

TEACHING TRANSACTIONAL SKILLS IN UPPER-LEVEL DOCTRINAL COURSES: THREE EXEMPLARS

RACHEL ARNOW-RICHMAN*

I will be speaking about integrating transactional skills and drafting in the upper-level employment law course. My remarks differ somewhat from many of the presentations so far which consider transactional skills primarily from the perspective of the business and commercial law curriculum. For this reason, I will spend the first part of my time discussing why I espouse a transactional mindset in teaching employment law and the synergies I see between these two legal disciplines. I will then offer an example of how I incorporate transactional skills in the substantive employment law course and talk about the pedagogical value of exposing students to skills in this way.

What do employment law and business law have in common? Perhaps some of you see an obvious connection. Even if you do not, you are probably not surprised by the proposition that there is one. That is because, as transactional lawyers and scholars with transactional practice experience, you have likely been forced to think through the employment law consequences of the deals you have done. Perhaps you have structured employment agreements for the principles retained in an acquisition, or inherited the collective bargaining agreement of a going concern, or faced any number of similar issues, all of which are part and parcel of transactional practice.

As an academic with a foot in each camp, I must confess that most employment law faculty do not share the same cross appreciation for business issues. This is likely due in part to some of the concerns raised previously in the conference about the absence of significant practice experience among faculty. The problem is compounded in the case of employment law faculty who are unlikely to have engaged in transactional practice in particular and may not have had an opportunity even to represent corporate clients in a litigation practice. As a consequence, I believe there is a great deal of misperception within the legal academy about what employment lawyers do, particularly with respect to management-side employment work, which is the focus of my remarks today.

Two interrelated problems have conspired here, both of which reflect the larger issue that is the theme of this conference. The first is the presupposition that

* Rachel Arnow-Richman is a Visiting Associate Professor at Fordham Law School and an Associate Professor at the University of Denver College of Law. She teaches Contracts and Employment Law. Prior to entering law teaching, Professor Arnow-Richman practiced in commercial litigation and management-side employment law at Drinker Biddle & Reath LLP in Philadelphia, PA.

employment law is primarily a litigation field. Certainly there is a great deal of employment litigation, particularly federal employment discrimination litigation, owing in part to the reforms wrought by the 1991 Civil Rights Act.¹ But the last time I checked, there was a great deal of litigation between commercial and business entities as well. The distinction between litigation and transactional work is a distinction in skill not substance. Large law firms serving large corporate clients have structured themselves along these lines, with different groups of lawyers handling different types of work. But that is merely because such firms have historically had the work volume and resources necessary to sustain two legal departments offering two distinct skill sets. There is nothing inherently transactional or litigation-based about any particular area of substantive law.

Indeed, employment law is a field in which lawyers use both sets of skills—we both make our beds and we lie in them. That is to say, management-side practitioners draft all kinds of written instruments—employment contracts, non-competes, severance and release agreements, and alternative dispute resolution agreements—as well as litigate the consequences of those agreements when they are breached. They are also involved in the development, drafting, and adoption of internal management policies, such as family/medical leave policies, nondiscrimination policies, and dispute resolution policies. In these ways, employment lawyers act much like business lawyers, drafting documents and counseling clients about how to advance their interests and manage risk.

The second piece of the problem is the public law/private law divide that is felt so keenly among some faculties. This is a distinction of questionable substance that has been misapplied much as the transaction/litigation distinction has. I think that many faculties and curricula have, consciously or unconsciously, assigned employment law conceptually to the public law sphere, and I am not sure why that is. It may be due, once again, to the volume of civil rights-oriented litigation in the field, or to the prevalence of federal statutory law in the area. We in the field joke about the alphabet soup of employment law—the FLSA,² the ADA,³ the ADEA,⁴ the FMLA,⁵ to name a few, many of which were enacted in the last quarter century. But if the workplace is heavily regulated, so too is everything else. That would include, for instance, securities trading, something that is obviously the core of the business

¹ Pub. L. No. 102-166, 105 Stat. 1071. The Act amended Title VII of the 1964 Civil Rights Act, giving victims of employment discrimination access to jury trials and more lucrative remedies.

² The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2000).

³ The Americans with Disability Act of 1990, 42 U.S.C. § 12101 (2006).

⁴ The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2006).

⁵ The Family Medical Leave Act of 1993, 29 U.S.C. § 2601 (2006).

or “transactional curriculum.” We live in a regulatory state. Thus, the fact that something is regulated in some part cannot be the baseline by which we designate a field private or public.

What I would propose for purposes of curricula is that rather than thinking about public law verses private law—an abstract concept useful, if at all, in some theoretical scholarship—that we think more about the kinds of skills and analysis on which different practice areas are likely to draw. We should ask whether a lawyer’s primary responsibility will be to effectuate client intent *ex ante*, or alternatively to deal with the consequences of particular actions or inactions, some of which may have been fortuitous or unplanned. Judged in this way, the management-side employment lawyer has much more in common with a corporate lawyer than, say, a personal injury lawyer. His or her job is to enable the client to achieve a particular result in the context of a planned relationship with an eye toward complying with applicable public directives and ensuring the availability of public enforcement should it be required.

