

Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools

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INTRODUCTION

More than fifteen years ago, the *Clinical Law Review* published “Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice.”¹ In that article, Professor Susan R. Jones illustrated how shifting societal and political norms calling for increased individual economic self-reliance and the reduction of government entitlements resulted in

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1. Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195 (1997) [hereinafter Jones, *Small Business*].

the meaningful expansion of small business and community economic development legal clinics.² The article presented a historical snapshot of the 1990s' age of welfare reform, and demonstrated how transactional legal clinics with a social and economic justice mission helped to promote community economic development.³

Since the publication of that article in 1997, transactional legal clinics have grown exponentially and have manifested in increasingly diverse transactional specialties, underscoring Professor Jones' argument that law school clinical programs must adapt to societal demands, as well as economic constraints and opportunities.⁴ Further support for this theory is evidenced today by the fact that market forces have necessitated changes in the way legal education is delivered, including the escalating importance of clinical legal education in teaching students to think and perform like lawyers.⁵ Recent downward shifts in the economy, academic reports extolling the benefits of experiential learning⁶ enlivening experiential remedies, funding for transactional clinics, and student demand for hands-on lawyering opportunities have all led to the expansion of transactional clinical curricula.⁷ Moreover, transactional clinics are

2. *Id.* "Small business and community economic development (CED) clinics represent an important and growing component to the future of clinical legal education. The national political trend is away from government entitlements and toward personal responsibility and economic self-sufficiency. This shift has encouraged the growth of more small business and CED clinics at law schools." *Id.*

3. Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 241 (2011) (citing Jones, *Small Business*, *supra* note 1, at 195–96).

4. At the time of that article, there were only a handful of small business clinical programs and approximately eighteen community economic development clinics. Jones, *Small Business*, *supra* note 1, at 195–96; *See also* SUSAN R. JONES, LEGAL GUIDE TO MICROENTERPRISE DEVELOPMENT (A.B.A. 2004); Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249, 250 (2004) [hereinafter Jones, *Promoting Social and Economic Justice*]; Susan R. Jones, *Transactional Lawyers Supporting Economic Development in the Nation's Capital*, 9 J. AFFORDABLE HOUSING & CMTY. DEV. L. 18, 18–27 (1999) [hereinafter Jones, *Transactional Lawyers*].

5. *See generally* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter THE CARNEGIE REPORT]; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

6. THE CARNEGIE REPORT, *supra* note 5; STUCKEY ET AL., *supra* note 5.

7. The perpetual rise in transactional legal clinics is also a substantiation of the

important to teaching not only substantive law, lawyering skills, and values, but they also expose law students to entrepreneurs and social entrepreneurs,⁸ helping students to understand their specialized legal needs. This exposure is essential, given the emphasis on entrepreneurship and innovation in American society and the need to cultivate an entrepreneurial spirit in law students at a time when the legal market is shifting, due, in part, to rapidly developing technologies.⁹

This Article is a sequel to Professor Jones' 1997 article, one of the first scholarly articles to discuss transactional law clinics.¹⁰ It discusses developments in transactional clinical law teaching and practice over the last two decades, and the ways in which transactional clinics enrich legal education.

Our thesis is this: Like their litigation counterparts, transactional clinics have evolved from a societal need, namely, the need to improve the economic conditions of low-income communities through business development. Accordingly, the earliest transactional clinics were focused on housing and community economic development law.¹¹ These early clinics taught business and property law doctrine, as well as transactional lawyering skills.¹² More recent transactional clinics emphasize entrepreneurship, innovation, and creativity, and the associated legal needs of entrepreneurs and small businesses.¹³ The heightened U.S. emphasis on entrepreneurship,

importance of entrepreneurship, both as a field of study and for the role it plays in the American economy, particularly in the area of job creation. There are, however, divergent views on whether small businesses or new businesses are fueling the American economy. "It's not small businesses that matter, but new businesses, which by definition create new jobs. Real job creation, though, doesn't kick in until those small businesses survive and grow into larger operations." Jared Bernstein, *Small Isn't Always Beautiful*, N.Y. TIMES, Oct. 23, 2011, available at http://www.nytimes.com/2011/10/24/opinion/small-businesses-arent-key-to-the-economic-recovery.html?_r=1.

8. See *infra* pp. 105–08 for a discussion of social enterprise.

9. See generally Thomas D. Morgan, *The Changing Face of Legal Education: Its Impact on What it Means to be a Lawyer*, 45 AKRON L. R. 811 (2012).

10. Jones, *Small Business*, *supra* note 1.

11. *Id.*

12. *Id.* at 202–08.

13. For example, the University of Michigan Law School Entrepreneurship Clinic represents businesses started by University of Michigan students. *About the Clinic*, U. MICH. L. SCH. ENTREPRENEURSHIP CLINIC, www.law.umich.edu/clinical/entrepreneurshipclinic/Pages/About-the-Clinic.aspx (last visited June 13, 2013).

innovation, and creativity has been fueled by a global financial downturn and the emergence of a global economy.¹⁴ As a result of these phenomena, law schools have created transactional clinics to address the societal need for economic improvement and growth, law student demand for transactional clinical experiences, and the need to train lawyers to represent entrepreneurs and businesses.¹⁵ Furthermore, while entrepreneurship has always been at the backbone of the American economy, today's entrepreneurial emphasis is broader, ranging from microbusiness to high technology, and requiring myriad lawyering abilities.¹⁶

There are two important factors relevant to transactional clinics that bolster our thesis. The first is the advent of the digital age and the presence of millennial law students and millennial entrepreneurs in their thirties and younger drawn to entrepreneurial endeavors.¹⁷ The millennial generation precedes Digital Natives, persons twenty years of age and younger who have not known a world without technology.¹⁸ These generations are said to be the most entrepreneurial ever seen in America.¹⁹ Second, this generational entrepreneurial acumen is supported by the crowdfunding movement, which is changing the way businesses are funded.²⁰ Crowdfunding

14. See PHILIP AUERSWALD, *THE COMING PROSPERITY: HOW ENTREPRENEURS ARE TRANSFORMING THE GLOBAL ECONOMY* (2012); WORLD ECONOMIC FORUM, *EDUCATING THE NEXT WAVE OF ENTREPRENEURS* (2009), available at http://www3.weforum.org/docs/WEF_GEI_EducatingNextEntrepreneurs_ExecutiveSummary_2009.pdf (last visited Sept. 11, 2013); Julian Montijjo, *Entrepreneurship is Future of Global Economy, Porges Says*, CORNELL CHRON., Apr. 2013, available at <http://www.news.cornell.edu/stories/2013/04/entrepreneurship-future-global-economy> (last visited Sept. 11, 2013) (quoting Shelly Porges, Senior Adviser at the Global Entrepreneurship Program of the U.S. Department of State: "Entrepreneurship will revolutionize global economics with new jobs and by exciting new companies.").

15. "Student demand is helping to fuel the increase in skills-based training. Some evidence has shown a rise in the number of students pursuing business law." Francesca Jarosz, *None of Your Business? No*, A.B.A. BUS. L. SEC. (2006), <http://apps.americanbar.org/buslaw/blt/2006-09-10/jarosz.shtml> (last visited Sept. 11, 2013).

16. Susan R. Jones and Deborah Austin, *Learning from HUD: A Continuum of Service for the Small Business Community*, 9 J. AFFORD. HOUSING & CMTY. DEV. L 119 (1999–2000).

17. Steven K. Berenson, *Educating the Millennial Law Students*, 1 CHARLOTTE L. REV. 51 (2008).

18. DAVID HOULE, *ENTERING THE SHIFT AGE* 143 (Source Books Inc. 2012).

19. *Id.*

20. Elizabeth M. Gerber et al., *Crowdfunding: Why People are Motivated to Post and Fund Projects on Crowdfunding Platforms*, DESIGN, INFLUENCE, & SOCIAL TECH. (2012),

websites such as Kickstarter.com are enabling new business start-ups, providing economic opportunity heretofore unseen.²¹

While transactional law is taught in a variety of law school classes, transactional clinics give students opportunities to use their theoretical doctrinal knowledge, provide exposure to entrepreneurial ecosystems, and provide opportunities to learn concrete transactional lawyering skills prior to entering law practice.²² Yet, true to their social justice underpinnings, transactional clinics often serve a social justice mission, while a few new clinics focus singularly on entrepreneurship.²³ Based on this thesis and by providing historical context, we hope to begin a robust conversation about the future of legal education through the lens of transactional clinical law practice.

Part I of this Article discusses the evolution of transactional clinical law practice, definitions of transactional law, substantive areas of transactional clinical practice, regional distribution of these clinics, and substantive legal developments in transactional law practice in the last two decades. Part II discusses transactional skills training pedagogy and emerging scholarship in the field, along with frequently encountered ethical and practice issues, namely, competition with the private bar, group representation, pro bono publico services, the unauthorized practice of law and

available at http://distworkshop.files.wordpress.com/2012/01/dist2012_submission_11.pdf (last visited Sept. 11, 2013).

21. Kickstarter is a well-known funding vehicle for creative projects. Additional sites include WeFunder, Startup Addict, Rocket Hub, Quirky, CoFolio, and Start Some Good. See *Top 10 Crowdfunding Sites for Entrepreneurs*, PLANTO START, <http://plantostart.com/10-crowdfunding-websites-entrepreneurs/> (last visited Sept. 6, 2012). In March 2012, Congress passed the Jumpstart Our Business Startups Act ("JOBS Act") providing several important exemptions from securities regulation. The JOBS Act is composed of discrete bills, including H.R. 3606 and the Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012 ("CROWDFUND Act"), which amended § 4 of the Securities Act of 1933 to include a transaction exemption of \$1 million from registration. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 101(a), 126 Stat. 306 (2012). The JOBS Act increased access to investors and equity markets. Due to technological advances and the increasingly global marketplace, new ventures now possess distinct methods for raising capital.

22. See generally ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE (West 2013); GEORGE W. KUNEY & BRIAN KRUMM, THE ENTREPRENEURIAL CLINIC HANDBOOK (West 2013); RICHARD K. NEUMANN, JR., TRANSACTIONAL LAWYERING SKILLS: CLIENT INTERVIEWING, COUNSELING AND NEGOTIATION (Wolters Kluwer Law and Business 2013).

23. *Supra* note 13.

multijurisdictional practice, and the proliferation of online document service providers. Part III explores the advent of new hybrid business structures supporting social enterprises, such as L3Cs, benefit corporations, social purpose corporations and flexible purpose corporations. Part IV examines the future of clinical education, outcome design measures and assessment, and program evaluation.

On the whole, much has changed from the time transactional law clinics first emerged at U.S. law schools. To that end, an important disclaimer is in order.²⁴ This Article cannot possibly capture the richness and variation of all transactional clinics. Indeed, many transactional clinics can claim unique and exclusive characteristics in areas such as their mission, client base, or geographical reach.²⁵ Additionally, a few law schools have more than one transactional clinic model, and in some cases, they have several.²⁶

The doctrinal coverage of transactional law²⁷ clinics includes but is not limited to corporate, tax, employment, intellectual property, contract law, and Uniform Commercial Code issues. Clinic clients

24. Because our focus is on transactional law clinics, we have specifically omitted discussion of the development of substantive transactional courses, as well as the use of simulation exercises in doctrinal teaching. However, transactional doctrinal pedagogy is rapidly developing and is incorporating technology. To illustrate, Professor, Karl Okamoto (Drexel School of Law) developed a virtual program, LawMeets,TM as a massive open online course (MOOC), a rapidly evolving tool to foster education. LawMeetsTM created the first MOOC geared towards teaching transactional lawyers. *See Courses: Learn Smarter, LAWMEETS*, www.lawmeets.com/courses (last updated 2012).

