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BEST PRACTICES:
*Transforming
Legal Education
in a
Changing World*

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BUILDING ON BEST PRACTICES:

Transforming Legal Education in a Changing World

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Once author final drafts were received, readers Grace Allison, Jill Engle and Rob Smith read not just individual sections but much or all of the book and commented accordingly.

Warren Binford and Glenn Kaas read the entire manuscript for copy editing purposes; Fritz Wollett read significant sections.

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And, of course, we could not have done this without the patient and continuing support of our families.

Foreword

Roy Stuckey

BUILDING ON BEST PRACTICES is a remarkable book produced by a remarkable group of people. It will provide helpful guidance to law teachers for decades to come. I am proud that the authors and editors chose to associate their work with BEST PRACTICES FOR LEGAL EDUCATION.

In 2007, we expressed hope in BEST PRACTICES that the completion of the drafting phase would mark the beginning of a process of discussion, debate, and implementation of the principles discussed in the document — or other principles that would promote improvements in legal education. We also expressed hope that the discourse would be real discourse — concerned with normative values, not the justification of the system that currently existed.

BUILDING ON BEST PRACTICES is proof that real discourse has occurred. Many, if not most, of the publications cited in the book were written after 2007. Our understanding of what law schools should be trying to achieve and how they can accomplish their goals has grown exponentially since 2007.

In the *Foreword* to BEST PRACTICES, Bob MacCrate concluded that “there is indeed an ‘historic opportunity to advance legal education,’” which had been suggested in the Carnegie Foundation’s report on legal education, EDUCATING LAWYERS. We are living in an era where, for the first time, law teachers are engaged in an effort to review and adjust the goals and methods of legal education based on sound educational theories and practices.

Before the MACCRATE REPORT in 1992, there was no momentum for reforming the core goals or methods of legal education in any significant way, despite a century of criticism from various constituents. Largely because of the MACCRATE REPORT, there was some momentum for change when BEST PRACTICES AND EDUCATING LAWYERS were published in 2007.

Reform seems especially likely today in light of the August 2014 changes to the ABA Standards for Approval of Law Schools. ABA Standard 204 requires that, before each site inspection, a law school must prepare a statement of the law school’s mission and its educational objectives in light of that mission, and the law school must conduct an assessment of its effectiveness in achieving its stated objectives. Another important change is a requirement in ABA Standard 301 that a law school shall establish and publish learning outcomes designed to achieve a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession. ABA Standard 302 describes the essential learning outcomes that law schools must strive to achieve, and law schools must assess whether their learning outcomes and other goals are being achieved.

The new ABA Standards reflect principles of best practices that were championed in BEST PRACTICES. In 2007, they were merely aspirational. Today they are the law of the land, and a

Foreword

person could reasonably ask, “Can reform be stopped?”

Yes, reform can be stopped unless enough law teachers are motivated to embrace change and to implement new goals and methods across the curriculum. It is far from certain whether this will happen. We said in 2007 that the resistance of the legal academy to change was so well-entrenched that we hesitated to undertake the Best Practices project, and we knew that it would be difficult to motivate some law teachers to modify their attitudes and practices. This remains true today.

There are reasons to be hopeful, however. Law teachers are very bright people and most have good intentions. They want to be known as good teachers, and they want their students to become effective, ethical, and responsible members of the legal profession. As law teachers become more educated about the shortcomings of legal education, discover examples of successful materials and methods, and develop an appreciation of how new goals and methods can be advantageous to their institutions, themselves, and especially their students, I have hope that law schools will continue to become more effective at preparing students to enter the legal profession. BUILDING ON BEST PRACTICES will be a valuable resource during this process, and Section 8C, *Leadership and Curricular Change*, will be very useful in motivating more law teachers to move forward.

