Teaching Business Lawyering in Law Schools: A Candid Assessment of the Challenges and Some Suggestions for Moving Ahead

Eric J. Gouvin
Western New England University School of Law, egouvin@law.wne.edu

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I. INTRODUCTION

In the past twenty-five years or so there has been extensive commentary about the role of professionalism in legal practice. Because law schools are the gateway to the legal profession, it would seem that one of the major goals of a legal education should be to introduce law students to the skills and values of the profession. This idea was described quite nicely by Judge Harry T. Edwards:

Law schools are professional schools, not graduate schools. We grant JDs, not Ph.Ds. Upon graduation, our students are qualified to seek licenses that normally are not available to persons who do not have a legal education. Therefore, the public has a right to assume that lawyers have attained a certain level of technical competence, share a commitment to a defined set of ethical norms, and accept the responsibility to interpret and practice the law in public-regarding ways.

For quite some time, however, there has been a growing gap between the legal profession and the legal academy. The literature is rich with critiques of...
how poorly law schools prepare students to enter the profession. While law schools do a decent job of educating students about the substantive law, they do not do a very good job of training them in the practice skills that lawyers need, sensitizing them to the ethical obligations of lawyers in their various roles, or inculcating in them the professional norms, values and practices of lawyers. Put another way, the academy does well in communicating the written rules and the theories behind them, but not so well with the unwritten rules and the values behind them. Recently, a couple of major reports have yet again urged law schools to move toward a more practice-focused mode of instruction. As part of the recurring push for practice-oriented training, the American Bar Association ("ABA") recently amended its standards for approval of law schools to mandate that all ABA accredited law schools require professional skills training for their students as a condition of graduation.

As a law professor who recognizes that the vast majority of his students are going on to practice law—not to become law professors—I applaud these efforts. As a legal academic whose practice background is in transactional lawyering, however, I fear that to the extent law schools are attempting to provide their students with professional skills and values, they are doing it in a way that is skewed toward litigation practice and gives short shrift to transactional practice. I do not want to suggest that the professional skills and values of litigators are not

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important—they are—but I do point out that many, if not most, lawyers actually practice in areas other than litigation.

Lawyers need to be exposed to the skills and norms of the transactional side of practice as well as the litigation side because there are real differences between transactional lawyers and litigators. 6 Although my prejudices are painted in broad strokes, in general I believe that litigators are more focused on the battle at hand, while transactional lawyers are more relationship-oriented and focused on the larger war that must be won. Litigators fight to assign blame for problems that have already occurred, while transactional lawyers strive to avoid problems in the first place. Litigation is by and large a zero-sum game—the parties are fighting over how to split losses. One party will win and one party will lose. In transactional law, on the other hand, the possibility exists for lawyers to add value to a deal. 7 In transactional practice, it is possible for all the parties to leave the closing feeling like the deal was a great idea (probably not something that happens very often at the end of a lawsuit). In short, transactional lawyers have a special set of skills and values that need to be acknowledged and taught. 8

Where law schools do an acceptable job of acculturating our students to the adversarial, litigation side of the profession, 9 we do a less than satisfactory job in

6 In his characteristically clear and insightful way, Jeff Lipshaw has offered some thoughts on the differences between litigation and transactional practice, which I recommend to the reader, along with the accompanying comments, which are both civil and thoughtful. See Posting of Jeff Lipshaw to Legal Profession Blog, Litigation or Transactional Law Career: Some Advice to Law Students, http://lawprofessors.typepad.com/legalprofession/2008/07/litigation-or-t.html (July 1, 2008).

7 The classic articulation of the idea that transactional lawyers might actually add value to the transactions they work on was developed by Professor Ronald J. Gilson in his article Value Creation by Business Lawyers: Legal Skills and Asset Pricing, 94 YALE L.J. 239 (1984). Gilson’s article has provided the grist for many law review articles in the twenty-five years since its publication. I will not attempt to recreate the arguments made in support of and in opposition to Gilson’s thesis, but I do recommend a recent article by Professor Steven L. Schwarcz, Explaining the Value of Transactional Lawyering, 12 STAN. J.L. BUS. & FIN. 486 (2007), which provides an empirical test of the thesis and finds value creation occurs but perhaps not for the original reasons outlined by Gilson.

8 See Mark A. Sargent, What Does It Take? Hallmarks of the Business Lawyer, BUS. L. TODAY, July - Aug. 1996, at 11 (listing the relevant attributes of the business lawyer as: (1) serving as a guide through the regulatory wilderness; (2) possessing the ability to “penetrate the impenetrable;” (3) knowing not only what the law is, but what it was, why it is, and where it might be going; (4) distinguishing mountains from molehills; (5) responding with the right fire power; (6) acting as the universal translator so your client can understand and comply with the law; (7) being the reality check and having the emotional detachment to give clients an honest view; (8) getting the deal done by dealing with all the details to make sure that the closing happens; and (9) acting as a trusted facilitator).

9 Even the Carnegie Report noted that law schools perform an impressive task in getting students during the first year to “think like a lawyer.” See CARNEGIE REPORT, supra note 4, at 47. I would suggest, however, that given the heavy reliance on appellate decisions for teaching materials, we are really developing students who can think like litigators.
inculcating the skills and values of transactional lawyers, including lawyers with the sensibilities necessary to counsel entrepreneurs. This failure to acculturate our students matters because litigators and transactional lawyers approach the practice of law in fundamentally different ways. As a case in point, I recall a transaction from my own practice experience. My firm was known as a business law firm (although we had an excellent litigation department). We represented a Finnish company that was entering into a joint venture with one of the Maine Indian tribes to produce a proprietary building system, the intellectual property for which being owned by our Finnish client. The Indian tribe was represented by a firm that had won a series of brilliantly litigated cases forcing federal recognition of the Maine tribes and establishing a new order for how the tribes were governed.

I do not want to take anything away from counsel for the tribe—they were outstanding litigators. The problem was they could not hang up their litigator hat when they were in a transactional context. That is not to say that business lawyers need not zealously represent their clients in transactions. It is true that the parties to a transaction are, in some sense, adversarial—they both need to negotiate zealously to make sure they get a good deal. In the end, however, both parties at the table need to recognize their common interest in making the deal succeed so they both can make money. A business deal cannot be adversarial in the same way that litigation is adversarial because otherwise no deal would get done: one party would win, one party would lose, and it would become clear to the loser that the deal made no sense.

