MORE ON DOCTRINAL COURSES: INTEGRATING TRANSACTIONAL SKILLS

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Lenné Espenschied

Shaken, Not Stirred: Integrating Transactional Skills into Core Curricular Courses on Contracts and Commercial Law

My name is Lenné Espenschied and the title of my presentation is Shaken, Not Stirred: Integrating Transactional Skills into Core Curricular Courses on Contracts and Commercial Law. I will share with you some of my experiences in incorporating transactional skills into a first year contracts course, then Bruce will share his experiences in teaching secured transactions, and I will wrap up our presentation by sharing my experiences in incorporating transactional skills into a UCC course.

As an adjunct professor at the University of Georgia, I taught contract drafting. Last year, I took a foray further into academia as a professor at another law school. As anyone knows who has been through the process, vetting of law school professors is thorough; in interviews when asked again and again what I would like to teach, I responded "contracts, contract drafting, or transactional skills." When asked to teach "commercial transactions," I initially thought it was deals-based course. To my dismay, I learned that Commercial Transactions at that school covered UCC Articles 2, 2A, 3, 4, and 9, all within one 4-hour course in an "opportunity" school setting.[1] This was an interesting challenge because I had not studied sales, commercial paper, or secured transactions myself since law school.

I have always had a passion for teaching transactional skills and believe this to be my forte, given 25 years' experience in transactional practice, and so I welcomed the challenge to try some different things in terms of incorporating transactional skills into doctrinal curricular courses.

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[1] Although some of the students in the school could compete successfully anywhere, the majority of students would not be admitted elsewhere. I have come to understand the terms "opportunity" and "access" to mean that students are given the opportunity to pursue a law degree, and access to a degree they would not otherwise be able to obtain.

"Shaken, not stirred" is, of course, a reference to Ian Fleming's iconic character, James Bond, who preferred his martinis shaken, not stirred because shaking produces a more thorough immersion. Bond might be on to something that we can use in the context of legal education.

The great thing about speaking on the second day of a fabulous conference is that I realize now that many of my *ideas* are not new because other people have introduced them as theoretical aspirations in previous modules this weekend. I am not sure if I can add anything that is new to the aspirational ideology of teaching transactional skills; however, I have actually *applied* these ideas in doctrinal courses on contracts and commercial law and believe I can provide valuable information and insights as to the more practical aspects of what worked for me and what didn't in terms of implementing these ideas. Based on my experiences and observations, integrating analytical transactional skills in doctrinal courses does produces a more thorough immersion for our students in understanding key concepts.

We have made a lot of progress in the last four years in terms of teaching transactional skills; however, in most schools, transactional training is still accomplished through elective "transactional" courses. What is really ironic is that the majority of students, who, for example, need training in contract drafting, are not even aware of it, and they are going to leave our hallowed halls without ever studying anything about contract drafting unless we intervene. I was very pleased to see that there was a segment in this conference on drafting settlement agreements. Settlement agreements are routinely used in litigation practice. So many students come to law school thinking that because they are going to be litigators, they do not need to study contract drafting; they do not consider that approximately 90% of the cases settle, and a settlement agreement is, of course, a contract. It is a particularly dangerous contract at that, among parties who have already shown themselves to be litigious in the first place. And so, in my humble opinion, it is amusing that we have focused on litigation and the case method for what we call "*traditional* curriculum" -- traditional all the way back 160 years, never mind the hundreds of years before that when lawyers were taught as apprentices. The reality of the practice of law is that virtually all lawyers draft agreements of some sort, and a few of us litigate. Thus, students who want to pursue a career in litigation are ill-served by not being *required* to take a course on contract drafting because they usually don't have the foresight to understand that drafting contracts is an essential practical skill for them and their counterparts who are interested in transactional practice.