Although the eventual outcome of the reform movement is uncertain, one thing is certain. This is an exciting period in the history of legal education in the United States. There are many signs that the tide has turned and that those who cling to the *status quo* will be left behind. If you are unsure about your support for legal education reform, I urge you to heed the words of one of my favorite poets:

Come senators, congressmen
Please heed the call
Don't stand in the doorway
Don't block up the hall.
For he that gets hurt
Will be he who is stalled
There's a battle
Outside and its ragin'
It'll soon shake your windows and rattle your walls
For the times they are a-changin'.¹

Don't be among those who are stalled. Join the discussion about the future of legal education. The changes that are called for in the MACCRATE REPORT, EDUCATING LAWYERS, BEST PRACTICES, and this book are not to be feared. They should be embraced and implemented with excitement and celebration.

¹ Bob Dylan, *The Times They Are a-Changin'*, on THE TIMES THEY ARE A-CHANGIN', (Columbia Records 1964).

Preface

This volume is a follow-up to BEST PRACTICES FOR LEGAL EDUCATION,² a project of the Clinical Legal Education Association (CLEA), authored primarily by Roy Stuckey, published in 2007, and distributed at no cost to legal educators. The new volume is not intended to be an exhaustive resource. Not a second edition, BUILDING ON BEST PRACTICES is intended to be used in conjunction with the original volume, as the core content of BEST PRACTICES remains just as useful as when it was originally published.

Each section of this book therefore begins with an introduction that references BEST PRACTICES, describing what that volume did, or did not, have to say about the subject. It points the reader to that volume, where appropriate, and then explains why additional discussion of the subject is timely. The new volume follows a different format from BEST PRACTICES and is styled not as a “Restatement” with comments, but as more discursive observations that identify not only best practices, but what can be considered good practices, and emerging best practices, in areas where neither consensus nor empirically-based best practices can be identified.

The genesis of this volume was the recognition that, as was no doubt inevitable in a project of the scope of BEST PRACTICES, some topics were covered in less detail than they deserved, notably diversity and intercultural competence,³ and others, such as externships, were the site of significant new developments in the years immediately after the book was published. As this project evolved, it also became apparent that, increasingly, new lawyers, and law teachers, are asked to be conversant with an expanded range of knowledge, skills, and values — to use the term associated with the influential and widely cited MACCRATE REPORT.⁴

Legal education is called to respond to this broader view of what lawyers must be trained to do. This book identifies ten such areas and provides guidance on what and how to teach them. The demand to teach a broader range of knowledge, skills, and values presents difficult trade-offs, however, that are also considered.

Like BEST PRACTICES, this volume began as a CLEA project, under the auspices of the Best Practices Implementation Committee. Supported by the co-chairs of the committee, Carolyn Wilkes Kaas and Lisa Radtke Bliss, and the Best Practices blog⁵ editor Mary Lynch, Antoinette Sedillo Lopez championed the importance of a follow-up volume, and volunteered to edit it, either alone or with a co-editor. Deborah Maranville signed on to collaborate as a co-editor, and was indispensable in moving the project forward. At a moment when additional support was needed, the committee co-chairs stepped forward to provide additional assistance as co-editors. In their work with over fifty authors, each of the co-editors brought differing but essential skills. This is truly a collaborative project, among

² ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007)[hereinafter BEST PRACTICES].

³ This important topic was covered in less than two pages, at text accompanying notes 258-61.

⁴ *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* [MACCRATE REPORT], ABA Section on Legal Education and Admission to the Bar (1992).

⁵ See <http://bestpracticeslegaled.albanylawblogs.org/>, archived at <http://perma.cc/JHH9-2585>.

Preface

the editors, among groups of co-authors, and among the editors, the authors, and the many legal educators who volunteered to read and comment on individual sections, or the entire book. Authors' and readers' names appear in lists at the front of this volume. Authors are also credited at the beginning of each section, and section readers in the first footnote of each section. If there is more than one author, they are listed in alphabetical order, unless the authors' agree that there is a lead author whose name should come first in which case the additional authors' names follow the notation "with." The editors apologize if anyone among this wide community of participants was inadvertently omitted.

