

ENTREPRENEURIAL LAW PROGRAMS AND LEGAL NEEDS

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Richard Benham

Good morning. My name is Richard Benham, and I'm here with my colleague from Florida State University, Elizabeth Ferrell. We're going to talk about a survey that we've recently conducted concerning the status of entrepreneurial law programs, both doctrinal classes and clinical programs.

Perhaps 'information collection' is a better term. Last month, I accepted an appointment at Florida State to start a clinical practice to serve entrepreneurial businesses, in our case closely connected to Florida State University faculty and student and staff projects. In addition, I am going to teach a doctrinal law and entrepreneurship class in the spring.

I wanted to create something unique, but not recreate anything that I could beg, borrow, or steal from somebody else. I was initially interested in gathering up resources, and also trying to set some standards and manage expectations. How many students should I reasonably expect to be able to be involved in this program? How many client matters should they reasonably be able to handle if we're doing this well, both for my own goal setting and also to rein in the Dean just a little bit on expectations?

Thus, we sent out our simple survey. I'm going to ask Elizabeth to tell you about the methodology, and then I will share with you just some very rough preliminary results and ask you for your thoughts on what else we might ask about if we continue this research.

Elizabeth Farrell-Clifford

The first step we had attempted to figure out was who we needed to ask in all these law schools. There is not one central listserv or resource to find out who the professors, the adjuncts, the clinical faculty are that teach in this area and run the clinics. We had to figure out who we need to ask to get the kind of information we wanted. And so if you received an email for this survey, even though Richard's name was on it, if you

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received it, I'm the person to blame, especially if you weren't the right person to contact. I take the fault or credit for it one way or the other.

Our first step was soliciting contact information via the ABA's Assistance Associate Dean's Listserv. Our associate dean was very willing and helpful to sort of send the message out for us on our behalf. We also circulated a list through the law library director's listserv. As some of you may or may not realize, there's a huge back channel among law library directors. They can also be a source of information.

But we also targeted a few other resources. As some of you may or may not be aware of, the Kaufman Foundation's Entrepreneurialship.Org, the E-ShipLaw Area had their own listserv. If you do any thing in this area and you're not on their listserv, it's a very valuable resource that hopefully could eventually become the kind of listserv that we were hoping to find.

The other place we tried to find information was through CALI -- hopefully most of you are aware of CALI. They actually have a little obscure tool on their website that will search all law school websites. So we sort of used brute force digging up through law school websites and information to find out who are the faculty we need to contact for this survey.

We ultimately got around 140 to 150 emails. They were not all unique. At some law schools, we had anywhere from one to five people who we could contact, and we did solicit all of those people to see if they might have different things to add to the survey.

Our next step was developing the survey content. We used the Qualtrics Survey package that FSU has licensed. In the past, I've used Survey Monkey, and I've used some less sophisticated tools. Qualtrics really makes your life easier in a variety of ways, even though it does have a little bit of a learning curve. There are things that we were able to take advantage of as far as functionality, analytics, and tracking. If you tell us you don't have this clinical program, it sort of will skip you over to the next question, and also let us know to look at detailed analytics on you and will show us that bottom graph about how many emails we sent out, how people opened them, and how many people even responded, as well as whether people dropped out on the survey and what questions that they were dropping out on. It's a very useful tool for us and for anyone else trying to gather this type of information.

The survey had essentially two big umbrella areas of questions we asked about. The first question was about the substantive classes. This is where we kind of introduced a little bit of a definition thing that came up because entrepreneurial law. If any of you are teaching in this or poked around at all, we found there are some varying definitions. Some law schools will interpret an entrepreneurial lawyer going as someone who goes out and hangs up their own shingle. For the purpose of our survey, we defined entrepreneurial law as 'a lawyer who advises entrepreneurial clients.' That's where we

were focused our energy and that’s where we pulled a lot of information out about the substantive classes.

And we were able to capture a lot of information. If any of the survey takers are in this room, you have my thanks because we asked for a lot of information and you gave it to us, and we appreciate that.

The next big umbrella areas we talked about were clinical opportunities. We asked about what kind of client mattered and what kind of client types were important. We also asked about frequency: are these the kinds of clients that you serve often or less often? This was the background of the survey, and this is where I will turn it over to Richard to sort of get into the interesting stuff -- the answers.

Richard Benham

So, the big caveat up front -- this is very preliminary, working graph of the results of the 140, 150 some odd people that we sent contacts to. We have just over 50 gross responses, but of those some are very incomplete and really not useful in the analysis. So, there’s substantial follow-up required if we’re going to make reasonable, broad conclusions about this stuff.

As Elizabeth said, the data breaks down into two broad sections and two subsections: clinical doctrinal classes, clinical classes, and within clinical, questions directed to kind of the client served and client experience and questions characterizing the student experience.

For those of you, who are here and see your logo on the screen, thank you. For those of you who are here and don’t see your logo on the screen, if you have the survey, please help us and remember to take it when you get back next week. If you don’t have the survey and you don’t see your school up there, please send us an email so we can get the survey instrument to you.

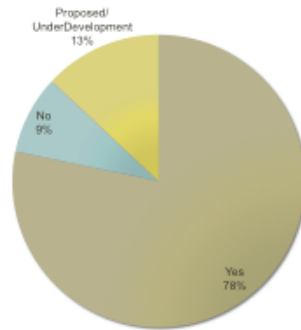


The first simple question was ‘Do you offer a doctrinal class in law and entrepreneurship?’ and we put a little bit of a definition in the question. Probably because of self-selection effect, almost everybody that sent the survey back in responded “Yes, we either are or we’re interested in it because we have one proposed and under development.” There were 9% that said “no” and indicated that they didn’t have much interest.

Doctrinal Classes

- Does your school offer one or more substantive classes **specifically directed** to Entrepreneurial Law topics (46)

One or More Doctrinal L&E Classes?



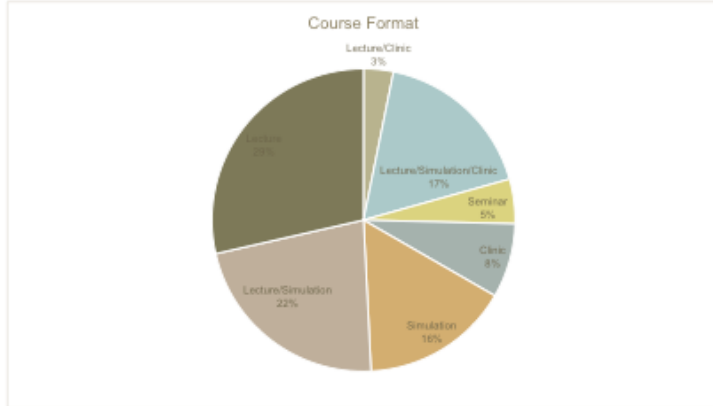
We then asked in a little bit more detail to try and tease out what these classes are, if you respond that you have a doctrinal class in a law and entrepreneurship topic. Twenty-eight schools gave us various course titles, 77 titles in total. The range of classes offered was from one to ten classes at each school.

