

# THE LAWYER'S TOOLBOX: TEACHING STUDENTS ABOUT RISK ALLOCATION

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## Dana Malkus

Good afternoon everyone. The rest of this panel is focusing on teaching students about risk allocation. The idea with the rest of our time today is for us to be able to give you some specific ideas and specific ways that we use exercises in our classrooms to teach students about risk allocation. So what I'd like to start with is a very simple -- I just want to explain to you sort of a simple exercise that I use to introduce my students to the idea of risk allocation.

Before we get to that, we thought that it might be helpful for us to make explicit to you what we mean by risk, and we think that it's also helpful to make this explicit for our students because a lot of times we talk about risk without really having a common idea or understanding of sort of what that is.

The way that I often explain it to my students is something along the lines of this: risk is the chance that something will basically be different from what you were expecting. Then, I tie in this idea of risk management. What can we do about risk? So there are different ways that we might try to mitigate, at least the negative possible deviations from our objectives.

So I actually included, in the materials, a description of an exercise that I use that I call a building blocks exercise, which is not a very original thing. We don't actually have time to go through the exercise, but I just wanted to kind of explain to you how I do it.

I do a couple of things. I teach in a clinic and I also teach a basic transactional drafting course, and I use this exercise usually in my transactional drafting course; although, I have used it in my clinic as well when we're talking about contract drafting. And the idea with it is pretty simple. I use it because I think it's a helpful way to get kind of a visual

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picture of risk, and it can be a helpful way to introduce just the idea of why do we have -- at least one purpose for why we might use a contract. Why do we structure deals the way that we do? One big reason is try to deal with all of this risk that's out there.

So the thing that I do in this exercise, and I gave you some example facts. I usually use some variation of these facts between an owner and a contractor. And I actually ask the students to take a couple of minutes to think about the risks from the perspective of either the owner or the contractor. And I actually have them just kind of jot them down on paper. I sometimes will have the students talk about it together and generate a list together. Sometimes I'll have them do it separately. It kind of depends on what time we have. But after they've taken a couple of minutes to think about it, then we go around and everyone names one of the risks that they thought of. And as they name the risk, they have these blocks. They take a block and add it to the sack, so each risk that gets added, you know it makes our tower grow taller and taller and taller until eventually the tower will fall over. And, again, it's kind of a visual representation of what happens when there's too much risk that the deal kind of can't stay alive in a sense.

After this brief exercise, then that will lead into a discussion, and I can use the discussion for various points that I might be trying to get across. I gave you a list of ways that I use it on the exercise, but I think it's really helpful as a way of being able to make the implicit process of risk management explicit for students to be able to methodically go through and identify the possible risk and in a factual scenario that isn't -- it's not overly sophisticated or overly complicated. It's very easy for the students to think of possible risks. So they don't have to have a lot of background in the particular subject matter. But it's an easy way for us to be able to go through and methodically identify the risks and then be able to talk about the concept of managing those risks to talk about the concept of how might we address those things in a contract or outside of a contract, what are some other ways that we might manage those risks, insurance, and just changing the way that we operate or the way that we do something.

Another thing that can happen in this discussion is we can look at these risks that have been identified and talk about the fact that not all risks are necessarily equal. Not all the risks are maybe as serious as some of the others, so, again, being able to point out to the students that, you know, some things maybe require more action on our part than others. And with my clinic students, especially, I find that it's been helpful to make this explicit because when I used to not make it explicit, it seemed like a lot of them would think that relatively minor risks were a really big deal. And they would kind of overlook the really big risks. So I have found it to be helpful to try and start talking about the differences in the level of risk.

The last couple of things that I'll point out -- so another big topic that usually comes up in this discussion is the way that risk tolerance levels will differ, and I will almost always

share with the students stories about how my clients have often decided to go ahead with the deal that I maybe personally would not want to go ahead with because I'm much more risk adverse than a lot of my clients. So I have a lower risk tolerance than a lot of people that I have represented. And that also leads into interesting discussions -- kind of ethical discussions, as well, and what do you do when your view is really different from your client's. We can talk about practical things like what kind of discussion do you have with your client. How do you document that? What are some practical realities when that difference exists? And the last thing that I have up here is one that I mentioned. We then often will talk about the different tools for managing risk outside of simple -- the things within the contract.

So I usually use this exercise at the beginning of the semester just, again, as a way to be able to introduce risk, but I have found it to be helpful as something that we can refer back to throughout the semester as we talk in more detail about the specific tools and contract provisions. Going back and thinking about this simple exercise from the beginning is a helpful way. Everyone sort of has that common experience that we can refer back to throughout.

That's all I have. I'm happy to answer questions. I think we'll have some time at the end. And I'm going to turn it over to Scott.

### **Scott Stevenson**

Good afternoon everyone. As Eric said, I'm now with Lewis & Clark in Portland, Oregon, but this is a homecoming for me of sorts because right after commencement of law school, I moved to Atlanta in 1989, and I studied for the Georgia bar in this building. And, I couldn't believe it. I actually had pangs of nostalgia. [Inaudible] wow, I spent five weeks of my life in here 20 something years ago, so it's amazing what a couple of decades will do. Put a burnish on even the most unpleasant experiences.