25. *Supra* note 13.

26. Harvard, Michigan, and Yale are examples of schools with several clinics operating under the transactional rubric. Harvard's transactional clinics include the entertainment law-based Recording Artists Project (RAP) and The WilmerHale Legal Service Center's Community Enterprise Project, which includes the Art Law Clinic. *See Clinics*, HARV. L. SCH., <http://www.law.harvard.edu/academics/clinical/clinics/index.html> (last visited May 30, 2012); *Art Law Clinic*, HARV. L. SCH., <http://www.law.harvard.edu/academics/clinical/lsc/clinics/art.htm> (last visited June 27, 2012).

27. "'Transactional law' refers to the various substantive legal rules that influence or constrain planning, negotiating, and document drafting in connection with business transactions, as well as the 'law of the deal' (i.e., the negotiated contracts) produced by the parties to those transactions." ASS'N OF AM. LAW SCH., 2009 MID-YEAR MEETING: WORKSHOP ON TRANSACTIONAL LAW, *available at* www.aals.org/midyear2009/ (last visited Sept. 14, 2012).

include small businesses²⁸ and microbusinesses,²⁹ nonprofits, community economic development institutions,³⁰ and social entrepreneurs.³¹ Clients are often referred by community partners, and range from neighborhood-based small businesses and new and well-established nonprofit organizations, to technology start-ups and

28. “A small business is not dominant in its field of operation and qualifies as a small business concern under Title 13, Code of Federal Regulations, part 121 . . . [U.S. Small Business Administration] has established size standards for all for-profit economic activities as they are described under the North American Industry Classification System.” U.S. SMALL BUS. ADMIN., SMALL BUS. SIZE REGULATIONS, *available at* <http://www.sba.gov/content/small-business-size-regulations> (last visited Sept. 28, 2012).

29. The target market for microenterprise services is defined broadly as aspiring entrepreneurs and those whose businesses employ five or fewer workers including the owner, and who need less than \$50,000 in financing. ELAINE L. EDGECOMBE & TAMRA THETFORD, THE ASPEN INST., MICROENTERPRISE DEV. AS JOB CREATION (2013), *available at* <http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/JobCreation.pdf>. (last visited June 14, 2013).

30. The American Bar Association Section of Business Law describes community economic development as:

[T]he creation or strengthening of economic institutions that are controlled or owned by the residents of the low-income community in which they are located or in which they will exert primary influence. Institutions may take such forms as housing development corporations, business firms, industrial development parks, banks, credit unions, cooperatives, and community development corporations (CDCs). They may also include organizations or services that upgrade the human and social environment in ways that increase the economic value and energy of the community. The process of community economic development means that the community builds a variety of locally controlled economic institutions that will:

- attract outside capital into the area
- improve the physical environment
- increase job and entrepreneurial opportunities for residents
- provide or encourage others to provide more accessible services and goods to residents
- in general, create conditions under which the community can participate in the economic advantages of the rest of society.

See A.B.A. THE ABC MANUAL: STARTING & OPERATING A BUS. LAW PRO BONO PROJECT (2000), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/probono/businesslaw/abc_manual/abc_manual.authcheckdam.pdf; JEFFREY R. PANKRATZ, MEETING THE LEGAL NEEDS OF COMMUNITY-BASED DEVELOPMENT ORGANIZATIONS: THE ROLE OF THE PRIVATE BAR (1992).

31. Social entrepreneurship works with market forces and applies a “business-like approach” to address social problems and serve the disadvantaged. ARTHUR C. BROOKS, SOCIAL ENTREPRENEURSHIP: A MODERN APPROACH TO SOCIAL VALUE CREATION 4–5 (Pearson Prentice Hall 2008).

a host of other ventures.³² While the majority of transactional clinics are in-house live-client clinics, there are also externships, or outside placements, as well as self-described “clin-ships.”³³

I. THE EVOLUTION OF TRANSACTIONAL LEGAL CLINICS

Despite the fact that a significant number of attorneys engage in transactional practice,³⁴ transactional clinics are relatively late entrants to clinical legal education. Transactional legal clinics first began to emerge in the United States in the late 1970s and early 1980s.³⁵ In the mid-1990s,³⁶ there were only a handful of small business clinical programs and approximately eighteen community economic development clinics.³⁷ Today, the Kauffman Foundation³⁸

32. *Supra* note 3; *See generally* Jones, *Small Business*, *supra* note 1.

33. A hybrid of the transactional law school clinic and externship opportunities has been dubbed a “clin-ship.” SEAN M. O’CONNOR, INTELLECTUAL PROPERTY INSTITUTE, HOW TO BUILD IPR FOCUSED ENTREPRENEURIAL LAW & BUS. CLINICS TO ASSIST REGIONAL ECON. DEV. AROUND THE GLOBE 19 (2008), available at http://iipi.org/wp-content/uploads/2010/07/How_to_Build_IP-Focused_Law_Clinics.pdf.

34. Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS’N LEGAL WRITING DIRS. 118, 118 (2008) (citing Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten “Dirt Lawyer,”* 62 U. PITT. L. REV. 335, 335–36 (2000)); Nancy B. Rapoport, *Is “Thinking Like a Lawyer” Really What We Want to Teach?*, 1 J. ASS’N LEGAL WRITING DIRS. 91, 103 (2002); David V. Snyder, *Closing the Deal in Contracts: Introducing Transactional Skills in the First Year*, 34 U. TOLEDO L. REV. 689, 689 (2003); Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 430 (2005).

35. Jones, *Small Business*, *supra* note 1, at 204.

36. Jones, *Small Business*, *supra* note 1. During the 1990s, the private bar was concurrently seeking ways to encourage microbusiness and community development projects as a way of creating pro bono opportunities for business lawyers. *See* A.B.A., THE ABC MANUAL: STARTING & OPERATING A BUS. LAW PRO BONO PROJECT (2000), available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/probono/businesslaw/abc_manual/abc_manual.authcheckdam.pdf; JEFFREY R. PANKRATZ, MEETING THE LEGAL NEEDS OF COMMUNITY-BASED DEVELOPMENT ORGANIZATIONS: THE ROLE OF THE PRIVATE BAR (1992).

37. Community economic development has been described as “a strategy that includes a wide range of economic activities and programs for developing low-income communities such as affordable housing and small business development.” A.B.A., FORUM COMM. ON AFFORDABLE HOUS. & CMTY. DEV. LAW, BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECON. DEV. FOR ADVOCATES, LAWYERS & POLICYMAKERS 3 (Roger A. Clay, Jr. & Susan R. Jones, eds., 2009).

38. The Ewing Marion Kauffman Foundation was founded in the mid-1960s by entrepreneur and philanthropist Ewing Marion Kauffman. The Foundation focuses on four programmatic areas: (1) entrepreneurship, (2) advancing innovation, (3) education, and

reports there are more than 140³⁹ transactional clinics at just over 200 American Bar Association (ABA)-approved law schools⁴⁰ with varying doctrinal coverage, client types, and models of client representation, as well as different levels of community engagement.⁴¹

In 2012, acknowledging the surge in transactional legal clinics, the Association of American Law Schools (AALS) Clinical Section created a Transactional Clinics Committee.⁴² Further recognizing the importance of transactional skills in the practice of law, the AALS

(4) research and policy. See EWING MARION KAUFFMAN FOUND., <http://www.kauffman.org> (last visited Aug. 16, 2012).

39. *Law School Entrepreneurship Clinics*, EWING MARION KAUFFMAN FOUND., <http://www.entrepreneurship.org/en/entrepreneurship-law/law-school-entrepreneurship-clinics.aspx> (last visited Mar. 7, 2012). Our analysis includes Kauffman Foundation data listing 145 transactional clinics, as well as CSALE 2010–2011 survey data from 809 total clinics providing the self-reporting of 131 law schools. *What is CSALE*, CTR. FOR THE STUDY APPLIED LEGAL EDUC., <http://www.csale.org> (last visited Mar. 7, 2012). See also Email from David Santacrose, Assoc. Dean for Experiential Educ., University of Michigan Law School, to author (May 28, 2012, 11:09 EST) (on file with Prof. Jones). About thirty-five clinics are community/economic development and transactional. CSALE conducts a survey every three years.

40. See *ABA-Approved Law Schools*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited Nov. 5, 2013). It is noteworthy that the Association for American Law Schools lists 177 member schools, as well as twenty-two nonmember fee-paid schools. See, e.g., *Member and Fee-Paid Schools*, ASS'N AM. L. SCH., http://www.aals.org/about_memberschools.php (last visited May 30, 2012).

41. Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 241 (2011) (citing Jones, *Small Business*, *supra* note 1).

42. “The mission of the Transactional Clinics Committee is to:

a) Analyze the role of transactional clinics in clinical legal education recognizing the importance of entrepreneurship in the U.S. economy, the global economy and the emergence of new business structures in nonprofit, for-profit and social entrepreneurship law, as well as the changing nature of American legal education;

b) Support and advance the teachers and the teaching of doctrine, skills and values and scholarship in the specialized clinical context of transactional work;

c) Support the advancement of a range of transactional clinical programs including but not limited to: microbusinesses, small business, entrepreneurship, community economic development, community lawyering, intellectual property, nonprofit law, affordable housing, arts and entertainment, and venture creation recognizing that the connective tissue of transactional clinical programs is job creation and national and international economic development.

d) Coordinate with the AALS Section on Transactional Law and Skills.”

AALS Annual Meeting: The Debt Crisis and the National Response: Big Changes or Tinkering at the Edges?, CLINIC NEWSL. (Ass'n Am. Law Sch., Maryland, Fall 2012) at 8.

provisionally approved a new Section on Transactional Law and Skills, adding the ninety-fourth section in this learned society.⁴³ That Section, which works closely with the Clinical Section Transactional Committee, focuses on transactional law pedagogy and scholarship, as well as the substantive business, financial, and lawyering skills needed to consummate business transactions.⁴⁴

The Kauffman Foundation has supported the surge in clinics through an extensive E-Law website⁴⁵ and listserv for transactional teachers, financial support of some clinical programs, and a yearly Transactional Clinical Conference that is, as of this writing, in its twelfth year.⁴⁶ Moreover, under the visionary leadership of Professor Anthony Luppino (University of Missouri Kansas City), the United States Association for Small Business and Entrepreneurship (USASBE) has created a Law and Entrepreneurship Special Interest Group (SIG) “to promote and encourage the development and advancement of programs and services in a specific entrepreneurship field and to provide a forum for information exchange.”⁴⁷ This Group is focused on interdisciplinary collaboration in law and entrepreneurship, research and policy development, community service involving law and entrepreneurship, monitoring the development of business cases involving legal issues, and new interdisciplinary scholarship in the field.⁴⁸

Professor Sandy Ogilvy, Director of the National Archive for Clinical Legal Education at the Columbus School of Law of the Catholic University of America, gathered data in 2012 on the history of various clinical specialties through the AALS law clinic listserv and reported three early transactional clinics: a Community

43. *AALS Sections Index*, ASS’N AM. L. SCH., <https://memberaccess.aals.org/> (last visited June 27, 2012). The Section has applied to the AALS for final approval.

44. Association of American Law Schools, Petition for Provisional Status Proposed Section on Transactional Law and Skills (on file with Prof. Jones).

45. *Entrepreneurship Law*, KAUFFMAN FOUND., <http://www.entrepreneurship.org/en/Entrepreneurship-Law.aspx> (last visited Oct. 4, 2012).

