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# YOU CAN'T JUST LEARN IT ON THE JOB: THE CASE FOR REQUIRING TRANSACTIONAL DRAFTING WITHIN THE LAW SCHOOL CURRICULUM

*Joseph Hummel\**

I.	INTRODUCTION.....	2
II.	THE CURRENT STATE OF TRANSACTIONAL DRAFTING WITHIN LEGAL WRITING AND THE LAW SCHOOL CURRICULUM.....	3
III.	DEFINING TRANSACTIONAL DRAFTING .....	9
IV.	WHY SHOULD STUDENTS LEARN TRANSACTIONAL DRAFTING?.....	15
	<i>A. Transactional Drafting Skills Offer Broad Applicability to All     Practices of Law</i> .....	15
	<i>B. Transactional Drafting and the NextGen Bar Exam</i> .....	19
V.	EXISTING PROPOSALS FOR REMEDYING THE DEFICIENCY IN TRANSACTIONAL DRAFTING AND SKILLS TRAINING EDUCATION....	22
VI.	ISSUES AND LIMITATIONS WITH EXISTING PROPOSALS FOR INCORPORATING TRANSACTIONAL DRAFTING AND SKILLS TRAINING.....	27
	<i>A. Academic Prioritization</i> .....	28
	<i>B. Human Resources</i> .....	32
VII.	A REASONABLE WAY FORWARD: REQUIRING TRANSACTIONAL DRAFTING IN THE LAW SCHOOL CURRICULUM .....	35

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\* Joseph Hummel. Assistant Professor of Law, University of North Texas at Dallas College of Law, Dallas, Texas. B.A. 2005, Boston College; J.D. 2008, Southern Methodist University Dedman School of Law. A version of this paper was presented at the Lone Star Regional Legal Writing Conference at the University of Houston Law Center on April 5, 2024. The author is indebted to and wishes to thank Professor Natalie Brandt for her insightful comments on this article. The author also wishes to thank the editors and staff at the *Texas Tech Law Review* for their hard work and diligent efforts in making this article come together.

## I. INTRODUCTION

This Article argues that transactional drafting should be a required course in the law school curriculum, and specifically one taught outside of and apart from first-year legal writing. First-year legal writing has traditionally focused on an objective memo—persuasive brief format.<sup>1</sup> Often, this involves analysis of a tort or some other “litigation-style” hypothetical in either or both semesters.<sup>2</sup> In doing so, first-year writing programs skew toward a litigation focus or orientation.<sup>3</sup> The effect of this orientation largely risks ignoring the transactional component of legal education and practice, as well as the professional desires and aspirations of many law students.<sup>4</sup> As a consequence, students interested in transactional practice are left to learn those skills, if at all, in upper-level electives or, more likely, in on-the-job training.<sup>5</sup> Given the broad utility, applicability, and necessity of transactional drafting skills to legal practice—be it in either a transactional or litigation setting—this need not and should not be the case. Requiring law schools to teach transactional drafting would not only meet the needs and desires of law students soon to enter the workforce, but it would also better prepare them for contract and transactional subject matter and skills proposed to be tested on the NextGen Bar Exam.<sup>6</sup>

This paper consists of six parts. Part II of this paper discusses the current state of legal writing pedagogy, and in particular, transactional drafting within it as part of legal education.<sup>7</sup> Part III looks at the scope of and defines transactional drafting as a unique, but necessary, discipline within the framework of legal education.<sup>8</sup> Part IV explains why transactional drafting education is not only important but necessary: (1) for success as a well-rounded, practicing attorney and legal writer, and (2) for preparedness on the NextGen Bar Exam.<sup>9</sup> Part V surveys proposals for incorporating transactional drafting into the law school curriculum.<sup>10</sup> Part VI evaluates those proposals and identifies them as well-intended and aspirational, but

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1. See Julie M. Spanbauer, *Teaching First-Semester Students That Objective Analysis Persuades*, 5 J. OF THE LEGAL WRITING INST. 167, 167 (1999).

2. See Lynnise Pantin, *Deals or No Deals: Integrating Transactional Skills in the First Year Curriculum*, 41 OHIO N. UNIV. L. REV. 61, 72 (2014) [hereinafter Pantin, *Deals*].

3. *Id.* at 77.

4. *Id.* at 73.

5. *Id.* at 64.

6. See *Content Scope Outlines for Public Comment*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/reports/preliminary-content-scope/> (last visited Sept. 4, 2024) [hereinafter NextGen Bar CSO].

7. See *infra* Part II (explaining the litigation-focused approach of legal writing education and its neglect of transactional skills).

8. See *infra* Part III (distinguishing transactional legal writing from other types of legal writing).

9. See *infra* Part IV (explaining the importance of teaching transactional writing to law students).

10. See *infra* Part V (discussing various proposals for incorporating transactional drafting into the law school curriculum).

ultimately insufficient to wholly incorporate transactional drafting in the law school curriculum in the most efficient, complete, and effective manner.<sup>11</sup> As a solution to remedy the deficiencies in those existing proposals, Part VII proposes mandating transactional drafting as a required course in the law school curriculum—particularly one taught outside of first-year legal writing.<sup>12</sup>

## II. THE CURRENT STATE OF TRANSACTIONAL DRAFTING WITHIN LEGAL WRITING AND THE LAW SCHOOL CURRICULUM

Under the Curriculum guidelines set out in Standard 303(a) of the American Bar Association Standards and Rules of Procedure for Approval of Law Schools (ABA Standards), legal writing is the only professional skill required to be taught in the first year of law school.<sup>13</sup> The ABA Standards also require “at least one additional writing experience after the first year,” which can take the form of an upper-level legal writing elective or participation on a law journal.<sup>14</sup> Yet beyond the requirement that law schools offer legal writing in the first year and an “additional writing experience”<sup>15</sup> after that, little exists in the way of requirements for what content those legal writing courses should or must specifically contain.<sup>16</sup> The answer, though, seems to lie in tradition. The first-year legal writing course of a traditional law school program has tended to enforce a litigation-oriented curriculum, and often at the expense of transactional skills and drafting.<sup>17</sup> First-year legal writing often focuses on objective and persuasive writing.<sup>18</sup> Objective, or predictive, writing involves an objective or neutral assessment of a legal issue based on how the law might be applied against a specific set of facts.<sup>19</sup> Objective writing sees its goal as educating the client.<sup>20</sup> Persuasive writing, on the other hand, focuses on the lawyer’s role as an advocate for a client, trying to persuade an audience to adopt a position, grant some relief, or take—or not take—some action relative to a client’s position.<sup>21</sup> This broad,

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11. See *infra* Part VI (explaining the deficiencies of the proposals discussed in Part V).

12. See *infra* Part VII (discussing the author’s proposal to include transactional drafting in the law school curriculum).

13. See STANDARDS AND RULES OF PROC. FOR APPROVAL OF LAW SCHS. Standard 3.03(a) at 20 (AM. BAR ASS’N 2024) [hereinafter ABA Standards].

14. See *id.*

15. See *id.*

16. See *id.*

17. See Pantin, *Deals*, *supra* note 2, at 63 (citing Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59, 60–61 (2007)).

18. See Spanbauer, *supra* note 1.

19. See *id.* at 176–77.

20. See Anna P. Hemingway, *Making Effective Use of Practitioners’ Briefs in the Law School Curriculum*, 22 ST. THOMAS L. REV. 417, 420 (2010).

21. See Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387, 389–90 (2002).

bifurcated, objective-persuasive categorization forms the basis of many first-year legal writing programs.<sup>22</sup> In many—if not most—programs students spend their first semester working on an objective memo and their second semester working on a persuasive brief or an appeal.<sup>23</sup> Often, both semesters utilize a litigation or dispute resolution scenario for context.<sup>24</sup>

Recent survey responses collected by the Association of Legal Writing Directors (ALWD) or Legal Writing Institute (LWI) support these historical practices.<sup>25</sup> The ALWD/LWI Legal Writing Survey 2019–2020 (the ALWD 2019–2020 Survey) shows that objective writing and persuasive writing were still the focus of the first and second semesters of the first year, respectively.<sup>26</sup> For the 2019–2020 survey year, out of 160 responses from legal writing faculty, 151 respondents identified the “1L First Full Term” as the academic term in which objective (including predictive) legal analysis and writing is taught, whereas 145 out of 160 identified the “1L Second Full Term” as the academic term principally focused on “basic persuasive writing.”<sup>27</sup> While the ALWD/LWI Legal Writing Report of the 2020–2021 Survey (ALWD 2020–2021 Survey) did not specifically ask respondents for a breakdown of the semesters in which they taught objective and persuasive writing, the responses, thematically, aligned with responses from the prior year.<sup>28</sup> Of the 321 respondents for the 2020–2021 year, 188 taught a “[c]ourse focusing principally on objective (including predictive) legal analysis and writing,” 157 taught a “[c]ourse focusing principally on basic persuasive writing,” and 145 taught a “[c]ourse focusing on both objective (including predictive) legal analysis and writing AND basic persuasive writing.”<sup>29</sup> The ALWD/LWI Legal Writing Survey 2021–2022 (ALWD 2021–2022 Survey) results were in line with prior years.<sup>30</sup> Of the 138 respondents who noted that their school taught a “[c]ourse focusing principally on objective (including predictive) legal analysis and writing,” 129 offered it in the 1L First Full Term, and six offered it in the 1L Second Full Term.<sup>31</sup> Of the 134 respondents who noted

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22. See Johanna K.P. Dennis, *The Renaissance Road: Redesigning the Legal Writing Instructional Model*, 38 S. UNIV. L. REV. 111, 130 (2010).

23. See *id.*

24. See Adam N. Eckart, *Litigation Bias*, 101 OR. L. REV. 51, 59–60 (2022) [hereinafter Eckart *Bias*].

25. See Ted Becker et al., *ALWD/LWI Legal Writing Survey, 2019–2020*, ASS’N OF LEGAL WRITING DIRS. (2021) [hereinafter *ALWD 2019–2020 Survey*]; Ted Becker et al., *ALWD/LWI Legal Writing Survey, 2020–2021*, ASS’N OF LEGAL WRITING DIRS. (2022) [hereinafter *ALWD 2020–2021 Survey*]; Ted Becker et al., *ALWD/LWI Legal Writing Survey, 2021–2022*, ASS’N OF LEGAL WRITING DIRS. (2023) [hereinafter *ALWD 2021–2022 Survey*].

26. See *ALWD 2019–2020 Survey*, *supra* note 25, at 26.

27. *Id.*

28. See generally *ALWD 2020–2021 Survey*, *supra* note 25 (showing that the survey did not ask specifically about semesters when discussing objective and persuasive writing).

29. *Id.* at 15.

30. See generally *ALWD 2021–2022 Survey*, *supra* note 25 (showing that the ALWD 2021–2022 survey results were consistent with prior surveys).

31. *Id.* at 24.

their schools taught a “[c]ourse focusing principally on basic persuasive writing,” 122 offered it in 1L Second Full Term, five offered it in 1L First Full Term, and three offered it in 2L First Full Term.<sup>32</sup>

These figures are perhaps not surprising given the utility and foundation that objective and persuasive writing and related assignments offer law students.<sup>33</sup> Objective and persuasive writing requires students to research case law and statutes, analyze the law, organize an argument, and apply fundamental principles of legal reasoning to either predict or advocate for an outcome.<sup>34</sup> In many instances these assignments work in tandem with other first-year subjects.<sup>35</sup> For instance, students may write a memo analyzing whether a party can satisfy all of the elements of a tort or whether a litigant will succeed on a breach of contract claim.<sup>36</sup> During first-year legal writing, students may also learn oral advocacy skills and other “non-traditional” means of written communication, such as professional emails.<sup>37</sup> These are fundamental skills applicable to any litigation practice, but they are also skills necessary for any well-rounded legal education.<sup>38</sup>

This traditional, “litigation-dominated model” of legal writing has largely remained the norm across law schools for many years.<sup>39</sup> Although commonly perceived as a rite of passage for first-year law students, these litigation-oriented assignments often do little to introduce students to transactional topics, or even transactional documents in their entirety, if at all.<sup>40</sup> *As of 2011*, “[a]t best, 15% of mandatory [legal research and writing (LRW)] courses include[d] transactional [or contract] drafting, while 18% ha[d] some transactional skills component in their first[-]year curriculum.”<sup>41</sup> Given that “[a]t least half, if not more, of all attorneys engage in some form of transactional practice, rather than litigation, or [an]other form of dispute resolution,” a traditional litigation-oriented law school and legal writing

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32. *Id.*

33. See generally Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 249 (1996) (“Legal research and legal writing have traditionally been identified as the two most fundamental skills that a first year student should master.”).

34. See Elizabeth E. Berenguer, *Designing Problems to Enhance Student Learning*, 28 J. OF THE LEGAL WRITING INST. 77, 86–89 (2024).

