59, at 73, 100.

107. *See id.* at 100.

108. Tina L. Stark, *Conference Introduction: My Fantasy Curriculum & Other Almost Random Thoughts*, 10 TRANSACTIONS: TENN J. BUS. L. 3, 3-5 (2009).

109. *See* Illig, *supra* note 98, at 224.

110. *See id.*

111. *See id.* (stating that the media culture of litigators through movies and television are dramatic, gripping, and theatrical).

112. *Id.* at 221.

113. *See id.* at 224-26 (noting media portrayals of lawyers, the influence of those portrayals upon law students, and the lack of a pre-law school education as to what transactional lawyers do).

to suggest that the media provide an accurate portrayal of legal practice (the legal genre clearly serves to entertain, not educate viewers about the practice of law), but that the popularity of such shows causes students to have some idea of what it is a litigator typically does.[114] In this author's experience, students do not understand what it means to do transactional work.[115] If anything, the pervasiveness of the dominant model of the litigator in popular culture may mean that law schools should do more to promote transactional practice.[116]

Further, law schools may unintentionally push students into litigation by ignoring transactional skills in the first year, even though some students might otherwise have a natural inclination toward non-adversarial work. [117] Additionally, not all law students' personalities are suited for combative/adversarial litigation careers, yet perhaps we force students into them by not educating them about their options.[118] We cannot expect students to decide between litigation and transactional practice if they are not exposed to both sets of decidedly different skills.[119] "In fact, research shows that the vast majority of first year law students . . . have no idea what area of practice they will pursue."[120] If law students come into law school unsure of what area of law they want to practice, it would be a disservice to students to perpetuate the notion that being a lawyer means that one is a litigator.[121] Additionally, students cannot decide what practice area they are interested in if they are not exposed to what it is that transactional lawyers do as part of their law school classroom education experience.[122] Serving students and fulfilling law school curricular needs are important considerations, and are factors when determining whether law schools should integrate and continue to work towards developing transactional learning in first year courses.[123]

Preparing the next generation of lawyers is a major motivator for incorporating transactional skills in the first year curriculum.[124] Training

114. *See* Illig, *supra* note 98, at 224-25.

115. After I introduce myself and describe my professional background to my students on the first day of classes and tell them that I practiced corporate law, many of them come up to me after class and want to talk because they are interested in practicing corporate law or they know that they do not want to practice in an adversarial context. However, many of them are not sure, or have little direction, about what it is and how they can do it. *See* Pantin, *supra* note 53, at 146-47; *see also* Illig, *supra* note 98, at 221.

116. *See* Illig, *supra* note 98, at 224-26.

117. Schulze, *supra* note 15, at 61-62.

118. *Id.*

119. *See id.* at 73-74.

120. *Id.* at 61.

121. *Id.* at 72.

122. Schulze, *supra* note 15, at 72.

123. *See id.* at 91-92.

124. Okamoto, *supra* note 12, at 71.

students to think from a perspective looking forward, rather than from a perspective focused on the past is certainly worthy of exploration.[125] Who would not want to hire an attorney trained to think about and plan for the future? Professor Karl Okamoto's points out that

> [i]t is easier to teach ex post legal analysis than to teach ex ante legal planning. . . We as law professors are all well-versed in the methods of legal analysis and argumentation . . . [yet] . . . [w]e are not good at providing tools for dealing with uncertainty about the future. And yet that is exactly what transactional lawyers do for a living.[126]

Why would the legal academy not want to expose all first year law students to transactional lawyering and indeed prepare all students for both transactional practice and litigation practice? Why would we not want to produce confident, capable lawyers who understand the needs of their clients in multiple legal contexts? Receiving skills training in the first year of law school that incorporates both litigation and transactional skills is helpful to future litigator and future transactional attorneys alike.[127]

V. HOW CAN LAW SCHOOLS INTEGRATE TRANSACTIONAL SKILLS IN THE FIRST-YEAR CURRICULUM?

The previous sections identified the pedagogical value of teaching transactional skills.[128] This section of the article identifies a means of integrating transactional skills teaching into the curriculum and specifies how to accomplish such a goal in the first year. The development of practice-ready lawyers requires some analysis of what competencies are required.[129] The first step is to identify the substantive skills and competencies necessary to graduate a law student intent on practicing transactional law, and then extract from those competencies to determine what can be taught in the first year.[130] By asking questions, law school professors determine the competencies necessary for transactional law success. For example, "what are the goals that you should have for someone who would be a transactional attorney and how can I teach them to be practice ready?" Put differently, "what is it that I want my students to

125. *See* Todres, *supra* note 18, at 375.
126. Okamoto, *supra* note 12, at 122.
127. *See* Penland, *supra* note 3, at 130.
128. *See supra* Parts III-IV.
129. *See* Penland, *supra* note 3, at 122-23.
130. *See id.* at 118-23.

know or be exposed to if they were to come into my office as junior associates?"[131]

