

What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers

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I. Introduction

While many law schools are beginning to teach transactional skills to train transactional lawyers for the practice of law,¹ a gap remains between the minimal transactional skills a young lawyer should have and those that the recent law school graduate actually possesses.² The primary purpose of this article is to identify basic transactional competencies for transactional lawyers and provide resources and direction for obtaining those transactional competencies. The article will take a brief look at the history of formal transactional training in law school; identify basic transactional skills necessary to prepare a lawyer for transactional practice; and provide insight into attaining transactional competency.

This article assumes that transactional competency is necessary for new lawyers. At least half, if not more, of all attorneys engage in transactional practice.³ Accordingly, this assumption not only makes sense, it is supported by

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¹ See e.g. Columbia L. Sch., *Transactional Studies Program*, http://www.law.columbia.edu/center_program/deals (last accessed June 1, 2008); U. of Mich. L. Sch., *Urban Communities Clinic*, <http://www.law.umich.edu/centersandprograms/clinical/ucc/Pages/default.aspx> (last accessed May 31, 2008); Va. Law, *The Law & Business Program*, <http://www.law.virginia.edu/html/academics/lawbusiness.htm> (last accessed June 1, 2008); Washburn U. Sch. of L., *Business and Transactional Law Center*, <http://washburnlaw.edu/centers/transactional/> (last accessed June 1, 2008). Emory Law School recently established a new Transactional Law Center as well. *Emory Law Establishes Transactional Law Center, Appoints Executive Director*, http://www.law.emory.edu/index.php?id=292&no_cache=1&tx_ttnews%5bttn_news%5d=547 (May 5, 2007).

² In a previous article, I outlined this gap and made suggestions for change in law school curricula to fill the gap. Lisa Penland, *The Hypothetical Lawyer: Warrior, Wiseman or Hybrid?* 6 *Appalachian J. L.* 73 (2006).

³ Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten "Dirt Lawyer"*, 62 *U. Pitt. L. Rev.* 335, 335-36 (2000); Nancy B. Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach?* 1 *J. ALWD* 91, 103 (2002); David V. Snyder, *Closing the Deal in Contracts: Introducing Transactional Skills in the First Year*, 34 *U. Toledo L. Rev.* 689, 689 (2003); Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 *St. Thomas L. Rev.* 429, 430 (2005).

statistical and anecdotal information.

The *MacCrate Report*, published in 1992 by an American Bar Association task force, was unique because it focused on legal education not from the perspective of the legal academy, but from a practitioner's perspective.⁴ That is, it examined what American lawyers need to know to practice law.⁵ That Report is well known for its emphasis on setting a baseline of skills and values necessary for law practitioners and urging law schools to provide those baseline skills and values.⁶ Because it focused on "skills," it was not well received by some in the legal academy.⁷ Having fought hard against the perception of legal education as a "trade school," many law school academics did not welcome the Report's emphasis on skills.⁸ However, regardless of its reception, the *MacCrate Report* recognized that in the forty years preceding the Report there had been a marked growth in demand for legal services in the business community because, during that time, "economic activity vastly expanded, new business enterprises multiplied [,] and the number of transactions in every segment of the economy proliferated."⁹ That is, the Report illustrated the growth in the business sector of the economy and the concomitant growth in the need for lawyers skilled in business and transactional law.¹⁰

Likewise, a 2000 survey of the Young Lawyers Division of the American Bar Association supports the premise that a significant number of attorneys are engaged in transactional practice.¹¹ In a survey to which 850 young lawyers responded, half of the respondents indicated that the greatest percentage of their

⁴ See ABA Sec. Leg. Educ. & Admis. to the B., *Legal Education and Professional Development — An Educational Continuum, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap* 3-8, 11 (ABA 1992) [hereinafter *MacCrate Report* (the chair of the task force was Robert MacCrate)].

⁵ *Id.* at 7.

⁶ *Id.* at 135-221. The Report developed a Statement of Skills and Values ("SSV") which identified lawyering skills and professional values necessary to effectively practice law. *Id.* The idea was that the SSV would serve as learning objectives for law schools. *Id.* at 128.

⁷ See Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying the Gaps We Should Seek to Narrow*, 8 Clin. L. Rev. 109, 116-24 (2001).

⁸ Some couched their objections to the *MacCrate Report* objectives in the economic burden of clinical and skills education, see e.g. John G. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of the American Legal Education*, 43 J. Leg. Educ. 157 (1993). Russell Engler suggested that the heart of the objections was not economic, but more basic concerns with skills-based training. Engler, *supra* n. 7, at 118-19.

⁹ *MacCrate Report*, *supra* n. 4, at 17.