35. See, e.g., Susan J. Hankin, *Bridging Gaps and Blurring Lines: Integrating Analysis, Writing, Doctrine, and Theory*, 17 J. OF THE LEGAL WRITING INST. 325, 334–41 (2011) (discussing an “integrated” program for a “Legal Analysis and Writing” class at the University of Maryland School of Law that incorporates legal writing with a “connected course, either Torts, Contracts, or Civil Procedure.”).

36. *Id.* at 345.

37. Sherri Lee Keene, *One Small Step for Legal Writing, One Giant Leap for Legal Education: Making the Case for More Writing Opportunities in the “Practice-Ready” Law School Curriculum*, 65 MERCER L. REV. 467, 494 (2014).

38. See Silecchia, *supra* note 33.

39. See Pantin, *Deals*, *supra* note 2, at 65.

40. See Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 477–78 (2002).

41. See Pantin, *Deals*, *supra* note 2, at 76 (citing Tina Stark, *Transactional Education: What’s Next?, Welcome & Opening Remarks*, 12 TENN. J. BUS. L. 3, 5 (2011)).

curriculum leaves a significant percentage of law students without required exposure to a broad and important area of law.<sup>42</sup> Beyond the 50% of law graduates working in the transactional realm,<sup>43</sup> a significant number of graduates are also accepting employment in “J.D. Advantage” positions.<sup>44</sup> J.D. Advantage positions include those “in which the possession of a J.D. by the graduate was sought by the employer, required by the employer, or provided a demonstrable advantage in either obtaining or performing the duties of the position from the perspective of the employer,” but which nevertheless “do not require passage of the bar exam or authorization to practice law or involve practicing law.”<sup>45</sup> The ABA defines J.D. Advantage jobs to “include landman, tax associate, regulatory analyst, patent agent, FBI agent, paralegal/legal assistant, and compliance manager/specialist.”<sup>46</sup> For the class of 2021, and as of April 18, 2022, 10.4% of law students were employed in J.D. Advantage positions, up from 10% for the class of 2020.<sup>47</sup> While the number of students in J.D. Advantage positions decreased slightly to 9% for the class of 2022,<sup>48</sup> that percentage is still not insignificant, and suggests the number of law graduates working in areas other than litigation could be higher than the estimated 50%.<sup>49</sup>

That is not to say that law students are not receiving any instruction in transactional drafting skills. The ALWD 2019–2020 Survey suggests law schools are increasing offerings of transactional drafting-related courses, but these are most often available as non-required, upper-level electives.<sup>50</sup> In response to the question, “Which Elective LRW Courses has your school offered during the Current Academic Year and the past two Academic Years?”, 62% of the participants in the ALWD 2019-2020 Survey responded that they offered contract drafting; 57% offered drafting survey courses, which included drafting a variety of practice-oriented documents; 32% offered corporate document drafting, including “bylaws, offering statements, SEC compliance documents, etc.”; and 15% offered other transactional

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42. See Pantin, *Deals*, *supra* note 2, at 61 n.3 (citing David V. Snyder, *Closing the Deal in Contracts: Introducing Transactional Skills in the First Year*, 34 U. TOL. L. REV. 689, 689 (2003) (“stating that half or more than half of law students are going to be transactional lawyers.”)).

43. See Snyder, *supra* note 42.

44. See Adam N. Eckart, *Deal Me In: Leveraging Pedagogy to Integrate Transactional Skills into the First Year Legal Research and Writing Curriculum*, 21 U.C. DAVIS BUS. L.J. 125, 138 n.65 (2020) [hereinafter Eckart *Deal*].

45. AM. BAR ASS’N, EMPLOYMENT OUTCOMES AS OF APRIL 2022 (CLASS OF 2021 GRADUATES) 2 (Apr. 18, 2022), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2022/class-2021-online-table.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/class-2021-online-table.pdf).

46. *Id.*

47. *Id.* at 1.

48. See AM. BAR ASS’N, EMPLOYMENT OUTCOMES AS OF MARCH 15, 2023 (CLASS OF 2022 GRADUATES) 1 (Apr. 5, 2023), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2023/class-2022-online-table.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2023/class-2022-online-table.pdf).

49. See generally *id.* (displaying employment statistics of 2022 law graduates).

50. See ALWD 2019–2020 Survey, *supra* note 25, at 40.

drafting.<sup>51</sup> Further, the survey identified specific transactional drafting topics within that 15% of other transactional drafting.<sup>52</sup> Those include business planning, real estate, real estate drafting, immigration documents, drafting licensing agreements, intellectual property transactional drafting, and a practical business transactions course.<sup>53</sup> Of those four categories, only one respondent identified one course—the drafting survey course—that was exclusively taught within the first LRW program.<sup>54</sup> The remaining courses were either taught as part of an upper-level legal writing program, or to a much lesser degree, as part of a “Combined First Year and Upper-Level LRW Program.”<sup>55</sup> No respondents identified corporate document drafting or other transactional drafting as falling within the combined first-year and upper-level LRW program.<sup>56</sup> Only 5% and 7% of respondents, respectively, identified the drafting survey course and contract drafting as falling within the combined first-year and upper-level LRW program category.<sup>57</sup> At least with respect to courses specifically identified as contract drafting, this data shows an increase in the number of schools offering transactional drafting-related courses over the past decade, but almost always after the first year, and almost always as an elective course.<sup>58</sup> One survey suggests that as of 2020, as few as “7% of [law] schools offer some instruction on transactional skills” in the first-year legal research and writing course.<sup>59</sup> The ALWD 2020–2021 Survey did not include the question, “Which Elective LRW Courses has your school offered during the Current Academic Year and the past two Academic Years?”<sup>60</sup>

The next two ALWD surveys similarly show that transactional drafting courses were being offered, though again at lesser rates than objective and persuasive writing-focused first-year courses, and most often as electives offered outside the first year.<sup>61</sup> Of the 321 respondents who taught legal writing courses during the 2020–2021 academic year, 6 offered a drafting survey course, 17 offered general contract drafting, 2 offered corporate document drafting, including “bylaws, offering statements, SEC compliance documents, etc.,” and 5 offered courses that were “transactional” in nature: including “[f]amily law drafting (prenups, divorce and property settlement agreements, custody agreements, etc.),” corporate dealmaking, drafting

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51. *Id.*

52. *Id.*

53. *Id.* at 41.

54. *Id.* at 54 (discussing Q7.9#1).

55. *Id.*

56. *Id.*

57. *Id.*

58. See Eckart *Deal*, *supra* note 44, at 140–42 (noting that, according to the ALWD annual surveys, 60% of schools offered contract drafting courses from 2017–2018 as compared to 34.4% in 2008).

59. See *id.* at 136–37.

60. See *ALWD 2020–2021 Survey*, *supra* note 25.

61. See *id.*; *ALWD 2021–2022 Survey*, *supra* note 25.

healthcare documents, and introduction to transactional skills.<sup>62</sup> Most of these were designated as courses satisfying an upper-level writing requirement, and only two noted that the course was required.<sup>63</sup>

Results for the ALWD 2021–2022 Survey followed a similar pattern.<sup>64</sup> In response to a question about required LRW courses, seven of 144 respondents, or 5%, noted that transactional drafting was a required course.<sup>65</sup> Two noted that the course was required in the 1L Third Full Term—suggesting that a trimester program may have specifically carved out space for transactional drafting instruction, possibly in tandem with a first semester objective memo, second semester persuasive brief format.<sup>66</sup> Transactional drafting-related courses were offered as electives at a higher rate.<sup>67</sup> 65% of respondents noted their schools offered general contract drafting; 32% offered corporate document drafting, including “bylaws, offering statements, SEC compliance documents, etc.”; and 56% offered a drafting survey course.<sup>68</sup> Drafting courses touching on transactional-related documents were also noted as being offered: family law drafting, other transactional drafting, and wills and estate planning drafting were noted as being offered by 18%, 18%, and 29%, respectively.<sup>69</sup>

While this information might be telling as to the number of law school programs offering some version of a transactional drafting course, it falls short of giving that very fact—it is data about transactional drafting courses being *offered*, and less about total enrollment in those courses,<sup>70</sup> or even frequency with which the courses are offered.<sup>71</sup>

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62. *ALWD 2020–2021 Survey*, *supra* note 25, at 15.

63. *See id.* at 17.

64. *See generally ALWD 2021–2022 Survey*, *supra* note 25 (showing limited upper-level drafting courses).

65. *Id.* at 20–21.

66. *See id.* at 24.

67. *Id.* at 37.

68. *Id.*

69. *Id.*

70. *Id.* The 2021–2022 ALWD Survey did provide some information on student enrollment in elective transactional drafting-related courses, but reported figures were only available if respondents provided information about the course. *Id.* Responses did provide some information about average class size. *Id.* For instance, respondents noted that for the 2021–2022 academic year, an average of 17.1 students were enrolled in contract drafting, 15.7 students in corporate document drafting, 15.1 students in a drafting survey course, and 15.1 in other transactional drafting. *Id.* at 40–41. A variance does exist in the reported averages given that some respondents noted “0” in response to certain questions, perhaps as oversight or perhaps to indicate that their school did not offer the stated course. *Id.* at 38. These averages reflect the responses if 0s were excluded, thus providing a higher mean. *Id.*

71. *See generally id.* (failing to report enrollment and other statistics).

## III. DEFINING TRANSACTIONAL DRAFTING

The ALWD/LWI surveys are helpful in assessing the evolution of legal writing education, but as noted, in a sense they only tell so much.<sup>72</sup> Moreover, some of the nomenclature and terminology specifics in the responses prompt their own questions.<sup>73</sup> If we are interested in assessing the state of transactional drafting pedagogy in law schools, what do we include within the scope of a transactional drafting course? Does a family law drafting course requiring students to draft a pre-nuptial agreement count? Are we including doctrinal courses that ask students to draft a will or trust document? How comprehensive, if at all, are work product assignments in a drafting survey course? This uncertainty begs a question, and one related to our thesis: if we are going to require transactional drafting, what exactly does transactional drafting mean, and what exactly does it include?

Defining transactional drafting is no easy matter. But we can define it in relation to other types of writing because transactional drafting serves a different purpose than other types of legal writing.<sup>74</sup> Transactional drafting does not seek to be either predictive or persuasive.<sup>75</sup> Instead, transactional drafting, and transactional skills generally, might best be described as “prescriptive.”<sup>76</sup> Transactional drafting is not concerned with predicting the outcome of a specific legal situation, nor does it attempt to persuade its reader as to a certain legal position.<sup>77</sup> Rather, transactional drafting aims to regulate behavior and dictate the future conduct of parties relative to a business transaction or other legal relationship.<sup>78</sup> While a singular definition may prove elusive, Professor Lynnise Pantin’s definition proves useful: “‘Transactional law’ refers to the various substantive legal rules that influence or constrain planning, negotiating, and document drafting in

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72. *See id.*

73. *See id.*

74. Eric Gouvin et al., *Teaching Communications Skills in Transactional Simulations*, 20 TENN. J. BUS. L. 429, 430–31 (2019).

75. *See id.* But that is not to say that persuasion has no place in transactional documents. *Id.* While a brief or motion may be persuasive with an aim to convince a judge to take or not take some action, transactional documents can still, and in the eyes of some should, benefit from legal persuasion informed by, among other things, rhetoric, science, logic, and narrative. *See generally* Susan M. Chesler & Karen J. Sneddon, *The Power of a Good Story: How Narrative Techniques Can Make Transactional Documents More Persuasive*, 22 NEV. L.J. 649, 657–58 (2022).

76. *See* Carol Goforth, *Transactional Skills Training Across the Curriculum*, 66 J. LEGAL EDUC. 904, 905 (2017).

77. *See* Paolo Butturini & Susan L. DeJarnatt, *Taking on the Role of Lawyer: Transactional Skills, Transnational Issues, and Commercial Law*, 44 S. ILL. U. L.J. 225, 229 (2020) (citing Eric Gouvin et al., *Teaching Communications Skills in Transactional Simulations*, 20 TENN. J. BUS. L. 429 (2019)).

78. *See* Gouvin, *supra* note 74, at 430 (“[For example,] [t]he transactional lawyer assists in creating employer-employee relationships for the client who owns a business, [or] in creating a set of legal relationships for the client setting up a tax plan or a new entity . . . . All these transactional lawyer acts make events happen in the future that would not otherwise have occurred.”).

connection with business transactions, as well as the ‘law of the deal’ (i.e., the negotiated contracts) produced by the parties to those transactions.”<sup>79</sup>

While transactional drafting and litigation drafting share and require, in name, many of the same skills, the two disciplines are nevertheless unique.<sup>80</sup> From a drafting perspective, how a transactional lawyer makes a transaction or deal come together requires many of the same skills an effective litigator may utilize to analyze a legal issue—conceptualization of client objectives, knowledge of the law, and clear writing, among others.<sup>81</sup> The two disciplines, however, differ in application and context,<sup>82</sup> and traditionally required legal writing programs have more often than not ignored or deemphasized the transactional elements of these skills.<sup>83</sup>

Effective transactional drafting requires a lawyer to be able to understand the client’s objectives, understand the legal framework that exists and which must exist in order to reach those objectives, and translate those objectives into a legally enforceable agreement using clear, precise, and unambiguous language.<sup>84</sup> As an initial matter, a transactional attorney must possess a certain business acumen.<sup>85</sup> A transactional lawyer must understand a client’s objectives to “memorialize and effectuate a client’s intentions in connection with business and financial events and transactions.”<sup>86</sup> This entails more than the simple “fact gathering” exercise common within the purview of objective and persuasive writing.<sup>87</sup> Objective and persuasive writing is most often concerned with precedent and past events designed to estimate some future event or assign responsibility for wrongs.<sup>88</sup> In the transactional setting, this process is future-oriented and collaborative, and

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79. Pantin, *Deals*, *supra* note 2, at 66 (citing THE ASS’N OF AM. L. SCH., WORKSHOP ON TRANSACTIONAL LAW, THE IMPROVEMENT OF THE LEGAL PROFESSION THROUGH LEGAL EDUCATION 2 (2009)).