So just to give you some context for the exercise, for the discussion that I have with my students around risks, identifying risk, and risk management, I teach at a live-client, small-business clinic. We represent our clients -- our clients are very small. These are not businesses that are planning to or are seeking venture financing or whose exit strategy involves being acquired or engaging in public offerings. These are closely-held businesses, with people that want to earn a living wage being their own boss doing something that they want to do. In almost all instances, the owners of the business are all actively involved in the operation and management of the business, and that has some relevance, with respect to trying to manage the risk or trying to protect their personal assets.

The students -- second and third years students -- so at a minimum, they've had the first year of law school and business associations as a prerequisite, so they have some understanding of the idea of limited liability and the fact that certain entity choices can

provide that. They don't quite yet have some of the nuances of that and wouldn't be able to have a sophisticated or an informed discussion with a client about what limited liability means as far as what it can protect against and what it cannot protect against.

So when I say a risk profile, you guys should have an exercise in your material. I don't know if it's available to you now, but it's just an outline of the -- I spend about an hour, an hour and a half during my first day with students, and we have -- the way our clinic is structured, the first week they come and meet us on Friday and we have them for eight hours. And we are trying to prepare them for the clients that they are going to be meeting and interviewing with, as primary chair, the following week. So we need to introduce them to some ethical issues. We need to talk about client interviewing and being client-centered and behaving and trying to begin creating a collaborative relationship with a client. And we have this discussion of risk, as a way to sort of -- if I could summarize what I want to do, is I'm trying to move students from issue spotting to problem solving. And all of -- you know the students I have, they should -- they have developed issue-spotting skills. This is something they've been doing for the last year and a half. In their exams, they're often given a hypothetical set of facts, and they've got to spot the issue, state the rule, etc, etc, etc. And I want to build on that skill because some of my students are quite nervous, and if I can start with something that they feel comfortable doing and I start the class -- the discussion on risk similar to a doctrinal class, where they're given a set of facts. And I'm asking them to spot issues. And I see some students like oh this isn't so foreign. This is something I've done before.

Also, I want to say that when I speak of risk, for my purposes, for this discussion with the students this early in the semester, I'm speaking of it fairly narrowly and that I'm talking just about sort of the legal risks that they would have already discussed or considered in some of the classes, such as [inaudible] or breach of contract in a contract course. And some of them may have had employment law, so you know premises liability, as an example, or products liability. And I want to build on their familiarity with those concepts to get them to start thinking about to prepare for a client interview, use that to prepare for a client interview, and then down the road after the interview to start building a framework to have an informed discussion with the client about hopefully options we can present the client on how to address the various risks.

So it's basically -- what it is, is an in-class discussion, with the students, based on factual hypothetical -- a description of hypothetical small business. And from that, I tend to use the same visualizations to describe the business and then to try and compare and contrast some of the tools that our clients typically use to address risk, whether it's forming a limited liability entity, using insurance, using contracts to allocate or reduce risks, etc.

So this is just sort of the process, and, again, it starts with a hypo, and then from that hypo, I just want my students to issue spot and go, "oh this client is already leasing or

wants us to help them lease a property.” What does that mean as far as legal risk? Students they’ve covered premises liability reports, and they’ll say oh premises liability or the student – or this client isn’t providing a service. They’re actually manufacturing and selling a good and what type of liabilities arise from that. Well products liability. So it’s something they can do, and it builds their confidence, and again, the goal is to begin to get them instead of what they’ve done in their exams and take facts and identify legal issues from those facts sort of the client interview is sort of reversing that process. Our students will have a very limited amount of information about the client from an intake form, maybe one or two sentence description of the client’s business or business plan, and then maybe a one-sentence description of the matter that the client believes that he wants help on. So [the students] don’t have a lot of information to start with, but they need to come up with a list of questions for the interview, or at least a list of topics that they want to discuss with the client.

And so I start doing something that they’re familiar with and then by the end of the process, hopefully they’ve got a framework where, “oh, I’ve got a client that is interested in opening up a yogurt shop.” So what questions would I want to – you know, some students have a hard time coming up with the questions that they need to ask. [inaudible] If they see the client wants help with the trademark issue, they can ask [the client] very limited specific questions about, “oh, what trademark do you want to use,” so on and so forth. But, as we’ve all learned, those of us who have gone into practice and how much you -- how important it is to fully understand the client’s business model or the industry you’re in or how much you learn each time you do a transaction or you work with a client closely, what an educational experience it is for the lawyer and how much a better job you do as a counselor when you fully understand their business, where their profit generates from, where their risks are. I’m trying to take baby steps toward that in the clinic.

And those of you that teach in clinics know that sort of the concept of being client-centered and client-centered representation is an important emphasis for us. And I don’t want to go down the track of talking about client-centered representation. That’s not what we’re speaking about, but we want -- at the end of the day, our students are going to be sitting down with their client and hopefully our students are going to be able to present options to the client, be able to discuss the benefits and drawbacks of those options and let the client make the decision that is reflective of that client’s tolerance for risk something that Dana mentioned earlier. And risk is such a great concept to – it goes hand-in-hand with client-centered representation but just discussing about risk and the differences between and among people for their tolerance for risk is – I’m starting to introduce concepts of risk but I’m reinforcing the importance of client-centered representation. And we can – you know I’ll often just poll the students. How many of you have bought a lottery ticket before and you know some students would have bought a ticket every week. Other students would

have never spent a dollar on a lottery ticket in their life and you see right there sort of a difference in people's appetite for risk.