¹⁰ *Id.* The Report also noted that private corporations generated more than half of the legal business in the United States and the rapid increase in demand for legal services within the business sector. *Id.* at 82, 88. Further support for the growth in demand for business legal services is illustrated by the Report's citation to the increased number of in-house counsel for corporations, and its citation to a study finding that more than half of the Chicago Bar members were working in the corporate client sector. *Id.* at 31, 34.

¹¹ ABA Young Lawyers Div., *Career Satisfaction Survey* 1, http://www.abanet.org/yld/satisfaction_800.doc (Nov. 7, 2000).

work time was spent in the areas of general corporate law, commercial law, and personal injury defense.¹² Between 25 percent and 49 percent of respondents indicated that the greatest percentage of their time was devoted to general corporate law and commercial law.¹³ Thus, both the *MacCrate Report* and available statistics support the assertion that transactional practice is more than alive and well; it is equal and perhaps dominant to litigation practice. Additionally, even those litigation attorneys who proclaim they have never engaged in transactional practice have undoubtedly drafted the most basic of transactional documents — a settlement agreement. So, indeed, transactional competency is a must. However, while law schools are beginning to meet this real need, there is still a gap between what a transactional lawyer needs to know and what a law student learns in law school.¹⁴

II. History of Transactional Training

For various reasons, law schools emphasize the role of lawyer as litigator and provide legal training accordingly.¹⁵ The casebook method is the primary method of teaching in the first year of law school.¹⁶ That method focuses on appellate court cases in which litigation has already occurred. The casebook method continues as the major teaching method beyond the first-year curriculum.¹⁷ By emphasizing “cases” through the casebook teaching method,

¹² *Id.* at 13.

¹³ *Id.*

¹⁴ There is an ongoing struggle in legal education between theoretical legal analytical learning and practical skills-based learning. This conflict is noted by the authors of the recent report of the Carnegie Foundation evaluating the current state of legal education. William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 8 (Jossey-Bass 2007) [hereinafter *Carnegie Report* because the study was undertaken by The Carnegie Found. for the Advancement of Teaching]. The report notes the importance of both theory and practice and suggests not merely a détente, but a partnership between the two. *Id.* at 12-14. There truly does seem to be an evolution in legal education that recognizes and promotes the best of both “thinking like a lawyer” and “doing” like a lawyer. *Educating Lawyers* adds one more essential element to educating young lawyers — “professional identity” which recognizes that “professionalism, social responsibility, and ethics” are as integral to a lawyer’s job as analytical thought and skills competency. *Id.* at 14.

¹⁵ For a fuller discussion, see generally Penland, *supra* note 2; Kenneth N. Klee, *Teaching Transactional Law* 5-7 (UCLA School of Law Research Paper No. 03-17, 2003) (available at <http://ssrn.com/abstract=445823>); Gerald Korngold, *Legal Education for Non-Litigators: The Role of the Law Schools and the Practicing Bar*, 30 N.Y. L. Sch. L. Rev. 621 (1985).

¹⁶ Law professors who responded to a nationwide survey indicated that an overwhelming percentage (97 percent) of the first-year curriculum for doctrinal subjects is taught using the case method approach; a significant majority (two-thirds) of class time in the first year is devoted to case method teaching. Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 Seattle U. L. Rev. 1, 27 (1996); see also Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. Rev. 121, 128-29 (1994); *Carnegie Report*, *supra* n. 14, at 3; Phillip C. Kissam, *The Discipline of Law Schools: The Making of Modern Lawyers* 18 (Carolina Academic Press 2003).

¹⁷ See *Carnegie Report*, *supra* n. 14, at 3; Friedland, *supra* n. 16, at 27.

law school depicts the typical lawyer as a litigator, rather than as a transactional attorney.¹⁸ Whether the law school subject is a litigation-related subject, such as torts, or a transactional subject, such as contracts, the casebook method is the pedagogy of choice.¹⁹ Legal Writing and Analysis, also a first-year course, focuses primarily on litigation analysis and writing skills.²⁰ Throughout the three years of law school, course offerings lean primarily toward litigation-oriented subjects.²¹ As in the first year of law school, transactional subjects continue to be taught from casebooks.²² Admittedly, the number of law schools offering contract drafting has risen markedly,²³ as have the transactional clinics and transactional externships²⁴; however, most extracurricular and clinical opportunities are litigation oriented.²⁵

Thus, while more than half of lawyers likely practice transactional law (and undoubtedly a greater percentage are called upon to use transactional skills at