Common themes were “entrepreneurship” in the title, and we also frequently got “small business” and “technology”. Clearly, there’s a relationship between technology venture service and entrepreneurial law. We also saw “nonprofit,” and we were a little surprised by the number of schools that reported activity with nonprofit corporations.

Next, we looked at the format of the classes. The surprising information for me here was that a big portion of these classes involved simulation, which seems like the most possible work. I think that means that there should be a rich set of materials among the community, and maybe those of us who would like to start up these classes, but think it is just a little bit too daunting to do at the outset, we may be able to get some help from colleagues.

Doctrinal Classes - Format

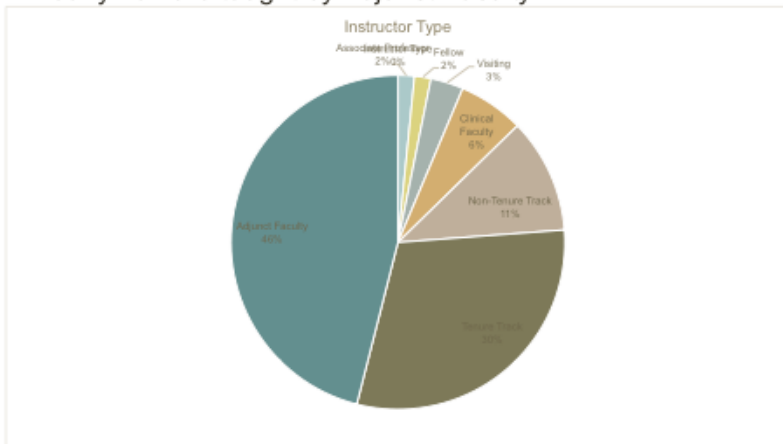
- Many reported classes that include simulation, but more inquiry is needed to clarify these reports (63)



It was not a surprise that adjunct professors teach a lot of these classes. Tenure-track faculty were more represented than I thought, though.

Doctrinal Classes - Instructors

- Nearly half are taught by Adjunct Faculty



We then looked at the clinical offerings. How much has clinical practice opportunity grown in this area? The first clinic related question we asked was when did the school open the clinic they are talking about. The first was reported in 1985 at Columbia University. There were two or three others before 2000, and then starting in 2000, there was some fairly consistent growth in these programs, but with a significant

uptick in about 2010. There's apparently a drop off in 2014. That's of course due to the partial year results. We don't know how many will end up there.

Clinical Offerings

- 25 Schools reported having one or more Clinical programs directed to Law and Entrepreneurship*
- The longest operating was established in 1985
- There is substantial growth in the rate of clinic openings since 2010



* We limited detail responses to one clinic only, typically the oldest or biggest

We limited responses on clinical programs to one, which would affect the numbers if schools had more than one clinic. We asked that if you have more than one clinic directed to this activity, only tell us the details about the largest or the oldest or whatever you choose, so there are some others out there that might be added later.

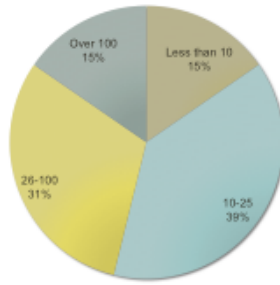
Next, we asked about the number of clients served. The schools that responded with “less than 10” and “over 100” came in just about the same. The majority is in the middle, with an average of about 49 and a median of about 25.

We also looked at the types of clients these clinics serve. Answers ranged from individuals that have a preplanning idea; somebody's that's establishing a new profit or a new nonprofit business; someone seeking services for an already established business before they got to your clinic; and for profit enterprises and nonprofit enterprises. And then, because I am particularly interested in programs like Florida State's, because our charter is limited at least initially to faculty for university-connected enterprises, we asked how many of you serve that community now. And to me the surprise, again, was the level of nonprofit support. “Other” in this really came out to mean “we don't know -- we don't have that information at all.

Clients Served – Quantity

- 26 schools reported on “New Matters Opened” annually
 - Range 5 – 250
 - Mean of approx. 49 and Median of 25

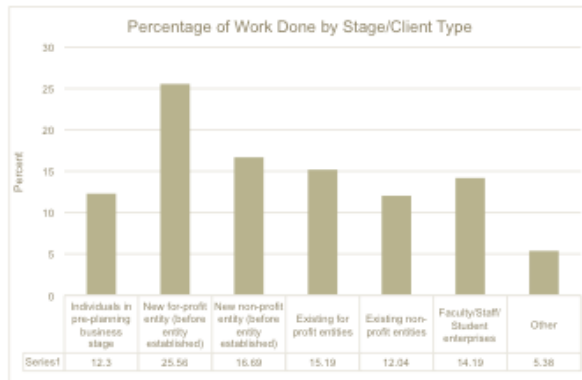
New Matters Per Year (approx.)



We asked about eligibility. How do you determine eligibility of clients coming into the entrepreneurial law clinic? Do you charge fees? Do you have trust account capability? By far the predominant limit was geographic. We serve companies within this community within the bounds of our state. Whatever it was. That was the one that governed.

Clients Served – Stage/Client Type

- We asked about the type(s) of clients served and the approximate percentage of each type



About a third require some other traditional, clinical services as an expressed statement of the client’s inability to otherwise afford legal services, but very few had any hard limits that they published about financial limits or head counts. Nobody reported maximum number of employees, for example. Where there were expressed limits, it was

almost always \$100,000 of revenue or \$50,000 of assets with one outlier at \$200,000 of revenue. Less than 10% of the reporters charge any fee at all and that was either a flat fee of \$300, if you were able to pay, or a fixed price -- we didn't get the price data -- by service in two cases. Nine out of 28 operate trust accounts.

Elizabeth showed a preview of the question about the services offered, to define what is really being done. Also, so we can figure out what we're going to really be able to expose students to and to direct what skills we were going to try to spin up in the clinic boot camp.