Graduating law students generally need to have some substantive knowledge of the law governing the types of transactional documents they will draft in the future.[132] As part of the larger law school curriculum, students should take courses such as corporations, wills and trusts, real estate transactions tax, securities regulations, and accounting or another financial literacy course in order to better understand the substantive basis of transactional law.[133] Students should have the opportunity to apply this substantive knowledge through experiential learning courses, clinics, and drafting courses as well as have some exposure to transactional law to understand the contents of transactional law practice, recognize some vocabulary, and understand the paradigm of transactional law practice.[134]

Transactional teaching in the first year is important because the first year is when law students form first impressions about the practice of law.[135] Exposure to transactional thinking is important at this stage, including, the concept of transactional law is, and what transactional lawyers do.[136] The goal for students in the first year should be for them to develop an understanding of (1) basic vocabulary related to transactional practice; (2) the substance of a transaction; (3) an understanding of how the pieces of a contract fit together; (4) how to investigate facts relevant to a transaction; (5) legal research and those resources that are unique to transactional practice; (6) how to draft and negotiate an agreement; (7) how ethics and the model rules relate to transactional practice; and (8) transactional thinking as it relates to planning interactions and managing risk.[137]

The above competencies lend themselves to skills that can and should be taught in a first year skills course.[138] The fundamental transactional skills that students would learn are a transactional approach to the practice of law.[139] Such competencies would be transferable to the practice of law applicable to a broad range of contexts.[140]

---

131. *See generally id.* (discussing competencies required of a transactional lawyer).

132. *See* Schulze, *supra* note 15, at 91.

133. *See* Circo, *supra* note 1, at 192, 209, 227-29 (discussing various substantive concepts employed in transactional practice).

134. *See, e.g.*, *Circo*, *supra* note 1, at 227-29 (discussing incorporation of transactional skills training into the curriculum at Emory Law School).

135. Schulze, *supra* note 15, at 61-62.

136. *See* Pantin, *supra* note 53, at 139.

137. *See* Arnow-Richman, *supra* note 50, at 460-61; *see* Pantin, *supra* note 53, at 139-40; *see* Penland, *supra* note 3, at 123-27.

138. *See generally* Pantin, *supra* note 53.

139. *See* Penland, *supra* note 3, at 118-23.

140. *See id.*

In many first year skills courses, litigation-oriented assignments such as memo writing, trial and appellate brief writing, and oral advocacy dominate actual instruction of skills.[141] The current skills that are taught and the assignments that are assigned do not necessarily reflect the fact that certain forms of litigation require transactional skills. Some litigators draft contracts, and others negotiate discovery agreements and settlement agreements- all of which require transactional drafting skills.[142] Further, some litigators negotiate case management/scheduling plans, discovery agreements (on how the parties will exchange docs/e-discovery), resolutions of discovery disputes, settlement agreements, and draft engagement agreements with experts and consultants.[143] At best, 15% of mandatory LRW courses include transactional drafting, while 18% have some transactional skills component in their first year curriculum.[144] While those numbers show that some schools are incorporating transactional teaching in the first year,[145] law schools need to do more to emphasize these skills and to broaden and strengthen our teaching of lawyering skills to reflect what lawyers actually do in practice.[146] By effectively omitting transactional skills, the current approach may subconsciously push law students toward litigation, and in effect may not properly train law students in the skills that half of them will likely need after graduation.[147]

The alternative would be to maintain the status quo, which is to treat some other body of skills and knowledge as the starting point, with transactional lawyering as a marginalized subject to be added once the foundation in litigation has been laid.[148] The status quo is simply not effective. In order to meet the call to develop more practice ready

141. *See id.* at 120-21 (illustrating that the casebook method is biased toward litigation); *see* Mader & Rosenthal, *supra* note 101, at vii.

> (Question 20): The office memorandum remained the most common written assignment, with 186 responders reporting that they required an office memo. Other common writing assignments included appellate briefs (141), client letters (116, up considerably from prior years), pretrial briefs (105), and e-mail memos (102, up considerably from the 81 reported in 2012, the first year that we offered 'e-mail memo' as an option in response to this question). One hundred fifteen (115) programs also reported using 'other writing assignments.' The most common oral exercises were appellate arguments (140), oral reports to supervising attorneys (87, up considerably from prior years), pretrial motion arguments (84), and in-class presentations (80).

Id.

142. *See* Penland, *supra* note 3, at 120-21, 123, 125.

143. *See* Pantin, *supra* note 53, at 138.

144. *See* Tina Stark, *Transactional Education: What's Next?, Welcome & Opening Remarks*, 12 TRANSACTIONS: TENN J. BUS. L. 3, 5 (2011).

145. *See id.* at 5.

146. *See* Penland, *supra* note 3, at 121-22.

147. *See id.* at 118.