Needless to say, the transaction between our Finnish client and its Maine Indian tribe partner failed. It limped along for a couple of years, but the counsel for the tribe always saw issues as “us versus them” (i.e. Indians versus Finns) and never as just a problem affecting the venture and therefore in the interest of both parties to address jointly with give and take on both sides. In my estimation, the legal counsel for the tribe was so used to the win/lose mentality of litigation that they could not adjust to the possibility of the win/win outcome that well-lawyered business deals envision.

That is one example, but there are many others. If we keep cranking out new lawyers who see the world as a no-holds-barred battle to ultimate victory or defeat, we are going to have the unintended effect of retarding the development of good business lawyering generally. Aspiring business lawyers trained by

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10 Although I have related one war story from one business lawyer’s practice, other commentators can provide evidence of the difference between deal lawyers and litigators. See, e.g., Lisa Bernstein, The Silicon Valley Lawyer as Transaction Cost Engineer?, 74 OR. L. REV. 239, 240-41 (1995) (“The lawyer as ‘hired gun’ may accurately characterize the role of business litigators . . . . However, leaving litigators off to one side, the image of the lawyer as hired gun is not an accurate characterization of the role of any transactional business lawyer, at least any good transactional business lawyer, in the Silicon Valley or elsewhere.”); Lawrence M. Friedman et al., Law, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report, 64 IND. L.J. 555, 562 (1989) (providing support for the idea that a good business lawyer “thinks of himself as a kind of engineer—a legal engineer. . . . his job is to solve problems: to take a principle, a task and ‘engineer’ it legally”).
litigators using litigation-based teaching materials will enter the profession with the wrong orientation to be effective in the deal-making role. To counteract this tendency, law schools should start introducing law students to the culture of business law, and especially the role of the lawyer in entrepreneurial activity. Despite the pressing need for the transactional perspective in the law curriculum, the legal academy has been slow to integrate the professional skills and values of transactional lawyers into the program of legal instruction. This Essay discusses my view of why the integration of transactional law has been so slow and offers several options for advancing the cause.

II. LEARNING FROM POGO

When I was a kid there was a popular comic strip character named Pogo, an opossum who lived in a swamp. He was most famous for having said “We have met the enemy and he is us.” This has been an important guiding principle to me my entire life. So, while in the abstract there may be many obstacles to bringing the sensibility of the deal lawyer into the classroom, I will start by looking at the law professoriate generally, on the theory that what does or does not happen in a classroom is largely the responsibility of the professor.

One obvious reason for the reluctance of some law professors to bring the profession into the classroom is that a significant minority of law professors never actually practiced law. In some cases, these professors came right from law school into the ranks of legal academia, perhaps with a stop along the way to clerk. Others came from another graduate school within the university and never even had a clerkship (or, in some cases, a law degree). I am not making any comment here on the role that scholars from other disciplines should play in the law school; I am merely pointing out that professors who have never practiced law are unlikely to be in a good position to bring a sense of the practice of law to their students.

Even for professors who do have practice experience, however, there is a pretty strong contingent in the faculty ranks who never enjoyed the practice of law and who have no appetite for it. Some are openly disdainful of the practice (and practitioners). Indeed, anyone who has spent any time in the legal academy gets a sense that many professors view the teaching of law as their escape from the practice of law. For these professors, too, the prospects of finding a way to


12 Although it is rare for a person to be hired on to a law faculty without that person possessing a law degree, it is not unheard of. The eminent literary theorist Stanley Fish, on the faculty of Duke from 1986 to 1998, and currently a professor at the Florida International University School of Law, is probably the best known example of such an appointment. See Florida International University School of Law, Stanley Fish, http://law.lawnet.fiu.edu/index.php?option=com_content&task=view&id=233&Itemid=425 (last visited Oct. 12, 2009).
work lessons about the professional values and skills of the business lawyer into the classroom seem dim.

Then again, even among professors who practiced law before teaching law and did not hate it, most did not practice business law. Law faculties are dominated by professors whose legal practice was in litigation, often involving public law topics. As a member of my institution's faculty appointments committee on several occasions, I have been struck by the paucity of transactional lawyers who enter into the main channel for faculty recruitment, the Association of American Law Schools' ("AALS") Faculty Appointments Register. As a result of the oversupply of litigators in the faculty candidate pool, in many law schools even "transactional" courses are taught by commercial litigators instead of deal lawyers. One consequence of the preponderance of litigators on law faculties is that the main method for promoting knowledge of the profession—the legal clinic—is usually focused on litigation, even though many lawyers practice in areas involving only transactions.

This litigation fetishism permeates legal education, with the most obvious symptom being the teaching materials we use throughout the curriculum, but especially in the first year. We call these teaching materials "casebooks" for good reason—the primary materials in them are opinions of appellate courts. Professor William Carney summarized the concern I am describing:

Whether professors realize it or not, they are inculcating attitudes about the role of law when they teach students. I regard many appellate decisions as examples of the failure of private ordering. These failures, particularly those that relate to transactions, involve failures of either clients or their lawyers to specify fully the terms of relationships in various agreements. This setting casts litigators and courts as the rescuers of innocent victims who are unable to protect themselves ex ante. The reality is otherwise. Millions of relationships are created and millions of agreements are written that are more or less peacefully and successfully performed. Lawyers play the role of "transaction cost engineers" to assure these successes. Too often students graduate without ever having seen this function.

We (perhaps unconsciously) socialize our students from the very first day of law school into the belief that everything revolves around litigation, even though in commercial transactions, litigation is not the most important method of resolving disputes.

13 For more information on the faculty recruitment process as facilitated by the AALS, see AALS, Faculty Recruitment, http://www.aals.org/services_recruitment.php (last visited Oct. 12, 2009).
15 The classic article on this point, of course, is Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55 (1963). The findings of Professor Macaulay's article have been debated and revisited over the years, but the basic premise remains intact—business practice litigation is far from the most common way to resolve disputes. The big lesson is that in business matters, relationships and norms of behavior may matter more than the specific legal rights spelled out in a given document. For an example in the international context, see
Of course, some of the law professors who did practice law also specialized in transactional law. It is among this small slice of the professoriate that there exists the greatest chance of finding teachers willing (and possibly able) to bring the world of the entrepreneur and the deal lawyer into the law school classroom. Before getting too giddy with the possibilities, however, we ought to think about what it means for the typical law professor to have "practiced law." Although most candidates for law teaching positions have had some kind of private practice experience, it is quite limited. The average length of time of law practice for all law professors is 3.7 years, with the length of time in practice negatively correlated to the rank of the law school in the U.S. News and World Report rankings.\textsuperscript{16} In the typical law professor hiring, the candidate is from one of a handful of elite schools\textsuperscript{17} (where he or she was taught by professors with, on average, 1.4 years of practice experience),\textsuperscript{18} and has practiced at a big law firm in a big city.