¹⁸ See Korngold, *supra* n. 15, at 622. The casebook method is often criticized not only for its adherence to a litigation orientation, but for many other reasons as well. The Best Practices project initiated by the Clinical Legal Education Association criticizes the case method approach because abuse of the method “contribute[s] to the damage that the law school experience unnecessarily inflicts on many students.” Roy Stuckey et al., *Best Practices for Legal Education: A Vision and A Road Map* 139 (Clin. Leg. Educ. Assn. 2007) (available at http://www.cleaweb.org/documents/Best_Practices_For_Legal_Education_7_x_10_pg_10_pt.pdf). It has also been criticized for viewing cases from the limited perspective of the appellate court and omitting the perspectives of clients, attorneys, and others. *Carnegie Report*, *supra* n. 14, at 57 (citing P.C. Davis & E.E. Steinglass, *A Dialogue About Socratic Teaching*, 23 N.Y.U. Rev. L. & Soc. Change 249, 275 (1997)). Further, the case method approach has been criticized as an ineffective teaching method. See e.g. W. David Slawson, *Changing How We Teach: A Critique of the Case Method*, 74 S. Cal. L. Rev. 343 (2000). For a more extensive discussion of the casebook method of teaching, see Penland, *supra* n. 2, at 77-80.

¹⁹ See Friedland, *supra* n. 16, at 15-23.

²⁰ This is illustrated by commonly used Legal Writing textbooks. See e.g. Charles R. Calleros, *Legal Method and Writing* (5th ed., Aspen Publishers 2006); Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* (4th ed., Aspen Publishers 2006); Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research, and Writing* (4th ed., Aspen Publishers 2006); Robin S. Wellford Slocum, *Legal Reasoning, Writing, and Persuasive Argument* (2d ed., LexisNexis 2006).

²¹ ABA Sec. Leg. Educ. & Admis. to the B., *A Survey of Law School Curricula: 1992-2002*, 16-17, 25-26, 34-36 (ABA 2004) [hereinafter *Survey of Law School Curricula*]. See also Penland, *supra* n. 2, at 83 (summarizing and explaining the statistical information disclosed by the *Survey of Law School Curricula*).

²² See *Carnegie Report*, *supra* n. 14, at 3. A quick look at the textbooks in any law school bookstore reveals the predominance of casebook teaching in all law school courses.

²³ *Survey of Law School Curricula*, *supra* n. 21, at 36 fig. 10 (of the 152 schools surveyed, the number offering contract drafting increased from 30 in 1992 to 58 in 2002).

²⁴ *Id.* at 35 fig. 8 (among the schools surveyed, transactional clinic offerings increased 400 percent).

²⁵ *Id.* at 34-36. Litigation-oriented clinics make up the majority of clinics offered. Additionally, in spite of an increase in corporate counsel externships, these externships are still few and far between. Professor Kenneth Klee concludes that transactional courses have penetrated the legal curriculum; however, his conclusion is based upon the survey responses of only forty law schools. Klee, *supra* n. 15.

some juncture in their practice), law schools fail to adequately train attorneys for transactional practice.²⁶ The two challenges for law students, young lawyers, and law firms are identifying minimum competencies for transactional practice and identifying how young lawyers might acquire those competencies.

III. Transactional Competencies²⁷

While half of all lawyers will go on to become transactional lawyers, they will engage in widely varied kinds of transactional practices as well as in many different office sizes, locations, and settings. A transactional attorney may focus on real estate transfers, property management, corporate issues, or deals and buy-outs. A transactional attorney may work in a large firm where the deals are complex or may practice in a small town or city as a general practitioner.²⁸ Setting minimum competencies is designed not to prepare lawyers for a specific type of transactional practice, but to provide them with the baseline of knowledge for the major areas of transactional practice. Clearly, the transactional attorney will build upon this baseline in the practice of law.²⁹ Thus, this article introduces

²⁶ Indeed, the Best Practices report concludes that law schools fail to adequately train attorneys for practice at all, be it transactional or litigation. Stuckey et al., *supra* n. 18, at 16-29. Similarly, the Carnegie Foundation report suggests that the case-dialogue method of teaching misses two necessary dimensions: experience with clients and the connection between students' sense of justice and their understanding of legal procedure and doctrine. *Carnegie Report*, *supra* n. 14, at 56-58.

²⁷ This article is not the first document to address transactional competencies. While the *MacCrate Report* does not generally isolate transactional competencies, its Statement of Skills and Values broadly addresses skills necessary for both litigation and transactional attorneys. *See MacCrate Report*, *supra* n. 4, at 138-39. Prior to the *MacCrate Report*, the University of Montana School of Law created a detailed list of transactional competencies. *See* Gregory S. Munro, *Outcomes Assessment for Law Schools* 93-94 (Inst. for L. Sch. Teaching 2000). The University of Montana list is found in U. Mont. L. Sch., *ABA Self-Study Report* (Apr. 11, 1995) (copy on file with J. ALWD) [hereinafter *Montana Competencies*].

²⁸ When working in various small practice settings, my response to the question "what's your specialty?" was "whatever just walked through the door." Attorneys who work in less populated areas or as general practitioners often have to be pretty darn good at almost anything that needs legal attention. If your specialty did not just walk through the door, it is sure to walk out of it. Students should understand that being a "competent" lawyer in the manner required by the ABA Model Rules of Professional Conduct does not always mean "passing" on a particular transaction. Model R. Prof. Conduct 1.1 cmt. 2 (ABA 2006). The competencies necessary to comply with that rule may often be attained by self-education. *Id.* Clearly, a lawyer should know his or her limitations. *Id.*, cmt. 1. However, law school provides an excellent education in education; thus, most lawyers should be confident in their ability to self-educate.