So this is just an example of what I would start to do based on the hypothetical. And I take the hypothetical client and start to ask the students to place the client in sort of a web of all of its commercial relationships and you know do they have a lease. They've obviously got clients. They may or may not have employees, etc, etc, and this is sort of a fully-flushed out example of that where you can start to discuss if there's a personal guarantee in connection with a lease or a loan, you know, how that might impact the discussion I want the student to have about, you know, what risks forming an entity will or will not do. It obviously won't address the potential liability under the personal guarantee.

And this exemplifies what I would like the students to be able to create and what their goal is, is to understand the business well enough to understand who are all of their contractual obligations to, who are they expecting to have money paid to them and you see the dollar signs here. And I can -- you know anytime there's an arrow pointing back to the client with a dollar sign, then the reflection of the client has some credit risk or some payment risk there. And how would we address that risk in the contract between our client and their clients? And so this is just one way to visualize a business, and again, this is just sort of the contractual relationships and doesn't reflect some of the potential court liabilities from running a retail shop or manufacturing or selling products. But I think it provides a framework the students can go back and start okay I want to, you know, it's going to generate questions for them that they have for their client. And that's my short-term goal. It's going to generate questions for them that they have for their client, and that's my short-term goal is to prepare them to have a client interview where they gather as much information that specifically relevant to the matter the client wants help on but as a larger picture just want to understand the business as a whole so they can place that issue in the context of the client's business model, and then once it's created, it can help sort of catalog the risks.

And then sort of the second visualization tool I use is just the basic (vin diagram). And this tool helps me illustrate how various risk management tools what type of risks they can cover and what type that they can't. So formation of an entity, you know, may deal with some liability -- court liability arising from operation of the business. At least protect the owner's personal assets from, but, again, a lot of our businesses are often solely-owned or even if they're not solely-owned, the owners are operating and managing it. And you're familiar from your understanding of business entities that you know you're always responsible for your own [Inaudible] act. So if it's a sole owner acting, engaging, running the business to the extent that that owner creates a tort, the limited liability doesn't really address that risk, and so (well maybe insurance). What insurance can or can't cover? And so this helps the students start to understand and visualize that not all tools address all risk. What combination of tools may address the clients most, you know, the risk that they're most

probable to occur in that business model. And this does help the students be able to have a more – a nuance discussion about what a limited – we do a lot of limited liability formations for our clients. And the students come to me, and they know that limited liability is a good thing, but again, they're not quite familiar – they're not able to have a fully informed discussion with the client yet about its drawbacks or its limitations when it -- what risks does that not address. So what else – you know what other risk maybe the client need to think of, of other tools to do that.

And my goal at the end of the semester the students are all sitting down with their client. We'll have some counseling session, and they'll deliver some work product, whether it's a new entity with some tips and recommendations for how to operate the business through the entity, but I want them to be able to have a sophisticated discussion about what limited liability means in the context of an entity so the client, consistent with being client-centered, can make an informed decision about whether it's worth it to them to operate the business entity.

And the final tool I'll use is just a simple table, and you know we talked about the process. What I'm trying to achieve is to start the students down the road from issues spotting to problem solving. This table just has sort of some factual predicates to potential legal risk in the left hand column and then at -- you know the category or a description of what the legal risk is. [Inaudible] with employee liability arising from an employment relationship could implicate contract law, could implicate employment regulations, etc, etc, and then each of the next four columns correspond to one potential tool that addresses at least some risks, limited liability, legal entity, insurance, contractual risk allocation, and then the final column sort of controls and best practices so this sort of issue spotting based on the fact. This is the issue, and then here are some of the tools or some of the ways to solve the problem in that risk.

And one thing that's maybe more unique to this clinic's practice and other clinics that work with very small businesses are the importance of controls and best practices and trying to – if you're preparing a contract for the client, the fact of the matter is if the financial situation that most of our client's in, even if we draft the greatest contract in the world, which clearly establishes all the rights the client needs to have, places – obligations clearly and ambiguously on the other party, if there's a breach, our client's rarely going to have the financial resources to actually enforce that contract. So we look at the contract not only as a statement of enforceable rights and obligations but as an opportunity to educate the client about what kind of discussion they need to have with their clients or whoever the contracted party is to how important it is to have a well-drafted scope of services, which is something the client prepares on an engagement-by-engagement basis or a client-by-client basis. We're not there every time they use this form of contract, and if the client doesn't understand that if they -- you know that they need to have a well-drafted, scope of services that [inaudible] ambiguously outlines what each parties expectations are of the other and the

final work products are going to look like and how much is to be paid and when, then the legal terms that we've created have limited value because our clients simply don't have the money to go to court and force contracts. Many small businesses don't. And so this is something that we – with the hypothetical, will fill this out, in the class, during the hour, hour and a half I spend on this. And then this blank form will be available for the students to use, if they want to, with their client. And, again, not all students receive a matter that duplicates risk. Sometimes we'll do some IP work. Sometimes we're drafting employee handbooks or whatnot. There's obviously risk in each of those issues, but not the kind that I'm speaking about today. But this is something that – you know – at the end of the day, if a student does use this and fill this out and certainly some of these solutions have no relevance to it, so they just remain blank. But then, again, the student can use this to help have an informed discussion with a client, at the end of the semester where they can hopefully give options. Well, you know, insurance is one option. Here are the benefits, and here are the drawbacks. You could form an entity. This is what it protects against. This is what it doesn't address. And then, again, consistent with being client-centered, the client then has all the information necessary to make an informed decision about what to spend its time and money on, as far as what tools to apply to address the risk that it's most concerned about.

