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## BARRIERS TO ENTRY: PUTTING IT TOGETHER, SCHOOL BY SCHOOL

JAY GARY FINKELSTEIN\*

“To dream the impossible dream”<sup>1</sup>

I am a corporate transactional partner in a major international law firm, and an adjunct member of four law faculties.<sup>2</sup> Although, for over a dozen years I have had great classes, supportive law schools, and appreciative students, I remain an institutional outsider, a pedagogic itinerant.

My subject area is international transactional law and business negotiations, focusing on practical skills taught experientially and collaboratively using an extended simulation module. The course I teach, International Business Negotiations (“IBN”), has been developed over more than 14 years, has been adopted by over 25 law schools in the US and internationally<sup>3</sup> and is taught over 30 times each year (some schools offer the class in both semesters). This article reflects upon the effort, and the journey, that has resulted in this successful quest to have a class incorporated into the curriculum at multiple law schools and to have a positive impact on legal education. It

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\* Jay Gary Finkelstein is a corporate transactional partner at DLA Piper LLP (U.S.). This article is based on a presentation at the LegalED Conference on March 20, 2015. The author would like to acknowledge the assistance and guidance of Professor David Thomson, University of Denver Sturm College of Law, for his review and comment on the drafts of this article.

<sup>1</sup> “The Impossible Dream” from *Man of La Mancha* (1972), music by Mitch Leigh and lyrics by Joe Darion. There is another lyric that appears later in that song which the author considered as the introduction to this article but abandoned as too daunting a tone with which to begin: “To be willing to march into hell, for a heavenly cause.” Accordingly, that lyric is relegated to this footnote.

<sup>2</sup> The author is a member of the adjunct law school faculties at Stanford, Berkeley, Georgetown and American. He has also been a visiting adjunct law faculty member at University of Indiana, Addis Ababa University (Ethiopia), Emmanuel Kant Baltic Federal University (Kaliningrad, Russia), IDC (Israel); University of Tel Aviv (Israel), and Sun Yat-Sen (Zhongshan) University (China).

<sup>3</sup> The US law schools known to be offering the class are American (where the class was originated), Berkeley, Boston University, Chicago, Denver, Fordham, Georgetown, Golden Gate, Hastings, Northwestern, Stanford, Suffolk, UCLA, University of Indiana, University of Virginia, and Washington & Lee. The international schools offering the class include Bucerius (Germany), Ghent (Belgium), Tel Aviv University (Israel); Baltic Federal University (Russia), University of Dundee (Scotland), IDC (Israel), Sun Yat-Sen University (China), Hebrew University (Israel), York (UK), Western Ontario (Canada), Southern Cross University (Australia), and FGV (Brazil).

also reflects upon the challenges and obstacles, as well as the advantages, faced by those outside the academy who are willing and able to participate in the efforts to make a legal education more relevant to the current practice of law.

I became a transactional lawyer despite a stellar legal education that did not teach me about my chosen area of legal practice.<sup>4</sup> Motivated by the academy's lack of courses focused on introducing students to transactional practice, I became an adjunct in 2003 and have become an increasingly vocal proponent for teaching transactional law and expanding experiential learning opportunities in law school. I am, however, both an aberrant Big Law partner who devotes a substantial amount of time to teaching and a nearly invisible participant among law school faculties. I have navigated this somewhat precarious path without a guiding light and as a result have hit many speed bumps and dead ends. I participate in academic conferences where I am often the only full-time practicing lawyer. I have meetings (which I initiate) with full-time faculty who teach business law topics (but as theory, not practical skills) and although I get cordial acknowledgment of the need to adopt innovative approaches to teaching and suggestions that my offers to assist are welcomed, I generally do not hear back (even after follow up).

Practitioners who teach present a threat to faculty who teach but do not practice. This is particularly true with respect to transactional practice where few full time faculty have experience. While regular faculty offer law students instruction and insights into certain foundational elements of law, including business law, those teaching business law subjects generally fail to teach how these foundational elements are applied to address client matters, i.e., how to prepare common transaction documents or to accomplish a client's transactional objectives by applying and utilizing the foundational skills and working within the legal context.<sup>5</sup> Practitioners teach students how to apply the legal doctrine being taught in other classes and, in the case of transactional practitioners, introduce students to the process of how to "do" a business transaction and be a value-add business lawyer.<sup>6</sup> As a

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<sup>4</sup> I graduated from Harvard Law School in 1978, magna cum laude. None of my classes provided the skills and insights I needed to be a successful transactional lawyer. Like most of my contemporaries and law students to this day, I graduated without any exposure to actual transactional agreements or the process by which they are created.

<sup>5</sup> The issue, while still present, is less severe in dispute and litigation practice areas, as many faculty have some prior experience in these areas and clinics are mostly oriented to dispute resolution contexts.

<sup>6</sup> There are examples in addition to the IBN course discussed in this article. See, e.g., *Curriculum Guide-Courses, Mergers and Acquisitions in Practice: Advising the Board of Directors*, GEO. L., [http://apps.law.georgetown.edu/curriculum/tab\\_courses.cfm?Status-](http://apps.law.georgetown.edu/curriculum/tab_courses.cfm?Status-)

result, practitioner/adjuncts potentially highlight what faculty do not know, creating a tension between the academy and the practicing bar.

While I have criticized legal education as not being practical enough, I have never sought to undermine the system, but merely to be allowed to assist in modifying and enhancing it from within. Student reviews of the class I teach regularly include comments that it is the best class they have taken in law school<sup>7</sup> since it shows them how a practicing lawyer uses legal skills to analyze a complex business problem and create a workable legal solution. I have had multiple students tell me that they entered my class thinking they wanted to be a litigator and left the class knowing they wanted to be a transactional lawyer. I understand that there is a tendency among faculty to down-play student evaluations as a motivator for curriculum development, but when there is a chorus erupting from those seeking to enter our profession with more than a theoretical knowledge of the law, it seems wise to pay attention.

A law school course catalogue is like a photo album, a collection of snapshots of the law. The practice of law, on the other hand, is more like a kaleidoscope where the multifaceted pieces blend together to form a complex interactive mosaic. Each lawyer may be expert in one or more pieces of the mosaic, but knowledge of the others, as well as the ability to integrate them to address the issue at hand, is necessary to complete the picture and to understand when other experts should be consulted. In no area is this concept more dramatically illustrated than in the negotiation of business transactions, where not only do multiple areas of law become integrated, but significant aspects of business, psychology, economics, politics, and accounting are also integral components. Many law schools have commenced efforts, principally through legal clinics and externship programs, to provide students with an improved sense of how the component pieces of a legal education fit together in addressing legal issues and the needs of clients, although few have tackled the task of creating an integrated approach to teaching business transactions.<sup>8</sup>

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*Course&Detail=2288* (last visited August 23, 2015) “The goal of the course is to simulate through this hypothetical M & A scenario, the legal skills needed to guide a client’s strategic and tactical business decisions in a real-life M & A situation.”

<sup>7</sup> See text at note 71 *infra*.

<sup>8</sup> There are notable exceptions: Emory University School of Law and Boston University Law School both offer certificates in transactional law. Both programs were initiated by Professor Tina L. Stark who commenced her teaching career as an adjunct professor after working as a practicing transactional lawyer. Other law schools, such as Chapman University Fowler School of Law and Colorado University School of Law are also exploring similar offerings. Some law schools also offer clinics focused on transactional matters. See International Transaction Clinic, NYU L. SCH., <http://>

Another glimpse at the law school course catalogue demonstrates that the law school curriculum remains, as it has historically, heavily focused on litigation-based instruction. Nearly all typical business law courses, such as business organizations, tax, uniform commercial code, securities law, and related subjects are taught using case studies of litigated issues.<sup>9</sup> Accordingly, the focus is on what went wrong in the disputed matter as illustrative of what should be done right. For business transactions, instruction often explores breaches of fiduciary duty, the fall-out of failed contractual agreements, and the consequences of the failure to provide adequate disclosure or engaging in insider trading; but how a lawyer actually structures a business transaction, drafts a viable business contract, accomplishes a merger, mitigates risk through contract provisions, crafts disclosure documents or, in general, translates the concepts of business transactions into the legal documentation that memorialize and govern such relationships<sup>10</sup> is woefully absent. Most law students graduate without ever seeing a business contract, whether a loan agreement, a merger agreement or a simple lease. Accordingly, those law school graduates who desire to pursue corporate practice are, when newly minted and adorned with their law degrees, generally ill-equipped to function as business lawyers. Some—generally those with prior business experience—have the ability to comprehend a business transaction, but even these few are poorly equipped as lawyers to assist in drafting a transaction agreement or assessing its structure.

The private bar readily identifies the lack of practical skills acquired by JD graduates as part of their legal education, both with respect to litigation and transactional practice. A recent survey of law firm hiring partners highlights the point:

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[www.law.nyu.edu/academics/clinics/international-transactions-jd](http://www.law.nyu.edu/academics/clinics/international-transactions-jd) (last visited Jan. 25, 2017), International Transactions Clinic, U. MICH. L. SCH., <http://www.law.umich.edu/clinical/internationaltransactionclinic/Pages/default.aspx> (last visited Aug. . 23, 2015), the Organizations and Transactions Clinic at Stanford, Organizations and Transactions Clinic, STAN. L. SCH., <https://www.law.stanford.edu/organizations/clinics/organizations-and-transactions-clinic> (last visited Aug. 23, 2015), and the Social Enterprise & Nonprofit Clinic at Georgetown, Social Enterprise and Nonprofit Clinic, GEO. L., <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/social-enterprise/> (last visited Aug. 23, 2015).

