

OPENING REMARKS

SPARKS!

A POTPOURRI OF RECENT DEVELOPMENTS AFFECTING THE TEACHING OF TRANSACTIONAL LAW AND SKILLS

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Welcome to the Fifth Biennial Conference on Teaching Transactional Law and Skills! We are so glad to have you here. I am Sue Payne, the Executive Director of the Center for Transactional Law and Practice here at the Emory University School of Law and with me is Katherine Koops, the Assistant Director of the Center.

To welcome you to our conference this morning, we present: Sparks!

OBSERVING LAWYERS IN THEIR NATURAL HABITAT

K. Koops:

A March 2016 working paper by Ann Sinsheimer and David Herring³ reports the results of a three-year ethnographic study of the reading, writing, and interpersonal skills of associates—generally second- through fifth-year lawyers—in the workplace. In the interest of full disclosure, most of the associates were litigators.⁴

An “ethnographic study” is what cultural anthropologists do with unfamiliar peoples and cultures.⁵ In this case, it is sort of like observing attorneys in the wild. In this study, the researchers observed the subject attorneys in their offices, interviewed them, collected “artifacts” (also known as written work), and conducted “think-aloud protocols.”⁶

What is a think-aloud protocol? Pretty much what it sounds like: you “think aloud” as you perform a task, describing what you’re doing and

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³ Ann Sinsheimer & David J. Herring, *Lawyers at Work: A Study of the Reading, Writing, and Communication Practices of Legal Professionals*, 21 LEGAL WRITING INST. J. (forthcoming Mar. 2016).

⁴ *Id.* at 10-11.

⁵ *Id.* at 8.

⁶ *Id.* at 12.

explaining your thoughts and feelings. That is a very simple view of the basic methodology. Now, what are the findings? No great surprises, but the study produced a few nuggets that might translate into things that we can think about incorporating into the classroom.

Reading. Sinsheimer and Herring concluded that “for . . . junior associates lawyering [is] fundamentally about reading.”⁷ While traditional law school courses emphasize close reading of cases in textbooks, the study found that practicing attorneys spend more time skimming and scanning content from a wide variety of sources, typically on a computer screen.⁸

Writing. “Even in the smallest workplace [included in the study,] email exceeded face-to-face communication and phone calls as the means of communication.”⁹ The authors reported that “tremendous care in responding to email was a recurring theme for all our [participants].”¹⁰

Interpersonal Skills. Although “[l]aw schools often talk about the need for teamwork in legal practice,” the study concluded that “it is less common to address the hierarchical nature of teamwork in a law firm setting.”¹¹ Additionally, the primary forms of communication were intraoffice or business communications, as compared to legally-focused communications with the court or clients.¹²

Suggestions for incorporating these findings into classroom instruction include:

- practicing skimming and scanning via timed exercises;¹³
- exposing students to a broad variety of reading materials;¹⁴
- developing exercises that require students to compose emails to various audiences;¹⁵ and

⁷ *Id.* at 13.

⁸ *Id.* at 13-27.

⁹ *Id.* at 45.

¹⁰ *Id.* at 48.

¹¹ *Id.* at 58.

¹² *Id.* at 58-60.

¹³ *Id.* at 70.

¹⁴ *Id.* at 71.

¹⁵ *Id.*

- practicing professional written and verbal responses in a variety of contexts.¹⁶

Fortunately, many of the transactional skills courses we teach already incorporate many of these suggestions. Sue will now discuss another skill that is utilized in practice.

Developing CQ (Collaborative Intelligence): It is important to teach students to play well with others.

S. Payne:

I hope you will get the chance to read a recent (April 2015) law review article called *Law School Culture and the Lost Art of Collaboration: Why Don't Law Professors Play Well with Others?* by Michael I. Meyerson.¹⁷ Professor Meyerson asks why so few law professors collaborate on projects and scholarly articles when compared, for example, with mathematicians. While more than 50% of all mathematical papers are co-written, only 20% of legal scholarship is co-written.¹⁸ Moreover “[t]o the extent that law professors avoid collaboration, so will their students.”¹⁹

Many of us who teach transactional law and skills routinely require law students to divide up into teams and collaborate on problem solving, or even on drafting. So, at least the students get the chance to practice collaboration. But many law students are simply not-at-all good at it. They moan, they hem and haw; they cannot decide who should move where, who should take notes, or who will report back to the class. That is why I was so surprised the time I taught a contract drafting module in a business law course at Goizueta Business School, just across the street from us. I asked the students to get into groups and they did it willingly and in a matter of seconds. Moreover, in the blink of an eye, they had chosen a note-taker and a reporter.

Why is it important for lawyers to have high “Collaboration Intelligence Quotients”?²⁰ Professor Meyerson pulls together the research on

¹⁶ *Id.* at 72-73.

