At the Lectern

Transactional Skills Training Across the Curriculum

Carol Goforth

I. Introduction

Legal education adapts slowly. In no area is this gradual change more apparent than in professional-skills instruction.[1] While increasing academic resources have been devoted to practical skills, and particularly communication-based skills such as legal writing, the changes to date have not fully addressed the needs of modern lawyers. With the exception of legal writing, most skills instruction at the majority of law schools takes place in the upper-level curriculum. And while legal writing may be commonly taught in the first year, most first-year writing instruction is either predictive[2] or persuasive[3] in nature, rather than focusing on transactional drafting. This means that at most law schools, transactional skills are introduced after the required first year has immersed law students in the world of litigation. Even in the upper-level curriculum, transactional practice is underemphasized. For example, upper-level writing courses tend to focus on persuasive writing either in the form of briefs or scholarly articles, rather than on transactional drafting.

Although this article addresses transactional skills more broadly, legal writing provides an appropriate lens through which to view the differences between a dispute-resolution focus and one based on deals or other

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1. The 1992 "MacCrate Report" helped focus attention on professional-skills training. A.B.A. Section of Legal Educ. & Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum (1992) [hereinafter MacCrate Report]. *See also* William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (2007) [hereinafter Carnegie Report], and Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Road Map (2007).

2. Predictive writing is sometimes called objective or descriptive. Its focus is an objective presentation of what the law is or is likely to be, typically as applied to specific facts.

3. Persuasive writing reflects the lawyer's role as advocate; its role is to persuade the audience that the law ought to result in a particular outcome. Whether structured as a brief, position paper, or scholarly article designed to influence the opinions of readers, the focus of persuasive writing is to persuade. An annotated list of scholarship on persuasive legal writing was published by Professor Kathryn Stanchi in 2009. Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. Ass'n Legal Writing Directors 75 (2009).

transactions. When a lawyer assists in a transaction, the kind of writing required is fundamentally different from the predictive or persuasive writing associated with litigation and other dispute-resolution contexts. Transactional drafting is prescriptive; it sets out how persons affected by the writing are to behave in the future rather than evaluating the consequences of prior acts. It neither involves a narrative about how the law is likely to apply to particular facts nor makes arguments about how the law should apply. It does not focus on explaining the law at all. Instead, this kind of writing uses the law to construct a legally enforceable template by which the involved parties will govern themselves prospectively, based on possibilities and contingencies that have not yet happened. It requires input from both sides of the deal and something other than adversarial persuasion, and it must be clear not only to the current parties, but also to those who might be called to understand the terms of the arrangement in the future.

Because contractual arrangements play such an integral role in the modern world, and because both contracts and property are basic first-year subjects typically involving written documentation, one might easily assume that law students would have plenty of instruction on and exposure to at least the contract drafting part of transactional practice. This, however, is not the case. Consider the only professional skill typically taught in a distinct first-year course at most law schools: legal writing.[4] Although most programs offer two semesters of legal writing instruction in the first year of law school, the overwhelming emphasis is on litigation-based writing rather than transactional drafting.[5] Thus, even though classes like legal writing, contracts, and property are regularly taught in the first year, most law students will graduate without having any significant exposure to transactional skills.[6]

It seems incredibly obvious that lawyers need to be able to do more than litigate. Why, then, is transactional training so underemphasized? In part,

4. Accreditation standards require legal writing in the first-year curriculum. Am. Bar Ass'n, *Standard 303(a)(2): Learning Outcomes, in* Standards and Rules of Procedure for Approval of Law Schools 2016-2017, at 16 (2016) [hereinafter ABA Standards], http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf (last visited June 8, 2017).

5. *See infra* Part II of this article for a discussion of the frequency with which drafting is being taught. Most of the information relied upon in this article with regard to legal writing ("LW") classes at institutions other than the University of Arkansas comes from online data posted by law schools in their webpages and the 2015 Report of the Annual Legal Writing Survey, prepared by the Association of Legal Writing Directors and published by the Legal Writing Institute [hereinafter 2015 LW Survey], http://www.alwd.org/wp-content/uploads/2017/03/2015-Survey-Report-Final.pdf (last accessed June 14, 2017). As of June 2017, the 2015 survey was the most recent report posted. Primarily for comparison purposes, at places the 2014 report is also referenced. 2014 Report of the Annual Legal Writing Survey, prepared by the Association of Legal Writing Directors and published by the Legal Writing Institute [hereinafter 2014 LW Survey], http://www.alwd.org/wp-content/uploads/2014/07/2014-Survey-Report-Final.pdf (last accessed June 14, 2017).

6. Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 Colum. Bus. L. Rev. 475, 478 (2002).

this may be attributed to the traditional case method and its focus on the adversarial system, both of which focus time and attention on litigation and disputes instead of transactional work.[7] Of course, many of the skills taught in traditional law school curricula, such as the ability to research and understand (or access and analyze) legal authorities, and predict how applicable legal principles and rules will or should apply, will serve attorneys in good stead when they face a transactional project. The reality, however, is that additional skills are needed.[8]

To explain why transactional-skills training needs significantly more attention in law schools today, this article will first consider how law schools currently approach the education of law students, particularly in the first year of law school. Because it is the only widespread formal skills instruction in place in the critical first year, particular attention will be paid to existing legal-writing instruction. Second, this article will evaluate the extent to which current training covers the skills needed for effective legal representation of clients in a transactional setting, and the extent to which law students need specialized training in such skills as they prepare for the practice of law. The final section offers potential options for remedying the lack of transactional-skills training, with alternatives if a school cannot or will not devote sufficient resources to guarantee a full range of transactional-skills instruction to all students.

II. The Teaching of Skills in American Law Schools

In 1992, the ABA's MacCrate Report advocated that law schools emphasize core competencies specifically including professional skills.[9] Today's accreditation standards also require legal-writing instruction in both the first year and in the upper-level curriculum, and other professional skills at some point for all students;[10] but none of this means that transactional skills

7. Kenneth D. Chestek, *Reality Programming Meets LRW: The Moot Case Approach to Teaching the First Year*, 38 Gonz. L. Rev. 57, 62-63 (2003) (reporting that most first-year LW classes focus on "legal analysis, predictive memo writing, persuasive writing, and legal research.").

8. *See, e.g.*, Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten "Dirt Lawyer,"* 62 U. Pitt. L. Rev. 335, 335 (2000) (noting that the traditional litigation-centric focus of legal education fails to offer adequate support for students who will embark on transactional careers).

9. *See* the MacCrate Report, *supra* note 1 at v, listing problem-solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiations, litigation and ADR procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas. Even though the report is widely regarded as having been influential, at least some commentators concluded the report had far less impact than it could and should have. Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis or More?*, 100 Dick. L. Rev. 245, 261-62 (1996).

10. Current accreditation standards for law schools require at least one writing experience in the first year and at least one additional writing experience after the first year, and at least six credits of "experiential" learning, involving any of a number of professional skills. *See* Am. Bar Ass'n, *Standard 303: Curriculum, in* ABA Standards, *supra* note 4, at 16.

are mandatory.[11] In fact, most law schools continue to emphasize litigation and dispute-resolution-based skills at the expense of transactional-skills training.[12]

The most comprehensive compilation of information about any kind of skills instruction focuses on legal writing and comes in the form of an annual survey conducted by the Association of Legal Writing Directors/Legal Writing Institute (ALWD/LWI).[13] The 2015 report, which includes data from the 2014-2015 academic year,[14] indicates that most law schools teach legal writing in both of the first-year semesters.[15] Even though they often involve five or six credits,[16] legal-writing classes are still selective in what they cover, with most

11. 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 (2007) (arguing that first-year LW classes should include transactional drafting in order to adequately train attorneys).

12. The emphasis on a lawyer's role in handling disputes has been noted before. One commentator on the subject complained that "[f]or many of the same reasons that law schools have marginalized skills instruction, they have also long emphasized litigation preparation at the expense of transactional training. This bias persists in the current 'skills' curriculum, which mostly emphasizes brief writing, advocacy, and litigation-based clinic opportunities." Rachel S. Arnow-Richman, *Employment as Transaction*, 39 Seton Hall L. Rev. 447, 478 (2009). "[L]aw schools overwhelmingly focus students' attention on litigation by means of their required LRW curriculum. These courses traditionally begin with an office memorandum assessing the likelihood of success of a forthcoming lawsuit, then move on to a persuasive brief (usually in a trial court), and conclude with an oral argument." Schulze, *supra* note 11, at 61 (citing Chestek, *supra* note 7, at 62-63, and Silecchia, *supra* note 9, at 281). Other skills are also taught with a dispute-resolution focus. For example, the ABA Section of Dispute Resolution has a committee on Legal Education, ADR and Practical Problem Solving (LEAPS). In 2010, LEAPS conducted a survey on how law schools teach problem-solving, and the resulting data showed an increasing number of schools teaching such skills, but with nonlitigation dispute-resolution classes or components being less prevelant. *See* A.B.A. Section of Dispute Resolution, LEAPS, Curriculum Models, http://leaps.uoregon.edu/content/curriculum-models (last visited June 10, 2017).

