Practice in the Academy: Creating "Practice Aware" Law Graduates

Jay Gary Finkelstein

"[Come], enter into my imagination . . . ."[1]

Consider an imagined conversation between Christopher Columbus Langdell (1826-1906), the father of the case study method and the traditional law school curriculum, and Joseph Flom (1923 - 2011), name partner at Skadden, Arps, Slate, Meagher & Flom LLP and the father of modern transactional legal practice. Obviously, their lives did not overlap, but had they met, they may have conversed as follows:

> F: Chris, when you conceived of the case study method as a radical new approach to teach law, were you aware of the needs of the profession?
>
> L: Not really. The objective was to transform legal education. It was time to eliminate the "technical study" of what the law is and to replace it with a dialectical process of inference to introduce students to law by studying the legal opinions of judges. The classroom would focus on Socratic analysis, with professors asking students to address opaque questions and challenging them in class. As a result, students would learn "law" as a lofty legal and academic thought process.

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1. Dale Wasserman et al., Man of La Mancha: A Musical Play 11 (1966).

F: But what about getting business done—not everyone will become a judge or a professor?

L: Practice of law and issues of law and business are too mundane! They are not worthy of intellectual study.

F: But that is how the world works—remember those people like Widener, Harkness, etc., who funded the Harvard endowment—where do you think they got those funds?

L: Inherited?

F: Hopeless!

L: But business does not involve lofty thought, it is just, just, just making money!

F: But who protects the parties to business deals? It's lawyers. How are they to learn what their clients need if not in law school? How do they learn how to understand and manage the legal aspects of business transactions and the ethics of legal practice?

L: They will be hired by those who serve business clients and learn from them after they leave the ivory tower of legal thought.

F: And who will pay for this training?

L: That is not our concern. We must assure that students learn the intricacies of legal thinking, the esoterica of legal reasoning, and the eloquence of legal opinions. We must condition them to appreciate nuance and subtlety.

F: But most of your graduates will actually practice law. How does your approach prepare them for that?

L: I am not concerned with that! With a mind that appreciates "the law" they will acquire the skills to "use the law" later.

F: In your pursuit of lofty legal thought, will you show them actual contracts?

L: What? Actual contracts? We don't need any contracts—we will talk about contractual issues and the underpinnings of the rationale of contracts—such as peppercorns, mailboxes, dueling forms, meeting of the minds, mutual mistake, etc. Mere drafting is . . . so "technical."

F: But businesses need contracts that accomplish objectives, and lawyers need to know how to translate business terms into contractual language that memorializes the agreement of the parties and serves as a roadmap for future operations and collaboration, allocating risk and responsibility. Where do your students learn that?

L: From you!

F: Maybe it's time we again "transform legal education" and re-examine both the students' and the profession's needs.

* * *

This imagined conversation frames the current challenge of legal education: the tension between the traditional study of law and the needs of law graduates and the profession to engage in practice and have "practice aware"[2] legal graduates. Consider, however, what legal education might have been had Langdell and Flom been able to work together on the curriculum!

There has been enough written to document the crisis confronting legal education, and the literature is extensive on the need for changing the historical legal curriculum to embody more practical skills, transactional law, and international law.[3] This article will not repeat the analysis of the current issues and challenges but will focus instead on two practical solutions:

First, involve more practitioners working with full-time faculty to develop curriculum offerings that focus on the practical skills components of traditional doctrinal classes.[4] We will call this "Vertical Collaboration."

Second, expand the use of pedagogy that replicates the practice of law and enhances the learning experience through collaborative exercises. Practice emphasizes teamwork, collaboration, and creative problem solving; accordingly, pedagogy should (i) involve students working in teams (learning from each other) to address practical problems, (ii) utilize divided class formats with interaction intended to replicate the process of working with opposing counsel, and (iii) create classes offered between law schools where students participate in simulations on opposing sides of a problem, and as in actual practice, interact and work with others that they do not know to address legal issues. We will define this interactive pedagogy as "Horizontal Collaboration."

Both Vertical Collaboration and Horizontal Collaboration provide immense potential to enhance doctrinal teaching, to provide experience with practical skills, and to make simulations and other experiential pedagogy more "real."

2. I prefer the term "*practice aware*" to "*practice ready*", which overstates the objective and purpose of law school. See discussion *infra*.

3. *See* Neil J. Dilloff, *Law School Training: Bridging the Gap between Legal Education and the Practice of Law*, 24 Stan. L. & Pol'y Rev. 425, 426 & nn.1-6 (2013).

4. *See* Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 Berkeley Bus. L.J. 187 (2012).

As a result, they will enhance the law school experience of students and afford them opportunities to become "practice aware."[5]

There is substantial literature on the science of learning, some of which dates back over a hundred years.[6] The manner in which students learn to be lawyers (or learn any profession) was most succinctly summarized by Professor Donald A. Schon in a speech to the 1992 American Association of Law Schools. In essence, as Professor Schon stated, students (i) learn by doing, (ii) in the presence of a senior practitioner, (iii) with others trying to learn, (iv) in a virtual world.[7] In other words, collaborative and experiential learning is the key to learning professional skills. In fact, every other professional school uses this methodology.[8] Why does experiential learning work? Again, in the most

5. The focus in this article is on classroom instruction rather than law school clinics, which already incorporate aspects of both Vertical and Horizontal Collaboration. See discussion *infra*. The discussion herein also describes pedagogy which can meet the new ABA standards for approval of law schools. *See* Cara Cunningham Warren, *Achieving the American Bar Association's Pedagogy Mandate: Empowerment in the Midst of a "Perfect Storm,"* 14 Conn. Pub. Int. L.J. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477475. "Of all reform measures, the pedagogy mandate is the one most directly linked to preparing graduates to succeed in the evolving legal employment market that is at the root of the crisis." *Id.* at 2. "Under this new approach, 'the role of the professor is not to deliver information but to design effective learning experiences so the students achieve the course outcomes and to monitor student learning in order to continuously improve the experiences.'" *Id.* at 3 (quoting Janet W. Fisher, *Putting Students at the Center of Legal Education: How An Emphasis on Outcome Measures in the ABA Standards for Approved Law Schools Might Transform the Educational Experience of Law Students*, 35 S. Ill. U. L.J. 225, 237 (2010)). "As a threshold matter, Revised Standard 301(a) confirms a new goal for legal education: To prepare students, upon graduation, for admission to the Bar and for the practice of law. This obligation may appear to be self-evident; however, '[i]n the history of legal education in the United States, there is no record of any concerted effort to consider what new lawyers should know or be able to do on their first day of practice or to design a program of instruction to achieve those goals.' Instead, it had been the role of law schools to teach students to think like lawyers and to leave practical training to the employers. Revised Standard 301(a) adds the words 'upon graduation' to make the shift clear." Warren, *supra* at 7 (quoting Roy Stuckey et al., Best Practices for Legal Education: A Vision and A Road Map 3 (2007)). "Revised Standard 303 outlines the curricular changes that must occur in order to bring these 'practice ready' Standards to fruition." Warren, *supra* at 8. "Achieving rather than just complying with the mandate involves overcoming historical and cultural barriers to pedagogical innovation." Warren, *supra* at 12.

6. Lev Vygotsky, a prominent Russian psychologist in the 1920s-1930s, introduced the "zone of proximal development," which has influenced later U.S. education writers. *See* Saul McLeod, *Zone of Proximal Development,* Simply Psychol. (2012), http://www.simplypsychology.org/Zone-of-Proximal-Development.html. I thank Professor Richard. L. Roe at Georgetown Law School for introducing me to the Vygotsky's.

7. Donald A. Schon, *Educating the Reflective Legal Practitioner*, *in* 2 Clinical L. Rev. 231 (1995) (speech at the Mini-Workshop on Theory and Practice: Finding Bridges for the Classroom, 1992 AALS Annual Meeting).

