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# WHEN THOSE WHO DO TEACH: THE CONSEQUENCES OF LAW FIRM EDUCATION FOR BUSINESS LAW EDUCATION

*James A. Fanto\**

## I. INTRODUCTION

This Essay, in Part II, highlights developments in legal education conducted by and within law firms, particularly through the use of on-line resources. I became aware of these developments as a result of being a consultant within my former law firm's education program after a five-year absence from the firm. The Essay then offers several explanations for law firm training efforts in Part III. Finally, in Part IV, the Essay cites the implications of one aspect of this education, the on-line production of transaction agreements, for teaching business law in law schools. The Essay concludes that, because law firm education shows how business law practice is changing, we in the academy should draw insights from it to help us better prepare our students for the practice that awaits them.

## II. DEVELOPMENTS IN LAW FIRM EDUCATION

There is currently more formal education in law firms than existed ten or twenty years ago. This is not a new observation, for the *MacCrate Report* highlighted—and even celebrated—this kind of education in 1992 as a model for helping law students make the transition from school to practice.<sup>1</sup> It is not unusual for a law firm

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\* Professor of Law, Brooklyn Law School. I have been a consultant for the Mergers & Acquisitions Group of the Corporate Department of the law firm, Davis, Polk & Wardwell. My observations concerning law firm education are based upon that firm's training program, as well as upon discussions with lawyers (some of whom are former students) in other firms regarding their training resources. This Essay represents my own views on firm legal education and in no way reflects those of Davis Polk or of any other law firm.

<sup>1</sup> See AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM REPORT OF THE ABA TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 299-301, 314-16 (1992) [hereinafter MACCRATE REPORT] (describing growth of in-house training programs in large law firms, corporations and government agencies).

now to have an education staff consisting of directors of legal education, members of the firm's practice groups, and even former and consulting law professors.<sup>2</sup>

The goals of the education staff are to ensure that firm lawyers are properly indoctrinated into the firm's practice, that they continue to be educated in their practice areas, and that they have effective tools for their training and practice. To these ends, the staff offers, or supervises the offering of, courses for lawyers, ranging from an introduction to the firm's legal practice for beginning associates to both theoretical and practical courses for senior associates (e.g., guidance on how to supervise new lawyers or how to deal with clients). In addition, the staff, with the participation of senior lawyers, offers mini-courses on particular topics in the various practice areas as well as general training on transaction agreement drafting. Experienced firm lawyers also review current developments in the law of a particular practice area through bi-monthly or even weekly meetings.

Law firm education does not end with legal training. Recognizing that an effective business lawyer must be familiar with the terminology involved in the presentation of financial positions and results and the financial considerations motivating investments and transactions, firms bring in accounting and finance specialists (often from accounting and consulting firms) to review with the lawyers developments in their areas, as well as to teach elementary courses on finance and accounting. Indeed, one "niche" business today among these specialists is the offering of this training in law firms.<sup>3</sup>

As the *MacCrate Report* observed, this kind of education program is typical of large law firms, corporate legal departments, and government agencies, which have the resources to conduct it. Supplementing these efforts are the many Continuing Legal Education (CLE), Practising Law Institute (PLI), American Law

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<sup>2</sup> At Davis Polk, for example, the group is called "Practice Resources & Professional Services" and includes over ten full-time members who both direct the training of lawyers and provide practice resources (particularly on-line) for them.

<sup>3</sup> For example, the Dickie Group, made up of, among others, professors of accounting and finance, offers seminars on the basics of accounting and finance to law firms. See, e.g., THE DICKIE GROUP, THE LAWYERS' CORPORATE FINANCE PROGRAM: PRACTICAL INSIGHTS INTO FINANCE AND BUSINESS (1999) (detailing course materials for eight-hour program on corporate finance).

Institute-American Bar Association (ALI-ABA), and local bar association programs and courses on substantive law and practice in different areas of business law. One acknowledged problem with such courses, however, is that they are not necessarily organized in any coherent educational way and often presume much practical knowledge.<sup>4</sup> Partly as a result of the *MacCrate Report's* observation regarding these deficiencies, "transition" courses for new lawyers are beginning to appear, as well as tools for such training.<sup>5</sup>

### III. REASONS FOR LAW FIRM EDUCATIONAL DEVELOPMENTS

Enhanced legal specialization partly explains a firm's education programs. Law practice in all areas, including and perhaps especially business law, is becoming increasingly specialized; lawyers need to know more in order to function at even a basic level of competence in these areas. It is cost effective for experienced, senior firm lawyers to train their new lawyers in the practice areas that they have mastered. For similar cost reasons, however, this training can no longer be done through an apprenticeship.

