

TEACHING TRANSACTIONAL SKILLS AND TASKS OTHER THAN CONTRACT DRAFTING

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OPINIONS

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INTERVIEWING AND PRESENTATIONS SKILLS

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THE DEAL SKILLS COURSE: INTEGRATING
TRANSACTIONAL SKILLS AND TASKS WITH
DOCTRINAL FOUNDATIONS

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Introduction

First of all, thanks so much for being with us. We are excited about this panel. And this was a bit of a shocker, but the theme for the panel is skills other than the traditional transactional skills. I suppose that means drafting, negotiations, ADR. And, of course, we know in practice one has to have a myriad of skills. One has to have a very big tool bag to be an effective transactional lawyer. So I'm very proud to be on this panel with David East from South Texas and Carol Newman here who is hosting us from Emory.

David is going to start out and talk about what I think is a fascinating and difficult skill, which is drafting an opinion letter. And you can imagine all of the things that go into that.

Next, I am going to weigh in on teaching presentation skills. I'm going to talk about the use of PowerPoint and outline suggestions for more effective use of PowerPoint. I'm hoping that we can generate some ways to have more effective presentations done by our students.

And then Carol's going to be our clean-up hitter. I am kind of fascinated to hear from her because she is in tune, a lot still, with the deals practice, in teaching the Deal Skills course. And, of course, that's a huge accomplishment. So we will learn from her experience and what goes into that, how she generates her own material, and how the students have

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reacted to that. So I think we're going to have a great panel. We are going to save some time at the end for questions. Really looking forward to your feedback as well. So let's start off with Professor David East from the South Texas College of Law.

W. DAVID EAST

OPINIONS

Part of what I want to do could fit in the area of the best practices that Tina Stark spoke about yesterday when she said that the concept of best practices was perhaps premature. We really are still developing what are the best practices in teaching transactional skills. One way to take my remarks is that I would like to persuade everybody that as a part of teaching transactional skills, it is important to teach students about third-party attorney opinion letters.

I want to encourage that and I hope the materials I have will help provide resources. I will talk about how we have managed to do it, I think, effectively. But first, why do I think teaching opinion letters should be included in best practices? Well, they are customary and are expected documents in many types of deals—not just financing deals (secured and unsecured) where they probably originated and are ubiquitous—they show up in mergers and acquisitions and issuance of securities and real estate deals including oil and gas transactions and so forth.

The consensus among attorneys I know who do this sort of work is that this is the part of the closing, the part of the transaction that our clients know the least about. And because it's usually the last document delivered at the closing, it may not be finalized until we get to that last document because the deal may have been changed as we went through the closing, or we did not finish negotiating its terms before closing. So we are there holding up the closing while we negotiate the final terms of the opinion letter.

Our students should understand they don't want to be perceived by the client as a roadblock to the client getting the loan (or whatever else the client will receive). So whenever possible they should complete negotiating the opinion letter before closing. It doesn't hurt to point out that if the deal goes badly, whoever gave the opinion may end up being a target defendant. We should warn students about things like this because they will be expected to issue opinion letters from time to time.

My impression is that very few law schools teach anything significant about opinion letters. I think those of us who do so give our students a head start, and we ought to do that for our students. Most law firms expect their junior lawyers to learn this part of practice by osmosis, as one of my friends who is a senior partner says. It would help if the students at least had an introduction to the fundamentals of opinion letters before they get to their law firm. If nothing else, it will speed up the osmosis process.

Opinion Letters

I probably ought to describe an attorney opinion letter but I don't want it to sound like I'm talking down to anybody. I expect some among the audience, however, may not know much about opinion letters, because we have people here who teach transactional skills from different perspectives. Some people have significant transactional practice

experience while others may have relatively little. I actually had relative little experience until I undertook to teach the area.

But we all remember that in the practice, we frequently had to master areas that we had not studied, perhaps had not even had the opportunity to study in law school. And we also know from teaching that we end up teaching some things that we never studied in law school and in which may have had very little practice experience. We are able to do that because we know how to ask the right questions and how to go find the answers.

So part of what I want to do is persuade you that anybody who can teach Transactional Skills should be able to at least teach the basics of opinion letters. But what is an opinion letter? It is a letter from an attorney or a law firm addressed to a recipient who is somebody else's client, which is why we call these third-party attorney opinion letters. The letter contains the opinion giver's opinions or conclusions on various legal issues.

Principally, in many deals it addresses the valid existence, capacity, and authority of various business entities. I think of these existence, capacity and authority opinions as predicate opinions to the main opinion, especially in financing deals: that the deal documents are enforceable against my client. Of course there may be other matters. I may be asked to opine on who has an interest in a particular property and what those property rights may involve or confer, whether a security interest or mortgage is enforceable against my client, whether securities have been authorized, and whether the issuance and sale will violate any laws.

I may also be asked to provide certain factual assurances such as that my client is not involved in any litigation that will have a material adverse effect on my client or on the transaction. That is not so much a classical opinion as it is a reassuring statement, if I'm willing to make it, and I may if I can qualify it appropriately.

How Much is Teachable

How much of this is teachable? Well, none of us can teach all of the possible subject matter that our students may encounter in practice. We teach fundamentals, foundation stuff. You can do that with opinion letters. We teach it at South Texas College of Law in conjunction with what we call our Capstone courses, which are simulation courses—simulated deals. I primarily teach a corporate merger deal—a management-leveraged buyout in the form of a reverse merger. We also have a real estate acquisitions course, and an international business transaction involving intellectual property. And I'm going to teach for the first time next spring an energy model. Interestingly enough it will be based on the acquisition of a platform in the Gulf. There may be some for sale—by the way. Houston is an energy capital, so why not teach an energy course?

In all of these deals, the students have to learn the structure of the deal and the students have to draft at least five or six of the key documents that would have to be executed and delivered at the closing.

In every one of these courses, the last key document that they work on is the opinion letter. We advise them that in many of these deals there may be more than one opinion letter; but we make them focus generally on the opinion letter from the attorney for the borrower to the principal lender because that's a fairly straightforward opinion letter where we can teach the fundamentals. And all these Capstone courses involve third-party financing because such financing is ubiquitous in deals. We do them with other people's money when we can.

The opinion letters we teach don't necessarily address the scope of the entire deal but just the scope of the documents that we have required the students to grapple with. They have to draft the documents and then we have a review session, after which they have to redraft them and turn them in for a grade. So even though there may be mortgages and more than one security agreement that would be necessary in a particular deal, we might just have them draft one security agreement (along with the merger agreement, loan agreement, etc.) where they have to work with some precise issues about what is the collateral and what representations and warranties are appropriate and so forth. Then, when we get to the opinion letter, its scope is narrowed to match the documents they had draft. It can be done. We have to make certain pedagogical choices to narrow the field of the opinion letter to teach them the basics, and we think we've managed to do that by limiting it to the deal documents they have to draft.

To introduce opinion letters the first thing we do is show them a simple form opinion. The one we show them comes from a great practical book on commercial loans: Hillman's Commercial Loan Documentation.⁴ It's a PLI book and it's excellent because it not only has forms, they are annotated. The authors explain why the form is drafted the way it is, which is exactly what students need to comprehend. We show them a simple opinion letter—a basic finance opinion letter from the borrower's counsel to the lender—with the explanations.

That at least lets us introduce them to the basics. The whole scope of such an opinion letter is to assure the lender and the lender's counsel that the loan documents are enforceable against the borrower. That lets us teach the predicate opinions of the valid existence, capacity, and authority of the borrower, whether corporate or limited liability company or whatever, that the borrower has exercised its authority correctly to do what it has the power to do, and so forth. All of these predicate opinions lead to the so-called remedies opinion or the enforceability opinion which we slow down and teach in some detail since the opinion that the documents are enforceable can involve complex issues.

We teach them why the lender wants an opinion from the borrower's counsel—somebody who is not the lender's own attorney. The notion being—and Hillman has a really good explanation and description of this, which is another reason I like to use that text—that the lender's counsel wants to make sure the loan documents are enforceable. And so you have to get the predicate opinions about the valid existence, capacity, and authority of the borrower.