13. In 1999, 117 schools participated in the annual LW Survey. Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal,* 73 UMKC L. Rev. 253, 255 n.14 (2004) (noting that this was sixty-six percent of ABA-accredited law schools). In 2013, 190 North American law schools (representing approximately ninety-five percent of schools eligible to complete the survey) replied. ALWD/LWI, Report of the Annual Legal Writing Survey 2013, http://www.alwd.org/wp-content/uploads/2013/08/2013-Survey-Report-final.pdf (last visited June 10, 2017). In 2014, this number had declined from 190 to 178, representing eighty-nine percent of solicited programs. 2014 LW Survey, *supra* note 5, at iv & v. In 2015, the number of respondents increased to 194. 2015 LW Survey, *supra* note 5 at iv.

14. As of the date this article was written, the 2015 report was the most recent one available online from ALWD. *See* http://www.alwd.org/surveys/2004-2015-survey-report/ (last visited June 14, 2017).

15. Ninety-eight percent of schools offered LW classes in the first semester, ninety-nine percent in the second semester. 2015 LW Survey, *supra* note 5 at ix.

16. A 2010 curriculum survey conducted by the ABA indicated that forty-three percent of law schools offered five or six credits of legal-writing instruction. Catherine L. Carpenter, *Recent Trend in Law School Curricula: Findings from the 2010 ABA Curriculum Survey*, The Bar Examiner 6 (June 2012), *available at* http://ncbex.org/assets/media_files/Bar-Examiner/

assignments being predictive or persuasive in nature. For example, in 2014-15, 193 schools asked students to prepare office memoranda, 127 asked students to write pretrial briefs, seventy-seven required trial briefs, and 139 used appellate brief writing assignments.[17] Only sixty-seven schools required any document drafting in the first-year program.[18] In some respects, a first-year legal-writing program that is ninety-five percent litigation-based and five percent drafting does active harm, in that it minimizes the importance of transactional skills.

Evidence that transactional skills are introduced in other first-year programs is hard to come by. No readily accessible formal annual surveys or information-collection efforts exist on skills training other than legal writing. Certainly there is widespread acknowledgment that a generally prevalent first-year curriculum exists, and that it is typically taught through the Socratic method relying on casebooks to illustrate rules of law.[19] Beyond that, most reports appear to be

articles/2012/810212beCarpenter.pdf (last accessed Jan. 20, 2017).

17. All the ALWD Survey reports from 2004 to 2015 are available at http://www.alwd.org/surveys/2004-2015-survey-report (last accessed June 14, 2017). Information on the kinds of writing assignments required appears in the following chart, which is taken from responses to question 20 in the survey:

Project type	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Office memoranda	182	181	176	166	187	188	172	186	174	193
E-mail memos*	n/a	n/a	n/a	n/a	n/a	n/a	81	102	109	127
Client letters	100	96	90	88	99	103	93	116	116	127
Pretrial briefs	107	110	93	93	105	111	95	105	101	127
Trial briefs	60	60	54	51	65	63	52	65	67	77
Appellate briefs	150	147	137	133	149	150	138	141	125	139
Law review articles	7	5	6	5	4	3	6	7	5	7
Drafting documents	56	60	49	46	64	64	53	60	63	67
Drafting legislation	11	10	8	8	10	13	6	10	11	9
Other	40	37	90	92	114	117	94	115	113	126

* This option was not added until the 2012 survey.

18. *Id.* These numbers actually overstate the relative importance (or understate the relative unimportance) of transactional drafting, because the top five required writing projects (in terms of the importance of the work as self-reported by law schools) all focus on predictive or persuasive writing rather than anything identified as drafting. Some drafting may be done in the context of litigation. Informal phone calls with LW faculty at various schools provided some indication that a number of programs use drafting of interrogatories, motions, or other litigation-based forms in the required LW classes. The official LW Survey does not collect data of this sort.

19. The Law School Admission Council (LSAC) suggests that "[m]ost law schools rely on the 'case method' approach to teaching. First-year curricula usually include courses in civil procedure, constitutional law, contracts, criminal law and criminal procedure, legal method, legal writing and research, property law, and torts." *Is There a Standard Law School Curriculum?*, LSAC, http://www.lsac.org/jd/thinking-about-law-school/standard-curriculum (last visited June 10, 2017).

anecdotal, resulting in a lack of information that is more pronounced when considering upper-level skills training in law schools.

Even regarding legal writing, the focus of upper-level electives is not well-documented. The annual ALWD survey combines information about what kind of writing is taught after the first year with information about the type of person who teaches the course.[20] This means, as the survey report notes, that the report totals "do not represent the number of schools offering a particular course,"[21] although the results do suggest that over the past five years an increasing number of courses have included transactional drafting.[22] To put this in context, however, the elective "drafting" courses that do not focus on transactions outnumber by more than two-to-one those that do,[23] and other litigation-based upper-level LW electives also significantly outnumber transactional-drafting offerings.[24] In addition, we do not know how many sections of each of these courses are offered, how many credits they involve, how frequently they are offered, or how many students are allowed to enroll when they are taught. We also do not know whether general drafting includes such topics as drafting of pretrial memoranda or even complaints or answers, all of which have a dispute-resolution orientation.

20. 2015 LW Survey, *supra* note 5, at 27. Item 35 asks, "[w]hat courses are taught in the elective writing curriculum and who teaches those courses?" *Id.* Respondents are asked to "mark all that apply."

21. *Id.* Information about elective LW offerings from 2010 to 2015, separated by type of writing required and excluding student-run appellate advocacy programs, appears in the following table:

Offering	2010	2011	2012	2013	2014	2015
General writing skills	158	168	173	171	171	178
Survey course	50	53	48	51	59	70
Drafting, general	148	161	169	184	174	189
Drafting, litigation	175	188	219	226	219	243
Drafting, legislation	84	90	95	102	101	111
Drafting, transactional	194	208	239	260	237	255
Advanced advocacy	236	231	240	251	245	271
Scholarly writing	166	170	175	188	177	197
Judicial opinion writing	60	63	70	82	83	99
Other	39	38	40	49	47	60

Data taken from responses to question 35, 2015 LW Survey, *supra* note 5 at 27-29.

22. The data do not indicate definitively if this represents an increase in the number of programs that offer transactional drafting courses, but the number of distinct courses has increased.

23. The survey identified 543 drafting courses that are general or focused on litigation or legislation, as compared with 255 transactional-drafting classes. 2015 LW Survey, *supra* note 5, at 27-28.

24. The totals for litigation drafting (243), advanced advocacy (271), and judicial opinion writing (ninety-nine), were more than twice the number of litigation-based writing offerings (613 as compared with 255). *Id.*

Although law schools are clearly devoting increasing resources to skills training,[25] this article suggests that transactional-skills training is still underemphasized. While the evidence is clearest in the contract of legal writing, other skills training also appears to focus very heavily on resolving disputes.[26] Certainly mediation and arbitration classes, which are offered as "professional skills instruction" in most law schools, tend to have a dispute at their heart.[27] Training in problem-solving appears to be dispute-oriented as well.[28] Most interviewing and counseling materials for law students appear to start with a dispute.[29] Even negotiation classes often focus on dispute

25. Law schools must now provide at least six credit-hours of experiential training. *See* Am. Bar Ass'n, *Standard 303(a)(3): Curriculum, in* ABA Standards, *supra* note 4, at 16.

26. Even commentators who note the overemphasis on litigation in law schools tend to focus on dispute-resolution training and issues.

> Legal education is built around a core irony: almost no human disputes are resolved via trials, and yet we dedicate years to teaching law students how to resolve disputes via litigation. To remedy this incongruity between legal education and the reality of lawyering, the two of us have begun integrating negotiations, settlements, and mediation into our 1L legal writing curriculum. This article describes why and how we have introduced our students to these non-litigation skill sets, starting to train them in what we believe may be their most powerful dispute resolution skills when they enter the legal world.

Olivia Farrar & A.G. Harmon, *Lawyering Outside Lawsuits—Incorporating Negotiations, Settlements, and Mediations into the Legal Writing Curriculum*, 19 Persp: Teaching Legal Res. & Writing 42 (2010).

27. ADR was one of the first skills other than legal research and writing to be emphasized in law school curricula, and it is now generally true that most law schools "routinely train students in ADR processes, law, and technique." Richard Chernick, *Alternative Dispute Resolution: The Growth and Maturation of Mediation*, L.A. Law., Mar. 2002, at 8. Mediation is a way to resolve disputes, and this source speaks of mediation as the "aspect of ADR that has had the most far-reaching effect on the legal system since 1976, and mediation is likely to continue to be ADR's most potent force for years to come." *Id.*

28. Bobbi McAdoo, *It's Time to Get It Right: Problem-Solving in the First-Year Curriculum*, 39 Wash. U. L.J. 39, 57-60 (2012), describing the Dispute Resolution Institute's role in emphasizing problem-solving skills training and the design of problem-solving training as "an overview of the range of dispute resolution processes."

29. For example, one article addressing the need to train students in interviewing and counseling posits three kinds of situations requiring interviewing skills. All three, however, involve disputes (a potential employment-discrimination claim, a defective patio installation, and a defective medical product). Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients,* 23 Ohio St. J. Disp. Resol. 437, 446-47 (2008). Training manuals also suggest the need for a chronological overview, an approach that makes little sense when gathering information about deals and business transactions. This is the approach taken by the authors of leading textbooks on interviewing and counseling, David A. Binder & Susan C. Price, Legal Interviewing and Counseling: A Client-Centered Approach (1977) and David A. Binder, Paul Bergman & Susan C. Price, Lawyers as Counselors 259 (1991). *See also infra* note 40.

resolution, although this skill would seem to have a natural tie-in with deals and transactions.[30]

III. What Are Transactional Skills, and Why Are They Different?

The previous section of this article provides evidence of the systematic emphasis on dispute resolution in current legal education, even in skills classes. Legal-writing instruction provides the clearest example of this, and so when the question of whether transactional skills are different, it also makes sense to look first at whether the current approach to legal writing really fails to prepare law students for a transactional practice.

