

INTEGRATING TRANSACTIONAL SKILLS TRAINING INTO THE DOCTRINAL CURRICULUM

Rachel Arnow-Richman¹

*Scaling Carnegie: Four
Iterations of Teaching
Transactional Workplace Law
Skills*

Barbara Lentz² &
Andrew Verstein³

*Shared Perspectives and
Strategies in Course,
Curriculum, & Competency
Exercise Design*

SCALING CARNEGIE: FOUR ITERATIONS OF TEACHING TRANSACTIONAL WORKPLACE LAW SKILLS

Rachel Arnow-Richman

I have titled my portion of the presentation “Scaling Carnegie: Four Iterations of Teaching Transactional Workplace Law Skills.” During my time, I will discuss four models for integrating transactional lawyering skills into the doctrinal classroom. I refer to these models as iterations because they represent the natural evolution of my experience as a “podium” professor, who, over the last ten years, has experimented in various ways with skills education and integrated learning.

I hope to provide a taxonomy as well as a set of recommendations about the use of these models in the context of the larger law school curriculum. I will begin with a few preliminary remarks about the role of podium faculty in the experiential education mission. I will then provide some background about why I believe workplace law course provides a useful platform for transactional skills training. Next, I will present the four iterations of experimentation that track my evolution from a traditional teacher to a proponent and provider of integrated learning. Finally, I will offer some conclusions about each model and its relative value in achieving an integrated curriculum.

¹ Chauncey Wilson Memorial Research Professor & Director, Workplace Law Program, University of Denver, Sturm College of Law.

² Associate Professor of Legal Writing, Wake Forest University School of Law.

³ Associate Professor of Law, Wake Forest University School of Law.

Doctrinal Faculty as Part of the Solution

Law schools are in a double bind right now. They are under acute pressure to produce practice-ready lawyers for firms and other employers who can no longer afford to train new hires. At the same time, law schools are seeking to conserve teaching resources and reduce costs in the face of decreased enrollment and tuition dollars. Delivering an experiential education is one way that law schools can distinguish themselves in marketing their graduates to legal employers and marketing their curriculum to law school applicants. But it is also expensive. Experiential learning opportunities such as simulation courses and live-client clinics require a low teacher student ratio, which schools can ill afford to provide with consistency.⁴ If law schools want to make integrated learning the norm rather than the exception, it has to at least partially rethink the role of the podium professor and the structure of the doctrinal classroom.

Workplace Law as Transactional Law

This is what I have been doing over the last ten years with my doctrinal course in employment law. By way of background, the course that I teach serves as the foundation course in the University of Denver Law School's Workplace Law Program. It offers a survey of the various common law and statutory protections governing individual workplace relationships. It covers, among other things, basic contract and tort principles as applied to the workplace; constitutional principles as applied to the speech and privacy rights of government employees; and what we call the alphabet soup of employment law: the CRA of 1964 & 1991 (Title VII),⁵ the ADA,⁶ the ADEA,⁷ the

⁴ The cost will, of course, depend on the way in which schools choose to staff experiential learning courses. Relying on adjuncts or other non-tenure line faculty to fill these teaching needs can substantially lower the price tag. See Martin J. Katz, *Understanding the Costs of Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 28 (2014). It is my view that over-reliance on contract faculty is contrary to the goal of achieving an integrated learning experience and raises serious equity issues about the treatment and status of non tenure-line faculty. Such issues, however, are outside the scope of my remarks, and will be taken up in a future article. See Rachel Arnov-Richman & Nantiya Ruan, *Experiential Learning and Faculty Status: An Employment Law Perspective* (forthcoming 2017) (work in progress on file with author).

⁵ Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1-17 (2016).

⁶ Americans with Disabilities Act of 1990, 29 U.S.C. §§ 701-718 (2016).

⁷ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2016).

FMLA,⁸ and the FLSA,⁹ which are just a few of the federal statutes that regulate employment relationships.

Admittedly, this is not the universe of doctrines that springs to mind when considering how best to prepare students for transactional practice. Workplace law rarely if ever makes the list of core business and commercial law courses that are the bread and butter of a transactional law curriculum. Yet each of the doctrinal areas I have mentioned, including the statutory rights topics, lends itself to a transactional perspective. In my view, workplace law not only can, but should, be taught at least in part through that lens.

Why? First and foremost, because that is what employment law practitioners, particularly management-side attorneys, actually do. Management lawyers certainly litigate: they defend against employee claims and charges brought in a variety of courts and agencies. But those same lawyers also handle a wide range of transactional matters: they draft and review contracts; audit and revise employer policies; oversee regulatory compliance; and, of course, counsel and problem solve on behalf of their clients. In short, management-side employment lawyers do many of the same things, and think about their work in many of the same ways, that business lawyers do in representing organizational clients.¹⁰

Second, and perhaps more importantly, workplace law offers an accessible context for understanding the transactional mindset, which can in turn prepare students for more complex areas of business law. Students may have no idea what a prospectus is or understand the principles behind indemnification. They likely have no frame of reference for appreciating the importance of representations and warranties in an acquisition agreement. But they know what an employment policy looks like. They know what a non-compete is. They understand not only how an employment relationship operates, but more importantly how it feels. That is, they intuitively understand the goals and interests of the parties, which of course is the first step to being an effective transactional lawyer.

Four Iterations of Transactional Skills Integration

⁸ Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2016).

⁹ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219.

¹⁰ See generally Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 474-79 (2009) (hereafter *Transaction*) (discussing the transactional aspects of employment practice).

I have been leveraging these synergies for over a decade now. As a junior professor, I taught employment law class using my version of Socratic pedagogy for approximately five years. At that point—about the time that many of us begin to feel settled (maybe a bit too settled) in our teaching routines—I began asking myself some hard questions about the utility of the case method in the upper-level curriculum. After a good bit of soul searching, I channeled my restless energy into re-designing the class to focus more directly on lawyers' work.

1st Iteration: The Break Out Exercise

My first foray was neither ambitious nor innovative: I added a single practical exercise to the course.¹¹ I based the exercise on a problem already contained in my textbook and developed it into a written assignment.¹² I merely drafted a few pages of additional materials and assigned it for completion out of class.

The goal was to create an opportunity for students to apply a particular aspect of their doctrinal learning in a practical context and produce a realistic deliverable. The topic I selected was the law of implied contracts and employee handbooks. The assignment was to revise specific language in an employer's personnel manual in light of caselaw holding an employer potentially liable in contract for a breach of its policies. I administered the exercise in a number of ways over a number of years—altering the number of clauses to be revised, requiring at times a written explanation of the proposed revisions, and varying the format for the explanatory document where required.

I think there is much to commend this approach. To begin, it is highly efficient. I spent a small part of one class period teeing up the exercise, mostly by teasing out the client goals and identifying areas for revision in the policy language. I spent the better part of a class period debriefing the assignment, reviewing student samples and discussing their effectiveness. Most of the heavy lifting occurs outside of class, and little is lost in terms of class time or substantive coverage.

¹¹ This portion of my remarks draws on a prior more detailed discussion of the exercise, the background law on which it is based, and my goals and takeaways in administering it. *See id.* at 482-501.

¹² I teach the course using my co-authored casebook. *See* TIMOTHY P. GLYNN, CHARLES A. SULLIVAN, & RACHEL S. ARNOW-RICHMAN, *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* (Erwin Chemerinsky et al. eds., 3rd 2011).

Similarly, there is little in the way of additional work. Designing an assignment around a pre-existing problem is a simple task, and more and more casebooks contain problems that lend themselves to such an exercise. Absent problems, one can simply ask the students to revise language that formed the basis for litigation in any of the principal cases contained in their textbook. Finally, because this was a one-time undertaking over the course of the semester, I had only a single set of student materials to read and mark.