All of that is to say that there are strong synergies between these two disciplines that make employment law an excellent platform for both teaching transactional skills and instilling a transactional mindset. Employment is also a context that is highly accessible to students. The situations that arise in teaching this course consist of a series of small deals between a single company and either its workforce or an individual employee. This contrasts sharply with the complex transactions students will encounter in more traditional business courses. Finally, incorporating transactional skills into a basic employment law course allows for enhanced transactional training without wholesale curricular reform. In opening the conference, Professor Tina Stark, styled her presentation a “fantasy curriculum,” explicitly recognizing that opportunities to raze existing curricula and build anew are few and far between. What transactionally minded educators need to do is devise modest, scalable approaches to teaching these skills that are not contingent on more wide-reaching reform. Professors Rob Illig and Therese Maynard offered examples of this type of approach earlier in the program in describing the specialized transactional skills courses that they teach at their institutions. What I am suggesting here is even more modest. I am proposing bringing this type of instruction into an existing doctrinal course.

Let me now turn to a more detailed explanation of how I leverage transactional teaching opportunities in my class. As I mentioned previously, there are two main contextual opportunities for teaching transactional skills in employment law—drafting contracts between the employer and its employees and developing workplace policies. The instructional material I use is my text book,

*Employment Law: Private Ordering and its Limitations.*⁶ This is not a drafting book; it is a traditional case book, built around the theme of employment as a transaction. It takes a problem-solving approach, with hypothetical scenarios interspersed among the cases, like what you might see in a UCC casebook. Some of the problems are litigation oriented, but most are not. For instance, in one problem, the student is told that a foreign company wants to open an office in the U.S. The student is given the parental leave policy that the client has used abroad at its home location and asked how the policy ought to be revised to comply with American law. In another example, students read three cases about non-compete agreements, at the conclusion of which, a problem asks them to consider whether a different type of written instrument might better have accomplished the employer's goal. Would some other document—a different type of restricted covenant, a training repayment agreement, or even an agreement with a different party, such as a “no poaching” agreement with the competition—have better protected the client's interests? As a final example, students are given a chance to draft employment contracts. They read a case about a written employment contract that was held to be ambiguous on a key issue related to deferred compensation. A problem then asks students to revise the agreement to better express each side's interpretation and to imagine how those versions of the agreement might be reconciled.

Many of these examples are amenable to simple classroom discussion and often that is how I use them. In the last few years, however, I have taken one problem and ratcheted it up to a full-blown, graded assignment. I ask students to revise an employer's personnel manual in light of case law suggesting that the manual could have contractual significance. If you teach contracts, you are likely familiar with the law in this area, but I will provide some brief background by way of telling you what cases I assign. Students read *Woolley v. Hoffmann-LaRoche, Inc.*,⁷ the key New Jersey Supreme Court case finding that personnel manuals can have the force of contract. The *Woolley* court held that the language in the defendant's manual describing the applicable procedure and permissible reasons for termination created an implied-in-fact contract that termination would occur only for just cause. The court went on to say that if an employer does not wish to be contractually bound by promises in its personnel manual, it can avoid that result by adding disclaimer language stating that the manual is not intended to create a contract and employment remains terminable at will.

⁶ TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN & CHARLES A. SULLIVAN, *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* (2007).

⁷ *Woolley v. Hoffmann-LaRoche, Inc.*, 491 A.2d 1257 (N.J. 1985).

Students next read *Conner v. City of Forest Acres*,⁸ a South Carolina Supreme Court case interpreting the disclaimer proviso in *Woolley*. The employer in that case placed the requisite disclaimer language in its personnel manual, but even so was unsuccessful in seeking summary judgment on the plaintiff's breach of contract claim. The reason for that result was that the handbook contained numerous statements at odds with the disclaimer, such as assertions, in mandatory language, that discipline "shall be" of an increasingly progressive nature. As a result, the court found that it was possible for an employee to reasonably read the manual as contractually binding despite the disclaimer and concluded that a trial was necessary to resolve the question.

The final case students read is *DeMasse v. ITT Corp.*,⁹ a case dealing with what is now the outstanding question on the enforceability of employment manuals—how does an employer revise them? There is a split of authority as to whether the employer can change manual terms unilaterally or whether new consideration and formal modification is required. *DeMasse*, an Arizona Supreme Court case, is a divided opinion in which the majority favors formal modification, while the dissent would hold that employers can change terms unilaterally. Students thus get a taste of the rationale on both sides of the jurisdictional split.

I put the students in groups of three. Each group must turn in a revision of the text of the manual, which I lift directly from the *Woolley v. Hoffmann-LaRoche* case. Students must also submit a cover memo to the client explaining their changes. They are allowed to use only the three cases I have described and the notes and materials that follow in the text book. No outside research is permitted. The directions are to revise the manual in light of these cases so as to ensure that in the future the client will not be at risk of contractual liability should it fail to comply with all of its policies. Students are also instructed to ensure that management's interests in having the manual are preserved in the revision process. What are those interests? Here students have guidance from the *Woolley* decision, which talks about the policy implications of its rulings, and we draw these out in class. The manual serves management's interest in creating procedures for its supervisors to follow in order to maintain consistency across its operations. More importantly, to the extent the policies contained in the manual are favorable to workers (such as a policy granting job security absent cause), the manual creates positive workforce morale. In turn, it is likely to enhance productivity and increase the value of the company's human capital assets. So the task is to balance those two things—the client's desire to

⁸ 560 S.E.2d 606, 612 (S.C. 2002).

⁹ 984 P.2d 1138, 1140 (Ariz. 1999).

eliminate the risk of liability and its desire to preserve the managerial value of the handbook.