8. Medical school, architecture school, business school, and engineering school all utilize substantial experiential/and clinical components.

basic analysis: It is more engaging, it deepens thinking, it improves retention, and it facilitates application to new contexts.[9]

It is common knowledge that most full-time law school faculty (excluding clinical and legal writing faculty) have had little or no practical experience.[10] This statement is not intended as a criticism, but simply cited as a fact. Where law faculty have had practical experience, most of that experience likely involved judicial clerkships, litigation or other advocacy positions.[11] Few full-time law professors have had transactional experience,[12] yet over half of practicing lawyers practice transactional law,[13] many of whom almost never see the inside of a courtroom.[14] While there are a growing number of doctrinal

9. *See* Scott Fruehwald, *Reform Will Bring More Rigor to Legal Education*, Legal Skills Prof Blog (Aug. 11, 2013), http://lawprofessors.typepad.com/legal_skills/2013/08/reform-will-bring-more-rigor-to-legal-education.html (noting the influence of the work of Benjamin Bloom and its impact on educators and curriculum designers, as discussed in Paul S. Ferber, *Bloom's Taxonomy: Teachers' Framework*, L. Tchr, Spring 1997, at 4, *available at* http://lawteaching.org/lawteacher/1997spring/bloomstaxonomy.php and Carol Tyler Fox, *Introducing Law Students to Bloom's Taxonomy*, L. Tchr., Spring 2012, at 21, *available at* http://lawteaching.org/lawteacher/2012spring/lawteacher2012spring.pdf.).

10. Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. Rev. 105 (2010).

11. There are exceptions, such as at the University of Montana Law School. *See Montana Expands Experiential Curriculum*, preLaw (July 15 2014), http://www.nationaljurist.com/content/montana-expands-experiential-curriculum ("While traditional law schools have relied heavily on faculty who have had no practice experience or expertise, UMLS requires that, in addition to academic and scholarly achievement, faculty candidates have substantial practice experience in the area in which they will teach"). As transactional law has become more focused in the law school curriculum, many faculty members who teach transactional law subjects are also exceptions, having come to the academy after practicing for some period of time.

12. There are a growing number of faculty who are focusing on transactional law, and a growing number of law schools offering programs in transactional law, although the numbers are still small compared with the traditional law school programs and faculty focused on advocacy aspects of law.

13. Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. Ass'n Legal Writing Directors 118, 118-32 (2008) ("At least half, if not more, of all lawyers engage in transactional practice"). *See also* Sheila F. Miller, *Are We Teaching What They Will Use? Surveying Alumni to Assess Whether Skills Teaching Aligns with Alumni Practice*, 32 Miss. C.L. Rev. 419, 426 (2014) (survey results show 48% of the alumni surveyed practice transactional law, either exclusively or in combination with litigation).

14. I had a traditional Langdellian legal education. Virtually none of the classes that I took in law school (with the possible exception of portions of antitrust, UCC, business tax, and corporations) had any relevance to the corporate transactional practice that I have pursued for over 35 years. I was not introduced to any customary business agreements in law school. Since the end of my federal district court clerkship immediately following graduation from law school, I have probably been inside a courtroom fewer than ten times (including swearing-in ceremonies and jury duty). I tell my students that I do not know where the courts are located (which is true) and that if I ever need to find out, something must have gone terribly wrong! I was initially attracted to teaching transactional law because of my

professors who are working to restructure their teaching methodologies to add practical skills and experiential components,[15] others are either resistant or denying any need for change.[16]

The economics of both practice and law school have changed. Clients are no longer willing to pay to train young lawyers,[17] and, in fact, the projects that were typically used to train lawyers, such as large litigation discovery projects, corporate document reviews, and certain "commodity work" are no longer done in the traditional manner but are either outsourced to computer review, performed by lower-cost "alternative legal service" providers, or performed in-house.[18] Hiring statistics confirm the dramatically lower numbers of

experience (i) in law school and transitioning to a transactional law practice, and (ii) in interviewing law graduates and realizing that, generally, they had no idea what a corporate transactional lawyer does. My goal was to provide students with an understanding of transactional legal practice and the skills utilized by transactional lawyers so that they could make informed decisions about the type of practice they may want to pursue.

15. *See Course Portfolios*, Educating Tomorrow's Law., http://educatingtomorrowslawyers.du.edu/course-portfolios (last visited Feb. 24, 2014).

16. *See* Robert J. Condlin, *Practice Ready Graduates: A Millennialist Fantasy*, U. Md. Francis King Carey Sch. L. (Nov. 18, 2014), http://ssrn.com/abstract=2316093. *See also* Harry W. Arthurs, *The Future of Legal Education: Three Visions and a Prediction* (Osgoode Hall Law Sch. of York Univ., Research Report No. 49/2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2349633 ("Producing practice ready lawyers is something that law schools simply cannot do. . . . We lack information about what legal practitioners do, what . . . competencies they actually need. . . ."). For a more balanced assessment, *see* David Barnhizer, *'Practice Ready' Law Graduates,* The Selected Works of David Barnhizer 26 (Jan. 2013), http://works.bepress.com/david_barnhizer/83 ("Calls for a legal education that produces 'practice ready' lawyers is delusional from the perspectives of possibility, available resources and the best use of the resource of university law schools. But asking that legal education be significantly improved and that new graduates possess the conceptual structures and professional approaches that enhance the probability that they will be excellent professionals . . . is something that certainly ought to be a central element of the debate over the appropriate (and best) role to be served by formal legal education.").

17. David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. Times, Nov. 20, 2011, at A1 ("Last year [2010], a survey by American Lawyer found that 47 percent of law firms had a client say, in effect, 'We don't want to see the names of first- or second-year associates on our bills.'"). A different, and constructive, approach is offered by Microsoft. *See* Karen Sloan, *Microsoft GC Complains of Legal Training Shortfall,* Nat'l L. J. (Apr. 9, 2014), http://www.nationallawjournal.com/id=1202650393152/Microsoft-GC-Complains-of-Legal-Training-Shortfall?slreturn=20141117111706 ("Smith has tackled the training deficit with a number of initiatives. His Microsoft Advocacy Clinic, for example, gathers 15 promising young litigators from the company's outside law firms to work together on projects. The clinic takes place every other year. In a separate pilot initiative, the company has set aside $50,000 in legal fees to be matched by outside law firms. The firms identify promising first-, second- and third-year associates who would benefit from exposure to a wide array of legal matters they typically wouldn't be a part of, such as depositions.").

18. More powerful computer applications capable of legal reasoning are being developed. *See* Susan Beck, *Emerging Technology Shapes Future of Law*, Am. Law. (Aug. 4, 2014), http://www.americanlawyer.com/id=1202664266769/Emerging-Technology-Shapes-Future-of-Law?slreturn=20141117111825 (describing a new computer application named the "Watson

new lawyers hired by large law firms.[19] More new lawyers are opening their own practices upon graduation; incubators at law schools are multiplying.[20] Numbers of new applicants to law schools are down and students are demanding more practical skills training. Trends indicate that law school education must conform to the "new reality." Law schools are being challenged to bridge the "skills gap" between traditional doctrinal education and practical skills.[21]

Debater" being developed by IBM, "[Robert] Weber, [senior vice president and general counsel of IBM and] a former litigation partner at Jones Day, says Watson won't replace the judgment of a senior law firm partner, but it could eventually handle tasks of senior associates. He sees it researching and writing a memo summarizing the law and suggesting the most persuasive arguments and precedents.").

19. Based on a recent survey, the number of first-year lawyers hired declined from 4,173 in 2009 to 3,264 in 2014, based on 83 firms surveyed (a decline of 22%). Anna Winter et al., Chambers Associate: The Student's Guide to Law Firms 16-21 (Antony Cooke ed., 2014). *See also* Jennifer Smith, *Big Law Firms Resume Hiring: Odds Improve for New Graduates, Though Levels Remain Soft*, Wall St. J., (June 24, 2013), http://www.wsj.com/articles/big-law-firms-resume-hiring-1403477513?tesla=y&mg=reno64-wsj ("The chances of landing a job at a large law firm have improved from the hiring nadir a few years back, when sputtering demand for legal services triggered layoffs and cutbacks. Of class of 2013 law graduates working in private practice about nine months after graduation, 20.6% landed a job at a firm with more than 500 lawyers, according to the National Association for Law Placement. Such positions accounted for 16.2% of law-firm jobs held by 2011 graduates.") Still, the prospects are clouded by the changing market for legal services. *See also Hiring/Staffing Trends in the Legal Market*, L. Prac. Today (Sept. 2013), http://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/september13/hiring-staffing-trends-in-the-legal-market.html (quoting a director of business development at Providus Group: "Reports indicate that legal hiring is beginning to trend up, and yet we continue to see a focus to save and conserve resources via outsourcing, conservative hiring and asking existing attorneys and paralegals to handle more responsibilities to make up for the deficit." Quoting a boutique law firm partner: "At least in the field of litigation, the legal services market does not appear to be recovering at any appreciable rate. . . . Clients have become very conscious about how their money is spent and many have rejected the old model of paying high hourly rates and having a team that is comprised primarily of junior lawyers with little experience.").