Ultimately, the model succeeded in achieving the relatively modest goals I had set. The students received an in-depth exposure to doctrine, as the exercise required them to apply several strands of employee handbook jurisprudence. They experienced a realistic practice context, this type of work being standard fare for management attorneys. And, in the versions that required a formal explanatory document, the students produced a written deliverable of the type that might be required in communicating with a client or supervising attorney.

The challenges came with the lack of integration and reinforcement. If this is the only exposure students are getting to this type of work, it feels like a one-off for them within the structure of the course overall. This is reflected in the quality of their work. Consider the version in which I require students to draft a letter to the client explaining the proposed revisions. I am essentially asking the students to draft something not unlike an advice letter. But who is teaching them about advice letters and the subtle ways in which they are drafted? Who is teaching them about risk tolerance, and the way that lawyers provide different options to different clients? Lawyers engaged in the real life work that my exercise simulates draw on a wide range of general skills and a wealth of prior experience. It is impossible to teach all of those skills and convey all of that context in the course of administering a single exercise, which may itself be the students' first exposure of its kind. Thus, while I think this model of integration can work, it works best in the context of holistic curriculum where students are likely to have prior, complementary exposure to the underlying skills on which the exercise draws.

2nd Iteration: The Problem Method

My next effort involved adopting a problem-based approach to the course overall.¹³ This is a relatively common pedagogy in the business and

¹³ This portion of my remarks draws on my more expansive discussion of the merits of the problem method and my experience implementing it in my employment law course. See Rachel Arnow-Richman, *Employment Law Inside Out: Using the Problem Method to Teach Workplace Law*, 58 ST. LOUIS U. L.J. 29 (2013) (hereafter *Inside Out*).

commercial curriculum, at least in statutory subjects. Courses on the Uniform Commercial Code (UCC), for instance, are often taught through problems. On the other hand, it is not a common approach in employment law, where much of the doctrine derives from the common law and the relevant statutes are not especially complex. When my casebook appeared in its first edition in 2006, it was one of the only, if not the only, general employment law book to consistently include problems side-by-side with the case materials.¹⁴ Other books have come along since, but almost all of the ones I have seen, including my own, use problems in what I call the “additive” mode. That is, the problems are presented as capstones to particular units, much like practice exam questions. This is vastly different from using a problem as a framing device, what I think of as the signature characteristic of a “pure” or “integrated” problem method.¹⁵

In the problem-based iteration of my course, we began each topic with a short fact scenario involving a hypothetical client. Students were asked to analyze the problem in the role of the client’s attorney, with particular groups of students assigned to take the lead on different problems over the course of the semester. In class, we examined the client’s situation, teasing out his or her legal and business interests, then unpacked the relevant cases and legal rules. Once students grasped the doctrine, we brought those principles back to the problem, focusing on how best to advise the client in light of our legal knowledge.

There are many advantages to this method, which has since become my standard approach to the upper level podium course. It is consistent across topics and across the semester, so it avoids the lack of integration one experiences with the “break out” method I previously describe. It is also consistently client-centered. Throughout the course we are thinking about the law from the perspective of serving a client’s needs. It is especially useful for the inculcating a sense of how lawyers counsel clients in the face of uncertain law and conflicting goals. The call to question is always a version of “what do you tell the client?” It is relatively easy, particularly if you adopt a book containing problems. Finally, there is little to no loss in coverage, as the problem and doctrine are handled in tandem. In short, you need change hardly anything about your class other than your expectations.

On the downside, since the problems are mere framing devices, the method does not achieve an in-depth exposure on any one topic. It is a

¹⁴ See GLYNN, et. al., *supra* note 12.

¹⁵ See Arnow-Richman, *supra* note 13, at 44-46 (adopting this terminology).

breadth-over-depth arrangement. There is also no obvious or easily administrable writing component. By way of comparison, I have used the problem involving the employee handbook revision, previously described in the first iteration of my course as a framing problem in the “problem method” iteration of my course. For the break out exercise, students complete a revised draft and usually an explanatory cover document. In the problem-method version, we talk about the key portions of the policy that need to be changed, and often do some collective in class drafting, but students do not produce a final, formal document. We go from identifying issues, to discussing the law of employee handbooks, to counseling the client. The last is done in broad strokes through class discussion.

In theory, this problem could be addressed by combining iterations 1 and 2. In other words, one could teach all of the material using the problem method and, in addition, assign a single breakout exercise. I have tried this, and it is certainly possible to execute it well, but it might require the instructor to eliminate certain components of one or both methods. Were I to repeat that particular mash-up, I would eliminate the requirement that particular students prepare the framing problems for class discussion. Assigning that preparation on top of the break out exercise, while still moving forward with the reading assignments and class work proved cumbersome for me and the students. A key selling point of both of the break out method and the problem-method is that they can be scaled to a large enrollment course. That virtue is quickly lost when one combines different types of problems and assignments and different pedagogical models. The result was a class that, as one student evaluation put it (I think fairly), had “too many moving parts.”

3rd Iteration: The “CIC” Course

The next progression in my journey was to tackle what we at the University of Denver School of Law call a “Carnegie Integrated Course,” or CIC. The CIC is idiosyncratic to Denver Law, but my experience with the format holds universal lessons about the challenges of achieving a truly integrated learning experience.

Following the issuance of the 2007 Carnegie Foundation Report on Legal Education, Denver Law established a Chair in Modern Learning and appointed a committee to consider how best to address the critiques contained in the Report. One of the things that came out of that process was the creation of the CIC – a course that would achieve the Carnegie Report’s vision of integrating doctrine, skills and professional ethics and values in a single learning environment. The committee developed a comprehensive list of best practices

for CICs: Such courses must be taught in a practice-oriented environment, with students acting in the role of attorneys. The students must experience at least two distinct practice contexts, such as negotiating, drafting, client interviewing, or oral argument. They must produce a variety of written deliverables, including one involving a research component and one involving a rewrite. In addition, such courses must incorporate a graded ethics and professionalism component and an oral presentation opportunity.¹⁶

If this sounds like a lot, it is. I signed on to create one of these CICs along with a colleague, Professor Nantiya Ruan, who, in addition to being a seasoned member of our full-time writing faculty, maintains an active worker-side employment law practice. We sat down with a list of specific skills and practice contexts that we wanted to teach alongside my original employment law syllabus, and developed four teaching modules. Each consisted of several doctrinal areas of employment law, a factually rich problem that frames the module, and several evolutions of the facts that could allow us to incorporate additional topics and skills as the module progressed.

To give an example, the first module of the course involved the representation of a medical practice followed by the representation of one of its principal physicians. This particular module covered a variety of common law employment contract principles as well as some related state statutory matters. Within the module I again used a version of the employee handbook “break out” exercise, although this time it was done in a more limited fashion and was embedded in a larger set of issues. The client first presented the students with the question whether it could lawfully terminate a physician’s assistant suspected of marijuana use, a matter that raised unique issues of Colorado state law. Counseling the client on that matter required the students to examine the practice’s personnel policies, which in turn led them to recommend that the practice revise its employee handbook. Once they completed this assignment, the principal physician, whom the students had counseled in connection with the drug abusing physician’s assistant, decided to leave the practice for a new position. The physician sought legal advice regarding the proposed contract of employment, in particular its noncompetition provision.

While navigating these questions, the students were exposed to the relevant bodies of doctrine—employment at will and other employment

¹⁶ A complete list of Denver Law’s requirements for Carnegie Integrated Courses can be found online. *The Experiential Advantage*, UNIV. OF DENVER, STURM COLL. OF LAW, <http://www.law.du.edu/index.php/experiential-advantage/course-simulations/cic-requirements>.

contract principles, the law of employee privacy and drug testing, and the laws of covenants-not to compete. They also engaged in a number of simulations and used a variety of lawyering skills, including client counseling, negotiation, contract review, contract revision, and corresponding with opposing counsel. Finally, the students wrestled with ethical questions, such as whether it would present a conflict of interests to represent an individual partner after previously representing the partnership.