And that's all I have to say today, and I'm available for questions afterwards.

### **Eric J. Gouvin**

So, one of the interesting things when we put this program together was that we found that addressing the problem of risk and ending up at similar places while coming at it from slightly different paths. So let me talk to you about my experience teaching my students to think about risks in business transactions.

I am mostly a so-called podium teacher, although I did establish our Small Business Clinic about ten years ago and taught the Clinic for four years. When I was in the Clinic, one of the things that always presented a challenge was to find that combination of skills training and doctrinal knowledge necessary to give the students what they needed to represent clients. Most of our clients were very small enterprises and part of that is just a fact of life when you're running a small business clinic. But it is also a good training ground for our students because most of the graduates from my law school, Western New England, aren't going to go to a big Wall Street firm. They are going to go to main street, and they are going to be working with closely held businesses.

They will be confronted daily with the problems that make up the substance of my new course, which I call the Transactional Lawyering Seminar, one of which is the problem of risk management. I have been teaching this course this semester at my home institution and in the LLM program at the Boston University School of Law. The course is all about soft skills business lawyers need to possess. We have not really done any substantive law in the course so far, except for ethical issues. I am trying to get them to think about the many



roles that business lawyers to play: lawyer as business advisor, lawyer as negotiator, lawyer as strategist, lawyer as project manager, lawyer as – fill in the blank. Lawyers are asked to do a lot of these things, and especially lawyers at smaller firms working with smaller companies, will have clients who are not going to go out and hire a whole army of consultants and outside advisors. For these smaller clients, the trusted business lawyers are going to be asked to play many of these roles.

As I was designing the syllabus for the course it dawned on me that one of the key roles that lawyers are asked to take on is lawyer as risk manager. In the course I wanted to make it explicit for my students what that role entails. We talk about risk all the time in law school, but we never give our students a methodology for thinking about the risk management role. In the transactional lawyering course seminar, I have very few legal materials, but I do assign a great dealing of reading that one might ordinarily see in a business school course and, secondary sources on other topics. When we get to the section in the syllabus on risk management, I gave my students some readings from a classic risk management textbook. My goal was to give them the overview of what risk managers in the risk management setting do. I did this not because my law students are going to go out and do risk management *per se* but because they ought to be made aware of the fact the one way or another -- either intuitively or on purpose -- t they're going to be playing the risk manager role throughout their careers. One of the ongoing themes in the course is the tension between Model Rule of Professional Conduct 1.1, which is all about competence and MRPC rule 2.1, which is about advising. Sometimes I think you have to go beyond legal advice when you're counseling a client on non-legal issues affecting the subject of your representation.. When the lawyer ventures too far from purely legal advice, however, the spectre of Rule 1.1 looms large – is the lawyer competent to provide that advice?

I try to convince the students that at the beginning of a business the choice of entity is not a foregone conclusion. Whether you decide to incorporate or not, or form an LLC or not is not an end in itself, but should be part of a larger risk management strategy. What kinds of risks does the client face? How much exposure does the client have? What tools do you have at your disposal to address those exposures? If someone is selling greeting cards out of a shop in the mall as a sole proprietor does she really need to form a legal entity or would she be better off just buying more insurance? Getting her to think about the goal, which is protection of the client, rather than focusing on the tools at hand (i.e. legal entities) is important because you sometimes lawyers get off track when they put too much focus on the means instead of the ends.

To help the students think about risk in a systematic way, we develop the classic methodology, which consists of five steps. The first step is to identify the exposure. The readings talk about all the different places risk managers find exposure. These sources of risk are things that can be pretty intuitive or more conceptual and I have the students place the risks identified into the context of the ongoing hypo that we work with throughout the

semester, which is the acquisition of division within a larger corporation and which highlights some of the challenges on both the buyer's and the seller's side.

While the first step is figuring out what's there, one of the things that I really want the students to appreciate is that not all risks are created equal. I want to make explicit for the students that from the client's point of view some risks really don't matter that much and others matter a lot. In order to tell the important risks from the unimportant ones, the lawyer must understand why the client is doing the deal. Specifically, what's driving the deal? If there are risks that are affecting those underlying deal drivers, pay attention to those and take care of them. But if the risk identified is something off in the distance and affects something that is not essential to the deal, well the lawyers can figure out some way to deal with them in some other way: We can contract around it, or we can carve it out or we can insure it. I want to make sure my students get the message: Don't get hung up on molehills; focus on the mountains.

It turns out that lawyers are actually pretty good at seeing the risks and identifying the downside to any given activity. This is a sad statistic, but the incidence of depression in the legal profession is way out of proportion compared to the general population. We probably tend to look on the dark side anyway, and we're pretty good at being professional pessimists when it comes to finding all the problems. But finding all the problems without finding a way out of those problems is itself problematic, and one of the reasons why lawyers get such a bad reputation in the business world. We are often seen as "deal killers" because for the most part most of the students learn only one step in risk management, which is finding the problem, but not the other steps, which require finding the solution. So my goal here after identifying the risk is to push the class on to the next step, which is to measure the client's exposure. We don't all have accurate crystal balls, but after you've been around the block a few times, you get a sense of how likely it is that a particular kind of activity is going to result in liability. Accountants are also very helpful in the role of assessing risk exposure, as are insurance agents. I do tell students to be a little leery of insurance agents in this role because although they might be good at identifying and quantifying risks, they also almost always have some insurance product to sell you that could solve your problem. To the guy in charge of hammers everything looks like a nail, and the insurance guys have a lot hammers. So I always advise the students to take advice that is potentially tainted by conflict of interest with a grain of salt.