But I might be able to create an LLC for three cats: Curly, Larry, and Mew, without too much trouble. The lender wants to make sure that the borrower is backed by real people, and one of the best ways to do that (in addition to dealing with the borrower directly) is to turn to the borrower's counsel, who will not issue an opinion letter, presumably, without having met and had business relationships with the actual people behind the LLC or behind the corporate entity. It gives some assurance that there really is an entity, validly in existence and so forth.

An opinion like this and the assurance commonly requested that the borrower is not involved in litigation that might crater the deal can best be furnished, just as a matter of efficiency, by the borrower's counsel. I know we don't talk too much about economics and

⁴ HILLMAN ON COMMERCIAL LOAN DOCUMENTATION (Thomas S. Hemmendinger ed., Practising Law Institute, 5th ed. 2000).

economic efficiency when we are just trying to teach them how to do a deal. But the borrower's counsel is usually in the best position to furnish these opinions and that assurance more cheaply than the lender's counsel. As Hillman points out, lender's counsel will have to go back to examine the formation documents and the regulating documents for the entity and examine minutes of meetings and so forth.

Well, frequently the borrower's counsel was there when all of this happened. She may have formed the entity and knows immediately and first-hand the answers to the diligence questions that an outside attorney would have to investigate. So it actually makes sense just as a matter of efficiency to ask for an opinion from the borrower's counsel. Also, borrowers are going to have to pay for the opinion letter no matter who issues it; they always do have to pay for it, so they might as well pay their own lawyer rather than paying somebody else's lawyer to do the diligence required to sign off on the opinions.

We make the students aware of why borrower's counsel is signing an opinion letter to a non-client. Then we talk to them about liability. There is a great Texas case that I highlight. *McCamish Martin* came out 11 years ago from the Texas Supreme Court.⁵ It is an instructive case on liability for negligent misrepresentation. The Texas Supreme Court said that an attorney can be liable for negligent misrepresentation for giving what amounted to an opinion or an assurance. This was not an opinion letter case, but there was a representation by a law firm that an entity had acted when, in fact, that entity had already deprived itself of the ability to act. So it couldn't have done what it had purported to do.

All the case says is that Texas was willing to adopt negligent misrepresentation was a workable theory that a third party could use to sue the attorney or law firm that made that misrepresentation. The court went on to point out (in dicta) that the same theory could apply to third-party attorney opinion letters and even discussed how lawyers could protect themselves with limitations and qualifications.

Other Resources

The second thing we take the students through is the famous TriBar report from 1998, Third Party "Closing" Opinions.⁶ We highlight what it covers, from definitions to questions about appropriate assumptions and qualifications and appropriate opinions to ask for, and opinions you shouldn't ask for, and what sort of diligence you should do before you issue an opinion, and what does the remedies opinion encompass. The TriBar is well written and speaks for itself. On the Emory conference website is a list of ABA and national resources.⁷ You can find the same list on the ABA website and there are extremely helpful things there about opinion letters.

We are all able to do research and the information is all here. Especially, the first five or so listed articles deal with the foundations of opinion letters and opinion letter practice. And then the second list on the Emory conference website, just to show you what somebody might be looking for, is a list of Texas materials.⁸ Actually, I became willing to do

⁵ *McCamish, Martin, Brown, & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999).

⁶ The TriBar Opinion Committee, *Third Party "Closing" Opinions*, 53 BUS. LAW. 592 (Feb. 1998).

⁷ See W. David East, *Teaching Attorney Opinion Letters* (Conference Handouts), 7, http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/East/East_Conference_Handouts.doc.

⁸ *Id.* at 8.

teach opinion letters because I kept hanging around with a bunch of transactional lawyers in the Business Law Section of the State Bar of Texas. They were constantly writing this stuff about opinion letters and I got into it and thought maybe I should be teaching some of this.

Many states will have similar materials. If you do a little looking, they will have sections that have done some work on opinion letters in their states. The information is there.

So how do we actually teach opinion letters? Well, first, for a number of years we really expected them to draft and turn in an opinion letter and some of my teaching colleagues still do. The corporate reverse triangular merger we teach is complex enough (it even has mezzanine financing because it is more fun to teach it that way) that the opinion letter quickly gets fairly complex. We would spend three or four hours in class teaching through the material, and then the students would do a draft. We would have given them a “go-by,” not perfect, of course, because we want it to be like the real world where the students would have to do something more than substitute names. (I should explain that in Texas we call them go-bys; in the more educated world I think they call them precedents, but in Texas go by is as far as we got.)

We kept finding that no matter how effectively we thought we taught, no matter what we tried, we found ourselves in our sessions reviewing the students’ drafts doing too much—just dictating language that they needed to change or include rather than telling them, “You have a problem here; see if you can fix it.” We want them to walk out with documents that will be as good as they can do because they will take these with them into practice.

So we started a year ago handing them a “bugged” opinion letter. Here I have to confess that sometimes it's much better to be lucky than smart, because I've been privileged to work with a couple of adjuncts who had many, many years of experience with big deals and opinion letters. One of them is Sidney Holderness whose book (he's co-author) I cite here.⁹ You really ought to get the Holderness and Wunnicke book if you want to teach opinion letters, if for nothing else, because of the forms and the explanations of the forms. All of his forms are heavily foot-noted explaining what each provision is doing.

Sidney had so much fun writing a bugged opinion letter. Everything from punctuation and spelling bugs, to opinions that were missing, to opinions that contained qualifications that didn't belong, missing qualifications and limitations. All the sorts of stuff you might expect. The students had to mark up the bugged draft, which is much more like what first year lawyers and second year lawyers are going to have to do. We actually think that works.

And so my final point would be: I'm convinced this can be taught. One of the fun things about that bugged letter is every time Sydney and I went through it after that, we found stuff we hadn't found the first time and didn't realize he buried in there. Which reminds us to tell the students in the end they are going to close the deal with the best documents they can bring to the table at the time. We will never close a deal with perfect documents. We will close it with the documents we have. Everybody says all right. We will close with those. We go back and look at them a year later and we may find things in there

⁹ A. SIDNEY HOLDERNESS & BROOKE WUNNICKE, *LEGAL OPINION LETTERS FORMBOOK* (Aspen Publishers, 3d. ed. 2010).

that make us wonder how we let that slip by. But the deal is closed, and no problem comes up.

So you don't have to be a real authority on this just to teach the basics. I think you can teach the fundamentals of opinion letters. The resources are there and I hope people will start doing this because I think it's a great service to our students. Thank you.

DOUGLAS WM. GODFREY

INTERVIEWING AND PRESENTATIONS SKILLS

Thank you, David. Now, I'm going to weigh in on one of my favorite things to teach. One thing that we historically have not taught. One thing we should teach more is presentation skills. By that I mean small-scale communication.

It's an old truism of law school that after the first year, a law student can explain a fine point of law to an associate justice of the Supreme Court but he can't explain his uncle's will to his aunt. And I think that's true and I think that is negligent on our part because most communication does not take place at the United States Supreme Court. However, if you come out of the first year of law school, that will be your impression. That's the dialect that most lawyers are in and it is profoundly wrong. Most lawyers communicate in a myriad of manners. And they have to do things like beauty contests or pitching the client. I grew up in a relatively small town in Northern Illinois. Several of my friends are lawyers in DeKalb County and they go to the Waterman Village Board to talk about bond deals and they represent the school district. They have a much richer life than I do as a lawyer in Chicago. They actually make a difference. But they have to present to anything from literally the farm board to the board at Northern Illinois University, who are very sophisticated people. And we have to teach them some tools to further that task. And so that's why I would respectfully ask you to think about how to work teaching presenting skills into a course that you offer.

Now, I do it in a course that I developed. A course that I am actually writing a book on: *The Lawyer As Investigator*. And in that course I teach interviewing skills. I teach how to develop a case plan. I teach how to process physical and electronic evidence. And it's offered to second and third years.

And one of the things I do is teach presentation skills. I originally came out of law enforcement. That is my first love. So there are many criminal examples, one of which I will mention shortly. But another advantage of teaching presentation skills is that not only is it a different form of rhetoric, it can be in a different mode. We know we are the trier of the word. We know we are servants of the word and we beat the first years to death with this endless stream of text. And didn't you actually feel kind of sensory deprivation after your first year of law school? I certainly did.