I have many great things to say about this iteration of the course. It presented an organic and integrated picture of law, which students do not often experience. The traditional classroom, in addition to being divorced from any practical context, is also highly abstract in its approach to doctrinal learning. Material is presented through a consciously structured organizational framework: contract law, tort law, constitutional law, and so forth. In contrast, the CIC offered a kind of doctrinal immersion. In class, as in life, the relevant areas of law were dictated by the client's situation and ran all over the map without regard to subject matter boundaries.

An important added value of this model came from the use of full-on simulations. The first class began with a model interview: I played the principal physician contacting an attorney on behalf of the practice. Professor Ruan played the attorney who advised me. Role plays like these enhanced context and made the study of the problems more realistic. It also allowed us to consider aspects of practice and professionalism different from those that arise in the preparation of written documents. We were able to discuss how to present oneself as an attorney, how to put a client at ease, how to take notes and make records, and most importantly how to respond in the moment as facts and events unfold.

Perhaps most importantly, the course was recursive in structure. Each module lasted for several weeks and was sophisticated enough to allow for multiple executions of similar skill sets. For instance, two weeks after the students observed my colleague and me in role play a client interview, they conducted their own client interviews: the students worked in pairs with one student playing the attorney and the other playing the physician seeking advice about the newly extended offer of employment. Similarly, the process of reviewing the employee handbook laid the groundwork for the students to review the new employment contract offered to the physician. Most of the handbook portion of the module, was conducted in class. We identified and discussed problematic language as a group, then broke into smaller groups to tackle the revisions, then reconvened as a group to discuss how we would present our conclusions to the client. When we moved on to counseling the

physician about the new job offer, students followed the same steps but with greater independence and a more fully realized final product. They reviewed and revised the prospective employer's proposed contract and wrote a persuasive cover letter to opposing counsel in support of the physician's preferred terms.

The key limitation of this model is probably obvious. The course involved significant increased work for both of the teachers: the development of customized teaching materials, the creation and execution of numerous simulation designs, ongoing management of administrative and logistical issues, and the constant provision of student feedback and assessment. It is not an exaggeration to describe it as exhausting. It was also incredibly resource intensive from an institutional perspective. Professor Ruan and I co-taught the course in a literal sense. We prepared all of the materials in collaboration and led every class meeting together. As a result, each of us got full teaching credit (3 credits a piece), while, owing to the significant student contact demands of the course, enrollment was limited to twenty students. By way of contrast, I usually teach thirty to forty students in employment law (and can easily accommodate up to fifty). In addition, the twenty students who were able to take employment law that year were forced to choose between taking the intensive CIC format or foregoing the subject altogether, meaning we did not have an option for students seeking a more modest exposure to the field. Last but not least, doctrinal coverage suffered significantly, with topical selection sometimes being driven by the problem structure and the nuances of the doctrine taking a backseat to skills exposure. Certainly there were many positive learning outcomes, but we did not succeed in providing anything close to a thorough overview of the field, something I aspire to achieve in the traditional course.

But before I condemn the Employment Law CIC to the annals of history, I must acknowledge that the experience taught me a great deal about both the value of integrated learning and how to create an integrated learning experience, knowledge and skills that I can now apply in other contexts. For instance, I believe the pedagogy and format of the CIC could be repurposed effectively with fewer sacrifices in a more focused course, one that aimed to cover just a few selected topics. Similarly, the approach is highly suitable to a capstone, or other type of advanced course, in which the students have already had a more basic exposure to the relevant body of law.

4th Iteration: Lecture & Lab

In fact, that is what I attempted in my fourth and most recent iteration of the course. I call this final version "lecture and lab," although both are

misnomers. I rarely lecture in any of my podium courses, and there were no real-life experiments (or clients) in the so-called lab component of this model. My vision and terminology derived from the widely used method of teaching undergraduate courses in math and science: As many as one hundred students might be enrolled in a traditional lecture hall course that meets semiweekly, while separately, the students meet in smaller groups for a lab or recitation in which they engage in focused, hands-on treatment of the same material.¹⁷

For my “lecture and lab,” I offered my regular employment law course (which I now routinely teach using the problem method) for full enrollment. I simultaneously offered a “practicum” course capped at twelve students who had either previously taken or were cross-enrolled in my employment law course. The practicum had a much more limited focus than the CIC version of the course. I chose to focus exclusively on transactional and pre-litigation matters, as opposed to the full range of practice contexts and lawyering skills we had tackled in the CIC. I also felt free to take on a more limited set of doctrinal issues, knowing that the students would gain a more thorough exposure through the general course. At the same time, I was able to use all of the teaching techniques—simulation, written deliverables, problem solving, etc.—that I found effective, if constraining, in the context of the CIC.

Overall, I found this more streamlined version of the course less demanding both for myself and, I believe, for my students. Although I used at least as many modules as we had used in the CIC, they were less ambitious; I did not feel the need to cram a great deal of content into each and every one. An added value was that, with the scaled down expectations, I had space to invite the participation of a number of practitioners, whose contributions added perspective and reinforced key learning points.

My review is not all rosy. Workload remained an issue despite the more streamlined nature of the course. Fortunately, I was able to repurpose a lot of the materials from the CIC, so that the added prep time was spent primarily on assessment and logistics. Increasingly, legal publishers are producing skills-oriented books and supplements that can offer faculty a “ready-made” experiential course. Indeed, on the heels of the CIC experience, Professor Ruan and I contracted to produce a workplace volume for West’s Professional Skills Series.¹⁸ That paperback supplement contains versions of many of the

¹⁷ See Arnov-Richman, *supra* note 10, at 501-04 (making the case for a “multi-credit hybrid” course involving separate classroom and lab components).

¹⁸ See Rachel Arnov-Richman & Nantiya Ruan, *Workplace Law*, DEVELOPING PROFESSIONAL SKILLS SERIES (forthcoming 2016).

problems and exercises we developed for the CIC. The teachers; manual and website contain the background information, instructions, and supporting documents to enable other faculty to replicate our course without having to do the front-end work of designing materials.

There are still resource issues to consider. Offering my full enrollment podium course alongside the practicum solved the problem of serving all students interested in taking employment law. However, I taught only employment law that semester, the 3-credit practicum replacing what could have been another large enrollment course. Similarly, the students who cross-enrolled received six credits of employment law rather than the usual three, meaning they too had a less substantively diverse set of courses. And it is probably fair to say that I was less creative in my podium class during the semester that I taught the practicum. My bandwidth for experimentation was consumed by the small course, and to some extent I fell back on traditional, less labor-intensive pedagogies in my other class meetings.

Conclusion

Yet I consider these to be first generation problems in our still nascent quest to reform the J.D. curriculum. Some may go away as the Academy finds its footing in the wake of the recent disruption. One can imagine a future in which faculty can comfortably rely on a more developed infrastructure for integrated courses, including more readily available teaching materials and better administrative support. The law school of the future can be expected to have established norms about how such courses are scheduled, graded and credited in the context of the overall curriculum. Other challenges, such as the additional preparation and assessment involved in delivering experiential learning, may not go away. But we may come to accept them as we affirm our commitment to a more integrated and possibly very different-looking curriculum. We may reach a different understanding as what constitutes a well-rounded J.D. curriculum, recognizing the value of varied learning experiences over variations in substantive learning. We may develop a different notion of how best to allocate faculty resources, prioritizing pedagogical innovation over credits taught. In the end, such shifts may engender a world in which the integrated classroom is not the outlier of legal education but its centerpiece.