The purpose of prescriptive writing is materially different from other kinds of legal writing, which helps explain why it requires different skills. When attorneys prepare predictive documents, they are interpreting the law and describing its probable application, usually to specified or presumed facts. They are informing the reader about existing legal authority and attempting to educate the reader on how that authority will govern under defined circumstances. If, instead, the work product is persuasive in nature (for example, as would be the case in a litigation brief), the attorneys take the same legal authorities and use them to convince the reader that a particular outcome or result is required, again in the context of particular facts. In the case of prescriptive writing, the lawyers need to be familiar with legal authority, and they certainly need to be able to predict what the law requires.[31] But the primary focus of the writing is not on the law itself. Prescriptive writing sets out how the parties wish to structure their own behavior prospectively, in compliance with legal requirements and limitations. Transactional drafting

30. Many commentators seem to assume that negotiation is simply another form of ADR. *See, i.e.*, Becky L. Jacobs, *Teaching and Learning Negotiation in a Simulated Environment*, 18 Widener L.J. 91, 93 (2008) (discussing training in "negotiation and other ADR topics"). Other commentators simply talk about negotiation as if it goes hand in hand with other ADR training. John Barkai, *Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil*, 75 Neb. L. Rev. 704, 705 (1996) (noting that "[n]egotiation and ADR skills are two of the fundamental lawyering skills in the MacCrate Report.") Practice-oriented materials also often talk about negotiation in connection with dispute resolution such as settlements. Charles B. Craver, *Effective Legal Negotiation and Settlement,* 14 ALI-ABA Course Materials J. 7 (1989).

31. Even here, some disparity exists between the kinds of authorities that an attorney writing predictively or persuasively would expect to consider and the range of legal knowledge a transactional drafter needs to possess. Lawyers engaged in a transactional practice must bring to the table knowledge of many different aspects of law, not just an understanding of the law applicable to the primary subject matter of the transaction. One commentator explained that this means a good legal drafter would possess "a breadth of experience and a flexibility that allows the lawyer to probe and assess the many aspects of a transaction better than if the lawyer's experience were limited to one or two specialties; and second, the ability to apply learning from one field to other fields, such as introducing non-disturbance agreements from real estate transactions to ship chartering and equipment leasing." Peter Siviglia, *Teaching the Drafting of Contracts*, 70 N.Y. St. B.J. 46, 46-47 (1998).

thus covers efforts to "memorialize and effectuate a client's intentions in connection with business and financial events and transactions."[32]

Knowing how to predict the law and being persuasive about how it should apply simply do not equate to being able to draft a transactional document, even though it may be governed by the same substantive rules that would come into play if a dispute were involved.[33] Unlike other types of writing, transactional documents "do not entertain, do not convey information or ideas, and do not try to persuade."[34] It is therefore not surprising that drafting requires a range of skills not generally covered in other writing classes.

Obviously, some teachable skills will apply to virtually all kinds of writing. The ability to write grammatically correct sentences and to use punctuation effectively immediately come to mind. All writing (legal and otherwise) can benefit from being clear, concise, and well-organized, just as all writing can benefit from careful proofreading. Ideally, students come to law school with these kinds of basic written communication skills. Legal writing is something on top of those basic rules. Legal writing requires an accurate understanding of underlying legal principles and legal authority, and the ability to use those principles and authorities effectively. Prescriptive drafting involves many of the same basic principles, but beyond this, prescriptive writing begins to differ significantly from the other forms of writing more commonly taught.

Prescriptive writing requires the drafter to think through a deal and consider what might happen in the future, to understand the ramifications of the clients' plans and desires, and to understand the context in which the transaction is to take place. Why? Because contracts that fail to cover all aspects of the deal clearly and consistently are likely to result in avoidable disputes later on. Documents that neglect to include unambiguous provisions covering foreseeable contingencies will not adequately protect clients' interests.[35]

32. Michael R. Smith, *Alternative Substantive Approaches to Advanced Legal Writing Courses*, 54 J. Legal Educ. 119, 124 (2004).

33. Even law students who have run across contracts before entering law school "concede that being exposed to drafting contracts does not necessarily prepare them to competently draft them. More often than not, the best way to develop the skills and expertise they need to competently draft contracts is to actually draft them; in other words, obtain some 'on the job' training." Lisa L. Dahm, *Practical Tips for Drafting Contracts and Avoiding Ethical Issues*, 46 Tex. J. Bus. L. 89 (2014).

34. Peter Siviglia, *Designs for Courses on Drafting Contracts,* 12 Scribes J. Legal Writing 89, 89 (2008).

35. Many years ago, a litigator at the firm I was with joked that my role as an attorney focused on transactional law was to "foment litigation," as a sort of guarantee for full employment opportunities for litigators down the road. My experience was apparently not unique. Professor Claire Hill quoted a litigator from a prominent N.Y. law firm as saying, "When our corporate group drafts a contract, we're twice blessed." Claire A. Hill, *Bargaining in the Shadow of the Lawsuit: A Social Norms Theory of Incomplete Contracts*, 34 Del. J. Corp. L. 191 (2009). She interpreted that remark as suggesting "that the low quality of his corporate partners' drafting assured significant legal expense if the contract were to be litigated," or "that the unclear drafting, caused by the corporate lawyers' incompetence, made litigation more likely." *Id.* at 191 n.1.

Once the lawyer actually begins to draft, the writing must not only be clear to the client and other current parties, but also readily understandable by third parties who may enter the picture later; it also must be unambiguous if an arbitrator or judge is called upon to consider the language in the event of a dispute down the road. The ability to produce this kind of work requires not only precise and unambiguous writing, but also a specific understanding of how similar documents have been construed in the past.[36] Drafting for a transaction requires a knowledge of contractual forms[37] and stylistic matters that may be unique to contracts, and even to specific kinds of contracts. For example, linguistic variety may be essential to keep an appellate brief from being boring and unpersuasive, but it can be extremely problematic in a contract.[38] Similarly, formal wording or the use of more complicated language may help convey a particular tone that is useful in a document to a particular attorney, judge, or client, but it should not be present in contracts that may have many potential readers.[39]

36. "As a contract drafter, the successful transactional attorney will have numerous form contracts on which he/she can rely, but will use them only with caution and only as a starting point to create unique contracts for each client and transaction." Dahm, *supra* note 33, at 100.

37. Professor Burnham has a nice description of the general format of a typical contract in his student guide, Scott J. Burnham, Drafting and Analyzing Contracts 218-28 (3d ed. 2003). Professor Brody and her colleagues offer a similar outline for the framework of contracts. Susan L. Brody et al., Legal Drafting 204-06 (1994). Professor Stark offers an outline suggesting an organizational framework that might work for the substantive provisions of an agreement. Tina l. Stark, Drafting Contracts: How and Why Lawyers Do What They Do 397 (2d ed. 2014). Professor Payne's book on sample practice exercises for students studying contract drafting includes an appendix with a contract-drafting checklist that includes the "essential parts" of a contract. Sue Payne, Basic Contract Drafting Assignments, A Narrative Approach 383-84 (2011). Using forms correctly actually takes considerable skill. Much of the complexity in this instance comes from the abundance of components that must be handled, and handled well, to properly use forms in the drafting process. No one seriously suggests that contracts should be drafted from scratch; that would be wildly inefficient. However, to ensure that a form agreement is appropriately revised for a client, the drafter must make sure that form is thorough and appropriate to the underlying transaction, that it applies the correct law, that it is up to date, that it contains nothing the lawyer does not understand, that it is specifically tailored to the client's needs and priorities, and that it has been carefully proofread.

38. "Variety is the bane of drafting; it befuddles readers and quickens the blood of sharp-eyed litigators." Kenneth A. Adams, A Manual of Style for Contract Drafting 1 (2004). Gisela M. Munoz, *Writing Tips for the Transactional Attorney,* Prac. Real Est. Law., May 2005, at 33.

39. Law students spend untold hours reading cases involving bad or at least ambiguous contractual language, and become used to language like "witnesseth" and standard phrases like "for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged . . . ." These begin to sound as if a lawyer wrote them, and students begin to model their own drafting on that kind of language. The use of older forms further encourages archaic terminology that does "not improve your chances of a court properly interpreting a contract that ends up in controversy." Munoz, *supra* note 38, at 33. Similarly, larger words may make you feel more erudite, but they do nothing to make a contract more useable or less ambiguous. Or, as William Strunk Jr. and E.B. White said: "Do not be tempted by a twenty-dollar word when there is a ten-center handy, ready and able." William

Next, consider the dichotomy between the approach necessary for an attorney to act appropriately in a litigation or other dispute-resolution setting and in a deal in the context of other skills. As an initial matter, to draft an appropriate document, the lawyer must engage in extensive fact-gathering.[40] In the transactional setting this includes not only gathering information about the client's desires and priorities, [41] but also having the insights necessary to

Strunk Jr. & E.B. White, The Elements of Style 76 (3d ed. 1979).