In the remainder of my time, I will touch on the value I see in the exercise and what I hope students take away from it—the learning points, if you will. First, the exercise recasts the notion of rule application. We have talked a good bit already in the conference about how deal lawyers' use of legal precedent differs from the application of rules to stagnant facts. I like to talk about deal lawyers' work as creating facts in response to law. This idea of creating facts is exciting to students. It not only teaches critical thinking skills that are crucial to transactional practice, I think it makes them more skeptical consumers of the facts that they read in other cases. They realize that those facts were engineered at one time too.

Like other forms of rule application, the exercise of creating facts from law enhances the degree to which students see nuances in the doctrine. For instance, the need for disclaimer language under *Woolley* is something that students understand quite easily. They struggle a bit more with the result in *Connor*, but understand, at least in theory, the need to edit out promissory language in their client's handbook. When they go to do these two things in the context of the exercise, however, it falls apart on them. The second learning point then is just how hard it is to pull off what you understand conceptually once you put pen to paper and actually do the drafting. Crafting the disclaimer proves to be quite difficult. A good disclaimer has a number of components—it must disclaim contractual status, it must reiterate that employment is at will, it must reserve the right to modify—it is not a single concept. The editing portion of the revision—the ability to identify promissory language and figure out a way to change it consistent with client goals—is even harder. While I would say, overall, that students enjoy the exercise very much (according to the feedback I have gotten), at the same time they are generally frustrated about how long it takes and about the differences of opinions they encountered in their group. Which is precisely the point. To the extent that members of the group view and value particular language in different ways, the group dynamic simulates a negotiation experience between parties with competing interests. What I hope is that each group will come up with a range of possibilities as to where to strike this balance between risk avoidance and morale enhancement, generating a spectrum of options. I frequently remind students that their goal is not to eliminate risk—and indeed the impossibility of fully eliminating risk is another learning point in the exercise—but rather to best serve the client's interest.

This brings me to the penultimate learning point of the exercise. At the end of the day it is the client who decides these questions, and that comes as a great relief to students. I encourage students to use the client memo as an opportunity to provide options to the client where they are uncertain about what to recommend.

This again contributes, I hope, to their creating a continuum between extremes akin to what Professor Stark described in the context of teaching students about drafting. In her example of a contract for the sale of a car, the buyer wants an assurance that the vehicle will have no more than fifty thousand miles while the seller wants something less specific. In the end, they will wind up agreeing to a range or a mileage approximation. This is effectively what happens with the personnel manual revision with the two extremes being a manual that strictly protects the employer from liability, but does little to enhance worker moral, and a manual that instills positive feelings and loyalty among employees but exposes the employer to significant legal risk.

There is a final lesson here about the role of the lawyer. The lawyer, of course, is the expert; he or she ought to be able to bring something to the table beyond just responding to what the client presents as its issues and interests. I give students a taste of this in the exercise. The assignment is to revise the text of the manual. Our hypothetical client does not ask about, and the exercise directions do not say anything about, how the revised manual should be disseminated to the workforce. But students have read *DeMasse*, the case about modification, and they are told explicitly that it is one of the three cases they are to take account of in completing the assignment. Very few of them recognize that what they are doing is within the *DeMasse* paradigm of modifying a contractually viable handbook and that, depending on the jurisdiction, the modification may not be enforceable absent new consideration and assent.

You can imagine that when we come to this issue in debriefing the exercise students invariably say, "You didn't tell us about that." This brings me to the point on which I will close, which is actually an admission about the limits and the challenges of the exercise. A significant one for me is managing my expectations of student performance and deciding how strict to be in administering (and grading) the exercise. With respect to the modification issue, I want students to have a realistic experience. In real life, the client does not tell the lawyer everything he or she needs to know. That is because the client does not know everything and may not recognize what is important from a legal perspective, which is why the lawyer has to use his or her knowledge proactively. At the same time, I struggle with the fact that students generally have not had an experience like this before in their law school career. Do I treat the exercise as a trial-by-fire or do I hold their hands? This all happens in the context of a substantive course, so there are significant constraints on the amount of time I can spend doing the latter.

I would like to end with my own disclaimer. I am not a skills teacher, nor am I a business law scholar. I am a doctrinal teacher working in a field in which the

pedagogical focus and the scholarship is concentrated on the public law aspects of the field. I am in the process now of writing an article that expands the themes and ideas in this presentation,¹⁰ so I would welcome feedback from those of you who have spent many more years than I contemplating the importance of transactional skills training and its relationship to the larger curriculum.

LISA BLISS*

I am Lisa Bliss and my colleague, Sylvia Caley, and I and are talking today about teaching transactional skills in the context of teaching wills and advanced directives. We have provided for you in the materials all of the written pieces of a series of exercises that we do and our hope today is to just talk a little bit about why we are teaching transactional skills in the context that we are doing it in. We are going to tell you about how we use this exercise and what students learn from it and then give you some ideas to think about in terms of how you might replicate or use this as a jumping off point for something to do in one of your own classes. We will also talk about the pitfalls and some of the opportunities that doing this creates.

So, I think you heard us say that we teach in a clinic that is part of a medical-legal collaborative, and I think it is helpful for you to understand the backdrop of where we are teaching these skills. Our clinic is pretty new and it is part of a community collaboration between the Atlanta Legal Aid Society, Children's Healthcare of Atlanta, which is the Children's Hospital here, and Georgia State University College of Law. So, all of our clients come to us because they are low income families who have a child that's being treated at the Children's Hospital. So, we have that illness or a child with an illness as a backdrop to what we are teaching.