A. Verstein Take some questions.

Rachel Well I don't want to—I want to make sure you have your—

A. Verstein Oh I'll take the time back later. Don't worry about it.

- Rachel Okay. Yes, sir.
- S. Meiklejohn Yeah, one question. I'm Sandy Meiklejohn. My colleague Bob White with whom I'm teaching a course that we'll talk about tomorrow, teaches bankruptcy at Quinnipiac, and he teaches a one-credit bankruptcy lab along with or after a three-credit regular bankruptcy course. One question that did come up when—and I helped him with that course to some extent—one question did come up when proposed to us was if you have limited enrollment in the bankruptcy lab. Does that give an unfair advantage on the final in the regular bankruptcy course to the students who are able to take the lab? Now, it turned out it didn't matter because it didn't hit the enrollment limit in the lab. So anybody who wanted to get into it was able to, but that is a question that got raised and what we said was look, let's just try it. We don't know whether this is going to work or not and the only way to find out is to try it and the faculty went along with that. But it is a question that someone raised.
- Rachel Yeah and I guess what I'll say is experimenting is learning and it is something I've thought about. I don't really want to say solution because I'm not really sure it's a problem. But what I will say is that I was somewhat mindful in crafting my final exam not to emphasize areas where we had done research in the lab. Bear in mind that in the lab there isn't a ton of legal research. It's mostly just doing but for areas where students did learn the law more in-depth, I did steer away from that when crafting the final.
- S. Meiklejohn I mean some faculty members said "Look it's an advantage."
- Rachel There's that as well. There's that as well. I'm happy to talk. Andrew?

*SHARED PERSPECTIVES AND STRATEGIES IN COURSE, CURRICULUM,
& COMPETENCY EXERCISE DESIGN*

Barbara Lentz & Andrew Verstein

Barbara Lentz

I'm into experiential learning. So thank you for joining us. My name is Barbara Lentz. I teach at Wake Forest Law School. I've been there sixteen years and I'm starting my sixteenth class—different class—this fall. We are doing a joint presentation of sorts. So I'll speak a bit. My goals are to talk about our learning objectives for the curriculum and trying to get transactional practice into the law school learning objectives. Then I've got some suggestions to help incorporate deep learning into different transactional or other exercises. For anything you want to do in your class, there's some good tips for planning your course and your exercises, so I'll do that as briefly as I can. Rachel will be in the middle and she's got four models of integrating transactional practice into courses across the curriculum. Then Andrew, my colleague from Wake Forest, will be speaking about new faculty and implications of what we know about some new faculty hires. So we have plenty of time for questions and thank you for coming.

So, as I said, those are my goals. My name is Barbara. I teach at the law school. I teach JDs, international LLM's. I teach master's students at the law school and also at the business school. I teach leadership at the business school. I teach at the college. So I'm really fortunate to have colleagues from all over the university, and they make lawyer jokes, and one of their favorite lawyer jokes is about my job at the buggy whip factory. They think "How you doing at the law school—you still making those buggy whips?" "What do you mean?" The buggy whip factories—they went out of business. It took them about twenty-five years. They had noticed but they didn't adapt and their industry ceased to exist because the need for its product disappeared. So some of my really good friends wonder if this has not happened to law schools [be]cause we have had twenty-five years or twenty-four and a half since the MacCrate Report, and then we had the best practices; and then we had Carnegie and now we have the new ABA regulations and it's moving. I'm from Chicago so our pace is molasses. Downtown Chicago in February. I'm an innovator and a disruptor. I like to see change and new things, so this is frustrating for me. I see their point, right? Do I work at a buggy whip factory?

What can we do to avoid going the way of the buggy whip? So about the same period, what have law schools done? Well, one response was to keep hiring until fairly recently and now hiring is coming back. Andrew is going to talk a little bit about that. But we're far above the hiring where we were in 1999 or 2000, although the number of students is not. So, for me, that's a sobering thing to think about. Okay. So the ABA says we had—what do we know? We had information from practice. We had information from our friends and colleagues who are still practicing law who told us we want to see practice-ready

lawyers. The ABA said we'd like to see practice-ready lawyers. Over eight years, we came up with standards, and here's our new standards. The first one says let's prepare practice-ready lawyers. The second one, B, says tell people how you're going to do it. What's your plan? Share it? You'll have to test and see whether the students actually attain your objectives later on. So that's the general framework. Prepare lawyers and have a public plan for how you want to do that. Okay, so learning outcomes are suggested. These are the basic learning outcomes. At your law school, you've probably started looking at learning objectives or adopting learning outcomes across the curriculum. They fall into a knowing and understanding: the big category B legal analysis, legal research, problem solving, and communication. We want to see some professionalism and ethics. Where does it mention transactional practice skills?

Speaker

Problem Solving.

Barbara Lentz

Problem solving, right. So problem solving is a good one. Everybody in the room has done statutory interpretation at one time or another. Does the term that does comes after or at the end of written and oral communication in the legal context? Does problem solving need to be in the legal context? How do you read that?

Speaker

It will need a comma after communication if the legal context applies. Or some kind of punctuation after communication?

Barbara Lentz

Right. If it was going to apply to everything.

Speaker

Right.

Barbara Lentz

You can do any kind of problem solving. It could be real world, just like your clients want you to fix things. Tina Stark likes to talk about not having business issues or legal issues, your clients just have issues. Fix it. So in plain English, fix it. Problem solving means fix it. So we can use that to try and get more transactional skills practice or transactional learning across the curriculum. There's also the other interpretation that mentions document drafting. Ding. Direct reference to some transactional work. Although there's some really good other things. There's certainly competencies here either for [cultural quotient], emotional intelligence, soft skills, that most of our transactional graduates and all of our practice-ready people need to have.

Okay, organization and management of legal work. Collaboration, cultural competency—where do you get that in torts? Do you get that in torts? How about negotiation? Lots of negotiation in constitutional law. So once your school comes up with your learning objectives—oh one other change. We now have six required hours of experiential learning. So that's fantastic. It's 7%. So 7% of law school will be doing and most of our students will do more than that, right? They want to get the experience. They know that it helps them hit the ground running but 7%. This is the big change? This is why some of my colleagues say you work at a buggy whip factory, because it took you eight years to do this? Really and now you're going to try put it into practice? Okay, in the same amount of time Wake Forest University has planned an engineering school. They raised the money. They built the building. They hired the faculty. They designed the curriculum, and they're starting classes in the fall. We were just talking about what the rules might be. So the world is moving on. So maybe we're looking at solving problems from the mid-2000s.

So every school is going to have your learning objectives and you'll think about where in the required curriculum your students will obtain those competencies because you design your goals. Then you design your own test to figure out how you meet it. So you'll introduce—that's the "I"—you'll introduce knowing or understanding in the first year or other required courses. Move to proficiency in some of those classes and maybe have competency. So who's doing the work? Where do the students develop the information that they need—the knowledge, understanding, written and oral communication, professionalism, ethics, and then other? Whatever other is. Is it across the curriculum? Not so much. Right? So I think we need to move this across the curriculum if we're really going to have practice-ready graduates. ABA said "have practice-ready graduates." So integrate transactional competencies into learning objectives across the curriculum. Even torts. There's got to be things that our colleagues can do in torts. Not everyone comes to teaching with background and change is hard. We know people are anxious.

Now to learning theory. I think that learning theory is helpful so that we're not still making buggy whips. What happens in other industries when you have twenty-five years of information and you ignore it? This is the automotive industry in Michigan and the 805,000 jobs that were lost in the last decade of the 2000s. I was living in Michigan until just before this, so there's real world implications to trying to wait it out. I don't know that we can wait it out anymore but everybody that comes to this conference, I believe, believes that, right? We know and we want to do things. How do we encourage our colleagues? Or if you're new to it, how do you implement some of these practices in your classes? Learning theory is really good. It works with my tenure tract colleagues or the typical doctrinal folks even if they've been teaching twenty-five years, [be]cause there's theory and there's research. It's kind of abstract. It's something they can talk about. We know about types of learning. Learning theory is newer to law schools. My friends in the university and the other departments have been doing this for twenty years or so, but it's

relatively new to the law school, but it's really helpful in designing your course and your curriculum to try and integrate transactional process.