40. In most law school courses and on most law school exams students are given the facts and asked to apply "the law," either objectively or persuasively. Students are not asked to go out and "discover" the facts. Even in materials designed to help students learn how to conduct interviews, the chronological approach is emphasized. *See, i.e.,* Claire Chiamulera, *Improving Question Frameworks in Child Interviews: Crafting a Simple, Chronological Child Questioning Strategy* (Part 4), 35 Child. L. Prac. 27 (2016); Minna J. Kotkin, *Creating True Believers: Putting Macro Theory into Practice*, 5 Clinical L. Rev. 95, 109 (1998) ("Almost every clinical teacher devotes some attention to interviewing skills. The basic approach that most use starts from the proposition that the client needs to provide her lawyer with a full factual picture and to articulate the result she seeks. To accomplish these goals, we teach students interviewing skills: structure the interview to begin with an identification of the problem; ask open-ended questions to obtain a chronological narrative; then work on theory development to gather legally critical and detailed information."); Marlene Pontrelli Maerowitz, *A Three-Step Approach to Effective Client/Witness Interviews,* Ariz. Att'y, Apr. 1997, at 17, 18 ("Step 1: Obtain a chronological overview."); Don Peters & Martha M. Peters, *Maybe That's Why I Do That: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing*, 35 N.Y.L. Sch. L. Rev. 169, 188 (1990) (suggesting that initial periods of interviews should be "devoted to narrative solicitation and general chronological reviews"); Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 Clinical L. Rev. 541, 572 (1995) (explaining that the client-centered format for interviewing begins with "the client's first identifying her problem/goal and then providing a chronology."). This approach is not helpful in most transactional settings.

41. Even in simulation classes, where students engage in mock interviews and counseling exercises, fact-gathering is often limited to information that can be ascertained from the client. Negotiation classes may involve the opportunity to interact with other parties, but many negotiation exercises are based on disputes, and the attempt to "settle" a disagreement. Understanding the "opposing" party's desires is important only to the extent that it helps the client obtain to a desirable outcome. The desire to "see" things from the other side's perspective to achieve a mutually advantageous ongoing arrangement is seldom a priority. Professor Bogart once commented on the relative lack of transactional negotiation in law schools by noting that "it may simply be that transactional lawyers are not prevalent, either among law professors generally or among negotiations teachers in particular . . . . Negotiations teachers seem more likely to be litigators than deal makers." Bogart, *supra* note 8, at 360. Other commentators have also explicitly recognized that the focus of many course designers is litigation. John S. Murray, *Book Review,* 40 J. Legal Educ. 393 (1990) (reviewing Donald S. Gifford, Legal Negotiation: Theory and Applications (1989)). One author explained his focus on negotiating disputes by saying the he sticks "largely to the negotiation of disputes. I leave out the negotiation of deals per se and stick to negotiation of the kinds of disputes which make up the grist of legal practice." Marc Galanter, *Worlds of Deals: Using Negotiation to Teach about Legal Process*, 34 J. Legal Educ. 268, 270 (1984). *See also* Becky L. Jacobs, *Teaching and Learning Negotiation in a Simulated Environment*, 18 Widener L.J. 91 (2008) ("Courses focused on negotiation theory and skill development have become curricular staples at North American law schools. Many of us in the academy are passionate about introducing our students to the various forms of alternative dispute resolution (ADR) and about improving their ADR-related knowledge and skills."); Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute*

understand the proposed transaction and predict issues that might need to be included in documenting how the parties intend to proceed.[42] It might also include gathering information about the interests and motivations of other parties to the contract, because the documents also affect their rights and their relationship with the client, which may be ongoing. Business clients often want and expect to come out of negotiations with a win-win result, and drafting a one-sided document, while appearing to give the client everything in the short run, may well be undesirable in the long term. Understanding motivations and the context for the deal and how the parties want it to progress over time becomes incredibly important, in a way that does not come up in predictive and persuasive writing, where the facts are already set.

In addition to fact-gathering, a lawyer preparing to undertake a transactional drafting project must have sufficient knowledge of the law and the underlying transaction to evaluate how to achieve the desired outcomes and to integrate the desired content into a workable structure. A related but even more challenging requirement is that the lawyer be able to think creatively about a myriad of possibilities that have not yet happened, including some that may not have been contemplated by the client or other parties.[43] Risks associated with any such contingencies will need to be discussed with the client, and issues arising out of these risks may need to be negotiated and then explained in the documentation. This is considerably more difficult than merely ascertaining the facts, which itself may be no easy task. It also makes it much harder to limit the scope of legal knowledge required, because transactions so often involve multiple diverse aspects of law.

Resolution, 54 J. Legal Educ. 79, 81 (2004) (speaking extensively about teaching "negotiation, mediation, and choosing or building dispute resolution processes").

42. A competent transactional attorney must be able to help the client balance priorities and understand risks associated with different drafting choices. "A transactional attorney . . . must understand every transaction from the client's perspective, at least to the extent that he/she recognizes what goals and objectives the client wants to achieve and what risks the client wants to avoid." Dahm, *supra* note 33, at 89, 100. The kind of risk assessment that must take place in a transactional context is often very different from that in dispute-resolution scenarios. "Transactional lawyers and litigators both weigh risks in counseling clients. The nature and role of the risk assessment differs, however. In transactional practice, with few exceptions (such as hostile takeovers), both parties to the transaction have the same end goal." Jonathan Todres, *Beyond the Case Method: Teaching Transactional Law Skills in the Classroom,* 37 J.L. Med. & Ethics 375, 376 (2009).

43. "Transactional practice differs from litigation at a fundamental level: While the latter typically looks back in time, reviewing what went wrong, and seeking accountability for past actions, the former is forward-looking and typically takes place when there is no conflict or dispute to resolve." Todres, *supra* note 42, at 375. This is a different set of concepts for law students, who are often very used to litigation-based case analysis, which involves issue-spotting and parsing through information about events that have already happened. "[T]hey are often far less familiar with how to approach a client's issue when nothing has happened yet. Teaching our students to think ex ante about clients' issues or legal matters is important to producing graduates who will excel in practice." *Id.* at 376.

Finally, transactional work may involve ethical issues not present in other kinds of legal writing.[44] Some of these issues may arise because working on transactions requires so much input from the client and relies so heavily on client direction. In addition, because a lawyer is prohibited from being a party to fraud, working toward a deal that appears to be valid but is intentionally ambiguous or unenforceable may itself be a violation of an attorney's ethical obligations.

It is not easy to effectively prepare for, negotiate, document, or even review proposed transactions. Every client's needs and priorities are unique; every deal is different; and many transactions can be incredibly complex. Given that law schools are doing a hit-and-miss job of training students on how to approach transactions, it is easy to see how young and even more experienced lawyers can fail to approach, negotiate, draft, or review contracts effectively.

IV. Why Transactions Matter so Much

Students in law school spend significant time learning to "think like lawyers."[45] Admittedly, this concept means different things to different people. However, our litigation and case-method-focused approach to legal education suggests a great deal of bias is inherent in what most educators understand when they talk about thinking "like a lawyer." One academic's explanation of "thinking like a lawyer" was that

> . . . good lawyers seem to share certain ways of thinking. They ask relevant questions and pay close attention to the raw information that they obtain. They winnow the unimportant facts from the important ones. Then they order what is left into a coherent story that is both fundamentally truthful and calculated to serve a predetermined purpose.[46]

44. Obviously the duty of competence applies in all drafting scenarios, but special rules apply when transactional documentation is involved. An attorney may be more focused on achieving expressed objectives and forget to inquire about underlying motives, so that an attorney who forms a "corporation" for a client may not live up to the ethical obligations of attorneys in failing to learn that the client really wanted help in choosing and then forming an appropriate form of business. In addition, because of the extent of the client's involvement, the attorney must be vigilant in avoiding fraud in connection with a proposed transaction. *See* Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 Lewis & Clark L. Rev. 989, 1004 (2010). For a further explanation of these obligations under Texas law, see also Dahm, *supra* note 33 at 95.

45. This is generally regarded as a positive thing. *See, e.g.*, Sheldon Krantz & Michael Millemann, *Legal Education in Transition: Trends and Their Implications,* 94 Neb. L. Rev. 1, 10 (2015). One commentator explained "thinking like a lawyer" this way: "[G]ood lawyers seem to share certain ways of thinking. They ask relevant questions and pay close attention to the raw information that they obtain. They winnow the unimportant facts from the important ones. Then they order what is left into a coherent story that is both fundamentally truthful and calculated to serve a predetermined purpose." Molly Sheppard, *The President's Message: How, Exactly, Do Lawyers Think?: Their Mental Distillations Bear a Complex Blend*, 26 Mont. Law. 4, 4 (2001).

46. Sheppard, *supra* note 45, at 4 (2001).

Unfortunately, while this works well when students and lawyers are called upon to express their ideas predictively or persuasively, this entire methodology begins to fall apart in the context of understanding how attorneys can help a client "do a deal."[47] The lawyer's role in a transaction is not to analyze how the law and predetermined facts fit together; not to tell a story; not to argue both sides of a given issue; and not to predict or rebut contrary arguments. Because of this, both the concept of what it means to "think like a lawyer" and law school curricula designed to teach those skills need to be expanded beyond analyzing and using the law in this manner.