20. The ABA maintains a list of law school incubator programs. *Incubator/Residency Program Profiles*, A.B.A., http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/program_profiles.html (last visited Dec. 10, 2014).

21. The "crisis" in legal education was heralded by some now (in)famous newspaper headlines: Ashby Jones & Joseph Palazzolo, *What's a First-Year Lawyer Worth? Not Much, Say a Growing Number of Corporate Clients Who Refuse to Pay*, Wall St. J., (Oct. 17, 2011), http://www.wsj.com/articles/SB10001424052970204774604576631360989675324; David Segal, *What They Don't Teach Law Students: Lawyering,* N.Y. Times, Nov. 20, 2011, at A1 ("Law Schools have long emphasized the theoretical over the useful"). The concern is mirrored in legal education blog posts. *See, e.g.* Scott Fruehwald, *The Biggest Problem in Legal Education: The Mismatch Between How Law Schools Teach Their Students and What Lawyers Do in Practice*, Legal Skills Prof Blog (May 5, 2013), http://lawprofessors.typepad.com/legal_skills/2013/05/the-biggest-problem-in-legal-education-the-mismatch-between-how-law-schools-teach-their-students-and.html; and James B. Levy, *Poll finds 97% of Recent Grads Say Third Year of Law School Should Be Devoted to Practical Skills Training*, Legal Skills Prof Blog (Sept. 13, 2013), http://lawprofessors.typepad.com/legal_skills/2013/09/poll-finds-97-of-recent-grads-say-third-year-of-law-school-should-be-devoted-to-practical-skills-tra.html. Even Chief Justice Roberts has

Law firms are adapting to the new economics of practice. Historically, new lawyers in the first few years of practice learned legal skills by participating on project legal teams, observing and assisting more senior lawyers. Starting with the simpler tasks (e.g., ancillary transactional documents, memos, or motions) they progressed to more sophisticated work (e.g., core documents, depositions, and briefs). As clients have objected to paying for training time of young lawyers, the older model has been eclipsed.[22] Now, aside from reducing the number of young lawyers hired, firms have been creative in their different approaches to introducing new training programs for their junior ranks that accelerate training, bridge the skills gap, and meet client needs. Drinker Biddle adopted a four-month boot camp for new lawyers, introducing them to corporate practice.[23] DLA Piper requires first-year associates to complete 250 hours of pro bono work in their initial year, focusing on building their legal skills.[24] Milbank created Milbank@Harvard, a multiyear training program

commented, "What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law." Bryan A. Garner, *Interviews with United States Supreme Court Justices*, 13 Scribes J. Legal Writing 1, 37 (2010). The theme was echoed in the Task Force on the Future of Legal Education, *Working Paper* 13 (Aug. 1, 2013) (American Bar Association) ("[A]s important as jobs and career success are to graduates and . . . to the success of the law school, little space in the curriculum is typically devoted specifically to preparing students to pursue and compete for jobs."). The ABA has now adopted a new standard that all law students must have at least six hours of experiential learning as part of their legal education. ABA Standards & Rules of Procedure for Approval of Law Sch. § 303(a)(3) (2014). *See supra* note 5 and accompanying text. California is going further, mandating 15 hours of experiential learning as a prerequisite for admission to the California bar. New York, Illinois and other jurisdictions are considering similar requirements. Together, California and New York, alone, represent over 25 percent of all lawyers admitted to the bar. Accordingly, law schools will need to offer classes that enable law students to meet these new admission standards, which in effect has the practicing bar mandating the changes in the legal curriculum necessary to create "practice aware" graduating lawyers. The impact is already discernible. *See Editorial: A New Direction In Legal Education*, Conn. L. Tr. (Apr. 30, 2014), http://www.ctlawtribune.com/home/id=1202653364807/Editorial+A+New+Direction+In+Legal+Education%3Fmcode=1381212787532&curindex=0 ("Changes in the legal marketplace are causing legal educators to rethink the nature, purpose and substance of legal education. As reported in these pages, Timothy Fisher and Jennifer Gerarda Brown, the recently appointed deans of the University of Connecticut School of Law and Quinnipiac School of Law, are enthusiastically and energetically embracing the opportunity to review old assumptions about what it means to be an attorney and the role legal educators play in preparing their students for the challenges they will face as counselors and advocates in a rapidly changing legal environment."). *See also* Karen Sloan, *Legal Education Due for a Makeover: ABA's House of Delegates Prepares to Vote on a Sweeping Revision of its Accreditation Standards*, Nat'l L.J., Aug. 4, 2014, at 1 (quoting Loyola University Chicago School of Law Dean David Yellen, "If there was a theme to what the comprehensive [ABA] review accomplished, it moved legal education into a 21st century model . . . requiring more practical skills training.").

22. *See supra* note 17.

23. Segal, *supra* note 17.

24. The DLA Piper pro bono program includes both traditional litigation matters as well as transactional pro bono that focuses on representation of domestic and international 501(c)(3) entities with respect to their corporate and contracting matters. *See Our Work,* DLA Piper, http://www.dlapiperprobono.com/what-we-do/work/index.html (last visited Jan. 23, 2015).

designed to "develop the multifaceted expertise and skills that sophisticated General Counsels should expect their valued legal advisors to possess."[25] Proskauer Rose and Andrews Kurth have adopted similar programs to train their new associates in business skills, such as finance and accounting, to better understand their clients.[26]

Law firms have also started to collaborate with law schools to provide training as part of the law school curriculum, often in the form of mini-courses. Good examples are Drinker Biddle at University of Pennsylvania[27] and Cravath at Georgetown.[28]

What law firms need, and what graduate lawyers need, is a cognizance of how a doctrinal legal education, the type of lofty knowledge of law championed by Langdell, relates to the everyday needs of clients and what a practicing lawyer needs to know to function as a legal adviser. The term "practice ready" is a misnomer and a false standard to set. No one expects a graduating lawyer to be fully able to practice. Those who articulate such a standard are often just setting up the straw man they need to defeat the objective by proving it unobtainable.[29]

The graduate lawyer should have the true objective of being "practice aware," a term that is intended to emphasize that what the graduate needs is (i) to be

25. Press Release, Milbank, Announcing Milbank @ Harvard–A Groundbreaking Professional Development Program (Feb. 9, 2011) ("For the first time, a law firm will collaborate with Harvard Law School to provide executive education over the course of an associate's career, on-site at Harvard, focusing on business, finance and law, utilizing Harvard Law School and Harvard Business School faculty.").

26. *See* Kat Green, *5 Innovative Associate Training Programs*, Law 360 (Nov. 7, 2014, 3:07 PM), http://www.law360.com/securities/articles/584154?nl_pk=91e15d53-cee4-405b-bbc6-47f6daf736aa&utm_source=newsletter&utm_medium=email&utm_campaign=securities.

27. *Practical Law Company and Drinker Biddle & Reath LLP Launch University of Pennsylvania Law School's First-Ever M&A Boot Camp*, Yahoo! Fin. (May 5, 2011, 8:57 AM), http://finance.yahoo.com/news/Practical-Law-Company-and-iw-383826188.html ("In an effort to provide law students with practical skills training in transactional areas, Practical Law Company (PLC), a provider of online legal know-how for law firms and law departments, and Drinker Biddle & Reath LLP . . . a nationally recognized law firm with over 600 lawyers, have joined forces to run the University of Pennsylvania Law School's first-ever transactional practice Boot Camp, from May 11-13. The three-day Boot Camp will introduce Penn Law students to private M&A by taking them through the steps of a typical transaction.").