We want to avoid surface learning where you know the rules but you can't transfer it. So if your student sees a hypothetical in class and you change the names of the parties on the exam, they don't recognize it because they can't take their learning and transfer it to another situation. Strategic learning, these are your folks who want to do well on the exam and if they hear me say in contracts class something about efficient breach theory they think, efficient breach theory. She likes it. Mention that. So they're motivated. They want to learn it. They have processed. They have rules, but far transfer is a little bit harder. Hard for them to take something out of context and apply that idea in a new setting. So designing exercises for far transfer will help you with your strategic learners. They'll have better understanding.

The first of the ABA core competencies is knowledge and understanding and we want to have deep knowledge. We want our students to be able to explain what the rules are in English in their own words and be able to articulate why they chose a particular rule to solve a problem just as they would with a client. That's deep learning. Those are deep learners. They learn from mastery. If you follow this sort of theory, it helps with curriculum design because you don't try and cover everything because broad coverage encourages surface learning.

Okay so deep learning—a little bit about learning outcomes. It supports far transfer. When you're describing exercises you're thinking of what's at the top of Bloom's taxonomy. So, evaluate. You have two approaches or two rules. Evaluate which one you select and tell me why. Design exercises around that. Not at the bottom. Although you can do the bottom, repeat the rule, a week after you introduce it to your students and that's retrieval. So some tips for exercise design—multiple opportunities and perspectives. And to me that means practice documents—so lots of small things that you can do to inculcate good habits. You have to read a UCC-1 and then you might read a provision of a contract. You can look at insurance revisions. Short things that you can do in ten or fifteen minutes in class and there might not be a graded component, but your students get to see the application of the law in different context. They need to retrieve the information that they know and realize what the issues are and how it's presented, so then it helps them with their learning. It helps them put the information into long-term learning. Every time the student needs to recall that information in a different format or, for a slightly different application, it deepens the connections and it deepens the learning. For transfer, retrieval, and drop zone, I try and do something every three weeks in my first year contracts class. In my art law class, its third year, we do something every week. We have a practice assignment every week. It could be oral. It could be group but they work all the time. The non-profits, it's really easy to have transactional work that they do including non-legal research. Non-legal research is terrific, because it makes students deal with the facts and facts

are messy. Fact development is something they all need to do. Then my last point—building connections and fluency, designing for that.

I take field trips. I find that a lot of learning happens outside the classroom. I know learning theory for adult learners and, in college, studies show that two-thirds of the learning happens outside the classroom. We have some additional considerations in the law school environment, because our students are sometimes often stressed or depressed and leaving the law school environment is an opportunity to have a breath of fresh air and new perspectives. So we leave fairly often. Even in the first year contracts class, we left and went to a museum and talked to folks about their legal issues and how they wrote a contract. We looked at contracts for borrowing art from one place to another, so lots of the concepts that we covered were right there in print with the people who had to draft them and negotiate them, and as I go forward with that, I know Karl is going to speak about using video.

Karl Okamoto

I did.

Barbara Lentz

Sorry I missed it. Hopefully it will be on the website. So I plan to have videos of those things that students can see as we go along and they'll write reflection papers on it. I like them to think and work and write all the time. Lots of small stakes testing because that's retrieval and that makes them stay engaged and stay on top and looking for applications. Then the last thing that I do is I assign my students to read the paper. I know it's totally old school, but if you're going to be a transactional lawyer, whether it's online or in print, you should read the Wall Street Journal. You should read the Financial Times. You should read the business section wherever you live. You should read the paper, right? You'll interview better. So I designed exercises just to get them to read the paper and we talk about it in class. Sumner Redstone has been a gift. I know that he has many challenges with his family, but it's been a gift to my legal classroom. Alright so some strategies and techniques superfast—and if you want any of the slides, you can send me an email and get that. I think I need to pass to Rachel. Rachel has four models?

Rachel Arnow-Richman

Did you have one more slide?

Barbara Lentz

I have a bunch more slides. It's like a medical convention. So in sum, deep learning across the curriculum means practice documents across the curriculum. We have to find, even if it's five minutes every two weeks in a first year class, you've got to find ways to have your students look at things lawyers make, read, and do to transfer their learning. To have near transfer and far transfer and be able to be practice-ready lawyers by the time they graduate, we

need everybody at the law school to pitch in and help us help our students attain those skills. Thank you. I want to see if I can get this up for you.

Andrew Verstein

I'll tell you I'm Andrew and I have a talk that is a confession and a plea. The confession is who I am and what I do, and the plea is help me to do better and help people like me to do better. So who am I and what do I do? I teach at Wake Forest University. I share a contracts class with Barbara. So those students get a very different experience in the fall than in the spring. As Barbara told you, she has a long experience as a teacher—I don't. Barbara also has a really great practice background and I don't. I don't have any serious practice background. I graduated from law school and then I went straight into teaching. I taught in China for a number of years and then I returned and ran a research center at Yale and taught some classes there. All temporary positions and now I'm a doctrinal professor entering my fourth year, so I do not have a deep well of practical experience on which to draw and I am not alone. Have you guys seen this series of articles by UCLA Professor Lynn LoPucki?¹⁹ Of course you have. This is the crowd that would have seen it. But yes, two-thirds of the hires at elite law schools as he defines them now have a Ph.D. and a substantial portion elsewhere. He estimates that by 2028 the majority of law professors at the elite schools will have a Ph.D. A Ph.D. isn't mutually exclusive with practice but it does, in fact, usually come at the cost of practice. LoPucki shows us that the amount of time that a Ph.D. holding applicant for a law teaching job—the amount of time between undergraduate and when they start teaching is on average about twelve years—to thirteen years for people without a Ph.D. That means that Ph.D. applicants are arriving with less time period, but also less time practicing once you squeeze in that Ph.D. I don't have a Ph.D. but I am also part of a generation outside of that two-thirds of Ph.D. holders, there's a group that three or four years of post-docs and stuff that are coming in. It's a different group that's making up a substantial part of the hiring and it's not the only trend. LoPucki shows us that those who do practice, who are experienced, tend to have more than they used to. So it's more than one trend happening at once in the hiring, but it's certainly a trend. It's a trend that the academy needs to come to grips with and try to figure out what it's going to do.

So what do we do about it? Well, one thing is we could try to resist it. And LoPucki wants to resist it and resist it for reasons like he thinks that it's at odds with the ABA's efforts to save us from buggy whip status and also it's going to create a sort of pernicious dual tract within the law school of like people who are like the Ph.D. (as overlords) as opposed to the people who do the teaching. So there could be reasons to try to resist this trend. I'm glad it wasn't resisted before I got in the door, but I am concerned about the future of law schools and I'm concerned that I do not know how to teach a class that is

¹⁹ See Lynn M. LoPucki, *Dawn of the Discipline-Based Law Faculty*, 65 J. LEG. STUD. 506, 540 (2016).

transactionally rich. Even though my area of law is a business-oriented law. I teach contracts with Barbara. I teach business organizations. I teach securities. I teach corporate finance. I think I'm qualified to teach these things in a sense but not in a transactionally rich sense, and there are a lot of people like me and so I think that we need to, for me and for people, try to figure out ways to try to onboard people.

This is a great program here at Emory. I'm really glad to be here. This is my first time here. There's so much good stuff going on these screens and in the packets. This is really rich, and yet the tone is still expert teachers talking to expert teachers about best practices. There's still not a tone of onboarding. So this is a plea to help people who are early in their careers and don't have the skills that they think they need and that you think they need to help them to find their way into this. So I'm going to tell you what I do right now to try to give my students what I, myself, believe they need. I'm going to tell you what I don't do but maybe you can help me to do it or something like that.