¹⁷ Michael I. Meyerson, *Law School Culture and the Lost Art of Collaboration: Why Don't Law Professors Play Well with Others?*, 93 NEB. L. REV. 547 (2014).

¹⁸ *Id.* at 568-69.

¹⁹ *Id.* at 555.

²⁰ *Id.* at 559 n.70 (“The concept of ‘collaborative intelligence,’ or ‘CQ’ was popularized by Stephen Joyce, who defines collaborative intelligence as ‘the capacity to harness the intelligence in networks of relationships.’” STEPHEN JAMES JOYCE, TEACHING AN ANTHILL TO FETCH: DEVELOPING COLLABORATIVE INTELLIGENCE @ WORK 1 (2007)).

collaboration and pinpoints why it is so important that we teach it. He concludes:

- The practice of law is collaborative.²¹
 - Lawyers engage in brainstorming, group decision making, editing, and being edited.²²
 - Lawyers work with colleagues, clients, consultants, accountants, etc.²³
- The nature of legal work is changing and, therefore, clients want team players.²⁴
 - While lawyers have become more specialized, clients' issues are more complex, multidisciplinary, and international; clients rely on lawyers' ability to work with other people who have the additional knowledge and skills required.²⁵
 - If lawyers know how to collaborate, firms can take on more sophisticated (and lucrative) work.²⁶

In light of Professor Meyerson's findings, I believe that we need to help law students develop their Collaborative Intelligence Quotients—that is, their "CQs." To the extent that you are already requiring students to work collaboratively, I hope that Professor Meyerson's article will give you some ready ammunition to use when students challenge you about it.

Grit

K. Koops:

Remember the book, "Who Moved My Cheese?"²⁷ This is not about that; this is more like, "I Don't Care Who Moved It—I Am Getting that Cheese!"

In a recent Freakonomics radio interview, in an episode called, "How to Get More Grit in Your Life,"²⁸ psychologist Angela Duckworth argues that you are not born with grit—it can be learned.

²¹ Meyerson, *supra* note 16, at 557.

²² *Id.* at 557-58.

²³ *Id.* at 558.

²⁴ *Id.* at 559-60.

²⁵ Myerson, *supra* note 16, at 561.

²⁶ *Id.*

²⁷ See SPENCER JOHNSON, M.D., WHO MOVED MY CHEESE? (1998).

Duckworth defines grit as “passion and perseverance for especially long-term goals.”²⁹ Through her research, she identifies four traits that “gritty people” have in abundance: interest, practice, purpose, and hope.

So, grit is kind of situational. You will have more grit if it relates to something in which you are *interested*. For example, I would be ten times more “gritty” with respect to my tennis game than to, say, bridge. We are fortunate that, in many cases, our students have elected to enroll in our courses, and have at least a baseline level of interest that they can refine as they gain experience and exposure.

Practice is a natural follow-on. It is a lot easier to practice regularly if it relates to an activity you are interested in. I would certainly rather practice tennis than chess or bridge. It makes sense that the greater your interest, the more you will enjoy (or at least not hate) practicing. The projects, assignments, and simulations our students complete all constitute what research psychologist Anders Ericsson calls “deliberate practice,” which, in his view, is more important than talent in mastering a skill.³⁰

The third component, *purpose*, is a connection between your interest and other people. Although most students are not yet aware of the many ways they can deploy their skills in the area of transactional law, we and their mentors in practice can expose them to practice areas, causes, and jobs that could define a purpose for their spark of interest.

While it may be listed last, the final component, *hope*, is necessary at every stage of practice. No matter where you are in your journey, there will always be ways you can go off the path. Hope is the belief that you can come back from these problems and challenges. As teachers, we play a key role in providing hope and encouragement as part of our, often-critical feedback that is necessary for “deliberate practice.”

If we can keep these elements of grit in mind as we teach, we can help build better, grittier practitioners for the future.

Multitasking. It turns out that it may not be good for us

S. Payne:

So says a very recent (May 2016) report from *Common Sense Media*,³¹ which, for full disclosure, I must identify as a parental advocacy group. The

²⁸ *How to Get More Grit in Your Life*, FREAKONOMICS RADIO (May 4, 2016), www.freakonomics.com/podcast/grit/ (last visited Oct. 1, 2016).

²⁹ *Id.*

³⁰ See K. Anders Ericsson, Ralf Th. Krampe & Clemens Tesch-Römer, *The Role of Deliberate Practice in the Acquisition of Expert Performance*, 100 PSYCHOL. REV. 363, 400 (1993).