46. The AALS Clinical Section and the Practical Law Company have also been financial supporters of the Transactional Clinician’s Conference. The Section appoints a representative to be a liaison to the committee and vice-a-versa. *See generally* ASS’N AM. L. SCH., <http://www.aals.org/index.php>; PRACTICAL L. CO., <http://us.practicallaw.com/>.

47. *Interest Groups: Entrepreneurship in the Arts*, U.S. ASS’N SMALL BUS. ENTREPRENEURSHIP, <http://www.usasbe.org/group/Arts> (last visited June 27, 2012).

48. *Id.*

Economic Development Clinic at Antioch School of Law started in 1973; a Housing Development Clinic started at Georgetown University Law School in 1974; and the George Washington University Law School Small Business Clinic started in 1977,⁴⁹ the lone transactional program focused exclusively on the representation of small businesses and nonprofit groups.⁵⁰

The role of transactional clinicians in promoting the “law and entrepreneurship movement”⁵¹ and the interdisciplinary dimensions of transactional work is well documented. Professor Anthony Luppino writes:

With respect to the education of would-be-transactional lawyers and counselors to entrepreneurs, faculty involved in small business/transactional law school clinics have, in fact, been among the most forceful advocates of exposing law students to interdisciplinary learning. In designing and implementing their creative clinical programs, they are answering the call made by Professor Steven Hobbs in the early stages of what is now a “law and entrepreneurship” movement, when he urged that “lawyers should themselves be entrepreneurial in promoting the study of law and entrepreneurship. These faculty members tend to have substantial practice experience and consequent familiarity with the reality that business transactions involve teamwork among clients and professionals from multiple disciplines.”⁵²

Today, transactional legal clinics have developed a stronghold in American clinical legal education.⁵³

49. Email from J.P. “Sandy” Ogilvy, Director of the National Archive of Clinical Legal Education, Columbus School of Law, The Catholic University of America, to author (Apr. 25, 2012, 16:36 EST) (on file with authors).

50. *Id.*

51. See Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241, 298 (1997).

52. Anthony Luppino, *Minding More than Our Own Business: Educating Entrepreneurial Lawyers through Law School-Business School Collaborations*, 30 W. NEW ENG. L. REV. 151, 160 (2007).

53. Our overall analysis is based on an amalgam of Kauffman Foundation and 2007–2008 CSALE Data. Kauffman Foundation’s Entrepreneurship Clinic listing notes 141 total law school clinics conducting transactional legal work. CSALE 2010–2011 survey data indicates 809 total clinics. CSALE’s 2010–2011 data reflected the self-reporting of 131 law schools. See

Other incentives for the creation of transactional clinics include program funding, student interest and activism, community needs, law schools' desire to offer experiential learning opportunities to students interested in business law, and the desire to bridge the gap between theory and practice.⁵⁴ The early growth in transactional clinics was influenced by systemic advancements, including the availability of grant funds from the U.S. Small Business Administration, the rise in small business loan programs, the creation of federal programs such as Empowerment Zones and Enterprise Communities, Community Development Financial Institutions, the Community Reinvestment Act, and nonprofit microenterprise organizations now numbering more than 500 nationally.⁵⁵ Significantly, welfare reform in the 1990s heightened the national discourse on personal responsibility and self-employment through microbusiness as a viable option for achieving economic self-sufficiency.⁵⁶

A more recent set of incentives include law schools' desire to acknowledge the *Carnegie Report*⁵⁷ recommendations to include new experiential learning opportunities for students and to broaden the overall business law curriculum.

A. Defining Transactional Law and Practice

Although there is no standard definition of transactional law, the AALS Section on Transactional Law and Skills offers a succinct description of transactional lawyering:

DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., REPORT ON THE 2007–2008 SURVEY, available at <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf> (last visited Mar. 7, 2012). See also Email from David Santacroce, *supra* note 39. About thirty-five clinics are community/economic development and transactional. CSALE conducts a survey every three years. When examined based on CSALE self-reported data, transactional clinics represent approximately 20 percent of the live-client clinics in the US.

54. Jones, *Small Business*, *supra* note 1, at 206–07.

55. *Id.* at 197–200.

56. Jones, *Small Business*, *supra* note 1; See also, SUSAN R. JONES, SELF-EMPLOYMENT: POSSIBILITIES AND PROBLEMS, HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA 76 (Joel F. Handler & Lucie White eds. 1999).

57. See THE CARNEGIE REPORT, *supra* note 5.

Transactional lawyering is a distinctive form of legal practice that focuses on the creation of “a law of the deal” rather than on the interpretation of legal texts, or the litigation and resolution of disputes. This sort of lawyering—often called “private ordering”—depends on the parties (not the government or the courts) to create the rules that will govern their relationship.⁵⁸

Most lawyers think of transactional law as “doing deals” in a large corporate law firm and as nonlitigation; but transactions can cover a broad range of matters including zoning, business licensing, commercial real estate leases, labor law compliance, and intellectual property.⁵⁹

In short, transactional work involves all of the legal skills used in establishing or growing a business, with an eye toward assessing risks and actively avoiding the courtroom. This includes planning, drafting, and negotiating against the backdrop of statutes, regulations, and case law, as well as counseling clients to help them realize their business goals and objectives.⁶⁰ It also requires business industry knowledge and keen practical judgment, to refine ideas based on legal and financial opportunities and constraints.⁶¹ Thus, transactional work often attracts a more sophisticated client than one might find in a nontransactional clinic—that is, a client who has harnessed the expertise, energy, and personal or borrowed funds to launch a for-profit or nonprofit enterprise.⁶²

Students quickly learn that the skill sets they gain in transactional clinics—interviewing and counseling, legal research and writing, issue spotting and analysis, professional responsibility, practice management, and document drafting—are scalable.⁶³ Along with

58. TINA STARK, ASS’N AM. LAW SCH., PETITION FOR PROVISIONAL STATUS: PROPOSED SECTION ON TRANSACTIONAL LAW AND SKILLS, *available at* entrepreneurs.typepad.com/files/aalspetition-1.doc (last visited June 13, 2013).

59. See Praveen Kosuri, “Impact” in 3D—Maximizing Impact through Transactional Clinics, 18 CLINICAL L. REV. 1, 5 (2012); see also Statchen, *supra* note 3, at 236.

60. See *supra* note 22.

61. *Id.*

62. *Id.*

63. A prolific scholar and seasoned transactional lawyer, Professor Michael Diamond, Director of the Harrison Institute for Housing and Community Development at Georgetown University Law Center, lauded student readiness for practice, stating: “Many of our students go

doctrinal knowledge and lawyering skills, students learn project planning, management, teamwork, and collaboration.⁶⁴ Indeed, transactional legal clinics across the country handle deals with enough frequency that it can be said transactional legal clinics are training “deal lawyers.”⁶⁵

B. Regional Distribution and Substantive Areas of Concentrations

Transactional clinic opportunities for law students are not equally distributed across the country. A review of the Kauffman Foundation’s Entrepreneurship website, which contains a directory of transactional clinics nationwide, shows a strong concentration of transactional clinical offerings on the East and West Coasts, particularly California and New York, with eleven and seventeen separate transactional clinics respectively in each state.⁶⁶ That is in sharp contrast to those states that have one transactional clinic (Arkansas, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Nebraska, New Mexico, and Oklahoma) or those that have no transactional clinics (Alaska, Delaware, Louisiana, Mississippi, Montana, Nevada, North Dakota, South Dakota, Rhode Island, and Vermont).⁶⁷

on to firms specializing in transactional work, often in the field of affordable housing. We have been told by a partner of one national firm with a large affordable housing practice (and one in which we have placed several students in the Washington, New York and Boston offices) that the housing and community clinic provided a great minor league system for that firm. In fact, our students who were employed by that firm were prepared to do things that its [fourth] year associates were not prepared to do.” *Harrison Institute for Housing & Community Development: Development Role & Services*, GEO. U. L. CTR., <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIHC/development.cfm> (last visited Aug. 14, 2012).

64. Susan J. Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459, 460 (1993).

65. The *Wall Street Journal*’s “Deal Journal” provides one account of the life of a deal lawyer. See Ronald Barusch, *An M&A Junkie Kicks His All-Consuming Habit*, WALL ST. J. BLOG (Dec. 6, 2010), <http://blogs.wsj.com/deals/2010/12/06/an-ma-junkie-kicks-his-all-consuming-habit/>; see also Brad Hamilton, *What it Means to Be a “Deal Lawyer.”* L. OF BUS. (Dec. 8, 2010), <http://bradhamilton.wordpress.com/2010/12/08/what-it-means-to-be-a-deal-lawyer>.

66. L. SCH. ENTREPRENEURSHIP CLINICS, <http://www.entrepreneurship.org/en/entrepreneurship-law/law-school-entrepreneurship-clinics.aspx> (last visited June 13, 2013).

67. *Id.* Roger Williams School of Law in Rhode Island will start a Community Economic Development Clinic in the Fall 2013. Email from Gowri J. Krishna, University of Michigan

To gain a better understanding of the services being rendered and the specific legal matters handled by law students enrolled in transactional clinics across the country, the following graph examines only those legal clinics that are solely engaged in transactional, nonlitigation work. Using the Kauffman Foundation's Entrepreneurship site as a starting point, we analyzed the listing of transactional clinics across the United States, dividing the legal clinics into six categories:⁶⁸ (1) Small Business and Entrepreneurship ("SB"), (2) Microenterprise ("ME"),⁶⁹ (3) Nonprofit Organizations ("NPO"),⁷⁰ (4) Intellectual Property ("IP"),⁷¹ (5) Arts & Entertainment ("A&E"), and (6) Community Economic Development ("CED").⁷²

Notwithstanding the aforementioned categories, transactional clinics are fluid by design, and the subject matter encountered each semester might shift based on a variety of factors, including the types

Law School, to the ELAW list service (May 8, 2013, 3:28 PM); Drake Law School in Des Moines, Iowa, recently announced a new transactional clinic. Email from Chip Lowe, Drake Law School, to the ELAW list service (Aug. 16, 2013, 12:00PM).

68. Many thanks to Michael Coffee who reviewed more than 140 law school transactional clinic websites and consulted with Professors Jones and Lainez on the findings. When compiling our final list of transactional-based clinics, we removed practicums and programs that did not include on-site, live-client representation.

69. The Microenterprise category includes those legal clinics that provide legal assistance to start-up, emerging, or entrepreneurial organizations. These clinics offer microenterprise and general entrepreneur legal services. See LAW SCH. ENTREPRENEURSHIP CLINICS, *supra* note 66.

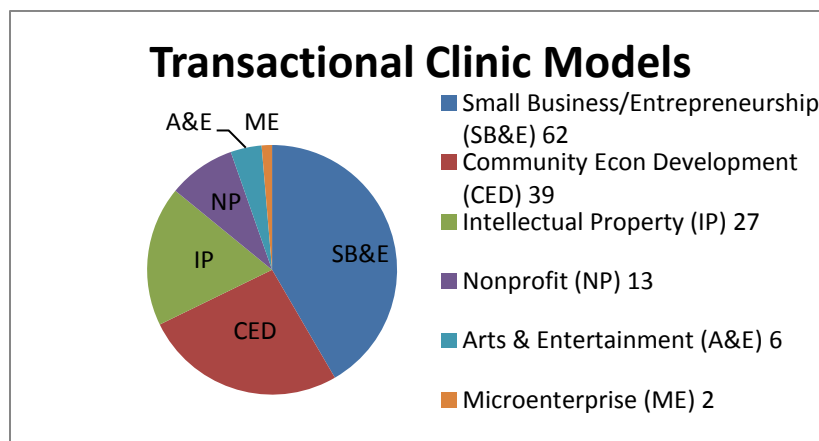
70. The Nonprofit category includes those clinics that exclusively provide legal services to nonprofit organizations, to the exclusion of for-profit businesses, and do not explicitly emphasize a greater CED purpose.