In a comprehensive survey of the profession conducted by the American Bar Association, almost half of all lawyers in private practice were solo practitioners.\textsuperscript{19} Seventy percent of lawyers in private practice were in firms of fewer than ten lawyers.\textsuperscript{20} Only fourteen percent of lawyers in private practice were associated with firms of over 100 lawyers.\textsuperscript{21} Yet almost all law professors who have legal experience are drawn from those very large law firms.

So, while these professors have practiced business law, they have done so in a setting very far removed from the experience of most business lawyers in the United States. Although I practiced in Portland, Maine for a firm that is big by Maine standards (sixty-five lawyers), I also had occasion to work with some Wall Street firms on several matters. The approach to legal work in a big city mega-firm appeared to be much different from the approach taken by small-
medium-sized firms. In part it may be a function of the kind of clients served by the two types of firms. For example, although clients of all firms care about controlling legal costs, the big, national clients serviced by mega-firms are likely to be less cost-sensitive than the typical small-business or entrepreneurial client being advised by his or her own business lawyer in Anytown, USA. The billing practices of firms may seem irrelevant in the context of the best way to educate future business lawyers, but it is actually quite important. Most law students practice in small- to medium-sized firms serving clients who are very concerned about billing. The small businesses and entrepreneurs represented by most business lawyers do not have much of a budget for legal services. If the client is concerned about billing, so should the lawyer. Being mindful of the billing sharpens the focus of the business lawyer—the advice given must be legally correct, but also practical and cost-effective. Law professors who understand that dynamic might find ways to bring it to life in the classroom. Law professors who are not in tune with that dynamic might prize legally correct (but impracticable) responses to legal issues over the pragmatic solutions that will be called for in practice.

I do not want to be perceived as disparaging the value of large law firm practice, but we should take note that law professors with transactional law experience at mega-firms are not typical of business lawyers in the real world. Associates in these huge organizations generally do not get the same kinds of professional experiences that practicing lawyers in smaller settings receive. Junior lawyers in big firms typically do not have a lot of direct client contact, they do not have to bring in business, they do not have their own clients, they do not make the important decisions in the representation of the client, they do not manage the billing of the matter, they probably have not had to say “no” to a client, break bad news to a client, or strategize with the client’s top decision makers about how to proceed, and on and on. They have often been part of a large team of lawyers that has attacked a problem from every angle, often with little concern about the cost of the representation. So, they are smart and they have worked on cutting-edge deals, but they have not been in the role of the deal lawyer as that role is actually practiced in the American bar outside of mega-firms.

In addition, the junior lawyers at huge firms who later become law professors often have had a very specific and narrow practice experience in terms of the subject matter of the representation they have been involved with. A business lawyer at a big firm is often tightly focused on a very thin slice of the world of “business law”—only matters dealing with the Investment Company Act of 1940, or experience helping governments in emerging markets privatize

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22 A colleague at another school recently expressed real surprise that my course package included both business organizations and secured transactions, as if corporate and commercial topics were worlds apart. His practice background was in a big firm and these topics would have been handled by different departments within the firm. From my point of view, coming from a medium-sized firm, these areas went together as the kinds of things a journeyman business lawyer would know, as in most firms the business lawyers know something about a wide range of topics from corporate law to tax to intellectual property to commercial law and more.
state-owned industries, for example. Those who think of themselves as "deal lawyers" may have had lots of experience doing document review in mergers and acquisitions or assisting venture capital firms structure financing arrangements. While many of these practices are highly sophisticated, they are also almost completely irrelevant to the typical law student who is going to end up practicing in a small- to medium-sized firm in a small- to medium-sized city. Those highfalutin legal matters do not come up very often in the typical business lawyer's day-to-day experiences in representing small businesses and entrepreneurs.

So let's review the bidding: lessons imparting the skills and values of real-world business lawyering about entrepreneurship rarely inform what's going on in the typical law school classroom because most law professors lack the experience necessary to add that dimension to their courses. This lack of experience may be because they never practiced law, or they hated the practice of law, or they practiced a different kind of law, or they practiced business law in a rarified atmosphere. Even with all those caveats, however, there should still be a group of teachers who care about entrepreneurship and law. Where are they? While in both course offerings and scholarship we see a nationwide trend toward more offerings, the current level of engagement is hardly universal across law schools.23

To understand the other obstacles that prevent further penetration of entrepreneurship into law school curricula, one must appreciate some of the political dimensions of the academy. First, most, although certainly not all, of the faculty members who are truly committed to entrepreneurship in law schools are clinicians.24 In many places, clinicians are in some sense "second class citizens" whose initiatives and proposals are not given as much backing as that given to the "podium" faculty. Until more traditional, tenure-track classroom faculty recognize the importance of entrepreneurship education, the topic runs the risk of being consigned to the realm of the clinicians alone.

Second, although the idea that entrepreneurship as a legitimate area of academic inquiry seems to be catching on at the university level,25 there remains some skepticism that entrepreneurship is something that can be taught.26 In their...
provocative essay, Professors Gordon Smith and Darian Ibrahim discussed whether there is anything to the idea that “law and entrepreneurship” is an independent field of inquiry within the law or whether it is the latest version of “the Law of the Horse”—a shorthand dismissal of “law and _____” courses as being nothing more than, say, contracts cases about horses, torts cases involving horses, etc.\textsuperscript{27} The essay makes a strong case that law and entrepreneurship research is distinctive, finding that some legal rules have been tailored to fit the entrepreneurial context or that other rules of law find novel expression in the entrepreneurial context.\textsuperscript{28}

While Professors Smith and Ibrahim make a strong case, it would be naive to think they have convinced every member of the academy and every law review editorial board that “law and entrepreneurship” is a legitimate subject for research. While this discussion may strike non-academics as, well, academic, the fact that “law and entrepreneurship” has not yet become established as an area of research in its own right has real implications for the production of entrepreneurship scholarship. The production of entrepreneurship scholarship, in turn, affects law school course offerings, as faculty usually have course packages that reinforce and support their research interests.