80. See Snyder, *supra* note 42, at 689–90.

81. Compare *id.* (discussing “thinking as a planner” as a skill of the transactional lawyer) with Soma R. Kedia, *Redirecting the Scope of First-Year Writing Courses: Toward a New Paradigm of Teaching Legal Writing*, 87 U. DET. MERCY L. REV. 147, 156 (2010) (discussing how “writing for judges and fellow lawyers” have “distinct features” and aspects, including problem solving, organizational structure, and reasoning and analysis).

82. Snyder, *supra* note 42, at 690.

83. See Eckart Bias, *supra* note 24.

84. See generally Barbara Wagner et al., *Defining Key Competencies for Business Lawyers: Report of the Task Force on Defining Key Competencies for Business Lawyers*, 72 BUS. LAW. 101, 115–39 (2017) (discussing the professional skills of business lawyers as set out by the Business Law Education Committee of the ABA Business Law Section’s Task Force on Defining Key Competencies of Lawyers).

85. See Gouvin, *supra* note 74 (discussing that for a lawyer, a transactional client is different from a litigation client and the lawyer may be less knowledgeable about the transactional client’s “playing field” than the client is).

86. Goforth, *supra* note 76, at 912; Michael R. Smith, *Alternative Substantive Approaches to Advanced Legal Writing Courses*, 54 J. LEGAL EDUC. 119, 124 (2004) (discussing a transactional lawyer’s objectives).

87. See Wagner, *supra* note 84, at 115–17 (discussing the business lawyer’s need to understand the parties’ “relationships in a transaction” and their “motivations in a transaction”).

88. See Pantin, *Deals*, *supra* note 2, at 68.

aims to avoid dispute and litigation.<sup>89</sup> As distinct from predictive or persuasive writing, transactional drafting is oriented to help foretell where the transaction or deal might go wrong,<sup>90</sup> evaluate contingencies and possibilities of risks and unknown events,<sup>91</sup> recognize what the client needs but doesn't know they need, understand what non-legal or "business" issues<sup>92</sup> might arise for the client in the future, and recognize what circumstances—be they legal, regulatory, financial, or political—may implicate or impact future performance.<sup>93</sup> This is not strictly speaking a knowledge of the law, but requires the lawyer to navigate the client's objectives relative to the law.<sup>94</sup> In other words, a transactional attorney must know what the client needs and wants in order to attain those objectives within an existing legal framework.<sup>95</sup> Often this involves communicating about legal, and at times, highly technical matters with clients who may not have the benefit of a legal education or knowledge of the law.<sup>96</sup> If the lawyer and the client cannot effectively communicate about objectives, ideas, or the state of the law, the lawyer may not meet the client's objectives and otherwise avoidable disputes may arise.<sup>97</sup>

None of that is to say that the transactional attorney need not know the law, or that transactional drafting is not informed by the law.<sup>98</sup> Rather, transactional drafting does require a knowledge of substantive law, and one perhaps distinct from that utilized in objective and persuasive writing.<sup>99</sup> If a lawyer, transactional or otherwise, lacks an understanding of what the law is or what it requires relative to a business transaction, whether the final work product reflects a client's objectives or how well a contract or a specific

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89. See Gouvin, *supra* note 74.

90. See Wagner, *supra* note 84, at 119 (discussing how "a good business lawyer will identify not only the immediate legal issues, but also risks that may arise down the road").

91. See *generally id.* at 123 (discussing how "a good business lawyer should understand risk management techniques that may assist clients in reducing or minimizing legal and business risks").

92. See *generally id.* at 119 (noting that the business lawyer must "[r]ecognize that not all problems are legal problems" and that "the most valued business lawyers provide business advice as well").

93. See *id.* at 121 (recognizing that "[g]ood business lawyers consider not only the effect of external systems—economic, political, social, and environmental—but also the financial, commercial, organizational, and personal constraints and priorities of clients and other interested persons").

94. See *id.* at 115–17 (discussing the business lawyer's need to "[u]nderstand the parties' relationships in a transaction" and their "motivations in a transaction").

95. See *id.*

96. See *id.* at 129 (noting that "[b]usiness clients vary in their level of sophistication, and the lawyer must be aware of how familiar the client is with legal concepts and issues," and that "a lawyer must be able to explain complex legal concepts in plain English").

97. See *generally id.* at 128–30 (discussing the role of and need for effective communication in a business lawyer's relationship with her client).

98. See *generally id.* at 115–16, 121–22 (discussing the need for business lawyers to "[p]ossess basic business knowledge," including financial literacy, and "possess a mastery of relevant law in order to identify and evaluate the legal issues confronting the client").

99. See *id.* at 121–22 (discussing how a business lawyer must have knowledge of "contracts, business organizations, and property, and may also include a range as diverse as administrative law, securities law, debtor-creditor law, the Uniform Commercial Code, bankruptcy, agency, intellectual property and licensing, corporate finance, and taxation, among others").

contract clause is written may prove entirely irrelevant if the contract or a provision within it is unenforceable, or legally accomplishes the opposite of the client's intended objectives.<sup>100</sup> Laws change, statutes are amended, new regulations come into effect.<sup>101</sup> That the law evolves remains a reality from which transactional attorneys are not immune.<sup>102</sup> Yet whereas objective and persuasive writing rely (to a large degree) on statutory and case law, transactional drafting is often informed by other non-legal resources that may be necessary to address a transactional legal issue.<sup>103</sup> With its focus on case law and case-oriented coursebooks, traditional litigation-oriented law school curricula, and legal writing programs in particular, often leave law students, and legal writing students, lacking the necessary exposure to these non-legal resources.<sup>104</sup>

Transactional drafting also requires a high degree of precision and clarity in writing in a manner that objective and persuasive writing do not.<sup>105</sup> An objective or persuasive writing assignment that involves a dispute or litigation scenario requires students to evaluate an issue after a problem has already arisen or some issue has gone wrong—for example, if a party has committed or potentially committed some tort, breached some contract, or violated some statute.<sup>106</sup> In these circumstances the written source of the dispute has already come into existence.<sup>107</sup> On the other hand, transactional writing, being prescriptive in nature, aims to prevent problems from ever arising in the first place by setting out the parties' rights, duties, and obligations—and contractual terms that set and define them—in language that is clear and understandable to both the client and third parties who may review the contract in the future.<sup>108</sup> The underlying skill—precision in

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100. See generally *id.* (discussing the need for lawyers to properly understand and evaluate the law).

101. See *id.* at 122 (“[A] good business lawyer will develop a sense not only of what the law is, but also what it was, why it is, and where it might be going. In addition, the experienced business lawyer will be aware of regulatory developments that may signal more scrutiny by regulators in certain areas.”).

102. See *id.*

103. See Eckart *Deal*, *supra* note 44, at 131 (citing Praveen Kosuri, *Beyond Gilson: The Art of Business Lawyering*, 19 LEWIS & CLARK L. REV. 463, 484–85 (2015) (discussing how transactional lawyers research and understand business and non-legal information, including industry information)).

104. See Eckart *Bias*, *supra* note 24, at 60–61 (noting that “[a]s many as 95% of all assignments in the Legal Research and Writing classroom are litigation-based, with fewer than 5% of such assignments categorized as ‘transactional-based’”).

105. See Jonathan Todres, *Beyond the Case Method: Teaching Transactional Law Skills in the Classroom*, 37 J.L. MED. & ETHICS 375, 377 (2009) (“Drafting is an essential skill in the transactional world . . . . Drafting, as all practicing attorneys know, demands great precision.”).

106. See *id.* at 376–77 (discussing the “nature and role of the risk assessment” as being different in a transactional as opposed to litigation setting and noting how assignments in a transactional course may “get students to project into the future, think about potential risks and which party should bear the burden, and examine the potential implications of those risk-related decisions”).

107. See *id.* at 375–76 (“Transactional practice differs from litigation at a fundamental level: While the latter typically looks back in time, reviewing what went wrong, and seeking accountability for past actions, the former is forward-looking and typically takes place when there is no conflict or dispute to resolve.”).

108. *Id.*

drafting—is the same,<sup>109</sup> but when and how the lawyer achieves that, and the manner in which they do it, is different in a transactional setting.<sup>110</sup>

In *A Manual of Style for Contract Drafting*, Ken Adams, an authority on contract language and usage, states that “[c]onfusing contract language leads to uncertain meaning, and uncertain meaning can lead to disputes.”<sup>111</sup> Adams identifies five sources from which uncertain meaning in contract language arises: “ambiguity, failure to be sufficiently specific, mistake, conflict, failure to address an issue, and vagueness.”<sup>112</sup> Certainly students may learn about these topics in legal writing, or even courses like Contracts.<sup>113</sup> But if the means of learning these issues is through an objective memo or persuasive brief, such as analyzing whether a mistake is grounds for reformation, that would not necessarily teach the transactional skill of drafting contractual language to avoid the problem from the outset.<sup>114</sup> Transactional drafting skills are unique from objective and persuasive writing skills in application in that the transactional lawyer must critically and proactively draft language with an awareness of potential ambiguity, lack of specificity, mistakes, conflicting terms, omitted terms or issues, and vagueness so as to prevent them from ever arising or appearing in the final document.<sup>115</sup> For example, being able to research and draft a memo identifying various jurisdictions’ definitions of “reasonable efforts” is a very different skill than being able to appreciate the inherent vagueness in the term itself and prospectively draft a contract to avoid problems relating to or arising from that term’s vagueness.<sup>116</sup> Transactional drafting may also utilize contractual forms that may or may not have negotiable terms.<sup>117</sup> Litigators are rarely limited in such a manner.<sup>118</sup> Grammar, syntax, and style, which all

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109. See *id.* at 377 (“Equally important, like litigation, every transactional matter is unique, and each one requires lawyers to draft new language that both is precise and does not expose their clients to liability or excessive risk.”).

110. See Snyder, *supra* note 42, at 689–90.

111. See KENNETH A. ADAMS, *A MANUAL OF STYLE AND CONTRACT DRAFTING* 185 (4th ed. 2018). Though difficult to quantify, the percentage of litigation that arises from drafting-related issues is not insignificant. One study from Harvard Law School suggested that poor drafting resulted in up to 25% of all contract disputes. See Goforth, *supra* note 76, at 917 (citing Richard B. Schmitt, *Law Schools, Firms Sending a Message: Polish Your Prose*, WALL ST. J., Aug. 28, 1995, at B3).

112. See ADAMS, *supra* note 111.

113. See generally *id.*

114. See Todres, *supra* note 105 (explaining that, in the context of a Public Health Law class, when students review their own or their peers’ transactional documents drafts, “they begin to see holes in the language they have chosen and also start to read such language more closely” and commenting that “[t]his learning can be reinforced with contracts cases in which indeterminate words caused significant litigation”).

115. See Scott J. Burnham, *Transactional Skills Training: Contract Drafting—Beyond the Basics*, 10 TENN. J. BUS. L. 253, 253 (2009) (discussing that by preventing ambiguity in language, a transactional lawyer actually “prevent[s] litigation from arising over the meaning of contract terms”).