We have seen that contract drafting skills are usually taught one of three ways: 1) in legal writing classes; 2) in classes like "Lawyering Process," which are the functional equivalent of a legal writing course; or 3) in an upper level elective course on contract drafting. These courses are certainly the best place for some of the more basic contract drafting techniques like using "shall" correctly, shortening average sentence length, avoiding provisos, and so on. These are very useful writing tips, but they fail to prepare students for

the analytical process that is required to figure out what to include in the contract and how to draft complex provisions to allocate risk. Teaching contract drafting in a meaningful way is very challenging for a number of reasons--many of which George Kuney and Dean Honabach mentioned in the Keynote Address this morning.[2] For one thing, the overwhelming majority of legal writing instructors have not actually practiced transactional law because the traditional career path for most law professors is: law review, judicial clerkship, and a few years of litigation practice prior to venturing into academia. I respectfully suggest that three to five years of practical experience is possibly sufficient for professors who desire to teach core courses in a "traditional" manner because these three to five years are a continuation of the tutelage in law schools. In other words, because litigation practice more closely resembles the "traditional" model of law school education, the three years of law school education directly augment the practical experience of litigators. After law school, most graduates are well equipped to research case law, compare and contrast cases, and distinguish which cases are applicable precedents because that's what they've been doing in class and on exams for three years during law school. The skills they've learned and have been practicing in school are exactly what will be required in oral arguments, and writing legal memoranda and briefs in practice.

In the keynote address, George Kuney mentioned[3] that a professor needs to achieve a 10,000-hour benchmark in actual law practice to establish meaningful expertise to obtain sufficient mastery of a subject to teach it. I agree, possibly, with the 10,000-hour benchmark; however, in my opinion, lawyers in transactional practice have a different starting point, which is another reason that teaching contract drafting in a meaningful way is a challenge for law schools today. For one thing, "traditional" law school education does virtually nothing to prepare lawyers for transactional practice, so new graduates are starting from -0- to pursue a career in transactional law. Moreover, new transactional lawyers often spend the first year or so doing tasks their formal legal education actually did prepare them for, like research and writing internal memoranda; they may begin marking up existing documents but only under intense supervision and contact with clients and opposing counsel is extremely limited. Generally speaking, the first year as a transactional associate affords only marginal, spectator exposure to the finer arts of transactional practice. The second year perhaps includes a little more exposure to the ins and outs of transactional practice; however, it is not until much later in the career of a transactional associate that he or she actually becomes involved in the more complex aspects of negotiating transactions and structuring deals. Kuney described how new transactional associates frequently spend most their time reviewing corporate documents for a subsidiary of a conglomerate – a necessary task that impacts the deal only to the extent irregularities are uncovered – and I

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[2] *See supra* George Kuney and Dennis R. Honabach, "Preparing the Transactional Lawyer: From Doctrine to Practice. " pp. 447-61.
[3] *Id.*

concur with his assessment.[4] I spent some time reviewing corporate documents myself as a new associate at Sutherland, Asbill & Brennan, back in the day before that sort of work was farmed out to document review companies. Factoring this in, I agree that 10,000 hours is "meaningful" experience; however, in my opinion, the meter for 10,000 hours of meaningful experience would begin to run at the point at which the associate truly begins to contribute to the more sophisticated aspects of transactional practice, like structuring a deal and negotiating a transaction. Kuney concluded this would occur at about the four to six year range for most transactional associates. Starting from the four to six year point, when a lawyer obtains 10,000 hours experience is when he or she begins to have sufficient understanding of the big picture of what transactional practice is really about to teach advanced transactional skills effectively. In other words, it usually requires 9 to 11 years in transactional practice to achieve meaningful expertise, which means that law schools should be hiring as professors for commercial and deals-based courses lawyers who have far more experience than is currently the norm.

In the Keynote Address, Dean Honabach noted that there is some resistance within the academy to the idea that professors who teach transactional skills should have significantly more practical experience than their counterparts who practiced litigation. It is a cherishable irony of legal education that professors who actually practiced only three to five years almost universally believe they are better equipped to teach than those who practiced far longer. I believe this is because the academy suffers a profound lack of understanding of transactional practice, which is predictable since the overwhelming majority of the members of the academy came from litigation practices. In my opinion, this resistance within the academy is the single biggest hurdle we have to overcome to be able to provide meaningful education in advanced transactional skills.