28. *Curriculum Guide-Courses, Mergers and Acquisitions in Practice: Advising the Board of Directors*, Geo. L., http://apps.law.georgetown.edu/curriculum/tab_courses.cfm?Status=Course&Detail=2288 (last visited Dec. 11, 2014) (Taught by Professors Paul Saunders, Distinguished Visitor from Practice; of counsel and former partner at Cravath, Swaine & Moore LLP, and Damien Zoubek, Adjunct Professor of Law, and partner at Cravath, Swaine & Moore LLP, "[t]his intensive one-credit course will take six students through a fast-paced unsolicited takeover offer over the course of a single weekend in March. The students will play the role of associates in a firm that is the outside counsel to a public company that has just received an unsolicited offer. The goal of the course is to simulate through this hypothetical M & A scenario, the legal skills needed to guide a client's strategic and tactical business decisions in a real-life M & A situation.").

29. *See supra* note 16.

introduced to practical skills, and (ii) to understand how doctrine relates to practice. The goal should be to provide sufficient knowledge of applied doctrine and practical contexts so that the graduate lawyer has a basis to understand the context of practicing law. Many law graduates have never seen during their law school education the most basic transactional agreements,[30] such as a loan agreement, employment agreement, lease, guarantee, commercial contract, or asset purchase or merger agreement. These documents are not the sole domain of top law firms; many solo practitioners will encounter basic transactional contexts early in their legal careers and yet may have had no prior exposure to the documents or issues involved in such matters. No one expects a new graduate JD to be able to draft a full commercial lease or merger agreement, but the first time one sees such documents should not be after graduation. While you may not want a graduate medical student to remove your appendix, the medical graduate has probably seen such an operation and knows how the theory of surgery applies to the task of treating the patient. Although the new law graduate may have a context for understanding litigation practice, the graduating lawyer's knowledge of transactional practice is generally deficient. Few opportunities exist in law school, even in the clinical context, to learn the basics of transactional law.[31] Effectively, it is the same as limiting a medical education to only the left side of the body.

Aside from the faculty's limited practical experience hampering the ability to teach transactional practice, the nature of transactional practice itself is a limitation. Litigation matters are extensively documented. Television shows (e.g., Perry Mason, LA Law); movies (e.g., To Kill a Mockingbird; My Cousin Vinny) and novels (e.g., any title by John Grisham or Scott Turow or the "Lincoln Lawyer" series by Michael Connelly) extensively document the lawyer as litigator. Moving from fiction to reality, every trial has a transcript; most dockets are public (providing access to motions, depositions and briefs),

30. *See* Charles M. Fox, Working with Contracts: What Law School Doesn't Teach You 2-3 (2002) ("[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. . . . The law of contracts as covered by a first-year contracts class—offer and acceptance, consideration and the like—rarely poses any issues in sophisticated commercial transactions. The majority of a transactional lawyer's time is spent on structuring the transaction, advising the client on strategy, negotiating and drafting the contracts, orchestrating the closing, and through the life of the deal keeping the transaction organized and moving forward. How is a new lawyer supposed to learn these skills? By doing and observing–in other words, 'on the job' training.").

31. The number of opportunities, fortunately, is increasing and certain law schools, such as Emory and Boston University, have created formal programs in transactional law. For a succinct summary of the issue, *see* Jennifer Smith, *'Practice-Ready' Matters to Young Lawyers, Too*, Wall St. J. L. Blog (Aug. 28, 2014, 4:41 PM), http://blogs.wsj.com/law/2014/08/28/practice-ready-matters-to-young-lawyers-too/ (quoting a current law firm associate, "I think a lot of the problem is you get into practice and, all of a sudden, you've got this 200-page offering memorandum or 100-page merger agreement. You're being asked to do something with it, and you don't know what any of it means.").

oral arguments are transcribed and judicial opinions are published. The entire process and the thoughts of both sides to litigation and advocacy, as well as the judicial determination, are literally an open book!

Transactions stand in stark contrast. Few if any movies[32] and novels have been devoted to negotiations; there are no transcripts of negotiations.[33] For significant transactions of public companies, the final document may be disclosed in securities filings, but the process of getting to the final agreements remains a mystery. As just one example, it is well-known that in the acquisition agreement between AT&T and T-Mobile, AT&T agreed to pay T-Mobile a break-up fee of $3 billion if the transaction failed to obtain antitrust approval. The transaction failed to be approved and AT&T paid the $3 billion. What was the insight of the T- Mobile lawyers that caused them to seek that concession? What was the back-and-forth in the negotiations that led AT&T to agree to the provision, effectively placing a $3 billion bet on regulatory approval? Unless one of the participants in the negotiation subsequently writes a book or article (and they are likely precluded by client confidentiality), we will never know the process that led to such contract provision and will be left to speculate.[34] The process of negotiation simply is not subject to the type of scrutiny and analysis afforded by the records of litigation, which is why there are few opportunities for faculty to study and write about transactional practice.[35]

32. There is an interesting, albeit brief, negotiation scene between Richard Gere and Julia Roberts that takes place in the film Pretty Woman (Touchstone Pictures 1990). Another writer has identified 12 Angry Men (United Artists 1957) as a film demonstrating negotiation skills, although it is in the context of litigation. *See* Kelly Lynn Anders, Advocacy to Zealousness: Learning Lawyering Skills from Classic Films (2012).

33. Even the ethical rules as set forth in the ABA Model Rules of Professional Conduct are primarily directed to the lawyer as advocate. *See* James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiations*, 1980 Am. B. Found. Res. J. 926 (1980); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 76 Iowa L. Rev. 1219 (1990); Michael H. Rubin, *The Ethics of Negotiation: Are There Any?*, Ass'n Com. Fin. Att'ys (Jan. 2009), http://acfalaw.org/system/docs/16/original/ACFAEthicsofNegotiationsJan09.pdf. Spanning 30 years of scholarship, the titles of these articles state the point clearly. In a business transaction, if you are concerned about the ethics of an opposing party, you generally just walk away from the negotiating table rather than litigate the issue.

34. The Deals course at Columbia, discussed *infra*, note 61, has students review actual transaction documents to assess the issues and how they were resolved by the parties and then invites the practitioners involved in the deal to discuss the transaction with the class. A similar class has been offered at Harvard Law School by Professor Guhan Subramanian. Professor Subramanian "brings the deals to life" by inviting various dealmakers, including CEOs and senior partners, to discuss actual completed transactions and the issues that arose in the negotiations. *See* Michelle Deakin, *Designing the Deal*, Harv. L. Bull. (Fall 2005), http://today.law.harvard.edu/feature/designing-the-deal/.

35. There are, of course, many substantial texts and articles on negotiation theory and practice. As one of the leading works, *see* Roger Fisher & William Ury, Getting to Yes (Bruce Patton ed., 2d ed. 1991). Reading about the theory of negotiations and actually conducting and practicing negotiations are, however, very different. I describe the difference to students by analogizing to football: It is one thing to read and learn the playbook; it is quite another to implement the plays on the field with eleven opposing team members trying to tackle you.

But transactions are the world of the practitioner. The transactional lawyer lives in the world of negotiations and documentation of business agreements. Straddling the world of law and business, the transactional lawyer is required to craft contracts that memorialize business agreements in a legal context. The task requires as much understanding of the business context in which the transaction takes place as it does of the legal requirements and constraints that govern the transaction.[36] This is a unique world, one that is foreign to the adversarial lawyer whose practice revolves around the courtroom, as the transactional lawyer is focused on making business happen and avoiding the courtroom; dispute anticipation and avoidance is key, providing mechanisms by which business can continue even if disputes arise.