<sup>9</sup> This is changing, and more professors, such as Professor David Zarfes at University of Chicago and Professor Celia Taylor at University of Denver Sturm School of Law, are integrating practice skills in traditional business law classes. See also, Bradley T. Borden, “Using the Client-File Method to Teach Transactional Law,” 17 *Chapman Law Review* 101 (2013), and William K Sjostrom, Jr., “Teaching Business Organizations from a Transactional Perspective,” 59 *Saint Louis University Law Journal* 777 (2015).

<sup>10</sup> See Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 *LEGAL EDUC.* 223 (2004).

Law Schools have the opportunity to revise their curriculum to strengthen the “practice-readiness” of litigation or transactional attorneys. This would increase a law firm’s ability to quickly monetize their new hires, costing less money to hone them into practicing lawyers. This study reveals the most important skills desired by legal employers and will help inform law schools of the specific tasks they can integrate into applicable classes and experiential learning programs pursuant to employer demand and the new ABA standards.

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*More than half of litigation hiring managers indicated that newly graduated law students most often lacked practical experience in drafting of settlement agreements, briefs, dispositive motions, deposition questions and interviews, and jury questionnaires. The most important drafting skills are similar among small and large firms.*

*95% of [transactional] hiring partners and associates . . . believed that new graduates are lacking practical transactional skills. . . . The transactional skills most lacking in newly graduated law students included drafting substantive contracts and ancillary agreements, locating optional/alternative clauses, negotiating contracts and salient provisions and, among large firms, reading a balance sheet or basic financial statements.<sup>11</sup> (Emphasis added.)*

Law firms that serve large corporate clients have generally filled the skills void with on-the-job training and programs that focus on providing associates with knowledge of basic business topics such as finance and accounting.<sup>12</sup> Not every lawyer, however, will practice in a firm that can afford to provide such programs, yet many of these lawyers will also need this type of training to provide proper legal guidance to clients starting a business, raising initial capital, negotiating a lease or small business loan, or entering into a key supply agreement.<sup>13</sup>

<sup>11</sup> LexisNexis, “White Paper: Hiring partners reveal new attorney readiness for real world practice,” (2015) at pages 2 and 5, available at: [http://www.lexisnexis.com/documents/pdf/20150325064926\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20150325064926_large.pdf).

<sup>12</sup> See, for example, Ellen Rosen, “For New Associates, Work Seems Like School,” Bloomberg Law (Sept. 21, 2015), available at: <https://bol.bna.com/for-new-associates-work-seems-like-school/> (last visited on Sept. 24, 2015), which highlights programs adopted at several major law firms that are designed to provide new associates with the practice skills not taught in law school. See also, Press Release, Milbank, Announcing Milbank @ Harvard-A Groundbreaking Professional Development Program (Feb. 9, 2011). The program focuses on providing training in business, finance and law, utilizing Harvard Law School and Harvard Business School faculty.

<sup>13</sup> In order to address the “access to justice” dilemma in the United States, as well as to foster lawyers starting their own practice, some law schools are sponsoring incubators or “low bono” programs for recent graduates which will serve under-served populations. See,

I wanted to teach transactional law not only because of the void in my own legal education but out of frustration that law students that I interviewed for associate positions at my firm generally had no idea what a transactional lawyer does.<sup>14</sup> Despite the focus of law school classes on litigation and dispute resolution, over 50% of lawyers practice some aspect of transactional law,<sup>15</sup> and I wanted to use my experience as a transactional lawyer to create a way to introduce law students to business transactional practice.<sup>16</sup>

I started teaching in law school with the assistance of a colleague and friend who was a member of the tenured faculty at American University, Washington College of Law. He had developed an extended simulation module and an initial collaboration with another law school to teach an innovative class in international business negotiations. I joined with this professor in 2003 to co-teach and to add practical skills components to the class. For the past 14 years, while continuing my corporate transactional practice, I have been teaching that class solo, further developing the structure and pedagogy used today, introducing various condensed versions of the class, teaching the class at 10 law schools (US and international)<sup>17</sup>, training adjunct

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Susan Beck, "Georgetown Pairs Up With DLA Piper, Arent Fox to Open Low Bono Firm," *The Am Law Daily*, April 12, 2015, available at: <http://www.americanlawyer.com/id=1202723260997/Georgetown-Pairs-Up-With-DLA-Piper-Arent-Fox-to-Open-Low-Bono-Firm?slreturn=20150618112055>, A number of other such efforts exist: See, Delece Smith-Barrow, "Consider Law Schools With In-House Firms, Incubators," *U.S. News & World Report*, June 17, 2013, available at <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/06/17/consider-law-schools-with-in-house-firms-incubators>. I have been involved in designing the introductory training program for corporate and business law issues that will be provided to the Georgetown graduates entering the programs so that they will be able to address basic business issues that may arise in serving clients from the community, such as starting a new business, getting a small business loan, negotiating a lease, etc. The program will start with the basics of corporate formation and introduction to basic business contracts.

<sup>14</sup> Those that did had a prior business background and did not learn it in law school.

<sup>15</sup> Lisa Penland, "What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers," 5 *J. ASS'N LEGAL WRITING DIRECTORS* 118, 118-32 (2008) ("At least half, if not more, of all lawyers engage in transactional practice"). See also Sheila F. Miller, "Are We Teaching What They Will Use? Surveying Alumni to Assess Whether Skills Teaching Aligns with Alumni Practice," 32 *Miss. C.L. REV.* 419, 426 (2014) (survey results show 48% of the alumni surveyed practice transactional law, either exclusively or in combination with litigation).

<sup>16</sup> See also, Adam Lamparell and Charles E. MacLean, *The New Law School: Teaching Students to Practice Like Lawyers*, (LexisNexis, forthcoming 2015); available on SSRN at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2621017#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621017#) (Chapter 20, the last chapter, is titled "Don't Forget Transactional Law").

<sup>17</sup> In addition to Stanford, Berkeley, Georgetown and American, I have taught at IDC (Israel), Tel Aviv University (Israel), Baltic Federal University (Russia), Sun Yat-sen University (China), Southern Cross University (Australia), and Addis Ababa Law School (Ethiopia).

and full-time faculty throughout the world to offer the class; and with my colleague, authoring both a journal article on the class<sup>18</sup> and the textbook and teacher's manual for the class<sup>19</sup>.

The class was designed to enhance the law school experience through creative pedagogy and to introduce law students to the manner in which a transactional lawyer approaches a complex business problem, including the multi-subject and multi-disciplinary nature of transactional practice which integrates legal, social, economic and political perspectives to create win-win transactional results.

The class involves the negotiation of a business transaction between a multinational pharmaceutical company with a somewhat tarnished reputation and a company in a fictitious developing African country which has a secure supply of a certain raw material needed by the pharmaceutical company to produce a new, potential blockbuster, medication. The key ingredient for the drug is produced using a process patented by the pharmaceutical company. The developing country is in need of new markets, new employment opportunities, technology transfer, and similar benefits of foreign direct investment. The pharmaceutical company needs a reliable source of the raw material, and it also would like to improve its reputation and access new markets for products in Africa. There is also a side business based on the waste product from processing the raw material for the drug which can be developed into animal feed or fertilizer and provides another new opportunity for the developing country. A transaction is feasible, and the lawyers have been asked to begin the negotiations. The complexity of the transaction and the challenges for the lawyers unfurl as the students become more familiar with the facts of the deal and the goals of the parties. In order to negotiate the transaction effectively, both sides need to understand the negotiation process as well as the political, social and economic aspects of the transaction, including how each party makes money, the nature of the supply chain, the key elements of a joint venture agreement, supply agreement or license agreement, nuances of producing and transporting both the raw material and processed product, regulation of the industry, and force majeure issues. In short, the class involves an examination of, and immersion in, the entire process of analyzing, negotiating, and docu-

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<sup>18</sup> Daniel D. Bradlow and Jay Gary Finkelstein, "Training Law Students to be International Transactional Lawyers – Using an Extended Simulation to Educate Law Students about Business Transactions," 1 *Business, Entrepreneurship & the Law* 67-87 (2007).