Compared to contemporary society's image of litigation practice, transactional practice is not as sexy. It does not make it to shows like Law & Order, Suits, or LA Law. Dean Honabach mentioned that Hollywood's best characterization of a deals lawyer is the Godfather! Seldom is there any mention of transactional practice in Hollywood because it is very hard to make the matters that we deal with dramatic and understandable to an everyday audience. So, when students come into law school--or at least when they came into the law schools where I've taught--they have virtually no understanding about what it is that we do as transactional lawyers. By contrast, most people who own a television have a clear mental image, inaccurate though it may be, of what litigators do.

Another thing that is very difficult about teaching a transactional course like contract drafting is that if students do not have a common threshold foundation in terms of pre-requisite substantive knowledge, then the drafting instructor must first establish familiarity with the substantive concepts so that the students can actually begin to draft

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[4] *Id.*

anything meaningful that simulates actual practice. Professor Sepinuck gave a wonderful presentation yesterday describing an exercise in a drafting course using promissory notes to understand what the key provisions are and to question why particular provisions are included in the note.[5] Professor Sepinuck mentioned that the students at first did not associate the substantive law with the problem they were assigned. They were eager to draft but completely missed the boat until he provided another round of instructions to enable them to connect the dots between transactional drafting and the substantive law from Articles 3 and 4 of the UCC. Students in a drafting course who have not taken banking law would be at an obvious disadvantage unless the professor takes time to explain substantive concepts. Luckily for Professor Sepinuck's students, he is supremely qualified to teach substantive UCC concepts, but most legal writing instructors would be unwilling to take this on.

Threshold foundational issues have to be overcome before any meaningful skills education can occur. Students can automatically relate to simple drafting exercises like drawing up a contract between individuals for the sale of a car, but this has very little value in terms of preparing them for the type of drafting problems they will actually encounter in actual practice. On the other hand, with respect to more complex problems that do simulate the realities of transactional practice, they have not yet learned to connect the dots between substantive law they've learned, or may not have learned yet, and the transactional skills we are attempting to teach. Often, they do not see the relevance of the drafting skills we teach because they are not drafting in a doctrinal context, and if we try to teach drafting in a first year segment, they may have no foundation at all for *realistic* exercises because they haven't progressed far enough along yet in substantive courses. Of course, this holds true at times even for upper level courses; for example, I discovered in teaching the banking law segment of Commercial Transactions that some of my students had never even had a checking account.

Professor Sepinuck did a great job of illustrating that is there is a lot more to drafting than filling in the blanks. My hypothesis is that in a drafting class that you might get one response to this exercise, but in a doctrinal course on banking law you would get a very different response because the students should have a better basis to connect the dots between applying the law and drafting the document. The task before us is to convince the academy of this. Most of the academy still operates under the illusion that analytical skills are involved in litigation and transactional practice involves made up "trade skills" that do not include any analysis at all; this simply is not true. Analytical skills are required in determining 1) what the provisions mean; 2) why are they included in the first place; 3) how to mark up a draft from a prior transaction to make it fit the current transaction; 4) how to shift the risk from one party to the other; 5) how to structure a complicated transaction; and 6) how to

[5] *See supra* Stephen L. Sepinuck, "Contract Drafting: Teaching with Forms," pp. 369-82.

draft provisions that weave together applicable law and relevant facts. The analytical skills required to make these determinations are exactly the same as analytical skills in the litigation context: what is similar, what is different, and what happens when certain variables are changed? The same analytical skills are required to think through all the variables in a complicated transaction and determine how to achieve a specific result, but unless you've reached the 10,000 hour benchmark *after* the four to six year point in transactional practice, this isn't apparent.

For example, a couple of years ago I studied the landmark contract case, *Jacobsen v. Katzer*, which dealt with open source code licensing; the outcome of several issues in the case hinged upon whether the language in question was a covenant or a condition precedent.[6] The court ultimately held the language was a condition precedent, and this produced a more favorable result for the plaintiff. [7]

It seems to me that the time for providing meaningful education about how you would draft that particular type provision is within the context of some sort of a doctrinal contracts or licensing class rather than in a skills-based drafting class; a drafting instructor rarely has time to devote to analytical discussions of cases and cannot assume that all of the students in the drafting class have studied the case. Armed with this perspective regarding the appropriate time to teach certain analytical transactional concepts, I sought opportunities in my contracts class to weave a discussion of the analytical skills that were required in the context of the cases in our casebook. I wanted to connect the dots to show them 1) how the way we draft influences the outcome of certain cases; and 2) how the outcome of certain cases influences the way we draft particular provisions in contracts. We have made progress in teaching elective transactional courses, but when we can teach transactional analysis in the doctrinal context, this is ultimately where success lies in transactional education.