Unless faculty members have experienced transactional practice, it is not surprising that it is approached with trepidation. Christopher Langdell would likely have been baffled by the applied legal and business thinking of Joseph Flom. Inscrutable through lack of recorded process, bridging business and legal practice that requires an understanding of the economic, political and social contexts that may create obstacles, the business transaction is otherworldly from the perspective of most faculty members.[37] They have no frame of reference by which to analyze, rationalize, and teach the process.[38]

So the academy finds itself in a dilemma. Students require and the profession is mandating more practical skills and most faculty members are not equipped to provide those skills, particularly in the context of transactional law. Employers need graduate lawyers who have more knowledge about legal practice and require less training to be effective legal counselors. Law schools and the profession have a shared responsibility to prepare and enable future generations of legal (and transactional) practitioners. The profession is adapting its programs for training young lawyers; the law school curriculum

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The practical experience is essential to comprehending and appreciating the theory.

36. *See* Press Release, Milbank, *supra* note 25.

37. There are a growing number of full-time faculty members who have come from transactional practice backgrounds. Professor Tina Stark created the transactional law program at Emory; Karl Okomoto is the Director of the Program in Business & Entrepreneurship Law at Drexel and the creator of LawMeets, http://www.lawmeets.com (last visited Dec. 12, 2014); Kent Coit is developing a transactional law program at Boston University; David Gibbs is working on developing a transactional curriculum for Chapman; Bill Mooz is developing transactional courses at University of Colorado Law School. *See infra* note 39. There are certainly others who are similarly inclined. It is also important to note that one of the earliest professors focused on transactional law, Ronald J. Gilson (Stanford and Columbia), also transitioned to academia following approximately seven years of law firm practice.

38. Of course, there are professors who write about aspects of transactional practice and the legal opinions affecting aspects of transactional practice. See, for example, the works of Professor Ronald J. Gilson (Stanford and Columbia), and the writings of Joshua Teitelbaum (Georgetown). Their respective writings are available on SSRN. The point here is that law school needs to focus more on the practical aspects of transactional law (i.e., how to transform a business deal into operative legal agreements) as distinguished from the theoretical and judicial aspects of transactional law.

similarly needs to adapt[39] and thereby share the effort to meet the needs of the profession. The immediate solution is to draw more of those who know practice—particularly those who practice transactional law—into the classroom to complement the doctrine and skills already being taught in law school.

There are many practitioners who would like to teach.[40] The academy, however, is mysterious to the practitioner, particularly to transactional lawyers who do not necessarily benefit from, or even follow, much of the scholarship produced by the academy.[41] Law schools function in an environment that has historically been isolationist from the perspective of the transactional lawyer, generally removed from the practicing bar. Those who practice, even if they are inclined to teach, often lack knowledge of the inner workings of the academy and how to enter the domain. Many who attempt to enter (by proposing courses, etc.) are rebuffed.[42] Discouraged, they may not try again.[43]

39. Much adaptation in the law school curriculum is underway. Washington & Lee has restructured its entire third-year curriculum to focus on practical skills. New York University is adopting changes in its third-year curriculum. University of Denver, Sturm College of Law, has adopted the Experiential Advantage. *The Experiential Advantage,* U. Denver Sturm C. L., http://www.law.du.edu/index.php/experiential-advantage (last visited Dec. 12, 2014) ("Denver Law is pleased to announce the launch of its new Experiential Advantage Curriculum™, which allows our students to spend a full year of their law school career in real or simulated legal practice."). University of Colorado recently offered an inaugural summer boot camp "designed to teach business skills and technology industry fundamentals before the students begin legal internships at technology firms." Karen Sloan, *Interns Thrive in 'Boot Camp'; Colorado Trains Them in Tech Business Basics,* Nat'l L.J., Aug. 18, 2014, at 1. Many other efforts by law schools are similarly in process to address the needs discussed in this article. *See also supra* note 5 and accompanying discussion of the new ABA standards.

40. I have often been asked by colleagues how to enter into law school teaching. I have also successfully recruited many colleagues into academia to teach as adjuncts. Once the process has been demystified, these capable lawyers become very effective instructors.

41. After all, most scholarship is not written about transactional law and the transactional process.

42. Most practitioners would not necessarily be aware of what needs to be submitted to a curriculum committee for the consideration of a class. I have approached many law schools about offering transactional practice courses, but the submission usually includes a full syllabus and prior experience with respect to teaching. Many schools have been receptive, but others have either neglected to respond to inquiries (even after follow-up) or outright rebuffed proposals. Repeated attempts have often resulted in successful discussions, but many practitioners would become discouraged if rebuffed at the first inquiry.

43. A new subcommittee of the ABA Business Law Education Committee, Integrating the Profession, is focused on motivating practitioners to enter the classroom and developing a dialogue between practitioners and law school faculty. *See Business Law Education Committee,* A.B.A., http://apps.americanbar.org/dch/committee.cfm?com=CL180000 (last visited Jan. 23, 2015). The recent program at the April 2014 Spring Meeting of the ABA Business Law Section was captioned: "From Practitioner to Professor: Transferring Your Experience into the Law School Classroom." Presenters included myself, Michelle Greenberg-Kobrin (Columbia), David Gibbs (Chapman), and Valerie Barreiro (USC Gould), all current or former practitioners who have successfully entered the law school classroom. The ABA Business Law Section Spring 2014 Meeting schedule is available at *2014 Spring Meeting,* A.B.A., http://www.americanbar.org/groups/business_law/events_cle/spring_2014.html

Many law schools, of course, have built significant adjunct faculties who teach compelling courses, including courses involving transactional law. In many cases, however, that adjunct faculty has minimal interaction with the regular faculty,[44] unless it is sought by the adjunct. The adjunct faculty, even if largely oriented toward traditional law school subjects and not transactional law, does possess substantial knowledge of practical skills.[45]

To draw in the transactional practitioner, law schools will need to help build the bridge with the practicing bar. To accomplish this, law schools can

> (i) acknowledge the need to offer more transactional and practical skills classes and make that known to the practicing bar;
>
> (ii) invite proposals and explain what needs to be submitted as part of a complete proposal;
>
> (iii) develop materials to guide and smooth the transition of practitioners to the classroom by providing guidance on how to prepare course outlines, focus learning objectives, create syllabi, and evaluate students;[46]
>
> (iv) make the practitioner feel welcomed as part of the institution; and
>
> (v) provide collaborative opportunities to pair practitioners with doctrinal professors, which may include teaching jointly.

The last point above is the Vertical Collaboration suggested at the outset of this article.[47] It represents potentially one of the most productive ways to bridge

(last visited Jan. 23, 2015).

44. For example, few adjuncts attend academic conferences. I attend and present at many academic conferences focused on experiential learning and transactional law, and these experiences have been invaluable in furthering collaboration between full-time faculty and me, but often I find that I am the only full-time practicing lawyer (or certainly transactional lawyer) in attendance. Involving more practitioners in the discussions at academic conferences, particularly those focused on practical skills, would further the engagement between the academy and the practicing bar (and adjunct faculty) and facilitate the collaboration advocated in this article.

45. Wes Porter, *Law Schools' Untapped Resources: Using Advocacy Professors to Achieve Real Change in Legal Education*, Educ. Tomorrow's Law. Blog (July 16, 2013), http://online.iaals.du.edu/2013/07/16/advocacy-professors-can-help-law-schools-achieve-real-change/.

46. Practitioners may overestimate what law students know and the basic "starting point" for teaching transactional practice. The practitioner needs to be able to reverse-engineer what the practitioner does on a day-to-day basis and "start at the very beginning" to teach practical skills. For an example of the type of helpful guidance that can assist in the transition to the classroom *see* Lyrissa Lidsky, *Ten (okay, Nineteen) Tips for New Law Professors,* Prawfs Blawg (Aug. 4, 2011), http://prawfsblawg.blogs.com/prawfsblawg/2011/08/ten-tips-for-new-law-teachers.html.