³¹ Laurel J. Felt & Michael B. Robb, *Technology Addiction: Concern, Controversy, and Finding Balance*, COMMON SENSE MEDIA 1 (2016), https://www.commonsensemedia.org/sites/default/files/uploads/research/csm_2016_technology_addiction_research_brief_0.pdf.

authors of the report, *Technology Addiction: Concern, Controversy, and Finding Balance*, reviewed research from a wide range of publications covering, among other things, the media use habits of college students and adult populations.³²

I give you the example of my 20-year-old stepdaughter. She will sit in front of the television watching Project Runway and commenting to me about the fashion while writing a research paper for her communications class on her laptop and texting two or three different friends on her iPhone.

Although I admit to being one of those who regards the highly-developed ability to multitask as *awesome* and considers it a valuable skill for a young transactional attorney to possess, this Common Sense Media report is powerful and could change my mind. The key findings of the report regarding multitasking include the following:

- If my stepdaughter, for example, is writing a research paper and texting her friends at the same time, “she [is not] really doing these two things at the same time—she is doing them sequentially.”³³ Each switch from one task to another “requires [a shift in] cognitive resources . . . from one task to another.”³⁴
- Although multitasking seems to save time, it often hinders productivity due to “cognitive fatigue”—that is, “mental exhaustion caused by the strain of switching between tasks and maintaining multiple trains of thought.”³⁵
- Multitasking “reduces work speed both because people think and move more slowly and because their resumption lag, or the time between tasks, may expand.”³⁶
- “[M]ultitasking makes it more difficult to create memories that can be accurately retrieved later.”³⁷
- “[H]eavy media multitaskers have a harder time filtering out irrelevant information. In other words, they may have developed a habit of treating all information they come across with equal attention instead of allotting steady attention to a particular task.”³⁸

The key findings of the report regarding laptop use include the following:

³² *Id.* at 10 (A more detailed description of the authors’ methodology can be found here).

³³ *Id.* at 19.

³⁴ *Id.*

³⁵ *Id.* at 19.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 20.

- “[S]tudents who multitasked on a laptop during a lecture performed worse on a test than students who were not multitasking.”³⁹
- Students who saw other students multitasking on a computer scored lower than those who could not see other people’s laptops.⁴⁰

So, to the extent that we can encourage our students not to multitask, I believe that we will be helping them to learn more efficiently. I know that I will like it better if I can convince my stepdaughter not to write her research paper and text her friends while we are watching Project Runway together. But it is not merely about me being annoyed. I actually want her to experience the joy of what psychologist Mihaly Csikszentmihalyi called “flow.”⁴¹ Flow occurs when someone is “completely involved in an activity for its own sake.”⁴² According to Csikszentmihalyi, “The ego falls away. Time flies. Every action, movement, and thought follows inevitably from the previous one, like playing jazz. Your whole being is involved, and you’re using your skills to the utmost.”⁴³ I want my stepdaughter to experience “flow”; I want my students to experience it, too.

Technology continues to drive change in practice, teaching and learning

K. Koops:

Danger Will Robinson! Danger! The robots are coming! On May 12, 2016, the following headlines appeared:

- On Fortune.com: “Meet ROSS, the World’s First Robot Lawyer.”⁴⁴
- On Above the Law: “Baker Hostetler Hires Artificially Intelligent Lawyer; Ushers in the Legal Apocalypse.”⁴⁵

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ John Geirland, *Go with the Flow*, WIREd (Sept. 1, 1996), <http://www.wired.com/1996/09/czik/>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Michal Addady, *Meet ROSS, the World’s First Robot Lawyer*, FORTUNE.COM (May 12, 2016, 11:23 AM), <http://fortune.com/2016/05/12/robot-lawyer/?iid=lefttrail>.

⁴⁵ Joe Patrice, *Baker Hostetler Hires A.I. Lawyer, Ushers in the Legal Apocalypse*, ABOVETHELAW.COM (May 12, 2016, 2:19 PM), <http://abovethelaw.com/2016/05/bakerhostetler-hires-a-i-lawyer-ushers-in-the-legal-apocalypse/>.

The “world’s first robot lawyer” is actually an artificial intelligence research product built on IBM’s cognitive computer platform called Watson.⁴⁶ Baker Hostetler has reportedly licensed ROSS for its Bankruptcy team.⁴⁷ Lawyers can ask ROSS a research question in natural language. Then ROSS reads through the law, gathers evidence, draws inferences, and returns answers. ROSS also monitors the law to notify users of new decisions that can affect a case. Moreover, his abilities improve as the number of interactions with attorneys increases.⁴⁸

ROSS isn’t the only “legal bot” or new or evolving technology our students will encounter in practice. For example, when asked in an interview which legal technologies were expected to experience the most dramatic growth in 2016, Ken Grady, Lean Law Evangelist at Seyfarth Shaw, expected it to be contract drafting and contract lifecycle management software.⁴⁹

Even if we don’t need to use everything that comes along, we need to keep abreast of technological developments. For example, when we teach due diligence or contract drafting, we need to continue to emphasize things like judgment, prioritization, and integration of information.