116. See ADAMS, *supra* note 111, at 210–12.

117. See Goforth, *supra* note 76, at 913.

118. See generally Wagner, *supra* note 84, at 124 (discussing the skill and judgment a business lawyer must employ in knowing when and how to utilize templates and form agreements).

lawyers necessarily utilize to some degree, are also employed differently in transactional writing.<sup>119</sup>

Consider one example. Jason Player signs an employment agreement with East Texas Copy Systems, Inc.<sup>120</sup> The agreement contains a non-compete clause.<sup>121</sup> The clause provides that he is restricted from “directly or indirectly engag[ing] in any business competitive with the type of business Jason Player is engaged in prior to [the] Agreement other than his employment with [Company] for a period of two years.”<sup>122</sup> The non-compete clause applies to the area within a 60 mile radius of Longview, Texas.<sup>123</sup> The agreement also provides that “[i]f Jason Player’s employment with Buyer is terminated prior to two year[s] [sic] from the date of this Agreement for any reason other than a for cause termination, [the] [n]on-[c]ompete clause will no longer be binding.”<sup>124</sup> Within two years of signing the Agreement, Player voluntarily terminates his employment with East Texas Copy Systems.<sup>125</sup> Player provides notice to East Texas Copy Systems that “the noncompetition agreement would not be binding on him and that after his resignation was effective, he would be free to engage in [a business competitive with East Texas Copy Systems] once again.”<sup>126</sup> East Texas Copy Systems sues to enforce the non-compete clause.<sup>127</sup> It loses.<sup>128</sup> In finding Player did not breach his non-competition obligations, the court undertook a simple grammatical reading of the clause’s language, specifically the likely innocently intended but consequential use of passive voice in the words “is terminated.” The court stated:

We agree with the trial court that under the plain and ordinary meaning of the terms used in the parties’ agreement, the Disputed Clause was effective if either party terminated Player’s employment. . . . [T]he emphasis of the Disputed Clause is on the termination of Player’s employment, not which party initiates the termination. Under the parties’ agreement, either party could terminate the employment relationship. Therefore, we presume that the parties, by not limiting which party initiates the termination, intended that either party could initiate the termination.<sup>129</sup>

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119. *See generally id.* at 145–46 (discussing the need for business lawyers to be “diligent” and “detail focused,” which requires that they be attuned to, among other things, grammar).

120. *E. Tex. Copy Sys., Inc. v. Player*, 528 S.W.3d 562, 564 (Tex. App.—Texarkana 2016, no pet.).

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.* at 565.

126. *See id.*

127. *See id.*

128. *See id.* at 567.

129. *See id.*

Or take, for example, the much-publicized case of *O'Connor v. Oakhurst Dairy*.<sup>130</sup> The case involved a dispute over a missing Oxford comma in a Maine overtime statute.<sup>131</sup> If an Oxford comma were included in the disputed clause, the language would have limited the circumstances under which the plaintiffs would be entitled to overtime pay.<sup>132</sup> The First Circuit found the statutory language ambiguous.<sup>133</sup> What started as a wage dispute became a debate over grammar and ultimately, for purposes of this article, indicia of the need to teach and learn transactional skills.<sup>134</sup>

The underlying facts of both *Player* and *Oakhurst Dairy* would make fine problems for objective memos or persuasive writing assignments in a first-year or upper-level legal writing course.<sup>135</sup> But those assignments alone would not fully address the drafting deficiencies that were at issue in both the case and the underlying statute.<sup>136</sup> The cases have value in demonstrating the legal research, writing, and analysis that would need to go into litigating the interpretation of both the non-compete and the statute.<sup>137</sup> But value also exists in analyzing the grammar, syntax, formatting, and language (or lack thereof) of the non-compete agreement or the statute itself to redraft them in a manner that would more accurately reflect the intention of Player's employer or the Maine legislature.<sup>138</sup>

#### IV. WHY SHOULD STUDENTS LEARN TRANSACTIONAL DRAFTING?

##### *A. Transactional Drafting Skills Offer Broad Applicability to All Practices of Law*

So, why is all this important? Attempting to pin down a singular definition of transactional drafting might prove difficult.<sup>139</sup> But that difficulty likely results from the broad category of skills, work product, and knowledge

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130. See *O'Connor v. Oakhurst Dairy*, 851 F.3d 69, 70 (1st Cir. 2017).

131. See *id.*

132. See *id.* at 71.

133. *Id.* at 72–73.

134. See generally *id.* at 69–80 (demonstrating the consequences of improper writing).

135. *Id.* at 70–71; *E. Tex. Copy Sys., Inc. v. Player*, 528 S.W.3d 562, 563–65 (Tex. App.—Texarkana 2016, no pet.).

136. Relatedly, a memo or persuasive brief assignment alone, regarding the *Player* or *Oakhurst Dairy* cases, might fail to teach students the communication skills often necessary to advise a client: (1) as to what went wrong in the underlying transaction or documentation, (2) how to remedy or revise the issue to prevent it from happening again, or (3) in a manner understandable to a client who might lack legal sophistication. See generally Wagner, *supra* note 84, at 128–33 (discussing the need for business lawyers to counsel and communicate with clients concisely and in a manner that accounts for the client's legal sophistication (or lack thereof)).

137. See *supra* notes 120–34 and accompanying text (discussing the facts of *Player* and *Oakhurst Dairy*).

138. See Goforth, *supra* note 76, at 913 (noting that “linguistic variety may be essential to keep an appellate brief from being boring and unpersuasive, but it can be extremely problematic in a contract”).

139. See *supra* Part III (attempting to define what transactional drafting is).

that might be included and/or assessed in a transactional drafting class.<sup>140</sup> That broadness and breadth, one might contend, highlights the value and importance of knowing and understanding transactional drafting skills as both a law student and a lawyer.<sup>141</sup> That a family law drafting or wills and estate planning drafting course might be considered a transactional drafting course, or that a corporate deal-making course might require a student to draft bylaws, corporate resolutions, indemnification agreements, employment agreements, leases, or any other variety of corporate agreements—those realities all point to a conclusion about life as a practicing attorney.<sup>142</sup> And that is, that to at least some degree, transactional practice is inevitable.<sup>143</sup>

In some form or fashion, a law student's career as a lawyer will touch on some form of transactional work.<sup>144</sup> This could be intentional or by necessity.<sup>145</sup> It could start in a student's first job out of school, or it could start many years into practice.<sup>146</sup> By design or through choice, many law students might pursue a strictly transactional practice after graduation.<sup>147</sup> In fact, estimates suggest that half of all law students will become transactional lawyers.<sup>148</sup> If that is the case, those students interested in a transactional practice need instruction and foundation on transactional skills, and in particular, transactional drafting.<sup>149</sup> If a transactional drafting course was not required, an interested student would likely pursue an elective on the topic, assuming one was offered at all.<sup>150</sup> For those with set goals of entering the transactional realm, the choice to pursue transactional courses in law school is an obvious one.<sup>151</sup>

But awareness of what field a student will, or even wants to enter, may not come until years into law school, or even years into practice.<sup>152</sup> While many law students enter school with defined ideas of their professional aspirations, "research shows that the vast majority of first year law

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140. See *supra* Part III (discussing the skills needed for transactional drafting).

141. See *supra* text accompanying notes 76–79 (discussing the purposes of transactional drafting).

142. See Todres, *supra* note 105, at 375 (noting that "transactional work is a significant component of most attorneys' practices," including solo practitioners, government lawyers, and public interest lawyers, and that transactional work involves more than just "doing deals" while at a large law firm").

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Snyder, *supra* note 42 (stating that half or more than half of law students are going to be transactional lawyers).

148. Tina Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223, 223 (2004) (discussing how new associates lacked sophistication on business deals and detailing a course that addressed this for interested students).

149. Snyder, *supra* note 42 (stating how many students need to get an introduction in law school to the skills they will use in practice).

150. See Eckart *Bias*, *supra* note 24, at 62–63 (noting how transactional drafting courses are offered as upper-level electives at a lower rate than upper-level litigation drafting electives).

151. See *id.*

152. Pantin, *Deals*, *supra* note 2, at 73.

students . . . have no idea what area of practice they will pursue.”<sup>153</sup> That presents an opportunity to meet the professional desires of law students and also educate those students who may not have a definitive idea of what their professional life might or should entail.<sup>154</sup> But given the litigation-oriented focus of most legal writing programs,<sup>155</sup> as well as the largely elective nature of transactional drafting courses,<sup>156</sup> it also highlights a knowledge void that risks being unfilled.<sup>157</sup>

This emphasis on litigation training over transactional training in law school may also be impacting students’ preparedness for practice<sup>158</sup> as well as their satisfaction with both their law school and professional legal experiences.<sup>159</sup> In terms of preparedness for practice, one study shows that employers report that nearly two-thirds of law students “entering transactional practice were ‘poorly’ or ‘very poorly’ prepared for transactional careers,” as opposed to only 16% of law students being “poorly” or “very poorly” prepared for work in litigation.<sup>160</sup> Job preparedness aside, recent law graduates also report dissatisfaction with their law school experience, in large part because of the lack of emphasis on practical experience and, within that, transactional practice specifically.<sup>161</sup> A 2024 survey found that 45% of junior law firm associates did not feel that law school adequately prepared them for their job, while 31% reported that their law firm experience “[did not] meet their expectations coming out of law school.”<sup>162</sup> Of the 31% who reported that their law firm experience did not meet their expectations from law school, many cited their school’s “focus on litigation and a lack of training in the type of legal work they now do.”<sup>163</sup> In response to a question about what they would change about their law school experience, “the most common answer provided by the surveyed associates

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153. *Id.*

154. *Id.*

155. Todres, *supra* note 105, at 375; Eckart *Bias*, *supra* note 24, at 62–63 (noting a litigation bias in upper-level law school electives as evidenced by, among other things, survey responses that show “only 60% of law schools offer at least one transactional or contract drafting elective, while nearly 80% of law schools offer upper-level electives in litigation drafting, and 78% report they offer an upper-level elective specific to appellate advocacy”).

156. *See* Eckart *Bias*, *supra* note 24, at 62–63.

157. *See* Todres, *supra* note 105 (“The analytical skills developed through traditional case law analysis are important to all areas of law, yet there are fundamental aspects of transactional practice that receive too little attention in law schools.”).

158. *See* Eckart *Bias*, *supra* note 24, at 53 n.7 (citing Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 BERKELEY BUS. L.J. 187, 211–12 (2012)).

159. *See* Karen Sloan, *Law School Failed to Prepare 45% of Junior Associates for Practice, Survey Finds*, REUTERS (Apr. 29, 2024), <https://www.reuters.com/legal/litigation/law-school-failed-prepare-45-junior-associates-practice-survey-finds-2024-04-29/>.

160. *See* Eckart *Bias*, *supra* note 24, at 53 n.7 (citing Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 BERKELEY BUS. L.J. 187, 211–12 (2012)).

161. *See* Sloan, *supra* note 159.

162. *See id.*

163. *See id.*

was more practical skills and a greater focus on transactional practices.”<sup>164</sup> While perhaps distressing, these surveys also present an opportunity for course correction that would benefit current law students, law graduates, and their employers.<sup>165</sup>

Requiring law students to take a course in transactional drafting is important because it will help produce law students that are more prepared for the variety of tasks they will actually encounter in practice—whatever practice area that might be.<sup>166</sup> Emphasizing litigation-based skills throughout the law school curriculum reinforces a false dichotomy between litigation and transactional skills.<sup>167</sup> Compartmentalizing “transactional” drafting as a skill separate and distinct from “litigation” skills does the term—and law students—a disservice because it minimizes its broad utility.<sup>168</sup> In reality, transactional drafting skills and litigation skills work in tandem, and law students should receive sufficient training in both to graduate more prepared for the realities of the practice of law.<sup>169</sup>

Consider the work of a typical litigator. A given lawsuit may require a litigator to read and interpret a statute or regulation, review and analyze a written contract, draft a discovery control plan, and, if the litigation happens to settle, draft a settlement agreement, among many other things.<sup>170</sup> These all require knowledge of transactional skills and an understanding of transactional drafting.<sup>171</sup> For instance, a contract likely contains written terms prescribing the parties’ rights, duties, and obligations.<sup>172</sup> To properly understand the parties’ rights, duties, and obligations, the litigator will first need to understand the mechanics of the contract language the parties

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164. *See id.*

165. *Id.* While almost half of the surveyed junior associates felt that law school did not sufficiently prepare them for their legal jobs, the majority still reported satisfaction with their chosen career path. *Id.* The same survey found that 83% of respondents would still decide to work for their current firm, despite any thoughts of lack of preparedness, while 67% intended to stay with their current employer for firms for three or more years. *See id.*

166. *See* Todres, *supra* note 105, at 375–76.

167. *See generally* Lori D. Johnson, *The Ethics of Non-Traditional Contract Drafting*, 84 UNIV. CIN. L. REV. 595, 605–07 (2018) (discussing generally the overlap between the “realms” of the “litigator as ‘advocate’ and the transactional attorney as ‘adviser’”).

168. *See* Tina L. Stark, *Transactional Skills Education: Mandated by the ABA Standards*, 20 TENN. J. BUS. L. 693, 695 (2019) [hereinafter Stark *Transactional Skills*] (“I believe that most in the Academy would now agree that doing deals requires sophisticated legal analysis—albeit an analysis unique to transactions. To state what I hope is obvious, just because two things differ doesn’t mean that one is of lesser worth or relevance.”).

169. *See id.* (“Learning both litigation and transactional skills create[s] a synergistic dynamic. Each delivers insight into the other, creating value for both.”).

170. *See* Pantin, *Deals*, *supra* note 2, at 76 (discussing various transactional skills and documents a litigator may need to draft as part of a lawsuit).

171. *See generally* Stark *Transactional Skills*, *supra* note 168 (discussing the importance of contract drafting in litigation).