47. Cardozo School of Law, Yeshiva University, has recently announced an innovative approach to practical skills offerings which embraces Vertical Collaboration. *See* Tania

the "skills gap," as well as the gap between the academy and the practicing bar. Collaboration between full-time faculty and practitioners provides an effective tool to fuse doctrinal and practical skills in a revised and focused law school curriculum, particularly in the area of transactional law.[48] The International Business Negotiations class I teach provides a prime example.[49] The class was originally conceived and implemented by Professor Daniel Bradlow at American University Washington College of Law. I joined with Professor Bradlow in 2003 to provide practice components for the class. Together we published a textbook for the class in 2013, along with a full teacher's manual explaining the class and the pedagogy.[50] The teacher's manual was designed to be a roadmap and complete outline of the class to facilitate understanding and implementation by new adjuncts, while allowing regular faculty to use whatever parts appealed.[51] The class has now been adopted by 22 law schools,

Karas, *Revamped Cardozo Courses Stress Practical Skills*, N.Y. L.J. (July 16, 2014), http://www.newyorklawjournal.com/id=1202663198773/Revamped-Cardozo-Courses-Stress-Practical-Skills#ixzz37qlNOv8q ("Cardozo now requires students earn six credits of practical skills through a clinic or externship. The school will offer several new skills-based courses *to be taught jointly by a faculty member and an adjunct practicing attorney.*" (emphasis added)). Another good example is at Yale Law School. "In recent years the divide between the approach of practitioners and scholars has been shrinking. In the past academic year alone, there have been dozens of classes, clinics, and projects that—at their core—value the engagement of students with real world, practical issues while also pursuing scholarly ends. Some of this expansion is due to a new generation of faculty, many of whom experienced clinical education as students. Taken as a group, these faculty members' classes and projects represent a new hybrid of pedagogical approaches—a melding of the technique of practitioners with the academic analysis and theoretical thought ascribed to scholars." *Beyond the Book—The Expansion of Experiential Learning,* Yale L. Sch., http://www.law.yale.edu/about/13645.htm (last visited Dec. 12, 2014).

48. Yale recently announced new academic courses, including courses in negotiation and mergers and acquisitions, that will integrate more experiential learning. "The plan is for some of the new courses to be taught by current partners, experienced practitioners, and current in-house counsel." *See* Sarah Ricks, *Yale Law School to Expand Practical Courses*, Legal Skills Prof Blog (June 2, 2014), http://lawprofessors.typepad.com/legal_skills/2014/06/yale-law-school-to-expand-practical-courses.html.

49. The International Business Negotiations class is fully described in an article published in 2007. Daniel D. Bradlow & Jay Gary Finkelstein, *Training Law Students to be International Transactional Lawyers—Using an Extended Simulation to Educate Law Students about Business Transactions*, 1 Bus. Entrepreneurship & L. 67 (2007). The course has been profiled by Educating Tomorrow's Lawyers. *International Business Negotiations*, Educating Tomorrow's Law., http://educatingtomorrowslawyers.du.edu/course-portfolios/detail/international-business-negotiations (last visited Dec. 12, 2014).

50. Daniel D. Bradlow & Jay Gary Finkelstein, Negotiating Business Transactions: An Extended Simulation Course (2013).

51. The textbook and the teacher's manual for the International Business Negotiations class were intended to provide, as proposed, *supra*, all necessary "materials to guide and smooth the transition of practitioners to the classroom." In addition to the class instructional outlines, all materials to organize the class, including syllabus and alternative class structures, are included, effectively making the course, from both a curriculum adoption and instructor perspective, in more common parlance, "plug and play" or "turn-key".

15 in the U.S. and seven international.[52] Most of the classes are taught by adjuncts who I have recruited and trained.

The International Business Negotiations class also represents a prime example of Horizontal Collaborative teaching and its effectiveness. The class is generally taught in parallel: either a divided class at the same law school or, more frequently, classes taught contemporaneously at two law schools, with each class representing one side of the simulated transaction for the entire semester.[53] The negotiations between classes at the same school are conducted using written communications and face-to-face negotiations.[54] When taught between two classes at different law schools, the negotiations are conducted

52. By my own observations, the U.S. law schools that offer the class are American, Berkeley, Boston University, Chicago, Denver, Georgetown, Golden Gate, Hastings, Northwestern, Stanford, Suffolk, UCLA, University of Virginia, and Washington & Lee. American, Georgetown, and Northwestern offer the class both semesters. The international schools offering the class are Bucerius (Germany), Ghent (Belgium), University of Dundee (Scotland), IDC (Israel), Hebrew University (Israel), York (England), and FGV (Brazil).

53. There are other similar classes offered by U.S. law schools. For example, Hamline Law School offers a collaborative Advanced International Business Negotiations class (LAW 9671). *Certificate in International Business Negotiation*, Hamline U., http://www.hamline.edu/law/dri/cibn/ (last visited Dec. 12, 2014) ("You learn via synchronous and asynchronous distance learning, working and studying together with all other domestic and international students. . . . You examine advanced concepts, skills, and dynamics of the negotiation process in the context of international business transactions and dispute settlement through readings, discussion forums, negotiations, and group activities; You engage in a series of applied and coached activities that require translation of negotiation theory into practice; Enables you to gain experience in negotiating across national boundaries using distance technology."). Another similar course is offered at University of Washington School of Law (LAW B 516 International Contracting). *Courses 2014-2015,* U. Wash. Sch. L., http://www.law.washington.edu/CourseCatalog/Course.aspx?ID=B516 (last visited Dec. 12, 2014) ("In Fall/Winter section, certain class sessions will take place by videoconference with a class of law students at the University of Tokyo, and the heart of the course will be team negotiation and drafting of an agreement with counterpart teams of Japanese law students, using email and videoconferencing. It is anticipated a section will be offered Winter/Spring in cooperation with a European law school, which include negotiations with European law students."). Both of these classes reflect concepts and pedagogy similar to the International Business Negotiations class discussed in the text. A third example, a course conducted between two Canadian law schools (University of British Columbia and University of Saskatchewan), is described in John C. Kleefeld & Michaela Keet, *Getting Real: Enhancing the Acquisition of Negotiation Skills through a Simulated Email Transaction,* 2 J. Arb. & Mediation 23, 25 (2011) ("Working with basic background facts and a stranger on the other side, the students were free to use their own names and choose their own negotiating styles, thereby reducing the artificiality experienced by role-players who have to assume roles and pretend not to know their counterparts. The exercise allowed for the development of a negotiation relationship over the course of a week, in contrast to the one-time nature of many in-class simulations."). To my knowledge, none of these other classes has been adopted by other law schools independent of the originating law school.

54. Divided classes at the same law school require two faculty members (one to guide each side to the negotiation) and present an excellent opportunity for pairing full-time faculty with an adjunct practitioner.

using formal written communications, email, and video conferencing,[55] or, when the two schools are in the same geography, such as Stanford and Berkeley or Chicago and Northwestern, by face-to-face meetings. The semester-long simulation exercise puts the deal in the classroom for detailed study, and the collaborative teaching between classes at two law schools replicates reality, as each class negotiates against an "unknown" party (rather than fellow students with whom they just had lunch) that is working on the same transaction but may have different motivations and objectives, just as with practicing lawyers. Students experience the transaction, as it evolves, in the same manner as a practicing lawyer.

While many of the IBN classes are taught by adjuncts from practice, some classes have adopted Vertical Collaboration between full-time faculty and practitioners to teach the respective classes.[56]

The power of Vertical and Horizontal Collaboration is immense, as students learn, as Professor Schon described, "by doing, in the presence of a senior practitioner, with others trying to learn, in a virtual world." Doctrinal and practical pedagogy merge to create a classroom environment where practical issues of transactional law can be analyzed in detail as a transaction unfolds through negotiation and, given the "safe" environment of the classroom, mistakes become lessons and not malpractice.[57]

55. The classes utilize a full range of means of communication. Communications between classes are conducted using email, formal written communications, videoconferencing, and, at times, Skype or teleconferencing. In addition, students in each class are generally divided into teams which alternate responsibility for written communications and live negotiations. While one team will conduct each live negotiation, the entire class remains connected using GChat or similar instant-messaging so that a running commentary, including the instructor, keeps everyone focused and engaged on the issues being discussed.

56. From my own observations, full-time faculty are (or have been) involved in teaching classes at American, Chicago, Suffolk, IDC, Boston University, Bucerius, and York, in some cases in combination with adjunct practitioners.