Law professors have incentive to write prodigiously in order to gain promotion and tenure and to maximize their potential for lateral moves. A young scholar who might be interested in law and entrepreneurship as an area of research faces a tough problem, however: while the academy values scholarly production, the articles must be placed in top journals and must get cited regularly. There is a tendency of legal scholars to search for a topic involving “deep theory” about which they can write the definitive exposition, even if articles involving those topics have little practical value to the practicing bar or the bench.\textsuperscript{29}

Top placement of articles relating to any business topic has always been a challenge in any event, given the perceived bias of law reviews toward more glamorous topics like constitutional law and criminal law,\textsuperscript{30} but to write in an area that is not yet widely recognized as a separate topic of inquiry creates even


\textsuperscript{28} Id.

\textsuperscript{29} The most famous recent discussion of the disjunction between the scholarship being generated by the academy and scholarship that would actually be useful to members of the bar and bench was precipitated by Judge Harry T. Edwards in his provocative article entitled \textit{The Growing Disjunction Between Legal Education and the Legal Profession,} 91 \textit{Mich. L. Rev.} 34 (1992). That article gave rise to a robust debate that seems to have done little to make legal scholarship more relevant to the legal profession.

greater challenges. To add insult to injury, in addition to not getting a top placement, scholarship about law and entrepreneurship is unlikely to generate a lot of citations because not many other scholars are writing in the area. Consequently, the new scholar ought to proceed cautiously, as the two major indices for faculties to assess the quality of scholarly output—placement and citations—are likely to be much more difficult to attain when writing in the area of law and entrepreneurship. To the non-academic reader this all probably seems silly, but it is real and is reinforced by the U.S. News rankings, which depend in large part on the “peer assessment” rating\(^3\) which many observers believe to be a function of the scholarly output (and placement) of a school’s faculty.

I have painted a somewhat pessimistic view of the possibility of bringing “law and entrepreneurship” education into the law school classroom, but I do not think the picture is completely bleak. There is a growing movement to recognize the role of lawyers in assisting entrepreneurs and a growing cadre of law professors who want to explore this area both in the classroom\(^32\) and in scholarship, though the progress is slow. The next Part offers some ideas about how professors who have some interest in bringing the skills and values of transactional lawyering and entrepreneurship into the classroom can do so without completely re-inventing themselves.

III. WHAT CAN WE DO TO CHANGE THE SITUATION?

As any therapist will tell you, the first step toward getting better is to admit you have a problem. If law professors acknowledge that we should be doing a better job of communicating the values of transactional lawyers in the law curriculum, then there are some steps professors can take, both individually and collectively, to correct the situation. If, on the other hand, the professoriate does what it has done in the past and erects a wall of denial about the issue, then the situation will not improve. Assuming, however, that at least some law professors do want to move ahead to find a way to integrate the professional skills and values relevant to business lawyers and those who counsel entrepreneurs, then here are some things that can be done (and which are, in fact, being done).

A. Rediscover Practice

As I outlined above, a big obstacle for bringing business lawyering into the classroom is the existing skill set of the business law faculty. Some professors have had little real business law experience and even those of us who did practice business law are a bit “rusty.” For professors suffering from these deficits, even if they want to bring these real world lessons to their students, they might not be


\(^32\) See Karl S. Okamoto, Teaching Transactional Lawyering, 1 DREXEL L. REV. 69, 71-73 (2009) [hereinafter Okamoto, Teaching Transactional Lawyering].
competent to do so. This is a real concern, but it is not an insurmountable problem.

Consider my own situation. I practiced from 1986-1991. The legal world has changed a lot since then. Many of the issues that were so hot in 1991 are irrelevant today. By the end of the 1990s it dawned on me that the longer I taught, the less relevant my specific practice experiences became. While I always tried to bring some of the eternal lawyerly skills into my classroom—contract interpretation, close reading, learning how to construct an argument—in terms of the practical skills that are pertinent to the current practice, I increasingly felt out of touch. Indeed, in 2001, when I had been teaching for ten years (which is twice as long as I had practiced law), I wondered whether I was still a lawyer any more.

In that year I resolved to became more involved in the American Bar Association to help me bridge the gap between the academy and the practice. I had been a member of the ABA since law school and found its publications to be very valuable, but I had never actively participated in a committee or attended an annual or spring meeting. Once I started getting actively involved with the Section on Business Law, however, I realized I had made a huge mistake by not taking full advantage of membership earlier. Every ABA meeting I attended brought me back in touch with cutting edge issues facing business lawyers and allowed me to interact with some really bright minds. I returned to my classroom with a much clearer understanding of what was going on in the world of business law, having heard it discussed and debated by leading lawyers. The depth of understanding I attained was much deeper than I could have achieved merely by reading about these topics in law reviews.

While I have chosen to invest my time with the ABA, other state and local bars are also available to fill this role in connecting the academy and practice. Law professors are welcome to participate in bar activities and often find themselves in the thick of things before too long.

Along these same lines, continuing legal education ("CLE") courses are another way to get your head back in the game, or to pick up a game you never really learned. CLEs come in many forms; some are now delivered online for minimal cost and inconvenience. Others are more elaborate affairs with top-notch teaching materials as an added bonus. In my experience, CLEs can freshen up old skills quickly and efficiently.