²⁹ In two articles identifying training areas for transactional associates, Tina Stark first identifies basic training for first- and second year associates. Tina Stark, *Training Junior Transactional Associates — First and Second Years*, 17 *The ALI-ABA Insider: A Newsletter of In-House Training Developments* (Winter-Spring 2003) [hereinafter Stark, *Training — First and Second Years*]. However, her second article recognizes the need to go beyond baseline training for "mid-level and senior associates" to ensure their productivity. Tina Stark, *Training Junior Transactional Associates — Third and Fourth Years*, 17 *The ALI-ABA Insider: A Newsletter of In-House Training Developments*

minimum transactional competencies for both the “deal” lawyer and for the general practitioner. While this article will address how to achieve these minimal competencies,³⁰ it is the competencies themselves that will guide law students, young lawyers, and law firms as they prepare for transactional practice.

A. Transactional Competencies for the Deal Lawyer

A lawyer who is an expert in putting together business agreements is often known as a “deal” lawyer. Business agreements are legal contracts, and an appropriately constructed contract “express[es] the parties’ business deal.”³¹ Thus, most of the baseline transactional competencies for deal lawyers are related to acquiring adequate background context for business agreements and acquiring the skills necessary to negotiate and draft a business agreement. As noted by one commentator:

Your junior transactional attorneys take on tough tasks right away, including drafting contracts and performing due diligence.

The big problem? Fed a strict diet of case-method analysis in law school, these new practitioners don’t have the necessary background to handle their duties effectively. . . .³²

So what do “junior deal lawyers”³³ need to know to hit the ground running in transactional practice? While the following list is fleshed out in more detail below, the essential competencies for a deal lawyer³⁴ are as follows:

(Summer 2003) [hereinafter Stark, *Training — Third and Fourth Years*].

³⁰ I do not underestimate the importance of the sources for achieving these competencies and that is precisely why they are included in this article. As Susan Irion writes, as a business lawyer, she had to learn her trade from the school of “hard knocks.” That is, she didn’t learn how to draft and negotiate a contract in law school, but on the job. She comments “but it shouldn’t be that way.” Susan J. Irion, *The New Classroom: Learning How to Draft Contracts in the Real World*, 16 Bus. L. Today 49 (Sept.-Oct. 2006) (available at <http://www.abanet.org/buslaw/blt/2006-09-10/irion.shtml>).

³¹ Tina Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* 9 (Aspen Publishers 2007).

³² Charles Fox, *Overview, Online Survival Skills Training Program: What Junior Deal Lawyers Need to Know*, http://www.pli.edu/product/clenow_detail.asp?id=35865. (last accessed June 2, 2008).

³³ Charles Fox calls them “junior deal lawyers.” See *id.* Tina Stark calls them “junior transactional associates.” See Stark, *Training — First and Second Years*, *supra* n. 29.

³⁴ These competencies are derived from various sources, but particularly noteworthy are the materials of Tina Stark and Charles Fox. In Tina Stark’s article on training first and second year associates, she identifies topic areas for foundational training similar to the competencies noted by this article. See Stark, *Training — First and Second Years*. Tina Stark’s consulting website is another source rich in information about transactional training. See Tina L. Stark, *Stark Legal Education, Inc.*, <http://www.starklegaled.com/tinastark/> (last accessed June 2, 2008).

Charles Fox identifies several similar areas of training in his Survival Skills course offered by Fox Professional Development and outlined at the Practising Law Institute’s website. See Fox, *supra*

1. The ability to understand business associations, advise about business structures, and draft documents related to business associations.³⁵
2. The ability to investigate facts and research the law (with emphasis on due diligence).
3. The ability to draft and negotiate contracts.
4. The ability to identify and address the ethical implications of transactional practice.

1. A Deal Lawyer Must Understand the Structure of Business Associations

At the very least, junior deal lawyers need to understand the various business organizations and the practical and legal implications of each.³⁶ That is, what are the attributes of a corporation, partnership, limited partnership, agency, or sole proprietorship? The lawyer should know how to create all types of business entities and how each entity is governed. The lawyer should be able to advise a client as to the advantages and disadvantages of doing business as a particular entity. The young lawyer should be able to answer the questions of who is in charge of the entity and who can act on behalf of this entity. She should be able to identify other persons and entities that may do business or enter into deals with business associations, such as trustees and beneficiaries, conservators, personal representatives, business promoters, lenders, borrowers, and the like. Again, the legal and practical implications of the nature of these persons and entities should be known. The young business lawyer should be knowledgeable in basic entity finance, including an understanding of financial statements.³⁷

n. 32; see also Charles Fox, *Fox Professional Development, LLC*, <http://www.foxprof.com/> (last accessed June 20, 2008). See also Jo Anne D. Ganek, *Successful Development for Transactional Lawyers*, K929 ALI-ABA 165, 167-68 (ALI 1994).