148. *See* Schulze, *supra* note 15, at 100-02.

graduates, law schools should move toward creating and developing transaction oriented materials and problems in an effort to introduce first year law students to transactional skills and to the concepts of what it is that transactional lawyers do.[149]

Transactional skills not only need to be taught in the first year, but can be integrated into the framework that already exists.[150] Diverse materials, teaching exercises, and teaching techniques can be used for transactional teaching.[151] This section examines some of the skills that are commonly taught in the legal writing course and demonstrates how easily transactional teaching can be incorporated with relative ease into the existing course structure.[152]

A. Legal Writing

Almost all law schools require the teaching of legal research within the first year.[153] Legal writing programs at most law schools focus on case analysis and writing skills generally used by litigators.[154] Historically, legal writing has only included the teaching of memo writing and brief writing.[155] Many memorandum and brief assignments are set in a litigation context or raise issues that relate to litigation, such as contemplating the client's problem in an adversarial context.[156]

Typically, memo assignments in LRW classes require analysis in a litigation context as to a client's likelihood of success upon engaging in a lawsuit.[157] One way to integrate transactional skills into legal writing would be to change the focus of the memo or the brief from a litigation oriented subject, to a non-litigation subject.[158] The memorandum need not be about whether or not our client will sue his/her adversary, the subject of the memorandum could be a transactional issue.[159] For example, the dispute

149. *See* Penland, *supra* note 59, at 129.

150. *See* Pantin, *supra* note 53, at 139.

151. *See generally* Todres, *supra* note 18 (exploring various methods of transactional teaching).

152. *See infra* Part V.A-E.

153. *See* AMERICAN BAR ASSOCIATION, REMARKS FROM ALWD FOR THE MARCH 14-15, 2015 ABA COUNCIL MEETING IN SAN DIEGO CA 3 (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/march2014councilmeeting/2014_march_alwd_report.authcheckdam.pdf (last visited Oct. 1, 2014).

154. A survey of popular Legal Writing textbooks reveals the focus on cases analysis and writing skills used by litigators. *See* Penland, *supra* note 3, at 121 (illustrating this point by a review of commonly used Legal Writing textbooks).

155. This is primarily because of the development of the law school curriculum and LRW courses in general. *See, e.g.*, Pantin, *supra* note 53, at 138.

156. *See* Pantin, *supra* note 53, at 142.

157. *See id.*

158. *See id.*

159. *See id.*

could arise out of a contract dispute.[160] The reason for this is that by writing about a dispute arising out of a written agreement students learn that the actual agreement will be a source of law.[161] Students need to learn how to apply the law in practice in a way that differs from the type of rule application students engage in their typical law school classes.[162] The memorandum drafting assignment may be for the students to identify and describe how the contract could have been written differently to avoid the dispute.[163] The purpose would be to expose transactional subjects and thinking to first year students.[164]

Another idea would be to create an assignment that does not include a dispute between the parties. For instance, the students could draft a memo of what "elements" would potentially go into a particular transactional document such as a lease, or will, or sale of a house.[165]

Teaching students how to draft for transactional deals in the first year legal writing course is yet another way to incorporate transactional lawyering.[166] "Drafting is an essential skill in the transactional . . . [practice of law] (and also needed in settlement negotiations and other aspects of litigation practice)."[167] Many law students get little exposure to the world of legal drafting unless they elect to take an upper-level drafting course.[168] If students do not elect to take one of these drafting courses, then it is possible for some students to graduate from law school having never reviewed or drafted an actual contract.[169] The exposure could be something as simple as an in-class writing assignment based on a contract; "underscor[ing] how governing law affects the interpretation and enforcement of a contract in a way that cannot be accomplished by mere discussion of cases and research, or as complex as a contracts drafting assignment."[170]

Integrating transactional writing skills into the teaching of legal writing would maximize student exposure to transactional drafting during the first year.[171] As part of that integration, students would be required to have to complete a transactional writing assignment in addition to memo and brief

160. *See id.*
161. *See* Pantin, *supra* note 53, at 140.
162. *See* Todres, *supra* note 18, at 375-76.
163. *See id.* at 377.
164. *See* Pantin, *supra* note 53, at 139-140.
165. *See*, *e.g.*, Todres, *supra* note 18, at 375-376; *see* Pantin, *supra* note 53, at 141.
166. *See, e.g.*, Pantin, *supra* note 53, at 137-39.
167. *See* Todres, *supra* note 18, at 377.
168. *See* Pantin, *supra* note 53, at 147.
169. *See id.* at 139.
170. Kunz, *supra* note 27, at 344.
171. *See, e.g.*, Pantin, *supra* note 53, at 139.

writing.[172] Law schools should consider the inclusion of transactional documents in the first year curriculum, as they are a form of legal writing.[173] Examples of transactional documents to possibly draft include: a simple letter agreement; corporate resolutions; employment handbooks; or services agreement.