Finally, if you are really interested in reconnecting with the profession, consider spending your next sabbatical in a law firm. A few years ago my colleague, Professor Amy Cohen, did exactly that. Her sabbatical project was to get a deeper appreciation for her area of expertise—intellectual property—by working in a law firm and writing a law review article about the experience. In Professor Cohen’s words:

A law professor has the luxury of taking a position on an issue without worries about losing a client or not getting paid for time spent researching an issue to its depth; a practicing lawyer does not have that luxury and thus, in some ways, must be more creative, more resourceful, and more realistic in addressing legal questions.
Every law professor should at some time during his or her teaching career be forced to confront that reality, not only because it will make that professor a better teacher and a better scholar, but also a better, less cynical, more humble and appreciative representative of our profession—the one we share with the lawyers we have all educated and sent out to the world of practice.33

B. Bring Problems into Your Doctrinal Courses

One of the biggest challenges facing business law professors who want to bring the practice into their classroom is breaking the influence of the appellate decision as a teaching tool and turning toward more transactionally-oriented materials as a way to teach business-related topics. Professors need to be creative to present situations where the students can experience legal issues in a context that is relevant to the business lawyer's world. Because business lawyers in practice are problem solvers, one excellent pedagogical approach is to use problems to teach students business topics.34

The leading proponent of this approach is Professor Douglas Leslie at the University of Virginia School of Law. Professor Leslie has developed an entire set of materials, that he calls CaseFiles, which can be used to teach contracts, property, employment, or labor law.35 These CaseFiles are like mini-simulations that set the stage for a discussion of legal issues in a way that is more like the way matters arise in practice. There is a set of facts, some preliminary investigation by a paralegal, and some relevant statutory and case law authority. It is up to the lawyer/student to work with these materials in a professionally competent way (with the guidance of the professor, of course). In the hands of a professor who is inclined to bring in the values of a deal lawyer, these materials can be an excellent jumping-off point.

Even without turning the whole course over to Professor Leslie's problems, a professor could use one or two selected CaseFiles to make a foray into this approach without giving up the familiar world of the casebook all together. Alternatively, one need not use Professor Leslie's materials at all, as a good number of casebooks use the problem method as part of their presentation of the material. When I teach contracts, for example, I use the Knapp, Crystal and Prince casebook7 because it provides excellent transactional problems which allow me to help the students synthesize the case material in a planning context, the way lawyers actually work with the law.

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34 See, e.g., Carney, supra note 14.
In my secured transactions course I also use both a book with problems, and I supplement that book with an elaborate hypothetical transaction. During the first week of class my students are given a file that describes a fictional company, Fruit de Mer, Inc., which engages in an aquicultural operation, farming oysters under scientific conditions, in a fictional jurisdiction. The file contains a description of the company, a website for the company, and various documents such as a mortgage on the real property, a security agreement, an equipment lease, a consignment agreement and other items one is likely to find in a file, including financial statements. This hypothetical company provides a platform to discuss all types of issues that arise in the course and need to be addressed at a level deeper than can be accomplished with the short problems in the book.

Including financial statements allows me to bring in a commercial lender from a local bank as a guest lecturer to assess this company as a potential borrower. He writes up a term sheet for a loan to the business. Later in the term I bring in a lawyer to close the loan that was written up by the banker. Students have a chance for questions and answers. I have received positive feedback from my students for these sessions.

I also extend the hypothetical into the examination process. The exam is a take-home and asks the students to analyze a problem in a way that a commercial lawyer would. It forces the students to work with documents and financial statements. My goal in giving this kind of case is to reinforce my emphasis on professional skills and values. Essentially, I’m putting my money where my mouth is: if professional skills and values matter to me, then I should evaluate the students on these grounds.

C. Re-tool a Course into a Simulation

Beyond courses in which problems are used to help present the material, one could design a whole course around one very richly textured problem and follow that complex problem throughout the course. A simulation course is different from a problem course, even my beefed-up secured transactions course, in that the hypothetical in the simulation course drives the syllabus in an organic way as the hypothetical scenario unfolds. This is opposed to a problem course, where the problems do not drive the syllabus, but instead are there to illustrate and develop the issues set out in the syllabus.

In a simulation course, students could engage in role playing to perform all kinds of transactional lawyer-type activities such as analyzing a term sheet, drafting documents and preparing for a closing. When I teach business planning, for example, I use the casebook by Professor Franklin Gevurtz precisely because it has an appendix with an excellently designed hypothetical

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38 DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS (7th ed. 2006).
40 For a description of one such course, see Karl S. Okamoto, Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School, 45 J. LEGAL EDUC. 498 (1995).
company that we follow through the course as it encounters various planning issues. The students are broken into teams so that they can play roles. I even bring in colleagues to play the role of the clients during the initial interview. Law students often have a distorted view of business lawyers and the business people they represent. Putting the students in a role allows them to develop some empathy for the characters in the simulation and perhaps a better appreciation of business people generally.

Simulation courses are often more engaging and stimulating as well. One of the adjunct professors in my school offers a course on franchise law. He is a nationally known expert on the topic, but when he structured his course as a traditional casebook-bound law school class, he struggled to get the critical mass of students to sign up. I sat in his class and can attest that it was delivered in a workmanlike way—a pretty decent, if unremarkable, law school class. Then a couple of years ago, he switched gears and reconceptualized the course as a simulation in which teams of students must come up with a franchise concept, work up the business model, draft the offering materials, and try to convince outside investors to back their business. He brings in outside “investors” to hear the pitches. I have been one of those “investors” and I must say that the class in which I was being wooed by the student teams trying to convince me to invest in their franchise was one of the most energetic, successful classes I have ever observed. Same teacher, same material, same law school, similar students, but a different pedagogical approach and a hugely different outcome in terms of student satisfaction and engagement. By the way, the simulation was a lot more fun for the professor too.

D. Consider Putting Together a “Deals” Course

As this Essay has noted many times, the typical law school curriculum does not give students much of a chance to think like a deal lawyer. One way for interested business law faculty to address this shortcoming would be to develop courses targeted directly at the special set of skills required for transactional lawyering. These courses could go under any number of names, such as “Entrepreneurship Law,” “Business Planning,” or even “Deals.” A course would probably use actual deal documents as the teaching materials, whether or not the overall structure of the course is a simulation or a problem course. In order to address a perceived weakness in our current teaching, the deal courses could focus on helping students learn how to spot, assess, and address business and

42 For an excellent discussion of what it means to think like a deal lawyer, see Tina L. Stark, Thinking Like a Deal Lawyer, 54 J. LEGAL EDUC. 223 (2004).
legal risks in a transaction; and critique agreements, negotiate terms and incorporate provisions into deal documents.45 My own prejudices suggest these pedagogical goals would be best achieved through a simulation or problem course, but a gifted teacher could bring these materials to life even in another pedagogical framework. Simulations tend to be resource intensive and require low student/teacher ratios to be effective. Problem courses permit a higher student/teacher ratio, but another format may provide opportunities to scale up the course to even higher enrollment, if that is consistent with institutional and professorial pedagogical goals.