The book deviates from Bluebook conventions in the following respects:

BEST PRACTICES was published in print form, but is also available in .pdf format at the CLEA website.⁶ Page numbers in the two versions differ. In order to make this volume easy to use for readers of both versions, citations to BEST PRACTICES therefore follow the format "text at notes ___."

We anticipate that some readers will read only parts of the book, or will read them out of order. Therefore each subsection is treated as its own piece for purposes of footnote numbering and providing full citations when a source is first referenced.

Instead of using "supra" and "infra" to cross-reference among footnotes, sources cited more than once are given a "hereinafter" short form in the first reference and subsequently cited only by that short form.

Cross references among different sections of the book are indicated by the use of "above" or "below".

Many authors reference websites. Because the life expectancy of websites is short, instead of providing a "last visited" date, a citation to an archiving site, "perma.cc" is provided. The perma.cc website provides an archival record of a screen shot of the website at the time it was archived.

⁶ www.cleaweb.org/Resources/Documents/best_practices-full.pdf, archived at <http://perma.cc/Q3B4-GCVM>

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Introduction

The two parts of the title of this book, BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD, capture both its genealogy and the essence of the moment in which it is published. Times of transition inspire reflection. This book is a reflection on the best of current and emerging practices in legal education that will guide individual teachers and law school administrators in designing a program of legal education that meets the needs of the lawyers of tomorrow. Today's law students will enter a profession vastly different from the one their predecessors experienced, for which different skills, knowledge and values are necessary. This book is an attempt to synthesize important developments in legal education that have occurred since the publication of BEST PRACTICES FOR LEGAL EDUCATION.⁷ It is designed to be a resource for anyone who hopes to contribute to the betterment of legal education and wishes to explore positive opportunities for change. Given the scope and speed of the ongoing changes in legal education, this book can be no more than a marker in time, attempting to capture most of the significant currents swirling around U.S. law schools and beyond.

BEST PRACTICES was initiated and published by the Clinical Legal Education Association (CLEA). Composed of clinical educators — those members of the legal academy who teach substantive law, skills, and values in the context of supervised legal practice opportunities for law students — CLEA is committed to the value of experiential education and preparing law students for practice. As the Best Practices project proceeded, it drew in a wide range of participants from across the academy who had expertise and insight to offer on all of legal education. BEST PRACTICES took a broad overview of legal education, drawing on learning theory and the experiences of other common law countries to support its recommendations.

The year that BEST PRACTICES was published also saw the release of a major report on legal education by the Carnegie Foundation for the Advancement of Teaching, EDUCATING LAWYERS: PREPARATION FOR PROFESSION OF LAW.⁸ That report analyzed legal education in terms of three apprenticeships, those of knowledge, professional skills, and building a professional identity. Resonating as it does with the “knowledge, skills, and values” language of the 1992 MACCRATE report that was a primary inspiration for BEST PRACTICES,⁹ it is not surprising that the CARNEGIE REPORT and BEST PRACTICES made complementary claims. Despite their differing provenance both volumes argued for a greater focus on preparation for the profession and experiential education. Bringing the reputation of the Carnegie Foundation and the detached perspective of social scientists, the CARNEGIE REPORT brought both “educational theory — how best to teach and . . . theory about educating professionals . . . [and] sociological theories of the legal profession” to its

⁷ ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter BEST PRACTICES].

⁸ WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

⁹ Bryant Garth identifies the differing contributions of MACCRATE and CARNEGIE in *From MacCrate to Carnegie: Very Different Movements for Curricular Reform*, 17 LEGAL WRITING: J. LEGAL WRITING INST. 261 (2011).

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analysis.¹⁰ The two volumes cross-referenced each other and both received significant attention within legal education.

The subtitle of the present volume, TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD, alludes to the dominant characteristic of the current environment — change — as well as the hope for positive transformation that hovers in the atmosphere alongside the fears that inevitably accompany change.