The benefits of teaching transactional drafting in the first year are that students' writing would improve as they learn precision, clarity, grammar, punctuation, usage and style.[174] The lesson of the importance placed on meaning and close reading in a document drafted for a transaction would serve students well and teach them another lesson in clear writing.[175] Emphasizing clear thinking and crisp, concise writing are important to conveying the parameters of the business transaction.[176] If, there is a message to be sent to law students about precision in their writing, "teaching them about transactional drafting sends that message."[177] Teaching precision teaches clarity and clear meaning. This type of writing is different from predictive writing and persuasive writing.[178] Drafting helps students understand how to take an idea and translate the idea into a written document.[179]

B. Writing Client Communications[180]

"A large part of what a transactional lawyer does is communicate with the client."[181] There is a delicate art and skill associated with communicating with a client over a legal matter.[182] Law schools generally teach students professionalism, but students also need to understand professionalism as it relates to drafting professional emails.[183]

The focus of legal writing courses in teaching email communication is how to teach students to write professional emails to a client, emphasizing

172. *See id.* at 138.
173. *See generally* Kunz, *supra* note 27; *see generally* Pantin, *supra* note 53.
174. *See* Schiess, *supra* note 22, at 3.
175. *See* Pantin, *supra* note 53, at 143.
176. *See id.*
177. *Id.*
178. *See* Todres, *supra* note 18, at 375-376.
179. *See id.* at 377.
180. *See* W. David East et al., *Teaching Transactional Skills and Tasks Other Than Contract Drafting*, 12 TRANSACTIONS: TENN. J. BUS. L. 217, 223 (2011) (stating that "[i]t's an old truism of law school that after the first year, a law student can explain a fine point of law to an associate justice of the Supreme Court but he can't explain his uncle's will to his aunt.").
181. Pantin, *supra* note 53, at 143.
182. *Id.*
183. *See*, *e.g.*, Alison Donahue Kehner & Mary Ann Robinson, *Special Issue: Articles on Legal Research and Writing: Mission: Impossible, Mission: Accomplished or Mission: Underway?: A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57, 70-71 (2012).

business etiquette, tone, and format, as evidenced by the email containing a salutation and a closing.[184] These skills are important, however, "students [also] need to learn how to translate documents and communicate the information in a clear, succinct, and effective way."[185] Students need to "know how to pare down the content of their email[s] and avoid speaking in legalese."[186] The author has not found any materials that teach students how to take a legal document and translate it down into an email form, or how to take a provision in a contract and break it down and explain to the client what the provision means in laymen's terms.

Examples of potential assignments where students would review documents and report their summaries to "clients" in an email format could include: a due diligence report, a letter of intent, a term sheet, a will, corporate resolutions, or a basic agreement. The assignment would require that the student review the document and draft an email to the client summarizing and detailing the substance of the document.

Writing client communications is "something that students need to work on in the first year."[187] First year professors need to focus their teaching on the skill of communicating with a client specifically about a transaction, which is arguably a major part of transactional practice.[188] If law schools have a mandate to develop practice-ready attorneys, "we cannot send them out of law school with the email skills that they have."[189]

C. Client Interviewing and Counseling

There are some skills that "transcend subject matter."[190] Both litigation and transactional contexts are effective ways to teach client interviewing and counseling skills.[191] Typically, however, the litigation context often frames client interviewing and counseling.[192] Yet, "client interviewing and counseling are two opportunities for transactional learning [and thinking.]"[193]

---

184. *See* Pantin, *supra* note 53, at 143.
185. *See id.*
186. *See id.*
187. *Id.* at 144.
188. *See id.* at 143.
189. *See* Pantin, *supra* note 53, at 144.
190. *Id.* at 137.
191. *See id.*
192. For example, in *Essential Lawyering Skills Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis*, a commonly used textbook that teaches interviewing and counseling, the authors describe the skill of interviewing in an adversarial context. *See* STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 90, 117 (4th ed. 2011). The skill of interviewing is generally taught as a skill necessary for interviewing witnesses and gathering evidence related to a trial. *Id.*
193. Pantin, *supra* note 53, at 140.

A transactional approach to client interviewing and counseling is client-centered as well.[194] A transactional lawyer needs to understand the needs of the client and the client's business in order to facilitate the deal.[195] Transactional lawyers must focus on the client as the center of the deal much like the way that a litigator must focus on the client's needs.[196]

The role of lawyers in counseling in connection with a transaction is that lawyers analyze, anticipate, and strategize about possible contingencies.[197] Additionally, in a transactional context, the counseling process is quite substantive. For example, a transactional lawyer explains to a client the substantive terms of an agreement or term sheet, and recommends what actions the client should take or what actions are required of them by entering into such an agreement.[198] They will also cover legal risks. Transactional lawyers must "develop the ability to analyze and anticipate what could happen, come up with ideas for how to account for all possible contingencies, and put all of this in writing (ideally in such a way as to enable clients to avoid litigation in the future)."[199] One can expose students to this way of thinking in a first year skills course.

Interviewing and counseling skills that should be considered in a transactional context are: listening to questions from a client's perspective, reviewing and advising about whether to sign a basic agreement, and diagramming a transaction.