This is a good time to remind your students that every client ought to have a team of professional; obviously a lawyer is on the team and in some cases, that lawyer might be doing a little bit more than a lawyer representing a big corporation might be called on to do. The team should also include a banker, an accountant, an insurance person, and maybe a marketing professional or business consultant.

The next step in the risk management process is to control the exposure. So we've measured it, what can we do about it? Well, sometimes you can just find a way to reduce the risk in either its severity or its frequency. One of the big problems that you have with risk in business organizations is employees. They make mistakes. How do you stop that? Train them properly. Hire them properly. Supervise them properly. Sometimes it just seems so obvious, but it is really important, in terms of lowering that exposure.

Here's the payoff. You go on into this deal with your eyes wide open. You've identified some potential problems, measured them, tried to get them under control, now what? Well, now the risk manager needs to figure out how to finance the risk. It's a cost of doing business. One way you can pay for the risk is just to avoid it all together. You may, after doing the initial assessment say there's just too much on the table. This deal doesn't make sense. So risk avoidance is one way, but by the time we get here, we've already talked about the relationship between risk and return, and I've been using Rob Rhee's recently published book, which I recommend. I think it's a very good book about financial literacy -- financial literacy for law students. I don't remember what the exact title is, but he has a knack for condensing complex ideas into digestible nuggets.

Beyond avoidance, another way that we can deal with the risk is just to recognize it as a cost of doing business. The client can retain the risk and price their goods or services accordingly. Sometimes it's self-insurance. A lot of people, who think they are self-insuring, don't have the discipline to really do that, but a lot of people for small problems that occur regularly, they're not going to break the bank. You know they're just going to pay it out of pocket.

Risk reduction or prevention could be a third way to handle the exposure. The way that you're doing business might actually be crazy. If we do it a slightly less crazy way, you're going to be more profitable and less exposed.

Risk sharing is a fourth method of financing risk. Of course, contracts are all about risk sharing. Can we find a way to negotiate with the other parties to the deal so that they take their piece of the risk and we'll take our piece? We can negotiate about how much exposure we will have.

And finally, the last approach to risk financing is risk transfer. This is also contractual, but when I talk about this it's mostly in the context of third party accommodation parties like guarantors or insurance products. Then this matrix for trying to figure out high severity, low severity, high frequency, low frequency, the different tools that work best in different situations.

	<b>High Frequency</b>	<b>Low Frequency</b>
<b>High Severity</b>	Loss Prevention Loss Avoidance Loss Reduction	Self-insurance Contractual Agreements (insurance)
<b>Low Severity</b>	Loss Reduction Risk Retention	Risk Retention

This is kind of intuitive, but making it explicit for the twenty-somethings that are in our classrooms, I think turns on a couple of light bulbs.

The last step in the risk management process calls for the risk manager to monitor, revise, and provide feedback. Are these mechanisms actually achieving the goals? It is less obvious how the lawyer will do this, but over your professional life, you'll see some things work better than others. Use the things that work. The things that don't work need to be modified or abandoned..

That is my take on teaching law students about risk management. It is part of a larger strategy where I try to make explicit for the students that this part of a whole body of knowledge out there that is imputed to business lawyers and that they ought to be aware that they perform these functions even when they think they are just providing legal services. By being aware of a methodology and making it explicit they might be able to do a better job with that function.

### **Usha Rodrigues**

Hello everyone. I'm Usha Rodrigues, and I'm batting cleanup on this panel, so I'll try to be brief so that you can get to some questions and answers, which we are all very eager to hear.

But first, I want to ask a question of the audience. How many of you teach doctrinal classes at your school? Okay, and how many of you – the rest of you are – raise your hand if you've been a skills or clinician sort of teachers. Okay, so that's the majority of the crowd; although I see we have some doctrinal people among us. So I'm a doctrinal professor largely. I teach business associations and contracts, and then I teach one skills-based class, the Life Cycle of a Corporation. And so I was going to speak to you just a little bit about how I try to introduce some concepts about transactional law and risk

management, in part, and in the first year. And I know Sue Payne is going to be talking about this tomorrow.

In this context, I think of Emory's very integrated approach to the first year, which we don't have at Georgia. I'm at Georgia Law. We have a pretty straightforward you know doctrinal first year, very litigation-focused, as I'm sure many of your home institutions also have. And so in light of Sue's comments about how for the skills sort of based lawyer, one of your -- the first step is to talk to your institution and make these connections and make the case for transactional law and skills training. You might want to try to offer this as a suggestion for something that your first year contracts professors can do in order to give students just a little tiny taste of what it's like to be a transactional lawyer in the first year.