<sup>19</sup> Daniel D. Bradlow and Jay Gary Finkelstein, *Negotiating Business Transactions – An Extended Simulation Course*, (2013).

menting (through letter of intent stage) a transaction. The course is designed so that each side to the transaction may be represented either by a class at two different law schools (introducing the real life aspect of negotiating with a party that is “unknown”) with the negotiations being conducted by video conference (or, if geographic proximity permits, face to face), or by two sections of the same class at a single law school. Class discussion focuses on the substantive legal and business issues presented by the module that need to be understood in order to negotiate effectively (the “doctrinal component”), as well as negotiating strategy, tactics, and psychology (the “practical skills component”). The negotiations start about the third or fourth class, allowing time for deep analysis of the facts and necessary substantive instruction. The negotiations proceed via both written communications and live negotiating sessions. The negotiations are cumulative<sup>20</sup> and evolve from week to week, so any obstacles or mistakes in one week must be resolved as the transaction progresses. Periods of frustration, impasse, and progress are interchanged as the negotiation continues and the parties learn to develop collaborative solutions, and it is often not clear until the final negotiating session whether all issues will be resolved and a transaction successfully concluded.<sup>21</sup>

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<sup>20</sup> The cumulative nature of the negotiations, as well as the collaborative teaching between law schools which introduces the element of the unknown counter-party are major distinguishing factor from other business negotiation classes and negotiation skills classes, which customarily utilize multiple shorter simulations on specific topics (e.g., a non-disclosure agreement, a labor agreement, a product purchase agreement) between paired students in the class. Accordingly IBN class is generally compatible, rather than competitive, with such other classes, and indeed such classes exist at many of the law schools where IBN is taught (and has been supported by the faculty teaching those classes). Of course, the unique aspects of IBN and its focus on transactional law may, draw some students who would otherwise enroll in a more typical negotiations class.

<sup>21</sup> A general counsel of a Fortune 500 company recently reviewed the materials for the class and stated in an email to the author: “I can’t help but think back to the international business negotiations class I took at [my law school] when I was there and then think about the international deals I have worked on over the past 20+ years and the issues that begin to come to mind as I think about your scenario. What you have created here is . . . a wholesale restructuring of the way students learn about these issues. This is excellent.” One respondent to the LexisNexis survey (see note 12, *supra*), also had a suggested solution to the dearth of transactional law practical skills among JD graduates which effectively described the IBN class: “For transactional area of law classes, ‘law schools could offer a negotiation transactions course where the students determine how to structure a transaction, find sample contracts and precedent deals, draft and negotiate key documents. . . .’ Most attorneys involved with hiring and management of new lawyers agree practical skills can be effectively honed through clinics, internships, clerkships, and experience in actual or simulated application to a case.” LexisNexis, “White Paper,” *supra* note 12, at p. 8.

The IBN class has been profiled by Educating Tomorrow's Lawyers (ETL) for its innovative approach to teaching law.<sup>22</sup> The class has been highly successful at each law school where it has been added to the curriculum<sup>23</sup>, is extraordinarily well received by law students, and continues to be one of the most unique law school classes offered today.<sup>24</sup>

Although my entry into the academy had been facilitated by my friend and colleague, upon endeavoring to expand the adoption of the IBN class, I entered the uncharted waters of other law schools. The successful experience teaching at American University formed the foundation for proving and promoting the IBN class and its experiential and collaborative pedagogy. Following the publication of the journal article in 2007<sup>25</sup> there were opportunities to speak at academic conferences about the class and its success. The thought of expanding the class to other law schools emerged from conversations with colleagues and as a result of the intense positive reaction to the class by students and those who commented at conferences. If students at American were so enthusiastic about the class, why not expand the opportunity to students at other US law schools. Since the class is generally taught collaboratively between two law schools, the initial logic was to reach out to other Washington, DC, area schools. Logic, however, is not always realized when one approaches the academy.

Can there still be any question about the value of practical skills training and experiential learning in law school?<sup>26</sup> When you read the headlines about legal education,<sup>27</sup> the perspectives of informed com-

<sup>22</sup> The profile for the IBN class at Educating Tomorrow's Lawyers is available at: <http://educatingtomorrowlawyers.du.edu/course-portfolios/detail/international-business-negotiations>.

<sup>23</sup> See list of schools at note 4, *supra*.

<sup>24</sup> See note 37, *infra* and related text.

<sup>25</sup> See note 19, *supra*.

<sup>26</sup> There is a quote attributed to Benjamin Franklin: "Tell me and I forget. Teach me and I remember. Involve me and I learn." See, <http://www.brainyquote.com/quotes/quotes/b/benjaminfr383997>. It is appropriate to be able to cite one of the Founding Fathers to bolster the case for more experiential learning in law school! Furthermore, the American Bar Association has now amended the accreditation rules for law schools to require six hours of experiential courses for each law school graduate, beginning with the class entering in 2016. See note 71, *infra* and related text.

<sup>27</sup> 21 The "crisis" in legal education was heralded by some now (in)famous newspaper headlines: Ashby Jones & Joseph Palazzolo, What's a First-Year Lawyer Worth? Not Much, Say a Growing Number of Corporate Clients Who Refuse to Pay, *WALL ST. J.*, (Oct. 17, 2011), <http://www.wsj.com/articles/SB1000424052970204774604576631360989675324>; David Segal, What They Don't Teach Law Students: Lawyering, *NY. TIMES*, Nov. 20, 2011, at A1 ("Law Schools have long emphasized the theoretical over the useful"). See also, Michele Goodwin, Law Schools' Failure to Prepare Students . . . It's Complicated, *Chronicle of Higher Education*, Dec. 13, 2011 ("Recent reports in *The New York Times*, *Washington Post*, and other national media shed light on a troubling phenomenon: law

mentators,<sup>28</sup> and even scholarly articles on the subject<sup>29</sup> there should no longer be any question, and the point is echoed loudly among the private bar.<sup>30</sup> However, there is lingering resistance, most of which likely emanates from the very source of the problem – entrenched law school faculties who are divorced from the world of the practicing lawyer.<sup>31</sup> At the very time that I sought to expand the IBN class to other law schools, some faculty were digging in, barricading the doors<sup>32</sup>, and hunkering down.<sup>33</sup> The road to reform would be strewn

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firms complaining about the quality of education received by students at top law schools. The concerns are real, although some law professors argue that ‘neither law students nor law schools can preserve their own future simply by better learning how to serve the corporate interests.’ Firms claim that law students are not prepared to perform basic tasks such as drafting contracts, negotiating mergers, and other key features of law practice.”)

<sup>28</sup> Chief Justice Roberts has commented, “What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law” Bryan A. Garner, Interviews with United States Supreme Court Justices, 13 SCRIBES J. LEGAL WRITING 1, 37 (2010). The theme was echoed in the Task Force on the Future of Legal Education, Working Paper 13 (Aug. 1, 2013) (American Bar Association) (“[A]s important as jobs and career success are to graduates and . . . to the success of the law school, little space in the curriculum is typically devoted specifically to preparing students to pursue and compete for jobs.”).

<sup>29</sup> Brent E. Newton, Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy, 62 S.C. L. REV. 105 (2010).

<sup>30</sup> See LexisNexis survey at note 12, supra.

<sup>31</sup> See the quotation from Chief Justice Roberts in note 29, supra.

<sup>32</sup> See, Robert J. Condlin, Practice Ready Graduates: A Millennialist Fantasy, U. MD. FRANCIS KING CAREY SCH. L. (Nov. 18, 2014), <http://ssrn.com/abstract=2316093>.

<sup>33</sup> Before I generate a flood of objections, there are many enlightened and creative faculties, and certainly individual members of many faculties, who are addressing the issue, and doing it well. Much has changed since my initial attempts to expand the IBN class to other law schools, as discussed elsewhere in this article. There is a continuing effort to re-examine and reform legal education, including efforts by the American Bar Association, the California Bar, the New York Bar and others to establish new requirements for experiential learning, and the efforts of many law schools to be responsive to the need for more experiential learning and practical skills classes. See Editorial: A New Direction In Legal Education, CONN. L. TR. (Apr. 30, 2014), <http://www.ctlawtribune.com/id=1202653364807/Editorial-A-New-Direction-In-Legal-Education?slreturn=20150619144941>

(“Changes in the legal marketplace are causing legal educators to rethink the nature, purpose and substance of legal education. As reported in these pages, Timothy Fisher and Jennifer Gerarda Brown, the recently appointed deans of the University of Connecticut School of Law and Quinnipiac School of Law, are enthusiastically and energetically embracing the opportunity to review old assumptions about what it means to be an attorney and the role legal educators play in preparing their students for the challenges they will face as counselors and advocates in a rapidly changing legal environment.”). See also Karen Sloan, Legal Education Due for a Makeover: ABA’s House of Delegates Prepares to Vote on a Sweeping Revision of its Accreditation Standards, NAT’L L.J., Aug. 4, 2014, at I (quoting Loyola University Chicago School of Law Dean David Yellen, “If there was a theme to what the comprehensive [ABA] review accomplished, it moved legal education into a 21st century model . . . requiring more practical skills training.”). The purpose of this article is not to recount all of the positive efforts to change the manner of

with the obstacles constructed by those in the “ivory tower”<sup>34</sup> most threatened by the reform.

A significant part of the difficulty in proposing change in law school, particularly from outside the institution, is that the system itself is resistant to change. Professor Deborah L. Rhode has set forth the essence of the issue in her new (2015) book, *The Trouble with Lawyers*<sup>35</sup>:

Almost thirty years ago, the New York Times ran a Sunday magazine feature titled, “The Trouble with America’s Law Schools.” The piece highlighted many of the curricular concerns common today, particularly the lack of practical training, the inattention to issues of professional responsibility, and the disengagement of upper-level law students. *Underlying these concerns was a sense of inertia and complacency among the faculty. As one Stanford professor put it, “The present structure is very congenial to us. . . . We’re not indifferent to the fact that our students are bored, but that to one side, law school works pretty well for us.”*

Such attitudes remain common, and with reason. For most [full-time] faculty, the pay, hours, and job security of their positions are enviable. In one survey, 93 percent of legal academics reported being satisfied or very satisfied, the highest percentage of satisfaction among any of the reported legal fields. *A fundamental problem in American legal education is a lack of consensus among faculty that there is a fundamental problem, or one that they have a responsibility to address. Law schools have a long and unbecoming history of resistance to reform.* That is likely to change only if external pressure from students, accrediting authorities, donors, and courts demands it. [Emphasis added.]