E. Or, Consider a Basic Business Transactions Course

On the other side of the coin, if the deals course is too sophisticated, consider a basic course that addresses common business matters head-on and allows law students to become literate in business concepts.46 Surprisingly often, one of the big barriers for would-be business law students is the jargon and vocabulary of business. Learning the language of business allows law students to get in the game and to begin to use the vocabulary of deal makers. It also gives them access to ever more sophisticated materials—both business materials and legal materials. There are some books on the market designed to provide this kind of basic business education.47 There are also some schools that already offer the basic business course.48

F. Help Out With Your Business Clinic

The best news in the quest to get transactional business lawyering and lawyering skills relevant for advising entrepreneurs into law schools clearly comes from law school clinics.49 During the first decade of this century, transactional law clinics have spread across the legal education landscape.50 Although not every law school has a clinic that focuses on transactional practice,

46 See Francesca Jarosz, None of Your Business? No: Law Schools Need to Bring Their Business Law Teaching Up to Date, BUS. L. TODAY, Sept. - Oct. 2006, at 35 (recognizing the need for better business teaching).
48 See, e.g., Stark, supra note 42, at 323-34 (describing course at Fordham Law School).
49 See LUPPINO, CAN DO, supra note 23, at 19-21.
these clinics have gone beyond being a mere curiosity at a handful of schools to being a staple of clinical education.\textsuperscript{51}

Business law clinics take many forms. Some deal only with for-profit small business clients,\textsuperscript{52} some deal with housing development,\textsuperscript{53} some are a combination of community economic development and business assistance,\textsuperscript{54} others focus on intellectual property.\textsuperscript{55} All of them give students a chance to begin really thinking like a business lawyer and to begin to shed the habits of thinking like a law student. The clinics will not make the students expert business lawyers, but will start them on that path. The clinics can also be useful in making students aware that business lawyers should engage in public-spirited legal assistance.\textsuperscript{56}

I started the Small Business Clinic at Western New England College School of Law in 2002. I was the first clinician, and I immediately saw how the experience in the clinic excited my students and got them thinking about themselves as professionals. We tend to teach professional responsibility as if it were a separate subject, but in practice, it is part and parcel of what lawyers do in their substantive area of expertise. The clinic allowed me to tie those threads together for the students. I consciously emphasized professionalism—taking the role of lawyer as counselor very seriously. In the orientation to the clinic, I focused on material they learned in professional responsibility, such as competence, zealousness, confidentiality, representing potentially adverse parties and the attorney/client privilege, and related it all to the transactional context. Professional responsibility texts suffer from the same litigation bias that I have


noted elsewhere. Placing these ethical issues in the transactional setting was a real eye-opener for my students.

While clinics are a powerful teaching tool, clinicians often can use a helping hand from other members of the faculty who have subject area expertise beyond the clinician’s experience. Faculty members who want to get back in the game might volunteer to help in the clinic in appropriate circumstances. If your school does not have a business clinic, this would be a good time to lobby for the creation of one.

G. Invite Guest Lecturers to Bring a New Dimension to Your Classes

Another way to bring the perspective of the profession into the classroom is through guest lecturers. In some circles the use of guest lecturers is considered a good way to get “someone else to paint your fence,” but while the professor issuing the invitation to the guest lecturer gets a “day off” from full class preparation, there are legitimate pedagogical goals to be served by employing this device.

Guest lecturers can serve several functions. First, they provide a reality check on what you have been doing in the classroom. The guest lecturer can provide testimony on the issue of whether the real world works in a way similar to the model described in class. Second, the guest lecturer can bring needed expertise to supplement the professor’s experience. Third, the extension of an invitation to an accomplished practitioner facilitates networking both for the guest lecturer (who is now known to your class to be an “expert” worthy of an invitation to deliver a class) and for your students who, if they are savvy, will take the opportunity to introduce themselves to this leading member of the bar to further the development of their own professional contacts. Finally, the use of guest lecturers could be something that makes your alumni relations office happy. I typically try to extend invitations to alums of either our law school or of the undergraduate college. I have never had an alum refuse an invitation and I’ve had some come back year after year.

Of course there is always the potential with guest lecturers that the presentation might turn into a recounting of war stories. While war stories have their place, most of us would not design a syllabus for our courses that sacrificed a whole class session to war stories. To guard against a guest lecture devolving into the war story hour, a professor should take an active role in shaping the class. First, lay out clear expectations at the time the lecturer agrees to the commitment. Second, prepare your students for what the lecturer will talk about and require them to bring good questions. Third, during the talk keep the lecturer on track by asking some questions yourself.

A few years ago, the Business Law Education Committee of the Section on Business Law of the ABA came up with a smart way to bring members of the bar into the classroom, not so much to provide a stand-alone guest lecture, but rather to co-teach a particular topic. The program was called the “Law School Initiative,” and it worked by giving the guest lecturer a detailed template for the
class ahead of time. The professor and the practitioner use that template to jointly address a topic in a business law course. Pairing up with a deal lawyer in a basic business organizations class could be a good way to bring in the world view of a lawyer who advises entrepreneurs.

Taking this to the next level, Professor Karl Okamoto at Drexel University School of Law has described how he cleverly leverages resources of helpful members of the bar through a series of guest lecturer/co-teachers to provide demonstrations on good transactional lawyering. To make the class even more interesting for his students (and more convenient for his collaborators in the bar), Professor Okamoto holds these classes outside of the law school. For professors interested in bringing the skills of transactional lawyers to their students, creative solutions like the one implemented by Professor Okamoto are likely to pay rich dividends.

H. Explore Team Teaching

If a law professor does not quite feel up to bringing the deal lawyer’s perspective to class, he or she could partner with a professor who is able to supply that dimension and teach the class as a team. Although the logistics of having two professors teach one course will vary from place to place and may require a bit of negotiation with the dean, a team of professors from, say, business organizations and tax could make a compelling argument that the two of them together can present a more potent business planning or entrepreneurial law course than either one of them alone.

Team teaching with professors outside of the law school is also available as a way to add a business dimension to your classes. I have participated in a team-taught class with colleagues from my institution’s business school. Although it was logistically challenging, it was a real learning experience for me.