CLE guidelines, which go hand in hand with specialization, may also offer a partial explanation for the new emphasis on firm education. In recent years, these guidelines have expanded and in many cases become mandatory.<sup>6</sup> A large firm can save time and money by conducting CLE programs within the firm (if state bar rules so allow). The experienced lawyers can train the new attorneys, and both groups receive CLE credit without wasting time traveling to and from conferences. Moreover, this firm CLE activity can be more tailored to a firm's practice areas than the generalized courses offered by other practitioners in a PLI or ALI-ABA setting.

The increasing size of law firms and the desire by their members to maintain per-partner profitability also account for educational

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<sup>4</sup> MACCRATE REPORT, *supra* note 1, at 313.

<sup>5</sup> There is a new working group in the ABA devoted to bridging the gap between business law practice and legal education. See Donald C. Langevoort, *An Academic's Perspective*, BUS. L. TODAY, July-Aug. 1999, at 33 (describing The Task Force on Business Lawyers as Problem Solvers).

<sup>6</sup> See generally MACCRATE REPORT, *supra* note 1, at 309-12 (explaining that over 37 states require some form of mandatory CLE).

developments. For sheer logistical reasons (i.e., the low ratio of partners to associates), the "mentoring" process with its close association of partner and associate that once occurred, particularly in the course of assisting in business transactions, is no longer possible. Formal group training thus replaces the personal training and apprenticeships that formerly characterized even the big firms. Although law schools have enhanced professional training in recent years, law firms recognize that they need to supply this training themselves in the early years of a lawyer's career to replace the mentor relationship.<sup>7</sup>

The formal training in law firms is arguably more efficient and egalitarian, at least with respect to firms with a certain partner/associate ratio. As firms grow in size, training conveyed by personal relationship is likely to be uneven. While some lawyers receive a "rounded" experience in a practice area, others may have an inadequate or incomplete training. A formal education system is designed to ensure that all associates benefit from a comparable formation. Indeed, part of the education program is monitoring the actual training and practice experience of each lawyer in a large firm, much in the same way that a human resource department would do in a corporation, so as to ensure equal opportunities for all lawyers.

In addition and perhaps most importantly, under pressure from clients, law firms need their new lawyers to become productive as soon as possible. This points to an aspect of training and practice resource development in firms that this Essay discusses in more detail below: the increasing use of on-line resources to facilitate the production of legal work (e.g., transaction agreements and documents). These resources give lawyers standard models, alternative drafting suggestions, and easy access to firm precedents. This reflects an effort by firms to train lawyers to produce low-value or

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<sup>7</sup> Some suggest that law schools have done and currently do little of this training. See MACCRATE REPORT, *supra* note 1, at 127-28 (stating that law students are just passive consumers of legal education lacking adequate concrete understanding of requirements of competent practice). Others disagree. See, e.g., John Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, in THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM, CONFERENCE PROCEEDINGS 28, 38-41 (Joan S. Howland & William H. Lindberg eds., 1994) [hereinafter THE MACCRATE CONFERENCE] (defending law school education norms).

“commodity-like” work quickly so that they can concentrate on the high-value work for which clients are prepared to pay premium rates.<sup>8</sup>

#### IV. THE CONSEQUENCES OF LAW FIRM EDUCATION FOR LAW SCHOOLS

Business law professors acknowledge, albeit in varying degrees, the connection between law school and legal practice. Indeed, if anything, law schools recently have exhibited more overall commitment to training lawyers for practice.<sup>9</sup> Thus, I make the following comments without intending to take any position on the appropriate allocation of law school resources among theoretical work, doctrinal training, and practical skills.

Law firm education makes us realize that our role in preparing students to work in the elite law firms is limited, especially given the resources that the firms are devoting to training their new lawyers and the specialization of the practice of these firms. We do indoctrinate students into the “culture” of law in the first year of law school and, in subsequent years, introduce them to the substantive areas of business law (e.g., corporate, securities, banking, corporate finance, antitrust) that many of these firms practice. We also provide a certification process that gives the firms a pool of applicants from which to select associates.<sup>10</sup> I would also argue that the elite firms should learn from us in the academy because, despite the vast resources available to firms for their educational programs, many of those engaged in firm education are not professional educators, and the quality of their training and pedagogy is uneven.<sup>11</sup>

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<sup>8</sup> CAROLYN E. PARIS, LEGAL DRAFTING AND ANALYSIS FOR CORPORATE FINANCE, Lesson 6A (1998 draft, in publication with Practising Law Institute).