It is important to digress to make another observation. IBN is a unique class, but it is not the only class to teach transactional negotiations, or even international negotiations using experiential and collaborative pedagogy. It is not even the only class to pair international

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legal education but to outline the obstacles faced by someone outside the academy trying to participate in, and contribute to, that effort. Many of those barriers continue to exist.

<sup>34</sup> “From the 19th century [the term “ivory tower”] has been used to designate a world or atmosphere where intellectuals engage in pursuits that are disconnected from the practical concerns of everyday life. As such, it usually carries pejorative connotations of a willful disconnect from the everyday world; esoteric, over-specialized, or even useless research; and academic elitism, if not outright condescension. In American English usage it is a shorthand for academia or the university, particularly departments of the humanities.” From Wikipedia: [http://en.wikipedia.org/wiki/Ivory\\_Tower](http://en.wikipedia.org/wiki/Ivory_Tower).

<sup>35</sup> Deborah L. Rhode, *The Trouble with Lawyers*, (Oxford University Press 2015). The quoted paragraphs appear in Salon, June 7, 2015, “We have a problem with lawyers: This is how we fix law school and the legal profession,” available at [http://www.salon.com/2015/06/07/we\\_have\\_a\\_problem\\_with\\_lawyers\\_this\\_is\\_how\\_we\\_fix\\_law\\_school\\_and\\_the\\_legal\\_profession/](http://www.salon.com/2015/06/07/we_have_a_problem_with_lawyers_this_is_how_we_fix_law_school_and_the_legal_profession/) (last visited November 8, 2015).

law schools to offer a partnered class. There are at least three other similar international negotiations classes of which I am aware.<sup>36</sup> The major difference is that, to my knowledge, none of those other classes has been replicated outside its originating institution. Why? I would surmise that the academic system provides no incentive, or even recognition, to replicate a class in another law school not involving a faculty member's home institution. Writing (or presenting at academic conferences) about an innovative concept and telling others how it may be implemented certainly garners credit in the category of scholarship and publication, but the effort to replicate the model or to train and recruit other instructors for a different law school is a diversion from the principal goal and demands of one's own scholarship. Accordingly, passive promotion of innovation, such as presentations and the publication of articles which leave it to the listener or reader to decide to take the next step to adopt, is the avenue used to promote innovative ideas. Active promotion of innovation<sup>37</sup>, by reaching out

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<sup>36</sup> Hamline Law School offers a collaborative Advanced International Business Negotiations class (LAW 9671). Certificate in International Business Negotiation, HAMLINE U., <http://www.hamline.edu/law/dri/cibn/> (last visited July 19, 2015) ("You learn via synchronous and asynchronous distance learning, working and studying together with all other domestic and international students. . . . You examine advanced concepts, skills, and dynamics of the negotiation process in the context of international business transactions and dispute settlement through readings, discussion forums, negotiations, and group activities; You engage in a series of applied and coached activities that require translation of negotiation theory into practice; Enables you to gain experience in negotiating across national boundaries using distance technology."). Another similar course is offered at University of Washington School of Law (LAW B 516 International Contracting). Courses 2014-2015, U. WASH. SCH. L., <http://www.law.washington.edu/CourseCatalog/Course.aspx?ID=B516> (last visited July 19, 2015) ("In Fall/Winter section, certain class sessions will take place by videoconference with a class of law students at the University of Tokyo, and the heart of the course will be team negotiation and drafting of an agreement with counterpart teams of Japanese law students, using email and videoconferencing. It is anticipated a section will be offered Winter/Spring in cooperation with a European law school, which include negotiations with European law students."). Both of these classes reflect concepts and pedagogy similar to the International Business Negotiations class discussed in the text. A third example, a course conducted between two Canadian law schools (University of British Columbia and University of Saskatchewan), is described in John C. Kleefeld & Michaela Keet, *Getting Real: Enhancing the Acquisition of Negotiation Skills through a Simulated Email Transaction*, 2 *J. Ass. & MEDIATION* 23, 25 (2010) ("Working with basic background facts and a stranger on the other side, the students were free to use their own names and choose their own negotiating styles, thereby reducing the artificiality experienced by role-players who have to assume roles and pretend not to know their counterparts. The exercise allowed for the development of a negotiation relationship over the course of a week, in contrast to the one-time nature of many in-class simulations.").

<sup>37</sup> To be successful, new ideas need promotion. Consider how marketing departments and advertising introduce and encourages the expansion of new technology or innovations. Unlike in the commercial world motivated by profits, for the reasons stated in the text, legal academics are less inclined toward active promotion of creative pedagogy among law

directly to other law schools, to introduce and encourage adoptions of a new concept, is rare.<sup>38</sup> Combining this institutional impediment with the resistance to change among faculties, you have daunting obstacles for introducing new concepts across law schools, even if the concepts have a proven record of success.

Furthermore, legal academies, particularly in the new competitive environment for law applicants,<sup>39</sup> have each developed their own responses to the need for more practical skills and experiential classes. While each approach is well publicized,<sup>40</sup> each has pride in its model, and there is little motivation to reach outside the institution for assistance, which could be perceived as an inability to address the problem within the existing administrative and faculty structures, i.e., an

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schools, opting instead for the passive promotion of journal articles and conference presentations which leave it to the reader or listener to determine whether and how to pursue the innovative concepts. There is no active, continuous engagement to foster the process.

<sup>38</sup> This observation is to be distinguished from the numerous partnering relationships between law schools. Such collaborations always involve the home law school working with the partner school, either to offer a joint program, exchange law students, offer partner classes, etc. There are also examples of faculty who have reached beyond their own institution to foster change. A prime example is Professor Bill Henderson, University of Indiana, who has actively promoted change throughout the legal educational system and, for example, has collaborated with professor Bill Mooz at University of Colorado to promote the Tech Law Accelerator program. See, Karen Sloan, Interns Thrive in 'Boot Camp; Colorado Trains Them in rich Business Basics, *National Law Journal*, Aug. 18, 2014, at 1. In a somewhat different context, another expansion of an innovative concept, including active promotion, can also be found in the Law Meets Transactional Negotiation competition which was originated (and promoted) by Prof. Karl Okomoto at Drexel University Thomas R. Kline School of Law. From an initial competition involving approximately 10 law schools, the annual program has expanded to include teams from over 80 law schools. See <http://transactionalmeet.lawmeets.com/participants/>. There are also other practitioners who have transitioned to academia, becoming full time faculty, including Tina Stark (Emory), Kent Coit (Boston University), David Gibbs (Chapman) and Karl Okomoto (Drexel).

<sup>39</sup> See Natalie Kitroeff, "Law School Applications Set to Hit 15-Year Low," *Bloomberg Business*, March 19, 2015; available at <http://www.bloomberg.com/news/articles/2015-03-19/law-school-applications-will-hit-their-lowest-point-in-15-years> (last visited November 29, 2015).

<sup>40</sup> Washington & Lee has restructured its entire third-year curriculum to focus on practical skills. New York University is adopting changes in its third-year curriculum. University of Denver, Sturm College of Law, has adopted the Experiential Advantage. The Experiential Advantage, U. DENVER STURM C. L., <http://www.law.du.edu/index.php/experiential-advantage> (last visited July 19, 2015) ("Denver Law is pleased to announce the launch of its new Experiential Advantage Curriculum", which allows our students to spend a full year of their law school career in real or simulated legal practice."). University of Colorado recently offered an inaugural summer boot camp "designed to teach business skills and technology industry fundamentals before the students begin legal internships at technology firms." Karen Sloan, Interns Thrive in 'Boot Camp; Colorado Trains Them in rich Business Basics, *NAT'L L.J.*, Aug. 18, 2014, at 1. Many other efforts by law schools are similarly in process to address the needs discussed in this article. See also *infra* note 72 and accompanying discussion of the new ABA standards.

“admission against interest.” Accordingly, cross-pollination between law schools is limited, other than what is accessible through the literature or through lateral faculty hires who, once inside, bring new insights from former institutions. And there is little or no incentive to turn to practitioners to help address the problem, since practitioners are generally not perceived as academic or scholarly in their approach or capable of contributing<sup>41</sup> to the issues within the academy.<sup>42</sup>

Is cross-pollination a good idea? It does seem to work in nature as the sharing of genetic attributes that contribute to a more viable species is favored.<sup>43</sup> While having each institution determine for itself how to address innovations in education and respond to demands for more practical skills training has the benefit of multiple experiments yielding creative solutions, the risk of multiple independent experiments is that there is no focus or conversion that assures, as in nature, that there is the “survival of the fittest,” or at least the identification and adoption of best practices.<sup>44</sup> Another recent commentator has noted:

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<sup>41</sup> See Jeffrey M. Lipshaw, “Memo to Lawyers: How Not to ‘Retire and Teach,’” Suffolk University Law School Research Paper No. 07-38, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=992489](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=992489). For a list of some transactional practitioners who have successfully made the transition to academia, see note 39, *supra*.