71. The Intellectual Property category includes those clinics that primarily focus on copyright, trademark, and patents.

72. Clinics categorized as CED are those clinics that approach transactional work with a distinct focus on community and economic impact. For example, Florida A&M University College of Law's Community Development Clinic is categorized as CED because, through its work, it "seek[s] to better the economic, social, equitable and cultural well-being of low income communities." *Clinics*, FAMU C. L., <http://law.famu.edu/go.cfm/do/Page.View/pid/83/t/Clinics.html> (last visited Oct. 6, 2013). Similarly, St. Louis University School of Law's Community & Economic Development Clinic "seek[s]" to positively impact disadvantaged communities." *Civil Advocacy Clinics*, ST. LOUIS U. SCH. L., <https://www.slu.edu/school-of-law-home/academics/legal-clinics/civil-advocacy-clinics> (last visited Oct. 6, 2013). Furthermore, the University of Notre Dame Law School's Community Development Project represents clients that perform activities "that contribute to community development." *Community Development Clinic*, U. NOTRE DAME L. SCH., law.nd.edu/academics/clinics-and-experiential-learning/clinics/community-development-clinic (last visited Oct. 6, 2013).

of available cases, case selection priorities, needs of community partners, faculty interests, and demographic realities.⁷³

TRANSACTIONAL CLINICAL MODELS⁷⁴



II. TRANSACTIONAL LAW PEDAGOGY

Students in transactional legal clinics learn not only substantive business law and new developments in the field but also professional skills and values, as well as practical legal skills in interviewing and counseling, legal research, drafting and problem solving, lawyering judgment, professional ethics, and practice management.⁷⁵ The surge

73. To illustrate, some clinics, like the GW SBCED Clinic, are seeing an uptick in requests from social entrepreneurs and more frequent requests from clients seeking trademark legal assistance. Indeed, one of the newest transactional clinics is Georgetown University's Social Enterprise and Nonprofit Clinic. *Social Enterprise and Nonprofit Clinic*, GEORGETOWN U., <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/social-enterprise/> (last visited Sept. 8, 2013). See generally Alicia E. Plerhoples, *Representing Social Entrepreneurs*, 21 CLINICAL L. REV. (forthcoming 2013).

74. Our clinic classification system placed sixty-two clinics in the general Small Business and Entrepreneurship category, two in Microenterprise, thirteen in Nonprofit, twenty-seven in Intellectual Property (including technology transfer), six in Arts & Entertainment, and thirty-nine in Community Economic Development.

75. *Supra* note 24; see generally ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE (West 2013); GEORGE W. KUNEY & BRIAN KRUMM, THE ENTREPRENEURIAL CLINIC HANDBOOK (West 2013); RICHARD K. NEUMANN, JR.,

in transactional law clinics has accompanied thoughtful attention to pedagogy and scholarship. Several scholars have written about essential transactional lawyering skills and why, heretofore, those skills have not been taught in law clinics.⁷⁶ They posit that transactional legal drafting is a discrete skill, and that law schools do not provide students sufficient skills training to draft professional “client ready” transactional documents.⁷⁷ Law firms, once training academies for new associates, are now unable and unwilling to train new associates as they have done in the past, for financial and other reasons.⁷⁸

Professor Lisa Penland opines that transactional or deal lawyers need four core skills.⁷⁹ First, they must be knowledgeable about various business associations and be able to draft documents relevant to those associations.⁸⁰ To this end, they must understand the advantages and disadvantages of each entity based on the transaction and the associated financing and financial statements. Second, transactional lawyers must be able to investigate the facts of the case, research the law, and undertake due diligence.⁸¹ “Due diligence is investigation of facts; however, it is a special kind of investigation . . . [a] young transactional attorney must understand . . . how to review corporate documents and how to obtain information about

TRANSACTIONAL LAWYERING SKILLS: CLIENT INTERVIEWING, COUNSELING AND NEGOTIATION (Wolters Kluwer Law and Business 2013).

76. See generally Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS’N LEGAL WRITING DIRS. 118, 118 (2008); Eric J. Gouvin, *Teaching Business Lawyering in Law Schools: A Candid Assessment of the Challenges and Some Suggestions for Moving Ahead*, 78 UMKC L. REV. 429 (2009); Statchen, *supra* note 3.

77. Statchen, *supra* note 3, at 274. See generally Tina L. Stark, *Natural Resources: Help is Here for Transactional Training*, 15 BUS. L. TODAY (2006); Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 233 (2004).

78. Daniel D. Barnhizer, *Mentoring as Duty and Privilege*, 82 MICH. B. J. 46, 46 (2003).

79. Penland, *supra* note 76, at 124.

80. *Id.*

81. “Due diligence is the investigation of facts; however, it is a special kind of investigation understood as ‘the examination of a business or portion thereof in connection with a proposed transaction.’” The young transactional attorney must understand the potential areas of due diligence, including how to review of [sic] corporate documents and how to obtain information about capitalization and stockholders, to name only a few.” Penland, *supra* note 76, at 125.

capitalization and stockholders”⁸² Interviewing and counseling skills are essential to obtaining information not only from clients but from third parties. Third, deal lawyers must be able to negotiate and draft contracts, skills that are intricately intertwined.⁸³ Significantly, contract drafting is different from other types of legal writing, because it requires precision to capture the parties’ meeting of the minds, and lawyers must understand the building blocks of a contract.⁸⁴ While the building blocks include “representations and warranties, covenants, rights, conditions, discretionary authority, and declarations,” lawyers must also understand the “large scale structure of a contract (introductory provisions, definitions, action sections, etc.).”⁸⁵ In the end, deal lawyers must know how to memorialize the contract using these skills. Fourth, deal lawyers must understand how to identify transactional ethical issues including duties to clients and third parties and issues of multi-jurisdictional practice.⁸⁶

Furthermore, these transactional skills are important not only for transactional lawyers but for litigators and general practitioners, as well, because they too are engaged in a variety of transactions from settlement agreements to real estate contracts.⁸⁷

Professor Statchen observes:

Since SBCs and transactional clinics are a relatively new phenomenon, an effort to analyze various teaching pedagogies within this learning environment is necessary. Nondirective, collaborative and partnership approaches from the clinical community, “New Rhetoric” and process-oriented approaches from the legal writing community, and value-adding business attorney functions from the doctrinal community, taken in concert, all have the ability to add structure and substance to the implementation of teaching and learning in the clinical environment.⁸⁸

82. *Id.*

83. *Id.* at 124.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 128.

88. Statchen, *supra* note 3, at 246.

Having identified the core competencies of deal lawyers discussed by Professor Penland, we now reflect on these competencies using Professor Statchen's observations in a clinical context. First, transactional clinics use the full panoply of clinical methodologies used in litigation and other types of clinics. Briefly stated, the core clinical teaching methodologies encompass case supervision, seminars, and rounds.⁸⁹ While nondirective supervision is the preferred method of supervision,⁹⁰ directive supervision has its place. Transactional clinics are also well suited to teach collaboration and student teamwork, because deal making and problem solving are inherently collaborative.

Second, in the field of legal writing, "process" or "new rhetoric" writing is now preferred over a "formalist" or "traditional 'product' approach."⁹¹ According to legal writing theorists, this means writers learn "what they want to say"⁹² throughout the writing process.⁹³ This approach becomes a launching pad for understanding the types of writing that occur in transactional practice, from client opinion letters to contracts, and understanding the use of sample forms (also called precedent documents) relevant to business deals.⁹⁴

Third, the doctrinal contribution illustrated by Professor Ronald J. Gilson's seminal work analyzing how lawyers are transactional cost

89. SUSAN BRYANT & ELLIOT MILSTEIN, N.Y. LAW SCH. CLINICAL RESEARCH INST., ROUNDS: A 'SIGNATURE PEDAGOGY' FOR CLINICAL EDUC.? 6 (2007–2008), available at <http://ssrn.com/abstract=1007504>.

90. See generally DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS (2013), describing clinical methods. Clinicians use a non-directive methodology when they reply to a student's question with questions designed to help the student think through and uncover case options and legal answers. A directive approach typically involves telling the student what to do.

91. The process or new rhetoric writing recognizes stages such as "pre-writing, writing and revision while the formalist or traditional product approach focuses on writing rules and final product critique." See Statchen, *supra* note 3, at 249 (citing Cheri Wyron Levin, *The Doctor is in: Prescriptions for Teaching Writing in a Live-Client In House Clinic*, 15 CLINICAL L. REV. 157, 178–79 (2008)).

92. *Id.*

93. *Id.* at 250.

94. The source of precedent documents is important. Prof. Jones has asked students to locate three precedent documents, and students have simply gone to the Internet to look for them without regard to who authored the documents and the credibility of the source. The better precedent documents may be those used in prior transactions along with form book samples, preferably with commentary.

engineers gives transactional clinics a “foundation and common language upon which to build its pedagogy.”⁹⁵ As transaction cost engineers, lawyers add value to a transaction by planning, accounting for, or avoiding “complex regulatory influences relating to tax, labor, product liability, employment, securities and corporate law.”⁹⁶ That is to say, by making the deal happen and limiting clients’ liabilities, planning serves a client’s needs. Indeed, the entire transactional clinical experience is premised on how the clinic students can enhance the client’s business venture and, more globally, their business relationships.⁹⁷ Like transactional lawyers, students in transactional clinics add value to clients in many ways, by: (1) reducing the client’s liability; (2) reducing costs, for example, by choosing an appropriate business entity or explaining legal issues in a carefully drafted memorandum (including, for example, the concept of a personal guarantee⁹⁸); (3) reducing regulatory costs (e.g., licensing and permits, and health and environmental compliance); (4) being a “reputational intermediary”⁹⁹ or resource builder,¹⁰⁰ and helping entrepreneurs exploit social capital¹⁰¹ through referrals to professionals in banking and insurance; (5) offering legal protections, including attorney-client privilege and confidentiality; and (6) providing “economies of scope” or the “nonlegal” benefits that come with the lawyers’ involvement.¹⁰²

95. Statchen, *supra* note 3, at 252 (citing Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984)).

96. *Id.*

97. *Id.*

98. *Id.* A personal guarantee is an “assurance of the future payment of another’s debt.” THE WOLTERS KLUWER BOUVIER LAW DICTIONARY COMPACT EDITION 466 (2011). To illustrate, in the case of a new business formed as a limited liability entity seeking a commercial lease, a landlord may require a shareholder, director, member, or manager to personally guarantee the lease.

99. *Id.*

100. Susan R. Jones, *Lawyering for a New Democracy: Current Issues in the Changing Roles and Practices of Community Economic Development Lawyers*, 2002 WIS. L. REV. 437, 459 (2002).

101. *Id.* at 462.

102. Statchen, *supra* note 3, at 252.

Scholars studying the future of legal education observe that employers value and require these skill sets along with a keen understanding of the interdisciplinary nature of problem solving.¹⁰³

III. RELEVANT SUBSTANTIVE LEGAL DEVELOPMENTS IN THE LAST TWO DECADES

New corporate entities, influenced by the social enterprise movement, have altered the landscape of corporate practice including transactional clinical practice.¹⁰⁴ The most significant changes have involved the creation and recognition of additional business entities recognizing social purposes.¹⁰⁵ Because the past two decades of legal education and law practice have changed dramatically, reflections on transactional clinical legal education would not be complete without a brief discussion of these corporate law developments.