Top 10 Core/Frequent Services

| Service Description | Count | % of Respondents |
|-----------------------------------|-------|------------------|
| Entity type selection | 26 | 100% |
| Relations between owners/founders | 21 | 78% |
| Establishing non-profit status | 16 | 70% |
| Independent contractors (1099) | 17 | 63% |
| Trademark counseling | 14 | 52% |
| Copyright counseling | 12 | 44% |
| Federal taxation counseling | 10 | 37% |
| Trademark - application filings | 9 | 33% |
| Contracts for sales of goods | 9 | 33% |
| Employee relations (W2) | 8 | 30% |
| State & local taxation | 7 | 26% |

No surprise with the headline: everybody does establishing new business entities, among others. A little bit surprising to me, having recently come out of practice largely in this area, is that there were a fair number of respondents who said "we do entity type selection, and will establish an entity, but we won't do an operating agreement or shareholders rights agreement or other relationships between owners." I found that result surprising. Again, a lot of nonprofit issues, and then we got into several soft intellectual property practice, which I think is true because there were a number of respondents that were particularly directed to intellectual property. And they may not do the other functions, but there were a substantial number of those.

There were a couple of other clinics that were specifically directed to tax and only tax, so I think that that provides a percentage here. Many others said we don't do tax at all or rarely. So, are they not doing IP, patent applications, or similar topics because of limitations of doing that. I was surprised again there are many that said they would do real estate leases, but no client has requested the service.

Less Frequent / Not Offered

| Service Description | % Core/ Frequent | % Not Offering |
|------------------------------------|---------------------|----------------|
| Patent counseling | 22% | 48% |
| Copyright - registrations | 19% | 22% |
| Patent - clearance or other search | 15% | 56% |
| Financing transactions | 15% | 15% |
| Real property leases | 11% | 7% |
| Patent - application filings | 11% | 74% |
| Real estate purchase | 4% | 30% |
| Secured Transactions | 4% | 22% |

Next, we looked at the student experience. About a quarter of the programs allow students into the clinic immediately after completion of the 1L year, and few had hard prerequisites for them, even professional responsibility or business associations (“BA”). Some had no prerequisite at all. Forty-five percent require BA, some require tax, and some require contract drafting.

Clinics – Student Experience

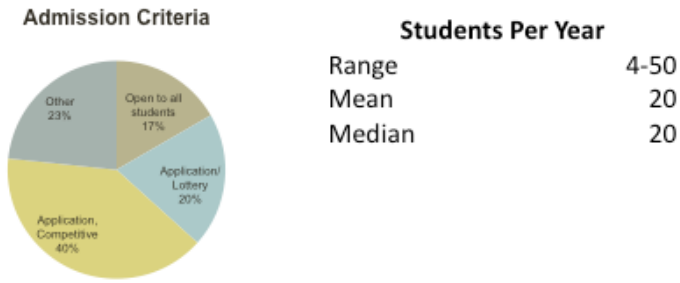
- Student Eligibility
 - About a quarter of the programs allow entry into the clinic upon completion of the 1L year
 - 70% allow entry by 2L's who meet course requirements
- Prerequisites and recommended courses

| Requirement | Count | % |
|----------------------------------|-------|-----|
| None | 8 | 40% |
| Business Associations or Similar | 9 | 45% |
| Professional Responsibility | 3 | 15% |
| Tax (Federal or Survey) | 4 | 20% |
| Contract Drafting | 4 | 20% |

What about applying to the clinic? There are a number of them that are open to all students who apply. In fact, there were several comments that said they don't limit enrollment. Some others are competitive, and first come-first serve is what others broke down into up to a limit, and then some also admitted students using a lottery.

Clinics – Student Experience

- We asked how students are selected for admission into the clinic and how many students are admitted each year



As far as students per year in these clinics, ranged from four to 50. The mean and median are both 20 students per year. The mean and median number of students per attorney supervisor are 12.

We asked about the amount of time students are expected to devote to the clinic, and almost every response came in 4 to 5 hours per week per credit hour. So if it is a three-hour seminar, they're expecting 12 to 15 hours per week total. And there were almost no deviations in that.

Then we looked at the number of supervising attorneys. The range was 1 to 18 total attorneys in these clinics. Students per attorney supervisor was 1.4, and the mean and median were both 12.

Clinics – Student Experience

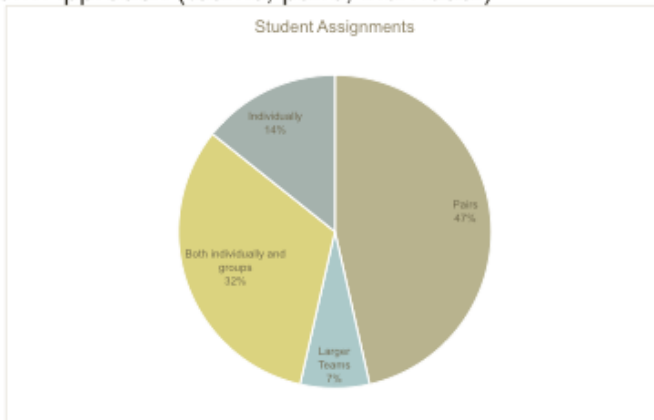
- We asked how much time students are expected to devote to the clinic
 - Almost all report 4-5 hours/week per credit
- We asked how many attorneys supervise the student activity

| #of Attorney Supervisors | | Students/Attorney Supervisor | |
|--------------------------|------|------------------------------|------|
| Range | 1-18 | Range | 1-24 |
| Mean | 3 | Mean | 12 |
| Median | 2 | Median | 12 |

How do students work: teams, pairs, or individually? I was really surprised to see that there was any individual student work, and I think maybe this is only students working their second semester in the clinic. That is something we would want to find out more about. Maybe some of you who have been doing this for a while have other experiences. It just almost seems inconceivable to me that the first student clinical experience would be individually, working directly one to one with the client on any live matter. Pairs predominated and in some instances, larger teams were the norm.

Clinics – Student Experience

- Work Approach (teams, pairs, individual)



There aren't many hard conclusions at this point, other than to say this is an area that is clearly growing. My pre-survey expectation, or actually even before we started doing the research, was that I thought we'd find maybe 15 or 20 programs. I was clearly wrong about that. There were many more, and they are growing in number. We can say that with some certainty. The size of them are growing over time, and consequently, the number of students who are getting through these programs as well as the number of clients that are being served are growing faster than the number of clinics, which you would expect in something that is gaining popularity.

In order to do anything meaningful with this, we need more responses. If we are going to really make comparable results, we need to go out and find out more details and nuances, through conversations with the people who responded.

Audience: How many surveys did you send out?

E. Ferrell: It was about 140 or so.

R. Benham: We sent out 140 requests to answer the survey with links to it, and we received about 50 responses.

Audience: Did you use the AALS as a mechanism for identifying the [inaudible].