One of the "central functions" of legal counsel in a transaction is to "assess and negotiate risk allocation, without the benefit of [a third-party] providing the final answers."[200] In a transaction, an attorney helps a client weigh risks or options.[201] Lawyers may participate in business planning, tax planning, and counseling the client at the formation of the transaction.[202]

There are ways to teach these skills in a transactional context and transcend subject matter, by bringing "transactional learning into the teaching of client interviewing and counseling."[203] For example, students can apply what they learn in a traditional doctrinal Contracts course during their first year if the faculty member structures an interview problem that centers on a contracts based issue. In another example, interviewing skills

194. *See id.* at 145.
195. *See* Todres, *supra* note 18, at 378.
196. *See id.* at 376-78.
197. *See id.* at 376.
198. *See* Roger C. Cramton, *Counseling Organizational Clients "Within the Bounds of the Law"*, 34 HOFSTRA L. REV. 1043, 1043 (2006).
199. Todres, *supra* note 18, at 376.
200. *Id.*
201. *See id.* (stating that one of the central functions of counsel in transactions is to assess and negotiate risk allocation, without the benefit of an arbiter (judge or jury) providing the final answers).
202. *See id.* at 375.
203. Pantin, *supra* note 53, at 137.

can be taught by having students interview clients about the terms of a contract.

Alternatively, with respect to counseling, the students could counsel the client on a contract-based issue, which might include explaining some of the terms of a contract. In connection with the students performing either an interviewing or a counseling problem, the exercise could culminate in students drafting a contracts provision relevant to the issue.

D. Negotiation

Many first year skills courses include negotiation as part of the course.[204] "Many, if not all, lawyers negotiate, and most transactional lawyers negotiate."[205] Negotiation is a "big part of what transactional lawyers do," yet many of the negotiation skills taught at the center of the litigation paradigm.[206] Most often in law school, negotiation is thought of as an adversarial process in that the parties are negotiating in an effort to settle a legal dispute between two parties to a lawsuit.[207]

> However, for transactional lawyers, negotiations often occur in a very different setting. Most transactional lawyers negotiate deals and contract terms in situations where both parties to the negotiations seek the same final outcome—the commencement or continuation of a contractual relationship. While [this author is] not suggesting that these negotiations cannot be confrontational or get 'ugly,' the parties are likely more similarly situated than a plaintiff and a defendant engaged in a civil lawsuit, or two parents dealing with custody of their children. Thus, transactional lawyers play a different role than other types of lawyers when they engage in negotiations.[208]

For transactional lawyers, negotiation actually occurs in a different context than the adversarial one.[209] Negotiation in the transactional context means that the lawyers approach the negotiation with a mutual problem solving perspective.[210] In fact, clients hire transactional lawyers to add

204. *See*, *e.g.*, *id.* at 145.
205. *Id.*
206. *Id.*
207. *See* Andrew F. Amendola, *New Perspectives in Negotiation: A Theraputic Jurisprudence Approach*, HARV. NEGOT. L. REV. (Jan. 27, 2010), http://www.hnlr.org/2010/01/new-perspectives-in-negotiation-a-theraputic-jurisprudence-approach.
208. Susan M. Chesler, *Training For Tomorrow: An Introduction to Negotiations for Future Transactional Lawyers*, BUS. L. TODAY (Apr. 2011), http://www.americanbar.org/publications/blt/2011/04/training_tomorrow.html.
209. *See id.*
210. *See id.*

value to the deal.[211] The conception of the lawyer's role as value-added "rejects the zero-sum game mentality."[212] The parties to the negotiation are seeking the same final outcome.[213] Law students need training to develop the negotiation skills relevant to transactional practice.[214] They need to develop the ability to analyze and anticipate what could happen, "come up with ideas for how to account for all possible contingencies, and put all of this in writing (ideally in such a way as to enable clients to avoid litigation in the future)."[215]

"Teaching students about transactional law in the negotiation context teaches them about professionalism" and teaches them more about what it is that transactional lawyers do.[216] Students gain exposure to and gain substantive knowledge about the subjects the negotiation covers.[217]

Students, who are socialized to think that lawyers are adversarial, generally approach negotiation from a similarly fashioned stance.[218] They generally come to law school thinking that their role as a lawyer will be adversarial and they must perform the role of a gladiator.[219] This author would argue that pop culture develops and shapes the preconceived notions that students bring to law school.[220] A mock negotiation exercise that the author uses in class reinforces the fact that law students are primarily trained to view every legal interaction as adversarial.[221]

Every year that this mock trial exercise is used, many do not actually reach a compromise.[222] The result is often that the two student lawyers cannot agree on the terms of the contract, so they decide to walk away.[223] In most instances, this is because one or both of the students do not want to

---

211. *See, e.g.*, Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L. J. 239, 243-44 (1984).

212. Stephen Bainbridge, *First, Kill All The Transactional Lawyers?*, IDEAS IN ACTION WITH JIM GLASSMAN (Jan. 9, 2007), http://www.ideasinactiontv.com/tcs_daily/2007/01/first-kill-all-the-transactional-lawyers.html.

213. *See* STEPHEN M BAINBRIDGE, THE COMPLETE GUIDE TO SARBANES-OXLEY: UNDERSTANDING HOW SARBANES-OXLEY AFFECTS YOUR BUSINESS 118 (2007) ("For the most part, transactional lawyers add value by increasing the size of the pie by reducing transaction costs[,]" allowing the parties to keep more of their gains "[b]y selecting the most advantageous structure for a given transaction, and ensuring that courts and regulators will respect that choice . . . .").