So then, practically speaking, what have I done in terms of integrating transactional skills into my first year contracts course? As mentioned above, because the school is "opportunity" oriented and admits many students who would not be considered qualified elsewhere, one challenge I continually faced is that the student body was comprised of an exceptionally broad range of academic talent as opposed to a school like UGA where the talent pool is considerably more homogenous. Another interesting quirk of this particular class is that I inherited it midstream, taking over a two-semester course for another professor at the beginning of the second semester; naturally, the class was apprehensive about any change in teaching methodologies. I really did not want to pile on drafting assignments on 1Ls because in the first year they are doing all kinds of legal writing, and I felt this would be too burdensome on them. So, I incorporated *analytical* transactional skills by focusing on the specific provisions giving rise to the cases we discussed in class, either as part of my

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[6] Jacobsen v. Katzer, 535 F. 3d 1373 (Fed Cir. 2008).
[7] *Id.*

Socratic questioning or as a group activity. We all know how much Gen X'ers and Millennials love group activities. They do not necessarily like to be graded as a group, but they love to interact as a group in class.

Using the wonderful book by Epstein, Markell, and Ponoroff,[8] and beginning at page 410 where the class finished in the first semester, I overlaid this material with topics from my own book, which is *Contract Drafting: Powerful Prose in Transactional Practice*.[9] I assigned readings from *Powerful Prose* that tracked along with the cases as shown in the chart below:

INTRODUCING DRAFTING CONCEPTS IN CONTRACTS 2

Epstein, Markell, Ponoroff
Powerful Prose
Topic of Discussion

1. Introductory Class:
   What is ambiguity?
   What happens when courts encounter ambiguity?
   What are the types of ambiguity?

2. Brower v. Gateway 2000: Introduce concept of ADR.
   Discuss pros and cons of building ADR into the contract.

3. Threadgill v. Peabody Coal Co:
   Discuss how trade customs can become part of the bargain.
   How do drafters prevent undesirable trade customs from creeping in?

4. Nelson v. Elway:
   What is a merger clause?
   What is the effect of having a merger clause in the written contract?
   What causes the ambiguity with this merger clause? (hint: it ISN'T the entire agreement.)
   How would you draft it differently?

5. Frigaliment Importing v. B.N.S. Int'l:
   What type of ambiguity is involved in this dispute?
   What are canons of construction?
   How could this problem have been avoiding by using defined terms?
   Draft a defined term for "chicken" that prevents ambiguity.

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[8] DAVID G. EPSTEIN, BRUCE A. MARKELL, AND LAWRENCE PONOROFF, CASES AND MATERIALS ON CONTRACTS: MAKING AND DOING DEALS (3d ed. 2011).
[9] LENNÉ E. ESPENSCHIED, CONTRACT DRAFTING: POWERFUL PROSE IN TRANSACTIONAL PRACTICE (2010).

6. Random House v. Rosetta Books:
   Consider how contracts must stand the test of time.
   Notice how even a long string of words failed to capture the essence of the dispute: would the drafter have been better off with a more general term?
   Compare language of similar provisions in the various contracts; notice how Bartsch language is broad enough to cover the new usage

7. Trident Center v. Conn. Gen'l:
   What type of ambiguity is involved? (Hint: contextual, from default
   What does *in pari materia* mean?
   How would you draft this differently?

8. Wood v. Lucy, Lady Duff-Gordon: What is an essential term?
   What essential term does the court infer?
   How would you draft this differently if you represented Lucy?

9. Billman v. Hensel:
   How was the disputed provision drafted differently than in Blakely?
   Who has more risk with the disputed provision in Billman?
   Who has more risk with the provision in Blakely?
   How would you draft the provision to shift more risk to the other party?