This volume arrives on the legal education scene at a particular moment in time. In the wake of the Great Recession, legal education experienced significant turmoil. After the recession,¹¹ law school applications rose to an all-time high in 2010 in keeping with the broad historical pattern — in the face of a difficult job market, returning to school looks appealing to many in the potential applicant pool. But this stability was only temporary.

Large law firms, hit hard by the contracting economy, were the sector of legal employment that had driven expanding enrollments. These firms offered substantial starting salaries to new law graduates that made high law school tuition costs financed by debt seem like reasonable investments to prospective students. The new economic pressures were exacerbated by ongoing technological changes that threatened upheavals in the delivery of high-end legal services¹² and drastically affected employment, including electronic discovery review. Firms merged, contracted, and even imploded, leaving many experienced and highly qualified attorneys out of work. Pressured to cut costs, clients of large law firms increasingly refused to pay for work done by new lawyers, which they viewed as paying for the cost of lawyer training. With a significant pool of prospective laterals, large firms shifted their hiring away from recent law school graduates. Many of those graduates thus found themselves underemployed, or unexpectedly practicing as solos.

In the face of gloomy job prospects, taking on massive debt to finance a law school education no longer made economic sense, and law school applications plummeted for four years in a row in the face of crisis rhetoric.¹³ Scandals engulfed several law schools that provided misleadingly rosy and, in some cases, flat out false employment statistics.¹⁴ In response, the American Bar Association, the accrediting body for legal education, strengthened its consumer information accreditation standard to require additional disclosures to prospective students concerning employment outcomes for graduates and to require all information released to be “complete, accurate, and not misleading.”¹⁵ Many law

¹⁰ *Id.* at 267.

¹¹ See Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 30, 2013, at A1; *Trends to Monitor at Law Schools in 2013*, JD JOURNAL, <http://www.jdjournal.com/2013/01/02/trends-to-monitor-at-law-schools-in-2013/>, archived at <http://perma.cc/YCB2-7ATF>.

¹² Richard Susskind, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2008) and *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013).

¹³ Bryant Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POL'Y REV. 503 (2013).

¹⁴ See, e.g. Elie Mystal, *Will Sued Law Schools Take A Hit To Their Credit Ratings?*, ABOVE THE LAW, <http://abovethelaw.com/2012/02/will-sued-law-schools-take-a-hit-to-their-credit-ratings/>, archived at <http://perma.cc/B4AB-UPD2>.

¹⁵ ABA Standards for Approval of Law Schools 2012-13, Standards 509: Consumer Information.

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schools responded to declining enrollment by reducing the size of their entering classes. From the fall of 2010 to the fall of 2013, first-year enrollment dropped 24%, in the face of a decline in applicants of 32%,¹⁶ with the decline most noticeable among younger applicants and those with higher LSAT scores.¹⁷

The myriad responses to these challenges are pulling legal education in conflicting directions. As influential commentators argued that law school should be reduced in length, some law schools responded by adopting year-round programs that compress courses required to obtain a J.D. degree into two calendar years. At the same time, the bleak job market and law firms' need for trained lawyers led to calls for law schools to produce "practice ready" graduates. In response, most law schools expanded their experiential education offerings, especially those that offer students supervised practice opportunities.¹⁸

The Great Recession also exacerbated another crisis that has been brewing for decades, the crisis in Access to Justice, expressed most visibly in the rise in the number of unrepresented litigants in the judicial system.¹⁹ Concerns over that rise created external pressures to expand education for practice. In 2014, the American Bar Association adopted a more robust experiential education standard requiring that all law students complete at least six credit hours of "primarily experiential" courses.²⁰ An ABA Taskforce²¹ called for across-the-board changes in legal education including "re-engineered" financing, reduced regulation of law schools in order to promote "greater heterogeneity," attention to "delivery of value to students," and "delivery of law-related services by persons without a J.D."²² Individual state bar associations in two of the most populous states — New York and California — created additional pressure on law schools and the ABA by adopting more stringent practice experience requirements for bar admission. New York now requires candidates for admission to the bar to show that they have provided fifty hours of supervised pro bono services.²³ California has adopted a similar requirement to be fulfilled either at the

¹⁶ Author calculation based on data available at <http://www.lsac.org/lisacresources/data/lisac-volume-summary>, archived at <http://perma.cc/5AR3-XCXW>.