57. Aside from the formal negotiations, the students are encouraged to open "back channel" communications with their counterparts as a manner of replicating the types of informal communications that surround most business negotiations. In fact, most of the intractable issues that arise during the negotiations are discussed and solutions brokered outside the formal negotiations. From a recent student in a class where face-to-face "back channel" meetings were possible: "Getting to know members of the other deal team outside of the conference room and in a setting common to 'regular' life highlighted their identity as individuals. I saw them as amicable partners working toward a common resolution of the transaction, not as adversaries in a bitter litigation. . . . The . . . conversation was an excellent way of getting us out of our adversarial habit and into a more amicable mindset." In some cases, these "back channel" communications develop into the personal relationships formed among negotiating teams, both lawyers and business people, as they interact over time to structure a deal. In one class, a female student in my class was the primary "back channel" communicator with a male student in the counterpart class. At the beginning of the final formal video session that followed extensive "back channel" negotiations, my student reported that her counterpart had emailed: "You look very nice this morning!" The negotiations concluded in a mutually beneficial transaction.

Students are effusive about the experience: "I mean it when I say that IBN was the most interesting class I've taken at any academic level."[58] "This has been my favorite course . . . so far at [this law school]. I learned the most about what practical lawyering entails."[59] "You can read about how to drive your whole life, but you wouldn't really know how to drive unless you get in a car and turn it on. This [class is] putting you in that driver's seat."[60] There are many other such quotes, including students who have indicated that they entered the class feeling certain that they wanted to be a litigator and after concluding the class came to realize that they wanted to be a transactional lawyer. Being made aware of what transactional lawyering involves can affect, if not alter, perspectives on legal practice. That demonstrates the power of both collaborative and experiential teaching.[61]

It is also important to compare the role of legal clinics and the type of collaborative and experiential learning upon which this article is focused. Clinics are an integral part of training law students in practical skills and a pairing of clinical and experiential learning experiences presents a highly compatible approach to creating the "practice aware" law graduate. Clinics have two limitations, however, that distinguish them from the type of experiential learning that a practitioner can provide in a classroom. First, clinics are restricted by the nature of the issues presented by the client of the clinic. Second, clinics can address only issues that are within the capabilities of the law students taking the clinic. Transactional law clinics, because of the limited opportunities of law students to study transactional law (as compared with greater opportunities for litigation practice), are limited to fairly basic aspects of transactional practice.[62] Certainly issues dealt with in the clinic

58. Anonymous student review at University of Virginia Law School.

59. Anonymous student review at Georgetown Law School.

60. Anonymous student review at American University, Washington College of Law.

61. Another similar course, but not identical in structure, is the popular "Deals" course at Columbia Law School. *See Deals Course,* Columbia L. Sch., http://web.law.columbia.edu/transactional-studies/deals-courses-and-workshops/deals-course (last visited Dec. 12, 2014). Taught by Professor Ronald Gilson, the class focuses "principally on the analysis of contract documents that memorialize a variety of interfirm business transactions." As part of the class, groups of students analyze actual transactions and the issues and solutions presented through the documents for the transaction. "The students present their deal to the class. Then, in the next class session, the expert practitioner or principal who actually participated in the deal . . . comes to explain what really happened and why." *Id.* As explained on the website, "The Deals course is one of the most popular in Columbia Law School, with over 150 students vying for approximately 50 available slots." *Id.* The class is an example of the type of Vertical Collaboration (faculty working with practitioners) and Horizontal Collaboration (teams of students working together) I have advocated.

62. Most transactional law clinics focus on start-up issues or specialized contexts such as intellectual property licensing. There are certain examples of more sophisticated transactional clinics that offer a broader array of project experiences, such as the International Transaction Clinic at University of Michigan ("Unlike other clinics now found in U.S. law schools . . . the ITC combines transactional work with an international focus." *International Transactions Clinic,* U. Mich. L. Sch., http://www.law.umich.edu/clinical/internationaltransactionclinic/

should advance the capabilities of the law students, but in the experiential classroom environment, the range of issues that can be considered is not limited by the constraints of representing an actual client in a clinical environment. Through simulations and other exercises, students can be introduced to new and challenging "real life" issues without the constraints of an actual client representation. The instructor controls both the issues to be discussed and the entire classroom experience. Students can be allowed to explore alternatives without the risks or constraints of an actual client representation. Together, the clinical experience and the experiential learning environment present the full scope of pedagogical opportunities.[63]

Collaborative teaching is not, however, a panacea. Not every good practitioner is a good teacher. It is important to identify practitioners who have both the time and the ability to be effective in the classroom. Providing a "roadmap" of assistance as suggested earlier will facilitate the process of attracting practitioners who can teach to integrate with the academy.

Of course, not every faculty member would pair well with a practitioner. Some are more receptive to change and adaptation of classroom materials. For transactional subjects, the most likely candidates are (i) faculty members who already teach business-oriented subjects (e.g., securities law, uniform

Pages/default.aspx (last visited Jan. 23, 2015)), the Organizations and Transactions Clinic at Stanford ("We advise organizations about corporate governance, structural, and programmatic matters. We review governance practices and draft bylaws, committee charters, policies and practical governance tools for nonprofit corporations, projects and coalitions. We review and draft contracts and MOUs, prepare template documents, and help plan and execute transactions." *Organizations and Transactions Clinic,* Stan. L. Sch., https://www.law.stanford.edu/organizations/clinics/organizations-and-transactions-clinic (last visited Jan. 23, 2015)), and the Social Enterprise & Nonprofit Clinic at Georgetown ("The Social Enterprise & Nonprofit Law Clinic at Georgetown University Law Center offers free corporate and transactional legal services to social enterprises, nonprofit organizations, and select small businesses in Washington, D.C. . . . [and teaches] law students the materials, expectations, strategies, methods, and lexicon of transactional lawyering, as well as an appreciation for how transactional law can be used in the public interest." *Social Enterprise and Nonprofit Clinic,* Geo. L., http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/social-enterprise/ (last visited Jan. 23, 2015)).

63. *See also* Cody Thornton, *Shared Visions of Design and Law in Professional Education*, 6 Northeastern U. L.J. 21, 22 (2013) ("This article reintroduces the legal academy to the learning environment of professional designers: the contemporary studio. Studio courses could provide the balance of theory and practice that the academy and the profession now seek. . . . The . . . studio environment teaches students to create and communicate solutions to complex problems. The primary value of a *legal* studio would be to release students' creativity within *both* the practical and the theoretical realms. The studio inherently fosters almost all of the core lawyering skills and should appeal to social justice activists as much as transactional gurus. . . . Conceptually, the 'legal studio' approach would fall between a clinic and a seminar, with elements of simulations, skills courses, and other teaching variations. The method would allow students to explore, without harm to clients or the students' own careers. In this setting, professors and students could work together to expand scholarship [and] to reconnect practicing lawyers to laws schools."). To underscore the last point, it should be noted that design studios generally have practicing architects and designers teaching together with full-time faculty.

commercial code, contracts, tax, or business organizations), (ii) faculty members teaching negotiations or international law classes, (iii) those who are interested in pedagogy involving collaboration and technology, (iv) faculty members who have explored the "flipped classroom," (v) faculty members who have experimented with video delivery of class materials, or (vi) faculty members who have expressed an interest in working with a practitioner. Some faculty members may gravitate naturally toward innovative approaches to the classroom; others may need to be encouraged.[64]

Introducing practitioners to the classroom, particularly in collaboration with faculty, also entails certain risks. First, faculty members will need to restructure customary formats for classes, and that will require a commitment of time devoted to teaching rather than scholarship, as traditional lecture formats will need to be intertwined with discussions of skills and exercises. Pairing practitioners with faculty members also poses the risk of highlighting what faculty members do not know. Potentially, the practitioner may get higher ratings from students than regular faculty. Having classes taught solely by adjunct faculty, without full-time faculty, may draw students away from classes taught exclusively by regular faculty as a result of students gravitating towards practical skills classes. Finally, the requirement for more work, additional preparation time devoted to teaching, and less time available for scholarship may increase insecurity for certain faculty members.[65]