³⁵ Both Tina Stark and Jo Anne D. Ganek include “substantive law training” as part of a transactional training program. See Stark, *Training — First and Second Years*, *supra* n. 29; Ganek, *supra* n. 34, at 167-68. (The substantive law training they suggest is more specific than the first of my transactional competencies. This is because those articles are particularly directed at large law firm training where the substantive area of law to be undertaken by associates is known; the first competency I note is more limited because it is directed to the most basic of transactional competencies.)

³⁶ See Stark, *Training — First and Second Years*, *supra* n. 29; Fox, *supra* n. 32; Ganek, *supra* n. 34, at 167-68.

³⁷ The Survival Skills Program offered by Charles Fox provides a more extensive overview of these subjects and, particularly, business finance. See Fox, *supra* n. 32. While the extensive list of skills and competencies in the “Business 101” module would admittedly be beneficial, this article attempts to identify minimum transactional competencies, rather than optimum large firm transactional competencies.

2. A Deal Lawyer Must Know How to Investigate Facts and Research the Law

The young lawyer will need to have investigative and research tools in her bag of competencies. The young lawyer must have an understanding of due diligence. Due diligence is investigation of facts; however, it is a special kind of investigation understood as the “examination of a business or portion thereof in connection with a proposed transaction.”³⁸ The young transactional attorney must understand the potential areas of due diligence, including how to review of corporate documents and how to obtain information about capitalization and stockholders, to name only a few.³⁹ The junior deal lawyer must know how to construct relevant areas of inquiry and formulate questions to uncover facts. The junior attorney must have interviewing and counseling skills that will assist her in obtaining information from clients and other parties.⁴⁰ The transactional lawyer must have a basic understanding of legal research and those research resources unique to transactional law.

3. A Deal Lawyer Must Know How to Draft and Negotiate a Contract

The competencies of drafting and negotiation are intertwined skills. A young lawyer must understand drafting in order to better negotiate the business deal. Further, the negotiation and drafting process are recursive; often negotiation continues throughout the drafting process. Before beginning to draft, the transactional lawyer must first understand that writing a contract is not like other types of legal writing.⁴¹ As noted by Charles Fox:

The writing that we are exposed to on a day-to-day basis (even in law school) is almost entirely expository writing, the goal of which is to persuade or provide information to the reader. A contract is different: the goal of a contract is to describe *with precision* the substance of the meeting of two minds, in language that will be interpreted by each subsequent reader in *exactly the same way*.⁴²

Once the transactional lawyer begins drafting, the most important drafting skill is an understanding of the building blocks of a contract. The building blocks of a contract are those components of the contract that are necessary to translate the deal into a legally effective document, including representations and warranties, covenants, rights, conditions, discretionary authority, and

³⁸ Charles M. Fox, *Working With Contracts: What Law School Doesn't Teach You* 273 (PLI 2002).

³⁹ See e.g. John F. Secgal, *Initial Due Diligence Checklist*, 1610 PLI/Corp. 365 (June-July 2007).

⁴⁰ Potentially, interviewing and counseling skills might occupy an entire competency. However, because interviewing and counseling are so closely related to obtaining information from the client, I have included these competencies in investigation and research.

⁴¹ Fox, *supra* n. 38, at 4.

⁴² *Id.*

declarations.⁴³ Seasoned drafters understand that a party may lose the negotiated advantage of a contract term by failing to use the appropriate building block. Another required drafting skill is understanding the basic parts of contract, that is, the large-scale structure of a contract (introductory provisions, definitions, action sections, etc.).⁴⁴ Further the young lawyer must know and understand the particular language used to memorialize a building block or to signify an organizational component of the contract.⁴⁵ Principles of clear and unambiguous drafting must be understood, including format, sentence structure, and tabulation.⁴⁶ The young attorney must not only understand how to draft a contract, but also, as a key tool in the negotiation process, how to review and comment on a contract drafted by another lawyer.⁴⁷

4. A Deal Lawyer Must Understand the Ethical Implications of Transactional Practice

Any list of competencies for lawyers must include ethical considerations. In the Carnegie Foundation report, *Educating Lawyers*, the authors urge a more deliberate integration of ethics and professionalism during the education of lawyers, be they transactional lawyers or otherwise.⁴⁸ Indeed, the report notes that “[p]rofessional education is . . . inherently ethical education in the deep and broad sense.”⁴⁹ The need to integrate ethical considerations into educating lawyers is universal, and some of the ethical considerations that transactional lawyers face are universal practice considerations. However, as one commentator noted, the ABA Model Rules of Professional Conduct, as well as case law and ethical opinions, focus on ethical issues that arise in litigation; thus, the ethical considerations unique to transactional practice may not be as transparent to young lawyers who have been trained using these resources.⁵⁰

The young transactional lawyer must understand how to allocate responsibility between client and attorney.⁵¹ She must have a thorough understanding of the scope of knowledge and experience she should obtain

⁴³ See Stark, *supra* n. 31, at chs. 2-4; Fox, *supra* n. 38, at 9.