A. Social Enterprise

Social entrepreneurship and its role in business and legal environments has been gaining momentum for decades.¹⁰⁶ Duke University Fuqua School of Business Professor J. Gregory Dees has spearheaded social entrepreneurship as a field of academic study.¹⁰⁷ The most often cited definition of social entrepreneurship is linked to Dees' early work in the field describing the "role of change agents in the social sector" as those creating and sustaining social, mission-driven values while continually adapting and innovating, succeeding despite constraints, and delivering results with unwavering commitment to targeted communities.¹⁰⁸

103. See generally Thomas D. Morgan, *The Changing Face of Legal Education: Its Impact on What it Means to be a Lawyer*, 45 AKRON L. R. 811 (2012).

104. See generally Alicia E. Plerhoples, *Representing Social Entrepreneurs*, 21 CLIN. L. REV. (forthcoming 2013).

105. *Id.*

106. ARTHUR C. BROOKES, *SOCIAL ENTREPRENEURSHIP: A MODERN APPROACH TO SOCIAL VALUE CREATION* (Pearson Education 2009).

107. *Id.*

108. JILL KICKUL & THOMAS S. LYONS, *UNDERSTANDING SOCIAL ENTREPRENEURSHIP: THE RELENTLESS PURSUIT OF MISSION IN AN EVER CHANGING WORLD* 16 (2012).

Social entrepreneurship in application can take the form of a pure nonprofit or pure for-profit, as well as hybrid forms including for-profits with nonprofit subsidiaries and nonprofits with for-profit subsidiaries.¹⁰⁹ New York's Greyston Bakery exemplifies the blended business entity structure. The Bakery, aimed at employing the unemployable—the formerly incarcerated and former drug addicts—is run by a parent nonprofit, the Greyston Foundation, but the Bakery itself is a for-profit subsidiary.¹¹⁰ Greyston Bakery, Inc., is a New York State Benefit Corporation¹¹¹ that generates \$5 million in yearly revenue.¹¹² Together, the Bakery and Foundation provide job opportunities, affordable housing, social services, and healthcare to program participants.¹¹³

Since the creation of the limited liability company (LLC) in the early 1990s, significant advances in corporate law have coupled profit generation with social responsibility—a purpose that would otherwise be frustrated by the traditional corporate axiom of maximizing profits above all else.¹¹⁴ In recent years, states¹¹⁵ have increasingly facilitated the formation of corporate entities such as L3Cs, Benefit Corporations, Flexible Corporations, and Social Purpose Corporations, each of which take charitable purposes into consideration.¹¹⁶

To some, the evolution of LLCs might seem like ancient history now, but this foundation is useful in understanding the new hybrid entities. A pivotal development in business law came in 1997 when

109. *Id.* at 129–35.

110. *Id.* at 131.

111. *Greyston Bakery was the State of New York's first Benefit Corporation*, GREYSTON BAKERY, <http://www.greystonbakery.com/2012/02/greyston-bakery-becomes-new-yorks-first-benefit-corporation/> (last visited Sept. 29, 2012).

112. KICKUL & LYONS, *supra* note 108, at 132.

113. *Id.*

114. *Supra* note 104.

115. Individual states control much of the entity creation and specific designation of corporate form. For example, LLC status is elected at the state level, with the federal government allowing for LLC, or disregarded entity status, via election on I.R.S. Form 8832. As of this writing, LC3s have been adopted in eleven states, while Benefit Corporations are statutorily authorized in eleven states. For legal developments in the field, visit SOCENTLAW, www.socentlaw.com (last visited Nov. 3, 2013).

116. Anurag Gupta, *L3Cs and B Corporations: New Corporate Forms Fertilizing the Field between traditional for-Profit and Nonprofit Corporations*, 8 N.Y.U. J. L. & BUS. 203, 206 (2011).

Treasury Regulations¹¹⁷ enabled the formation of the LLC disregarded entity. An LLC is a hybrid between a traditional corporation and a partnership.¹¹⁸ A corporation offers the benefits of limited liability, while a partnership offers flow-through taxation to each partner, so partners are only taxed once at the individual level.¹¹⁹ Examining the construct further, the term “disregarded entity” describes the fact that, on a federal level, a particular entity classification, such as a single-member LLC, can exist for the purpose of conducting day-to-day business; however, with respect to federal taxation, the single-member LLC entity designation is disregarded, and the individual owner is granted pass-through treatment and taxed on a personal level.¹²⁰ This explains the intrinsic appeal of the LLC, because an owner or member of an LLC can enjoy limited liability in business matters and also elect to avoid the double taxation characteristic of a corporation.¹²¹

Charting the course of the LLC is instructive preceding a discussion of the newest corporate forms, because while the LLC is now widely accepted, it took eight years for the LLC to gain widespread acceptance in all fifty states.¹²² Moreover, the LLC structure faced struggles similar to the new L3C model, discussed below, and at one point was not favorably considered for

117. See 26 C.F.R. § 301.7701 (1)–(3) (2011); Alice Abreu, *Paradise Kept: A Rule-Based Approach to the Analysis of Transactions Involving Disregarded Entities*, 59 SMU L. REV. 491 (2006).

118. Election of LLC status is accomplished by filing I.R.S. Form 8832, Entity Classification Election (Rev. Jan 2012), which is at the heart of the “check-the-box” disregarded entity election system. See 26 C.F.R. § 301.7701-3 (c) (2012).

119. The “check-the-box” regulations only allow elections in one direction, so that a corporation that falls under default corporation designation as described in 26 C.F.R. 301.7701-2(b) (2012) cannot elect to be treated as a partnership. CHARLES A. BOREK, MD. INST. FOR CONTINUING PROF'L EDUC. OF LAWYERS, BOREK'S MD. BUS. PLANNING GUIDEBOOK 14–17 (2009).

120. 26 C.F.R. 301.7701-2(a) (2012).

121. Recent scholarship has analyzed empirical data to conclude that the popularity of the LLC varies greatly between the states, largely controlled by formation fees rather than oft-cited taxes or substantive regulation. See generally Daniel M. Hausermann, *For a Few Dollars Less: Explaining State to State Variation in Limited Liability Company Popularity*, 20 U. MIAMI BUS. L. REV. 1, 47 (2011).

122. Allan W. Vestal & Thomas E. Rutledge, *Disappointing Diogenes: The LLC Debate that Never Was*, 51 ST. LOUIS U. L.J. 53, 67 (2006). See also Revised Unif. Ltd. Liab. Act § 101, NCCUSL (2006), available at http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf.

participation in joint ventures due to a litany of operational restrictions.¹²³

B. The Limited Liability, Low-Profit Corporation (L3C)

The L3C, or Low-Profit Limited Liability Company, is a hybrid of the LLC model. The L3C is a specialized form of the traditional LLC¹²⁴ that offers the protection of a corporation and the flexibility of a partnership but is explicitly formed to benefit a social mission or purpose.

There are nine states that have adopted the L3C as a business entity.¹²⁵ In 2008, Vermont became the first state to authorize the L3C, in large part “to signal to foundations and donor directed funds that entities formed under this provision intend to conduct their activities in a way that would qualify as program related investments.”¹²⁶ This raises a substantial constraint related to L3C funding—namely, the unsettled tax issues tied to contributions by private foundations.¹²⁷

To properly contextualize the program related investment (PRI) issue, we will briefly examine the federal requirements that govern yearly planned giving by foundations and donor advised funds. The Internal Revenue Service (IRS) grants private foundations certain benefits,¹²⁸ and requires foundations to disburse 5 percent of their

123. The 1997 “check-the-box” regulations largely resolved many of these issues. See Nancy Lieberman, *Structuring Joint Ventures*, 3 TAX PLANNING FOR DOMESTIC & FOREIGN PARTNERSHIPS, LLCs, JOINT VENTURES & OTHER STRATEGIC ALLIANCES 423, 434–35, (Practicing Law Inst. ed., 2002).

124. Gupta, *supra* note 116.

125. Vermont, Michigan, Wyoming, Utah, Illinois, North Carolina, Louisiana, Maine, and Rhode Island (beginning in July 2012) all have the L3C business entity designation. See *Laws, AMERICANS FOR CMTY. DEV.*, <http://www.americansforcommunitydevelopment.org/laws.html> (last visited June 14, 2013).

126. *Low-Profit Limited Liability Company*, VT. SEC’Y OF STATE: CORPORATE DIV., http://www.sec.state.vt.us/corps/dobiz/llc/llc_l3c.htm (last visited June 30, 2012).

127. See generally Edward Xia, *Can the L3C Spur Private Foundation Program-Related Investment?*, COLUM. BUS. L. REV. 242 (2013).

128. Private Operating Foundations receive several advantages. Some of these advantages are: eligibility to receive qualifying distributions from other private foundations; donors can generally deduct contributions to operating foundations to the same extent as organizations described in I.R.C. § 509(a) for income purposes; operating foundations are treated like organizations described in I.R.C. § 509(a) for estate and gift tax purposes; and operating

annual funds for charitable purposes, a requirement ostensibly met through L3C donations. However, this requirement is diminished due to the lack of definitive IRS guidance regarding whether these disbursements adequately constitute PRIs. A classification as a PRI is essential when a foundation is considering funding a particular program. Without a valid program related investment, a private foundation can face excise taxes for multiple years.¹²⁹ While an L3C is otherwise an attractive option for private foundation donations, a foundation's ability to treat these investments as PRIs, sufficient to avoid Internal Revenue Code (IRC) § 4944 excise taxes, remains an open question. Thus, private donors and scholars have remained wary of the benefits and longevity of L3Cs.¹³⁰ It is also important to note that PRIs, as a whole, require substantial resources and are not routinely used.¹³¹

foundations are not subject to the tax imposed by I.R.C. § 4942 on private foundations that fail to comply with the § 4942 distribution requirements. *See Taxes on Failure to Distribute Income*, 26 U.S.C.A. § 4943 (j)(3) (2007).

129. I.R.C. § 4944(a)(1), Taxes on Investments Which Jeopardize Charitable Purpose, states: "If a private foundation invests any amount in such a manner as to jeopardize the carrying out of any of its exempt purposes, there is hereby imposed on the making of such investment a tax equal to 10 percent of the amount so invested for each year (or part thereof) in the taxable period. The tax imposed by this paragraph shall be paid by the private foundation." 26 U.S.C.A. § 4944 (a) (1) (2006).

130. Numerous scholars have highlighted the PRI quandary as reason enough to discount the long-term viability of the L3C model. *See generally* Christopher C. Archer, *Private Benefit for the Public Good: Promoting Foundation Investment in the "Fourth Sector" to Provide More Efficient and Effective Social Missions*, 84 TEMP. L. REV. 159, 190 (2011); Daniel S. Kleinberger, *A Myth Deconstructed: The "Emperor's New Clothes" on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879, 886 (2010).