214. *See* East, et al., *supra* note 180, at 238.

215. Todres, *supra* note 18, at 376.

216. Pantin, *supra* note 53, at 145.

217. *See id.*

218. Melissa L. Nelken, *The Myth of the Gladiator and Law Students' Negotiation Styles*, 7 Cardozo J. Conflict Resol. 1, 3 (2005).

219. *Id.*

220. *See e.g.*, *Scandal: Sweet Baby* (ABC television broadcast April 5, 2012) (where the main character's public relations firm's lawyers are referred to as "gladiators").

221. Pantin, *supra* note 53, at 145.

222. *Id.*

223. *Id.*

give anything away to the other party.[224] They do not to concede because they (1) want to appear competent in front of their peers, (2) have preconceptions of what their role as lawyer is, or (3) it is simply their personality to want to win and compromising is not an option.[225] However, the result is that neither party gets a deal—the contract that their clients both desired.[226] In the three years that the author has taught this exercise, it often has led to great teaching moments in which this author is presented with an opportunity to discuss the role of a transactional lawyer in a negotiation setting.[227] In other words, the author instructs students that they should not initially be adversarial.[228] It is also an opportunity to bring in a discussion of ethics and professional conduct.[229] Since, while the model rules require zealous representation of a lawyer's client,[230] there is some tension because in a transaction, both parties' goals are usually to enter into a "mutually beneficial contractual relationship."[231] "[T]ransactional lawyers do not generally view the goal of contract negotiations as being to win everything while the other party loses everything situation."[232] This is the opposite of negotiations in a litigation context, which is often described as a "zero-sum" game.[233]

Students need to understand the fundamental concept of interest-based negotiation as opposed to adversarial negotiation.[234] If a first year LRW course teaches negotiations, there is a need to create a balance in teaching negotiation.[235] The negotiation does not necessarily need to be adversarial; rather it should be interest-based.[236] An example of a non-adversarial sample negotiation exercises that could work in an LRW course might be: to have students negotiate a term sheet provided to them, based on seller and buyer facts. The emphasis of any such negotiation would be that the parties' primary goal would be to reach an agreement and get a deal done.

---

224. *Id.*
225. *Id.*
226. Pantin, *supra* note 53, at 145.
227. *Id.*
228. *Id.*
229. *Id.*
230. *See* MODEL RULES OF PROF'L CONDUCT Preamble and Scope 1 (2011).
231. Chesler, *supra* note 208.
232. *Id.*
233. *See* G. Nichols Herman et. al., LEGAL COUNSELING AND NEGOTIATION: A PRACTICAL APPROACH 152 (2001).
234. *See* Jim Hilbert, *Collaborative Lawyering: A Process for Interest-Based Negotiation*, 38 HOFSTRA L. REV. 1083, 1087-88 (2010).
235. *See id.*
236. *See id.*

E. Ethics and Professionalism

First year law students need to gain a basic understanding of professionalism and the ethical obligations of lawyers.[237] LRW courses often address some of these issues.[238] Students need to learn ethics and professionalism as they relate both to litigation and to a transactional setting.[239] The Model Rules of Professional Conduct is the primary focus of most teaching about ethics.[240] However, most of the Rules of Professional Conduct are drafted in the context of litigation and other contested matters, and not in the context of transactional matters and negotiations.[241] Further, case law and ethical opinions generally focus on ethical issues that arise out of litigation, so that an issue may come up causing confusion to law students: the ethical considerations relevant to transactional practice may not be immediately transparent to them, even though they have been trained in legal ethics.[242] Essentially, the law school curriculum is not likely to address the topic of ethics in a transactional context.[243]

In training students for transactional practice, students need to understand how to recognize potential ethical dilemmas and how to handle them in a manner that is beneficial to their clients and to their own professional reputations.[244] As the pedagogy for teaching transactional law develops, so should the teaching of ethics relative to transactional practice.[245]

There are several topics that might be practical to address in a first year skills course: conflicts of interest, the role of the lawyer in a negotiation, and the role of the professional in providing advice.

VI. CHALLENGES

The integration by law schools of transactional teaching into the first year traditional skills curriculum is a mandate, which would improve a law school's ability to produce practice-ready attorneys upon graduation.[246] The

237. Melissa H. Weresh, *Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 21 TOURO L. REV. 427, 427 (2005).

238. *See id.* at 440.

239. *See id.* at 432-33.

240. *See id.* at 434-35.

241. *See* MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf; *see also* Carol Morgan et al., *Ethical Issues in Business and the Lawyer's Role*, 12 TRANSACTIONS: TENN J. BUS. L. 37, 39 (2011).

242. Penland, *supra* note 3, at 126-27.

243. *See id.*

244. *See* Weresh *supra* note 237, at 432-433.

245. *See id.* at 435.