So what I do is try to emphasize practical skills that I can emphasize in the ways that actually use the strengths that I may have. So a lot of that involves classroom activities of the form that Rachel is talking about where it's problem-based or it's a breakout thing where we're taking a case and we're not just reading it as a case. We're reading it as a tool to solve a business problem. So I'm playing the role of a client and asking the students how to solve the problem and very often that's the way that we get to the case. It's not from a case to begin with. It's a business problem to begin with and the students are going to help me solve it. We're trying to do that exercise with two layers of group work in my classes. So in my classes, I've built the students into permanent groups and one layer of the group work is within the group. They are modeling a law firm where one person is the partner of the firm that day and it rotates and the other students have to try to say, lawyer to lawyer, what the case law says and how it might bear on our problem. Then that exercise ends and *that* person and I are in dialogue and now it's partner to client and they've got to be able to turn that language that was just given to them into something that they can give to me. So you've got a translation happening in every class and the ability to translate and to counsel is—and also to risk spot—there's two levels of risk-spotting happening. It's something that the students need that I think is part of transactional skills broadly construed and that even an amateur like myself can help out with.

It's important to link that kind of an exercise to the final exam itself. So every question I ask as a law professor—at least every essay question—is framed as a business question. I do not ever ask who will prevail in this litigation. If that was the question I wanted to ask, I'm going to say “You are an attorney at a bank considering making a loan to Buster. Here is a bunch of legal facts. Do you have anything to contribute to the business decision about whether to loan to Buster?” A great thing about this is that while it honors the things we're doing in class, it gives the students a chance to try to integrate the legal knowledge into something that's actually happening.

Another nice thing about it is that it helps to answer the question that 1Ls, or one of the questions that 1Ls, are driven crazy by, which is the degree to which they ought to hedge in their answer. 1Ls are insanely upset at the “well should I say Buster will win or should I say probably Buster will win or shall I say maybe Buster will win.” “How shall I hedge? You always seem to hedge Professor Verstein. Why do you always hedge?” But you have different hedgings. So to some degree there’s no answering this. Lawyers like to hedge. But to some degree it depends on the context, right? So if the business case looks pretty good you can say something like: “probably we ought to make him a loan, because the legal risks are not so strong.” If the business case itself looks bad, then a student can say, “probably we oughtn’t make this loan because there’s a reasonable chance he’ll lose the case and in this business context it’s probably not worth it.” These kinds of “probabilities” and “maybes” only make sense in a context, so by making the course a context focused course all along, it gives us something to do on the final exam that honors that.

Emphasizing the business hook over and over is something that I do in part because I think, again, transactional *skills* involve understanding of transactional *context* from 1L year forward. The students don’t have that for the most part, so we want to be constantly building that in. For me, that means a couple things. That means one, the case selection. I do not have cases in my course, except for a few, that are set in the twentieth century. I have cases from the nineteenth century if they are just too good, but I otherwise have cases from the twenty-first century. Because fax machine cases—it’s not important to me to get them up to speed on that. But there are twenty-first century things that are important for me to get them up to speed on, and we focus our case fact lecturing on those things, so case selection is important to building a business transactional context understanding for the students. And also the emphasis that happens within the cases can be a tool for building transactional awareness.

Every one of my students leaves the course knowing that construction is rife for litigation. They learn it. They learn it because we see, as you all may know, construction cases make up like 1 in 7 cases in a contract case book. It’s really a terrifically high number that are construction cases, so I point out—“are we reading another construction case? And why is that? What is the problem here? Is it like the problems in every case?” Oh no, there are so many problems. My students all learn that construction cases have certain endemic problems that happen over and over again just by pointing it out. Then you point out other ones and say *Jacob & Young*,²⁰ who is this architect character? Let’s talk about why this architect character is given a certification right? Does that still happen? It turns out in 2008, the AIA said we shouldn’t do it that way

²⁰ *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239 (1921).

anymore.²¹ Why do you think they said that? Was it because of the stuff that happened in this case? Why did it take them 100 years?

These are the business contexts that are not just like telling them the story of Kent. It's telling them the things that drive the litigation context and the transactional context. Those things are things that are important that I can do, despite not having been a construction lawyer, and they are also things that play to my strengths. I wrote a paper that I'm very proud of about a weird kind of construction arbitration that is not well known but is important in the world and is widespread and nobody in the Academy seems to have heard about it.²² These are the Dispute Resolution Boards. Have you heard about these—DRBs?

Speaker

Yes.

Andrew Verstein

There. Okay one. They are super important. Look it up if you are sufficiently [interested]. Anyway, these DRBs are a technological solution to the dissatisfaction with architects that predates this recent change to pull the architect off of the decision-making body by about 10 years.²³ So this is an arbitral body that's job it is to deal with the discontent that people had that architects were maybe biased in their decision-making and construction context. Well, I happen to be a sort of local expert on that so I can bring that to them and inform them about that. And that's a way to use what I do have. So directing the case in an innocent way towards the places that we younger people have something to contribute might be a strategy that I and others can use.

So those are some of the things that I do given the skills that I have. Now there are things that I have not taken the plunge into that people have suggested to me. So this is a plea for either other ideas or ways to make these things work. One thing is to partner with practitioners. To have a real division of labor where I don't pretend that I'm a partner at a construction law firm. I *could* bring in such an expert as a guest teacher, but there are so many things that make someone in my position uncomfortable doing that:

First, it threatens the tempo of the course. Second, it leads to questions of accountability of how do I feel about that being on the exam? Must it be on the exam to create an incentive to listen or is it fair to have it on the exam? Maybe people didn't understand the way that the visitor taught. Third, I'm afraid of being humiliated by a lawyer in the flesh. So trying to find a way to partner with people in the real world with real current experience. I think there

²¹ See Andrew Verstein, *Ex Tempore Contracting*, 55 WM. & MARY L. REV. 1869, 1907 n. 198 (2014).

²² *Id.*

²³ *Id.* at n.189.

ought to be a dean at every school whose job it is to build this relationship for either younger or less transactionally savvy people, because I think it would be great, and I certainly don't have colleagues from practice that I can bring in from my firm or something like that.

I could borrow from other people great materials. This is something I would really love to do. I would really love to come into a class with a great reps and warranties document and put on the table and say here's one; let's work through it. Let's mark it up. I want that because I want my students to work through something like that. Yet I don't necessarily do it, because prior to coming to this conference and getting plugged into everybody, it seems like a scary thought to go onto EDGAR and download something from a publicly traded company, because maybe it's a bad one. I don't know. I didn't practice that type of law. Maybe it's a bad one. Am I going to teach my students from a bad one or from an atypical one? Not only might I embarrass myself and come across as not the expert that I want to be perceived to be, but I might actually teach them the wrong thing. You know that wouldn't be good at all. So I'm not building my own exercises of that sort but then if you give me yours, I'm still afraid that maybe I don't understand it as well as you do, and I'm going to get in big trouble in class.

People don't have this anxiety when they walk in to teach a doctrinal class the old fashioned way because there are great resources available. If you want to teach contract law and you don't need transactional skills in there, there are thirty-nine books and they all have PowerPoint slides ready to go and a teacher's manual full of questions that make you look so smart in front of the students. There's a humanity to onboarding people into a doctrinal approach to teaching a doctrinal class (though, perhaps, a commercially motivated humanity).