E. Ferrell: I started looking at the AALS Directory. It was not as helpful as I would hope,

Audience: There's actually a section AALS Transactional Clinical Group, and they meet every year.

Audience: I wonder about your choice of transactional law should just be like it might kind of shade the response to the survey and what kind of responses you get.

R. Benham: I was hoping to show that there are differences between transactional law generally and entrepreneurship law, because I have to figure out how to do what an entrepreneurship specific program does. I think we would get considerably different answers if we framed it the other way.

Audience: Framing the question regarding new matters, do you anticipate that to mean a new client or an individual deliverable? At my clinic we get about 24 new clients a year, but as far as deliverables, we probably do three or four items per year.

R. Benham: It could be several matters for each one.

Audience: So, is each one for each client supposed to be a new matter?

R. Benham: Yeah. We worked on that for sure, and there's noise in the data over exactly that. That is one of the things we need to clarify and say you know a new matter is opening a file for a new client -- a client, who's new to these things. We then need to have a follow-up question that says a new assignment for an existing client how many of those do you do or how many tasks for a typical client are done annually.

Steve Black

My name is Steve Black. I'm at Texas Tech University, and I'm very happy to be here today. I was delighted to be invited to come. I am a tax person, but I'm not going to talk about that.

So, as we've gone through the conference, I thought I might just write up a couple of quotes that are interesting. I heard someone say, "The deal changed between the signing of the documents and closing." I thought that was interesting. I heard someone say, "We need to teach our students to protect the client. We need to make it enforceable" -- 'it' being any documents that we're teaching our students how to draft. And then, "We need to make it less scary." Are we scary people? Apparently we are.

I do not teach contract drafting. I teach tax and transactional practice, business planning, IP business, oil and gas business; those types of courses. We have deals and they're flying, and in the past, I've had my students work through some software issues, so that's where I took the title from.

Let's talk about hacking for a minute. Is hacking a bad thing? It depends on who you ask. If it is your system that's being hacked, then yes it is. If you ask the programmers what is hacking, how would they answer?

Audience: Problem solving.

Problem solving, great. Let's talk about problem solving with some interesting contracts.

I didn't know how many people may be actually teaching entrepreneurs entrepreneurial things. I am going to assume that most of us have heard about the Lean Method, and I will go through this very quickly.

Eric Ries came up with this idea in conjunction with Steve Blank, who is at Berkeley and Stanford. The idea is that entrepreneurs are those kinds of people for

whom risk is not scary at all. And they are going to take other people's money and some of their own, and they're going to try new ideas. As lawyers, we like to represent those types of people. They're kind of fun and quirky.

As entrepreneurs, they recognize that they're going to make mistakes, and so the idea is to make those mistakes under controlled circumstances early and cheaply. Sounds sort of like a science laboratory. Go in that room over there. Explode things. When you know how a light bulb works, come back and talk to us, and we'll fund you. That is the Lean Method.

The Lean Method then says, let's test your business model. A lot of people say, "Oh, I'm going to put together a business plan. Five years out, this is where we're going to be," and if you work in finance, in banking, or as a lawyer, look at the ideas and ask, "What don't you know today that's going to come back and hurt us?" The Lean Method proposes "Let's test these ideas quickly. Let's fail early and test the business model. Then what we're going to do is have the user make an MVP – a minimum viable product." So, if you're going to start a new restaurant, come up with something really small. Start a hotdog stand first, and see if there's any market for this. See if anybody likes your food. See if you poison anybody. I'm assuming poisoning people is a bad idea, so let's go out and test this.

This is what the current thinking is for entrepreneurs. It is that we're going to go out and do this, and the essential part of this is when you find something that doesn't work, whenever your hypothesis is false, then you pivot. You change. You try something else. You don't sell hot dogs anymore if they're poisoning your clientele. You sell software or perfume or you do something else -- or you quit, one of those things. So, you've got these entrepreneurial clients who are saying, "Yeah I can do that. Let's go make mistakes. Let's go find out what's going to work, and then we'll change it." If I'm doing technology, let's rewrite all the software.

And that's exciting and fun, unless you happen to be the lawyer. Is it fun and exciting when the clients come back tomorrow and say, "Guess what? We changed everything. We are no longer selling hotdogs. Now, we're a software company." And the question for those who teach contract drafting is what do you do with the contract that you just finished signing. That's a problem.

So, here are some hypotheses that I came up with. First, your client's team is creative and fair. That's the reason they got together. They like each other, they want to be in business together.

Second, simple is better. I don't know if I believe that one. It just feels wrong as an attorney. Should it be simple? My students come in to basic tax. They look at the size of the abridged code, and they always want to go with the flat tax. Simpler is better. I'm going to waffle on that one. We'll leave it up there though.

Third, the lawyer for this endeavor believes that she is smart, and she likes a challenge.

Can we accept those three hypotheses for a minute? If those are false, the lawyer has bigger problems than worrying about what kind of contract to draft. If any of those hypotheses are false, they have bigger problems.

I am now going to talk about entrepreneurial agreements with this hypothetical. You've got three individuals who walk into your clinic or you're proposing a hypothetical to your class and you've got three individuals who want to start a business. And one of the things that we may do is advise them on the founder's agreement. How are these people going to divide up the responsibility and the benefits of a new organization, and how do you draft for that? Okay, have we got that down pat? Great.

So as an evolving hypothetical, consider this. You have three clients who come in, and two days just after you've decided what to include in drafting the founder's agreement -- which will split the business three ways, where each will share it equally until the first pivot point -- then in the hypothetical, we decide we really don't need the third guy. He doesn't add anything to the business and off he goes. What do we do as a contract drafting matter when we don't need one of the founders anymore? We were going to split it three ways. That's 33% for each of the clients, plus a little bit for the lawyer. We were going to split it one third, one-third, one-third, but we've decided that person number two actually has more skills in our new endeavor. When we pivoted, she was the key player, and now one-third, one-third, one-third really doesn't seem fair. So, how do you change agreements when you're clients are changing the game on you nearly daily? That's a great question, and I sit around and I think about that all the time.

As a lawyer, what do you do? Well, our traditional approach is you amend the agreement. Piece of cake. We put in a rider. We take out that provision. We do something. And if this happens over and over and over, what kind of a contract do you end up with? Something that looks completely different than the original, with all sorts of additions and pieces no longer part of the puzzle.

So, here are some thoughts of how we can teach our students to go out in this type of practice, and some alternative ways to look at contract drafting for entrepreneurial clients. There are going to be more, but here are some that I'd like to propose to you.

Does anybody follow the World Cup?