So, why are we doing this? We made an affirmative decision when we started our clinic—it's about a year and a half ago—that we wanted to teach a number of skills and our goal is to create better lawyers and help students achieve some competence not only in what they are doing in our clinic, but hopefully give them some skills that they can walk away with by the time they leave. Our clinic is a general civil practice so all kinds of things can come in the door, but one of the things that we do offer to all of our clients is the preparation of a will and advanced directives. One of the reasons for that, I mean everybody needs a will but not everybody has one, and families who have children with special needs really need to think about planning ahead in terms of if something were to happen to them—what

¹⁰ Rachel Arnow-Richman, *Employment As Transaction*, 39 Seton Hall L. Rev. 447 (2009).

* Lisa Bliss is Assistant Clinical Professor and a Co-Associate Director of the Health Law Partnership Legal Services Clinic at the Georgia State University College of Law.

things are they going to put in place for care for these special needs children? So, it is a good thing to have no matter what, it is a good thing to do no matter what, and the wills exercise we are discussing is a very good opportunity to get students involved in practicing certain skills before they meet with their real clients. So, we think it is the kind of knowledge and experience that all lawyers need and that they are skills that can be transferable. So, the things that we learn I think can be useful in any other context—any other lawyering context.

We also want to integrate the substantive law with the clinical experiences. We think the exercise is a good assignment for 2Ls and 3Ls, and probably 1Ls too, but that is a different conference. So, it helps us further our goals, offer something to our clients and helps the students. So, how does it work? Our goal is to teach basic interviewing skills, counseling skills, drafting skills, developing facts and application of facts to the law. What we have provided for you is the fact pattern that we use and it is part of a series of exercises. So, you could choose to assign only one piece of it or you could assign the whole series of exercises. It can work in a number of different contexts, and there are a number of different ways to handle it in terms of how you have the students perform the exercises. They can be done in class as part of a role play that faculty observes or they can be done as an out-of-class assignment, but essentially the main goals are to teach interviewing, counseling, and drafting.

So, in the materials there is an index that shows you the different materials that are included in the exercise. There is an interview fact pattern, which includes role play instructions for the student lawyer, and there are instructions for the client, or the person who is playing the role of the client. There is a counseling fact pattern and again there are role play instructions for both the lawyer and the client role for the counseling conference. There is a wills questionnaire that is already filled out for this specific client role. The use of this questionnaire is something that we do as part of our practice; it is very hard to get clients focused on some of the hard decisions that need to be made when you are drafting a will and so we like them to have that questionnaire ahead of time, so that they can start thinking about some of the decisions they need to make. Sometimes they come in and the questionnaire is not entirely filled in, but it provides an opportunity for them to start thinking about some of the choices that they are going to have to make when the will transaction is ultimately completed.

So, in the role play, the questionnaire is filled out for this client, and it is the point of departure for the initial interview. There is also a memorandum of law included and the reason that's in the materials is to summarize the legal issues for the person doing the counseling and the drafting of the will—some of the things that

need to be explained to the client so that the students don't have to go and do outside research in order to perform this exercise. So, the problem is contained. The fact pattern, as you will see, if you sit down and read it, is very, very dense. It involves a client named Gina DeLustro. She has five children, they are from different fathers. There are different situations with each father in terms of the level of involvement and in terms of their legal status. There is a sick child in the picture, and to make matters worse, the client herself has a terminal illness, so the preparation of her will needs to be done and it needs to be done soon.

There is a very rich fact pattern. You could certainly take this and cross out half of all these details. I mean sometimes when we do it, we have talked about there being too much, but it is real. I mean this is very representative of the type of clients that we see, number one. And number two, students are going to get all different kinds of things. They may not all get the same thing out of this problem, but there are lots of learning opportunities here. So, that's one of the reasons that it is so dense. But you could certainly cut way, way back on all of those facts if you wanted to make it a shorter exercise. We start with a classroom, more of a traditional type lecture where we just talk about the law of Georgia regarding wills, advanced directives, guardianships, etc. So, that kind of lays the foundation for the exercises, just the basic substantive law.

Also, as part of our clinic we have class exercises and lectures on interviewing and counseling. So, the students are learning those skills as a series. We continue to build all of those things but in terms of preparation for this problem. That's one of the things that we do. So, we have generic, practice sessions, short exercises in class where students are learning interviewing and counseling skills. And then, ultimately, it moves into this simulation of the wills and advanced directives problem.

There are lots of opportunities for feedback here. You can do it in writing, or you can do it during class as students are playing the role. It depends how you arrange the use of these materials, but there are a number of different ways that you could do it. You could have students go off after class, have it be an out-of-class exercise and then have them come back in and report how things went, or do peer review or peer feedback, that kind of thing. You can use your witnesses if you decide to have outside witnesses, which is something that we do, but that is definitely not the only way to do it. You can choose to videotape the class. There are a lot of different opportunities for learning depending on the context of your class and your goals. So, that's how we do what we do. I am going to let Sylvia talk a little bit about how our materials could be adapted for use in other courses and then some of the challenges and the lessons that we have learned by doing this exercise, and I think we will have time for questions at the very end.

SYLVIA B. CALEY*

So, why are we talking to you in a doctrinal, higher-level environment about doing—replicating a clinic experience? We really believe that this is transferable. We have students who are 2Ls and 3Ls in our clinic. Some have had wills, many of them have not, and for those who have had a wills class they would say, “Gee! We wish we had actually been able to create a will while we were taking the class, things would have become more concrete—more real. I would have grasped them and retained them longer.” We have students who haven’t had wills yet, and we really make a commitment to giving them the fundamentals so that they feel relatively secure in actually interviewing and counseling a client in drafting a will. (After they get a little mini-wills class from us, some law students actually decide that they don’t want to take a wills class.) The fact pattern could be massaged and changed slightly so that it could be used in other upper-level courses such as trusts and estates. As Lisa mentioned, all of our kids are sick and some of them are really sick. Some of them are disabled and will always be disabled, and their parents need to plan. Trusts and those kinds of issues are very concrete and real, and we definitely counsel our families so that they should consider these issues.