There is less warmth to bringing people in with annotated documents or really great teacher's manuals that make you feel like you can do transactional teaching as a person who doesn't have that background. I think it's an interesting question why I perceive that difference between doctrinal materials and transactional materials. Maybe it's a false perception and you'll put me on to the right stuff, or maybe it's that there are cultural issues that have to be ironed out here. Maybe we think, "Oh, doctrinal classes? Well anybody can do that. We all walk into that. But transactional stuff is too hard to kind of learn on the fly ." But we're going to try to teach the students so it can't be there. Maybe it's the opposite or something. "Oh transactional stuff is so low prestige that you could just make it up as you go along Verstein." I don't know what the cultural problem is that leads to this disconnect, but I've been teaching for three years and it's easier for me to pick-up a doctrinal class at this stage than a transactional one, but I'm here to personally repair and repent but also invite you to think there are going to be a lot more people like me crossing your paths. Finding a way to communicate with them and send them to the

right thesaurus or resources or syllabi is going to be doing them a service and doing a professional service as well. Those are my thoughts. Thank you.

Andrew Verstein

How about some questions?

Question

What is the demographic of the students that you are teaching? Are they right out of college? Do they have work experience? What is sitting in your classroom?

Andrew Verstein

Well I assume my students broadly follow the students of other schools. I'm on the Admissions Committee at my school, so I can say that more and more of our students are coming in at my school without practice experience. So my students are overwhelmingly fresh out of college or one or two years out, but there are the interesting exceptions who are ten or twenty or forty years out of [college], but I think that that's probably a national trend.

Question

Can we say who we are?

Andrew Verstein

Yes. Also was there more of a question to that?

Question

Yeah there really is. See I'm a transactional lawyer. I've actually practiced. I'm an adjunct at John Marshall Law School in Chicago. We have a non-traditional student body, so that if you were teaching a contracts class at John Marshall, chances are there's going to be one or two students in your class that's coming out of the construction industry.

Andrew Verstein

Yeah.

Question

These are guys who are engineers and their undergraduate degree is in construction. So...

Speaker

Resources.

Question

They're resources. You got to watch it from the one, from my perspective, you've got to watch it from those who are brokers. Oh my God.

Andrew Verstein

Those who are what?

Question

Brokers.

Andrew Verstein

Brokers.

Question

Real Estate Brokers. Commercial Brokers. Oh my God. You got to watch for those but engineers are—as an attorney representing developers—engineers/construction people they're really helpful. They aren't going to stab you in the back. They love to talk. You could make them into a wonderful resource. I learned a lot about construction working with clients. That's how it happens in the real world.

Andrew Verstein

Right.

Speaker

I think there was a hand over here. I'm not keeping a queue necessarily but - -

Jason Sowers

Jason Sowers at Vanderbilt. It was more of a comment than anything else. I did a consulting gig for a year and a half with one of the two larger legal research services and one of the things that they always wanted to talk to us about was how we could or what they could do. What types of product they could develop to put into the market recognizing the fact that a lot of people who are asked to teach doctrinal courses likely did not have practice experience and what we kept coming back to—and I think they took this recommendation seriously. And I think it could work because it was going to be a collection of problems written by people who practice that but not just the problem (and a sample answer) but also explaining why these are important to contextualize it so you have a little bit more comfort in taking someone else's work product. It's still a little work on your end to get yourself up to speed on it, but it tends to be a little more encapsulated, so those are allegedly forthcoming from that company.

Question

I'd like to twist around what you said because you expressed your openness to learn about being more practical skills oriented. I want to flip the question since you are open. For those of us—I think many of us who are adjuncts or are focused on teaching skills or have had practice experience as well as teaching are viewed not in the same way as fulltime faculty are. And that practice element is not always—how can I say this politely—it's not always viewed as special/valuable as having gone through years of education and being able to write law review articles. So some of us have to deal with those types of professors, what would your recommendation be to sort of convert them to the idea, other than the ABA and Carnie, that this is important and something that they should do?

Andrew Verstein

Yeah, I think there's more than one tough problem to crack and this is one too. There are a lot of cultures of disrespect and misunderstanding all overlapping. I will say that what I've been describing here, I think, is one potential avenue for connection. I know all the guys right out of the Economics degrees who've never set a foot in WestLaw. I know these guys. They are scared stiff that they don't know anything about transactional practice and so for at least this younger generation that is so far abstracted but not yet set in their ways, I think there are real potentials for bridge building and for trust building and for validation. They might end up saying "I don't have to develop a negative stereotype or attitude about this and say that's somebody else's problem. This is my problem too and I can achieve it." It's human nature to kind of denigrate things that you don't think you can do, isn't it? And so part of the solution is in bringing people in and inviting them, don't you think?

Speaker

I have to jump in because, first of all, kudos to you for coming here and speaking as honestly as you did, and I think this is such a tremendous opportunity and I hope that you're right, but even if you aren't right, as a sort of a universal statement about how people come into the Academy, even if there are just a few Andrews up there. You know I'm a traditional tenured doctrinal faculty member too. So there are people like me in the Academy. I have a chair and all this fancy stuff and on the publication list. There are people like me—from sort of if you want to think about that stratification—who are interested in this stuff and there are people like my co-teacher who publishes and writes and teaches skills classes, and then there are people like Andrew who are coming in new and really can go in any direction I think.

We have to find a way to have a conversation even if it's just with a subset of folks to make this happen, because I think the answer really is, and hearing what Andrew is saying, the answer—well, part of the answer is that if you're doing it three years or you're doing it ten years or even if you're doing the same thing you will feel more comfortable. So part of the fear goes away just by repetition and getting better at what you're doing even without

belaboring on it. So that's sort of my answer first cut and in terms of advice, but beyond that, your intuition is correct. It's about partnering and I can't say enough about the difference. I'm able to do what I do now, teaching a practicum, because in addition to doing the breakout exercises and just sort of experimenting, I co-taught a class with someone who is doing employment law all the time and has been teaching skills classes for ten years, and I'm in a law school where we have an environment that enables that. So that's a little bit unique, but I think that your intuition about where this is going and how this is going to come together in terms of collaboration is 100% right.

Speaker 2

Picking up on what both of you said, it won't happen right away but the longer you teach the more you get former students who are practicing in areas that relate to what you teach. Talk about somebody who knows what you want to do and is easy to work with. That's always kind of been a good source.

Andrew Verstein

That's great.

Speaker

I know—the hands. People up front probably don't see the people in the back. So yes?

Question

So in your model for a lecture lab, would you have had to teach the lab or could you have just taught the lecture and brought someone in that you trusted to teach the lab?

Andrew Verstein

I kind of was afraid of that question. I'm gonna just say no and I don't want to do that.

Question

So there's a trust issue right?

Andrew Verstein

No. Not about trust. It doesn't [equate] with my pedagogical aim and in my view, with the vision of the Carnegie Report, which is integrated learning. It's not right. I do my thing. I mean, I love Carl's example of—right here's the can lecture and now you do something and it's related to what you're learning cognitively and I don't really understand how you can separate those things out. I mean, one of the things that I learned doing the true collaboration of the CIC, the Carnegie Integrated Course, is what—you know this idea—you know

lawyers love to come in and say . . . “I didn’t learn anything in law school. I learned everything on the job. The stuff they taught me in class was nothing.” Lawyers don’t realize that they came to practice knowing all that, right? I mean, it’s so easy to say that.