<sup>9</sup> See, e.g., MACCRATE REPORT, *supra* note 1, at 234 (asserting that law schools have learned to teach skills associated with practice which once had been thought to be unteachable outside of direct practice experience).

<sup>10</sup> On this selection process, see Talbot D'Alemberte, *Keynote Address*, in THE MACCRATE CONFERENCE, *supra* note 7, at 4, 10-11.

<sup>11</sup> For a similar observation and other criticism of in-house programs, see John Claydon, *The MacCrate Report: In-House Training and the Legal Education Continuum*, in THE MACCRATE CONFERENCE, *supra* note 7, at 92-98; Peter G. Glenn, *Some Perspectives on In-*

Law professors, however, should learn from law firm education and its indications of the changing practice of law for the benefit of our students who will never work in the large firms. That is, many law students will not receive the legal education that law firms provide, because they will not be hired by these firms or they will work for firms that cannot afford to provide practice resources and training. This recognition of the plight of many new practitioners has in fact spurred reform efforts regarding legal education.<sup>12</sup> We should thus provide some of the training for these students, teach them how to educate themselves once they leave our institutions, and give them an idea of the practice awaiting them, as experienced practitioners/teachers may not be conducting their future education.<sup>13</sup>

To make this discussion about practical training and the transformation in law practice more specific, take an example from law firm training that is of particular interest to me: drafting agreements and other documents used in a transaction.<sup>14</sup> A common task of beginning lawyers is to add value quickly by doing something that is relatively routine: generating a first draft of a transaction agreement. Law schools (perhaps for understandable cost reasons) generally have not prepared their students to undertake this task. Students have not been trained to see the connection between the transaction agreements and the business law that they have learned

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*House Skills Training as Part of the Continuum of Professional Education, in THE MACCRATE CONFERENCE, supra note 7, at 87-91.*

<sup>12</sup> See MACCRATE REPORT, *supra* note 1, at 301 ("The plight of new lawyers beginning a general practice by themselves or in offices that provide little or no on-the-job training has been at the center of the ALI-ABA projects to improve the quality of transition education.").

<sup>13</sup> We should not ignore the increasing strength of CLE and PLI courses, nor the possibilities of legal training on the Internet, to provide this training at low cost to lawyers outside the large firms. Yet these alternatives do not completely suffice for the training of new lawyers. For a general discussion of CLE, see Victor J. Rubino & Richard D. Lee, *The Role of CLE in Implementing the Recommendations of the MacCrate Report, in THE MACCRATE CONFERENCE, supra* note 7, at 99-104. Although the *MacCrate Report* recommends development of a National Institute for the Practice of Law, MACCRATE REPORT, *supra* note 1, at 319-23, it envisions a continuing role for practice training in the law schools. *Id.* at 330-34.

<sup>14</sup> This area has not been studied much in the academy, other than by Bernard Black and Ronald Gilson, who examine the value contributions of business lawyers. See, e.g., BERNARD S. BLACK & RONALD J. GILSON, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 1559-1603* (2d ed. 1995) (discussing value contributions of business lawyers in chapter entitled "The Corporate Acquisition Agreement: The Private Ordering Role of Business Lawyers").

(i.e., how the law dictates the content of, and is enacted through, the agreements). Indeed, they often learn little about the structure of transaction agreements in law school.

For example, it is one thing to learn what a merger is, even the commonly used reverse triangular merger, and the fiduciary duties of directors in this transaction, which are all subjects in the basic Corporations course.<sup>15</sup> This information, which is undeniably important, occupies most of the attention of even law books prepared for advanced law school courses on mergers and acquisitions, books that are (again understandably from the law school's present orientation) more theoretically and doctrinally, than practically, oriented.<sup>16</sup> The challenge facing a new lawyer is to move from this general knowledge to drafting a merger agreement. To continue with the example, much attention in current merger practice goes toward drafting the "no-solicitation clause," which prohibits the "target" in the merger (and sometimes even the acquirer) from soliciting or encouraging other transactions once it has signed the merger agreement. In any given transaction, practitioners consider how rigorous the provision can be and how broadly or narrowly the exceptions to the no-solicitation clause can be drafted, and this drafting clearly relies on knowledge and interpretation of Delaware case law on fiduciary duty.<sup>17</sup>

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<sup>15</sup> See, e.g., WILLIAM L. CARY & MELVIN ARON EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 1130-1327 (7th ed. 1995) (containing typical chapter in Corporations text dealing with such issues).