⁴⁴ See Stark, *supra* n. 31, at chs. 5-17, 27; George W. Kuney, *The Elements of Contract Drafting with Questions and Clauses for Consideration* ch. 2 (2d ed., Thomson West 2006).

⁴⁵ See Stark, *supra* n. 31, at chs. 2-17.

⁴⁶ *Id.* at chs. 18-23; Fox, *supra* n. 38, at ch. 4; Kuney, *supra* n. 44, at ch. 3.

⁴⁷ See Stark, *supra* n. 31, at ch. 28; Fox, *supra* n. 38, at ch. 6; Kuney, *supra* n. 44, at ch. 4.

⁴⁸ See *Carnegie Report*, *supra* n. 14, at 14.

⁴⁹ *Id.* at 30.

⁵⁰ Stark, *supra* n. 31, at 377-78. Interestingly, Professor Stark notes that the lack of case law and ethical opinions related to transactional work is likely related to the private forum within which transactional lawyering takes place. While litigation occurs in a highly public forum and generally provides some sort of public “record,” the private nature of transactional lawyering makes disciplining a transactional lawyer more difficult.

⁵¹ *Id.* at 378-79.

before endeavoring to carry out a particular transaction.⁵² The transactional attorney must understand how to interact with third parties and the scope of the attorney's duties to those third parties who may not be clients of the attorney, or even direct beneficiaries of the deal.⁵³ The ethical parameters of joint representation, a situation allowed in transactional practice, must be clearly understood by the transactional attorney.⁵⁴ Finally, the transactional attorney must be aware of the ethical implications of multi-jurisdictional transactions.⁵⁵

B. Additional Transactional Competencies for the General Practitioner

Most non-litigation legal transactions fall within the definition of a "deal." Therefore, the general practitioner who engages in transactions (and every general practitioner will) needs to have all of the transactional competencies of the deal lawyer. Interestingly, while a lawyer who focuses on deals may undertake deals having considerably higher financial stakes than the general practitioner, because the general practitioner does not have the luxury of focusing on deals, the general practitioner needs a broader base of transactional competencies than the deal lawyer. The general practitioner may never need to further his or her self-education to the level of a large firm deal lawyer; however, the general practitioner will need a base of knowledge broader than the deal lawyer to effectively oversee the many types of legal transactions that will arise in her practice. Thus, to be competent as a transactional lawyer, a general practitioner must (1) achieve all of the competencies of the deal lawyer; (2) know how to acquire, manage, and transfer property; (3) understand basic tax; (4) understand basic estate planning and probate; and (5) understand the law governing marital dissolution.⁵⁶

Basic transactional practice requires an understanding of the nature of both real and personal property.⁵⁷ general practitioner should know how to acquire, manage, and transfer property.⁵⁸ This would include not only a basic understanding of the underlying law, but also an understanding of the documents necessary to undertake a particular transaction.⁵⁹ The attorney should be able to negotiate, draft, and explain documents related to common property transactions, such as leases, real estate purchase and closing documents,

⁵² *Id.* at 379-80.

⁵³ *Id.* at 380-81.

⁵⁴ *Id.* at 381.

⁵⁵ *Id.* at 381-82.

⁵⁶ The transactional competencies of a general practitioner are based on the *MacCrate Report's* SSV, *supra* n. 6; the *Montana Competencies*, *supra* n. 27; and my observations and experience related to general law practices.

⁵⁷ See *Montana Competencies*, *supra* n. 27, at 6.

⁵⁸ See *id.*

⁵⁹ See *id.* at 6-9.

documents related to the purchasing and selling of personal property and goods, debt instruments, and the like.⁶⁰

In addition, a general practitioner must understand basic tax law.⁶¹ At one time, income tax was a required course in most law school curriculums. It no longer is.⁶² However, a general practitioner needs to have an understanding of the potential tax implications of a transaction. Although a “deal” lawyer may have “on call” tax professionals with whom that lawyer can confer, the general practitioner does not always have such ready access to tax professionals. What the general practitioner needs is the ability to recognize a potential tax issue, whether it is an income tax issue or estate and gift tax issue. The general practitioner needs to know enough to know when to obtain outside assistance from more expert lawyers.