In a timely fashion, the AALS (Association of American Law Schools) Clinical Section’s Technology Committee is gathering signatures to petition the AALS to create a new section on Leveraging Technology for the Academy and the Profession.⁵⁰ The section will encompass:

- technology and the practice of law, which will help law school faculty to understand the emerging technologies being used in the practice of law and to help them figure out how best to prepare law students to use them in practice; and
- technology and legal education, which will help law school faculty learn how to use educational technologies in the classroom.⁵¹

⁴⁶ See Cecille De Jesus, *Artificially Intelligent Lawyer “Ross” Has Been Hired by Its First Official Law Firm*, FUTURISM.COM (May 11, 2016), <http://futurism.com/artificially-intelligent-lawyer-ross-hired-first-official-law-firm/>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Cathy Reisenwitz, *2016 Legal Technology Trends to Watch: Contracts, Artificial Intelligence, Cloud, and Wearables*, CAPTERRA LEGAL SOFTWARE BLOG (Jan. 5, 2016), <http://blog.capterra.com/2016-legal-technology-trends-to-watch-contracts-artificial-intelligence-cloud-and-wearables/>.

⁵⁰ Warren Binford, *Please Sign Petition for New AALS Technology Committee!*, CLINICAL LAW PROF BLOG (June 1, 2016), http://lawprofessors.typepad.com/clinic_prof/2016/06/please-sign-petition-for-new-aals-technology-committee.html.

⁵¹ *Id.*

Disruptive Innovation. A time of great change for legal education

S. Payne:

My husband is a psychologist. The other day he noticed me getting extremely agitated as I was reading articles to prepare for this talk. He pointed out that some people become agitated at times of great change. Most of the articles I was reading had one thing to say: Law schools are in crisis.

According to a very recent paper (March 2016) called *Disrupting Law School: How Disruptive Innovation Will Revolutionize the Legal World*, by Michelle R. Pistone and Michael B. Horn, disruptive innovation in legal services is to blame.⁵²

Pistone and Horn point out that traditional legal services are expensive, restricted by licensure, and individualized and customized.⁵³ Disruptive Innovators like Legal Zoom, Rocket Lawyer, Shake, and others are offering commoditized, less expensive services.⁵⁴ They are bringing standard transactional services to clients who could not otherwise afford them—that is, they are pushing transactional services “down-market.”⁵⁵

How does this relate to our students’ prospects in transactional practice? Is transactional work going to die? Some say that the smallest firms—the ones that rely on repetitive, standardized transactional work—could disappear.⁵⁶

According to Pistone and Horn, besides commoditization, there is a movement afoot to license non-lawyers to perform certain kinds of legal services.⁵⁷ The State of Washington is now licensing legal technicians as LLLTs (Limited Licensed Legal Technicians). An LLLT can “perform many of the functions that JDs traditionally performed, including consulting and advising, completing and filing necessary legal documentation, and helping clients understand and navigate a complicated family law court system.”⁵⁸ Some other state bars—California, Colorado, Massachusetts, New York, Oregon, and Utah—are considering similar licensure arrangements.⁵⁹

⁵² Michele R. Pistone & Michael B. Horn, *Disrupting Law School: How Disruptive Innovation Will Revolutionize the Legal World*, CLAYTON CHRISTENSEN INST. FOR DISRUPTIVE INNOVATION 1 (2016), <http://www.christenseninstitute.org/publications/disrupting-law-school/>.

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 4-6.

⁵⁵ *Id.*

⁵⁶ Keith Lee, *Transactional Work Is Going to Die*, ABOVE THE LAW (Oct. 15, 2015, 2:31 PM), <http://abovethelaw.com/2015/10/transactional-work-is-going-to-die-in-small-firms>.

⁵⁷ See Pistone and Horn, *supra* note 51, at 9-10.

⁵⁸ *Id.* at 10.

⁵⁹ *Id.*

As a result of disruptive innovation, Pistone and Horn posit that the JD degree is less attractive. They say: “Law schools should now begin to set themselves up as disruptors and offer online, competency-based educational programs that train students to provide legal services, not necessarily to be a JD.” Furthermore, they recommend that law schools:

1. create an autonomous business unit that has freedom from constraints of the current business model;
2. improve learning and control costs by using online, competency-based learning in combination with in-person experiences (a hybrid);
3. shift from courses to modules to be studied separately or in sequence, offering maximum flexibility; and
4. create programs that allow JDs to focus deeply on a particular area of the law and afford law schools opportunities to distinguish themselves in certain practice areas.⁶⁰

Wow! I think of myself as an innovator, but am I ready to be a disruptor? All I know is that I feel agitated. And that means a great change must be on the horizon.

⁶⁰ *Id.* at 21-22.