58 See id.
59 See Okamoto, Teaching Transactional Lawyering, supra note 32, at 75-78.
60 See id. at 76-78.
61 Although team teaching with colleagues from the business school seems like the most obvious place for a business lawyer to collaborate, other schools may offer opportunities as well. See Peter W. Salsich, Jr., Interdisciplinary Study in a Clinical Setting, 44 St. Louis U. L.J. 949 (2000) (discussing a collaborative effort between the School of Law and the School of Architecture at Washington University); see also Anthony J. Luppino, Minding More Than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations, 30 W. New Eng. L. Rev. 151, 200-01 (2007) [hereinafter Luppino, Educating Entrepreneurial Lawyers]. In his article, Professor Anthony Luppino describes “Entrepreneurship & New Venture Creation,” a course he team teaches with faculty from the Bloch Business School and the Engineering School at the University of Missouri – Kansas City. Luppino, Educating Entrepreneurial Lawyers, supra, at 200. Students enrolled in this course, roughly twenty percent of which are law students and eighty percent of which are business and engineering students, work in teams to develop business plans over the course of the semester and then compete in a business-plan competition at the course’s end. Id. at 201.
as well as for my students. In real life, lawyers work with business school trained executives and business consultants on a regular basis. Team teaching, especially if the classroom contains both JD and MBA students, allows your law students to get in tune with the cultural differences of the business professors and the MBA students.\textsuperscript{62} They have a different way of looking at the transaction and it’s not focused on the law! This added dimension to understanding transactions has a big payoff for the students.\textsuperscript{63}

But team teaching is easier said than done. True collaboration, where both professors feed off each other in a synergetic way, is hard to achieve. In my team-taught class, my business school colleagues and I were usually proceeding on somewhat parallel paths—me doing the law side and my business school colleague doing the business side of a given issue. On some days, though, we had the kind of true collaboration between law and business that somehow synergistically gave our students more than either of us could have given them separately. I only wish I knew how to replicate those magical moments.

Nevertheless, getting law students to appreciate the business school perspective is important because that business school view is probably more like the way the client views the world. The client is unlikely to think the business revolves around the legal aspects of the operation, but is much more likely to think the business considerations take first priority. I therefore consciously try to make my students think like \textit{business} lawyers—with a problem solving approach to legal issues that is informed by an understanding of business concepts.

The added value to law students of participating in interdisciplinary courses is significant, not because we expect the law students to eventually serve as business consultants, but rather because, as Professor Kim Diana Connolly put it:

\begin{quote}
“practice as a lawyer often require[s] some degree of conversance with other disciplines—at the least, an ability to know when to seek the assistance of other types of professionals or experts[,]” [and] the “mutual understanding between professionals assists in eliminating the confusion, delays, and poor decisionmaking caused by professionals unprepared to interact with one another.”\textsuperscript{64}
\end{quote}

\begin{footnotes}
\item[63] See Luppino, \textit{Educating Entrepreneurial Lawyers}, supra note 61.
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I. Encourage the Smart Use of Adjuncts

Members of the bar play an important role in most law schools' educational programs. We draft legions of attorneys to serve as, among other things, moot court judges, mentors, guest lecturers, CLE presenters, and externship supervisors. The most prominent role that members of the bar play in the law school's offerings, however, is as adjunct faculty.65

Adjunct faculty members offer courses that the full-time faculty may be unprepared to deliver. While some tenure-track faculty may worry that the adjuncts merely wile away the hours embellishing war stories or teaching the shortest distance to the recorder's office, in fact, most cutting-edge topics are best taught by members of the practicing bar because they are working with these topics and shaping the contours of these ideas on a daily basis. Good adjuncts bring a lot to the classroom. In addition to their subject area expertise, they bring enthusiasm, experience, and a reality check on what is really happening in the legal profession. As with guest lecturers, the smart use of adjuncts also provides the opportunity for the law school to earn some points with its alumni base and the local bar. More importantly for purposes of this Essay, adjuncts bring professionalism to the classroom. Their special contribution is that they are able to combine the theoretical with the practical.

The ABA Section of Legal Education and Admissions to the Bar promulgates the Standards for Law Schools.66 The ABA recognizes the role that adjuncts play in legal education and encourages law schools to use them appropriately. While Standard 403 basically mandates that the full time faculty teach the required courses, it goes on to say that law schools should include experienced practicing lawyers and judges as teaching resources to enrich the educational program.67 Appropriate use of practicing lawyers and judges as faculty requires that a law school provide them with orientation, guidance, monitoring, and evaluation. Your associate dean will be grateful if you volunteer to assist in the oversight function with one or more of the adjuncts in the business law area. By striking up a professional relationship with the adjunct faculty, you

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65 For an excellent treatment of the role of adjunct faculty, see David A. Lander, Are Adjuncts a Benefit or a Detriment?, 33 U. DAYTON L. REV. 285 (2008).
67 See id. at Standard 403. For schools that are also members of AALS, the by-laws that members must abide by are a bit less enthusiastic than the ABA when it comes to adjunct faculty. Bylaw Section 6-4, entitled “Faculty” states that: “A faculty’s competence shall by judged primarily with reference to the full-time members.” AALS BYLAWS § 6-4(e) (2008), available at http://www.aals.org/about_handbook_bylaws.php. In each division of a member school’s program, each student shall have the opportunity to obtain substantially all of his or her instruction leading to the Juris Doctor degree from the school’s full-time faculty. See AALS EXECUTIVE COMM. REGULATIONS OF THE ASS'N OF AM. LAW SCHS. § 6-4.1 (2005), available at http://www.aals.org/about_handbook_regulations.php#6. “A member school demonstrates compliance with Bylaw 6-4(d) if in each division of its program, the school’s full-time faculty offer at least two-thirds of the credit hours or student-contact hours leading to the J.D. degree.” Id.
might both benefit. The tenure-track faculty can share some tips of the trade for use in the classroom and the adjunct faculty might become a resource for helping the professor stay up to date.

J. Champion More Ambitious Curriculum Revision

At some law schools, the faculty has decided to take the persistent criticisms of legal education seriously and change their whole curriculum to focus on preparing students to enter the legal profession. At Mercer University School of Law, for example, the course of study is shaped around what they call the “Woodruff Curriculum,” which has been designed to emphasize practical skills, ethics, and professionalism.68 Short of completely overhauling the entire law school curriculum, Washington and Lee University School of Law has revamped its third year curriculum to focus on professional education.69 The 2009-2010 academic year was the first year of implementation for the new third year which is entirely experiential, consisting of simulation courses, live-client interaction, professionalism, and practice skills.70 Other law schools are also trying new approaches to bringing the profession into the law school as well, and I mention these two only as examples. For schools that have decided to revamp the whole approach to professional skills training, there may be an opportunity for business law professors to introduce the skills and values relevant to transactional lawyers.