After my last exams, some friends of mine and I at the University of Michigan went to the Sleeping Bear Dunes in Western Michigan. I would highly recommend it to all of you. It was just nice to get out and see green and all because we had to get away from all this text.

Well, you can communicate very effectively in manners outside of the word. You can use images. You can use graphic representations. You can use animations. I'm going to

have a big yield sign or caution sign about that as we talk more about this. So one of the things you can ask the students to do as they are working on presentation skills is think of other forms to effectively present material.

Now, the vogue in the academy is to talk about people's learning styles and that we should appeal to different learning styles. I would respectfully submit that in educational theory, there is no empirical demonstration that people learn better if you teach to their dominant learning style. Again, there is no good peer review demonstration that if you teach to their dominant learning style, they are more effective.

However, there is good evidence that certain material is better presented in different styles. For example, at the end of the year faculty meeting—we recently had ours, our all day faculty meeting, which I usually take two Valium before I attend. Things like bar graphs are very good at showing your admissions trends over five years. To write that in a narrative would be three paragraphs at least. Dean of Admissions can get up and say, "Here's what's going on with our LSAT. Here's what's going on with our bar passage rate." The dean can get up and narrate with a nice bar pie chart. And we can quickly glom onto this information.

So one of the reasons we wanted to teach presentation skills is there are very effective ways to present information outside of the word itself. Now, also one thing is—as we rear neophyte transactional lawyers, we have to teach them to speak client. And we do a very bad job of that, in part because many of us have never been clients. Some of us have. I believe you did a stint as an in-house counsel, so you were a real lawyer. You actually hired us so we were real nice to you. But we don't teach people to communicate with their clients. And one of the primary concerns clients have is, "The lawyers don't understand my business. They don't understand the transaction. They don't understand the pressing business need that I have."

There is a disconnect between how the business people are reared and how the young lawyers are reared and to understanding transactions and what's important.

In business school, one of the dominant training tools is PowerPoint. Now, we will get back to that in a moment. So one reason that we want to do this is to teach communication. But we have to communicate with the people who pay our light bills; otherwise, we won't have lights to turn on. So another reason to teach presentation skills is it is what clients expect and what they need.

Now one reason I also enjoyed it is it's something you can do in your second and third year. And if you look at the stuff at law school, many of our second and third year students check out. Engagement in the third year is a problem. Now, there are various proposals. You have South Texas with Capstone courses, which I think is a great idea. Emory has some simulation courses. I think it is a great idea. Anybody who goes to medical school – by her third year, she is in her clinical rotations. She is in the teaching hospitals. Seeing patients. Taking history. Feeling like a baby duck learning to quack.

We don't teach our third years how to quack. We still beat them to death in cases. They say, you know, I got the case. I can read a case. I can read a statute. I need other skills. Well, presentations are one of these skills that we can offer and it will get them engaged. It will be something new that they can try. That they can do outside of just reciting the facts of yet another case.

Now, how to critique. In the materials—not in the printed materials I believe, but on disk—I have a two-page critiquing sheet that I use in my Lawyer As Investigator course.

And that's one form of feedback that I offer. Because, of course, if you have to teach something, you have to give effective feedback.

Now, the other form of critiquing that I offer is software by MediaNotes. MediaNotes is offered by CALI. It's free, which appeals to me because I am cheap. But the other thing that MediaNotes does -- and this is just really cool, so this satisfies the cool test -- is it allows you to videotape the students as they make a presentation. You download that video into MediaNotes and then—now this system doesn't have MediaNotes loaded, so I can't actually run it for you -- but imagine a presentation up in that box and you can stop this time period at any point and write a little imitation. So you can write, "Oh, my God, Godfrey is being boring at this point. And then you let it scroll a little further down and say, "Please maintain eye contact." Let it go further and say, "Why the heck did you wear a bow tie?" And you can annotate the video for your student. And then what I do, because I'm not the most technologically well versed person, is I have each student just give me a flash drive and I download it on the flash drive because it's got a lot of video, it's a big file. So you might have trouble getting it through people's e-mail screens. Doesn't particularly work if you post it back onto a TWEN site.

There are websites that you can go to, password-protect them, and just post them up there and that is another alternative. I just like the security because this is an educational record. I like the security of the student giving me a flash drive and I give it back to her.

Another note—just got to be impressing lawyers for a second. I practice and teach in Illinois. Illinois is what is known as an all-way jurisdiction for recording any voice communication. Under the Illinois Eavesdropping Act,¹⁰ you have to have consent of everyone whose voice is recorded. So in my syllabus I say your voice will be recorded at your college for presentations because you are expected to ask some questions at the end. And then that is just my little admonition about that. But this is a really neat tool. The other thing is that it is another form of critique that the students have not had before, something they have not seen before, and it is something that they can actually see themselves in the role.

How many of you have been videotaped during a training process? I was when I was a District Attorney in Brooklyn and it was absolutely brutal. But, man, you clean up your act pretty quickly. I found that one of my bad habits was to put my hands in my pocket. The trial supervisor lit me up and the next twenty trials my hands were out of my pockets. So, it is a great form of critiquing and it is different. It keeps them engaged, which I assert is one the problems that we have had.

Now, problems with teaching presentations. Hopefully, I have convinced you at this point that they are neat. That they are new. That they help student's engagement. It takes time. In a class of twenty-four students in the Lawyer As Investigator course, out of fourteen-week semester, I devote two weeks to the students actually giving presentations. So if I was keeping billing sheets, that is ten to fifteen minutes of the student actually giving the presentation. Ten minutes of me actually writing up the notes—or twenty-five. Another fifteen minutes of going back through media notes, annotating the presentation. So on a billable hour, it is forty-five minutes to an hour to give a good critique back to the student if she has given you approximately an eleven-minute presentation, which is what I aim for.

¹⁰ Illinois Eavesdropping Act, 720 Ill. Comp. Stat. Ann. 5/14-1, *et seq.*

So like any teaching, it is very labor intensive. It is very hands on and you have to do it well. One of the reasons that you do it well is that some of your students will be leery about this. You know how some of the first years are very leery about their moot court? Some of the students are very leery about the presentations. And you have to do a little handholding—especially when they find out that they are going to be videotaped and audiotaped. However, it will get them through that.

Right now the dominant form of presentation is PowerPoint. And here is where I am being a big fat hypocrite because I am also using PowerPoint. Not only am I being reductionist on presenting on presenting, but I am using PowerPoint to criticize PowerPoint. So at this point I have lost all of my ethos—so you can tune out and not pay attention to me. But haven't you all been at a meeting where somebody has done a PowerPoint presentation and you walk out and say, "God, that is forty-five minutes of my life I wish I had back." And there are a myriad of things that are ills of PowerPoint. His name is Edward Tufte. He was at Yale and now he is out on his own and has written articles and books. His first was an article in *Wired Magazine* about 2003 in which he said PowerPoint is evil.¹¹ It has been subsequently followed by other articles. PowerPoint is stupid. I don't know why we blame PowerPoint and not the people who create the PowerPoint slides. But I think there is a point in that PowerPoint—we may need a Faustian bargain. It is so powerful. It is so convenient. It is so easy and it looks professional. My dean even encouraged me to redo the slides so we are branding the law school now. Notice the Illinois Institute of Technology Chicago. And I said, "Well, is this optional?" He said, "No." So I am serving one of my masters here.

But it is very easy to just to sit down at your desk and bang out some PowerPoint slides. And I have been teaching fulltime twelve years. On and off for almost thirty. I have created a total of seven PowerPoint slides for teaching. When I teach criminal procedure, evidence, investigative skills, and legal writing, I hardly ever use PowerPoint. And I think PowerPoint is very ineffective in law school teaching. However, it can be very effective in other circumstances.

So what are some of the problems with PowerPoint? One is you might remember the Challenger disaster. The problem with the space shuttle is some O-rings. Rings that sealed a joint failed. And that caused the explosion. Well, when the Challenger Commission went back and examined the process, they were highly critical of what they call the PowerPoint culture at NASA and PowerPoint engineering. The problem was there was a series of PowerPoint slides about the O-rings and everybody looked up here. They said, "Okay. Here are the assumptions. We tested the O-rings. They are fine." And no one questioned the underlying assumptions that they were tested under the right temperature, the right pressure, the right friction rate, all these things.