¹⁷ See, e.g. THE AM LAW DAILY, <http://amlawdaily.typepad.com/amlawdaily/2012/04/what-the-numbers-dont-say-law-school-applicants-are-getting-older-not-dumber.html>, archived at <http://perma.cc/YM5F-8BGW>.

¹⁸ A note on terminology. In contrast to BEST PRACTICES this volume defines Clinical Legal Education as all encompassing real experiential education opportunities, typically denominated law clinics and externships. Theory and practice skills simulation courses are treated under the broader umbrella of experiential courses.

¹⁹ See *Closing the Justice Gap*, THE BRENNAN CENTER FOR JUSTICE, <http://www.brennancenter.org/issues/closing-justice-gap>, archived at <http://perma.cc/43AM-SWW8>.

²⁰ ABA Standards and Rules of Procedure for Approval of Law Schools, STANDARDS, http://www.americanbar.org/groups/legal_education/resources/standards.html, archived at <http://perma.cc/84H6-YJ8G> [hereinafter ABA Standards].

²¹ AMERICAN BAR ASSOCIATION, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION REPORT AND RECOMMENDATIONS (2014), http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html, archived at <http://perma.cc/9D3M-X744>.

²² *Id.* at 22, 24, 25, 14-15.

²³ 22 NYCRR § 520.16: Pro Bono Requirement for Bar Admission, available at <http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml>, archived at <http://perma.cc/VFB3-SQJH>.

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pre-admission or first year post-admission stage and will also require fifteen semester “units of practice-based experiential course work”²⁴ or a Bar-approved externship, clerkship, or apprenticeship.²⁵

In light of the developments just described, the message of BEST PRACTICES continues to resonate strongly. A defining theme of BEST PRACTICES was the importance of integrating theory, doctrine, and practice in legal education in order to better prepare students for clients and legal practice.²⁶ That volume also emphasized the access to justice crisis facing the legal profession and called on legal education to inspire law students to participate in efforts to address the crisis and prepare them to do so effectively.

The importance of preparing students for practice, and of overcoming the theory/doctrine/practice divide, has only intensified in the years since BEST PRACTICES was published. Progress has been uneven, but legal education is changing rapidly at many schools and the change in many cases moves legal education toward better preparation for practice.

The framework articulated by the MACCRATE REPORT — that legal education must address knowledge, skills and values — remains compelling, at the same time that a rigid adherence to the framework can reinforce artificial barriers. A tension inevitably runs through this new volume — emphasizing the importance of educating law students in knowledge, skills, and values, while recognizing that the three are inevitably interrelated.²⁷ Similarly, using dichotomous theory versus practice language is likely to lead efforts to reform legal education astray, reinforcing existing tendencies that keep doctrinally-focused and clinical legal educators apart.

With the focus on preparation for practice, BEST PRACTICES called for a more intentional approach to legal education, beginning with each school articulating its mission and continuing with educational goals articulated in terms of outcomes. This volume builds on the call to link mission and outcomes; emphasizing the themes of integrating theory, doctrine and practice, developing the broader spectrum of skills needed by lawyers in the twenty-first century, and taking up the question how best to shift law school cultures to facilitate change.