There is a young man, who is the captain of the Argentinean team. When he was 13, he was diagnosed with a deficiency in his growth hormones, and his father Jorge had a meeting. The young man's name is Lionel. Lionel was just an amazing soccer

player – “football” if we’re going to talk about World Cup. At the age of 13, Lionel got to try out with one of the teams.

And following the tryout, which made everybody’s jaw drop at this 13-year old, the technical secretary for Team Barcelona, Charly Rexach, met with Lionel’s dad, and his dad said he didn’t have the money for the medical treatments for his 13-year old boy. He asked the technical secretary for help.

So, they’re sitting around a bar talking about this, and they wanted this boy to come and play. The technical secretary said that if he could cover Lionel’s medical expenses and give the father some living money, would you come and play, and Lionel’s father agreed.

The technical secretary grabbed the nearest piece of paper he could find, which was a napkin, and he wrote down this contract. And basically what it said was, in the presence of these two other people, who are here -- because he needed witnesses, right? We agree to front these expenses, as long as I have enough budget for them. There’s the disclaimer. We agree to front the medical expenses, and this man’s son agrees to come play. That’s not an agreement. It’s on a napkin for crying out loud! This napkin is framed and hung in Lionel’s attorney’s office today.

And today, Lionel is the team captain for Argentina. How do you train your students to draft things like this? Is this a good training tool? Sometimes it is. Why? Because it is the spur of the moment, because I need something to be memorialized, because we’re going to make an agreement. Should we have called the lawyers into the bar?

Here’s another napkin deal. It says, “Client request: Make it like Facebook. Add in some features from Google. Style it like Apple ... profit?” What’s the difference between those two napkin deals? This is what we’re thinking of when we talk about a back of napkin deal. We don’t train lawyers to draft napkin deals. That’s a bad thing to do, except you’d be amazed how many deals get done with napkins in bars.

Consider memorandums of understanding (MOU). Wikipedia defines a MOU in this way: “It expresses a convergence of will between the parties, indicating an intended common line of action. It is often used in cases where parties either do not imply a legal commitment or in situations where the parties cannot create a legally enforceable agreement. It is a more formal alternative to a gentlemen's agreement.”

Can you tell me what a contract is?

Audience: A promise for a promise.

S. Black: A promise for a promise, and then we tell students if that isn't good that it is a meeting of the minds. Do we not tell them that? What does this say? It expresses a -- not a meeting of the minds but a convergence -- what does convergence mean? We're almost there. We're not quite there. A memorandum of understanding is we're agreeing to agree.

Audience: Agree.

S. Black: What does that do? I like the last line of this. It is a more formal alternative to a gentlemen's agreement. It's a gentlemen's agreement! Duels and cravats and fox hunting.

Ok, so everybody's shaking hands, but one party has an ace up their sleeve. So, this is not a meeting of the minds but almost a meeting of the minds. Is it enforceable?

Audience: Sometimes.

S. Black:

What do we have here? We wanted our contracts to be enforceable unless they really shouldn't be enforceable or nobody wants them to be enforceable. Why do we not want them to be enforceable? Because I don't know what the entrepreneurs are going to do tomorrow. Well, if you don't know what they're going to do tomorrow, why are we drafting a contract today? That's a good question.

What's the remedy for a breach of a memorandum of understanding? I don't have an answer. I get to ask the questions here and write them up on the slides. It's a good question.

How about this: Let's not draft a contract. Contracts for entrepreneurs -- how long is an entrepreneurial founder's contract? I found some 24 to 30 pages, though I don't know why you need 30 pages. These people are going to change the business tomorrow. So, I start wondering what other alternatives we have.

This is the United States Constitution. What is a constitution?

Is the Constitution a contract? It is a social contract. What is a social contract? I don't remember signing it myself. Just by being born, I get drawn into this. And what are the remedies for this? I know that. I listen to NPR and watch the news. The remedy for a breach of a social contract is all the farmers go and get their pitchforks. We have it out in the street and start a bonfire and start shooting people. I don't like that. Why would we have a constitution? Because a constitution's job is to give broad outlines

to the understanding that we have that we are going to operate in a certain way. And when we need more specificity, we're not going to use a contract.

I did a search. I involved our library staff. They loved it. I said I've got to go find something and they said we are your people. Let's go find it. I said great. Teach me how to draft a constitution. Find the Lexus Nexus book on drafting constitutions, edition 1, and you learn there is nothing out there. If you are drafting a constitution, and you're from a small country or for a small business, you are on your own.

That's great. "I thought you were going to tell us something we could use in our classes." You can't, because a lot of what we do as transactional lawyers and a lot of what we do as the teachers of transactional lawyers is to teach them when there is no instruction manual. Congratulations! You have just been field promoted to expert. Figure it out. These clients that are students are doing things that nobody has done before. Before Facebook, there wasn't the degree of social networking that these people have put together. I don't know what the contract looks like, I don't know what the agreement looks like, I don't know what the constitution looks like, but I know some principles about how individuals who are in business work together. I know some principles about ownership. We can talk about IP as ownership.

One of my colleagues just wrote me back because I have a new article coming out about nonexistent IP. He said all that he knows about IP is that most of it is nonexistent. You are talking about things that are just ideas, and we like ideas. Can you put it down in way that makes sense to your client so they can use this?

When I was young, I used to play with Legos. Legos are building blocks, and building blocks help make our contracts less scary. You probably already know this. This was a revelation to me. Computer programmers, when you start to put together Facebook, you have different people writing the code together a lot of people writing individual parts of the code, and then it's supposed to fit together interestingly. I can teach students how to draft contracts that have movable parts. I can draft a one-page napkin contract, and in the napkin contract it says when we need the blue part, then here's what that agreement will look like and we'll fold it in later, or when we need the blue part, we agree to agree to add the blue part. When we need our social marketing director, we agree to agree to a process of pulling that person in and we can start to pull apart these complicated founders agreements, IP relations, stockholders agreements. What else do we talk about? What happens when the whole thing blows up and who gets what and we can agree later to add those parts in?

So, I took a look at what the lean entrepreneurs do. They build a minimal, viable product. That is the smallest thing that they can take out to customers to sell and see if it's going to work. And I ask myself the question, "Can it teach students to build a minimum, viable contract?" And if so, I try to find the best process to complete this.

Step 1: Remove the cruft. Cruft is garbage. I don't like a lot of the legalisms that we use. I believe in plain negotiation. I frequently take out my red pen and remove things that are hard to understand. So step number one, remove the garbage.