It was PowerPoint engineering that led to virulent criticism by the Challenger Commission because no one questioned it. No one looked behind the curtain to see if it was a very good wizard or not. And it turned out it was not a good wizard. And if we get time, I will show you at the end just recently on April 27th, the New York Times ran an article called "We Have Met the Enemy and He Is PowerPoint."¹² The article discussed low-

¹¹ Edward Tufte, *PowerPoint Is Evil*, WIRED, Sept. 2003, available at <http://www.wired.com/wired/archive/11.09/ppt2.html>.

¹² Elisabeth Bumiller, *We Have Met the Enemy and He Is PowerPoint*, N.Y. TIMES, at A1, Apr. 27, 2010, available at <http://www.nytimes.com/2010/04/27/world/27powerpoint.html?scp=1&sq=powerpoint%20rangers&st=cse>

level staff officers in Afghanistan who were Army Rangers, the elite of the United States Armed Forces. And they asked a lieutenant what he does to brief his superior officers and he said, "I make PowerPoint slides." The reporters thought he was joking. He said, "Wait a minute. You're a warrior." The lieutenant said, "No. I make PowerPoint presentations about how we are going to win the war."

That has been roundly criticized by, among others, General David Petraeus, the Commander of U.S. Forces in Afghanistan. And so we have to get out of a default setting of let's just do PowerPoint presentations. Another thing about PowerPoint, which we all hate, are presenters, whom, since they put so much effort and energy in the PowerPoint slides, have a bunch of text on it and read from it. I just want to put a bullet in my head. And I always want to say, "Look, Mrs. Davison and I in second grade got that reading thing worked out really well. She's a very good teacher and I can do that and really nicely now. And if you are just going to read to me, just give me the thing and I will go read it by myself. I am much faster that way, and reading it with hand motions doesn't do anything for me."

The third thing is, and this is really twofold. One is PowerPoint, especially with the default settings, we want to reduce everything to bullet points, right? Well, there is a problem with that. It does not show the association. It does not show the reasoning steps. It does not show the underlying relations. And also just as a default setting, we all have demands. We all want to get out of the office. We all want to go to our kids' wrestling tournaments. And so you are just really tempted to just say, "Okay. Boom. I've banged out twelve PowerPoint presentations. I'm ready for the next stage." It's kind of a checklist. "Okay. I've done this now."

Well, if you have done it effectively for your audience in the rhetorical situation that you are in—and this is an example from Edward Tufte: What if we reduce the Gettysburg Address to a PowerPoint? Well, we would have to have the title first. We are going to review the objectives and come up with some bullet points about what makes a nation great. Is this not the most inelegant, ass-backwards thing you've ever seen? What does it not do that the Gettysburg Address does? One, is it does not give you Lincoln's great command as a speaker.

Now, I am in Illinois and I'm very biased. I have, you know, a little bit of trivia. Out of the forty-four US Presidents, twenty-seven have been lawyers. Lincoln was, next to John Adams, probably the best lawyer that has been in the White House. John Adam was probably the best lawyer that has been in the White House, but Lincoln was a commanding speaker. He would practice and practice and read a lot. When he was younger he actually would just read the newspaper out loud to get a sense of his voice and command of his audience. And what you missed is his transitions. His eloquent transitions. His choice of diction. And particularly with the Gettysburg address, his choice of parallel structure. If you go back to the Gettysburg Address, it is fewer than 400 words. And you notice his use of parallelism and triplets and things like that. PowerPoint, of course, takes all of that away.

Last time I taught investigative skills, to twenty-four students, I railed against PowerPoint. Out of the twenty-four, how many do you think actually used PowerPoint for their presentations? Twenty-one out of the twenty-four. And if I had not railed against it, I'm sure all twenty-four would have. Now, one woman—a very engaging student, I really liked her—said, "Well, look, Professor Godfrey, you are not being fair. Coming out of undergraduate, I have done a lot of these. This is something I do really well. I am kind of queen of the PowerPoint. So why can't I use this as one of my strengths?" That struck me

as right. I cannot say you can never use this powerful tool, that would be bad teaching. So maybe we can come up with some suggestions to make it more effective?

Professor Merritt at The Ohio State University College of Law has a very nice article.¹³ She's much more generous towards PowerPoint than I. And she has some wonderful tips. And I am just going to summarize those for you:¹⁴

1. More images, fewer words. A bar graph is very effective. A lot of text on screen is not.
2. Show the big picture—though I want to caution you, I've got one of these slides about the Afghanistan War. Sometimes the big picture can be overwhelming because you overload it with detail.
3. Facilitate working memory. Well, here is where we lawyers can do a really nice job. Because often, since we are servants of the world, you need the language up there. So if you are teaching Article 2 and you need to know whether something is defined as a good, you can put the definition of a good right up there. You can actually put the language up there and say, all right. Is a bushel of soybeans a good? And then you can trace it out and you can do a flow chart to the other ways that the students are going. PowerPoint can be very effective that way. The way our previous generation of teachers might have used those over-head slides.
4. Avoid distractions. One of my favorite colleagues, a gifted teacher, is Ralph Grill, who has taught forever. They are going to take Ralph out of law school boots first. He does PowerPoint presentations for his first year torts. He has animations. He has bombs exploding. He has the scales falling over on poor Mrs. Palsgraf.¹⁵ And you know what, it's cool. Ralph is a great act. But most, respectfully, it is distracting. People become more concerned with, "Wow. What is going to come out of the side and blow up next time than listening to the words of the Palsgraf opinion?" We all remember that from first year of law school. Cardozo and the other justices engaged in the colloquy about what was it – foreseeability or duty? I can't remember. But that is what you need to take out of Palsgraf. Not the fact that you need to see some scales falling over on this poor lady.
5. Don't read the slides.
6. Maintain personal contact. Another thing about PowerPoint is it led you to the rostrum. And having done lots of peer review trials, mostly in state court when I was young and now in federal court, I like to get up and walk around. I like to establish contact.
7. Be interactive. For example, during the jury trial, if the judge will let me sit in the poor lady's lap, I would do so. It drives me crazy that in federal court they

¹³ Deborah Jones Merritt, *Legal Education in the Age of Cognitive Science and Advanced Classroom Technology*, 14 B.U. J. SCI. & TECH. L. 39 (Winter 2008).

¹⁴ See also Douglas Wm. Godfrey, *Teaching Presentation Skills* (Conference PowerPoint), 12-14, http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Godfrey/Godfrey_Teaching_Presentation_Skills_ed_3_PowerPoint.ppt

¹⁵ Palsgraf v. Long Island R.R. Co., 164 N.E. 564 (N.Y. 1928).

chase me back to the podium all of the time. Sometimes with a threat of contempt. But you need to get out and interact with your audience. And if you are back behind your slides, you never will.

8. Plan beyond PowerPoint. Again, it's not the end all and the be all.
9. Master some of the design principles. Here, again, I am the biggest hypocrite because I have not taken the time to really do that. But PowerPoint has become so powerful. There are lots of neat things you can do besides bullet points.
10. And finally extend PowerPoint outside the classroom. But I want to caution you about that because for many people it is, well, I will just post my slides on the TWEN site and they are there. My son, who is in college, I asked him about that. And he said, "No, Dad. I don't look at the TWEN—I don't look at the course websites for the slides. I go and talk to the professor." I said, "Well, why is that.?" He said, "Dad, I have been getting PowerPoint demonstrations since I was in the third grade. I don't need to see anymore. I actually want to go talk to the professor." I thought, "Well, that's pretty good. I have now been hoisted on my own petard there."

Hopefully, I put a couple things on the table. One, is the importance of presentation skills, the small skill rhetoric. Two, it is a worthy skill to teach. Three, there are resources out there, some mentioned in the materials. Four, be leery of PowerPoint and the Faustian bargain that you strike with it. And here is the example from the PowerPoint rubrics.

If you can figure out this PowerPoint slide, you understand how we are going to win the war. Now, look at that.¹⁶ That is just overwhelming. And you imagine this poor United States Army lieutenant, probably a West Point graduate, smarter than hell, trying to put this together for days and days and days. And I have no idea what it means. I'm of the generation where cars had carburetors and you'd go and get a Chilton's manual and these exploded diagrams and you'd try to trace—I could never do that. I don't have those spatial relations. So I see a slide like this and I just check out. I look forward to discussing this more with you during the question and answer period.