Drafting courses: Our students want more real-life experiences in creating usable documents. In our clinic, in addition to learning how to do a will, they learn how to write a letter. The vast majority who comes to us have never really written serious letters before, so we are starting at sort of very basic elemental issues and the more that we can give them concrete examples of real practice in real life, it is important. And then skills courses: I know that skills courses are always looking for realistic scenarios for interviewing and counseling, taping sessions and for feedback and whatnot, and we have a ready packet of materials for this.

Now, as we said we have been at this for about a year and a half, and it is working very well. But it is not without its challenges, and one of the big challenges is to make the course as close to real life as possible. The client needs to be someone that the student doesn’t know. It helps a lot. It also is important that the client be prepared, and we are asking a lot. These materials are dense, so to the extent that we can have repeat performers—we really appreciate it. We have learned from colleagues of ours around the country that some programs have access to professional lawyers, drama people, actors, and whatnot. We don’t have that, but we do have a ready pool of folks who work for a Volunteer Lawyers Foundation and for Atlanta Legal Aid, one of our partners. They view this as a perk—coming out,

* Sylvia B. Caley is an Assistant Clinical Professor and a Co-Associate Director of the Health Law Partnership Clinic at the Georgia State University College of Law.

giving back, and helping to train the next generation of lawyers. They enjoy doing this, but it is a big obligation and is only as good as they are prepared. Now, the one nice thing for us about using people at Legal Aid or with our Volunteer Lawyers Foundation is that they have a lot of experience with the type of people we see as clients. So they can put a realistic spin on their behavior and what they are saying, and that's very helpful.

Other challenges and opportunities involve our students' level of maturity and preparedness; courses that they may have had; and their personal self-confidence. We have had students freeze up in the middle of an interview and just say, "I can't do anymore," and walk out of the room. It was a learning opportunity and the student got a lot out of it—after the fact. She was terrified at that time, but students' knowledge is something that we always have to work with in making them feel prepared and comfortable to move forward, and of course their own dedication to learning is a big part of that equation.

As Lisa mentioned, the facts are complicated and we have to worry about whether we should reduce them. But the facts are based on a real-life case of ours, so it is not unique. We have seen many such situations, and we are trying to teach a slice of life, so we have decided that we shouldn't dumb down the exercise. The interviewing and counseling issues are always a challenge. Most of the students, particularly the second-year law students, haven't really had any experience in interviewing anybody on any kind of a level, but here we are asking them to hold a professional interview and a counseling session on some important issues of law and fact. That is a bit of a challenge. It takes time, and it would be a bit of a challenge in a doctrinal course, but from what we are hearing from students, they certainly would appreciate the opportunity to be able to do it.

We had an interesting experience the last time we offered this in the spring semester. We had all of our witnesses and clients lined up to come in and we had one of Atlanta's famous torrential downpours that shut down the highways—our class is at 9 o'clock in the morning—so there is not a whole lot of elasticity about travel time and so there are always issues. All the best plans sometimes can be laid aside because of mother nature, but in the end they all had a good experience.

Now, what are the opportunities for doing this—particularly in an upper-level substantive course? Well, it is an opportunity for schools to recognize that there are pro bono opportunities here for programs. Once you have a mechanism by which you can teach students a skill that is transferable to the community, then you can make it part of a street law program. You could offer a pro bono wills program or another pro bono project within the law school. We have found all of these things to be very effective for us. Our wills program is a real community

service: our clients really appreciate it, and service providers appreciate that we are helping families plan for the future and prepare for their children.

One of the things that we include in our class is asking students at least to think about creating their own advanced directives. It is very hard to interview and counsel a client on an advanced directive if you haven't contemplated those issues in terms of yourself. So, we ask our students to at least think about the decisions that they would make and hopefully execute the document; everybody needs one of these and it is an opportunity to do it within our class.

Finally, it brings to life, I think, for students that we are dealing, in our clinic particularly, with the real slice of life. Some of the issues that come within our civil clinic are cut and dry, predictable kinds of issues, but when you are dealing with a family like Ms. Delustro's and you are counseling her about her rather dark circumstances, it brings to life some real challenges that others who are not as fortunate have to deal with. It is an eye-opening experience for students, and I think one of the most satisfying things that we have gotten out of doing this part of our medical-legal collaborative is that we have a pretty robust evaluation and research component. We evaluate everybody including our students and one of the questions we ask them is if they feel that they will engage in pro bono activities once they leave law school and go into practice, and thus far 100% say that they will do that. And while we are trying to produce better lawyers, we also want to encourage the notion of giving back upon graduation and we have given them a takeaway skill that is a very useful one.

MICHAEL A. WORONOFF*

I teach Venture Capital and the Start-up Company at UCLA,¹¹ and I'd like to talk about three things today: First, I'd like to explore why I believe venture capital is a perfect course to teach transactional skills. Second, I'd like to share some thoughts on the best way to organize a venture capital course. Third, I thought I'd survey some of the teaching materials that are available in this area.