So you know I mean I use a case book. It's very litigation focused, but they're two classes -- two or three classes where I try to bring this transactional concepts and the idea that there's another way to practice law that doesn't involve the courtroom into the first year of contracts class. And one of them is a negotiations exercise I won't talk about. One of them is an NDA, which is a modular class. You can do it in fifty minutes, and Tina started talking. I hadn't had the benefit of hearing Tina's remarks before, but then I thought oh my gosh I'm doing a sink or swim. I'm one of the four bad examples (for the contracts).

But this is what I do. So I give them a NDA, and it's a very simple strategy or a very simple scenario, where the university has some material that it wants to disclose to a potential buyer. The buyer wants to know (can they just sort of kick the tires). See what the technology is like; see if it wants to do a deal, right? A typical NDA. And I divide the class up in half. Half the side represents the university. Half the side represents the company, and first they just read silently in the sink or swim sort of way.

T. Stark:                   It's not all bad. It's not all [inaudible]. It's self-taught. I mean there are pluses to it, it's just not a full pedagogy.

Although I'm going to talk to you about the pedagogy because, as Tina and I discussed in the break, I'm working on my third child, so I am a little meshuggeneh.

T. Stark:                   She didn't know "meshuggeneh." Crazy.

So I'm going to do a little free form riff on your pedagogy in a second. So this is what you do. So first they read silently, and then I start on the white board, okay what kind of -- you're the university. What are your concerns about this NDA? Okay, you're the company. What are your concerns? And this is second semester of contracts. We do have the luxury of six credits, at least for now, at Georgia, and so you know they talk about the limitations liability and the warranty and all of the legal concepts that they've learned in class, they see them in the contract. And they're really excited about this.

So I get them on the board, and I'm nodding and I'm nodding. And we're having a great discussion, and finally about -- after about fifteen or twenty minutes of this discussion,

someone, who probably has work experience, on the university side, raises their hand and says well look at the definition of confidential information. And I say okay let's look at the definition of confidential information. And it says confidential information is anything marked confidential or anything where if it's disclosed orally, if there's a follow-up memorandum sent within 30 days. And I say okay what's your concern? And the student, who inevitably has work experience, says well I'm just concerned that what if there's some information disclosed that doesn't have the world confidential marked on it. And I say yes, right. This is the biggest problem is that the whole – you know all of these risks, all of these limitations on what the company can do with the information turn on this defined term, which is a basic point, obviously, in contrast right. You have to look at the defined terms. They're the engine of the contract. And then if this definition – if you get this definition wrong, university, you have sold the goods, right? You have sold the crown jewels for nothing. I guess you've given away the crown jewels of the company, for nothing, and then I make this sort of common sense point that business people are never going to learn to mark everything confidential when they're having talks with their company. And they're certainly not going to remember to send a memo within 30 days because of something that they said. So it's this sort of common sense application and understanding of the underlying problem of the business and what the risk is really that drives the whole deal – that whole interaction.

Okay, so here's the extra meshuggeneh part. So this is my third child, and my first one, who's five, is learning to read, and she's in pre-K, but she's reading.

T. Stark:                    Good for her.

Yes, and we're on [inaudible]. We're way past *Run Spot, Run*. But what's interesting to me about her learning is that – you know I mean there was the ABCD song and then there was the putting together okay this is what an A means and a capital A and a lower case A and all of that stuff. And then she started to read sentences and words. But she already had a grasp of narrative and story, right, that she brought to the learning. So it wasn't like she was learning – she already had an innate grasp of narrative and how stories worked. We told Cinderella, ad nauseam, and all these other stories that she brought to the table, so it was sort of, in that sense, a Socratic in the original Socratic sense is that they bring this learning with them as they learn to read. Right? They already have this innate understanding.

And as I was reflecting on Tina's remarks and what I was going to say, there's something of that in teaching or at least for me, there's something of that in this exercise, which is yeah, we have all these legal concepts, and you're learning how they work in a contract, but don't check your common sense at the door. You have this understanding of how business works and you can bring that, or even if you've never worked in business, you just have this understanding of what – you bring something to the table, and don't lose that

common sense, when you start reading. So that's what I've learned in a very modest way in my contracts class.

So now we welcome your questions and comments.

Audience: Let me just make one comment because it follows up on what you were saying, and I'm not an expert in this, but I think there's people in the room, who are. But you're sort of picking up on learning theory and how the way we learn is to craft new material on to what they call schema. You know so like the reading that she's doing is that being crafted on to her narrative and that's making for you know sort of learning that becomes more profound or deeper or more easily remembered. One of the problems for beginning law students is that they don't necessarily have those things to build on, but if they do, I think the learning goes faster. And there's a whole science of this that, like I said, but that's about the tip of the iceberg, less than the tip of the iceberg, probably one grain.

E. Gouvin: That's a great point. We're at the comments and questions part of the program, and I am going to call on folks who have questions. I am supposed to repeat the questions for the tape, but it is going to be hard for me to repeat that last exchange. I am going to say there's a whole lot of teaching theory that we may or may not be ignorant of that talks about how we graft new individual experiences onto something called a schema. I thought that what you were going to be talking about, when you made reference to Tina's analogy, was the idea that when your daughter learned to read, she already knew what stories are. Not all students know what the business deals are, and so telling those business stories and getting them aware of that aspect of the law is a big challenge

Just a personal anecdote, my daughter is now in college, but when she was little I told her the story of the three bears many, many times.. I got so tired of it, which is my own fault for not having a deeper repertoire of stories appropriate for little kids, but it was also her fault because she kept requesting that story. To break it up a little and to drag it out a lot, I began embellishing the story in various ways. In some versions of the story went into great, excruciating detail about the financing of the homes. There were long discussions about the attornment clauses. I know it put her sleep.