172. *See generally* Burnham, *supra* note 115, at 261 (discussing how nuances and word choice in language in both contracts and statutes can create different and sometimes unintended consequences for promises and conditions).

employed.<sup>173</sup> Does the grammar, syntax, and/or<sup>174</sup> punctuation create uncertainty, ambiguity, or vagueness that alters or obviates the parties' original intent with respect to terms, obligations, or prohibitions under the contract?<sup>175</sup> Answering this requires an understanding of the categories of contract language and how they operate—a skill students might not encounter if the focus in first-year legal writing remains on objective and persuasive writing.<sup>176</sup> Consider next the contract's terms.<sup>177</sup> A contract can contain or reference transactional terminology such as indemnification, collateralization, and myriad “boilerplate” terms that regulate the parties' performance during and after the consummation of the contract.<sup>178</sup> Having a substantive understanding of these terms could help a litigator navigate a contract and analyze a path forward for the client.<sup>179</sup>

Given that law students will inevitably encounter some aspect of transactional work in practice, and considering the benefits a foundational knowledge of transactional drafting skills can offer all students and practitioners—even to those interested in litigation—it is time to explore adding transactional drafting to the required law school curriculum.<sup>180</sup>

### *B. Transactional Drafting and the NextGen Bar Exam*

An understanding of transactional drafting may also be necessary to overcome another hurdle law students must face even before entering practice—the bar exam.<sup>181</sup> In July 2022, the National Conference of Bar Examiners (NCBE), the not-for-profit corporation that “develops licensing tests for bar admission” and “acts as a national clearinghouse for information about the bar exam and bar admissions,” published its “Content Scope Outlines” (CSOs) detailing its vision for topics and skills to be tested on the

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173. See generally *id.* at 253–61 (quoting DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* 15 (1983) (“Some day someone will read what you have written, trying to find something wrong with it. This is the special burden of legal writing, and the special incentive to be as precise as you can.”)).

174. Joke intended. The use of “and/or” remains particularly problematic as a source of ambiguity in contracts. See Burnham, *supra* note 115, at 253–61.

175. See *id.* at 258 (discussing and providing examples of how ambiguity, as well as vagueness, grammar, syntax, and word choice, can lead to litigation over contract terms).

176. See *id.*

177. See *id.*

178. See generally Gregory Klass, *Boilerplate and Party Intent*, 82 *LAW & CONTEMP. PROBS.* 105, 106–08 (2019) (discussing various types and uses of contractual boilerplate in contracts).

179. Tina L. Stark & George W. Kuney, *Transactional Skills Training: Contract Drafting—The Basics*, 10 *TENN. J. BUS. L.* 139, 140 (2009) (“[E]verybody has to interpret a contract, be they a criminal court litigator or a transactional drafter. I think the best contract litigators are the ones that actually understand what the pieces of a contract were supposed to do even if they don't actually do that, so that we can get to the intent of the parties and have a discussion on that important topic.”).

180. *Id.*

181. See Susan M. Chesler & Karen J. Sneddon, *Raising the Bar: The NextGen Bar Exam and Contract Drafting*, 25 *TENN. J. BUS. L.* 843, 843–44 (2024) (stating that transactional skills are necessary to succeed on the bar exam).

NextGen Bar Exam.<sup>182</sup> These Content Scope Outlines “are just the first step in preparing the Test Content Specifications—the ‘blueprint’ for the new bar exam—which will be published in late 2024.”<sup>183</sup> The NCBE produced the CSOs after a three year study designed “to ensure that the bar exam continues to test the knowledge, skills, and abilities required for competent, entry-level legal practice.”<sup>184</sup> In the CSOs, the NCBE identified eight “Foundational Concepts and Principles”<sup>185</sup> and seven “Foundational Skills” it considers “as those that are most essential for newly licensed lawyers.”<sup>186</sup> Because the CSOs are only “recommendations”<sup>187</sup> for the next generation of the bar exam, the exact contents and scope of what might be included on future exams could very well change.<sup>188</sup>

For purposes of this article, it is worth noting that the CSOs specifically include “Legal Writing and Drafting” within the eight “Foundational Concepts and Principles . . . required for competent, entry-level legal practice” and thus possible subject matter for future bar exams.<sup>189</sup> Although legal writing has been a part of bar exams through the Multistate Practice Exam (MPT) for years, what is new and unique about the CSO is that within the subset of “Legal Writing and Drafting,” the NCBE specifically includes drafting principles relative to a contract or transactional matter.<sup>190</sup> Specifically, the proposed bar exam tasks within the Legal Writing and Drafting Foundational Concepts and Principles would require examinees to: (1) “[d]raft or edit selected specified provisions of a contract”;<sup>191</sup> (2) “[d]raft an email to a client, explaining the legal implications of a course of action, updating the client on the status of the client’s matter, and/or providing advice on the next steps to be taken in the matter (*Note: This task will most often relate to a transactional matter.*)”;<sup>192</sup> and (3) “[d]raft the analysis section of an objective memorandum (*Note: This task will most often relate to a transactional or compliance matter.*)”<sup>193</sup>

The CSOs also identify other Foundational Concepts and Principles outside of Legal Writing and Drafting that are applicable to a transactional

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182. See NextGen Bar CSO, *supra* note 6.

183. See *id.* at 2.

184. *Id.* at 1.

185. See *id.* at 1, 4–6. In late 2023, the NCBE announced that “family law [would] be added back to the list of foundational concepts and principles [starting with the July 2028] NextGen bar exam.” Julianne Hill, *NCBE Extends Current Bar Exam Until 2028, NextGen Test Will Include Family Law*, A.B.A.J. (Oct. 26, 2023, 1:31 PM), <https://www.abajournal.com/web/article/nextgen-exam-will-include-family-law-reversing-earlier-ncbe-decision>.

186. NextGen Bar CSO, *supra* note 6, at 1.

187. *Id.*

188. See *id.*

189. See *id.* at 1, 5.

190. See *id.* at 5–6.

191. *Id.* at 5.

192. *Id.* at 6 (emphasis in original).

193. *Id.* (emphasis in original).

drafting and skills course.<sup>194</sup> As to Contracts, the CSOs include, among others: “[i]ndefiniteness or absence of terms” (making specific inclusion of “required terms for real estate contracts”);<sup>195</sup> “[I]iquidated damages and penalties, and limitation of remedies”;<sup>196</sup> “[i]nterpretation” (including “the general rules of contract interpretation and their relative priority with respect to contract language and ambiguities”);<sup>197</sup> and “[i]mpossibility, impracticability, frustration of purpose, and risk of loss” (this topic to specifically include the concept of force majeure).<sup>198</sup>

To prepare students for the NextGen Bar and these new subject matter topics, the NCBE suggests law school faculty “revisit and reimagine” current assessments to account for the type of questions and tasks students will encounter.<sup>199</sup> For instance, to prepare students for contracts-related drafting skills likely to be assessed through the NextGen Bar’s “Performance Tasks” (PT60s), an assessment vehicle similar to the current MPT, the NCBE recommends that faculty offer assessments that might require students to “[d]raft contractual provisions (implied warranty disclaimers and limited remedy provisions”) and “[r]eview contract[s] and ask students to identify provisions to modify or to include to protect their client’s interest.”<sup>200</sup>

While the NCBE notes PT60s will provide examinees with “sources of law” to complete the task,<sup>201</sup> similar to how the current bar exam provides examinees with a “library” in conjunction with the MPT, the fact does not necessarily obviate the need for students to learn transactional drafting before the bar exam.<sup>202</sup> For one, a foundational understanding of transactional terms and concepts could only help examinees understand the broad topics being assessed on the NextGen Bar.<sup>203</sup> That, in turn, could have the impact of assuaging, even if slightly, fears attendant to answering a bar exam question on “new” or “obscure” topics that might be more traditionally taught in elective courses.<sup>204</sup> Moreover, were faculty to “revisit and reimagine”<sup>205</sup> assessments to incorporate transactional drafting skills into law school exams and assignments, that would provide students with additional practice and preparation for the types of questions they likely will encounter—and skills they will likely need to utilize—on the actual NextGen Bar.<sup>206</sup>

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194. *See id.* at 4–5, 18.

195. *Id.* at 18.

196. *Id.* at 21.

197. *Id.* at 19.

198. *Id.* at 20.

199. Timothy Davis, Presentation at UNT Dallas College of Law: The NextGen Bar Exam (Feb. 16, 2023).

200. *See id.*

201. *See id.*

202. *See* NextGen Bar CSO, *supra* note 6, at 5–6.

203. *See id.*

204. *See id.*

205. *See* Davis, *supra* note 199.

206. *See* NextGen Bar CSO, *supra* note 6, at 5–6.

The CSO and related sample information the NCBE has made available are not the final word on what future bar exams will look like or include.<sup>207</sup> Nevertheless, the inclusion of legal writing and drafting, and specifically drafting related to transactional matters, as a source of material for written components of future exams, speaks volumes as to how the NCBE and its contributing members view transactional drafting as a necessary skill, both for the bar exam and for life as a practicing attorney.<sup>208</sup>

#### V. EXISTING PROPOSALS FOR REMEDYING THE DEFICIENCY IN TRANSACTIONAL DRAFTING AND SKILLS TRAINING EDUCATION

Indulging for a moment the claim that transactional drafting skills are important and warrant inclusion in legal education, it is worth exploring some of the existing proposals for how and when best to do that.<sup>209</sup> Each proposal is unique and has merit.<sup>210</sup> They each also recognize the value that transactional skills bring to a legal education.<sup>211</sup> The proponents, though, differ on when and how to implement those skills in the law school curriculum.<sup>212</sup>

Arguing that law schools should expand their legal research and writing programs to include transactional training skills, Professor Louis Schulze proposes four “model programs” for integrating transactional drafting and transactional skills training into a mandatory legal writing curriculum: (1) an “integration model” that “adds transactional subject matter to the first-year [legal writing] course”; (2) an “expansion model” that involves incorporating transactional drafting and skills in a separate legal research and writing course after the first year; (3) a “writing-across-the-law-school-curriculum” model where transactional drafting is “interwoven throughout the doctrinal curriculum and provides a more system-wide writing experience”; and finally, (4) a “hybrid model” that would see doctrinal and legal writing faculty pair to co-teach transactional skills in an upper-level course.<sup>213</sup>

Professor Lynnise Pantin argues that “[t]he first year skills course”—namely legal research and writing—“is arguably the best opportunity to infuse the first year curriculum with transactional skills teaching, because it is intended to introduce students to what it is that lawyers do.”<sup>214</sup> As such, it should recognize that students, when they become practicing attorneys, will be both litigators and transactional attorneys.<sup>215</sup> She goes on to state,

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207. *See id.* at 1–3.

208. *See id.* at 1–6.

209. *See supra* Part IV (discussing the importance of transactional drafting in litigation).

210. *See Pantin, Deals, supra* note 2, at 63; Schulze, *supra* note 17; Goforth, *supra* note 76.

211. *See Pantin, Deals, supra* note 2, at 63; Schulze, *supra* note 17; Goforth, *supra* note 76.

212. *See Pantin, Deals, supra* note 2, at 63; Schulze, *supra* note 17; Goforth, *supra* note 76.

213. Schulze, *supra* note 17, at 94–100.

214. Pantin, *Deals, supra* note 2.

215. *Id.*

correctly in the author's estimation, that "[t]he first year skills course . . . should recognize that students, when they become practicing attorneys, will be both litigators and transactional attorneys."<sup>216</sup> Quoting Professor Tina Stark, Professor Pantin continues: "In a fully 'integrated transactional curriculum,' most or all students would be exposed to fundamental principles of transactional practice and, *after* the first year, interested students could pursue additional instruction for developing transactional skills for use in practice."<sup>217</sup> Teaching transactional skills in the first-year curriculum, Professor Pantin argues, would also "combat the popular myth that [all] lawyers are predominantly litigators."<sup>218</sup> Furthermore, teaching transactional skills in the first-year curriculum would expose law students to an area of law they might not otherwise encounter in a traditionally litigation-focused curriculum.<sup>219</sup>

For Professor Pantin, transactional skills could be integrated into first-year legal writing using pre-existing, litigation-oriented frameworks.<sup>220</sup> Specifically, legal writing faculty could "change the focus of the memo or the brief from a litigation oriented subject, to a non-litigation subject."<sup>221</sup> For instance, focusing a first-year legal writing objective memo on a contract dispute outside the litigation context, such as having students "identify and describe how the contract could have been written differently to avoid [a] dispute," would "maximize student exposure to transactional drafting during the first year."<sup>222</sup> Students would "be required to . . . complete a transactional writing assignment in addition to memo and brief writing."<sup>223</sup> In addition to objective memos and persuasive briefs, students might produce transactional documents such as "a simple letter agreement[,] corporate resolutions[,] employment handbooks[,] or services agreement."<sup>224</sup> Professor Pantin also advocates teaching transactional skills via use of other means of oral and written communication often taught in first-year legal writing, namely professional emails, client interviewing and counseling, and negotiation exercises.<sup>225</sup> In each of those, Professor Pantin proposes hypothetical

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216. *Id.*

217. *Id.* (emphasis added) (quoting Tina L. Stark, *Conference Introduction: My Fantasy Curriculum & Other Almost Random Thoughts*, 10 TENN. J. BUS. L. 3, 3–5 (2009)).