The two chapters of *Part One, Building an Effective Law School: Mission and Accountability* take mission identification as a starting point and begin in Chapter 1 with a

²⁴ Jon Streeter, *Task Force on Admissions Regulation Reform: Phase 1 Proposals for a Competency Training Requirement — Request for Adoption Following Public Comment 2* (Oct. 12, 2013), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000011266.pdf>, archived at <http://perma.cc/X6E6-QZ3P>

²⁵ Linda Morton, *California’s New State Bar Pre-Admission Requirements: 15 Units of Experiential Education and 50 hours of Pro Bono* and Steve Ellmann, *Three Innovations in Bar Admission Rules: New York (twice) and Arizona*, PRESENTER HANDOUTS: PLENARY 4: THE DEVELOPING LANDSCAPE OF CHANGE, http://www.elon.edu/docs/e-web/law/aell_symposium/Katherine_Kruse_handout.pdf, archived at <http://perma.cc/366P-DX7R>.

²⁶ For example, BEST PRACTICES Ch. 3, Section C was titled “Integrate the Teaching of Theory, and Doctrine, Practice,” text at notes 277-86.

²⁷ Katherine R. Kruse, *Legal Education and Professional Skills: Myths and Misconceptions about Theory and Practice*, 45 MCGEORGE L. REV. 7 (2013).

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review of the accreditation context in which law schools must develop their missions and then turns to best practices for developing a mission statement. The goal is to encourage law schools both to develop more meaningful mission statements and to use them in making decisions about directions for the institution. Chapter 2 then discusses two tools for linking mission and accountability — assessment plans and curriculum mapping.

Part Two, Building a Program of Instruction that Meets the Mission is the core of the book. Consisting of four chapters, it considers how to build a program of instruction that meets a law school's mission. Chapter 3 addresses questions that arise in rethinking the curriculum. These include the challenges of finding the appropriate balance among different aspects of legal education, determining how to structure the curriculum most effectively, through pathways, integration, and sequencing, and why three years of law school are needed to prepare students for practice. Chapter 4 revisits four characteristics of effective education, including building on teaching and learning theory, creating an educationally effective and welcoming environment, educating for the transfer of learning, and using outcomes assessment to improve student learning. Chapter 5 looks at how to implement effective education in six specific contexts. Three of those contexts are among the ones in which legal education is currently provided — the Socratic classroom, experiential legal research and writing courses, and the many other forms of experiential education, both throughout the curriculum and in separate courses. The other three contexts are becoming increasingly important or undergoing significant change — technology and on-line education, law libraries, and cross-border teaching.

Chapter 6 closes Part 2 with a broad overview of ten historically neglected or newly important areas of essential knowledge, skills, and values in a changing world. The traditional focus of legal education has been legal research and writing, legal analysis, oral and written advocacy, knowledge of substantive law and doctrine, as well as the ability to marshal facts, apply rules of law to facts, and reach and articulate legal conclusions. Without a doubt, these remain essential for today's law students. Other information, attitudes, and skills important to lawyer effectiveness have either been overlooked in legal education, offered only sporadically, or are traditional topics in need of a reexamination. One of the goals of Chapter Six is to identify those emerging competencies, from many sources.

Part Three, Building and Maintaining an Effective Institution consists of two chapters. Chapter 7 suggests strategies for building an institutional culture of assessment to improve student learning. Chapter 8 considers institutional strategies for incorporating experiential education throughout the curriculum, including the thorny question of faculty status, and closes with advice on leading for curricular change.

Discussions of legal education reform can fuel strong emotions among legal educators because identities are strongly tied to academic work. Criticisms of legal education may unintentionally imply that faculty are incompetent or have bad motives. In fact, most teachers *do* care deeply about teaching, and the legal profession, and are very conscientious about their work. Generally, the barriers to change are due to long embedded instructional traditions and multiple time pressures. Despite these constraints, many teachers invest their limited time in experimenting with teaching methods to improve their instruction. All teachers can promote constructive conversations about reform by explicitly acknowledging one another's good will and educational contributions from the outset of the conversation.

This book is intended to serve as a resource and guide for educators who are at the

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forefront of curricular change, and who are forging a path to transition from the past to a future of legal education that meets the needs of students who will use their law degrees in contemporary professional environments. It is our hope that soon yet another effort to map ongoing changes will be necessary as the terrain of legal education continues to shift.