One indication of the importance of teaching law students how to think like transactional lawyers might be studies, either existing or yet-to-be-conducted, evaluating the cost of poor drafting. Obviously, this is difficult to do, but one study from Harvard Law School some years ago apparently suggested that up to twenty-five percent of all contract disputes were really caused by poor drafting.[48] Anecdotal evidence from litigators also provides some support for the notion that poorly drafted contracts result in substantial litigation.[49] An alternative to studying the number of contract cases involving drafting issues would be to evaluate the number of malpractice claims based on drafting. Unfortunately, limited data exist, although the available information suggests that poor drafting is a significant concern for lawyers.[50]

47. Other formulations of what it means to "think like a lawyer" also fail to mesh well with thinking like someone called upon to draft a contract. One commentator described it as the ability to "think with care and precision, distinguish good arguments from bad, and analyze the facts and evidence presented in a case." Paula Davis-Laack, *Think This Way and That Way: Developing Mental Resilience*, 87 Wis. Law. 41, 41 (2014). Another suggested that the ability to think like a lawyer allows one to "easily see both sides of an argument, anticipate a counter argument, and know how to rebut it," even if it is counter to the lawyer's personal beliefs. Andrew Dufour, *Think Like a Lawyer,* 81 J. Kan. B. Ass'n 14, 14 (2012). For additional ideas about what it means to "think like a lawyer," see Carol Goforth, *Why the Bar Examination Fails to Raise the Bar*, 42 Ohio N.U. L. Rev. 47, 84-85 (2015).

48. Richard B. Schmitt, *Law Schools, Firms Sending a Message: Polish Your Prose*, Wall St. J., Aug. 28, 1995, at B3.

49. "A significant portion of the litigation I handle arises from contracts that, because they were poorly drafted in the first place, quite arguably failed to inform the parties of their obligations. At the same time, most of these contracts were crammed full of redundant, outdated, and unnatural language that had obviously been pulled from some other poorly drafted argument. Had such contracts been written in a way that eliminated any room for argument about a party's obligations, the breaching party would have only infrequently survived summary judgment…." Bill Davis, *To Say It Well, Say It Once*, Fed. Law., March/April 2003, at 5. *See also* Peter Siviglia, *supra* note 31, at 46 ("'I have been shocked by the number of times in litigation that I have asked more senior lawyers-including some fairly good lawyers-to explain the meaning of some provision in a document they prepared and found out they had no idea what it meant. Indeed, I have just finished litigating one such case. The litigation did no one any good and would not have happened but for some sloppy drafting.'") (quoting a letter received from Stephen E. Jenkins, a trial lawyer in Wilmington, Delaware).

50. Those few commentators who have said anything about this issue claim that poor drafting is responsible for a number of malpractice actions. *E.g.*, Ben Kaplan & Fred Dennehy, *Legal Malpractice in Representing Businesses: What It Is and How to Prevent It*, N.J. Law., Oct. 2014, at

On the other hand, a number of potential explanations suggest themselves for why law schools fail to focus attention on transactions. One possibility is a lack of student demand–though intentionally avoiding the opportunity to take transactional courses would seem to be ill-advised. First, it is unlikely that law students would select away from such offerings because they do not want to be transactional attorneys, simply because so few students actually know what they will be doing upon graduation.[51] In addition, a relatively small number of students who claim to know what they will be doing intend to have litigation practices.[52] Finally, even those likely or inclined to wind up with a litigation-based practice will still be engaged in deals and contracts on a regular basis.[53] As one pioneer in teaching transactional drafting said: "[W]hereas only a minority of lawyers now participate in litigation, other kinds of lawyers are called on to prepare definitive legal instruments almost daily. No legal discipline is more pervasive."[54] The unfortunate reality is that the predominant approach at American law schools "both subliminally pushes law students towards litigation and, at the same time, omits transactional drafting skills that many will need."[55] This suggests that a lack of student demand should not dictate whether transactional training is emphasized in the typical law school curriculum.

A second possibility is that law school faculties, and those in charge of curricular reform, might have divergent views on appropriate goals for legal education and the optimal roles for law faculty.[56] Certainly some faculty members resist the push for more skills training, seeing it as an effort to turn law schools into "trade schools" rather than institutions of higher learning. To the extent that this attitude continues to be represented on law faculties,

78, 81 ("Three problems appear repeatedly in business-related malpractice claims: 1) lack of client intake scrutiny, resulting in the representation of clients whose unsavory acts or blunders become imputed to the law firm; 2) failure to deal properly with potential conflicts of interest; and 3) mistakes in drafting documents and observing deadlines.")

51. Schulze, *supra* note 11, at 61 (noting that "the vast majority of first-year law students, despite the trend toward legal specialization, have no idea what area of practice they will pursue.")

52. Lynn A. Epstein, *The Technology Challenge: Lawyers Have Finally Entered the Race but Will Ethical Hurdles Slow the Pace*?, 28 Nova L. Rev. 721, 727 (1994) (talking about the trend toward specialization in the legal field).

53. Matthew C. Cordon, *Beyond Mere Competency: Advanced Legal Research in a Practice-Oriented Curriculum,* 55 Baylor L. Rev. 1, 2-4 (2003) (discussing the widespread criticism of theory-based curriculum and finding that a majority of surveyed attorneys thought that the ability to draft legal documents was of "great importance" for their daily work).

54. Reed Dickerson, The Fundamentals of Legal Drafting 1 (1986).

55. Schulze, *supra* note 11, at 61, citations omitted.

56. Tension exists between the view that "law schools exist to pursue knowledge as part of the larger mission of the academy and the other view that the purpose of law schools is to prepare students for the practice of law." John O. Mudd, *Academic Change in Law Schools*, 29 Gonz. L. Rev. 29, 49 (1994). Some academics favor a rigorous scholarship requirement (and concomitant expenditure of faculty resources on such endeavors), and others favor a higher teaching load and more hours of student contact.

it is surely diminishing over time. Repeated calls for increased practical-skills training from lawyers, judges, and law school accrediting agencies, as well as from a growing number of professors, has combined to make this less of an obstacle to change than it has ever been.

Another possibility is a lack of individuals willing and able to teach transactional skills such as prescriptive writing.[57] Teaching skills is not easy; certainly not everyone possesses the necessary skills or aptitude,[58] and of those capable of such instruction, not all potential instructors are likely to want to change their courses to incorporate skills training.[59] The issue of competence, as opposed to willingness, is especially important because in a number of schools, many skills classes are not taught by tenured or tenure-track doctrinal faculty.[60] It may not be realistic to expect inexperienced practitioners to be

57. At least one commentator has suggested the words of Pogo as being appropriate in this context: "We have met the enemy and it is us." Mudd, *supra* note 556, at 53. Other commentators have also suggested that faculties are primarily responsible for the lack of training in transaction skills. "Perhaps the most significant reason why law schools generally fail to integrate transactional skills into traditional law school classes is due to the background of the professors hired to teach the classes." Debra Pogrund Stark, *See Jane Graduate. Why Can't Jane Negotiate a Business Transaction?*, 73 St. John's L. Rev. 477, 481 (1999).

58. Even the most prevalent of legal skills, writing, is challenging to teach. Jeffrey Shulman, *A Few Serious, If Modest, Proposals to Improve Legal Writing*, W. Va. Law., Nov. 2007, at 12 ("No doubt many a young associate can testify to a supervisor's writing or editorial ineptness. It doesn't bear much repeating that most lawyers are not inclined to treat the English language with kindness. And even good writers may not have the time or temperament to teach others how to write. (It's easier to rewrite the darn thing themselves.))" A lack of experience may also play a role in law professors' unwillingness to attempt to teach lawyering skills.

> One cannot comfortably teach that which one does not truly know. If a professor has not had sufficient personal experience handling litigation or transactional matters, it will be very difficult for that professor to attempt to teach the skills necessary to handle these matters. It is far easier for a practitioner to become versed in legal theories than it is for a person whose sole legal experience is law school, and perhaps a judicial clerkship for a year, to become versed in the practice of law.

Stark, *supra* note 57, at 482.

59. Deeply entrenched notions of faculty autonomy practically guarantee that others will not and cannot dictate to other tenured or tenure-track faculty what or how they will teach. "Law professors traditionally possess nearly complete freedom to select the content of their courses, the books they will use, the standards employed to measure student performance, and the means by which students will be examined." Mudd, *supra* note 56, at 54.

60. The evidence about excessive reliance on adjuncts is clearest in the context of legal writing. Jan Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching*, 7 Scribes J. Legal Writing 51 (2000), citing conclusions reached by the Communications Skills Committee of the Section of Legal Education and Admission to the Bar and reported by it on Jan. 12, 1999. While the number of programs using adjuncts exclusively declined among reporting schools over the past few years, and the number of programs never using adjuncts increased, in 2013-14 forty-one schools used adjuncts having zero to two years of experience, and another fifty-five had adjuncts with between three and five years of practice experience. 2014 LW Survey, *supra* note 5, at 85, 88. In 2014-15, fifty-nine schools employed adjuncts with zero to two years of experience and sixty-nine had adjuncts with between

able to effectively teach skills such as effective drafting, especially when they themselves are unlikely to have had substantial exposure to such instruction. In addition, practicing attorneys may lack the time to devote sufficient attention to students in skills classes, which often require substantial faculty-student interaction.