Developing Horizontal Collaborative models also has challenges to address. While utilizing a divided class at one law school is fairly manageable, collaborations between law schools involve dual adoption of the class, coordinating two curriculums, working with two or more instructors, making adjustments for semester and quarter schedules, working across multiple time zones, and dealing with the sporadic idiosyncrasies of technology. Every one of these challenges, however, can be overcome. The current pairings for the International Business Negotiations class demonstrate every combination of cross-time-zone and cross-curriculum issues. The list below sets forth 14 pairings either from recent years or scheduled for the 2014-15 academic

64. Some law school deans have provided funding to faculty to re-envision the teaching of their classes.

65. *See* Alicia Plerhoples and Amanda Spratley, *Engaging Outside Counsel in Transactional Law Clinics*, 20 Clinical L. Rev. 379, 381 (2014) ("*To some clinical law professors, the idea of a clinic working with outside attorneys poses a credible threat to clinical pedagogy*, clinical faculty status, and the permanent integration of clinics into the law school curriculum (citing '[p]ersistent perspectives that clinics are expendable programs within the law school curriculum" and the threat or concern that "clinics should be closed to meet budgetary constraints rather than firing non-clinical faculty'). To other clinical law professors, collaborating with outside counsel is a part of everyday clinical work and may be necessary to satisfy ethical and professional responsibilities. This article acknowledges that the appropriateness of collaboration with outside attorneys will vary among different clinics, depending on various factors including the unique characteristics of the clinic and its work, the nature of the intended collaboration, and the collaborating partner." (emphasis added)). The article includes a decision tree for analyzing whether to collaborate with outside practitioners.

year involving 17 different law schools, both U.S. and international:[66]

American/Dundee (Scotland)[67]	Georgetown/Dundee
Stanford/Berkeley	UVA/Bucerius (Germany)
American/Hastings	Stanford/Northwestern
UVA/Northwestern	Northwestern/UCLA
American/Ghent (Belgium)	Georgetown/FGV (Brazil)
American/Northwestern	Denver/Golden Gate
Chicago/Northwestern	Suffolk/York (England)

From the above list, it can be seen that quarter schools (such as Stanford) have paired with semester schools (such as Berkeley) and schools have coordinated across time zones involving five or six hours' difference (American/Dundee, UVA/Bucerius, Georgetown/Dundee, American/Ghent, and Suffolk/York). All of the pairings involve the use of technology, except for Stanford/Berkeley and Chicago/Northwestern, which are able to utilize face-to-face negotiations. Sometimes technology does not work; this merely becomes a lesson for real practice–you must have a backup plan.[68] If the video system does not function, the class switches to a conference call and the negotiations continue.

There has been much discussion about what competencies are necessary for law graduates to become practicing lawyers. A recent article[69] identified 10 key competencies:

Judgment, Problem-Solving, People Skills, Teamwork, Organizational and Time Management Skills, Business Savvy, Business Development, How to Supervise Others, Focus on the Big Picture, and Using Common Sense. Each of these competencies is essential to both litigation and transactional practice. The difficulty that arises is how to teach these competencies. While it may be possible to deliver a lecture on some of these skills, they are really acquired through experience, and experiential learning (whether through clinics, simulations, collaborative teaching, or other practical exercises integrated into a doctrinal class) is the best means for law students to develop such competencies. Students working in teams on a simulated transaction that

66. From my own observations, five law schools either have offered or are offering the International Business Negotiations class in a divided class format: Washington & Lee, Boston University, American University, IDC (Israel), and Hebrew University (Israel).

67. American/Dundee is the original pairing for the International Business Negotiations class, which was established by Professor Daniel Bradlow in or about 2001. I have arranged and facilitated each of the other pairings.

68. I used to believe that copier repair was an extremely important skill that was not taught in law school. Today, knowing how to fix the video or Skype connection has replaced the copier but assumes equal importance.

69. Dilloff, *supra* note 3.

is negotiated using collaborative pedagogy between two law school classes will experience and need to employ virtually the entire list of recommended competencies.[70]

There is another list of competencies that law students also need to understand as future practitioners, particularly if they will become transactional lawyers. Students need to understand that law is not practiced in silos but is multidisciplinary. The transactional lawyer must be cognizant of corporate law, contract law, UCC, labor law, environmental law, intellectual property law, competition law, tax law, and potentially a host of regulatory laws. Note, the operative word is "cognizant," which is intended to mean sufficiently "aware" to know when to raise questions and seek the advice of appropriate experts in those areas. In effect, the transactional lawyer is the conductor of a symphony of law, cuing in each area of expertise required for the successful documentation and completion of the transaction while remaining in control of the whole process. The transactional lawyer must also be able to understand both the actual business involved in a transaction as well as the broader business context of a transaction (i.e., whether the transaction is part of a larger business objective and, if so, where the transaction fits in). By understanding the business involved, the lawyer can understand the risks inherent in a transaction, how risks may be allocated, where problems may arise, and what needs to be negotiated and then reflected in the legal documents. The transactional lawyer needs to develop a basic understanding of accounting to be able to understand the "language of business." In addition, the law student focused on transactional practice needs to develop skills in contract drafting, creative legal thinking (problem resolution vs. issue spotting), and, ultimately, how to "think like a *deal* lawyer."[71] Each of these competencies can be taught and illustrated by the transactional practitioner, either by integrating these topics into other law school classes or through experiential classes devoted to transactional practice topics (such as mergers and acquisitions) or in clinical contexts (e.g., new business clinics).

Creating the "practice aware" lawyer, particularly the "practice aware" transactional lawyer, requires a renewed focus on law school curriculum

70. For a recent example of how Albany Law School utilized horizontal collaborative pedagogy (teams of students approaching a task) as part of its orientation for new law students to begin the development of practical sills, *see* Mary Lynch, *Shultz and Zedeck: Collaboration and Motivation in Orientation!*, Best Prac. for Legal Educ. Blog (Aug. 13, 2014), http://bestpracticeslegaled.albanylawblogs.org/2014/08/13/shultz-and-zedeck-collaboration-and-motivation-in-orientation/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+BestPracticesforLegalEducationBlog+%28Best+Practices+for+Legal+Education+Blog%29 ("These one-Ls will be entering a profession and a world in which working with others, problem solving, creative thinking, and clear communication will be even more critical for those in our profession than in times past. As graduates, these students will be participating in teams and in collaborative enterprises that we faculty probably cannot now envision. However, it is our job to facilitate their acquisition of the kinds of skills and capacities and attitudes that will best serve them in the uncertain but potentially exciting future.").

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

offerings that can expose law students to the myriad issues that lawyers must consider and the problem-solving skills necessary for lawyers to facilitate and enable business transactions. One of the best resources to accomplish this task is the transactional practitioner who is able to bring the experience of practice into the classroom to supplement the doctrinal pedagogy. Experiential and collaborative learning opportunities further anchor these skills.[72]

Let's return to the mythical dialogue between Langdell and Flom with which we began:

> F: You obviously don't understand my world, and I am mystified by yours. Invite me into the academy; let me help shape the legal minds that will ultimately enter corporate practice and continue my work.
>
> L: What did you say?
>
> F: You said I should teach the graduating law students transactional practice. On that point, I agree with you. But I propose to do it in your classroom! Let's collaborate: You teach the doctrine that you believe underlies legal thinking; I will provide the practical skills that apply the doctrine you teach to the business world in which I practice. Together, students will get the full picture and graduate with sufficient knowledge to address client issues in a business context.
>
> L: That's a creative thought. I am not sure I completely understand how it might work, but let's give it a try.

Imagine the power and the educational impact of combining critical thinking on legal issues (full-time faculty) and critical thinking on applying law to address practical problems and achieve client objectives (the role of practitioners in the classroom). Add to that the power of creative collaborations within and between law schools to replicate the actual practice of law, enhance the learning experience, and develop practical skills. Vertical and Horizontal Collaboration integrate with the doctrinal curriculum to create an improved educational result, particularly with respect to transactional law, and produce the "practice aware" law graduate. The academy and the profession, working together, can bridge the "skills gap" and improve professional outcomes for future lawyers.

72. *See* Thornton, *supra* note 63.