218. Pantin, *Deals*, *supra* note 2.

219. *Id.* at 73 (citing Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69, 71 (2009)).

220. See Pantin, *Deals*, *supra* note 2, at 77; see also Lynnise E. Pantin, *The First Year: Integrating Transactional Skills*, 15 TENN. J. BUS. L. 135, 138–39 (2013) (discussing a method for using "easy to integrate" transactional skills ideas and concepts into an "already existing underlying litigation framework" within a first-year legal research and writing course).

221. Pantin, *Deals*, *supra* note 2, at 77.

222. *Id.* at 78; see also Pantin, *supra* note 220, at 140–41 (discussing using a hypothetical residential lease in a litigation-based assignment to demonstrate what changes could be made to a contract and why).

223. Pantin, *Deals*, *supra* note 2, at 78.

224. *Id.* at 79.

225. See generally *id.* at 79–84 (showing examples of transaction-centered assignments).

assignments incorporating transactional situations or transactional documents.<sup>226</sup> For instance, students might review “a due diligence report, a letter of intent, a term sheet, a will, corporate resolutions, or a basic agreement” and provide, via email, a summary to a hypothetical client.<sup>227</sup> Professors can model a client interview such that “students can apply what they learn in a traditional doctrinal Contracts course during their first year if the faculty member structures an interview problem that centers on a contracts based issue.”<sup>228</sup> Professor Pantin notes that other counseling exercises could involve students interviewing or advising clients about the terms of a contract.<sup>229</sup> For an “interest-based” or “non-adversarial” negotiation exercise that emphasizes collaboration rather than adversity, students can negotiate a term sheet with the aim of reaching a mutually agreeable end.<sup>230</sup>

Recognizing the need for law schools to devote resources to transactional skills, Professor Carol Goforth also proposes incorporating “transactional skills training” into the first-year legal writing curriculum.<sup>231</sup> In the alternative, she proposes building or “embedd[ing]” transactional skills training into other first-year courses such as contracts or property, or across the law school curriculum generally.<sup>232</sup> Her other proposals include adding “targeted skills classes” and “increas[ing] offerings in . . . transactional clinics or skills-training experiences offered in conjunction with legal practitioners as opposed to classes taught by full-time faculty.”<sup>233</sup> Professor Goforth does suggest “schools could mandate one or more additional upper-level classes focused on transactional skills.”<sup>234</sup> However, she largely dismisses that proposal, contending it may be difficult to find faculty “willing and able to teach [such classes],” and furthermore because it “relegates transactional-skills training to the upper-level curriculum, again reinforcing the notion that these skills are less important than those focused on disputes.”<sup>235</sup> Despite these and other limitations on incorporating transactional skills training into the first-year curriculum (discussed more below), and assessing other options, Professor Goforth ultimately argues that

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226. *See generally id.* (revealing the practical application of the exercises).

227. *Id.* at 79–80.

228. *Id.* at 81.

229. *Id.* at 81–82.

230. *See id.* at 84.

231. *See generally* Goforth, *supra* note 76, at 923 (discussing the whole proposal).

232. *Id.*; *see also* Deborah A. Schmedemann, *Finding a Happy Medium: Teaching Contract Creation in the First Year*, 5 J. ASS’N LEGAL WRITING DIRS. 177, 180–81 (2008) (noting how teaching “contract creation” can be “housed in various first-year courses,” such as contracts or property, and describing a program for teaching “contract creation” both through a four-week exercise in a first-year skills course and through a semester-long exercise in a first-year contracts course).

233. Goforth, *supra* note 76, at 924.

234. *Id.*

235. *Id.* at 927.

“the easiest starting point for change would be to add a significant transactional-drafting component to first-year legal writing.”<sup>236</sup>

Professor Adam Eckart also advocates using first-year legal research and writing to introduce students to transactional skills.<sup>237</sup> Specifically, Professor Eckart proposes using “small teaching” to integrate transactional research and transactional drafting skills into an already existing first-year legal writing curriculum via small changes in the course or lesson plans.<sup>238</sup> “Small teaching” uses “examples, assessments, and group exercises” in a specific course or lesson plan to allow students “to practice or apply skills or concepts learned in reading or through instruction.”<sup>239</sup> Professor Eckart argues that “first year legal research and writing courses must integrate additional legal research instruction, including transactional research,” as well as a separate component of transactional drafting.<sup>240</sup>

For Professor Eckart, transactional research could utilize traditional litigation-focused research strategies and skills, but apply those in a transactional setting, for instance, to assess the validity of contractual clauses such as a non-competition or non-disclosure clause.<sup>241</sup> Transactional research could also extend beyond traditional statutory or case law research into alternative sources such as “agency interpretations and no-action letters” and non-legal business information such as “list[s] of subsidiaries, competitors, industry regulations, or plans for future development” or other similar information available through public sources such as EDGAR.<sup>242</sup> Students could utilize this research in assignments requiring students to, for instance, interpret an agency opinion letter or “draft recitals or background provisions for a corporate transactional agreement, such as a merger agreement.”<sup>243</sup>

As a compliment to transactional research, Professor Eckart argues that transactional drafting can build upon both objective and persuasive writing assignments and incorporate other first-year topics.<sup>244</sup> Assignments may involve revising contracts, but can work in tandem with an objective memo or persuasive brief to show how litigation matters (such as those traditionally utilized in first-year legal writing programs) can evolve into transactional matters.<sup>245</sup> Professor Eckart proposes, as sample assignments, having

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236. *See id.* at 924.

237. *See generally*, Eckart, *Deal*, *supra* note 44, at 144–62 (providing strategies for implementing transactional learning in the classroom).

238. *See generally id.* (describing “small teaching” as “a pedagogical approach rooted in learning sciences aimed at facilitating active learning by utilizing the retrieval effect and the educational principle of scaffolding”).

239. *Id.*

240. *Id.* at 150, 156–57.

241. *See id.* at 150–51.

242. *Id.*

243. *Id.* at 152, 155–56.

244. *See id.* at 156–57.

245. *See id.* at 157–58.

students revise provisions of an employee manual to comply with applicable law and revising a residential lease.<sup>246</sup>

Notably, Professor Eckart argues that the proper time and place to introduce transactional research is not a separate course or separate semester of legal writing, but rather the first-year legal research and writing program.<sup>247</sup>

By integrating transactional research strategies into the legal research and writing curriculum, professors can illustrate different legal research skills helpful for practice and help students practice critical reading and analysis skills in a new context. In addition, such instruction can introduce students to transactional perspective and information currently underrepresented in legal research and writing courses, and assist in preparing students for legal practice upon graduation.<sup>248</sup>

Transactional drafting, he argues, is situated no differently:

[B]y integrating transactional drafting with existing objective and persuasive legal writing assignments, legal research and writing programs can leverage the use of in-class problems to save time. In addition, such integration shows students that all problems can have different applications and professors can demonstrate the life cycle of a client representation. Finally, such integration can introduce transactional drafting in all types of matters, which may increase its adoption by litigation-focused professors who otherwise may feel inadequately prepared to teach transactional drafting.<sup>249</sup>

Beyond these, other proposals include replacing the brief writing course in a first-year legal writing course and replacing it with a drafting course,<sup>250</sup> or teaching or incorporating transactional skills in a business associations course.<sup>251</sup> Professor David V. Snyder proposes introducing transactional skills, including “planning, negotiating, documenting, and closing the deal,” into “the standard 1L Contracts course.”<sup>252</sup> Professor Tina Stark has gone

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246. *Id.* at 159–61.

247. *See id.* at 149–50.

248. *Id.* at 150.

249. *See id.* at 156–57.

250. *See* Wayne Schiess et al., *Teaching Transactional Skills in First-Year Writing Courses*, 2009 TENN. J. BUS. L. 53, 53–54 (2009).

251. *See* Constance Z. Wagner, *Training the Transactional Business Lawyer: Using the Business Associations Course as a Platform to Teach Professional Skills*, 59 ST. LOUIS U.L.J. 745, 751 (2015) (“The standard course in Business Associations is one place in the law school curriculum where such elements should be added because of the transactional nature of business law practice. Such elements could easily be added with a little thought and effort on the part of law school instructors.”).

252. Snyder, *supra* note 42.

further than most in advocating for mandatory curricular inclusion of transactional skills instruction.<sup>253</sup> “The time has come,” she writes, “for us to say out loud that transactional education should be part of every student's law school education. It’s time for parity.”<sup>254</sup>

Utilizing many of the rationales noted by these and other professors, many law schools have already begun implementing transactional drafting and skills into the first-year writing curriculum.<sup>255</sup> These include University of Detroit Mercy,<sup>256</sup> Vanderbilt University,<sup>257</sup> NYU,<sup>258</sup> Northwestern University,<sup>259</sup> and Baylor University,<sup>260</sup> among others. While these programs are a start in the right direction, more can be done in terms of required instruction on transactional drafting and skills.<sup>261</sup>

## VI. ISSUES AND LIMITATIONS WITH EXISTING PROPOSALS FOR INCORPORATING TRANSACTIONAL DRAFTING AND SKILLS TRAINING

Integrating transactional drafting into a first-year legal writing curriculum is not without its challenges and limitations.<sup>262</sup> Each of the professors noted above acknowledge, to some degree, the difficulties,

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253. See Stark *Transactional Skills*, *supra* note 168, at 694.

254. See *id.*

255. See generally Schiess et al., *supra* note 250 (describing transactional curriculum at various law schools).

256. See *id.* at 59 (discussing the University of Detroit Mercy School of Law’s first-year legal writing program, which incorporates contract law into the course).

257. See *id.* at 57–59 (discussing Vanderbilt University School of Law’s “transactional planning module” offered in the first-year writing course).

258. See *id.* at 63–67 (discussing the process of incorporating a transactional simulation exercise into New York University School of Law’s first-year lawyering program).

259. See Sue Payne, *Teaching Contract Drafting to First-Year Law Students in Three Hours or Less*, 18 PERSP: TEACHING LEGAL RES. & WRITING 145, 149–50 (2010) (discussing the process of incorporating contract drafting into Northwestern University’s first-year, two-semester “communication and legal reasoning” course which includes “legal research, reasoning, and analysis; objective and persuasive writing (from closed memorandum through trial or appellate brief)[.] plus oral argument” with “only approximately three to four hours of instruction and minimal outside resources.” The end result, Professor Payne found, was that “with limited time and resources . . . it [was] possible to teach first-year law students some basic contract drafting principles.”).

260. See Writing Courses, BAYLOR L. SCH., <https://law.baylor.edu/why-baylor-law/academic-overview/legal-writing/writing-courses> (last visited Sept. 13, 2024). Baylor University incorporates transactional drafting as one of four of its required Legal Analysis, Research, and Communications (LARC) courses that students take during their three years of legal education. *Id.* The fourth of five LARC components, Baylor’s Transactional Drafting course, “emphasizes crafting common forms of legal communications and documents in a transactional setting, such as a real-estate deal, will-drafting, or business transactions.” *Id.*

261. See generally Schiess et al., *supra* note 250 (detailing gaps in transactional curriculum).

262. See Schulze, *supra* note 17, at 91 (noting a perceived difficulty in adding transactional drafting instruction to an already crowded first-year legal writing course); Pantin, *Deals*, *supra* note 2, at 86 (discussing the “challenge of timing and priorities” with adding transactional skills in the first-year curriculum weighed against “sacrificing other more valuable things”); see also Eckart *Deal*, *supra* note 44, at 144 (discussing how “competing priorities placed upon the professors who teach first year legal research and writing courses make[s] adding content to the course difficult”).

complexities, and inertia that work against amending or supplementing first-year legal writing programs.<sup>263</sup> These challenges generally boil down to issues of academic prioritization and human resources.<sup>264</sup> As discussed below and in Part VI, requiring a transactional drafting course as part of the law school curriculum, and specifically one outside the 1L year, would do much to alleviate, if not cure, many of the concerns and shortfalls noted in these current proposals for incorporating transactional drafting into the first-year curriculum.<sup>265</sup>

### A. Academic Prioritization

The oft-cited cure for how to best prioritize academic resources in light of the call to incorporate transactional drafting skills training, as noted and discussed in Part V, remains essentially two-fold.<sup>266</sup> The first solution would see a traditional litigation-oriented assignment such as a persuasive brief or memo converted into an assignment oriented around a transactional issue or document.<sup>267</sup> Alternatively (or for some, additionally), legal writing faculty could add a transactional-based assignment smaller in scope that would complement an objective memo, persuasive brief, or some other assignment traditionally administered in a litigation-oriented legal writing program.<sup>268</sup> Another more radical proposal involves removing the brief writing component of the first-year legal writing course entirely and replacing it with a drafting course.<sup>269</sup> While a step in the right direction, neither proposal—supplementation or replacement—fully corrects the issue of students being insufficiently trained and prepared for a transactional practice.<sup>270</sup>

The proposal to entirely replace the brief writing component of first-year legal writing with a drafting course is particularly problematic.<sup>271</sup> If approximately 50% of law students are going to go be transactional lawyers,<sup>272</sup> that would seem to imply that the remaining 50% would be excluded from the training so clearly necessary for a litigation-based

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263. See Schulze, *supra* note 17, at 91; Pantin, Deals, *supra* note 2, at 86; see also Eckart Deal, *supra* note 44, at 144.