246. *See* Schulze, *supra* note 15, at 63.

changes put forward in this article do not necessarily require significant deviation from the traditional approaches to teaching first year skills courses.[247]

Yet, there are several challenges and barriers to implementing transactional skills in the first year; one of the main issues being the balancing of all required skills.[248] There is also the challenge of timing and priorities.[249] In light of the amount of materials that professors need to cover during the first year courses they may believe that incorporating transactional skills is not possible and that if they do add transactional skills in, it will be at the expense of other areas they wish to address.[250] Convincing former litigators and other colleagues that they can and should implement transactional skills training into the first year skills course is an additional barrier because of the idea that one may be required to choose one skill over the other.[251] The argument is that there is not enough time to add anything else to the first year curriculum without sacrificing other more valuable things.[252] However, sacrifices do not need to be made in order to teach transactional skills in the first year,[253] although some tradeoffs may need to be made.[254] For example, perhaps rather than teaching a trial brief exercise and an appellate brief exercise, the curriculum may only have time for the teaching of one. Students can and will learn persuasive writing through the learning of writing one trial brief or motion. Although they may not learn appellate brief writing as part of the first year, there are still other opportunities to do so through a school's moot court or upper-level appellate writing course.[255] Moreover, although it may be a sacrifice, it is certainly worth the sacrifice since a school will gain the benefit of starting to train its students to think like transactional lawyers.[256]

---

247. *See generally id.*

248. *Id.* at 91.

249. *Id.* at 91-92.

250. *Id.*

251. The model at Temple University Law School is noteworthy. Temple requires a mandatory two-week intensive course introducing first years to transactional skills. The course is a transactional law workshop in which students role-play as both lawyers and clients in the formation of a high-tech business. With limited information, students are responsible for planning, investigating, negotiating and drafting the deal. The course is completed outside of and in addition to their legal writing course. *See Experiential Courses*, TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW, http://www.law.temple.edu/pages/Academics/Experiential_Learning_Programs/Courses.aspx (last visited Oct. 1, 2014).

252. Schulze, *supra* note 15, at 91-92.

253. *Id.*

254. *Id.* at 95-100.

255. Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief*, MAYER BROWN, *available at* http://www.appellate.net/articles/gdaplbrf799.asp

256. Schulze, *supra* note 15, at 62.

One of the challenges is the potential human resource issue.[257] A majority of law school faculty, including those that teach first year skills did little or no transactional work when they practiced and they likely did not learn transactional skills while in law school.[258] "There is a limited supply of law professors with the experience and inclination to teach transaction . . . .[O]f those who do have relevant practice experience, many may prefer to focus on advanced or specialize in doctrinal courses rather than on laying the foundation for general corporate practice."[259] However, law schools are full of talented faculty that can certainly learn and receive training in order to teach transactional lawyering.[260] In other words, professors do not need to be formally trained or be a particular type of person to teach transactional law.[261] For example, the author teaches appellate brief writing, despite the fact that she has never written an actual appellate brief. However, another challenge would be persuading faculty to teach something different from what they already teach.[262] Faculty need to be persuaded that, if the Academy wanted students to be good well-rounded lawyers, then they need to teach students something different.[263]

The biggest challenge is teaching the discipline of transactional lawyering itself.[264] Part of transactional work is private, done behind closed doors or transmitted over a computer.[265] Another part is developing instincts, or "deal sense."[266] One cannot teach deal sense.[267] While litigation is visible and audible, transactional practice is generally unseen.[268] Professors certainly can show students what litigators do, but it is not so easy to show students what transactional lawyers do.[269] There is no large body of transactional pedagogy, although that fact is slowly changing.[270] Materials are developing, but it is still challenging to find material and textbooks from which to teach lawyering skills like counseling,

257. *Id.* at 92-93.
258. *Id.* at 93.
259. Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, COLUM. BUS. L. REV. 475 (2002); *see also* Gouvin, *supra* note 21, at 434 (writing that as a member of his institution's faculty appointments committee, he was "struck by the paucity of transactional lawyers who enter in the main channel for faculty recruitment").
260. Schulze, *supra* note 15, at 93.
261. *Id.*
262. *Id.*
263. *Id.*
264. *See* WORONOFF, *supra* note 2, at 10.
265. *See* Kunz, *supra* note 27, at 338.
266. Stark, *supra* note 108, at 7.
267. *See id.*
268. *See* Kunz, *supra* note 27, at 337-38.
269. *See id.*
270. *See* Statchen, *supra* note 20, at 239.

interviewing, negotiation, and legal drafting in a way that is appropriate to the transactional context.[271]

Another challenge is that transactional drafting requires a significant amount of substantive knowledge.[272] Because it covers such a wide array of doctrine, transactional drafting may be too difficult to understand from a substantive perspective.[273] Arguably, the first year skills course may not be the most appropriate place to teach the doctrine. Yet, there is no need for faculty or students to have substantive knowledge in order to facilitate the traditional litigation assignments taught in LRW courses. Where there is a need, faculty find a way to incorporate the doctrine required for the teaching of the skill.[274]

The change to, and possible expansion of, the first year skills course to include instruction on transactional skills is not without challenges.[275] The suggestions in this article, however, are intended to allow for the smooth integration of transactional skills in the first year.[276] Incorporating the teaching of transactional lawyering is worth the effort, as it functions to truly prepare students for "real" practice and to counter the litigation bias that is pervasive in law school.[277]