131. Elizabeth Schmidt, *Corporate Creativity, The Vermont L3C & Other Developments in Social Entrepreneurship: Vermont's Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 167 (2010) ("[O]nly 173 of the more than 75,000 foundations in existence in 2007 actually made PRIs that year or the year before . . . Several reasons exist for the relative dearth of PRIs. Foundations typically give grants instead of making loans or investments, and they may not have expertise or interest in managing these investments. They also typically seek reassurance that such investments actually qualify as PRIs, given the onerous excise taxes they face if they make an incorrect determination. Thus, foundations tend to forego the process entirely, seek a private letter ruling from the IRS or an opinion letter from an attorney before investing in a PRI, or engage in an expensive and time consuming internal due diligence process."). Observers have highlighted the difficulty of using PRIs, noting that they are usually one-of-a-kind transactions. "Once you've worked on one PRI, you've worked on one PRI." *Id.* The Bill and Melinda Gates Foundation utilizes PRIs as one tool; however, it sees grant-making as critical for sectors that have a low likelihood of generating sufficient revenues from normal market forces. BILL & MELINDA GATES FOUND.,

Significantly, in April 2012, the IRS issued proposed regulations that, if promulgated, could substantially positively affect investments by foundations into L3Cs and the future of this business model.¹³² While the regulations do not explicitly cite L3Cs, there are direct, favorable impacts on L3Cs: “Under the proposed rules, more private foundations’ investments will qualify as PRIs, thus avoiding the [I.R.C. § 4944] excise tax The proposed regulations do not amend or modify the existing § 53.4944-3(b) regulations, but add nine new examples that ‘illustrate that a wider range of investments qualify as PRIs.’”¹³³

Looking ahead to the future of L3Cs, social entrepreneurship, philanthrocapitalism,¹³⁴ and venture philanthropy, significant opportunities are expected to develop, particularly given the advocacy efforts and success of high-profile social ventures.¹³⁵

PROGRAM-RELATED INVESTMENTS: LEVERAGING OUR RESOURCES TO CATALYZE BROADER SUPPORT FOR OUR MISSION, <http://www.gatesfoundation.org/about/pages/program-related-investments-faq.aspx> (last visited July 5, 2012).

132. *IRS Issues Proposed Regulations on Program-Related Investments*, NONPROFIT L. PROF. BLOG (Apr. 19, 2012), <http://lawprofessors.typepad.com/nonprofit/>.

133. *Id.*

134. While an in-depth discussion of philanthrocapitalism is beyond the scope of this Article, it is a concept worth introducing because of its cautionary alarm. Professor Jenkins explains, “Private foundation grantors operating under this new philanthropy exert their power not just through their dollars but also through an unspoken sense that they know best It places the foundation at the center of the social problem-solving endeavor, relegating grantees to the role of subcontractors expected to execute the grand vision of the private foundation funder.” Garry W. Jenkins, *Who’s Afraid of Philanthrocapitalism?*, 61 CASE. W. RES. L. REV. 3, 17 (2011).

135. See generally MUHAMMAD YUNUS, BUILDING SOCIAL BUSINESS: THE NEW KIND OF CAPITALISM THAT SERVES HUMANITY’S MOST PRESSING NEEDS (PublicAffairs 2010).

C. Benefit Corporations

Like the L3C, the Benefit Corporation¹³⁶ (“B Corp.”¹³⁷) is another new business entity. In April 2010, Maryland became the first state in the nation to grant legal recognition to the B Corp., allowing “social entrepreneurs [to] codify their missions in their corporate charters.”¹³⁸

In order to incorporate as a B Corp., an organization must have the dual purpose of creating a general public benefit (nonprofit purpose) and of creating value for its stakeholders and members (for-profit purpose).¹³⁹ A B Corp. differs from a regular corporation in that it allows an organization to sacrifice some profit in order to adhere to tangible, socially beneficial policies without incurring officer and director liability to shareholders for failing to optimize profits.¹⁴⁰

There are several threshold steps a company must take before becoming a B Corp. To qualify as a B Corp., an organization must not only have an explicitly social or environmental mission but it must also publish independently-verified reports of its activities to prove its financial goals are not overtaking its charitable mission.¹⁴¹

136. For purposes of clarity, a “Benefit Corporation” as discussed herein will refer solely to the legal designation currently conferred by state law.

137. While the term ‘Benefit Corporation’ is sometimes confused with the term ‘Certified B Corp.’ there is a discernible distinction between the two. Succinctly stated, the Certified B Corporation indicates that the entity has been officially certified by B Lab. Although ‘Certified B Corp’ terminology is implemented to underscore this distinction, it remains a somewhat opaque designation. According to B Lab’s website, “B Corp certification is to sustainable business what LEED certification is to green building or Fair Trade certification is to coffee.” *The Non-Profit Behind B Corps*, B LAB, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited Sept. 29, 2012).

138. *Maryland Passes ‘Benefit Corp.’ Law for Social Entrepreneurs*, BLOOMBERG BUSINESSWEEK (Apr. 13, 2010), http://www.businessweek.com/smallbiz/running_small_business/archives/2010/04/benefit_corp_bi.html (last visited June 15, 2013).

139. “While C and S corporations are required by law to pursue a profit, B corporations are legally tasked with pursuing both a profit and an articulated public purpose.” KICKUL & LYONS, *supra* note 108, at 128.

140. “But the simple fact is that traditional businesses are constrained by the need to put profits rather [than] the health of society first. The reason we need B Corps is that such companies enjoy the freedom to pursue a broader set of objectives.” *Maximising Shareholder Profits Still Rules the Day for US Businesses*, GUARDIAN, Aug. 13, 2013, available at <http://www.theguardian.com/sustainable-business/maximising-shareholder-profits-rules-us-businesses> (last visited Sept. 9, 2013).

141. *White Paper on The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately*

A B Corp. must balance its profit-making purpose with its charitable purpose, while keeping both its social mission and profit motive at the forefront of its activities.¹⁴²

D. Flexible Purpose Corporations

A Flexible Purpose Corporation is a new entity under California law effective January 1, 2013.¹⁴³ While it shares attributes associated with a B Corp., it is distinctly different.¹⁴⁴ Similar to a B Corp., a flexible purpose corporation must have one or more qualifying special purpose stated in the articles of incorporation (e.g., social and/or environmental), and it must be designed to offer a safe harbor from shareholder liability for failure to maximize profit. Unlike a B Corp., the flexible purpose corporation is not subject to third party supervision.¹⁴⁵

E. Selected Ethical Issues

Like their litigation counterparts, transactional legal clinics provide rich opportunities to explore the ethical dimensions of lawyering and to examine future trends in law practice. While it is not possible to discuss the multitude of ethical issues that arise in transactional law practice, several issues typically arise, including: (1) competition with the private bar, (2) volunteer pro bono publico, (3) unauthorized practice of law and multijurisdictional practice of law, and (4) group representation. Each issue is explored below.

the Public, at 17-18, Benefit Corp (Jan. 18, 2013), available at http://benefitcorp.net/storage/documents/BeneCit_Corporation_White_Paper_1_18_2013.pdf.

142. *Id.*

143. S.B. 201, 2011 Cal. Leg., Reg. Sess. (Cal. 2011).

144. Sharon Mac Corman, *New Corporate Forms: Flexible Purpose Corp., Benefit Corp., and L3Cs*, BERKELEY U., available at http://www.law.berkeley.edu/files/bclbe/BerkeleyHandout_1182001-1.pdf (last visited July 24, 2013).

145. See Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55 (2012). Similarly, a social purpose corporation, unique to the State of Washington, also allows for a social or environmental purpose. See *Social Purpose Corporation*, WASH. SEC'Y OF STATE, <http://www.sos.wa.gov/corps/SocialPurposeCorporations.aspx> (last visited Nov. 5, 2013).

1. Competition with the Private Bar

Competition with the private bar is a case selection issue likely to arise in transactional clinics, especially in clinics in which students participate in the case selection process.¹⁴⁶ The issue of competition with the private bar, now reflected in ABA Model Rule 6.1 on voluntary pro bono publico service, was initially addressed in a nonlitigation context when business law pro bono programs were first introduced.¹⁴⁷ Transactional clinics provide pro bono representation by law students under law faculty supervision, and hence they are a type of pro bono program. Historically, private voluntary bar pro bono and legal aid programs only existed in litigation cases, and they only provided services to individual clients meeting financial eligibility guidelines imposed by federally funded legal services programs.¹⁴⁸ These income guidelines limit eligibility for legal services to individuals with incomes within certain percentages of the federal poverty guidelines.¹⁴⁹

Initially, the explosion of legal services in the 1960s and 1970s was met with some hostility by the private bar because these legal services were seen as competition for the private bar.¹⁵⁰ Those concerns quickly waned because legal services-eligible clients could not afford private lawyers.¹⁵¹ When business law pro bono programs began to emerge and expand in the 1980s and 1990s, concerns about competition with the private bar resurfaced.¹⁵² In a business law context, some of the clients would be nonprofit groups, not subject to

146. Transactional legal clinics employ various case selection models. Some pre-select cases while others have an open intake system and involve students in the case selection process. See Statchen, *supra* note 3, at 259–60. See also Alicia E. Plerhoples, *Representing Social Entrepreneurs*, 21 CLINICAL L. REV. (forthcoming 2013).

147. See MODEL RULE OF PROF'L CONDUCT R. 6.1 CMT. (2010), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_1.authcheckdam.pdf (listing the states in which it has been adopted with some modifications).

148. James L. Baillie, *Fulfilling the Promise of Business Law Pro Bono*, 20 WM. MITCHELL L. REV. 1543, 1548 (2002).

149. See Annual Update of the HHS Poverty Guidelines, 77 C.F.R. 4034–35 (Jan. 26, 2012); A.B.A., PRO BONO PROGRAM LISTINGS—DISTRICT OF COLUMBIA, <http://apps.americanbar.org/legal services/probono/directory/dc.html> (last visited Sept. 29, 2012) (illustrating that DC Bar Pro Bono Project income limitation is 200 percent of poverty).

150. Baillie, *supra* note 148.

151. *Id.*

152. *Id.*

the same individual client eligibility guidelines as those applicable to individuals in traditional pro bono settings.¹⁵³

Rule 6.1 provides that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.”¹⁵⁴ These services should be “without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; . . .”¹⁵⁵ Pro bono legal services may be dispensed “at no fee or substantially reduced fee to individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate; . . .”¹⁵⁶

While the overarching determining factor for transactional pro bono case representation is whether the client can afford to pay a lawyer, other factors include the nonprofit organization’s budget or the revenue from the microenterprise business, and the project’s impact, as well as a successful lawyer-client relationship.¹⁵⁷ A cost-benefit analysis of resource expenditures should consider the volunteer lawyer’s time and the business law pro bono program’s resources.¹⁵⁸ Overall, while income eligibility factors alone in business law pro bono might be insufficient, and case selection standards might differ based on geography and circumstances, flexibility and good judgment should prevail.

This historical context is useful in understanding current and future trends in transactional clinical practice. Today, case selection criteria include not only financial eligibility tests but also whether the

153. *Id.*

154. MODEL RULES OF PROF’L CONDUCT R. 6.1 (2012), available at http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html (last visited July 16, 2012).

155. *Id.*

156. *Id.*

157. See Baille, *supra* note 148.

158. *Id.*

client has access to other pro bono legal counsel, as well as the size and diversity of the existing case docket, student interest in a specific type of business, community impact, the source of the referral, job creation potential, and the pedagogical value of the case to the students.¹⁵⁹

2. Volunteer Pro Bono Publico

The most frequent clients of volunteer attorney pro bono legal services are community development nonprofits and microenterprises.¹⁶⁰ Very small nonprofit groups represent 75 percent of all nonprofit organizations and are part of what is called the independent, third, voluntary, or philanthropic sector.¹⁶¹ These small nonprofit groups provide important community services, from helping the homeless to providing quality day care.¹⁶² Community development corporations, a type of nonprofit, have benefited from business law pro bono services and continue to so do.¹⁶³ Current economic constraints severely impact nonprofits, and some have had to merge to remain viable. Thus, in the current economic environment, nonprofits sorely need pro bono legal services.

Hard economic times also reinforce the need for microbusiness legal support because such businesses “cannot receive legal services in the marketplace.”¹⁶⁴ Indeed, “[t]hese businesses need pro bono services, and when these services are targeted to communities in redevelopment, the community development process can benefit greatly.”¹⁶⁵

159. These case selection criteria have been developed over time by the GW Law SBCED Clinic.

160. See Baille, *supra* note 148.

161. Nicole S. Dandridge, *Choking Out Local Community Service Organizations: Rising Federal Tax Regulations and Its Impact on Small Nonprofit Entities*, 99 KY. L. J. 695, 696–98 (2011).