264. See *supra* Section VI.A–B (detailing difficulties of placing transactional skills in first-year curriculum).

265. See *infra* Section VI.A–B (explaining how to balance implementing transaction skills with the current curriculum).

266. See *supra* Part V (explaining possible solutions for implementing transactional skills).

267. See, e.g., Pantin, Deals, *supra* note 2, at 77 (explaining how transactional skills can be gained through legal writing).

268. See generally Eckart Deal, *supra* note 44, at 144–50 (explaining roadblocks to teaching transactional skills); Pantin, Deals, *supra* note 2, at 74–85; Schulze, *supra* note 17, at 94–100.

269. Schiess, *supra* note 250.

270. *Id.*

271. *Id.*

272. See Snyder, *supra* note 42 (stating that half or more than half of law students are going to be transactional lawyers).

practice.<sup>273</sup> While appellate briefs could be an outlier in the average litigator's career, persuasive motion and brief writing typical to pretrial practice certainly are not.<sup>274</sup> Handicapping law students who are interested in pursuing careers in litigation in favor of those who might be predisposed to transactional work is wrong for the same reasons that law schools should not mandate a litigation focus entirely at the expense of transactional training—it relegates 50% of law students to the outskirts of a complete and fully realized legal education.<sup>275</sup>

Moreover, catering to a growing desire among incoming and current law students for transactional skills education at the expense of litigation-oriented training is misplaced because it emphasizes preference over practicality.<sup>276</sup> Students' preferences for transactional practice aside, the cold reality is that there will always be some law school graduates who accept employment immediately out of law school (or even later in their careers) simply out of necessity, or because of factors entirely beyond their control.<sup>277</sup> One need only look so far as the "lost generations" of the classes of 2010 and 2011 who graduated in the aftermath of the Great Recession to see that a law school graduate's desire for a transactional position might amount to little if the market for transactional attorneys has significantly contracted, if not evaporated entirely.<sup>278</sup> Make no mistake, transactional skills are important and law schools should emphasize and offer them to students.<sup>279</sup> But that is not to say that the litigation skills traditionally taught in first-year law school legal writing generally are unimportant, or that they lack utility for law students or practicing attorneys.<sup>280</sup> It does a disservice to law students and the

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273. *See id.*

274. *See* Jason G. Dykstra, *Beyond the "Practice Ready" Buzz: Sifting Through the Disruption of the Legal Industry to Divine the Skills Needed by New Attorneys*, 11 DREXEL L. REV. 149, 189–90 (2018) (noting how most private practitioners working in civil litigation "engage primarily in *pretrial* civil litigation," that as of the early 2000s, the volume of litigation increased while the number of civil trials decreased, and that most civil cases settle) (emphasis in original).

275. *See generally* Eckart *Deal*, *supra* note 44, at 137–38 (discussing survey data that showed in 2007 "only 41% of all incoming law students reported that they were 'very likely' or 'somewhat likely' to practice litigation whereas 46% of all incoming law students reported that they were 'very likely' or 'somewhat likely' to practice in a transactional setting after graduation").

276. *Id.*

277. *See generally* Scott F. Norberg, *J.D.s and Jobs: The Case for an ABA Accreditation Standard on Employment Outcomes*, 67 J. LEGAL EDUC. 1035, 1072 n.140 (2018) (explaining small law jobs during the recession).

278. *See* David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, (Jan. 8, 2011), <https://www.nytimes.com/2011/01/09/business/09law.html> (noting that, as of January 2011, since 2008, "some 15,000 attorney and legal-staff jobs at large law firms [had] vanished."); *see also* Deborah Jones Merritt, *What Happened to the Class of 2010? Empirical Evidence of Structural Change in the Legal Profession*, 2015 MICH. ST. L. REV. 1043, 1044 (2015) ("[O]nly 87.6% of the [law school Class of 2010] reported a job of any type. More than a tenth of the employed graduates were working part-time, and more than a fifth held jobs that did not require a law license.").

279. Snyder, *supra* note 42.

280. *See generally*, Eckart, *Deal*, *supra* note 44, at 137–38 (discussing statistics of incoming lawyers and their likelihood of litigating).

legal profession in general to excise from a legal education those fundamental skills such as persuasive writing that are foundational for any first-year curriculum and will become necessary in many legal practices.<sup>281</sup> Law schools can, and should, make room to account for both litigation and transactional training as a required part of legal education.<sup>282</sup>

In terms of prioritization, supplementing a first-year legal writing program with transactional material arguably requires omitting some traditional litigation-oriented information, materials, or assignments students would (or are) otherwise receiving.<sup>283</sup> Even more likely, it would mean adding to an already crowded curriculum.<sup>284</sup> A first-year student in a “traditional” legal writing curriculum might write a client letter or memo in the form of a professional email, an objective memo, a persuasive motion, or an appellate brief.<sup>285</sup> They might also present an oral argument or partake in some form of negotiation exercise.<sup>286</sup> Some programs will require students to submit both draft and final versions of the written assignments,<sup>287</sup> thus increasing the frequency with which students must submit work product.<sup>288</sup> Students may also be required to attend individual conferences with their professors or teaching assistants, if applicable.<sup>289</sup> Moreover, first-year students are also learning the fundamentals of legal analysis and reasoning, proper citation form, and, often in some cases, legal research,<sup>290</sup> all while acclimating to a world of law that for many may be entirely foreign on day one.<sup>291</sup> Specifics of each individual legal writing program aside, it is a busy year for first-year students.<sup>292</sup> The criticism (or more delicately, the concern) that adding a transactional component—be it research or drafting—to the first-year legal writing curriculum will either force the omission of other

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281. See generally Dykstra, *supra* note 274, at 189–90 (explaining rise in pre-trial civil litigation).

282. See Schulze, *supra* note 17, at 92–93; see also Pantin, *Deals*, *supra* note 2, at 86 (noting the prevalence of students practicing transactional law).

283. See Schulze, *supra* note 17, at 92–93 (noting that adding transactional teaching responsibilities to legal writing professors already focused on traditional first-year legal writing curricula would be burdensome); see also Pantin, *Deals*, *supra* note 2, at 86 (noting that “some tradeoffs may need to be made” in order to teach transactional skills in the first year).

284. See Schulze, *supra* note 17, at 92–93; Pantin, *Deals*, *supra* note 2, at 86.

285. See Keene, *supra* note 37.

286. See *id.*

287. See *id.*

288. See Schulze, *supra* note 17, at 92–93.

289. See Keene, *supra* note 37 (“During the writing process, for students to progress on assignments, first-year law students necessarily work closely with their professors, and often collaboratively with their peers on many aspects of their legal analysis, including the content and organization of legal discussions.”).

290. See Adam Lamparello & Charles E. MacLean, *Requiring Three Years of Real-World Legal Writing Instruction: Law Students Need It; Prospective Employers Want It; the Future of the Legal Profession Demands It*, 4 HOUS. L. REV. 95, 101 (2014).

291. See Pantin, *Deals*, *supra* note 2, at 67–68 (“The first year of law school is commonly described as the year when first year students are taught to ‘think like a lawyer.’”).

292. Hemingway, *supra* note 20, at 422 (“Law students are busy. During their first year of study, they frequently feel overwhelmed by the demands put upon them.”).

necessary material or, alternatively, burden already strained students and teachers with additional assignments, is not without merit.<sup>293</sup>

Consider a proposal to incorporate transactional drafting into first-year legal writing via an assignment where students are required to review publicly available financial documents and draft recitals and background provisions for a transactional agreement.<sup>294</sup> Few would doubt the utility and value of such an assignment, but consider the necessary building blocks and context that it would require in a first-year legal writing course.<sup>295</sup> Do students understand what recitals are, how to use them, and how not to use them?<sup>296</sup> Do students understand that there are different kinds of recitals, each serving a different purpose?<sup>297</sup> Do students know what a 10-K is?<sup>298</sup> Do they know what a 10-Q is?<sup>299</sup> Can they easily navigate EDGAR?<sup>300</sup> For some students the answers to these and similar questions may be obvious or redundant given prior education or professional experience.<sup>301</sup> However, it would be a disservice to assume all students possess that knowledge. As such, a professor giving an assignment of this nature must necessarily provide some foundational information and instruction to give the assignment context, value, and meaning.<sup>302</sup> That all takes time. How much time may depend on any number of factors.<sup>303</sup> But given every class and every semester contains a finite number of minutes, an additional assignment or instruction incorporating or referencing additional substantive material requires that something be omitted from legal writing—be it time on other topics or other material entirely—or that students assume additional reading and coursework outside of class.<sup>304</sup> Other first-year courses such as contracts may not introduce concepts such as recitals in lockstep with legal writing, assuming

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293. See Schulze, *supra* note 17, at 92 (discussing that adding transactional skills into a legal research and writing course may require adding a second-year course or adding more to the first-year course).

294. See Eckart, *Deal*, *supra* note 44, at 155–56.

295. Schulze, *supra* note 17, at 91 (discussing how understanding and learning transactional drafting would require “a background in business organizations, wills and estates, . . . real estate transactions,” and contracts).

296. See ADAMS, *supra* note 111, at 30–35.

297. See *id.* at 30–32.

298. See generally *id.* at 30–35 (demonstrating that first-year students may lack a foundational background in certain fields).

299. *Id.*

300. *Id.*

301. Payne, *supra* note 259, at 150.

302. Eckart, *Deal*, *supra* note 2, at 144–50.

303. See Schulze, *supra* note 17, at 91–93 (discussing how integrating transactional skills into law school would require schools to make many choices).

304. *Id.* at 91–93 (discussing how adding transactional skills into a traditional legal research and writing course may require adding skills into a first-year course or adding another course in students’ second year); Pantin, *Deals*, *supra* note 2, at 86 (“The argument is that there is not enough time to add anything else to the first year curriculum without sacrificing other more valuable things.”).

they are introduced at all.<sup>305</sup> There is very much a “tradeoff[]” involved when incorporating transactional materials, but that need not be the case.<sup>306</sup>

### *B. Human Resources*

In addition to the issue of how to prioritize course materials and assignments when incorporating transactional drafting skills into first-year legal writing, questions on staffing and human resource allocations also arise.<sup>307</sup> If new and/or additional materials and information are going to be incorporated into a first-year legal writing course, then there necessarily must be new or existing faculty willing and able to do that.<sup>308</sup> This argument generally amounts to two claims.<sup>309</sup> The first is that hiring new faculty raises concerns of cost and financial burden to law school budgets.<sup>310</sup> The second is that existing faculty lack the skill set to effectively teach and implement transactional skills that they historically lack.<sup>311</sup> These concerns would be largely alleviated in a legal writing program that requires a separate required course on transactional drafting.<sup>312</sup>

Consider cost and financial burden. By working in a curriculum where transactional drafting is a required course, making that investment in faculty specializing in transactional drafting and skills would pay dividends over the long term even if there were upfront costs.<sup>313</sup> Having legal writing faculty specialized in and dedicated to teaching transactional drafting could help—year over year—create syllabi, draft course problems, and coordinate with faculty teaching other transactional-related courses (contracts, business associations, will and estates, real estate, etc.) to ensure consistency and collaboration all while speaking the same transactional “language.”<sup>314</sup> Law schools could also utilize adjunct faculty and avoid the more significant cost concerns associated with paying a full-time faculty salary.<sup>315</sup> Considering students’ desires for more transactional skills education,<sup>316</sup> reports of

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305. See Schulze, *supra* note 17, at 91–92 (discussing how learning transactional drafting may require additional “knowledge of the doctrinal fields underlying the writing.”).

306. Pantin, *Deals*, *supra* note 2, at 86.

307. See Schulze, *supra* note 17, at 95–96 (discussing how adding transactional instruction into a curriculum where the professors are already busy leads to a conclusion that schools should have more instructors).

308. See *id.*

309. *Id.*

310. *Id.* at 92–93.

311. *Id.* at 93.

312. *Id.* at 96–97.

313. See *id.*

314. See generally Schulze, *supra* note 17, at 94 (explaining how implementing transactional drafting instruction can be a solution to problems in implementing transactional skills into a law school curriculum).

315. *Id.* at 93.