<sup>16</sup> Again, Black and Gilson's otherwise excellent book devotes only approximately fifty out of sixteen hundred pages to the subject of agreements; the rest is devoted to a discussion of law, finance and accounting issues. Their approach is echoed in other law school texts. See, e.g., DALE ARTHUR OESTERLE, *THE LAW OF MERGERS AND ACQUISITIONS* 244-305 (1999) (containing chapter on acquisition documents that takes up approximately 50 pages of an approximately 700 page book). But see WILLIAM CARNEY, *MERGERS AND ACQUISITIONS* (2000) (containing 120 pages on "practical" matters out of 1000 page textbook, but more practice-oriented discussion throughout book).

<sup>17</sup> See, e.g., William T. Allen, *Understanding Fiduciary Outs: The What and the Why of an Anomalous Concept*, 55 *BUS. LAW.* 653 (2000) (discussing practitioner concern over drafting exception to no-solicitation clause, known as "fiduciary out," which gives board of target company the right to ignore the contractual restriction, and often to terminate merger agreement, if its fiduciary duties so require). Indeed, the interplay between case law and drafting is at issue in a recent Delaware case. See *ACE Ltd. v. Capital Re Corp.*, No. Civ. A. 17488 (Del. Ch. Oct. 25, 1999) (discussing reading of and legal implications concerning "no shop" clause in merger agreement).

My point here is not just the often-discussed need for more law school training in drafting transaction agreements. As noted earlier, much of this kind of drafting by beginning lawyers is becoming a service that, while necessary, is not the kind of legal work that is most highly valued by clients (i.e., it is almost becoming a commodity service). Basic knowledge of the purpose and method of drafting agreements allows a new lawyer to get a transaction started. Further value is added (often by more senior lawyers, but sometimes even by the junior lawyer) through the negotiations over the agreement in a particular transaction and in the drafted responses to those negotiations.

Law firms address the "commodification" of the transaction agreement, and the need to train new lawyers to prepare agreements, through the "automation" of drafting. They provide lawyers online access to standard form model agreements built up over years of practice by the firm, a universe of drafting possibilities to deal with specific situations, and useful precedents and commentaries to tie the above together. Thus, the firms systematize the kind of knowledge that each transaction lawyer historically kept to himself or herself and then passed along to new lawyers through the mentor relationship. In a merger agreement, for example, there would be a basic "no-solicitation" provision and programmed drafting variations of the provision for a lawyer to select, together with an explanation of the alternatives and the advantages and disadvantages of selecting them. The goal of the firms is to program "thinking" into the on-line production of the transaction agreement so that an agreement is generated following the specific guidelines of the user.<sup>18</sup> Indeed, law firms expect that, in time, lawyers will become skilled in using and even creating their own libraries of "standard form" documents and comfortable with the tools of computerized document production.<sup>19</sup>

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<sup>18</sup> Naturally the creation of even a first draft of a transaction agreement requires thinking, and thus value creation, from a new lawyer. The use of standard form on-line programs speeds up and facilitates this process.

<sup>19</sup> See PARIS, *supra* note 8, lesson 1 ("In the future, lawyers will be called upon not only to draft specific contracts but to design templates for computer-based drafting."). As Paris notes, this document production will not replace lawyers, but it will eliminate some of their activity.

How do law professors help students make the transition to and be prepared for this kind of law practice (the key concern of the *MacCrate Report*),<sup>20</sup> particularly the students who will not have the luxury of the extensive practice resources of a large firm? This is a critical question because lawyers outside large firms will be especially affected by developments in law practice illustrated by the law firm training described above. Clients, particularly small business clients, will be reluctant to pay much for the commodity service of producing straightforward transaction agreements that can easily be generated by a lawyer's use of on-line resources.<sup>21</sup> We thus have to prepare students as quickly as possible to make the step to being transaction lawyers because they may have little leisure to develop themselves. They have to learn about the role of a lawyer in a transaction, particularly the framework and substance of transaction agreements, and they *now* have to be ready for the impact of new technology on the production of these agreements (this latter point makes our concern about preparing students all the more acute).