Even when full-time faculty are being asked to consider teaching professional skills, the reality is that no faculty member likes to have his or her academic "turf" invaded by others, and this basically ensures that curricular structure is tied to faculty structure.[61] Nonetheless, when it is time to set institutional priorities, to make new hires, or to allocate resources, this article suggests a strong need to look for those who will include transactional skills and drafting instruction as part of their teaching package. In addition, existing faculty members who agree to adapt their courses to include such instruction should be rewarded, rather than (for example) being criticized for teaching fewer students.

Another explanation for the lack of substantial instruction in transactional training is inertia.[62] Law professors in general do not like curricular changes,

three and fivers years of experience. 2015 LW Survey, *supra* note 5 at 89. With regard to other professional skills, evidence suggests that a number of schools use adjuncts to teach such offerings. One report simply concludes that "[m]ost adjuncts teach in clinics and skills courses . . . ." Marcia Gelpe, *Professional Training, Diversity in Legal Education, and Cost Control: Selection, Training and Peer Review for Adjunct Professors*, 25 Wm. Mitchell L. Rev. 193 (1999). There are many reasons for this to be the case. "Law schools are struggling to add courses that focus on practitioner skills, that is, skills associated with the actual practice of law. In many cases, the tenured law faculty focus on academics and research and are not interested in or skilled in teaching such courses." Catherine A. Lemmer & Michael J. Robak, *So, You Want to Be an Adjunct Law Professor? The Processes, Perils, and Potential,* 86 N.Y. St. B.J. 10 (2014).

61. Geoffrey C. Hazard, *Curriculum Structure and Faculty Structure*, 35 J. Legal Educ. 326 (1985). *See also* Geoffrey C. Hazard, *Competing Aims of Legal Education*, 59 N.D. L. Rev. 533 (1983) (suggesting that the barrier to an improved curriculum is typically the law faculty).

62. "Newton's first law of motion appears to be as influential in law schools as it is in the physical universe: when no force acts upon it, a body at rest remains at rest, and a body in motion continues to move in the same direction and in a straight line with constant speed. Law schools . . . tend to keep the schools moving in the same general direction in which they have traveled in the past." Mudd, *supra* note 56, at 46. The same sentiment has been echoed by Assistant Dean Rachel J. Littman:

> Inertia and lack of market pressure are partly to blame for the lack of industry-wide innovation. An ingrained tenure system that is based more on scholarship than on teaching effectiveness or a competency- or outcomes-based learning model heavily influences the status quo. Even schools that are on the cutting edge of legal education curricular reform have no corollary emphasis or reward for faculty to expand the methods of their teaching styles beyond the traditional.

Rachel J. Littman, *Training Lawyers for the Real World – Part One*, 82 N.Y. ST. B.J. 20, 21 (2010). Littman also places a fair bit of the blame for the lack of movement from traditional teaching methods and content on the ABA, which she says "plays a clear role in maintaining the status quo" through its accreditation standards, such as those limiting the role of adjuncts in law student instruction. *Id*.

and (speaking broadly) are unlikely to support systemic changes that would significantly change the way they need to teach their classes.[63] This is not irrational, as "teaching skills-based components of podium courses takes significantly more time during the semester because skills-based components require more feedback."[64] This, in turn, reduces available time for scholarship, which is often highly rewarded in academia, both in the promotion and tenure process, and in a faculty member's potential search for a job at a new institution.[65] In addition, many law schools exercise at least a subtle bias against skills instruction, with doctrinal or podium faculty being at the top of the hierarchy, and skills faculty ranking considerably lower.[66] Steps obviously can be taken to address such issues as faculty status differential, and incentives in both hiring and promotion decisions can be added to address the current disincentive to change, but inertia will have to be dealt with. One way is through education about the importance of transactional-skills training for all law students. This kind of education is a goal of this paper. Other than that, a consistent effort to hire faculty who are committed to transactional skills can help over time.

A final concern is the shrinking budgets faced by many schools, which means this is a particularly challenging time to ask for additional skills instruction, generally expensive because so time-intensive.[67] Effective skills

63. The typical "tenure-track or tenured law professor won't want to change the curriculum dramatically enough to provide a solid, skills-based cohort of podium courses. Adding new requirements to existing courses is hard work, and the podium faculty will point to the skills faculty—each of whom is more likely to have recent practice experience than are members of the podium faculty—as the appropriate source of gaining practical experience." Nancy B. Rapoport, *Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools,* 116 Penn St. L. Rev. 1119, 1136-37 (2012). Dean Rapoport (now special counsel to the President of UNLV) uses the term "podium faculty" for faculty who teach substantive, doctrinal classes rather than those primarily engaged in skills or experiential instruction. This resistance to change leads some to see doctrinal faculty in a less than flattering light. *See* Kent D. Syverud, *The Caste System and Best Practices in Legal Education,* 1 J. Ass'n of Legal Writing Directors 12, 14 (2002); Mary Beth Beazley, *Finishing the Job of Legal Education Reform*, 51 Wake Forest L. Rev. 275, 323 (2016).

64. Rapoport, *supra* note 63, at 1137.

65. "A prudent newcomer to the faculty quickly discerns what kinds of faculty activities are valued and rewarded. The reward system of most law faculties strongly favors writing law review articles over creating innovative courses or developing new teaching materials." Mudd, *supra* note 56, at 60.

66. "There's also the not-so-secret issue of status: there's a stubborn caste system in legal academia, with podium faculty members teaching substantive law at the top and the skills faculty members near the bottom, just ahead of adjuncts and the staff." *Id. See also* Syverud, *supra* note 63; Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 Duq. L. Rev. 329 (2001).

67. Law schools have been slow to respond to concerns that traditional legal education lacks sufficient practical training. The economics of change has often been at the heart of this resistance. *Strategic Directions in Legal Education for Idaho: The Report of a Special Panel Appointed by the President of the University of Idaho*, 43 Advocate 15, 17 (2000) (addressing the lack of reform in

training requires a faculty member willing to regularly evaluate student performance, provide formative assessment of student work, and engage in ongoing student interaction at a level significantly more intense than that experienced in traditional law school classes.[68] For that reason, enrollment in skills classes is often limited, which makes them relatively expensive for schools to offer. This is almost certainly the reason some schools have reduced the number of legal writing faculty,[69] even though widespread concern persists about the inability of new lawyers to write effectively. Faculty members in these programs are clearly aware of the economic pressures facing law schools, and many programs report that they have been affected by the recent decline in law school applications nationwide.[70] Addressing this will require action at the institutional level; there must be a commitment to providing adequate resources to offer students appropriate transactional skills training.

the mid-twentieth century, the panel proclaimed "[g]enuine curricular reform was expensive while narrow, traditional legal education in large classrooms remained relatively cheap."). Consider the special pressures in legal-writing programs, which are already staffed but also already asking a lot of faculty. "Given that most LRW professors already have large teaching loads that leave little time for scholarship, adding additional teaching responsibilities vis-à-vis a second year LRW course or even an augmented first-year course would seem burdensome. This leads to the conclusion that schools intent on adding transactional instruction should hire more LRW professors to meet this expansion; obviously, such an expansion costs money." Schulze, *supra* note 11, at 92.

68. This is, indeed, hard work. *See* Rapaport, *supra* note 62, at 1136-37.

69. According to the LW survey conducted in 2014, the number of LW staff "of all descriptions" has "declined steadily 2011-2014: a 13% drop in full-time professionals, a 24% drop in adjuncts, and over a 20% drop in the other three categories." 2014 LW survey, *supra* note 5, at 59 (comment to table 57). While the editor noted that part of the drop could be attributable to declining response rates, this alone should not have accounted for more than a fraction of the reported decrease in staffing. The 2015 survey results showed "a small uptick in adjuncts, part-time professionals, and teaching or research assistants," but despite a significant bump in the number of responding schools showed that the number of full-time professionals had declined by an additional seven percent. 2015 LW survey, *supra* note 5, at 60 (comment to table 57).

70. In 2014, sixty-eight LW programs reported being affected by economic conditions, while fifty-three indicated that their programs had not been affected. 2014 LW survey, *supra* note 5 at 93. In addition, seventeen schools reported "some discussion" of the issue, but indicated that nothing had happened at the time of the 2014 survey. *Id.* Where impacts had been felt, some programs reported salary freezes, six reported salary reductions, and two reported a freeze on hiring. *Id.* at 94. In addition, twenty-three programs are operating under hiring freezes applicable permanent faculty, and another nine were limited to temporary hires such as visitors, while eleven programs reported having less money for adjuncts, and six reported reductions in funds available for teaching assistants. *Id.* As part of these austerity measures, twenty-eight programs have reduced the number of LW faculty, and another twenty-four expect to reduce the number of professionals as contract terms expire or faculty leave and are not replaced. *Id.* The 2015 survey did not ask for this information, although the report notes both a sharp decrease in full time LRW faculty both in 2014 and then again in 2014. 2015 LW Survey, *supra* note 5, at 69, (comment to Table 71(b)).