Step 2: Refactor -- this is it; you've built it. It's wonderful. Can you rebuild it smaller, better, faster, more elegantly? Can you explain what it was that you just drafted? I love to have students come in and explain. This is a wonderful agreement. It's five pages. Can you explain to me what it does, and they will explain the first page and the second page, and tell me they got that from somebody else's form. Good. I'm sitting. I've got time. Can you explain to me what it does, and I will take notes, and we'll take out all that other boilerplate, and we'll put in your explanation, because that language is usually pretty good.

Step 3: Back to the Legos -- Do I Need This Now? My clients would love to agree to everything in the future, but they're changing everything up. So, do I need a stockholder's agreement for adding new partners if we're not anticipating adding any new partners today, and maybe the answer is yes, we do need this now or maybe the answer is no. And then again, can I explain it to you. This is the client explaining to the lawyer, and then the lawyer turning around and saying this is what I just wrote. The lawyer verbally reinforces what he's just written in the contract.

Step 4: Elegant Solutions. I think we all know what an elegant solution is, but how do I teach lawyers to draft elegantly?

What does a minimal viable contract look like? First, if it's simpler, you get more contact, not less, with the attorney for less cost. In the software world, we have things called sprints, which is where we've got three minutes to come up with something. What can you write in three minutes to get us to the next stage? So, what I don't want is a 24 page agreement. What I want is fast, get me the contract terms that I need today and do it napkin-style.

Second, let me involve less upfront cost because I'm anticipating my clients to come back again and again, and then we'll add little parts. So, I'm charging them for little pieces, not the whole thing up front.

And these types of contracts work with, and not against, the flow of business. As soon as the clients decide that they're going to add somebody else, then we'll fold in that part of the agreement.

Risks and rewards. Ok, again, I said if any of my hypotheses is not true -- your client's team may not be creative, in which case it may have been better either to not start the business or to have all the protections up front because what we need to do is protect the client. And notice that when we are working with our entrepreneurial clients, we adopt a lot of their risk tolerance. If I'm taking out parts of the contract, there's a good reason somebody added that in there. We're taking the safeties off.

The client's team may not be fair. Facebook -- what happened with the founders? Oops. That's what we were there for. We were there to protect them. But there's a balance between protecting them and trying to get in the way of what they are trying to accomplish. Often we hear, "Don't involve the lawyers because they're going to get in the way."

How do we teach these skills? I'll give you four suggestions. First, take baby steps. I love giving my students smaller parts. "I've hidden four errors in this contract. Go find them and root them out." Students may come report back that they only found three. Oh, I lied. There were only three, but it's good that you found the three.

Second, I hand them a contract and say that this contract is too long. What can you do with it? And then I offer candy to the person who makes it the shortest. Then we argue about whether the shortest was the best one or not -- kind of fun to do.

Use blogs. This idea came from the programming world. There was a blog called the Perl Quiz. Once a week, the moderator posted a problem. "Here's a problem. Think about it for a day; then start posting small solutions." These are mini-problems. So, I started doing that with contracts for my students. I need a provision that does X. I'm posting it on my blog, and I want all my students to think about it for a day. Then we're going to start posting drafting solutions. They would post small drafting solutions or short writing assignments. I encourage elegant solutions to common problems.

As your students go out into the entrepreneurial world, they're going to encounter weird clients, and some of the traditional things that we usually teach in broad contract drafting classes may actually work against what some of these clients are hoping to do. So, my proposal is maybe we start training our students to think lean and mean.

Any questions that I can answer?

Audience: I think this is a great topic. I've been running a clinic for eight years, and it comes up every semester as far as drafting. Clients who have micro-enterprises can only work with two or three pages, and so we do this regularly. How do you discuss with your students the idea of malpractice? You talked about risks, and we're taking on the client's risks, but the difference is our risk has to do with our malpractice policy as well as the rules and professional responsibility. How do you integrate that conversation to make your students feel comfortable drafting in this lean way?

S. Black: Comfort and risk really don't go hand-in-hand. Your clients are very risk-tolerant and an open discussion is very good with them. And so a lot of time the conversation usually goes like this. "We can draft

for you something that is going to nail down the four corners of what you want to do, but it's going to influence the way that you're going to be entrepreneurs or you're going to ignore the contract." That's the other part. Say you have a contract. Has anybody read it? No. So, no one has any idea about the rights and remedies. Where do you go from there?

So, here's the conversation we usually have with the clients. "We're going to come up with something that'll work with you today. You realize that if there are further problems, if those hypotheses are not right, if one of your founders is out to take advantage of you, that we may not be fully able to protect you. Is that what you want from us?" And so a little bit of a disclaimer, a little bit of limiting our risk there, and we let the clients know that upfront.

And then I let my students know that if they're going to practice in this area, everybody's taking a risk, and they're going to be known as a little bit more of a risk-taker attorney, and they should let their malpractice carrier know.

Audience: Would you memorialize that counseling in a client memo?

S. Black: Oh yeah, my files have a lot more paper than I give to the client.

Audience: A client memo would be longer than the contract.

S. Black: Yes, although I've done this on my disclosure with the clients too. I cut it down to a page or actually a couple of paragraphs. You know, you hand them a piece of paper and say I need you to sign this before we enter into an agreement, and they never read it. So, again, it's one of those sure things. You agree that you wanted me to take the safeties off. You wanted me to play with you. I'm going to explain them to you, but you agree that this is the type of agreement. It's like research hospitals. The doctor comes in and says I need you to sign this and this and this and this. Basically, you know we're going to experiment on you. You may die. The same thing with your startup -- I'm going to experiment on you. Your business may die. It's only money, goodness, and your reputation in the world and your job and I'm very sorry if it explodes but we're having fun here. It's a great question, and that was not the best answer to that, but it's a great question. Other questions?

S. Black: Yes, so your students are going out to New York to practice, so we're talking about large New York firms dealing with innovators

and others, and sometimes that's a mismatch with the firm and the clients. And so it's a wonderful discussion to have with your students because the training is wonderful. And then what I see is a lot of splinter groups. Hey, we've got enough entrepreneurial clients. We could go out on our own. Could we do it better? Hold that question. It's a scary question, but could we do it better than our firm is and when they say yes, somebody really ought to come back to them and say "Do you realize what you're doing?" You're giving up a paycheck to do this, but they believe enough. So, our students are entrepreneurs too because they want to go out and represent people whose hair is on fire.

I am over time. So my email is up here. Thank you again.

Jason Gordon

I am going to talk about legal demands of the startup venture.