Concerning basic practice skills, there is a resurgent interest among business lawyers about teaching students to draft and negotiate.<sup>22</sup> Practitioners, such as Carrie Paris (formerly a partner at Davis Polk) who has written a book on drafting complex transaction agreements with attention to the effects of computerization on drafting,<sup>23</sup> are contributing to this effort. However, as to teaching

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<sup>20</sup> See MACCRATE REPORT, *supra* note 1, at 285-304 (discussing kinds of transition education for lawyers).

<sup>21</sup> See RICHARD SUSSKIND, *THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY* xlvii (1996) ("While high value, socially significant and complex legal work will not, as I have said, be fundamentally changed through IT, the same cannot be said of numerous other categories of legal practice of today. I have in mind much of the standard and repetitive work of our current lawyers.")

<sup>22</sup> See Langevoort, *supra* note 5, at 36-37 (discussing concerns about designing contracts correctly and courses addressing this concern); see also BERNARD S. BLACK, *NEGOTIATING AND DRAFTING THE ACQUISITION AGREEMENT* (Practising Law Institute, 1997) (containing materials for course on drafting); NANCY J. KNAUER, *TRANSACTIONAL PRACTICE: QUALITY PAPER PRODUCTS, INC., PURCHASING A CLOSELY HELD CORPORATION* (1998) (containing materials prepared under auspices of National Institute for Trial Advocacy designed to help teach elementary transactional practice skills); James C. Freund, *Teaching Problem Solving: A Lawyer's Perspective*, *BUS. L. TODAY*, July-Aug. 1999, at 34 (discussing need to teach drafting and negotiating in problem-solving context).

<sup>23</sup> PARIS, *supra* note 8.

students how the drafting process is changing in response to the electronic media and how to use new tools for producing transaction agreements, the teaching materials, to my knowledge, are not yet available. With the possible exception of Paris's book, there are only a few useful works, such as James Freund's basic text on drafting and books from PLI sessions.<sup>24</sup> Even these works do little more than explain the structure of basic transaction agreements. This absence of materials in law schools is not entirely surprising. Teaching the impact of online resources on transaction skills should not be separated from our efforts to instruct students on conducting electronic legal research. However, because law schools have always been more litigation-oriented in their computerization efforts (and in their pedagogy in general), they have generally ignored, or at least have not adequately emphasized, the effects of information technology on training business lawyers.

Finally, we in the academy must seriously consider that it is just a matter of time before we experience competition from other kinds of education providers in preparing new lawyers for the changing world of business law practice. Private on-line education providers and bar associations may take up this task themselves. And who is to say that a law firm that has developed a particularly good method of and materials for legal training may not decide to market its intellectual property beyond the firm?

## V. CONCLUSION

Developments in law firm education are both exciting and dismaying for business law professors. They are exciting because they point to potentially great changes in business law practice and the delivery of legal services. Not surprisingly, in light of the transformation in legal practice, law firms are creating new tools that may maintain or increase their profitability. The developments are also dismaying because this transition potentially brings with it increasing commodification of legal services, with uncertain

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<sup>24</sup> See generally JAMES C. FREUND, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS (1975) (detailing experiences of active acquisitions attorney).

consequences for law students (particularly those who do not go to the large firms) that we send out into the world, and even for us.<sup>25</sup> At least one consequence of the changing legal practice is that new lawyers, both inside and particularly outside large firms, will be held to a higher standard of value production.

It is clear that many business law professors are not preparing students for a transition into practice that, as I have suggested, is even more radical than what the *MacCrate Report* envisioned. Law firms cannot afford to wait for us to catch up, and they are addressing the changes in law practice and the resulting shortcomings of legal education themselves. We should thus pay careful attention to the developments in legal education and practice resources in law firms, now that firms have seriously entered this activity, for it gives us a glimpse into both our and our students' futures. We should go further by incorporating some law firm methodology into our own teaching, for this will likely help us train our students better for the practice world that awaits them.<sup>26</sup>

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<sup>25</sup> The work of people involved in an activity that becomes a commodity service is generally devalued.

<sup>26</sup> Papers and discussions at the Teaching Corporate Law Conference at the University of Georgia, for which this Essay was prepared, clearly show that some insightful business law professors are developing teaching materials with one or both critical purposes in mind: to help students understand (i) how they can train themselves in business law and practice through Internet resources and (ii) how they can make the transition from theoretical or doctrinal knowledge to this practice. This issue of the *Georgia Law Review* showcases their efforts. It is simply necessary to bring the two purposes together in teaching materials that connect information technology to practice skills, such as drafting.