V. Options for Addressing the lack of Transactional Skills Training

There are a number of ways in which the current lack of transactional skills instruction might be remedied. For example, contract drafting could become a part of required first-year legal writing classes,[71] or could be embedded into first-year contracts classes.[72] Alternatively, transactional skills could be incorporated into other first-year courses, such as property.[73] A different approach would be to add significant transactional training across the curriculum, as appropriate in the context of particular subjects.[74] If this is not practical, transactional

71. Drafting could, for example, replace brief writing. *See* Wayne Schiess et al., *Teaching Transactional Skills in First-Year Writing Courses,* 2009 Transactions: Tenn. J. Bus. L. 53 (2009). Other scholars have suggested it would be even better to have an intensive yearlong experience that integrates a multifaceted approach to skills training. New York Law School, for instance, has "an eight-credit, first-year course that integrates theory with practice in order to teach professional skills. We teach legal research, reasoning, writing, interviewing, counseling, and negotiation, and we also have an oral argument component of the course." Lynnise E. Pantin, *The First Year: Integrating Transactional Skills*, 15 Transactions: Tenn. J. Bus. L. 137, 138 (2013) (noting that in the past all of these skills have had a litigation focus, but urging that this change). Others simply suggest integrating transactional writing skills into the traditional legal-writing curriculum. Schulze, *supra* note 10. *See also* Sue Payne, T*eaching Contract Drafting to First-Year Law Students in Three Hours or Less*, 18 Persp: Teaching Legal Res. & Writing 145 (2010) (adding three class hours of drafting instruction into the school's "CLR" class which covers "legal research, reasoning, and analysis; objective and persuasive writing (from closed memorandum through trial or appellate brief); plus oral argument" taught over two semesters.).

72. Jennifer S. Taub, *Unpopular Contracts and Why They Matter: Burying Langdell and Enlivening Students,* 88 Wash. L. Rev. 1427 (2013). Professor Taub illustrates the problem of trying to teach contracts without exposing students to drafting by comparing the experience to film students, and asking what would happen if those students had lots of theory and written explanations, critiques, and reviews of other work, but never actually got to pick up a camera during their training to become directors. *Id.* at 1427-28. *See also* Hazel Glenn Beh, *Teaching Contracts Transactionally*, 34 U. Tol. L. Rev. 687 (2003).

73. The lack of transactional focus in the first-year curriculum at most schools is actually a recurring complaint among those advocating for an increased emphasis on prescriptive writing. *See, e.g.*, Lynnise Pantin, *Deals or No Deals: Integrating Transactional Skills in the First Year Curriculum*, 41 Ohio N.U. L. Rev. 61, 64 (2014). Professor Pantin suggests that offering such programs in the first year is the best approach, because that is when students are introduced to the notion of what it means to "think like a lawyer," which should include a recognition that lawyers do far more than just litigate.

74. Some commentators suggest that doctrine and skills should not be separated. *See* Miriam R. Albert et al., *Exercise Showcase*, 12 Transactions: Tenn. J. Bus. L. 335 (2011), and Alice M. Noble-Allgire, *Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report into a Doctrinal Course*, 3 Nev. L.J. 32, 36-37 (2002) (focusing on the benefits of combining both kinds of instruction. Several different courses have been suggested as potential vehicles for this kind of combined instruction.). Constance Z. Wagner, *Training the Transactional Business Lawyer: Using the Business Associations Course as a Platform to Teach Professional Skills*, 59 St. Louis U. L.J. 745 (2015) (suggesting Business Associations); Michelle M. Harner & Robert J. Rhee, *Teaching LLCs Through a Problem-Based Approach,* 71 Wash. & Lee L. Rev. 489, 491 (2014) (a class focused on LLCs); Chad G. Asarch, *The Challenge of Practical Legal Education: A Study in Real Estate Transactions,* Colo. Law., July 2014, at 101 (Real Estate Transactions). Presumably, allowing individual faculty members to choose whether or not to integrate transactional drafting into their upper-level doctrinal classes would be far

training such as drafting could become a focus of targeted skills classes, which would include not only drafting, but also interviewing and counseling in connection with a deal, information-gathering and problem-solving, negotiation, and related skills.[75] Another option would be to increase offerings in advanced transactional clinics[76] or skills-training experiences offered in conjunction with legal practitioners as opposed to classes taught by full-time faculty.[77] Some commentators have suggested that interdisciplinary offerings could help in teaching transactional.[78]

Despite the divergence in actual suggestions, certain themes underlie all these approaches. First, scholars who have addressed the topic tend to agree that traditional law school instruction overemphasizes litigation and litigation-based skills. Second, there seems to be widespread consensus that the modern practice of law inevitably requires some familiarity with and at least minimal competency in transactional skills for all attorneys, even those who hope for or anticipate a career in litigation. Third, not all existing faculty will be willing or perhaps even able to effectively teach transactional skills. Fourth, law schools are not identical, and legal education is not fungible. Programs that could work well in one setting may not be suitable in other schools. Fifth, change is likely to be incremental, out of necessity if nothing else. Finally, while not every commentator has explicitly stated agreement with this, at least a widespread consensus exists that more frequent and more varied exposure to transactions is ideal, with integrated opportunities for learning in various formats being urged by most. With those ideas in mind, the options can be evaluated objectively.

Perhaps the easiest starting point for change would be to add a significant transactional-drafting component to first-year legal writing. Every school is

more palatable at most law schools. The problem would then be to ensure that all students are exposed to enough of the necessary skills to gain at least a minimal competency before graduation.

75. A number of articles suggest that schools need to offer distinct skills incorporating transactional drafting and other skills. *See* Susan M. Chesler et al., *Teaching Multiple Skills in Drafting & Simulation Courses*, 2009 Transactions: Tenn. J. Bus. L. 221 (2009). *See also* Karl S. Okamoto, *Teaching Transactional Lawyering,* 1 Drexel L. Rev. 69, 73-74 (2009) (describing Drexel's Law & Finance of Transactional Lawyering, an intensive transactional-skills class with enrollment limited to twenty-five students in each year's graduating class, designed to "serve to link the traditional doctrinal courses of the early years of law school with the 'experiential' and 'skills' courses that come in the upper years").

76. *See* Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic,* 56 N.Y.L. Sch. L. Rev. 233 (2012)

77. *See* Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 Berkeley Bus. L.J. 187 (2012) (discussing options for working with practicing lawyers to offer a range of transactional skills instruction).

78. Seth Freeman, *Bridging the Gaps: How Cross-Disciplinary Training with MBAs Can Improve Transactional Education, Prepare Students for Private Practice, and Enhance University Life,* 13 Fordham J. Corp. & Fin. L. 89, 95 (2008). *See also* Anthony J. Luppino, *Minding More than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations*, 30 W. New Eng. L. Rev. 151 (2007).

already required to have legal writing in the first-year curriculum, so this is certainly one possibility that could be implemented across the board.[79] Much of the support for transactional training comes from LW faculty;[80] they are already skilled at one-on-one interactions and feedback, and this would seem to be a logical place to start. A simple change to the accreditation standards could make this happen.[81] On the other hand, this kind of micromanagement over curriculum could interfere with the benefits of having individual institutions craft their own program of education, targeted to their students' needs. In addition, every course has a finite amount of content, because of the number of class hours and credits offered, available faculty time, and student time limitations. Thus, the question of how much focus on transactional drafting should be included in the first-year legal writing program becomes a question of time, resources, ability, and inclination. Finally, this kind of change alone will not solve all the problems, because if this is the only time students are exposed to prescriptive writing, the choice perpetuates the implicit message that transactional training is less important than dispute resolution.[82]

Nonetheless, because every law school has an LW program, and because this would at least guarantee some exposure to transactional drafting for all students early in their legal education, this seems like an obvious option. In taking this step, of course, a number of important considerations must be addressed. Most legal writing faculty will tell you that their classes already involve extensive one-on-one instruction and that there is little if any time available for additional exercises.[83] Even if a particular school is willing to add more credit-hours to the first-year LW program,[84] it may not be fair to further burden LW faculty, who are already at risk of burning out.[85] As a result, it is important to ask what comes out of the existing course so that drafting could be covered. One answer might be to remove the ubiquitous

79. *See* Am. Bar Ass'n, *Standard 303(a)(2): Curriculum, in* ABA Standards, *supra* note 4, at 16.

80. Most of the articles cited in this paper as supporting transactional skills training are from faculty who teach LW classes.

81. This article does not advocate changing accreditation standards, but that could be accomplished by amending Standard 303(a)(2) or the interpretations thereunder concerning the kinds of writing instruction required. *See* Am. Bar Ass'n, *Standard 303: Curriculum, in* ABA Standards, *supra* note 4, at 16.

82. Not only would this leave transactional training to lower-status LW faculty, it would also mean that transactional training is emphasized in one class while litigation continues to permeate the rest of the curriculum.

83. *Accord* Schulze, *supra* note 11, at 92.

84. These programs are already usually taught in both semesters. *See* 2014 LW survey, *supra* note 5, at vi.

85. "Traditionally, the ABA requirements have allowed schools to hire underpaid faculty, adjuncts, or upper-division law students to teach the core principles of written legal analysis and synthesis. This has led to burnout and high turnover among legal writing faculty." Melissa A. Moodie & Brette S. Hart, *The Missing Link: The Need for Good Writing Programs in Law Schools*, J. Kan. B. Ass'n, Jan. 2005, at 9. *Accord* Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?,* 40 Ariz. L. Rev. 105 (1998) (considering why LW faculty burn out).

brief- or persuasive-writing component and replace it with an introduction to transactional drafting. This assumes that faculty are comfortable in making this change, and that schools are willing to remove brief writing from the first-year legal-writing experience, which might adversely affect other curricular offerings that depend on all upper-level students' possessing such knowledge.[86] Extracurricular moot court programs could also be affected.[87] On the other hand, as previously mentioned, this at least guarantees that first-year law students gain a minimum of exposure to what appears to be a critically important lawyering skill.