Short of major curricular change, a law school might create a center to promote student awareness of and competence in transactional law. At my school I founded the Law and Business Center for Advancing Entrepreneurship as a way to provide enrichment experiences for the students in my law school who are interested in advising entrepreneurs and small businesses.71 Other schools have also developed transactional law programs within the precincts of a specific center within the law school.72

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70 Id.
IV. WHY DOES IT MATTER?

A skeptical reader at this point in the Essay might say that academic freedom permits any given faculty member to include some practical skills if the professor sees fit, but that there is no need to systematically press for the inclusion of more professional skills and values in the curriculum, as law firms are primarily responsible for that end of legal training. While that argument may have made sense once upon a time, the professional world our students are now entering requires law schools to do more.

Twenty-five years ago when I was entering the legal profession, I was lucky enough to join a firm where I went through what amounted to an apprenticeship. I had learned about the "law" in law school, but I learned about how to be a lawyer in the law firm, first as a summer associate, then as a new lawyer. The firm took this role very seriously, from partners providing intense one-on-one editing sessions of my work product, to firm-wide continuing education programs, to budgeting appropriately for off-site CLE, to providing lots of opportunities to observe senior lawyers in action and to learn from their example.

Yet, as much as I learned in law school and at the firm, I also learned a lot about lawyering from the other members of the bar, who took their role in bringing along new lawyers very seriously as well. I was lucky to practice in Portland, Maine—a nice, small city. The city was big enough to have interesting legal work, but the bar was small enough that people were accountable. In the bar where I practiced, the law was a profession and inculcating the professional values to new lawyers was a shared effort, done with respect and care and quite routinely. There were only so many lawyers doing deals and we were all going to cross paths again in the future, so we had an unwritten rule about dealing with each other in a way that would ensure good working relationships in the future.

Once, as a new lawyer, I had a real estate matter and on the other side was a lawyer known as one of the leading senior "dirt lawyers" in the city. I got it in my head that I was going to show him what I was made of and I sent over a purchase and sale agreement that was so one-sided in favor of my client that it was ridiculous. I thought I was being a good lawyer. Instead, I learned an important lesson. The senior lawyer let me know that my draft was insulting and that instead of me taking the first cut, we'd start over with his draft of the document. Controlling the document is an important advantage and I lost it because I was too green to put an appropriate first draft on the table. The lesson was not taught with malice, but it was delivered with a bit of a point, so I would not misunderstand what had happened. When I told the partner supervising the matter what happened, he smiled knowingly.

At other times I was given helpful guidance by opposing counsel when negotiating provisions in agreements, whether they were loan documents or corporate documents or leases. New lawyers sometimes have a problem distinguishing mountains from molehills and the more senior lawyer on the other side was often helpful in a professionally appropriate way in helping me make the distinction. Again, the lawyer could have just let me blunder into a mistake, but the unwritten rules expected a certain amount of professional courtesy in the form of patience with the new kid.
But all that was a couple of decades ago. In those days it was expected that firms would play this master/apprentice role, but between the time I graduated from law school and today, the economics of law practice and the time demands on partners have changed the dynamic. Even in big firms, the support for new lawyers is sketchy. Instead of learning at the elbow of a partner, junior associates are lucky if they can look over the shoulder of a senior associate. For the vast majority of lawyers in solo or small firm practice, the situation is even scarier. And while firms are getting stingier on associate support, the bar, by many accounts, is becoming less civil and helpful. I am not sure that I would have received the helpful advice from opposing counsel that I did when I was a young lawyer.

I believe the changing landscape of law practice has been part of the reason why the Cramton Report, the MacCrate Report, the Carnegie Report, the Best Practices Report and ABA Standard 302(4) have all called for more practice skills courses in law school. The bar has been demanding that law schools do a better job of preparing graduates to “hit the ground running” because the firms are not doing that any more. In short, if law schools want to “add value” to their degrees, they ought to find a way to be more effective in professional skills education, including teaching law students how to counsel entrepreneurs.

If law professors do not try to bring professional education into law schools, we will increasingly graduate lawyers who are not ready to practice law and who will face steep challenges in acquiring the professional demeanor that was once part of the de facto apprenticing process that prevailed in American law practice. If we persist in sending these ill-prepared graduates into the world, the profession as a whole will suffer. Lawyers who do not know how to act in transactional settings—how to help the deal happen, how to facilitate the situation so that the business people feel like a win-win situation has occurred—but who rather fumble around and effectively muddle through problems without adding value, will ultimately erode the position of the law profession generally and the deal lawyer in particular. We will all suffer a loss of professional stature.

73 See supra notes 3-5 and accompanying text.

74 A symptom of the loss of professional stature is the proliferation of lawyer jokes. In his excellent book, Lowering the Bar, Professor Marc Galanter follows the development of the lawyer joke. See generally MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE (2006). His core thesis is that a dramatic increase in the quantity and nastiness of lawyer jokes has occurred since about 1980; particularly jokes that scorn or wish death upon lawyers. See id. at 15. He attributes this increase in ridicule to public resentment and anxiety about the extent to which law dominates daily life in our highly legalized society. See id. Americans, including businesspeople and entrepreneurs, simultaneously resent and depend upon lawyers. Many are frustrated by the apparent disconnect between law and justice. Others decry the incompetence or avarice of the profession. A good example of how lawyers are viewed as simultaneously technically precise, greedy, and useless is the following joke: A man went to see a lawyer and asked what his least expensive fee was. The lawyer replied, "$50 for three questions." Stunned, the man asked, "Isn't that a lot of money for three questions?" "Yes," the lawyer said. "What is your final question?" Id. at 85-86.
The time is right for law schools to take transaction practice seriously. It is the right thing for the many constituencies served by the law school—students want to become skilled lawyers, employers are looking for graduates ready to practice law, and clients deserve competent representation when a graduate from an ABA approved law school handles their matters. In the end it could be a win-win-win situation: just the way a business lawyer likes it.