¹⁶ See Elisabeth Bumiller, *We Have Met the Enemy and He Is PowerPoint*, N.Y. TIMES, Apr. 26, 2010, available at <http://www.nytimes.com/2010/04/27/world/27powerpoint.html>.

CAROL D. NEWMAN

THE DEAL SKILLS COURSE:

INTEGRATING TRANSACTIONAL SKILLS AND TASKS WITH DOCTRINAL FOUNDATIONS¹⁷

I'm going to talk briefly about the Deals Skills course that we offer at Emory as part of the Transactional Law and Practice curriculum. You have already heard from Tina Stark and Bill Carney about how the course fits into the curriculum, which integrates doctrinal foundations with transactional skills and tasks. After completing prerequisites in foundational doctrinal courses, Emory students are able to take the following courses in a three-part transactional skills curriculum, with each course building on prior courses in an increasingly sophisticated context:

- **Contract Drafting:** In addition to traditional contract drafting skills, this course emphasizes drafting processes related to business deals.
- **Deal Skills:** Designed to teach the skills and tasks that every business lawyer needs, the goal of this course is for students to be able to be billed out as transactional lawyers on Day 1 of their first legal positions.
- **Capstone Courses:** Using the substantive law learned in the foundational doctrinal courses and the competencies and experiences developed in the Contract Drafting and Deal Skills courses, students are able to enter simulation courses ready to assimilate and practice particular types of transactions, such as mergers and acquisitions, private equity, venture capital, commercial real estate and other transactions.

This presentation focuses on the Deal Skills course within this curriculum. After a brief summary of the structure of the course, I will conclude with an overview of sample simulation exercises from one of the first classes, in which students are introduced to deal skills and tasks as they learn about and simulate an evolving business transaction.

But first, a few details about the prerequisite course, Contract Drafting. Together with teaching traditional contract drafting skills, this course emphasizes drafting processes related to business deals:

- How to think about translating the business deal into a contract.
- How to think about business issues from a client's business perspective.

As we teach Contract Drafting and the other skills courses, we continue to integrate into our students' thought processes and conversations such questions as: What is the business deal? What is your client trying to attain? How can we add value as lawyers, based on our understanding of the business deal and the various parts of a contract? Furthermore

¹⁷ This presentation describes the Deal Skills course, which is part of the curriculum developed and implemented by the Emory Center for Transactional Law and Practice under the leadership of Tina L. Stark, Executive Director and Professor in the Practice of Law. Please see the conference materials at Carol D. Newman, *The Deal Skills Course: Integrating Transactional Skills and Tasks with Doctrinal Foundations* (Conference Handouts), http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Newman/Newman_Deal_Skills_Handouts.doc.

each course uses a common vocabulary in discussing business concepts, such as the five-prong framework for identifying business issues used in the Contract Drafting course.¹⁸

The Deal Skills Course¹⁹

First of all, we teach the Deal Skills course with two professors, and I want to introduce one of my co-professors, Jan Connell,²⁰ who is here today. Later today, I'm going to talk about some simulations that she and I developed together when we first started teaching together.

The use of two professors provides a couple of advantages. First, we bring two different sets of experiences as transactional lawyers into the classroom. For example, Jan was in-house and I worked at a relatively large firm. As we draw on our different transactional experiences, she can also bring the perspective of a client into the classroom very quickly. Second, we have a practical pedagogical advantage, in that the two of us can play the roles of supervising attorneys or clients during simulation exercises, thereby providing some realistic aspects to the simulations. Accordingly, when we are in client mode, our students can ask their "clients" questions, and we try to react to them as clients would.

As I mentioned, the Deal Skills course is designed to teach the skills and tasks that every business lawyer needs, with the goal that each student be able to do something useful and be billed out as a transactional lawyer on Day 1 of the student's first legal position:

- Each class includes simulation exercises for the students to practice and improve their skills in typical transactional law tasks.
- Each skill builds on prior skills in the context of increasingly sophisticated tasks.
- Each class links the skills and tasks to concepts learned in the foundational doctrinal courses.
- Each class incorporates real-world business information, including oral reports based on current articles in *The Wall Street Journal* and presented by students at the beginning of each class.

The oral reports on business articles are an artificial construct, but they accomplish two additional pedagogical goals: First, students must select an article on a business subject and prepare a four to five minute oral presentation to the class and then answer questions from their classmates. Second, from the very beginning, these reports give the students opportunities to take their analytical skills, which are very strong, and then layer onto those skills an ability to summarize, synthesize, prioritize, and then present the results as reports --

¹⁸ See Tina L. Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 303-10 (Aspen Publishers 2007).

¹⁹ The Deal Skills course at Emory was conceived by Tina L. Stark. The syllabus for the Deal Skills course at Emory was developed by Carol D. Newman and Catherine P. Powell, with significant input from Tina L. Stark and M. Jan Connell. Catherine P. Powell is an Adjunct Professor at the Emory University School of Law and is Managing Partner at Tatum Hillman Hickerson & Powell LLP.

²⁰ M. Jan Connell is an Adjunct Professor at the Emory University School of Law. Before she retired from practice, she held positions as Vice President, General Counsel and Corporate Secretary, Medicine Shoppe International, Inc., and Assistant General Counsel, Cardinal Health.

for, in fact, they will be analyzing, summarizing, synthesizing, prioritizing and then reporting the results of their work for the rest of their careers.

Sample Syllabus

In your materials, there is a sample syllabus for the Deal Skills course,²¹ which I will review quickly. Unit 1 is a three-week introduction to transactional skills and transactional documents. In Unit 1, we want our students to attain a comfort level in talking about and addressing business and legal issues together. We want them to understand the basic steps of a deal and a couple of documents – a letter of intent and a purchase agreement – as a foundation for almost any kind of transaction. We also use this three-week introduction to provide a framework for the iterative process to come in the remainder of the course.

For example, in Unit 1, our students engage in different simulations that use their current knowledge and experience, with the idea that they will come out of this Unit 1 experience knowing how a deal starts, how they might meet with a client and ask business-oriented questions, and how they might put the client's answers into a legal context and then figure out, as lawyers, what to do next.

Unit 1 sets us up for the middle part of the course (Unit 2), in which our students continue to use and develop skills as they apply their doctrinal knowledge from the foundational courses. In this Unit, they will do the following:

- Perform a due diligence review of sample corporate records (including organizational documents, minutes and stock records) and contracts.
- Prepare written and oral due diligence reports.
- Prepare corporate and LLC resolutions.
- Review a draft of a simple third-party opinion letter, and deliver a report incorporating the results of a due diligence review of corporate records.
- Review and prepare reports regarding issues in financing transactions.
- Identify and consider risk reduction mechanisms in transactions.

We use a lot of due diligence exercises, so that students learn to review contracts, corporate records, resolutions, and organizational documents. We work with students in developing a facility in moving between legal concepts involving corporations, LLCs and partnerships. For example, we might employ a simulation involving an LLC and then follow it with another simulation involving a corporation, with the goal of trying to get our students to think quickly about both business and legal issues. We want them to think, "Well, the organizational documents for different types of entities will be different. And I may have some slightly different legal issues with this type of entity, even if I am dealing with the same business issues."

When our students perform due diligence review exercises, they also gain experience in spotting issues in other substantive areas of the law. The transactional lawyer, the deal lawyer, is often the issue spotter for the deal and may need to bring in additional resources to handle specific issues. In our simulation exercises, we encourage our students

²¹ See Carol D. Newman, *Sample Syllabus* (Conference Handouts), http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Newman/Newman_Deal_Skills__3-Sample_Syllabus_electronic.doc.

to ask questions about possible issues. Ask whether there is a labor union. Ask questions about employee benefits. Make sure that a consideration of tax issues is inherent in starting to structure a deal. Because our students, as transactional attorneys, will be the deal managers, they will often be the ones with whom their client will mention something that has nothing to do with the current deal. In sum, they need to spot issues and determine whether they need to bring in additional expertise.