<sup>42</sup> In a somewhat different approach, there has been a recent effort to identify what skills the practicing bar considers most important as a means of informing the academic response to reforming legal education and developing more practical skills classes. See, Neil W. Hamilton, “Changing Markets Create Opportunities: Emphasizing the Competencies Legal Employers Use in Hiring New Lawyers (Including Professional Formation/Professionalism),” 65 *South Carolina Law Review* 567-598. Educating Tomorrow’s Lawyers is in the process of compiling its Foundations for Practice survey of practitioners which was showcased at its fourth annual conference in October 2015. See <http://educatingtomorrowlawyers.du.edu/projects/foundations-for-practice> (“Foundations for Practice is an ambitious new project to determine the foundations entry-level lawyers need to launch successful careers in the legal profession.”). See also the LexisNexis survey cited at note 12, *supra*. Practitioners have also contributed to this discussion through articles focused on the necessary skills for young lawyers. See, Jay Gary Finkelstein, “Practice in the Academy: Creating ‘Practice Aware’ Law Graduates,” 64 *Journal of Legal Education* 622 (2015), and Neil J. Dilloff, *Law School Training: Bridging the Gap between Legal Education and the Practice of Law*, 24 *STAN. L. & POL’Y REV.* 425 (2013); Neil J. Dilloff, *Born to Run: How Law Schools Can Meet Law Firm Expectations for New Litigators*, 33 *The Review of Litigation* 857 (2014).

<sup>43</sup> Jonathan Weiner, *The Beak of the Finch* (Alfred A. Knopf 1994). This could be the first time that a book on Darwinian evolution has been cited in a law article!

<sup>44</sup> There has been a lot written on best practices: See ABA Section Of Legal Education and Admissions to the Bar, *Legal Education and Professional Development – An Educational Continuum* (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) 5 (1992) (better known as the McCrate Report); William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* 22, 27-28 (Carnegie Foundation for the Advancement of Teaching 2007) (better known as the “Carnegie Report”); Roy Stuckey

[T]he bench and bar have criticized law graduates for lacking the essential skills needed to practice law, and clients are refusing to pay for hours billed by new associates. . . .

In response, law schools across the United States have been forced to re-examine their programs of legal education. Some have made fundamental curricular changes and vowed to produce “practice ready” graduates who can competently practice law from the outset of their careers. In fact, the most common phrase that reverberates throughout the legal academy . . . is “experiential learning.” Indeed, law schools are almost tripping over themselves to claim that they are more “experiential” than others. Ironically, as law schools have boasted about their practice-ready curriculums and touted their clinical offerings, externship placements, and simulation courses, the criticism of graduates’ practice readiness has increased, not decreased.<sup>45</sup>

Cross-pollinating successful concepts requires the ability of existing faculty at a law school to be aware of the innovative concept developed at another law school and to be comfortable enough with the approach to implement it. Once made aware, they must either be able to incorporate the approach using their own efforts or have access to appropriate training and materials to utilize it. Publications and conferences work to make others aware of what is being done, but facilitating implementation requires textbooks, teachers’ manuals, and even direct training of faculty, as well as the willingness of law schools to implement new classes or pedagogies.

It is against this institutional backdrop and predisposition that I approached the concept of expanding the offering of the IBN class. As a practitioner who teaches within the academy but who is not anchored by academic convention, the opportunity to propagate a successful class appeared as a natural idea. It had a proven track record, so the concept and pedagogy should be *actively* promoted to others to encourage the offering of the class, and colleagues could be trained to teach the class. As a practitioner/academic I was not motivated, or constrained, by institutional pressure, the need for academic advancement, or even financial reward;<sup>46</sup> the focus was solely on an

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and others, *Best Practices For Legal Education: A Vision And A Road Map* (Clinical Legal Education Association 2007).

<sup>45</sup> Adam Lamparell and Charles E. MacLean, *The New Law School: Teaching Students to Practice Like Lawyers*, (LexisNexis, forthcoming 2015); available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2621017#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621017#), at p. 5 (the authors do not provide any quantitative or survey data to support their statement, although even if anecdotal, the observation is telling).

<sup>46</sup> Stepping into the classroom as an adjunct professor or instructor has significant appeal and rewards among many practitioners, but none of them are monetary. Adjuncts are the lowest paid among law school faculty participants. As the first dean that hired me

expansive view of giving back to the profession by sharing experience and teaching law students. Not being impeded by academic convention, and with blissful ignorance of obstacles, I had no difficulty engaging in the *active* promotion of the IBN class. With nothing to lose, I simply began knocking on doors – making the proverbial “cold calls” to promote an innovative class.

Apart from, or because of, institutional resistance to change, getting a new class offered at a law school involves a gauntlet that no outsider can truly comprehend. Most practitioners, even if eminently capable and qualified to teach, would be deterred from proceeding by the very description of the process. Since I generally interact with each law school that considers offering the IBN class, I have seen many processes for adding classes to the curriculum. While some are streamlined; others are more cumbersome, but whenever I have been able to access and work through the process, albeit arduous, the class has generally been approved. A few law schools that I have approached have not afforded that opportunity.

The first time I attempted to introduce the class to another law school was about 2009, after about six years of working with and further developing the class. Proven experience and successful track record in hand, I naively expected a welcoming response. My hypothesis was dashed on my first outreach.

I prepared detailed introductory emails with careful descriptions of the class, the innovative pedagogy, and documented successes, accompanied by the syllabus and law journal article. I arranged for colleagues with contacts at the target schools to make personal introductions to appropriate recipients (generally, associate deans). The emails were sent to two law schools, and I followed up with emails offering to discuss the proposal. There was no response whatsoever; it was as if the communications had entered a black hole; the bastion was impenetrable; there was not even a “thank you but not interested” rejection from either law school.

While each law school has its own process to review new course offerings, the following excerpt from an email I received in 2013 setting forth the process for considering the IBN course at a particular

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stated “what we pay you may cover cab fare from your office to the law school.” He was almost right, it was a bit short. Furthermore, to be absolutely clear, I receive no consideration (other than adjunct compensation where I teach) from schools who offer IBN. While I am often asked at the outset of a discussion with a law school considering the IBN class whether there is a licensing fee or other required compensation if they decide to offer it, the answer is always “no.” Assuming the textbook is used for the class, I do receive a meager royalty, but to keep this in perspective, in a good year the amount of the royalty I receive will allow me to have dinner with my wife at a modest restaurant. Pecuniary motivation is absent from this endeavor.

school (one of the initial two schools I had approached in 2009 and re-approached in 2013, only to have the IBN class rejected a second time!), outlines the general, and sometimes byzantine, process:

For a new course to be added to the school curriculum two full-time faculty members with expertise in the area review the packet. If the faculty members recommend the new course to the Curriculum Committee, the Committee must vote whether to recommend to full time faculty to adopt the course. If the Curriculum Committee supports the proposal package is provided to the full-time faculty. The proposal becomes an action item for the next faculty meeting and it will be open for discussion. If approved, the course will be offered and a course description will be added to the bulletin.<sup>47</sup>

With a review process that puts the existing faculty in control of new course proposals, rather than a more objective academic dean or dean of experiential learning, it is far less likely that an innovative new class will be considered favorably. The gate-keepers are probably those most threatened by potential new offerings, particularly ones offered by practitioners from outside the academy. Creative curriculum offerings potentially challenge embedded offerings and may shine an unflattering light on existing classes or faculty if students are attracted to the more innovative practical skills, experiential offerings taught by adjuncts. While most faculty members do not have the practical skills necessary to teach experiential learning classes,<sup>48</sup> protectionism, and a sense of comfort, still reigns at some institutions. It

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<sup>47</sup> Email received by the author dated September 14, 2013 from the associate dean of academic affairs at a top 20 law school. For confidentiality reasons, the name of the school is not disclosed.

<sup>48</sup> See Newton, *supra*, at note 30. The Newton article focuses its analysis on full-time faculty. Certainly legal writing instructors and clinical faculty have relevant practical experience. But see, Wes Porter, Law Schools' Untapped Resources: Using Advocacy Professors to Achieve Real Change in Legal Education, EDUC. TOMORROW'S LAW. BLOG (July 16, 2013), <http://iaals.du.edu/blog/law-schools-untapped-resources-using-advocacy-professors-achieve-real-change-legal-education>, ("The advocacy professors at your institution, like clinicians and legal writing professors, lead courses that include these [experiential and practical skills] elements. These colleagues have, from the outset, effectively blended doctrine and simulations, taught skills and values, interacted with individual students, catered to different learning styles, designed and demonstrated exercises and teaching scenarios, demanded students complete many assignments other than a final exam, and provided endless oral and written feedback. Advocacy professors, clinicians, and legal writing professors should contribute to the meaningful, curriculum reform your students—and prospective students—need.") The thesis of the Porter posting is that these resources, which are inside the legal academy, are underutilized in reforming legal education. Practitioners are even further removed from the conversation, and it should be noted that the clinicians and legal writing instructions generally do not have a transactional law background.

is not surprising that the gate did not swing open for IBN at that law school.<sup>49</sup>

Like Don Quixote, I was undeterred. I selected another target school, Northwestern, a few months later, but for this approach I enlisted the support of a colleague who was already an adjunct at that school and who was familiar with the IBN class materials and prepared to teach the class. This time, we got through the door and entered the maze.