During my MBA studies, I started providing legal and business help to individuals who wanted to start their own business. I focused on this work because my interest in the drafting process. The ABA gives you enough resources that it's kind of hard to mess it up, if you know where you're going; but I couldn't do it effectively. Rather, I was doing a really bad job of it. I also realized that some of my friends, who came from venture capital and private equity and had experience in entrepreneurship, knew more about the transactional processes than I did. I couldn't track what they wanted to do sufficiently to provide effective legal services. But I could do strategy. I could do market analysis. I could do statistical analysis. I could figure out how to value the company. That wasn't hard. Those were just learned skills. But what I didn't understand was the overall strategy of a startup and how it worked. Rather, I could draft the documents, but I didn't understand the process and the strategy of the businesses. Why not? It came down to I didn't understand the definition of a startup venture. It's just that simple.

So, to demonstrate my proposition, I'm going to ask you a question. What does it mean when an investor says you're not burning my money fast enough? Why would an investor -- and they still call it their money by the way -- why does an investor go to an entrepreneur and say you're not spending my money fast enough?

Audience: The investor expects growth [Inaudible].

Exactly, you should be burning my money like crazy. I gave you money because every dollar I put in produces a greater output. The growth curve for every dollar I put in should be achieving three, four, five dollars of present value in growth. Returning to me

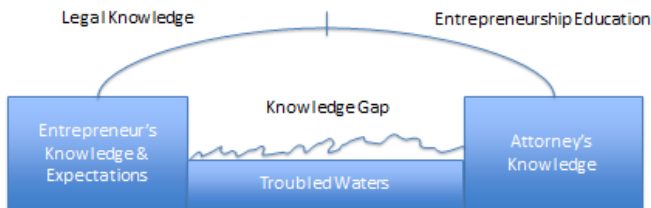
15 or 30 times my money in three years is going to mean you're going to have to grow like crazy. So, why aren't you burning my money? Why aren't you growing that fast?

I couldn't get that concept straight in my head, and most attorneys can't. That is, most people who call themselves small business attorneys cannot get that concept. The genesis of this situation is that there is a difference between a startup attorney and a small business attorney.

We have the small business administration. We have the small business development centers. What are they doing for the clients? Are they doing the setup skills or are they strategizing and counseling an entrepreneur who has a true startup, a growth-based venture, a scalable product that needs to seek funding, grow as rapidly as possible, accrue \$400 million worth of losses before going through an IPO. That's the startup venture. That's what's becoming popular with the all startup tech CEOs, the Zuckerbergs, the Zappos of the world.

An example is understanding accrued losses. So, why is Twitter valued at so much when it's never turned a profit? How did Facebook have several billion dollars worth of earned money before it ever turned a profit? That's what you have to understand, and most of our startup lawyers don't understand this. So, there is a gap in understanding there that happens counseling early on. It is what I call "bridge over trouble water."

Researching 2 sides of the Coin



You have this bridge, this gap between law and business, and all of these business skills, the marketing, the finance, the transaction, the strategy on one side, and over on this side, you have the legal transactions. These transactions actually memorialize what they want to do as a business. Well, what happens when the

entrepreneur tries to walk this road, and she is not an experienced entrepreneur? You get to this portion where there is no meeting of the minds between the lawyer and the entrepreneur. This entrepreneur can't walk into the attorney's office and say this is what I need you to do. I need you to draft this agreement for me. It's "Hey, I have this idea. What do I need to do next?"

Now, I made this mistake because I counsel entrepreneurs. I'm involved with the accelerator at my academic institution. I counsel aspiring entrepreneur and I send them out to attorneys for legal needs. Too frequently they come back and say "This is what they told me to do." And I respond oh god no – the instruction is completely out of order as to what they should be doing, poor decision making in the entity planning and drafting process, etc.

So, I'm going to go out on a limb here. I tell my communication students never ask anybody a question that you don't know the answer to. So, we already looked at some things -- things that we do for our clients. Someone in the audience please give me a couple of examples real quick. What are some of the things we do for our clients in transactional clinics? We call ourselves small business or start up lawyers, what do we do for our clients?

Audience: IP.

A: IP -- let's go with IP. So, how do you strategize this stuff? The traditional approach is to ask how to capture IP. That's what we learn in our IP classes. How do you capture it? But how does this approach change conceptually between a small business and a startup venture? The common conversation begins with, "I have this great idea." We're going to capture this. Ok, let's start doing your patent filing, and I explain to you, the client, what the difference is between a provisional patent and actually filing the claims so that you can get the patent. And you say that you know you're not ready to go to market yet. It's ok, the provisional patent can give you a year. But then you have to go ahead and tell your client that you realize they're going to pivot strategically in their venture. [Note: The majority of all startup ventures pivot strategically before finding concept-market fit]. Their idea is going to change. How does this affect the advice?

First, we're not on a first to file system any longer are we? It's first to disclose. When does the PHOSITA, a person having ordinary skill in the field, have enough information that they can copy your idea? The typical attorney will explain the need to capture the IP and follow the filing rules, but what does the startup entrepreneur really need?

They just need to temporarily protect their IP, to be ready to pivot again, to grab the next bit of their product change and add it to that patent -- to that intellectual property. When the entrepreneur stands before that investor or that venture capital firm,

they can tell them that they have a patent pending. Does a patent pending mean anything anymore? It means next to nothing. The patent pending is a disclosure, but the entrepreneur may disclose the product in other ways. That's the difference between the small business entrepreneur and the small business attorney and the startup attorney in that example. The startup attorney would explain all this to the client, and would strategize with them moving forward, and say I need to understand when you are going to seek seed capital. Are you going to need multiple rounds? Do you need to tell them the law of patents, because investors don't know any better? They still don't know it's the first to file versus first to invent. They just need to hear, "I've got a patent pending."

So, as this off-the-cuff example demonstrates, there's a counseling element that goes into transactional practice with small businesses versus startup ventures. If you don't have the breadth of understanding that applies specifically to a startup venture then you can't do this job effectively. And it all comes down to understanding what is a startup venture.

Now, your client is going to come to you for a lot more. They're going to come to you for the full gamut, the accounting, the financing, and everything in between. They're going to need a little bit of counseling on it as well. Now, does every attorney have the ability to counsel them on all of those topics? Usually, no. Early in my practice, even with a MBA, I still felt like I didn't know enough. I studied at the University of Alabama LLM program. I took two years to do their transactional courses while I learned individual skills on the side, and I still didn't fully learn this overarching thing. Entrepreneurial strategy (in a startup venture) is something you have to learn through practice and experience as entrepreneurs.

Now, these attorneys in Silicon Valley, they all know it. But places like Tennessee, Atlanta, and others that are hot beds for startups right now, they often don't have all the requisite knowledge to adequately serve the startup entrepreneur. We have this information gap for new attorneys that's not being filled here.

Now, I approach this issue from the perspective of a business school. I try to introduce enough legal education to my business students so that they can effectively start to walk this path. On the other side of the coin is the new or aspiring startup attorney. They have to walk the other side of this path.