10. Terms added by legislatures; warranties and the UCC.

11. Peacock Const. v. Modern Air:
    What type of ambiguity?
    How would you draft this differently to alter trade customs and avoid ambiguity?

12. Modification, waiver, excuse:
    How do we plan for unforeseeable events in contract drafting?
    Where are these issues typically addressed in the contract?
    What elements should we address?
    How is a contract modified?

13. Taylor v. Caldwell:
    What is force majeure?
    How would you draft a force majeure clause to avoid ambiguity?

14. Wepco v. Union Pacific:
    Was this force majeure clause faulty?
    Can you improve the language?
    If you represented Wepco, how would you draft the force majeure?
    If you represented Union Pacific, how would you draft it?

15. O'Brian v. Langley School:
    What are liquidated damages?
    Is this language effective?

16. Limitation of remedies:
    What is a limitation of liability?

17. Hawkins v. McGee:
    Was the doctor merely puffing, or did he create an express warranty?

As the chart shows, I brought in specific analytical drafting concepts into the doctrinal contracts course. We began with an introductory discussion of ambiguity and how it creeps into contracts. From the complete list above, for this presentation, I would like to pull out some specific examples and describe exactly what I did with them in class; then we will talk a little bit about what worked and what did not work.

The first example I wanted to share is the *Frigaliment Importing* case.[10] You all remember this as the famous chicken case: B.N.S. sold chickens to Frigaliment. There were two separate contracts and the contracts describe the goods as "U.S. fresh, frozen chickens, Grade A government inspected." The issue before the court was whether this description meant older chickens that are suitable for stewing, which is what was in fact delivered, or broilers and fryers, which are apparently younger spring chickens; the ones that are a bit more spry and less tough to chew. The seller delivered stewing chickens in fulfilling the first order; the seller also delivered stewing chickens for the second order but the plaintiff did not accept delivery. The plaintiff argued that the use of the term "chicken," according to trade customs, meant boilers and fryers. From *Powerful Prose*, I drew the class into a discussion of semantic ambiguity. What is semantic ambiguity? We talked a little bit about cannons of constructions the courts use in order to construe ambiguous terms. And then, we talked about how the drafter could have prevented ambiguity in the Frigaliment contract by using a defined term. Next, we talked about how, practically speaking, a lawyer would gain the knowledge that there is even an issue between stewing, broiling, and frying chickens. I think that this sort of touches on what Jan Connell said in the Keynote Address: that we need to listen like lawyers and talk like business people to really understand what the issues are in the transaction. So, we got a chance to throw all of that into the discussion of the *Frigaliment* case.

Next, I presented an in-class group exercise where students were assigned to draft a define term for "chicken" that would prevent the ambiguity that is the source of conflict in this case. The students divided themselves into groups of four or five students, and I asked each group to appoint a recorder who would transcribe the definition the group came up

[10] Frigaliment Imp. Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960).

with. We put the defined terms they wrote on the overhead projector to enable the class as a whole to analyze their work. My students loved this exercise, but more importantly, they gained significant insight into some of the challenges of transactional practice.

With respect to *Random House, Inc. v. Rosetta Books, LLC*, Random House had acquired rights to publish certain books.[11] The contract included a very broad provision assigning publication rights to Random House, but nevertheless, the authors sold to Rosetta Books a few years later the right to publish e-books. Random House sought to prevent Rosetta from publishing e-books. What we wanted to know as we studied the language was whether the contractual rights to print, publish, and sell the works in "book form" covered e-books. The definition of "book" is what caused the ambiguity in this case and we had a great opportunity to discuss, in this context, some of the challenges that are different between legal drafting and legal writing--namely, that drafting has to be able to stand the test of time because drafting is a future-oriented endeavor whereas most legal writing deals with past events. For example, as I was teaching a continuing legal education seminar on contract drafting recently, a lawyer mentioned that he was trying to draft a contract that was going to run for 90 years into the future for a long, long, long-term lease. He posed interesting challenges about how to handle even mundane issues in the future, like how do we get paid? This may seem like a simple question at first blush, but given the rapid changes in payment systems in the past decade, how do we describe in the payment section of a 90-year contract how we get paid when we do not know what the financial arrangements will be in the next 10 years, let alone 90? Similarly, this *Random House* case gives us the chance, in that context, to talk about the fact that drafting is a long-term endeavor with potential repercussions many years into the future, when all the individuals involved in negotiating and drafting the contract have long since departed.