Another competency essential to general practitioners is an understanding of basic estate planning and probate.⁶³ A general practitioner should have an understanding of both federal and state law related to the transfer of property on death.⁶⁴ This would include the ability to identify potential estate tax issues and draft a basic will.⁶⁵ The general practitioner should have an understanding of the probate process, the relevant time frames, and the documents necessary to complete the process.⁶⁶

Furthermore, a general practitioner must understand the law governing marital dissolution. While family law is not generally identified as an area of “transactional” law, most dissolutions are concluded by agreement of the parties. That is, the parties enter into a contract dividing their assets and determining their rights and responsibilities with respect to minor children. Because a contract is the heart of the dissolution, the general practitioner must have the competencies of a deal lawyer in order to effectively negotiate and draft the dissolution agreement. However, because family law is a unique and sensitive area of the law, the general practitioner should also have an understanding of the statutory and case law that governs the rights and responsibilities of the parties. The general practitioner must know how to counsel the client, obtain information from the client, investigate formally and informally, draft pleadings, and analyze financial information. In addition, the general practitioner must know how to negotiate and draft effective dissolution documents.

⁶⁰ *See id.*

⁶¹ While I worked as a small-town, small-firm practitioner, one of my business clients was adamant that I do the legal work for a like-kind exchange. The income tax course I took in law school provided me with the basic knowledge I needed; I supplemented that basic knowledge with self-education and solid advice from other lawyers.

⁶² *Survey of Law School Curricula*, *supra* n. 21, at 17.

⁶³ *See Montana Competencies*, *supra* n. 27, at 12-14.

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See id.*

IV. Attaining Transactional Competency

It is one thing to identify the basic transactional competencies; it is yet another to identify how to achieve those competencies. This section will address how to craft both individual and firm programs for ensuring transactional competency.

The primary key to achieving transactional competencies is setting a “curriculum.” A curriculum is something that one associates with educational institutions, teachers, and the like. However, the secondary meaning is “a set of courses constituting an area of specialization.”⁶⁷ Therefore, in determining how to meet the transactional competencies identified, the individual or the firm seeking to attain competency must identify the courses that constitute those competencies. Thus, the first step in determining how to set a curriculum would be more specifically defining the components of the transactional competency. Both the young lawyer and a law firm set on training young lawyers may set a curriculum by adopting a curriculum set by another institution or entity or by creating a curriculum.

If the prospective attorney is still in law school and has determined that she is going to become a transactional attorney (even if a general practitioner), the prospective attorney or law firm for which she is clerking may review the law school course choices and identify those courses that will help the prospective attorney meet the transactional competencies. Essential courses would include Business Associations, Income Tax, Estate and Gift Tax, Will Drafting, Contract Drafting, and Commercial Law. Further, to the extent that a prospective attorney has the opportunity to participate in a transactional clinic, transactional externships, or other extracurricular transactional opportunities, those opportunities should be taken. Law firms recruiting law students as summer associates and looking for future transactional lawyers would be well served to identify suggested curricular choices for potential associates. While law students sometimes identify themselves as future transactional attorneys, law schools do not have the same objectives as law firms and academic advising may be less than optimal at the law school; therefore, law firms should create an academic plan or curriculum for associates who apply for transactional positions.

If, however, the potential attorney graduates from law school without having achieved the transactional competencies, then the attorney or the firm for which she works must set a curriculum for achieving those competencies. The curriculum can be achieved in several ways. Outside consulting resources can be used to set the curriculum. That is, the attorney or firm may take courses specifically created by consulting firms to achieve the transactional competencies.⁶⁸

⁶⁷ *Merriam-Webster's Collegiate Dictionary* 307 (11th ed., Merriam-Webster 2007).

⁶⁸ While not wanting this article to be a commercial advertisement for consulting firms, I would be remiss in failing to identify top-notch transactional teaching consulting firms. Fox

Alternatively, the attorney or law firm may decide on a course of self-education. Self-education can be done in-house or through continuing legal education offerings. In-house education of transactional attorneys is fairly common in large firms; those larger firms presumably have transactional attorneys and experts who know what those firms need in their new associates and how to train them to achieve those competencies.⁶⁹ However, the general practitioner who sets out to practice law in a smaller practice setting may have to embark on a course of self-education with little or no direction. Appendix A to this article is a bibliography of resources for self-education or law firm education in the competency areas noted in this article. It is intended to provide transactional attorneys in small firms with curricular choices that will educate toward the transactional competencies identified.

Continuing legal education is another alternative for self-education. If an attorney seeks to self-educate in this way or a firm seeks to educate its young attorneys through continuing legal education offerings, it would be advisable to determine how various continuing education courses fit within the competencies noted and how the various courses fit with one another. Thus, if certain continuing education classes are offered each year, the attorney or firm should determine whether the classes should be taken in a certain sequence and to what extent the class fulfills the competencies. While continuing education is helpful, often the courses are either too narrow and do not provide the breadth of coverage necessary to achieve a particular transactional competency. Continuing education works best when combined with self-education.