Do I tell everybody that they have go get an MBA? Absolutely not. You have to understand really one thing -- the concept of the startup venture and the ability to apply the transactional skills that we practice for our clients and that we teach in our law school courses to the situation that the startup entrepreneur faces.

But there are some ethical implications to that. The duty of competence, for one. Do you even advise somebody on how they should value their firm based on the dilution that's going to happen in the funding process if you don't understand finance?

There's the rule of competency associated with legal services. The model rule provides that if you practice something along with your legal services, what's the duty of care there? Equal to that of your legal services.

There are a glut of large firms that are multidisciplinary firms, and they have the accountant and the attorneys on staff.. Can startup entrepreneurs afford a large firm? No, often they cannot. So, the small entrepreneurial attorney has to be able to handle this subject-matter proficiently. So, again, if you are going to hold yourself out to the public and say I represent not small businesses but startups, then you have to have these skill sets. You're going to undertake a multidisciplinary practice that branches into accounting and business skills in which you have to be proficient. Proficiency starts with understanding the targeted nature of a startup venture.

Now, I will say this. Looking at what law schools are doing now, with the entrepreneurship courses, the transactional curriculums, the concentration certificates, and even LLM programs, is great. Duke's LLM program was the first, and then I think Colorado is one that's followed and a couple of others now. And then you've got this whole collaborative model that's coming out. There is a push for cross-listing of courses between business and law schools.

So while all of these measures help, there are still some shortfalls. We have these entrepreneurship centers. Emory has a great program that it partners with Georgia Tech, the TIGER Program that is technology innovation and it introduces those students who need help to law students here who can help. There are many internal business incubators in schools and then external relationships with accelerators and incubators, etc. All of these are valid ways to promote the education of law students to be able to help the entrepreneur, to be aware of the startup process, and to use care in strategizing with them to provide services that match their intentions and needs going forward.

So, my proposal is a curriculum based around the lifecycle of the business. If you begin curriculum develop by listing all of the transactional services that we do for entrepreneurs and you include the ideation phase, the formation phase, the growth phase, and the exit phase, and you start teaching these skills early on, we can really start to prepare these students for the different demands these startup businesses are going to require. Our objective must be to teach the actual transactional skills that we in law school have to teach our attorneys, but to do so based on the strategic requirements of a startup venture. Here are examples of my working curriculum development process:

| | Management / Leadership | Business Governance | Finance / Accounting | Operations/ Logistics | Marketing / Sales / PR | Human Resources |
|--|---|--|--|---|--------------------------------|--|
| Business Entities | - Revenue Models - Non-Profit | - Ownership Control - Liability - Continuity | - Equity & Debt Structure - Financial Reporting | - Entity Restructuring - Subsidiaries | | - Entity Restructuring - Merger Consideration |
| Business Regulations (Compliance Reporting) | | - Permits - Licensing - Org. Setup | - Disclosure Reporting | - Meetings - Records - Reporting | | |
| Property Laws | | - Zoning - Leases - Land sale | - Securitization | | | |
| Tort Law | | - Fiduciary Duty | - Avoidance | - Injury - Fraud | - Privacy Laws - Defamation | - Fraud |
| Commercial Law/ Contracts | - Purchase Agreements | | - Security Interests - Debt Instruments | - Contracts - Security Intrstrs - Collections | | |
| Environmental Law | - Research & Development | | | - Compliance | | |
| Employment Law | - I/C Agreement - Work for Hire | - Hiring/Firing - Compliance | | - Discrimination | | - Retention - Compensate |
| Taxation | | - Setup Reporting | - Recognition - Deference - Planning | - Income Reporting - Structuring | - Planning | - Consequences - Planning |
| Securities Law | | | - Disclosures - Registration - Exemptions | | | |
| Intellectual Property | - NDA - Infringement - Protect IP | | | | - Use of IP | |

Working draft for reference only.

| | Ideation / Creativity | Startup / Formation | Financing | Operations / Building Team | Early Stage / Late Stage Growth | Exit |
|--|---|--|---|---|---------------------------------|--|
| Business Entities | - Revenue Models - Non-Profit | - Ownership Control - Liability - Continuity | - Entity Restructuring | - Entity Restructuring - Subsidiaries | | - Entity Restructuring - Merger Consideration |
| Organizational Documents | | - Org Docs. - Bylaws - Ownership | - Org. Doc. - Modifications | | - Org. Doc. - Modifications | - Org. Doc. - Modifications |
| Business Regulations (Compliance Reporting) | | - Permits - Licensing - Org. Setup | - Disclosure Reporting | - Meetings - Records - Reporting | | |
| Property Laws | | - Zoning - Leases - Land sale | - Securitization | | - Acquisitions | - Commercial Sale |
| Tort Law | | - Fiduciary Duty | - Avoidance | - Injury - Fraud | - Privacy Laws - Defamation | - Fraud |
| Commercial Law/ Contracts | - Purchase Agreements | - Debt Agreements | - Security Interests - Debt Instruments | - Contracts - Security Intrstrs - Collections | - Contracts Law | |
| Environmental Law | - Research & Development | | | - Compliance | | |
| Employment Law | - I/C Agreement - Work for Hire | - Hiring/Firing - Compliance | | - Discrimination | - Compliance | - Retention - Compensate |
| Taxation | - Forms of Revenue - Basis | - Setup Reporting - Phantom Income - Founder's stock | - Recognition - Deference - Planning - Disclosures | - Income Reporting - Structuring | - Planning - Disclosure | - Consequences - Planning |
| Securities Law | | - Debt Instruments | - Registration - Exemptions | | - Registration - Exemptions | - Reporting |
| Intellectual Property | - NDA - Infringement - Protect IP | | | | - Use of IP - Licensing | - IP Transfer |

Working draft for reference only.

So, there are two things I want you to take away from this. You're going to get a lot of pushback in whatever you do. I don't know if you're familiar with Judge Easterbook's paper, *Cyberspace and the Law of the Horse*. People cite this work all the time to support the argument that startup law isn't real. They argue that you cannot throw an amalgam of subjects together and say that it is an area of law practice. Well, I disagree. Not with him specifically, because he was talking about cyber space], but with those who use this argument to talk about startup law.. I say that it is a unique area of legal practice. The strategic implications of how you apply the multiple areas of transactional practice make it an area of practice unto it self or a substantive area of law that requires instruction.

My two takeaways are this. First, educating a startup lawyer starts with understanding the startup venture, and second, we must teach our students clinical skills, not just with the info applied by a client, but with applied strategy applicable to the startup venture.

End of Session