162. *Id.*

163. See Baille, *supra* note 148, at 1545–46.

164. See *id.*

165. *Id.* at 1547.

3. Unauthorized Practice of Law & Multijurisdictional Practice

Boston College Law School Professor Paul Tremblay observes how transactional clinics are different from litigation clinics:

“[T]he student-practice rules of nearly all states are silent about students’ practice in transactional settings. Without a student-practice rule in place, students who wish to represent clients in a transactional clinic are effectively nonlawyers, practicing, in effect, under the law license of the supervising attorney. Faculty and students in such clinics therefore must understand confidently the limits of that nonlawyer role.”¹⁶⁶

The law and commentary on nonlawyer practice is “confused and incoherent,” and respected authorities instruct lawyers on this topic in one of two ways.¹⁶⁷ One school of authority prohibits the nonlawyer from discussing legal issues with clients or negotiating on their behalf, and states that the nonlawyer may only assist with “preparatory matters.”¹⁶⁸ The other school advises that lawyers may delegate tasks if the lawyer supervises those tasks and takes responsibility for them.¹⁶⁹ After observing that the “prevailing unauthorized-practice-of-law dogma . . . trusts lawyers to protect a client’s interest,” he concludes that, with the exception of court cases, “a lawyer may responsibly delegate . . . lawyering activities to a nonlawyer associate, subject to the prevailing conceptions of competent representation and to the lawyer’s retaining ultimate responsibility for the resulting work product and performance.”¹⁷⁰

This issue is particularly important because clinical law students “assume the role of a practicing lawyer with much, and sometimes almost complete responsibility for the client’s representation.”¹⁷¹ Indeed, this role assumption is a hallmark of clinical legal

166. Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice within Law Firms*, 85 IND. L.J. 653, 658 (2010).

167. *Id.* at 653.

168. *Id.*

169. *Id.*

170. *Id.* at 698–99.

171. *Id.* at 658.

education.¹⁷² The surge in transactional law clinics has resulted in a call for reform of the student practice rules to allow for transactional practice.¹⁷³

For transactional programs representing clients in intellectual property matters, particularly trademarks and patents, the United States Patent and Trademark Office has a Law School Certification Program.¹⁷⁴ This is noteworthy because it is the only certification many transactional clinic students can obtain.

a. The Proliferation of Online Document Service Providers

The proliferation of online document service providers such as LegalZoom offers yet another lens on unauthorized practice of law (“UPL”) issues, as well as market forces impacting the practice of law.¹⁷⁵ The legal profession is a self-regulating industry, and UPL statutes have kept nonlawyers from infringing on legal markets.¹⁷⁶ Nevertheless, online document service providers have become quite popular with consumers.¹⁷⁷

Each state determines what constitutes the practice of law.¹⁷⁸ In an effort to create a uniform definition of the practice of law, the ABA created the Task Force on the Model Definition of the Practice of Law (the “Task Force”), which concluded that states should continue to determine the meaning of “practicing law.”¹⁷⁹ At the same time,

172. *Id.*

173. *Id.*

174. *See Law School Clinic Certification Pilot*, U.S. PATENT & TRADEMARK OFF. (Oct. 2, 2013), available at http://www.uspto.gov/web/offices/dcom/olia/oed/law_school_clinic_package.pdf.

175. John Wallibillich, *LegalZoom: When the Law Goes Public*, WIREDCG (May 2013), <http://www.wiredgc.com/2012/05/23/legalzoom-when-the-law-goes-public/>; *LegalZoom Selected Best Legal Forms Provider by The National Law Journal*, PR NEWSWIRE (Dec. 2011), <http://www.pnewsire.com/news-releases/legalzoom-selected-best-legal-forms-provider-by-the-national-law-journal-135596873.html>.

176. *See generally* Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?*, A.B.A. J. PROF'L LAWYER 58 (2008) available at http://www.americanbar.org/content/dam/aba/migrated/cpr/pubs/maute.authcheck_dam.pdf.

177. *Supra* note 175.

178. *See* A.B.A., STATE DEFINITIONS OF THE PRACTICE OF LAW, available at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf (last visited on Sept. 11, 2013).

179. *Id.*

the Task Force did two things. First, it suggested that state definitions include “that the practice of law is the application of legal principles and judgment to circumstances or objectives of another person or entity.”¹⁸⁰ It reasoned that each state could use this definition as a foundation and add to it accordingly.

Second, the Task Force created Model Rule 5.5: “Unauthorized Practice of Law [and] Multijurisdictional Practice of Law.”¹⁸¹ Adopted in forty-four states, the rule prohibits attorneys from practicing in states in which they have not been admitted to practice, except under certain circumstances.¹⁸² The relevant portion of the rule provides that an out-of-state lawyer “cannot establish an office or other systematic and continuous presence in this jurisdiction for the practice of law” or “hold out to the public or otherwise represent that” she is authorized to practice in the jurisdiction.¹⁸³ However, an out-of-state lawyer may provide legal services on a temporary basis in a jurisdiction, provided certain criteria are met.¹⁸⁴

180. See A.B.A., 2003 TASK FORCE ON MODEL DEFINITION OF PRACTICE OF LAW 13, available at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_328.auth_checkdam.pdf (last visited June 13, 2013).

181. MODEL RULES OF PROF'L CONDUCT R. 5.5 (Discussion Draft 2011).

182. See Stephen Gillers, *Multijurisdictional Practice of Law: Merging Theory with Practice*, B. EXAMINER, May 2004, at 28, 32, available at http://www.ncbex.org/uploads/user_docrepos/730204_Gillers.pdf. See also Richard T. Seymour, *Ethics and Practice Issues, and GATS: Midwinter Meeting, Berlin, Germany*, A.B.A. (May 11, 2011), available at <http://www2.americanbar.org/calendar/110508-2011-midyear-meeting/Documents/seymour.pdf> (last visited June 16, 2011).

183. *Supra* note 181, at (a)(1)–(2).

184. ABA MODEL RULE 5.5 provides “(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. (b) A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that: (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are

Critics of Model Rule 5.5 argue the broad definition is not based on evidence, does not protect legal consumers as predicted, and that a simpler definition—like, “the unauthorized practice of law is saying one is a lawyer when one is not”—should be sufficient.¹⁸⁵

Observers have concluded that there are major gaps in areas of UPL and multidisciplinary practice which lead to lawyers “sneaking around” these ethical rules because of disconnect and confusion.¹⁸⁶ UPL issues will no doubt continue to influence the future of law practice.

reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. (d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: (1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.” MODEL RULES OF PROFESSIONAL CONDUCT R. 5.5 (2012), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practical_of_law.html.

185. George W.C. McCarter, *The ABA’s Attack on “Unauthorized” Practice of Law and Consumer Choice*, 4 ENGAGE 131, 133 (2003), available at http://www.fed-soc.org/doclib/20080220_ProResMcCarter.pdf. It is noteworthy that the major cases on UPL, *Birbrower* and *Fought*, were decided prior to the creation of Model Rule 5.5, and indeed the decision in *Fought* is supported by Model Rule 5.5(c)(1). *Birbrower, Motalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5–6 (Cal. 1998) (finding one may practice law in California in violation of section 6125 even though not physically present there, by communicating by modern technological means; but a person does not automatically practice law in California whenever he virtually enters the state by electronic communication). The Supreme Court of California decided *Birbrower* prior to ABA Model Rule 5.5. In that case, the court held that a New York law firm, which had previously drafted a contract that would be governed by California law, for a California client, was engaged in the unauthorized practice of law by offering legal services in connection with the drafted agreement. *Id.* at 13.

The Supreme Court of Hawaii refused to adopt the *Birbrower* approach in *Fought & Co. Inc. v. Steel Engineering & Erection, Inc.*, 951 P.2d 487, 491–92 (Haw. 1998). In *Fought*, an Oregon law firm supervised the litigation of a Hawaii client against the State of Hawaii, without filing for pro hac vice appearance. *Id.* at 496. The court held that an Oregon law firm, supervising the litigation of a Hawaii client involved in litigation against the State of Hawaii, while not filing for pro hac vice appearance, was not engaged in the unauthorized practice of law by merely supervising the litigation. *Id.* at 497.

186. See Charles W. Wolfram, *Ethics and the Multijurisdictional Practice of Law: Sneaking Around the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 685 (1995).

b. LegalZoom, Inc., UPL Lawsuits

Boasting close to one million customers and annual revenues of more than \$100 million, LegalZoom, Inc., (“LegalZoom”) has been the subject of several lawsuits alleging UPL, for example, in California and Missouri.¹⁸⁷ LegalZoom’s SEC Form 1 Registration Statement¹⁸⁸ acknowledges that more lawsuits are possible, while it advertises it is “[t]he leading online destination for small business and consumer legal services.”¹⁸⁹ And it contends that “[e]veryone deserves access to quality legal services so they can benefit from the full protection of the law.”¹⁹⁰

The LegalZoom UPL issues are interesting for a variety of reasons. First, clinic students grapple with this issue at the intersection of a changing legal paradigm: consumers simply will not continue to pay the high cost of legal services, technology has automated some tasks, and work can be outsourced overseas.¹⁹¹ Students themselves struggle with the same question their clients confront: Legal fees are expensive, so why shouldn’t legal documents be available at low cost? At the same time, some clinical programs have encountered clients who purchased documents from online service providers only to find that they needed legal advice to understand them or to correct errors, and that they required legal counseling on other legal aspects of the business.¹⁹²

187. *LegalZoom Reaches Agreement in Principle for Proposed Settlement of Missouri Class Action*, GLOBENEWSWIRE (Aug. 22, 2011), <http://www.globenewswire.com/newsroom/news.html?id=230108>. See *Legalzoom.com v. N.C. State Bar*, 2012 WL 3678650 (N.C. Super. Aug. 27, 2012) (LegalZoom is seeking a declaratory judgment that, among other things, it is not engaged in the unauthorized practice of law.); *Lowry v. Legalzoom.com, Inc.*, No. 4:11CV02259, 2012 U.S. Dist. LEXIS 100155 (N.D. Ohio July 19, 2012) (dismissing UPL claim against LegalZoom for lack of subject matter jurisdiction).

188. U.S. SEC. & EXCHANGE COMM’N, FORM I REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933 (May 10, 2012), available at <http://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299zs-1.htm>.

189. *About Us*, LEGALZOOM, <http://www.legalzoom.com/about-us> (last visited June 16, 2013).

190. *Supra* note 188.

191. Danny Ertel & Mark Gordon, *Points of Law: Unbundling Corporate Legal Services to Unlock Value*, HARV. BUS. REV., July–Aug. 2012, at 126, 127 (discussing the high cost of legal services and the disruption of the close relationship between big law firms and corporate legal departments). See generally Morgan, *supra* note 103, at 816.