Over a period of about 15 months, we slowly navigated the process of curriculum committee and faculty reviews, responding to repeated series of questions, but ultimately achieving the goal of addition to the curriculum.<sup>50</sup> We proceeded to have a superb new class offering, partnering Northwestern with American. We also attracted the attention of the press, with two articles being published about the collaborative class offering between two US law schools, brought together by technology.<sup>51</sup> With the ratification provided by Northwestern offering the IBN class and the raised profile through press coverage, naiveté was reinforced by success and my hope for further expansion rekindled.

By the time that Northwestern agreed to offer the class, the “crisis” in legal education was in full swing. Nearly every day there was a new criticism of law school education in either the popular or academic press.<sup>52</sup> Legal academia was being threatened with unaccustomed challenges, as well as declining enrollment, and the need to act was accelerating. While the IBN class had not been developed as a

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<sup>49</sup> I understand not wanting to offer competing courses or pull students from existing successful classes into a new offering. IBN however exists alongside multiple international law and negotiations classes at most of the schools where it is offered, and is generally perceived by those who analyze it as complimentary to, and not competitive with, other courses. Because of its focus on an extended simulation and collaborative offering with partner schools, the class is generally perceived to be structured in a manner that affords a different educational exposure than other classes that focuses on international negotiations and business transactions.

<sup>50</sup> At the 2015 Educating Tomorrow’s Lawyers Conference held in Denver from October 1-3, 2015, the focus was on foundational skills that the profession desires in new lawyers, including leadership. A video, “First Follower: Leadership Lessons from Dancing Guy,” available at <https://www.youtube.com/watch?v=FW8amMCVAJQ> (last visited October 30, 2015) was shown multiple times and emphasized the critical role of the “first follower” in ratifying a leader and starting a movement. The decision of Northwestern as “first follower” was a key turning point in the progress of advancing the pedagogic concepts of the IBN class. In the words of the video: “The first follower transforms a lone nut into a leader.”

<sup>51</sup> Karen Sloan, “With Tech’s Help, a Dose of Reality,” *The National Law Journal*, October 3, 2011; Kathryn Alfisi and Thai Phi Le, “Virtual Negotiations Add Edge to Transactional Law Class,” *Washington Lawyer*, December 2011.

<sup>52</sup> See newspaper articles cited in note 28, *supra*; See also, Porter, *supra* note 39, and Newton, *supra* note 30.

panacea for law school ills, its themes and experiential pedagogy, along with its emerging track record of multiple adoptions, provided accelerated momentum in consideration by law schools of a new potential offering which could be responsive to critics.

When motivated by idealism, it helps to have friends, and the next effort to promote the class was facilitated by a personal introduction of the IBN class to the dean of Stanford Law School<sup>53</sup> who had expressed an interest in innovative curriculum offerings. From that introduction, the offering of the class at Stanford was greatly facilitated and the new class was approved within a few months of the first contact. In Fall 2012, Stanford offered the IBN class, in partnership with Northwestern.<sup>54</sup> This class also received more positive press coverage.<sup>55</sup>

With the success at this second US law school outside of the originating institutions, several things started to happen in quick succession. First, the class was profiled by ETL, also in Fall 2012 concurrent with the first offering at Stanford, which provided a new level of ratification. While teaching at Stanford, I was introduced by the Stanford faculty member in charge of the negotiations program to her counterpart at Berkeley, and Berkeley expeditiously agreed to offer the class. In the Fall of 2013, Berkeley offered the IBN class and partnered with Stanford, a geographic collaboration which allowed the first opportunity for “face-to-face” negotiations between classes at two schools, which met in San Francisco.<sup>56</sup>

The key to having IBN offered at these additional law schools was personal contact and perseverance. Having approached multiple schools and meandered through successful efforts, the process was being mastered and the questions asked at each new school were essentially those that had been answered during the process at other schools. The further ratification of the concept by the offering of IBN at each successive school also made subsequent discussions easier. No longer was the class merely the proposal of an outsider adjunct; it was a proven vehicle of new academic pedagogy with independent ratification through both the profiling by *Educating Tomorrow's Lawyers* and

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<sup>53</sup> The dean of Stanford Law School at that time was Lawrence Kramer.

<sup>54</sup> See note 51, *supra*. In the words of the cited video, with the second follower: “This is a turning point. It’s proof the first [follower] has done well. Now it’s not a lone nut and it’s not two nuts. Three is a crowd and a crowd is news.”

<sup>55</sup> Julia Love, “DLA Lawyers Bring the Boardroom Into the Classroom,” *The Recorder*, December 7, 2012.

<sup>56</sup> Stanford and Berkeley continue as partnered schools to offer the class with the face to face negotiations taking place in San Francisco. Northwestern continues to offer the class twice per year and has partnered with multiple law schools throughout the US.

multiple school offerings, along with outstanding student reception and effusive press coverage.

Shortly after completing the first IBN class at Stanford, I was invited to speak about experiential learning at a faculty conference for Hastings, which then offered the IBN class in the Spring 2013 semester using a “divided class” format (i.e., a class that is divided in half and conducts the negotiation within the single class rather than being partnered with another law school). Up until that time, I had been directly involved in teaching one of the partnered classes at each successive offering law school.<sup>57</sup> Hastings was the first offering law school for which I had no teaching role; the class was taught by two colleagues from the DLA Piper San Francisco office. Hastings was also the first law school to utilize the divided class model for IBN (in subsequent years Hastings has partnered with American and other law schools).

Then, a chance invitation to appear on a continuing legal education panel put me back in touch with an associate dean at one of the original law schools I had contacted. He expressed interest in my teaching efforts, and I relayed the history of my initial contact with his institution. He wanted to know to whom I had sent my first emails (the gate keepers), and upon learning the recipients, indicated that they were no longer at the school and the new administration was receptive to innovative curriculum ideas. With his introduction to the new people, the class progressed smoothly through the review process to adoption in approximately six weeks. Perseverance had triumphed!

The publication of a text book<sup>58</sup> for the class, along with a complete teacher’s manual, opened new opportunities. Rather than the class being a concept based on a syllabus supported by collected materials and experience, the class was now fully contained in organized, published materials which could be readily accessed. The availability of the textbook and teacher’s manual made it far easier to explain the class and to showcase the teaching methodologies, which were fully discussed in the professor materials. Together, they created a roadmap to offering and implementing the class which potential instructors could follow, and this became key to the expansion of the IBN class.<sup>59</sup>

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<sup>57</sup> I taught the American class that partnered with Northwestern and the Stanford classes that partnered with Northwestern and then with Berkeley.

<sup>58</sup> See note 21, *supra*.

<sup>59</sup> Another factor in facilitating the adoption of IBN and the partnering of law schools in different geographies has been the support of DLA Piper in providing video conferencing facilities at our offices throughout the country for use by law school classes where a law school offering IBN does not have such facilities available. Accordingly, I

Through continued personal outreach, multiple additional schools expressed interest in offering the IBN class,<sup>60</sup> and each was willing to shepherd the class through its internal curriculum review process in rapidly declining time periods. I continued to work with each school and to arrange appropriate partner schools. However, with many schools, I began to encounter a new dilemma. Schools wanted to adopt the class, but they were unable to identify anyone willing or able to teach it.<sup>61</sup> Reviewing the multiple IBN offerings, it became apparent that in addition to gaining curriculum approval, each class was being taught either by me or a colleague I had trained. The solution to expanding IBN was that wherever possible, it would be eased by presenting the class *along with an instructor*. Accordingly, I focused my efforts on finding instructors in geographies where I thought I might approach schools. The source was, as with Hastings, generally my transactional law colleagues, or those in other law firms with similar practices. This approach yielded success.

Many lawyers, particularly those more senior at law firms, relish the idea of teaching. The challenge, as detailed herein, is that they are both unfamiliar with the way to approach the academy or are deterred or rebuffed by its systems. Developing a course complete with a syllabus, lectures, reading materials, simulations, and other materials takes time and effort, and without guidance on how to develop a successful course, most practitioners never even get to present their willingness to teach. On the other hand, if offered the opportunity to

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have been supported in the expansion of IBN by both colleagues willing to teach and the availability of video conferencing facilities in major cities where law schools are located. A new phenomenon has also developed recently: An international law firm (not DLA Piper) has recently agreed to sponsor the IBN class at a European law school, paying \$10,000 per year under a three-year agreement with the school to cover the costs of having a US adjunct professor travel to the European law school to teach the class (which will be offered in partnership with a US law school class). Another international law firm is considering similar approaches to other European law schools. By this effort, the practicing legal community is directly supporting the expansion of IBN and experiential learning offerings at these European law schools and indirectly fostering IBN offerings at US law schools by expanding the pool of potential partner schools.