We do use fundamentals of third-party legal opinions as part of the skills that we teach, but we primarily use the fundamentals as a way of teaching how an entity takes action. Many clients leave the details of *how* their company takes action to the lawyers. And so we work with our students on what it takes to achieve, for example, due organization or due authorization.

We also spend some time on typical transactional contracts, including leases, purchase agreements and loan documents, for it is likely that their clients will seek advice on such documents at some time. Studying loan transactions leads nicely into a class devoted to risk reduction mechanisms, in which we not only talk about risk reduction documents that lenders use (such as guaranties, security agreements, pledge agreements, etc.), but we are also able to reinforce a concept that our students have worked on in Contract Drafting, which is how risk gets allocated in a contract. They have already learned in Contract Drafting that reps and warranties can be modified to shift risk. They already know about using materiality qualifiers and knowledge qualifiers, and, as a result, we can delve more deeply into provisions like, for example, indemnification provisions and the allocation of risks within those provisions. So we have a real opportunity to emphasize, discuss and simulate how lawyers can look at certain business issues and perhaps suggest solutions that may allocate risk within a deal and the contract that evidences the deal.

Throughout Unit 2, we incorporate a number of reports, oral and written, and many of these reports are prepared by groups of students. And just a moment about assessment here...we do not grade the student assignments during the first three weeks (Unit 1) of the course, for one of our goals in Unit 1 is to get a group of students who have different experiences to a common level of experience and comfort. For some students, their main business experience before beginning the Deal Skills course is in taking the Contract Drafting course, whereas other students may have actually run their own businesses. We often have some students who are in the joint J.D. and M.B.A. programs. But in the middle portion of the course (Unit 2), all of the exercises involve weekly homework that is graded by the professors, with feedback every week. We grade them as a group on the group exercises because a transactional practice often involves working with others, whether by choice or not. Now, to be fair, we also want to make sure that students are learning individually. So a third of their course grade is based on a final individual project (in lieu of an in-class exam) that replicates, in a different context, a lot of the skills and knowledge that they have developed collaboratively during Unit 2.

Finally, Unit 3 is a four-week simulated transaction, where student pairs play the roles of co-counsel, while we professors play the roles of the clients. In Unit 3, students practice the skills and use the knowledge that they have developed in Units 1 and 2. They learn about a business deal from us, in our roles as clients. They have to consult with us as clients. They work on negotiation strategy charts. They give us, as clients, verbal reports as well as written updates about the status of their deal. They have to ask us what we, as clients, want to do as the negotiations develop. And they have to incorporate the results into a contract on which both sides have agreed.

It is interesting, and perhaps a bit sobering, to see how the lawyers can change the deal. We have taught the course five times, and each student negotiating group has come up with a slightly different deal, using the same basic facts and the same clients. Part of this is because we, in our client roles, try to take our cues from what our student lawyers emphasize and suggest. And to make sure that our students are aware of their roles in the results of their negotiations, we conclude the negotiations of this Unit 3 with an extensive debriefing – individual memos as well as class discussions – about their final deals and how they got there. In these debriefings, as well as throughout the negotiations process, we specifically focus on negotiating styles and strategies.

We devote the last class of the course to a review of the ethics and professionalism issues that may have arisen during the course. Using a series of hypothetical transactional scenarios, we ask our students to try to determine how they might resolve the problems presented. We bring in an outside panel of invited transactional lawyers from the Atlanta Bar to then give feedback to the students. So the last feedback is not from Jan and me or other professors – instead, the last feedback comes from the invited transactional lawyers.

Sample Exercises: *Introduction to the Business Deal*²²

Now, for the few remaining minutes of this presentation, I want to focus on some sample exercises that will give you an idea of how we use these simulations to do the kind of skills-building that I just described. We have given you 32 pages of an abbreviated teacher's manual²³ with some exercises and fact patterns for Classes Two and Three (*Introduction to the Business Deal* from Unit 1). In Class Two – where we are introducing students to deal scenarios and are not grading them yet – we do several simulations:

- *Learning the Business Deal From Your Client* (Exercise 2-1).
- *Reporting Summary to a Supervising Attorney* (Exercise 2-2).
- *Beginning to Negotiate a Term Sheet* (Exercise 2-3).

We also assign, as preparation homework, some case readings on letters of intent, as well as articles and a form letter of intent to review between Classes Two and Three. And then in Class Three, we expect the students to incorporate what they learned in the simulations in Class Two, as well as what they learned in their homework reading. For example, in Class 3, they review a so-called letter of intent and advise their clients as to whether they think it would be enforceable and what they think the next steps should be.

So let me just give you the 30,000-foot perspective. By the time that students have reached the end of Class Three (which is also the end of Unit 1), we are able to give them a homework assignment that involves drafting a letter of intent, reviewing a form purchase agreement in the context of the deal that they have partially simulated, preparing a short due diligence checklist, and preparing an internal pre-closing checklist.

²² These exercises and teaching plans were developed by Carol D. Newman, M. Jan Connell and Catherine P. Powell. They are available on the Emory Exchange at <http://www.law.emory.edu/centers-clinics/center-for-transactional-law-practice/emory-exchange-for-transactional-training-materials/access-to-the-emory-exchange.html>.

²³ See Carol D. Newman, *Introduction to the Business Deal* (Classes 2 and 3): *Using Simulation Exercises to Teach Skills and Tasks* (Carol D. Newman, *The Deal Skills Course*), available on the Emory Exchange at <http://www.law.emory.edu/centers-clinics/center-for-transactional-law-practice/emory-exchange-for-transactional-training-materials/access-to-the-emory-exchange.html>.

We don't expect the skills to be great at this point. What we do expect is for the students to understand the part of the deal that they simulated and to be ready to go into the middle portion of the course (Unit 2) where we will expect them to perform the day-to-day skills required of a junior-level associate, including associate-level reviews of documents and preparation of oral and written reports on their reviews.

Exercise 2-1: *Learning the Business Deal from Your Client*²⁴

Before describing how we teach this first Exercise 2-1, I'm going to give you the highlights from a two-page fact pattern. Keep in mind that, at the beginning of class, the students do not know these facts, for their mission in this exercise is to uncover these facts. The facts to be uncovered involve a fictitious person, Marshall Greene, who owns and is CEO of a fictitious corporation. Marshall is 60 years old and wants to sell the family business, and Marshall's children are not ready to take over. Marshall is divorced, and Marshall's ex-spouse owns 25 percent of the company. Their interests in the company are subject to a stockholder agreement. Another issue in the fact pattern is not necessarily a legal issue at all. Marshall is worried about health insurance. Marshall gets health insurance through the company and is concerned about how to replace that insurance if Marshall sells the company.

This Exercise 2-1 (*Learning the Business Deal from Your Client*) is a little bit different from many client counseling exercises. Our goal here is for our students to just jump in, learn how to ask business-oriented questions, use appropriate client communication skills and learn to listen in the business context. From the beginning, we remind the students of the five-prong framework²⁵ for identifying business issues that they have already learned in the Contract Drafting course: Is money involved? Is risk involved? Is control involved? Are standards part of what we are dealing with here? And what is the endgame for what the clients may want to happen? Given that framework, with which they are already familiar, they are prepared to think of business-oriented questions.

First, we divide the students into two groups. (It does not matter who is in which group, for each group will have a chance to practice the same skills as the class progresses.) Each of the two professors meets with one of the groups. In this example, we call one group "seller's counsel," and we call the other group "seller." As the students begin this exercise, they don't know what they are selling or who the seller is.

One professor (we will say "Professor A") gives the seller's counsel an e-mail that is supposedly from a supervising attorney, saying, "My flight has been delayed, and I am going to be in the air when a client, who is already on the way to the office, arrives. (We have cleared conflicts at this stage.) The client is thinking about selling its business. Can you take the meeting for me? Find out what you can and report back to me. And, unfortunately, anyone else who might be able to help you is not available right now." Professor A also reviews with seller's counsel a two-page handout about various client communication tips, and then says, "Your job is to go into the meeting, ask business-oriented questions and try to find out as much as you can. Don't give any specific advice yet. We want you to be able to summarize at the end what you found out and what you think the next steps should be."

²⁴ See *id.*, *Learning the Business Deal from Your Client*, at 5-8.