U. Rodrigues: That's the goal.

E. Gouvin: Questions?

Audience: Thanks to you all of you for an excellent session. In terms of some of the language that you used measuring your exposure and controlling your exposure, there are a couple of questions I have right now. One is in terms of measuring the exposure, is anyone currently teaching probabilities and using data analysis to students? That's something that we're starting to talk about. I'd be interested in whether you found ways to do that. What's behind that for me is a general counsel of a major telecom company said that – he talked about how many resources he used negotiating indemnification provisions. And then he went back and checked, and it didn't actually litigate once in eleven years, which I thought to be a very interesting insight [inaudible] circle back to measuring your exposure. And then how do you do the cost benefit analysis, in terms of once you've decided here's how we might control it? How do effectively teach those in tandem with one another, in terms of whether it's actually going to be worth it in your [inaudible]?

E. Gouvin: Well I'll field that first and then I will hand off. I want to bring your attention to a good book by Steven Shavell, Louis Kaplow, Howell Jackson Kip Viscusi and David Cope at Harvard called Analytical Methods for Lawyers. It's a pretty good book. They've got chapters on statistics and regression analysis, on game theory and another chapter on decision analysis. They also have a lot of nice exercises that go along with it. I use the chapter on decision theory to help my students think about making a decisions tree: here are two paths that we might go down and each lead to a chance node. We assess the chances not because I expect them in real life to actually explicitly do that, but because I want them to think methodologically how one would you think things through that if you could know with some certainty what the expected outcomes are and how you could apply that to the mode you're at right now to make that assessment. So, in theory, this is possible to do, but you well know in reality it's very hard to do, and so, you know, a lot of it ends up with gut checking and stuff.

There was just a piece that came out recently. I forget who wrote it, but I just read the abstract. It's in the To Be Read file, but this whole thing that we tell ourselves about how we create value, in negotiating mergers and acquisitions, someone has actually gone back and done some empirical evidence looking at price changes



between the time of the announcements of the deal, the actual final documentation. At least at that point, there's no empirical evidence to show that lawyers add value to the process. So it's maybe a story we tell ourselves to justify our existence. In any event in the context of risk management you have a bunch of tools available to you, and some are better for some applications than others, and you know putting – here's the basket of process you have and tools you have. But don't think that one solves all. You want to pick up on that?

S. Stevenson: I mean I certainly – you know when you introduce the concept of risk, I introduce it as a quantitative concept, you know, that it's the probability of an occurrence of an event times the magnitude of the consequence of the event and that those are two quantifiable variables. It's hard when you're actually trying to use them -- you know trying to find quantifiable, statistical information to drive an advice or a counseling session with a client. It's just more antidotal. I mean I use to be an engineer, and so there was a course called Engineer and Economics, where you get into [inaudible] and then you use statistics and probabilistic analysis to make the decision well if I increase the foundations of a bridge by 5 feet, how much is that going to cost me to concrete and what risks am I avoiding. And, you know, it's like the fifty-year storm versus the one hundred-year storm, so it's hard to get – when you try to apply that in with the legal counseling area, it's hard to get quantifiable information. I certainly ask my students to ask our clients, “what are your risks?” They know their business better than you do and what claims – you know what is the client's claims history, and I try to use that information to help drive our counseling and the advice we give, but again, that's more antidotal than quantifiable.

E. Gouvin: Any other?

D. Malkus: I pretty much have the same response as Scott. I mean we do have those conversations in the clinic. I don't really (engage them so much) in transactional drafting, but in my clinic, we do, but it's really much on just a case by case basis and – I do think that it's helpful to have those conversations with the students, but I don't have any sort of formalized way of being able to do it.

S. Stevenson: Another point I want to make is in the hypo that we use as we track through the course because this a lot of outside reading about the theory of what lawyers do and why they do it. But we're also

following this acquisition. In the hypo, there's some litigation. One is just the regular little tort claim, and one goes to the validity of the license agreement. And to get them to appreciate look, there's a big difference. One is the cost of doing business and one can be a threat to the [inaudible]. So even if we can't quantify it precisely, we know in our gut [inaudible]. [Inaudible] we have? You want more stories about my daughter?

E. Gouvin: Does anyone have any ways that they discuss risk or use it in their teaching?

Audience: Just an example of the third apple guy. You know apple was originally Jobs, Wozniak, and the guy that designed their original Newton logo. He dropped out, and there's a whole bunch of great stuff about that they were setting up a partnership, and he decided that, you know, these young guys they can take that risk, but that you know he had a mortgage. He had kids going to college. And he didn't want to face the risk of looking for, you know, an antidotal discussions about it. It's just an interesting one that the students (would love).

E. Gouvin: I am going to summarize for the tape. In the canon of business stories that students can probably relate to, the three founders of Apple would be a nice morality tale in which Steve Wozniack and Steve Jobs end up going on, but the third guy dropped out because he couldn't take the risk.

Audience: I was just going to follow up on the discussion between Usha and Tina about learning and how much you bring to the table when you're learning in this area. Both in the skills based and the clinic based learning, what are your recommendations for getting to the business experience that they don't have? I think most of the students don't have it.