<sup>60</sup> University of Virginia and Washington and Lee were the next adopters. See note 4 *supra* for the full list of adopting schools.

<sup>61</sup> Most law school faculty members have little or no experience with the practice of transactional law. Teaching the negotiation and documentation of a business transaction is quite different from teaching classes on corporate organization, securities regulation, uniform commercial code, tax, antitrust, international law and similar classes, which address the framework in which business transactions occur but not how to accomplish and document a transaction. Faculty that teach framework classes likely have little experience doing transactions. See Newton, *supra* at note 30. In addition, learning to teach a new class also takes time that faculty could otherwise devote to scholarship. To successfully teach the practice aspects of transactional law requires practicing transactional lawyers who are willing and able to become adjunct faculty members.

teach a class (such as I was back in 2003), they relish the opportunity and are eager to put in the time to learn the material and the process of teaching it. Accordingly, I found many ready potential adjuncts willing and able to lead a class at an identified law school. With the textbook and teacher's manual available, I also had the tools to guide them through the process of learning and offering the class, while providing support as they taught for the first time. With these resources, new opportunities to expand the offering of IBN were presented.

Among the 30 classes of IBN currently offered worldwide, the majority are taught by adjuncts.<sup>62</sup> However, a new wave of interested full-time faculty has emerged, and now about 25% of the classes are taught by regular faculty<sup>63</sup>, occasionally paired with adjunct practitioners.<sup>64</sup>

Not all obstacles, however, dissipated. Boosted by the confidence engendered by success, along with the model of offering an instructor to teach the class, I decided to reach out again to the second school I had initially contacted. Another proper email with descriptions and background materials was sent to a new contact person. A brief initial response was received: "Thank you for your new course proposal. It is being processed. . . ." Two follow up emails from me offering to set up a conference call to discuss were ignored. Then, the following email was received and, after reciting the process of internal review quoted above,<sup>65</sup> it concluded:

As for your course proposal, two faculty members with an expertise in this area reviewed the proposed course and did not recommend that we pursue a course in this area. Your proposal overlaps with topics covered in existing courses.

Some walls are unassailable.<sup>66</sup> In due course, and possibly a change of administration, I may contemplate another approach to that school.

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<sup>62</sup> Law schools offering IBN taught by adjunct faculty include: Northwestern, Stanford, Berkeley, Washington and Lee, Georgetown, Hastings, American, UCLA, Golden Gate, Ghent (Belgium), Hebrew University (Israel), Tel Aviv University (Israel), and University of Virginia.

<sup>63</sup> Law schools offering IBN taught by full-time faculty include: University of Chicago, University of Dundee (Scotland), Denver, IDC (Israel), Suffolk, Bucerius (Germany), Boston University, FGV (Brazil), and York (UK).

<sup>64</sup> Adjunct faculty collaborate with full time faculty at University of Chicago, IDC (Israel) and Bucerius (Germany).

<sup>65</sup> See note 48, *supra*.

<sup>66</sup> There is certainly a need to evaluate the overlap between a proposed course and existing courses. This question has arisen in various other conversations with law schools now offering IBN. At those schools, the assessment that there may be overlap started a discussion and analysis in which we assessed whether there was an actual overlap. In one case, that discussion led to a conclusion that IBN actually was compatible with and distinct from the other classes, so IBN could be offered along with the other existing offerings. In another case it was decided that a student would not be allowed to take both an existing

Maybe then I will be able to explain how IBN is complimentary to their existing courses.

Sometimes I was not the only one making the recommendation to a law school for consideration of the IBN class. Many of my classes include international exchange and LLM students who are drawn to the subject matter of IBN. These students have a unique experience which is distinguished from many of their other classes, both at home and in the US. Upon returning to their home institutions, these students become ambassadors for the class, raising the prospect of adoption with their faculty and administrators and opening the dialogue for offering the class in partnership with US law schools. Multiple foreign law school adoptions, which have also taken multiple years of discussion and arrangements, including training instructors, have occurred through this process of students promoting the class.<sup>67</sup> There are now multiple active partnerships between these international law schools and their US counterparts.<sup>68</sup>

The success of IBN as a class adopted at law schools throughout the world has solely been a result of persistent outreach and promotion of the concept as well as being able to offer a complete package: (i) a proven course model, (ii) textbook and teachers' manual, (iii) adjunct faculty candidates capable of teaching the class, (iv) arrangements with potential partner schools, (v) facilities for video conferencing,<sup>69</sup> if needed, and (vi) active interaction with all IBN faculty and monitoring of the process leading to first offering and issues arising during the course. The motivation has been to contribute to re-imagining how legal education is taught and to promote the concepts, school by school.

Active promotion of innovative concepts requires time and effort, but as the proliferation of IBN proves, it does yield results. Most full-time faculty members would not have the time, interest, or incentive to oversee this type of endeavor to have one of their classes offered at other schools with which they are not directly involved, and they

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class and the newly offered IBN class. The key point is that the preliminary assessment was not a barrier but the beginning of a collaborative dialogue and assessment.

<sup>67</sup> The following schools have adopted the IBN class as a direct result of student recommendations and introductions: Ghent (Belgium), Bucerius (Germany), IDC (Israel), Escola de Direito de São Paulo da Fundação Getulio Vargas (FGV) (Brazil), Hebrew University (Israel), Tel Aviv University (Israel).

<sup>68</sup> Among the US/international law school pairings in recent years have been: American/Ghent (Brussels), University of Virginia/ Bucerius (Germany), Georgetown/ FGV (Brazil), Suffolk/York (UK), University of Chicago/Tel Aviv University, Northwestern/Tel Aviv University, and Fordham/Hebrew University, in addition to the original American/University of Dundee (Scotland) pairing.

<sup>69</sup> See note 60, *supra*.

would be unlikely to achieve any academic recognition from the effort. For the institutional outsider, however, the success of the effort is the ratification of the concept as well as the reward, and it is measured through the continued acclaim of students taking the course and the repeated offering of the class by the adopting schools<sup>70</sup>: The following comments are representative of student reactions:

Berkeley: “[O]ne of the most valuable experiences of my law school career.”

Stanford: “Very valuable course [that] taught me many things I will be using in my future career . . . .”

Georgetown: “[E]xtraordinarily valuable for aspiring transactional lawyers, [and] those like me . . . simply . . . interest[ed] in taking a transactional law course. “

Virginia: “The most interesting class I’ve taken at any academic level.”

American: “You can read about how to drive . . . but you wouldn’t really know how to drive unless you get in a car and turn it on. This [class is] putting you in that driver’s seat.”

Tel Aviv University: “The . . . course places the students in an atmosphere that brings a practical experience that is unattainable in other courses. We all feel as though we’re learning what the real-world negotiation would be like.”

Ghent: “[T]hank you (again) for — I must say — one of the most useful experiences in my career and personal life.”

The effort is not over. Conversations are ongoing with multiple law schools which have expressed interest in considering the class. In states like California where the state bar has been considering 15 hours of experiential learning, and with the ABA now requiring six hours of experiential learning, the class has tremendous appeal as a turn-key addition to any law school’s curriculum.<sup>71</sup>

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<sup>70</sup> Each of the following quotes is from an anonymous student review at the identified law school.

<sup>71</sup> See, ABA Standards and Rules of Procedure for Approval of Law Schools 2014-2015, Section 303(a)(3) (mandating six hours of experiential courses), available at: [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf) (last checked November 15, 2015). For a thorough and critical analysis of the six-hour ABA standard as compared to the 15-hour standard, see, student note by Emily Traylor Vande, “Settling for Six: Should the American Bar Association Have Done More to Promote Experiential Learning in Law Schools?”, 39 J. Legal Prof. 305 (2015) (“[A] growing group of scholars believes the failure of law schools to properly prepare their graduates is contributing to new law graduates’ inability to obtain employment. Instead of teaching students practical legal skills, law professors focus on helping law students learn how to “think like a lawyer” by using the case method to teach substantive legal doctrines. In the past, law firms took on the responsibility of teaching their new associates the practical skills needed to become

Continuing conversations are still not without obstacles. Not every door swings wide just because the class has experienced success, and even where a discussion is progressing smoothly, an unanticipated event may interrupt the progress, such as the academic dean leading the conversation at one school being appointed as dean of another law school. In the end, however, that last event (which actually occurred) may lead to two conversations, one continuing with the replacement academic dean and one with the former academic dean after he assumes the dean's position at his new law school.