²⁵ See Stark, *supra* note 18, at 303-10.

Meanwhile, on the other side of the room, the other professor (Professor B) is reviewing the fact sheet for the seller with the “seller” group. And now, a big word of caution. We're not teaching our students to be clients, and this is the only exercise we do in the entire course in which our students act as clients. But there is a method to our madness. We want them to have the experience of listening to attorney-like questions from the point of view of the client and to concentrate on the types of questions that elicit certain answers.

Professor B asks the “seller” group to learn their facts very quickly and tells them the rules of the game: They can only answer questions with the facts that they have been given, and they have to listen carefully to the questions that they will be asked. Answer “yes” and “no” questions with “yes” or “no.” Answer more open-ended questions with appropriate, but not expansive, responses.

Then the client “interviews” begin, as the “seller” meets with the “seller’s counsel.” We split them up two versus two. The goal of seller’s counsel is to find out as much as they can, and the goal of the seller is to answer only appropriately. After the groups have finished the interviews, we reassemble the class to determine what each group learned. We go around the room and ask each pair of seller’s counsel to tell us one thing that they learned. We put their “facts” on the board, and there is usually a “fact” that one group learned, but the other groups did not learn. And the students become very interested in those differences, as they realize that the groups did not learn the same things, even though they all started with the same amount of information.

We then turn to the sellers and say: “What did you not tell them? What did they not ask? And, of what you did tell them, what was the question that elicited your answer?” With these questions, we are really looking at how the seller’s counsel groups found out their facts. And the sample I gave you included some personal facts, some clear business facts, and some clear legal issues.

That is then the opportunity—it is all on the board—to talk about the different facts, using the five-prong analysis²⁶ of business issues that they have used in the Contract Drafting course. We look at each fact on the board: Does it involve money? Is this an issue of risk? Is this control? Is this standards? Is this endgame? Then we ask if there are any additional legal issues, which leads us to a discussion of the intertwined business and legal issues. For example, Marshall Greene’s stockholder agreement will require some legal analysis. And the stock ownership issues clearly involve money, risk, control and endgame.

To conclude Exercise 2-1, we do a second client counseling exercise, this time with the groups reversed, so that the original “seller” group becomes “buyer’s counsel” and the original “seller’s counsel” group becomes “buyer” with a new set of facts. And they complete this exercise much more quickly the second time.

Exercise 2-2: Reporting Summary to a Supervising Attorney²⁷

But remember, this class also involves doing an oral report. In Exercise 2-2, we ask small groups of seller’s counsel and buyer’s counsel to meet and prioritize what they will tell the supervising attorney about the “client” meeting. We ask them to pick the three most important facts or issues and to choose a presenter who will make that report to a very hurried supervising attorney. Then, one of the professors stands near the door and says,

²⁶ *Id.*

²⁷ See Carol D. Newman, *Introduction to the Business Deal, Reporting Summary to a Supervising Attorney*, at 9-10.

“My flight was even later than I thought. What did you find out? I’m on my way to a meeting. Please tell me quickly what’s important.” We expect the students to tell us, for example, first, what the deal is, together with anything that might be a deal stopper, and any information that we might need or anything that might require lead time. In our role as a senior partner, we ask a few questions and then interrupt and say, “I’m so sorry. I’ve got to go. You will have to tell me the rest later.” The point of the interruption is to hone skills in summarizing and prioritizing. We run through these reports quickly, alternating between buyer and seller presenters.

Finally, we conclude the report exercise with another debriefing, in which we ask each student group to consider whether (and why) they identified the same issues as the other groups. This discussion enables us to continue with a discussion of what was easiest and what was more difficult to summarize or to prioritize.

And then, for the first time in the course, we introduce the students to peer feedback. We ask each group to tell their presenter something that he or she did especially well. We ask each group if the presenter covered the issues as instructed by the group. We want them to get into the habit of analyzing their own performances and the performances of their peers in order to improve the next time. And we’re also introducing them to the fact that, over time, they are going to get a lot of feedback in the Deal Skills course, from their peers and from us.

Exercise 2-3: Beginning to Negotiate a Term Sheet²⁸

To conclude Class Two, we ask the students to begin to negotiate a term sheet, based on the seller and buyer facts that are still on the board. One thing we want them to experience in this exercise is a realization that they will need additional client input to negotiate a term sheet. As soon as they realize that they need more information, we debrief the exercise by discussing what further direction they might need from their clients in order to negotiate the details. If they have made any agreements that their clients have authorized, we probe to see if there are issues that the students have not considered. For example, if they have agreed to employ Marshall, we ask about the terms of the employment agreement (details that have not yet been discussed or revealed).

Finally, we use the attempt at term-sheet negotiations as an opportunity to introduce negotiating styles. For example, we ask, “How did the other side come across to you?” We let them use their own words. We conclude by starting to use some of the terminology that we will use in Unit 3 when we really talk about and practice negotiating styles and strategies.

Summary of Sample Exercises

Now, I have talked really fast, and there are other exercises in your handouts, including one in which students will have more facts and will negotiate a letter of intent, as I described. But by the end of Class Two—this is one of my favorite classes – our students have gone, in three hours, from not really knowing how a deal starts, to having practiced a number of deal skills that they will develop during the remainder of the Deal Skills course:

- Asking client-oriented questions and learning to listen as a client might listen. (Learning to listen like a client really makes them ask much better questions after only one exercise.)

²⁸ See *id.*, *Beginning to Negotiate a Term Sheet*, at 10-11.

- Trying to figure out how to negotiate a term sheet and consequently learning that a business lawyer needs to consult the client throughout the process – unlike many adversarial negotiations, the strategic decisions in transactional negotiations often require significant client input as the deal progresses.
- Learning that a transactional lawyer will probably have to ask questions that the client has not considered, such as, “How will we do this? What will you do if this particular event occurs? What will your next step be?”

In sum, by the end of both Classes Two and Three, students have simulated the following deal activities:

- Preparing for and meeting with a client.
- Listening to questions from a client’s point of view.
- Synthesizing, summarizing and prioritizing information learned in a client meeting.
- Reporting to a supervising attorney about issues raised in a client meeting.
- Beginning to negotiating a term sheet.

They have also begun to apply substantive knowledge from doctrinal courses in practical application:

- Corporate structures and deal structures (asset vs. stock acquisitions), including business, tax and legal issues.
- Introduction to due diligence review.
- Familiarity with a sample letter of intent and a sample asset purchase agreement.
- Reviewing and advising about whether to sign a simple letter of intent.
- Diagramming a simple transaction.

General Summary

By the end of the Deal Skills course, our students are ready to assimilate and practice, in their Capstone courses, particular types of transactions, such as mergers and acquisitions, private equity, venture capital, commercial real estate and other transactions. For example, the Deal Skills exercises in reviewing, negotiating and drafting letters of intent prepare students for the Capstone simulation courses, most of which involve a letter of intent. In their Capstone courses, students who have completed the Deal Skills course will also be able to use their increased facility in applying concepts from doctrinal law courses to practical business situations, as well as their ability to identify and prioritize business and legal issues. Finally, their repeated practice of reporting skills (written and oral) and transactional negotiation skills will enhance their ability to handle the next challenges of a Capstone course as they develop into transactional lawyers.

QUESTION AND ANSWER SEGMENT**QUESTION**

I enjoyed your presentation, but I think it was a classic argument against PowerPoint. I just want to make the observation that the things you were saying at the beginning are consistent with smart use of PowerPoint. That if your goal is to present things rapidly and visually and be high impact, someone who knows how to use that program well can really kill you. But if all you know how to do is make bullet points, you are going to kill them, literally.

DOUGLAS WM. GODFREY

Yes.

SPEAKER

But the conundrum here, though, is to use PowerPoint well, you have got to invest in knowing what PowerPoint can do because it's awesome when you do it well.

DOUGLAS WM. GODFREY

I wouldn't quite agree it's awesome. But I would agree with you it was a part of a strawman, and I needed a rhetorical tension for my audience to get my thesis across. But, one is that I would respectfully assert that it should be everyone's default mode. And it often is that. If you go to conferences, you almost expect to see PowerPoint presentations.