An additional option would be to find other places in the first-year curriculum to begin students' exposure to transactional practice. For example, first-year contracts classes could have a practical transactional focus embedded from the outset. Looking at, reading, reviewing, drafting, and negotiating contracts would seem to be another logical starting point for transactional skills, given the subject matter of the class. This would also help address the issue of status, since contracts is a traditional first-year class taught by doctrinal faculty. On the other hand, it is also typically taught in large sections, making substantial skills instruction (which requires relatively intensive individualized student interactions) problematic.[88] While small sections might solve this problem, they would raise the issue of faculty resources, and concern over upper-level electives that could be lost if additional faculty are needed to teach contracts to first-year students. Quite aside from that, as law schools face increasing pressure to ensure that their students pass the bar,[89] and as long as the bar exam includes a focus on the minutiae of contract law doctrine,[90] it will be difficult to find sufficient time in conventional contracts classes to add a significant focus on transactional training. This assumes that contracts faculty agree about the necessity of such instruction and that they possess sufficient enthusiasm and competence to effectively train students in the necessary skills.[91]

86. Appellate advocacy, trial or pretrial practice courses, and appellate practice clinics could be affected.

87. Because most moot court competitions require briefs to be written as part of the experience, the lack of persuasive writing in the first year might affect participation and success in this kind of extracurricular activity.

88. While some schools offer a "small section" experience in one of the traditional first-year courses, including contracts, at most schools "doctrinal courses are taught to a big group of students, anywhere from 50 to 80." Ilene Fleischmann, *Small-Class Guarantee Will Deepen First-Year Law School Experience*, U. Buffalo (Mar. 9, 2015) (quoting Professor Luis E. Chiesa, vice dean for academic affairs at University at Buffalo Law School and touting a new small-section experience for law students at that school), http://www.buffalo.edu/news/releases/2015/03/016.html.

89. *See, e.g.*, Am. Bar Ass'n, *Standard 316: Bar Passage, in* ABA Standards, *supra* note 4, at 24, imposing rules regarding bar pass rates as a criterion for accreditation of American law schools.

90. *See* Goforth, *supra* note 47.

91. As one commentator explained a few years ago, "one of the impediments to law schools becoming more relevant to law practice might be law faculties' lack of connection to law

It might also be possible to embed exposure to the necessary skills in other first-year classes, particularly property.[92] However, even torts or other litigation-based classes could include some exposure to transactions, for example in the context of negotiating and drafting settlement agreements.[93] Unfortunately, all the same problems present with using contracts as a vehicle for teaching transactional skills apply to trying to insert such instruction into other doctrinal first-year courses.[94]

Alternatively, schools could mandate one or more additional upper-level classes focused on transactional skills. Current accreditation standards do require that students receive at least one LW experience after the first year of law school as well as substantial skills instruction, so it might be possible to achieve this alternative without the addition of substantial additional faculty resources if these upper-level offerings are focused on transactions.[95] This assumes that there are faculty members willing and able to teach such classes, and it relegates transactional-skills training to the upper-level curriculum, again reinforcing the notion that these skills are less important than those focused on disputes. For these reasons, a better option would be to add at least some transactional-skills instruction in the first year, as well as adding upper-level options.

An alternative to offering distinct transactional-drafting and -skills classes would be to teach the skills across the curriculum. A number of commonly taught courses could include at least some transactional training. These would include domestic and international commercial and business-related courses; wills, estates and trusts; real estate transactions; health law; and classes covering other regulated industries. Skills classes that primarily focus on interviewing

practice." Emily Zimmerman, *Should Law Professors Have a Continuing Practice Experience (CPE) Requirement?*, 6 Ne. U.L.J. 131 (2013). It is not just that law professors may lack recent practice experiences; many may not have practiced at all or at least never engaged in a significant amount of practice. "An increasing percentage of law faculty members today lack significant practice experience. Indeed, significant experience practicing law may actually disqualify an applicant for a law faculty appointment." William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 Baylor L. Rev. 201 (1996) (citing Paul D. Reingold, *Harry Edwards' Nostalgia*, 91 Mich. L. Rev. 1998, 2001 (1993)).

92. "Students in property law should see a title policy and understand what purpose it serves when learning about publicly recording real estate documents." Chad G. Asarch, *The Challenge of Practical Legal Education: A Study in Real Estate Transactions*, Colo. Law., July 2014, at 101.

93. "Settlement agreements are routinely used in litigation practice . . . [because] approximately 90% of the cases settle, and a settlement agreement is, of course, a contract." Lenné Espenschied & Bruce G. Luna, *Shaken, Not Stirred: Integrating Transactional Skills into Core Curricular Courses on Contracts and Commercial Law*, 14 Transactions: Tenn J. Bus. L. 535 (2013).

94. All first-year courses are typically taught in large sections, and concerns about the practical background and experience of doctrinal faculty apply regardless of subject matter, as does the reality that many of these long-tenured faculty have no real desire to engage in practical skills training with their students.

95. *See* Am. Bar Ass'n, *Standard 303(a)(2): Curriculum, in* ABA Standards, *supra* note 4, at 16.

and counseling clients, negotiation, or even mediation and arbitration could also have a transactional base or at least include a transactional component. While this could be an ideal way to enhance students' opportunities to hone transactional skills, a number of potential problems come with this approach alone. First, it is not likely to be easy to encourage large numbers of faculty members to agree to undertake the task of substantial skills instruction. Aside from any concerns over status, a number of disincentives in place are likely to discourage faculty members from spending the needed time for effective skills training. Not every faculty member has the ability or interest in teaching transactional skills, especially not when it is so time-intensive. Even if they might be able and willing, they might be extremely reluctant to take the time away from other projects and initiatives.

There might be ways to manage these burdens, such as offering elective limited-enrollment skills lab credits as an add-on that interested students could choose. Adjuncts might be used to help create and evaluate skills-based assignments. Courses in which faculty members accept these additional obligations might be offered with limited enrollments. One problem with this approach would be ensuring consistent exposure to essential skills for all students across the curriculum, but this could be a very powerful way to increase the visibility and prevalence of transactional skills. Used in conjunction with a required first-year experience, in which every student would gain at least a minimal familiarity with transactions, this kind of curricular reform could be incredibly valuable for students.

Perhaps the least radical change for law schools would be the addition of distinct upper-level electives focused on skills training. These could be courses such as transactional negotiation, or transactional drafting.[96] Unfortunately, while this might be the least burdensome manner of introducing such training into the curriculum, it might also be the least satisfactory unless it is also tied to other changes. Relegating transactional training to upper-level electives sends a clear message that it is less important than litigation skills, perpetuating the myth about the relative unimportance of transactions in the modern world. It might be easier and cheaper to staff a limited number of electives, but this is also not likely to reach all students. On the other hand, offering transactional-skills training anywhere is better than not offering it at all.

Other options exist, but they are all quite expensive and unlikely to be universally available to students. Though advanced transactional clinics can offer a superb training ground for students anticipating a transactional practice, they are unlikely to have room for all students to benefit, unless a particular law school has a focused transactional mission. There are also limits on the clinical experience, because the kinds of work are dependent on

96. If the school also has a basic LW class that includes significant exposure to prescriptive writing, these could be offered as advanced electives in a way that is truly advantageous for students anticipating a practice focused on the particular kinds of drafting being covered. Legislative drafting could also be taught this way.

the needs of real clients. Not every student will see every important kind of project, and exposure to various issues will vary from student to student.

Similarly, interdisciplinary offerings might offer students a realistic exposure to business transactions, but they raise a number of issues about coordination and expense allocations among different academic departments, and are likely to be very difficult to coordinate as a practical matter. Still, it is certainly worth considering whether joint programs could significantly improve the educational environment for students interested in learning transactional skills in realistic settings.[97]

As this discussion makes clear, a variety of options are available for faculties willing to experiment with transactional training, and clearly a great need exists for such experimentation to take place. As schools undertake the newly mandated process of developing programmatic learning outcomes,[98] the role of transactional skills in the professional lives of lawyers should not be overlooked. This article seeks to explain the need for these efforts.

97. Independent of course offerings, law schools should encourage students to think about the transactional nature of law practice. Business Law groups can help expose students to relevant issues and practitioners with transactional experience in the real world. Faculty can participate in symposia on transactional issues. This can even be done in conjunction with pro bono and community outreach programs, which would serve multiple valuable goals at the same time. Sponsored presentations for students from alumni and other members of the practicing bar can help focus attention on issues related to prescriptive writing.

98. Law schools are now required to establish and publish learning outcomes, which must include competency in written communication in a legal context. Am. Bar Ass'n, *Standards 301(b): Objectives of Program of Legal Education* and *302(b): Learning Outcomes, in* ABA Standards, *supra* note 4, at 15. While these provisions do not expressly identify transactional skills as an essential component of experiential learning, the evidence that it should be considered as such appears overwhelming.