V. Conclusion

It is the rare lawyer who has never practiced “transactional” law. Thus, it is the rare lawyer who can practice effectively without having achieved the basic transactional competencies. Law school education is becoming more adept at providing attorneys with transactional skills; generally, however, it falls short. Attorneys must know what the baseline transactional competencies are and devise a course for achieving them. Until the gap between law school education and the transactional competencies are achieved, it is incumbent upon the lawyer to be competent and take whatever steps necessary to educate himself or herself to become so.

Professional Development, LLC has a crackerjack course for young transactional attorneys, the Survival Skills Training Program, which would prepare any young transactional attorney for the practice of law. See Fox, *supra* n. 32. Similarly, Kenneth Adams offers a variety of courses that ensure the fulfillment of transactional competencies. See Ken Adams, *Adams Drafting*, <http://adamsdrafting.com> (last accessed June 2, 2008).

⁶⁹ See Irion, *supra* n. 30.

Appendix A

Sources for Deal Lawyers and General Practitioners

ALI-ABA's *Practice Checklist Manual on Advising Business Clients III* (ALI-ABA Comm. on Continuing Prof. Educ. 2004).

Scott J. Burnham, *Drafting and Analyzing Contracts: A Guide to the Practical Application of the Principles of Contract Law* (3d ed., LexisNexis 2003).

Corporations and Other Business Organizations: Statutes, Rules, Materials, and Forms (Melvin Aron Eisenberg ed., Found. Press 2000).

Charles M. Fox, *Working With Contracts: What Law School Doesn't Teach You* (PLI 2002).

Lawrence J. Fox & Susan R. Martyn, *Red Flags: A Lawyer's Handbook on Legal Ethics* (ALI-ABA 2005).

Thomas R. Haggard, *Legal Drafting: Process, Techniques, and Exercises*, (Thomson West 2003).

David A. Katz, *Due Diligence in Acquisition Transactions*, 1606 PLI/Corp. 577 (PLI Corp. L. & Prac. Course Handbook Series No. 10830, June 2007).

William A. Klein & John C. Coffee, Jr., *Business Organization and Finance: Legal and Economic Principles* (9th ed., Found. Press 2004).

George W. Kuney, *The Elements of Contract Drafting with Questions and Clauses for Consideration* (2d ed., Thomson West 2006).

Carole A. Levitt, *The Lawyer's Guide to Fact Finding on the Internet* (ABA L. Prac. Mgt. Sec. 2006).

Terry Lloyd & Tina L. Stark, *Accounting for Lawyers 1996: Using Financial Data in Law Practice* (PLI 1996).

Larry E. Ribstein, *Unincorporated Business Entities* (2d ed., Anderson Publg. Co. 2000).

John F. Seegal, *Initial Due Diligence Checklist*, 1610 PLI/Corp. 365 (PLI Corp. L. & Prac. Course Handbook Series No. 11552, June-July 2007).

Tina Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (Aspen Publishers 2007).

Melissa H. Weresh, *Legal Writing: Ethical and Professional Considerations* ch. 8 (LexisNexis 2006).

What's Fair: Ethics for Negotiators (Carrie Menkel-Meadow & Michael Wheeler eds., 1st ed., Jossey-Bass 2004).

Sources for General Practitioners

Barlow Burke, *Real Estate Transactions* (3d ed., Aspen Publishers 2003).

J. Martin Burke, *Understanding Federal Income Taxation* (2d ed., LexisNexis 2005).

J. Martin Burke & Michael K. Friel, *Taxation of Individual Income* (8th ed., LexisNexis 2007).

Richard E. Crouch, *Family Law Checklists* (Thomson West 2003).

Milton R. Friedman & Patrick A. Randolph, Jr., *Friedman on Leases* (5th ed., PLI 2004).

Daniel F. Hinkel, *Practical Real Estate Law* (5th ed., Thomson/Delmar Learning 2008).

Jerome A. Manning & Anita S. Rosenbloom, *Manning on Estate Planning* (6th ed., ALI-ABA Comm. on Continuing Prof. Educ. 2001).

Larry Rice, *The Complete Guide to Divorce Practice: Forms and Procedures for the Lawyer* (3d ed., ABA 2005).

Thomas L. Shaffer, Carol Ann Mooney & Amy Jo Boettcher, *The Planning and Drafting of Wills and Trusts* (15th ed., Found. Press 2007).

Gregory M. Stein, Morton P. Fisher, Jr., & Gail M. Stern, *A Practical Guide to Commercial Real Estate Transactions: From Contract to Closing* (ABA Sec. of Real Property, Probate & Trust Law 2001).

Harold G. Wren & Leon Cabinet, *Tax Aspects of Marital Dissolution* (2d ed., Thomson West 2005).