Two, is that I agree that you can add video clips and movie clips. When I teach Evidence, I can add Twelve Angry Men and Henry Fonda arguing Power Point. But it takes time. Also, it is like this at Emory because they are so good, but this is the first time that I haven't seen any technical glitches during presentations. And there is a great thing on YouTube about "Why not to do PowerPoint?" and it's got Lincoln fumbling around. That's required viewing. And everyone should go Google: Lincoln Head PowerPoint Presentation. It's a great parody. But I just want to make a couple of points. The blackboard is technology, too. The graphic is technology.

SPEAKER

We all use it all the time. If you are doing things on the board like drawing pictures of any kind, it's usually better to put the graphic on the PowerPoint.

DOUGLAS WM. GODFREY

You know, I would respectfully say I disagree. Because the thing that a blackboard has is that it is interactive. So if you want to do a flowchart with the student right there and say, "Okay. We are starting with this article in the contract, and let's go to the definitions. Let's go to the operational sections. Let's go into the warranties..."

SPEAKER

That's always the point. People who use PowerPoint well know how to make it interactive. You have got to have hyperlinks within your set up that allow you to flow with the conversation. People get locked into linearity with PowerPoint. They think it's the definer of discussion only because they don't know how to use the program.

DAVID EAST

I will assert—well, I'm going to make an empirical observation without having any data. But I would assert that 95 percent of the people don't do that. They don't make it interactive.

Now, we're constantly told by Microsoft (and also Apple, which has their version of PowerPoint which is in some ways better) that they are going to make it easier to use and more interactive because, yes, I agree: You can do a lot of neat things with PowerPoint. But you can also bore the IT people.

DOUGLAS WM. GODFREY

I would just make two observations. One, particularly for younger professors, I have seen colleagues at more than one school who are spending their time doing PowerPoint presentations when I, as a senior faculty member, would counsel them to think about how they should be organizing the course. How are you going to present the material? What's going to be your entry question for this case? And they are slaving away to get the PowerPoint. Obviously, time is a limited commodity.

The second observation I would make is to go and look at some of the handouts that you've gotten from this conference, which were just PowerPoint slides, and see if you gave that PowerPoint package to one of your colleagues, whether they could recreate the points that the speaker made. And one of the things that PowerPoint does, and it's Tufte's point, is that you can put much more information on a two-page outline than you can just using bullet points. And a lot of the meat of a presentation should fit on a two-sided handout, so that you can give it to one of your colleagues and say, "I saw this great presentation," and they can get the point. What you see in the bullet points are the rhetorical questions and the issues that are going to be raised.

And so, depending on the purpose, (and obviously in class, it's a different purpose than a conference) people have to be careful with using PowerPoint.

SPEAKER

That's why Microsoft Office has bundled PowerPoint and Word. If you want to create a Word document, do so. And that's an effective synopsis of your presentation. If what you're trying to do is present, you use PowerPoint, which is presentation software. Presentation software is designed to provide synopsis later on what was happening. It was designed to make your points in your presentation. Critique it for what it's designed to do.

QUESTION FROM JEFF LIPSHAW²⁹

I'm Jeff Lipshaw from Suffolk University Law School. Even though I have a view on PowerPoint, I want to change the subject in the PowerPoint war. I'm curious about intertwining what I thought was a point made by Doug to something that Carol said, which is the idea of "speaking client." I found that in a long life—you know, long period of practice—that translating, to your point, translating the report back about what the legal issues are to a client is an art in itself. And I wonder if when you are using law professors, or even lawyers as clients, that you truly lose that aspect of having to explain to a non-lawyer what it is you are doing in legal terms.

²⁹ Jeffrey Lipshaw is an Associate Professor at Suffolk University Law School, where he teaches Agency, Partnership & The LLC and Securities Regulation.

For example, think about trying to explain to a client the difference between a stock deal and an asset deal. I have ended up using an egg carton to illustrate this point. And sometimes I actually have the egg carton. And I say, “Look. I can sell the whole entity with the egg carton or I can pull eggs out, but I can't sell half the carton.” And in this day, clients frequently ask you to sell half the carton.

I'm curious what you do in the Deals Skills course to try to “speak client.”

CAROL D. NEWMAN

Absolutely. One of the things that I left out of the description of Class Three is an exercise in which our students report to us in client mode. And we really try to take our lawyer hats off very quickly. Your example is one of the ones we use. When they start talking and say that they want to buy assets or want to do a stock deal, we stop them and say, “Whoa, you've lost me here. Can you tell me what this is about?” And then we will ask questions and say the kinds of things we think would be appropriate to say, such as, “Well, if I buy the stock, do I get this asset?” We start asking questions that quickly lead them to the realization that they don't really know it substantively if they can't explain it. And so we refine the ability to explain legal concepts in every single class throughout the class. And we do it in front of the class.

So everyone gets a chance to summarize points in plain English. At the beginning, they may actually think—when they talk to us as lawyers—that that will be the easy part. But that becomes the harder part because we do not let them explain it as if we know already it.

QUESTION FROM WILLIAM J. CARNEY³⁰

Bill Carney from Emory. A little perspective. I used to be Of Counsel to a firm downtown and was talking to one of the partners. This was probably a decade ago. He had a bright new associate from Harvard Law School. Well trained, smart. She said she was working on a deal. He said, “Is it an asset sale or merger?” and she said, “Yes.”

He shook his head and said, “We have a lot of work to do.” This is an example of where that work is taking place, and it's a marvelous advance.

DOUGLAS WM. GODFREY

And I think what Carol was describing was just so cool because you had so many small-scale presentations. So many rhetorical situations where you have to judge your diction, your vocabulary. How you're communicating. And I would just respectfully say, you don't dumb things down for clients. I've always found clients to be quite bright and quite demanding. You just have to learn to speak in their world and be in their world. And often that's a lot of fun in and of itself. But it takes a lot of effort to “speak client.”

QUESTION FROM KATHY HELLER

Kathy Heller from Chapman Law School. I have been using acting students and given them new material because they are not bringing anything to the table. I found the students tend to help one another, like they forgot to ask me my name because they all know

³⁰ William J. Carney is the Charles Howard Candler Professor of Law at Emory University School of Law, where he teaches Business Associations, Securities Regulation, and Corporate Law. He is a well-known author, lecturer and teacher in corporate law.

my name. I give them pseudonyms. We tell the lawyer that you are using a pseudonym. They never get the real name. This is my company. How do you know it's a company?

I teach Entertainment Law, and they tend to be in another world. The actors are very good at going into another world completely. But what I do is I have the law students take it to the next level and take the interview: what they've gained from that, the deal points, and do a draft for both. They draft, depending on what side they're on. If you don't have the information, how do you draft it? There's where the shock comes in. Who are the parties? Oops. You know what -- how much? When? Where?

But I just recommend to everybody to get a hold of some acting students. They are terrific. They get completely into the role on every level. And whatever you give them, they excel with it. I give the students e-mails. They have only e-mail exchanges with the other party. One side doesn't have the e-mails, and that's how they learn.

The next step with the drafting really helps. They see where the gaps were.

CAROL D. NEWMAN

You are absolutely right. And that's why, for example, we believe the Contract Drafting course is the prerequisite for this course, so that they are able to start drafting. As we all know as lawyers, the drafting process quickly helps you figure out what you don't know. Helps you figure out what you need to ask next.

QUESTION FROM ANTHONY LUPPINO

I was just going to actually respond to Jeff Lipshaw's question. Tony Luppino, University of Missouri, Kansas City.

I guess since some of us were around the interdisciplinary panel yesterday, the way we have been having our law students get some batting practice is I co-teach a class with Business and Engineering faculty and students. So, we have the law students make presentations to the Business and Engineering students about, for example, securities regulations, in a course about venture capital and formation.

Well, to explain securities regulations and to understand the term is kind of difficult and, as you say, the business students are absolutely used to presentations. So there is good feedback there. So I think finding other students can help because I do find it difficult sometimes to take my background out of it and pretend I'm a client. And I think the Business and Engineering students are raw and need to be educated.

DOUGLAS WM. GODFREY

And obviously bottom line is we are a service industry. We only have value as we give value to others. So we should pull in the Business school, the medical students, and the folks that are going to be our future clients more because without them, we really don't have a purpose. We'd all be teaching high school English.