E. Gouvin: That's a great question. So for the tape, the question is how do you get students to have the business experience in either the doctrinal or the clinical setting that they just don't have. I mean how can we get them up to speed?

T. Stark: Well I've used a couple of different approaches over the years. I've required the Wall Street Journal and then each class had a discussion. I taught a course called Business Basics so that I actually taught business, and I brought in somebody from an insurance company. And I brought in somebody from Moody's. I mean I was in New

York, so I was able to bring in all – I brought in somebody from the Federal Reserve. But even if you're not in New York City, there are people – NYU is now doing their financial literacy course. You can put one together. That's what I did.

U. Rodrigues:

I also require the Wall Street Journal in my Life Cycle of a Corporation class, which takes you through the life cycle of a corporation, and I'm happy to talk more about that after the session. But it is a good introduction to business. You use case studies and sort of a lot of antidotes kind of like the Apple anecdote, you know tales about business.

And then, I'll put in a plug for my colleague, Carol Morgan, at the next session. She's going to talk about the corporate counsel externship we have at Georgia, which is a great – we're very proud of this model where students get placed in-house. And there's a classroom component and an in-house component – you know an on-site component. But there, you know they're dealing with the client, and they're seeing the legal team deal with the corporate client in a way that gets them a sense of understanding the business. Other than that, you know, I teach Van Gorkom, and in Corporations I talk a lot about the business of – you know I try to talk about the deals in Corporations to let them know how much fun it can be.

T. Stark:

There are also actually mini (treaties) on business that Aspen publishes, and they actually go through a lot of different aspects of basic business: interest rates and how stock markets are run. So, there are resources that are available.

And the other thing is the Wall Street Journal publishes these little booklets on personal finance and on other things, and they're not that expensive. And they're wonderful explanations about basic business.

S. Stevenson:

Another place I find that it's really pretty helpful is the Economist. They have discontinued calling it economic-focused but they used to have a one-pager that could explain an economics idea in well-written prose for any English literature major to master. So the website still has a lot of those things on there, for downloading for free.

D. Malkus:

Just to follow up on that, it's not really for the basics, but I recommend for my students, but I don't require it, but for them to get the email from Deal Book every day that just has squibs. And

they're broken down by topics, so you can go like – like [inaudible] venture capital, so there's a venture capital section. There's a legal regulatory section. They can see the highlights, and then we can, you know, talk a little bit about it when it comes up in class.

Audience: [Inaudible] to do is go to their clients, when you're trying to evaluate the perspective on what risk you really need to worry about. I was on the board of a company that got sold this past year and it's a supply tech company. We have nothing to sell. We had drugs in the pipeline, and we got this certain material adverse events clause. It was a very long part of the negotiated document. So somebody, I think our CEO, said wait a minute. There's only one thing (you or I) care about. We've got one molecule that's in phase 3 clinical testing. Let's get direct about this. The only really material adverse event that we could have is an FDA law to attest it, because you really don't care that much about everything else which is exactly true. That's the way the clause finally read. That was the only meaningful thing that was changed. Everything else went away, so it kind of fits in your comments.

E. Gouvin: So the comment is in assessing risk, don't forget to ask the client because the client often has a pretty good sense of what they're up against. And don't forget to tie the documentation to the deal drivers in a way that doesn't over-lawyer the deal.

S. Sepinuck: One of the things I talk about sometimes is many of the clauses that the students are inclined to accept as boilerplate in a contract are really – without understanding it are really risk allocations devices without them knowing it. And maybe the worst offender is the force majeure clause which sounds fair – you know they don't have to perform if there's a hurricane, but you know what? I mean, if it happens, it's all on you. And while a lot of these things, if you're really good and you're opposing counsel, you (draft and it sounds really fair). That's the whole point okay, but in fact they're not, and really one of the things that they've missed is that if you don't fully understand the clause – it's like being in a poker game. If you don't know who the patsy is, you're the patsy. And that's kind of the lesson about some of the “standard” boilerplate clauses.

E. Gouvin: Yes, and let me embellish. So the point for the tape is a lot of times students overlook the so-called boilerplate, when it actually can be a

very important part of the risk allocation, and bringing their attention to it could be really important.

Let me put in a plug for Steve Sepinuck and others who are involved in the business law section of the ABA. There's a surprisingly deep well of very useful stuff through the section. Stephen has given many talks about contractual issues. Didn't you do one on boilerplate?

S. Sepinuck:

With Tina.

E. Gouvin:

Right, with Tina Stark. You already know Tina. I want to make sure you make the connection with Stephen as well because they do some really great stuff, and it's easily transferable into your notes. It's easily transferable into a class where you bring these topics up..

If you're not active in the ABA, by the way, you're looking at a couple of folks, who have been involved in it for quite a while. It's a great place to make connections. It's a great place to stay current with what's going on, in practice. After I'd been teaching law for ten years, I really questioned whether I was still a lawyer. So becoming active in the ABA was really important for me to reconnect in a way that was really exciting and fun. You meet a lot of great people and so I am making an open invitation to everybody who wants to join and to be involved, especially the business law education committee, which Tina and I have been involved with for many years. And your schools may pay for it.

Other questions?

E. Gouvin:

Alright, I really appreciate your attendance.