*Mr. Woronoff is a partner at Proskauer Rose LLP and Adjunct Professor at UCLA School of Law, where he developed and teaches "Venture Capital and the Start-up Company." J.D., University of Michigan Law School, 1985; M.S.I.A., Krannert Graduate School of Management at Purdue University, 1982; B.S.I.M., Purdue University, 1982. He may be reached at mworonof@umich.edu.

¹¹ See Michael A. Woronoff, *Course Description: Venture Capital and the Start-Up Company*, <http://law.ucla.edu/home/index.asp?page=245> (last visited Feb. 1, 2009).

Let's begin by exploring why venture capital is such a good subject to teach transactional skills.

At the recent Georgetown Law "Future of the Global Law Firm" conference, both academics and practitioners complained that legal education offered today is irrelevant to practicing lawyers.¹² It is not that there is a lack of training in substantive areas (the reported consensus was that 3Ls graduate with sufficient substantive law training), but rather that students do not receive enough training in the non-legal skills that are necessary for success.¹³

I disagree with the first part of this thought. I actually think we don't do that good of a job of teaching substantive skills to students who want to be transactional lawyers. This is not because professors do a bad job teaching the transactional courses; the problem is that students are provided too many electives and too little guidance. Consequently, more often than not, students just don't take enough of the courses that are likely to be important to their practice.

I am a practitioner in Los Angeles, which—believe it or not—is a small legal community. I run one of a handful of the sophisticated transactional practices in the region.¹⁴ As a result, I see a large proportion of the 2Ls and 3Ls in the marketplace who want to do sophisticated corporate transactional work. My observation (admittedly anecdotal) is that a large percentage of them—well over half—will never take a course in securities law. That is a crime. Moreover, it's not just securities law; many law students never take accounting, administrative law, bankruptcy, commercial transactions, and a host of other valuable classes. Time and time again I talk to students who *know* they want to practice transactional law, but have not taken—and do not plan to take—these courses. So, I disagree with the conclusion

¹² See Bruce MacEwen, *Legal Education Reform?*, ADAM SMITH, ESQ., May 20, 2008, http://www.bmacewen.com/blog/archives/2008/05/legal_education_reform.html (“[A] surprising consensus of remarks . . . spontaneously arose at the Georgetown Law symposium. A chorus of voices, including managing partners and legal academics alike, criticized the current state of legal education as antique, out of touch, and irrelevant to the practice of law today.”).

¹³ *Id.* (“The . . . criticism centered on the theme that while legal education might have prepared associates to have a fighting chance of starting off on the right foot as competent technicians 20 or 40 or 60 years ago, technical acumen is today taken for granted, and the real ‘action’ over whether a 3L can mature into an accomplished practitioner has much more to do with qualities such as emotional intelligence, empathy, the ability to read personalities, judgment under pressure, and a knack for gaining the trust of one’s peers and co-workers. If these are the traits correlated with success, then the conventional law school curriculum has completely lost touch with what practitioners need to succeed.”).

¹⁴ *Leading Southern California Transactional Firm*, LOS ANGELES DAILY J., Supplement 11-12 (June 25, 2008).

that 3Ls are graduating with sufficient substantive law training, but that issue is for another day.

I obviously agree with the second conclusion or I wouldn't be at this conference: Students do not receive sufficient transactional skills training. Law schools that wish to offer a curriculum relevant to the practice of law need to increase their skills training options.

Now, for skills training to be effective, students need some level of prior substantive knowledge. For example, students will get little value from an exercise to negotiate a fiduciary duty out provision in a merger agreement if they have not yet learned the body of applicable law. Perhaps this prerequisite of a knowledge base is why many current proposals center on integrating skills training into existing substantive courses, in effect teaching both law and skills at the same time.

Most of the time this proposed solution is unworkable, however, because the substantive law is too voluminous and complex. In most courses, there is barely enough time to teach the substantive law adequately. While skill training exercises are useful in developing skills, they are inefficient in transmitting knowledge. Outside readings and in-class lectures are essential to provide a thorough understanding of complex material. So, substituting exercises for other material in a traditional class would necessarily decrease the amount of substantive knowledge taught. Compounding this problem is the fact that, for skills training to be effective, using one exercise (or even a few) is insufficient. Repetition is essential. So, unless extra class time is added, much is lost by merely adding skills training to an existing course.

This is why I like the idea that Tina Stark floated in her keynote address: add a required contract drafting course to the curriculum.¹⁵ That way you can teach students all the basics they need to know about contract law in the traditional course. Once the students understand contract law, the skills training will be much more effective. In his remarks, Rob Illig described a similar solution he's implemented at Oregon. While students are enrolled in a (what I imagine to be rigorous) doctrinal

¹⁵Tina L. Stark, *My Fantasy Curriculum and Other Almost Random Points*, *Emory Law and Economics Research Paper No. 08-29*, 7, available at <http://ssrn.com/abstract=1158506> ("I do not believe, however that the contracts course should morph into a drafting course. There is too much else to learn in contracts. Instead, the fantasy curriculum includes a required three-credit contract drafting course.").

M&A course, they have the option to take a one-credit transactional skills “lab” taught by practitioners.¹⁶

Unfortunately, I don’t have this luxury. As an adjunct faculty member, I only teach one course a year, and I can’t really convince the school to add a transactional skills lab to accompany my course. I had to structure a course where I don’t have to spend too much time teaching the substantive law. The perfect solution was a venture capital course.