192. Statchen, *supra* note 3, at 254.

4. Group Representation

Ethical rules are largely based on individual representation. Within this predetermined individual construct, group or collective representation presupposes “structured entities” with “powerful constituents.”¹⁹³ Professor Tremblay observes that in transactional community practice, typically involving nonprofit cases, entity structure does not contemplate “messier, less organized, and often contentious group representation.”¹⁹⁴ A transactional community lawyer¹⁹⁵ representing a community group must follow the ethical rules associated with traditional business corporations and partnerships, but she must do more. Community groups might often be more loosely structured, so a transactional community lawyer must develop “an authority scheme” to determine whom she “may rely on for direction.”¹⁹⁶ Here, the lawyer has a greater responsibility to “ensure that the constituent with whom she meets is a faithful proxy for the wishes of the group.”¹⁹⁷

In addition, the lawyer has at least three special duties associated with her representation of community groups, all of which can be at odds with one another: (1) if the group has a public mission, having obtained state nonprofit corporate status, federal tax exemption from the IRS, and state tax exemption, the lawyer must respond to that public mission; (2) she must attend to internal group dynamics regarding “empowerment” and “cohesion”; and (3) the lawyer might have a “moral duty to intervene and establish conditions, even if not chosen by the group, that are likely to increase autonomy and the power of the group in the long run.”¹⁹⁸

193. Paul Tremblay, *Counseling Community Groups*, 17 CLINICAL L. REV. 389, 467 (2012).

194. *Id.*

195. Community Lawyering is an approach to the practice of law centered on building sustainable and enduring relationships with clients and communities. It assumes a nontraditional approach to law practice, “one in which the client community or community groups are the protagonists in framing and resolving their concerns, and the lawyers act as team members, working both for and with clients.” Karen Tokarz et al., *Conversation on “Community Lawyering”: The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL’Y 359, 364–65 (2005).

196. Tremblay, *supra* note 193, at 389.

197. *Id.* at 467.

198. *Id.* at 390.

IV. FUTURE ISSUES, OUTCOME DESIGN MEASURES, ASSESSMENT, AND PROGRAM EVALUATION

Revisions to ABA law school accreditation standards are underway, and there are many more changes afoot.¹⁹⁹ Professor Thomas D. Morgan, author of *The Vanishing American Lawyer*, observes that the “face of legal education is changing,” and what lawyers do with that education will be different from what lawyers did in the past.²⁰⁰ In the last forty years, the number of licensed lawyers has grown substantially; but the “production of lawyers has greatly exceeded the rate of GDP growth, and at least three graduating classes of potential lawyers have struggled to get law-related jobs.”²⁰¹ Globalization and geographic diversity are factors changing the nature of lawyers’ work. Specialization is more prevalent. Some lawyers will remain local practitioners delivering “high-touch personal services,”²⁰² while others will continue to work in large firms and in specialized areas of law.²⁰³

Technology, “free or open source”²⁰⁴ access to legal information, and legal document production outsourcing are also changing how lawyers work.²⁰⁵ As the earlier section on the proliferation of online service providers explains, the general public can now get documents that were at one time only available to lawyers.²⁰⁶ Another significant change, especially in corporate practice, is the use of nonlawyers.²⁰⁷ Indeed, corporations are demanding more value, rejecting high cost billable hours.²⁰⁸ They want “lawyers to get closer to the business, to deliver more value.”²⁰⁹ Nonlawyers “can help lower costs, but more

199. See generally THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* (2010); see also THOMAS D. MORGAN, *THE CHANGING FACE OF LEGAL EDUCATION: ITS IMPACT ON WHAT IT MEANS TO BE A LAWYER* 814 (2012).

200. Morgan, *supra* note 103.

201. *Id.* at 814.

202. *Id.* at 816.

203. *Id.*

204. *Id.* at 817.

205. *Id.*

206. See *infra* pp. 117–21 for a discussion of the proliferation of online document service providers. See generally Morgan, *supra* note 103.

207. Morgan, *supra* note 103.

208. Ertel & Gordon, *supra* note 191, at 126–33.

209. *Id.* at 131.

important, they can help the client get its whole problem solved, not just the legal elements.”²¹⁰ Today, nonlawyers like accountants, business specialists, and economists might supervise attorneys.²¹¹

If adopted, the proposed changes to the ABA accreditation standards could upend legal education as it is known today. These changes range from an elected curriculum, with the exception of mandatory professional responsibility and writing courses, to the abolition of grades and the substitution of a “variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students.”²¹²

Examining the “core” of legal education, Professor Morgan posits a “core-plus-more” model in which the core curriculum would be three semesters while the “more,” assuming another three semesters, would “go beyond core training to invite students to tailor their education to their individual skills and aspirations.”²¹³ This model is premised on a sharper understanding of what lawyers need to know and what legal educators should teach, that is: “(1) how to ‘think like a lawyer’ about legal issues, (2) how to think about fundamental questions that are raised by work in a legal system, and (3) how to apply practical skills to improve a client’s outcomes.”²¹⁴

Future lawyers “will need to give clients and other lawyers a reason to seek out that lawyer rather than seeking out someone else.”²¹⁵ Today, clients can work with consultants worldwide, and those clients often require specific and unique skill sets including nonlegal services.²¹⁶ A lawyer with a combination of legal and nonlegal skills might be better able to distinguish herself in the marketplace.²¹⁷

Transactional legal clinics are well positioned to offer students a scalable experiential learning foundation and a range of legal and nonlegal skills that position them as lawyers not only now but in the

210. Morgan, *supra* note 103, at 819.

211. *Id.* at 820.

212. *Id.* at 824–25.

213. *Id.* at 828–29.

214. *Id.* at 829.

215. *Id.* at 836.

216. Morgan, *supra* note 103.

217. *Id.*

future. Clinical pedagogy teaches students habits of mind so they can teach themselves about legal changes and the integration of theory and practice for solving real world problems in transactional practice.

Finally, any consideration of future trends in legal education must include a discussion of outcome measures and assessment, that is, the process of measuring the effectiveness of legal education through assessment of student learning.²¹⁸ Based on the premise that law schools have been overly focused on input measures to the exclusion of output measures, the Report of the Outcome Measures Committee of the ABA Section on Legal Education and Admission to the Bar proposed revisions to some of the Standards.²¹⁹ To illustrate, the Clinical Legal Education Association (CLEA) observes that fundamental lawyering skills, “such as client interviewing, counseling, negotiation, fact development and analysis, conflict

218. Specifically, outcome measures are defined as “accreditation criteria that concentrate on whether the law school has fulfilled its goals of imparting certain types of knowledge and enabling students to attain certain types of capabilities, as well as achieving whatever other specific missions(s) the law school has adopted.” That is, the process of measuring the effectiveness of legal education through assessment of student learning. See Catherine L. Carpenter et al., *Report of the Outcome Measures Committee*, 2008 A.B.A., SEC. LEGAL EDUC. ADMISSIONS B., available at <http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf>. Given the importance of anticipated changes in this area, the historical context for this development is instructive. The Section of Legal Education and Admissions to the Bar “provides leadership and services to those involved in legal education and admissions to the bar.” See A.B.A., SEC. LEGAL EDUC. ADMISSIONS B., http://www.americanbar.org/groups/legal_education.html (last visited Sept. 11, 2013). The U.S. Department of Education recognizes the Section’s Council as the accrediting body for American Law Schools. See *About Us*, A.B.A., SEC. LEGAL EDUC. ADMISSIONS B., http://www.americanbar.org/groups/legal_education/about_us.html (last visited Sept. 11, 2013). The Section’s Standards Review Committee reviews proposed changes to the publication, *Standards and Rules of Procedure for Approval of Law Schools*. *Id.* at 3. Chapter 3 of that document is titled, *Program of Legal Education*. In 2007, the Section on Legal Education created a Special Committee on Outcome Measures to consider: (1) “whether and how . . . [it] could use output measures, other than bar passage and job placement, in the accreditation process . . . (2) methods to measure whether a program is accomplishing its stated mission and goals . . . and (3) specific recommendations as to whether the Section should adopt those measures as part of the Standards.” *Id.* at 4.

219. Carpenter, *supra* note 218, at 54–58. See also Letter from Leigh Goodmark, President, Clinical Legal Education Association (CLEA), to Jeffrey E. Lewis, Chair, Standards Review Committee (Apr. 18, 2012), available at <http://www.cleaweb.org/Resources/Documents/2012-04-18-CLEA%20comment%20on%20Outcome%20Measures.pdf>; CLEA, COMMENTS ON PROPOSED REVISIONS TO CHAPTER 3 STANDARDS 302 & 304 (2012) [hereinafter CLEA, COMMENTS].

resolution, organization and management of legal work, collaboration, cultural competence, and self-evaluation,” should be mandatory, but the proposal relegates them to an exemplar option.²²⁰

CLEA also criticizes several parts of Proposed Standard 304, because it does not go far enough in providing students experience with real clients and actual problem solving.²²¹ Law schools, it opined, should be in step with other professions (e.g., medicine, architecture, and social work) that mandate “real world supervised practice” prior to professional licensure.²²² Similarly, expounding on this important observation and proposing new Standard 304(a)(4),²²³ CLEA writes that students should have the chance to “grapple with affective and normative realities of professional practice. No one learns to swim by moving their arms and legs on a gym floor, however useful work outside the pool may be.”²²⁴

Offering another academic perspective, the AALS, through the work of an appointed advisory committee on the ABA Standards Review Committee, expressed concern that the proposed ABA Standards “might either undercut the basic structure of faculty governance of law schools by full-time faculty or weaken” academic freedom.²²⁵ American legal education is respected worldwide, in part, because of its distinctive “professional legal professoriate.”²²⁶ Indeed, the AALS emphasized that academic freedom is also a public value, foundational for clinicians’ ability to withstand “the growing number of attacks some law school clinics have faced for representing unpopular clients.”²²⁷

The future of clinical legal education suggests that transactional clinicians would do well to monitor developments in legal education

220. CLEA, COMMENTS, *supra* note 219, at 3.

221. *Id.*

222. *Id.* at 3.

223. *Id.* at 5–6 (suggesting 302-2(a)(4) require one faculty-supervised experience working with a client or clients to solve a legal problem or to realize an opportunity).

224. *Id.* at 3.

225. Letter from H. Reese Hanson, AALS President, to Hewlett H. Askew, Consultant on Legal Education Section on Legal Education and Admissions to the Bar (June 1, 2010), available at http://www.aals.org/services_newsletter_presMay10.php.

226. *Id.*

227. *Id.*

outcomes and assessments. Indeed, many transactional clinicians, entrenched in clinical methodology, have already undertaken the task of thinking about outcomes as they teach students lawyering skills and values in a business context.²²⁸ In this “new normal” legal environment, law firms are no longer willing to train new lawyers as they did in the past.²²⁹ New law firm models are emerging and, in some corporate practices, the billable hour is being replaced with a flat fee.²³⁰ Studies of legal education, economic constraints facing law schools, and a challenging job market facing law graduates have all resulted in changes to legal education.

CONCLUSION

This Article is a sequel to a 1997 work by Professor Susan R. Jones entitled “Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice,” which was one of the first scholarly articles to discuss small business clinics. It was published more than fifteen years ago in the *Clinical Law Review*, at a time when transactional (small business) clinics were relatively new clinical offerings. These clinics, like their litigation counterparts, mirror economic, political, and social influences in American society. While the late 1970s and early 1980s witnessed only a handful of small business clinics and fewer than twenty CED clinics, today, there are more than 140 transactional clinics, including small business transactional, microenterprise and entrepreneurship, nonprofit, intellectual property (including technology transfer), and community economic development.

Mindful of the important role of entrepreneurship and innovation, the ongoing shifts in legal education and law practice, and the recent

228. Jones, *Small Business*, *supra* note 1; Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 241 (2011) (citing Jones, *Small Business*, *supra* note 1, at 195–96).

229. Danny Ertel and Mark Gordon, *Points of Law: Unbundling Corporate Legal Services to Unlock Value*, HARV. BUS. REV., July–Aug. 2012.

230. Ben Fischer, *Upstart Law Firm Expands New Model; Clearspire Opening Offices in Five U.S. Cities*, WASH. BUS. J., Feb. 22, 2013.

emphasis on social enterprise, the authors hope this Article will ignite a robust conversation within the transactional clinical community about best practices, opportunities and innovations in the field, and clinical pedagogy and design, now and in the future.