I really experienced in the Carnegie Integrated version of the class what happened when doctrine got sacrificed and the cognitive learning got sacrificed. Those things are really, really related and it’s understanding. Being able to apply sort of a nuance. Like here’s an open issue, right? Whether it’s in statutory or reading the code or whatever. Here’s an open issue and you know it’s open and here are sort of the different ways that courts have looked at it and here’s how I drafted in a nuanced way in to account for that. Or, here’s sort of a more likely thirteen or fourteen-year transactional mindset. I call this—I’ve written some articles on this approach, by the way, and I’ll share them with you—but in my article I call it the highest common denominator approach to drafting in practice, which we all know. And here’s sort of the amazing thing, if you don’t connect these two things—you guys know this because you are transactional lawyers. If you don’t connect these two things, and it’s about the doctrine and the practice together, it’s amazing. Because I say to students, like, “you take this” and they’re saying, “Oh, well this is enough. Like, I could just draft it this way, because there’s a case that says that this is okay.” I’m like, “No, no, no, no.” There might be a case that goes another way, and it’s not surprising to me that they take that view, because all they’ve seen is the arguments that say this clause will disclaim liability, so they’ve seen case law that supports that and they don’t understand that that’s not the point because you’re trying to keep . . . ? I think you need to have an integration to experience that. Unless you want a world where they say, “Oh, doctrine doesn’t have anything to do with practice. Practice doesn’t have anything to do with doctrine” and practitioners saying “Yeah, yeah what you learned in the air is nothing. Here’s how you really do it. It’s not in the air and that’s not how you really do it. You really do it because of the way the law is.” I’m sorry.

Question

So never mind the . . . ?

Answer

Sorry. I’m really passionate about this.

Question

At UT we’re trying to look at ways—or University of Texas, not the University of Tennessee, which is here as well—we’re trying to look at ways to do this with having your sort of lecture plus lab. I think where we have, maybe, several lab sections to the class and the person doing the doctrinal bit will also do one or two of the lab sections as well and bring in others to do the rest of them. We’re also trying to look at ways of getting local lawyers and alums involved where the person who can’t make the commitment to teach the entire

class, they can assign on to do a unit where maybe it starts out with an email from the alum lawyer who gives the assignment that's sort of mostly canned.

Answer

I got to dial back. I got to dial back on my position on this a little bit. Like, I realize this and I think probably maybe the answer is that, I think what you're talking about is right. That there's going to be more of a merge. So I'm saying I want to stay, as the doctrinal instructor, I want to stay involved with my lab. I think what it may be is I [have] to bring the folks who are sort of the practice side into my class so that maybe if it goes both ways it can be . . . [unintelligible]?

Question

Right. It's like being the star chef that's still in the kitchen that has lots of other chefs that actually get the food out. Maybe you're doing stuff and you feel creative. Very few people would get to eat if you managed to supervise every plate.

Speaker

Can you keep your Michelin's?

Speaker 2

That's right.

Barbara Lentz

I think if you have good planning and good structure and you know where—if you try and do everything in one in your class, you can't do it. It's not right to, but if you have a curriculum map and people sign up to take different pieces, you can absolutely do it.

Answer

Yeah. The curriculum map and that's sort of what we need to be thinking about.

Question

One of the things, I'm actually presenting tomorrow with Jill Gotee at Cardoza. One of the things that we've found to be particularly successful is we as the Cardoza faculty teach the modules and so on, but we bring practitioners in to observe when we're doing—whether you want to call them labs or demonstrations or whatever—to observe and they give them feedback and sometimes we also do luncheon lectures. So we bring people in to talk for a short period of time. One of the things that we've found, for better or for worse, is in addition to those practitioners bringing in the “this is what it's really like, this is what we really care about, this is what our client really cares about, this is what you're going to experience in your life.” They, more often than not, just repeat what we've taught them in the classroom, but the students take what

they've said and all of a sudden it's "Wow, this practitioner told me. This has got to be true." So we have to feel very humble about that because we've already told that to them three times over the course of the program, but when the practitioner said it the fourth time it really is a very powerful tool, so I would suggest that you think about ways to do that.

Pete Windsor

I agree on that. All the talk that—I'm Pete Windsor from Houston—for all the talk that we look down our nose at adjuncts, which is true. We look down our nose at writing teachers which is true, the whole thing. English literature people look down on creative writing people. All that's true. The fact remains the students give more credence to the practitioners than anybody else. That's almost always the case if you have a good practitioner. I think this becomes very important. There are lots of lousy drafters out there. There are also a lot of good ones and making that distinction and making sure the adjunct doesn't tell just war stories of things we all are familiar with, what's true. If you can get a good practitioner in doing that, I agree 100%. He's going to give validity to what—or she's going to give validity to what you're saying maybe beyond where it ought to be. Doesn't matter. That's irrelevant and I think—but it puts a lot of pressure on the academic to be skeptical and practical. I mean you take a person who's a partner in a law firm and start quizzing them, they're going to be irritated. They're not going to be pleased that you're willing to see if they're good enough for you. You obviously need tact and things like that, but I think that's really important and if you can get the point across that you learn.

I'll just give you one example. I used to teach with a practitioner—taught a course called International Contracting. When we did letters of credit, he said at the very beginning, "I read my letter of credit and I always begin with part one is not binding and part two is binding. That's the first thing." That's the first thing, and that's the first thing I teach my students. That's pretty obvious, but it's not always in there. It's got to be in there in a way that means something. Not like those awful examples that Tina gave in her talk of her schizophrenic letter of intent, which was like standup comedy it was so bad. But something like that. I learned from that man. He was very good. He'd done billions of dollars; literally, billions of dollars of mergers and acquisitions in the oil field, so we got a lot to learn from these people, but we've also got to be careful about it. As careful as we're being when we hire somebody through our faculty. Even if we're hiring somebody just for one day for free on that person's nickel, still, for our students' point of view, that's irrelevant.

Answer

So I think that's a really good point, and I'm just going to say to that I've had maybe ten lawyers come into my practicum in the fall. I was very specific about what I wanted them to cover, and I felt in the end that I wasn't specific enough and I have a really strong sense from that experience as to who I would bring back and what, in particular, I would want them to cover in-depth. And also, and I think this is the most important part, in kind of getting

them to understand where the students are, because I think a real problem with practitioners is they come in and they don't appreciate how little context students have for what they're talking about. So I would say to them you need to start by saying X. That this client is not the same as say this principle. You have to start there. So I'll tell them that.

Pete Windsor

So to that, and I'll use practitioners as I once was a practitioner—coming in for one presentation, they don't see what happens. It's actually better to have them come back a second semester or give them two or three classes to have and then they see this is not—I have to go back to something more basic. And Andrew, if I may, to you since you're inviting all sorts of things, 97% of all cases settle. Only 10% of the cases that get tried go on to appellate decisions. So looking at cases for what's going on in the field is giving you like the smallest pinhole on anything. This is why I think practitioners just say “No, this is what really happens. We know what the cases say and that's why we do all these other things.”

Andrew Verstein

This is right, though, there's more than one way. I'm thinking about how to use that is the important part.

Christine McKay

I was just going to make a comment. I'm Christine McKay. When you're talking about bringing in practitioners, to ask them to teach when they don't have that context, I don't know that that adds value; but bringing them in to add texture to your class, to add depth, to really end up with reiterating what you just said—all those things and then the light bulbs go up. Because you know you have to say it four or five times until they're going to hear you, because half the time they're on the phone or whatever it is and it's a different—it changes up the whole kind of rhythm of the class to bring somebody in. Feel a little excited and so they pay attention. I think as long as they know kind of what you're talking about and where you're going from, I have found it very helpful, but I have done it from a panel discussion where I brought in three attorneys: an in-house, an outside, someone who does both, and two actual people doing the transactions on the commercial lending side or the financial side with mergers, acquisitions, turn-arounds and then they all talk to each other. Everything we've been doing comes together, but I'm not asking them to teach a point. We're already past that and I think that's where you get the texture and maybe some more depth and things.

Andrew Verstein

Talk about what they do and what sort of things you need to know. Not that I'm going to teach you these things but these are things you need to be paying attention to in your classes.

Answer

And I'll just add to that. It's also an exposure to the bar in terms of networking and I tell my students that. In particular, the job environment.

Speaker

Definitely job opportunities come.

Answer

This is the way of getting your face before—I mean I've brought in like some of the best employment lawyers in Denver.

Speaker

So I think maybe we're out of time? Thanks everybody.