The great thing about venture capital is that, because of the nature of the practice, the course tends to be broad rather than deep. Venture capital is not a subject like M&A. M&A is deep and complex. Venture capital is very broad but shallow. And the students already know much of the applicable substantive law: most of it is contracts, which they were required to take during their first year, or business organizations, which is typically a pre-requisite to a venture capital course. The rest is a hodgepodge of very basic law in a variety of areas, such as securities, tax, labor, and employment law. As a result, students can learn the substantive law quickly, allowing the instructor to focus more on the business aspects of the deal and the counseling, negotiating, drafting, and other skills that are necessary to be a good transactional lawyer. An additional benefit of this breadth is that students are exposed to the types of multidisciplinary problems that they rarely see in other classes but that transactional practitioners face all of the time.

Furthermore, the knowledge that students gain from the typical venture capital course is transferable well beyond a venture capital practice. Let me give you three examples:

First, three of my class sessions involve a line-by-line analysis of different types of term sheets. The first is a term sheet for a venture capital (VC) fund, the second is a term sheet for a preferred stock investment by a VC fund into a potential portfolio company, and the third is an M&A term sheet for the ultimate sale of a portfolio company. None of these term sheets is unique to venture capital practice. For example, the fund formation term sheets used by very sophisticated private equity (PE) firms are similar to the VC fund term sheets I use in class. The term sheets that PE funds use when making investments are similar to the VC investment term sheet. And an M&A term sheet is an M&A term sheet. You go through many of the same issues no matter what the nature of your client.

¹⁶ Rob Illig, *Teaching Transactional Law 2*, THE CONGLOMERATE, Aug. 25, 2008, <http://www.theconglomerate.org/2008/08/teaching-tran-1.html>.

Second, I give my students an out-of-class negotiation exercise devised to replicate a real life situation. I break the students into multiple teams of two or three students, give each team a set of confidential facts, and ask sets of two teams to draft and negotiate a confidentiality agreement between two technology companies considering a joint venture.¹⁷ Almost all transactional practitioners confront confidentiality agreements on a routine basis. Beyond that, though, the drafting and negotiating skills the students learn from this exercise are transferable to almost any type of contract.

Third, we spend quite a bit of time discussing theoretical models of financial contracting and how to address uncertainty, information asymmetries, and agency problems. If you think about it, all these problems exist in venture capital transactions in an extreme form. As an example, the information asymmetries in venture capital are generally quite large. So I am able to highlight these issues in an exaggerated form, allowing students to more easily grasp the concepts. Then, when they go into practice, even if they are practicing in much more sophisticated, nuanced practice areas, they are able to draw on the skills that they learned in my class.

So, venture capital is inherently a perfect subject to teach transactional law skills. Let's look at the best way to organize a venture capital course.

About a year ago, Victor Fleischer criticized the predominant structure of venture capital courses in a post on the Conglomerate blog. He noted that, based on the syllabi he had examined, these courses are typically structured around stage of development: classes progress from the formation of a corporation, to raising money, to exit, examining each step along the way. His criticism of this structure involves a perceived lack of conceptual organization. To him, the lack of a clear theme makes it hard for students to remember what they learned. According to Professor Fleischer, this organization also makes the course too much like a CLE course.¹⁸ Jeff Lipshaw, a commentator to Professor Fleischer's post, agreed, stating

¹⁷ *Part Two: Transaction Courses Pay Off for Corporate Law Students*, Daily Bruin (May 27, 2004), available at <http://dailybruin.com/archives/id/28821/>.

¹⁸ Victor Fleischer, *Teaching Venture Capital*, THE CONGLOMERATE, July 30, 2006, http://www.theconglomerate.org/2006/07/teaching_ventur.html ("What's the best way to teach a course in this area? I've looked at a few syllabi from classes in entrepreneurship or venture capital at various schools, and they tend to focus on the classic stages of a tech start-up, from initial funding (perhaps angel funding), to VC funding, to IPO or other acquisition/exit. There's a lot to be said for this format. But looking at these syllabi, I can't figure out how they're conceptually organized. And I'm afraid my students will have the same struggle. In my experience, having clear themes makes it

that nothing “distinguishes [such a class] either from (a) a CLE course, or (b) a business school course.”¹⁹

I agree with Professor Fleischer’s underlying factual observation. I started teaching about seven years ago, and when I created my first syllabus I did a pretty extensive search and looked at every available syllabus I could find. They were all life cycle based. So, I agree with his facts, but I disagree with his conclusion.

Clear themes do run throughout the life-cycle course. At each stage we analyze incomplete financial contracts. That’s what a class in venture capital is all about. So, we examine the control structures and the incentive mechanism and things like that at every stage.

Additionally, life-cycle organization aids the average student in memorization. I think Professor Fleischer may not be focusing on the fact that these are students—not professional academics. I have found that giving students something “real world” to base their analysis on is helpful. Life-cycle provides that base. The way issues are addressed at any particular stage of the start-up company (a) is affected by how issues were addressed in prior stages and (b) will affect which (and how) issues must be addressed in future stages. As a result, students are constantly reviewing past material and foreshadowing future classes.

As an aside, if your goal is to train transactional lawyers,²⁰ I am not sure I would knock CLE training. Many of these courses are much better at training junior attorneys in substantive law and transactional skills than either law schools or firms. I also wouldn’t knock business school courses. If part of the goal is to train transactional lawyers to see a deal through the client’s eyes, concern that the course is similar to a business school class misses the point entirely. It’s perfectly okay if the legal aspects of the course are overshadowed by the business aspects of the deal and non-legal skills. My course was designed primarily to teach those latter things. As I mentioned earlier, I think it is essential that students receive deep training in the substantive law—but they can and should receive this training in other courses.

much easier for students to retain what they learn in the long-run. It’s what distinguishes a law school course from a CLE seminar.”)