316. Sloan, *supra* note 159.

employer dissatisfaction with recent graduates' transactional training,<sup>317</sup> and planned changes for the bar exam,<sup>318</sup> the case for making a long-term investment in transactional drafting and skills training only becomes more pressing and obvious.<sup>319</sup>

Similarly, no valid argument exists to claim that current legal writing faculty, even assuming they have a background in litigation, or no background in transactional drafting, cannot effectively and competently teach transactional drafting and skills.<sup>320</sup> It may be true that most legal writing professors have a background in litigation.<sup>321</sup> Yet that need not imply that faculty trained in litigation cannot learn transactional skills, or that they lack the impetus to do so.<sup>322</sup> It is far from impossible for lawyers to successfully transition from litigation to teaching transactional drafting.<sup>323</sup> Moreover, given the (slow) rise in transactional drafting courses in law school,<sup>324</sup> many books, articles, and conferences are readily available to guide the uninitiated.<sup>325</sup> Tina L. Stark's *Drafting Contracts: How And Why Lawyers Do What They Do*,<sup>326</sup> Sue Payne's *Basic Contract Drafting Assignments, A Narrative Approach*,<sup>327</sup> Charles M. Fox's *Working With Contracts: What Law School Doesn't Teach You*,<sup>328</sup> and Kenneth A. Adams's *A Manual of Style for Contract Drafting*,<sup>329</sup> represent just a few of the excellent and

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317. See Eckart *Bias*, *supra* note 24, at 53 n.7.

318. See *supra* Section IV.B (discussing the inclusion of transactional drafting in the NextGen Bar Exam).

319. See Silecchia, *supra* note 33, at 247.

320. See generally Amy Bauer, *From the Courtroom to the Classroom: How a Litigator Became a Transactional Drafting Professor*, 20 TENN. J. BUS. L. 559, 560 (2018) (discussing the value that litigation experience brought to teaching transactional drafting).

321. See *id.*; see also Schulze, *supra* note 17, at 93 (citing Christine Hurt, *Erasing Lines: Let the LRW Professor Without Lines Throw the First Eraser*, 1 J. ASS'N LEGAL WRITING DIRS. 80, 84 (2002)).

322. See Schulze, *supra* note 17, at 93 (arguing that "presuming that LRW professors cannot be 'cross-trained' in transactional skills demeans talented legal educators" and that many professors would welcome the opportunity to pursue new research and skills to relieve the "mid law-teaching career doldrums"); see also Pantin, *Deals*, *supra* note 2, at 87 (noting that, "[f]or example, the author [Sue Pantin] teaches appellate brief writing, despite the fact that she has never written an actual appellate brief").

323. Full disclosure: the author counts himself among the proud converted. See also Amy Bauer, *From the Courtroom to the Classroom: How A Litigator Became a Transactional Drafting Professor*, 20 TRANSACTIONS: TENN. J. BUS. L. 559, 560 (2018) (discussing the journey from practicing litigation, to teaching legal writing, and finally to teaching transactional drafting).

324. See *supra* Part II (discussing the current approach to including transactional drafting in law school curriculum).

325. See TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2d ed. 2013); SUE PAYNE, *BASIC CONTRACT DRAFTING ASSIGNMENTS: A NARRATIVE APPROACH* (2010); CHARLES M. FOX, *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU* (2d ed. 2008).

326. See STARK, *supra* note 325.

327. See PAYNE, *supra* note 325.

328. See FOX, *supra* note 325.

329. See ADAMS, *supra* note 111.

widely-circulated books on transactional drafting that professors could utilize to learn transactional fundamentals and build course curricula.<sup>330</sup>

Including transactional drafting as a required course in the law school curriculum would also alleviate many ancillary concerns and arguments that first-year legal writing—and not an upper-level elective or clinic course—is the proper and best place to teach transactional drafting.<sup>331</sup> Critics contend that neglecting to teach or include transactional skills in the first-year legal writing program perpetuates errors and fallacies that do a disservice to law students.<sup>332</sup> These criticisms include claims that neglecting to include transactional skills in the first-year curriculum: (1) bolsters the perception that law school is and should be litigation-oriented; (2) reinforces the myth of lawyer as litigator; (3) unintentionally pushes students into litigation at the expense of exploring a transactional practice; (4) unfairly caters to students that are pre-disposed to adversarial work; and (5) reinforces the message that when transactional skills are taught outside the first year or as only upper-level electives they are somehow less important than litigation skills.<sup>333</sup>

Incorporating transactional drafting into first-year legal writing would, admittedly, make some progress toward eliminating these criticisms and concerns.<sup>334</sup> Making transactional drafting a required course would do even more.<sup>335</sup> As long as first-year legal writing teaches the traditional litigation-oriented methods of objective and persuasive writing (which it should), any transactional topics that augment or replace those assignments would be, at best, a limited or piecemeal introduction to an exhaustive and broad subject.<sup>336</sup> While something may be better than nothing, requiring that students learn transactional drafting and skills would go further to ensure that students graduate with a more complete understanding of transactional skills and how those might fit into their careers.<sup>337</sup> Teaching transactional drafting as a required course would dispel the notion that law school is litigation-oriented and that all lawyers are or must be litigators.<sup>338</sup> If schools emphasize transactional drafting with the same degree of time and attention (or at least as a separate, required course) that they pay to objective and/or persuasive writing, that would convey to students the message that transactional drafting

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330. *See id.*

331. *See* Goforth, *supra* note 76, 927.

332. *See generally id.* (explaining how not including transactional skills in first-year curriculum implies that the material is less important).

333. *See* Pantin, *Deals*, *supra* note 2, at 71–73 (outlining arguments to teach transactional skills in the first year); *see also* Goforth, *supra* note 76, at 927 (“Relegating transactional training to upper-level electives sends a clear message that it is less important than litigation skills, perpetuating the myth about the relative unimportance of transactions in the modern world.”).

334. *See* Goforth, *supra* note 76, at 925.

335. *See id.* at 927.

336. *See id.* at 925–26.

337. *See id.* at 928.

338. *See id.* at 927.

is important, that it must be part of a legal education, and that it is necessary for any legal practice.<sup>339</sup> Furthermore, requiring students to learn transactional drafting would cater to those students interested in a non-adversarial practice.<sup>340</sup> It would also expose students predisposed to litigation to a subject they might otherwise avoid, but which they nevertheless need, or at the least, from which they will benefit.<sup>341</sup> Lastly, having a required transactional drafting course taught outside the first year would put the subject on par with objective and persuasive writing, sending the message that it is important and cannot be ignored.<sup>342</sup> Indeed, many required courses are offered only after the first year, including Professional Responsibility and, in some instances, Constitutional Law.<sup>343</sup> Even though these are offered after the first year, few would argue they lack utility or are unimportant.<sup>344</sup>

#### VII. A REASONABLE WAY FORWARD: REQUIRING TRANSACTIONAL DRAFTING IN THE LAW SCHOOL CURRICULUM

Though perhaps radical, or maybe just short of radical, adding transactional drafting to the already lengthy list of required law school courses would go far to remedying a gap in legal education—and not just legal writing education.<sup>345</sup> Few seem to doubt the value that transactional drafting knowledge would bring to students' education.<sup>346</sup> But the existing proposals to amend or supplement “traditional” first-year writing programs to account for new and different knowledge are not the ideal way to do that.<sup>347</sup> As noted above, incorporating new material into first-year legal writing necessarily means some other material or assessment is minimized, or at worst, excised entirely.<sup>348</sup> Resources are limited.<sup>349</sup> Class minutes are finite.<sup>350</sup> First-year legal writing is the time and place to learn legal writing,

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339. See generally *id.* at 906 (discussing the need to focus more time on transactional work in legal education).

340. See generally, Eckart, *Deal*, *supra* note 44, at 137–38 (2020) (discussing survey results showing, as among law students, a not insignificant preference for transactional practice).

341. See generally, Dykstra, *supra* note 274, at 187–90 (discussing how most new attorneys are likely to work in smaller, private firms or as solo practitioners, and as such will likely engage in some form of civil litigation).

342. See generally *infra* Part VII (explaining the value of implementing transactional writing into curriculum).

343. See generally Goforth, *supra* note 76, at 904 (stating that most skills are taught in upper-level curriculum).

344. See generally *id.* at 906 (explaining that the American Bar Association requires certain professional skills be taught during law school).

345. See generally Snyder, *supra* note 42 (discussing benefits of the transactional law experience).

346. See Pantin, *Deals*, *supra* note 2, at 71–74 (discussing the value of transactional law experience in schools).

347. *Id.*

348. See Schulze, *supra* note 17, at 92–93 (noting that adding courses to the first-year curriculum would be burdensome).

349. *Id.*

350. *Id.*

not a wholesale new subject or some portion thereof—which necessarily is what adding foundational information about transactional skills would require and mean if it were done thoroughly and completely.<sup>351</sup> Adding transactional drafting and skills to the first-year writing curriculum *could* provide some *baseline* of transactional knowledge to students—but it would likely be just that, a baseline.<sup>352</sup> Considering the breadth of topics that fall within the ambit of transactional drafting,<sup>353</sup> and that many law schools offer transactional drafting as a separate, standalone class,<sup>354</sup> any introduction of the subject into an already crowded first-year legal writing program would be topical, or survey-level at best.<sup>355</sup> Legal analysis, objective writing, persuasive writing, and advocacy—all of these foundations of first-year legal writing are also foundations for a successful career as an attorney.<sup>356</sup> We should not sacrifice fundamentals for the sake of expediency or topical subject-matter coverage.<sup>357</sup>

Rest assured—no offense is intended to those noted above who advocate for bringing an important subject into the fray.<sup>358</sup> Everyone wants the same thing.<sup>359</sup> But a better way forward exists.<sup>360</sup> Preserving the objective-persuasive writing format of first-year legal writing and supplementing it in the second or third year with a required transactional drafting course would most efficiently and completely provide students with a robust, well-rounded education needed to meet the demands of practice and also those of the NextGen Bar.<sup>361</sup> This could likely be done in a two or even a rigorous one credit course.<sup>362</sup> Requiring that transactional drafting be taught as a separate course outside of the first year would allow students to learn the fundamentals required in “traditional” legal writing.<sup>363</sup> At the same time, it would also allow students to focus dedicated resources to learning transactional skills in a manner, and a place, that could go beyond a “survey” or simple introduction of what is otherwise a broad, nuanced, and involved

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351. *Id.*

352. *See id.* (emphasis added).

353. *See, e.g., supra* Part II (discussing the current state of law school curriculum); *see also* Marlene Coir, *Resources to Assist in Contract Drafting*, MICH. B.J., June 2013, at 56–57 (discussing treatises and resources for various types of contracts that attorneys may encounter); Chesler, *supra* note 75, at 652 (discussing the variety of documents that might be considered as a transactional document).

354. *See generally supra* Part II (discussing traditional first-year legal writing courses).

355. *See* Schulze, *supra* note 17, at 92–93 (noting that adding courses to the first-year curriculum would be burdensome).

356. *See generally supra* Part II (discussing current legal writing programs).

357. *See generally supra* Part VI, note 262 (discussing issues and limitations for incorporating some skills and the concern for sacrifices being made).

358. *See* Pantin, *Deals, supra* note 2, at 71–74 (explaining a view in support of the valuable transactional law experience in schools).

359. *Id.* (discussing the value of transactional law experience in schools).

360. *Id.*

361. *See supra* Section IV.B (discussing transactional law and the NextGen Bar exam).

362. *See* Schiess, *supra* note 250 (supporting a first-year drafting course).

363. *Id.*

subject area.<sup>364</sup> Allocating the course to the second or third year would also allow students to build off of and contextualize transactional drafting within the realm of other doctrinal courses, like Contracts, Property, and Civil Procedure, which they will have already taken.<sup>365</sup> Having already read and studied case law in first-year courses like Contracts—case law that explored topics like offer, acceptance, and remedies from a more abstract perspective—students could then apply the more technical skill of effective drafting to learn how those issues both come about and how they can be preemptively avoided.<sup>366</sup>

Requiring an additional course in the law school curriculum is no small task.<sup>367</sup> But as legal education—in particular, legal writing education—continues to evolve, we must evolve and adapt with it.<sup>368</sup> Were we to maintain the current “traditional” structure of first-year legal writing and supplement it in the second or third year with a required course on transactional drafting, we would accomplish much while sacrificing little.<sup>369</sup> Students would graduate having learned both litigation and transactional skills, and the writing acumen that would best help them tackle both in the real world.<sup>370</sup> In turn, students would be more prepared for the realities of a multifaceted practice—one that, whether or not a student pursues a career in a litigation or transactional realm—will undoubtedly and inevitably involve and require some facet of transactional drafting and knowledge.<sup>371</sup>

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364. *Id.*

365. *See* Hankin, *supra* note 35 (discussing writing programs that incorporate Torts, Contracts, or Civil Procedure).

366. *Id.*

367. *See* Schulze, *supra* note 17, at 92–93 (noting that adding courses to the first-year curriculum would be burdensome).

368. *See generally*, Wagner, *supra* note 84 (discussing a lawyer’s need to understand transactional law).

369. *See* Hankin, *supra* note 35 (discussing writing programs that incorporate Torts, Contracts, or Civil Procedure).

370. *See* Pantin, *Deals*, *supra* note 2 (stating that more than half of law students are going to be transactional lawyers).

371. *Id.*