VII. CONCLUSION

If law schools are to develop practice-ready attorneys, then law schools must begin to train law students for transactional practice.[278] If students are not educated in the ways of thinking like a transactional lawyer, law schools are doing a severe disservice to over half of their students by ill-equipping these students for the actual practice that they will engage in upon graduation.[279] And what are we teaching our students about the importance of transactional law if we do not address the practice in the first year? We do not want to run the risk both of marginalizing our transactional-oriented students and of creating a litigation-bias among lawyers that "litigators are real lawyers" and transactional lawyers just "do deals."[280] The best place to begin transactional training is the first year skills course where law students

271. *See id.*
272. *See* Schulze, *supra* note 15, at 91.
273. *See* Fleischer, *supra* note 259, at 484.
274. *See* Schulze, *supra* note 15, at 93.
275. *See id.* at 91.
276. *See supra* Part V.
277. *See* Todres, *supra* note 18, at 375.
278. *See* WORONOFF, *supra* note 2, at 1.
279. *See* Gouvin, *supra* note 22, at 452 (arguing that law schools sending ill-prepared graduates to practice will cause the academy's public perception to suffer, stating: "We will all suffer a loss of professional stature.").
280. *See* Nelken, *supra* note 218, at 1.

first learn how to think like a lawyer.[281] Thinking like a lawyer should also include transactional lawyers as well as litigators.[282]

Teaching transactional lawyering in the first year will lead to developing well-rounded, second-year students who can build on what they have learned; these students can then utilize that knowledge in upper-level doctrinal courses.[283] Teaching transactional skills will improve student ability to conquer substantive concepts of law.[284] As a result, students will better understand the law as it relates to a specific transactional document.[285] Such teaching as part of the first year curriculum helps students become truly practice-ready.[286]

The teaching of a transactional skill set enriches students' legal education.[287] "Law schools are giving more and more attention to the question of how to prepare students to become [more practice ready and in turn, how to prepare students to be] transactional lawyers."[288] The interjection of these elements of transactional skills enriches their experience and their understanding of who they are as student lawyers.[289] Further, by incorporating transactional skills into the first year, law schools will no longer give primacy to future litigators.[290] Rather law schools can and should begin to give future transactional lawyers equal treatment in their training.[291]

There is currently a tremendous amount of uncertainty around the future of legal education.[292] A scan of daily news headlines,[293] recruitment numbers of law schools,[294] and titles of academic conferences[295] suggests that real change and real reform must occur. No matter how such reform takes shape, law schools will still be in the business of educating

281. *See* Fleischer, *supra* note 259, at 477.
282. *See* Gouvin, *supra* note 22, at 432-33.
283. *See* WORONOFF, *supra* note 2, at 17.
284. *See* Wayne Schiess, *Teaching Transactional Skills in First-Year Writing Courses*, 2009 TRANSACTIONS: TENN. J. BUS. L. 53, 56 (2009).
285. *See* Statchen, *supra* note 22, at 237-38.
286. *See* Gouvin, *supra* note 22, at 430.
287. *See* Snyder, *supra* note 3, at 691.
288. *See* Okamoto, *supra* note 12, at 71.
289. *See* Snyder, *supra* note 3, at 691.
290. Gouvin, *supra* note 22, at 432-33.
291. *See* Schulze, *supra* note 15, at 76.
292. *See infra* text accompanying notes 293-95.
293. *See* Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs are Cut*, N.Y. Times (Jan. 30, 2013), http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html; *see also* Bronner, *supra* note 1.
294. *ABA Section of Legal Education Reports 2013 Law School Enrollment Data*, AMERICAN BAR ASSOCIATION (2013), http://www.americanbar.org/news/abanews/aba-news-archives/2013/12/aba_section_of_legal.html.
295. *See* 28th Annual Midwest Clinical Conference titled, "Harnessing the Storm: Creative Responses to the 'New Normal' in Legal Education."

tomorrow's lawyers.[296] Such education should comport with realities of real practice.[297] The MacCrate Report[298] and the Carnegie Report,[299] demand from the practicing bar, in addition to the new wave of law school curricular reforms and student desire to learn transactional lawyering, mandate that law schools implement the teaching of more transactional skills teaching into the curricula.[300] The best place for such implementation is within the first year skills curriculum.[301] This paper hopes to further the pedagogy of training practice-ready lawyers in an attempt to equalize the teaching of litigation and transactional skills in the first year and advocate for curricular and teaching choices to reflect the needs of future lawyers and the work that they will actually do in practice.[302]

296. Schulze, *supra* note 15, at 100 ("[W]e should recognize that we fail in our role as educators of future lawyers by teaching only a portion of that group. What opinion would we have, for instance, of medical schools that taught only podiatry?").

297. *See* Penland, *supra* note 3, at 120-23.

298. *See generally* NARROWING THE GAP, *supra* note 1.

299. *See generally* SULLIVAN, *supra* note 1.

300. *See* Circo, *supra* note 1, at 199.

301. *See supra* Part V.

302. *See* Penland, *supra* note 3, at 120-22.