¹⁹ *Id.*

²⁰ I recognize the appropriateness of this goal is in dispute at many law schools. I have reason to believe, however, that Professor Fleischer agrees with me that this is an appropriate goal. *See, e.g., Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475 (2002).

As you might guess, my course is organized around the life cycle of the start-up corporation. We have an overview class, which looks at the beginning of the process through the eyes of the founder. By examining his quests (a) to hire a lawyer and accountant and (b) to raise an initial round of capital from angel investors, students are given a framework for thinking about the rest of the course. Subsequent classes examine choosing the form and jurisdiction of organization, leaving an employer when you may possess trade secrets, hiring and compensating employees, obtaining multiple rounds of financing, how venture capital funds monitor investments, and finally exits—IPO, M&A, and bankruptcy.

Before I finish, let's talk a little about materials.

As I mentioned earlier, there is not a great (or even good) text available—there is a huge gap here. I use “The Entrepreneurs Guide to Business Law” by Bagley & Dauchy, which Jeff Lipshaw described somewhat disparagingly as the best of the practitioner-oriented “how-to books.” It is not really a practitioner book at all; it is written more for a business person than a lawyer. In fact, it is used in quite a few business school courses, but it is not as rigorous a text as you would normally use for a law school class. It is just the best that is available. The good news is that it is relatively inexpensive as far as law school texts go.

To supplement the text, I put together a reader of materials containing law review articles, items from the SEC, IRS, and NVCA websites, and some other materials.

The backbone of my class is business school cases, mostly from Harvard Business School. For those of you unfamiliar with them, business school cases range from 1 to 50 pages long and attempt to simulate real-life situations, putting students in the role of participants.²¹ To accomplish this, the cases present information—often based on actual situations—in an unstructured manner. Students are required to prioritize, synthesize, and analyze that information before making decisions based on their analysis and prior knowledge.

To compare different learning methods: lectures are good for transmitting large amounts of substantive information but are not good for teaching skills. Business cases are less efficient at transmitting substantive knowledge, but are great for teaching how to apply substantive knowledge.²² In other words, these cases are

²¹ WILLIAM ELLET, *THE CASE STUDY HANDBOOK* 13 (2007).

²² BENSON P. SHAPIRO, *HINTS FOR CASE TEACHING*, HARVARD BUSINESS SCHOOL NOTE 9-585-012 at 2 (1985).

great for a course—like venture capital—where the amount of substantive knowledge taught is relatively small and you are focused on teaching non-substantive skills.

Two great things about these cases: first, they are not written from the lawyer's standpoint; they are written from the business person's standpoint. Second, they are messy. That is, they typically contain irrelevant or biased information and unstated assumptions, and they are told in a non-linear fashion.²³ I say this is great because I think that it mirrors the way transactional lawyers receive information in real life. Nobody tells you what information is important or identifies issues for you—you have to figure it out on your own. Also, you never get all the information you need. These cases teach students to distill pertinent information, identify issues, and then make decisions and give advice in the face of imperfect information.

I use business school cases in just over half of my classes. The course includes cases on:

- choosing a lawyer and angel investor,
- leaving an employer and trade secrets,
- hiring and firing senior management,
- compensation issues,
- choice of entity,
- private placements of securities,
- negotiating competing term sheets,
- corporate opportunities, and
- IPOs.

When it works well, students love using business school cases. Perhaps they are so accustomed to doing the same thing over and over again in their other courses that they are simply excited about the different teaching method, but I think there is more to it. I think students who plan on becoming transactional lawyers feel they are finally getting a taste of what it is like to practice in this area and enjoy learning skills that are directly applicable to the practice.

The downside to using these cases is that if the students don't prepare and participate, the method just doesn't work.²⁴ This requirement can pose challenges at

²³ ELLET, *supra* note 21, at 13.

²⁴ *Id.* at 12.

schools like UCLA, where I am limited on how much I can adjust grades based upon class participation. This inability to reward (or penalize) can make it difficult to encourage participation. In business schools, a significant majority of a student's grade is often based on class participation.²⁵ This can be very motivating. I have to rely more on self-motivation. I happen to be lucky because I teach at eight o'clock in the morning. As a result, almost everybody that takes my class wants to be there, so they typically come prepared and participate. Still, I think it would be better if class participation could be given greater weight.

Interestingly, some are starting to criticize the use of business cases in MBA courses. A Booz-Allen report recently declared that "the business school case method . . . depends too heavily on analysis and talk, and not enough on context, experimentation, and the iterative learning that is essential for successful implementation."²⁶ Even if you agree with this criticism, it doesn't really apply to the types of cases used in a venture capital course. I think you can pick from the thousands of cases available and find seven that work very well in the law school classroom. At least I feel like I have.

To sum up: The nature of the venture capital practice makes a venture capital course an ideal method to teach the business aspects of deals and transactional skills. The best way to organize the course is based on the life cycle of the venture capital company. Finally, although there is a dearth of traditional materials, there are plenty of alternative sources available—particularly business school cases, which are designed to teach exactly the type of skills we should be teaching.

²⁵ See, e.g., Benjamin Barton, *A Tale of Two Case Methods*, 75 TENN. L. REV. 233, 236 (2008) ("At the Harvard Business School, class participation is 50% of the grade.").

²⁶ MacEwen, *supra* note 12.