Based upon repeated surveys of practitioners regarding the skills needed by graduates for practice, law schools need to be responsive.<sup>72</sup> Law schools produce graduates that enter a chosen profession, and it is imperative to provide them the initial skills required to function in that profession. This objective is not, however, in conflict with teaching foundational concepts, required courses, and preparation for the bar;<sup>73</sup> rather, it requires a rethinking of approach that merges content with application and skills. Some faculty may resist change based

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successful attorneys. In today's legal market, firms no longer have the time, money, or desire to train new associations and thus prefer to hire attorneys who have several years of practical experience. The burden of teaching new associates practical skills has thus fallen on law schools. . . . [T]his note will examine and refute the arguments in favor of a lesser experiential learning requirement, explaining why the ABA should have adopted the CLEA's proposal [for 15 hours of experiential courses] in order to produce the most competent lawyers." (at 305-306; citations omitted) See also, Legal Skills Prof Blog, "[Clinical Legal Education Association] outlines reasons the New York Bar's Task Force on Experiential Learning and Admission to the Bar should adopt a clinical training requirement for all graduates," available at: [http://lawprofessors.typepad.com/legal\\_skills/2015/11/clea-outlines-reasons-the-new-york-bars-task-force-on-experiential-learning-and-admission-to-the-bar.html](http://lawprofessors.typepad.com/legal_skills/2015/11/clea-outlines-reasons-the-new-york-bars-task-force-on-experiential-learning-and-admission-to-the-bar.html) (Quoting the CLEA's comment on the New York Bar's Task Force on Experiential Learning and Admission to the Bar: "The ABA has done too little to address the need for more practice-based education. After decades of calls for reform, the ABA's new requirement in Accreditation Standard 303(a)(3) would allow a J.D. graduate to sit for the bar having only taken one or two courses (6 credits) in professional skills and no clinical experience through a law clinic or externship. Six credits represents only 1/14th of the 83 total credits required for a degree. By adopting the ABA's learning outcomes for professional skills, [the Committee] would further enshrine this inadequate requirement. . . . For the good of the profession and protection of the public, all J.D. applicants for the bar should be required to have a law clinic or faculty-supervised externship experience and . . . 15 credits of practice-based legal education.")

<sup>72</sup> See Alli Gerkman & Logan Cornett, *Foundations for Practice: Survey Overview and Methodological Approach* (2016), and Alli Gerkman & Logan Cornett, *Foundations for Practice: Hiring the Whole Lawyer: Experience Matters* (2017), both available at <http://laals.du.edu/foundations>.

<sup>73</sup> It should be noted that BARBRI and similar bar preparation programs do a very good job of supplementing the foundational skills taught in law school and preparing students to pass the bar exam. With such a safety net in place, the law school curriculum can be modified in ways that improve the teaching of practical skills without undermining the objective of providing skills and knowledge necessary to pass the bar. In fact, teaching the practical aspects of foundational skills is likely to embed the learning better than

on the premise that there is no room in the law school curriculum for the newly mandated experiential learning requirements, whether it be the six-hour ABA standard or the 15-hour California standard.<sup>74</sup> These complaints miss the point. Experiential hours need not be additive; rather, they need to be melded with the teaching of foundational concepts. The required change is less radical than many seem to realize. While some classes like IBN may be added, other classes need to be modified to teach doctrine *while incorporating practical skills*, and this can be accomplished in part by creating partnerships with practitioners who can bring their skills into the classroom to supplement the full time faculty.<sup>75</sup> Such a partnership will accomplish the real goal of providing a balanced legal education and graduating lawyers who understand the basics of practice.<sup>76</sup> It will also help to break down the historical divide between the legal academy and practitioners. As the barriers to entry are reduced, the partnership will have an opportunity to emerge.<sup>77</sup>

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straight doctrinal instruction, which should improve comprehension and enhance the ability to pass the bar.

<sup>74</sup> See discussion at Best Practices for Legal Education, August 13, 2015, “What’s going on in California? “TFARR- recommended” 15 credits of competency training,” available at: <http://bestpracticeslegaled.albanylawblogs.org/2015/08/13/whats-going-on-in-california-tfarr-recommended-15-credits-of-competency-training/#comments>; and Legal Skills Prof Blog, August 14, 2015, “A Reply to Dean Tom Guernsey’s Comments Concerning California’s Proposed 15-Credit Experiential Learning Requirement,” available at: [http://lawprofessors.typepad.com/legal\\_skills/2015/08/a-reply-to-dean-tom-guernseys-comments-concerning-californias-proposed-15-credit-experiential-learn.html?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=feed%3A%2Ftypepad%2FYhQk+%28Legal+Skills+Prof+Blog%29](http://lawprofessors.typepad.com/legal_skills/2015/08/a-reply-to-dean-tom-guernseys-comments-concerning-californias-proposed-15-credit-experiential-learn.html?utm_source=feedburner&utm_medium=email&utm_campaign=feed%3A%2Ftypepad%2FYhQk+%28Legal+Skills+Prof+Blog%29).

<sup>75</sup> One means to create the time necessary for practice-based exercises and skills projects is to utilize the “reverse classroom” concept which moves certain doctrinal instruction (particularly lectures) to an online platform where students can watch as part of their preparation for class and thereby free up class time for the skills exercises.

<sup>76</sup> The goal should be “practice aware” not “practice ready.” The skills of a lawyer will obviously be honed by professional practice, but practice aware graduates will start with a better understanding and be better prepared to enter the practicing bar. See, Jay Gary Finkelstein, “Practice in the Academy: Creating ‘Practice Aware’ Law Graduates,” 64 *Journal of Legal Education* 622 (2015).

<sup>77</sup> For a perspective reinforcing the objectives stated herein to encourage partnerships between faculty and practitioners to integrate doctrinal classes and practical skills instruction, see the recent and interesting discussion in the legal academic blogs initiated by Professor Andrea Boyack in her August 27, 2015, post “‘Practice Ready,’ Get set. Go!”, on PrawfsBlawg, available at <http://prawfsblawg.blogspot.com/2015/08/get-practice-ready-get-set-go-.html>. After reviewing the “practice ready” debate, including an excellent summary of Professor Robert Condlin’s paper, “Practice Ready Graduates”: A Millennialist Fantasy,” see note 33, *supra*, Professor Boyack concludes:

“I hope that the majority of those supporting more “practice readiness” do not actually envision tomorrow’s law schools as mere trade schools. But I believe that many of today’s efforts to build bridges from school to actual law practice are worthwhile. It is valuable to teach legal doctrine in a way that gives it

*Conclusion.* As we strive to improve legal education and particularly to focus on “practice oriented” law classes, we need more involvement by those who are most conversant with the skills of practice – the practitioners. To do so, we need the doors to the academy to be open to communication and receptive to innovative concepts. We need to suppress protectionist systems that have distanced the academy and practitioner. My journey has been unique and deliberate, and it is not one that many other practitioners would follow. For legal education to evolve, however, it will be necessary to build further collaboration and to dismantle the barriers between legal education and law practice. There needs to be more dialogue and fewer barriers to entry.

Law schools need to demystify the process of access to the academy and work to develop practitioner collaboration that can support efforts to expand practical skills legal education. Academic deans can begin the dialogue by reaching out to local bar associations to let it be known that experienced practitioners who have proposals

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context and meaning and gives law students a glimpse into the world of practice. I find it natural and effective to integrate the practice context into teaching. In a 1L Contracts class, for example, I do believe that students should read actual contracts, struggle with actual interpretation disputes, and try their hand at drafting clauses or even entire documents. In upper division courses (such as Real Estate Transactions), there are still more opportunities to use glimpses into practice as ways to give context and meaning to legal doctrines. But of course in a mere 39 hours of a law school course, there is insufficient time and no client reality – so these experiences may firm up a student’s foundation for practice, but that doesn’t necessarily make him or her “practice ready” (again, this all comes back to what this phrase means to begin with!).”

In a responsive blog post on August 29, 2015, “The goal of producing ‘practice-ready’ grads is really about turning out law students who are ready to undertake a professional apprenticeship,” on Legal Skills Prof Blog, available at [http://lawprofessors.typepad.com/legal\\_skills/2015/08/the-goal-of-practice-ready-law-grads-is-really-about-producing-new-lawyers-who-are-ready-to-embark-o.html](http://lawprofessors.typepad.com/legal_skills/2015/08/the-goal-of-practice-ready-law-grads-is-really-about-producing-new-lawyers-who-are-ready-to-embark-o.html), Professor James B. Levy summarizes and agrees with Professor Boyack: “She makes a number of excellent points, most of which I completely agree with. To wit, while it’s pedagogically vital to incorporate exercises drawn from practice and experiential learning opportunities into the classroom, it is unrealistic to believe that law schools can produce grads who are ready right out of the gate to handle actual client matters on their own without proper supervision. . . . More significantly, being an effective lawyer takes good, professional judgment which has to be earned the old fashion way and thus can’t possibly be imparted in a 3 or 4 credit course. Rather, good judgment like wisdom only develops over time as the result of mindful effort and application to the task at hand. The primary goal of a legal education has always been and should continue to be about teaching students how to think like a lawyer.”

I might add that the goal should be expanded to include “thinking like a deal lawyer,” but then I would simply add, in the convention of mathematical proofs: Q.E.D., and let’s begin the process of faculty and practitioners working together to make this a reality.

for innovative classes or who are willing to work with faculty to develop innovative methods for teaching practical skills will be welcomed. Classes that showcase effective teaching of doctrine and practice skills should be encouraged, and faculty should be incentivized to work with practitioners to test new models of instruction. Successful efforts should be acknowledged, publicized, and replicated, even between law schools. Faculty will certainly need to make changes and become comfortable with new means to integrate doctrinal instruction and practical skills, but the result will be worth the investment: law school graduates will be better prepared to begin their legal careers; they will not be experienced practitioners, but they will be “practice aware.” Working together, the academy and practitioners can begin to break down the barriers in order to construct a new collaborative foundation to improve the academic preparation for the profession.

The quest continues. The dream can be realized!