Our class discussion also considered the drafting concept of "unnecessary strings of words" because Random House, in this contract, had set out to describe "book" using about 14 different words. And though it tried every word plus the proverbial kitchen sink to capture this concept of what is a "book," the contract nevertheless came up lacking because none of the different words used could anticipate an e-book. We talked about how unnecessary strings of words hinder excellent drafting without resolving the very problem they are used to overcome. We looked further at the concept of defined terms. In this case, because precedents were cited, we were able to compare contractual language from the precedents to see two different ways of drafting this provision. (Of course, there are many ways, but we were in contracts with 1Ls and didn't want to overwhelm them with possibilities.) Looking at the two different ways of describing essentially the same provision, we were able to see which drafting produced a better result, because the precedent that was cited in the case produced the result that Random House desired. We were able to compare,

[11] Random House, Inc. v. Rosetta Books, LLC, 283 F.3d 490 (2d Cir. 2002).

contrast, and distinguish the two provisions by looking at them side by side. Next, we considered whether the Random House lawyer committed malpractice by not considering how the simple word "book" might be interpreted this far into the future. Our discussion centered around what he or she could have done differently, and how lawyers should address future technological developments that may render existing contractual protections void.

The chart of page __ shows how we integrated analytical transactional skills on a case-by-case, and you can see that within a total of 26 hours teaching time in Contracts II, I was able to draw analytical concepts of contract drafting into the discussion of specific cases 17 times, which gave my 1L students great insights into the nature of analytical problems that transactional lawyers face.

Audience: Can I ask just a logistical question? When you do things--when you flash student work up on the screen, do you have them like email it to you in the middle of class? How do you get it onto the screen?

L. Espenschied: You know, this is where it helps to be a dinosaur I guess. I actually have them write it on paper, so they have one recorder for each group. And the thing about this is nobody's ego is on the line because it is a group answer. I actually have them handwrite it out, and so it would have to be a short provision, you know just one sentence or so. Then, we have time to put it on the board and look at what they drafted during the same class period.

Okay, so what worked in terms of incorporating transactional skills into doctrinal Contracts II? It was fortuitous that I was teaching the second semester because I quickly realized that this would have been way over their heads in the first semester. They would not have been ready for this at all in the first semester, so I wouldn't recommend adding transactional components to the mix until the half-way point when they *begin* to understand how to think, compare, contrast, and distinguish. Most of my students were really enthusiastic -- they loved this. They really enjoyed it and said so, often. It teaches them very clearly that they need to challenge the language they are working with – don't presume that pre-existing contract language is always acceptable. It helped to clarify the concept of ambiguity. It helped them see why it matters what and how you draft. It helped them connect the dots between writing and practice. It gave them a framework--even for the future litigators--to be able to assess the quality of the language involved.

An unexpected benefit of incorporating transactional skills at such an early stage and with all students (as opposed to those who have chosen an elective skills course as 2Ls or 3Ls) is that it got many of my students interested in transactional practice for the first time. Although during introductions on the first day of class, none of my students expressed an interest in transactional practice, by the end of the semester many had decided to pursue

transactional studies because they understood it a little bit better, and the good news is that discovering their interest so early afforded them the *time* to pursue it, which 3L students who encounter transactional skills for the first time in their last semester have foregone. One last advantage of teaching analytical drafting skills this way is that the variety of realistic caselaw examples *with an authority backing up the recommendations*, takes out the "that's-your-writing-style; this-is-mine" objections we sometimes encounter in working with headstrong students and hypothetical examples.

Okay, so what didn't work? Well, it earned me my one and only posting in many years of teaching on RateMyProfessor.Com[12], where someone complained in essence that "she doesn't seem to know this is contracts and not contract drafting." For the record, just in case you were wondering, I did know that. We spent well over 90% of our time on "traditional" Contracts concepts, but in my opinion this was a worthwhile use of class time that most students enthusiastically appreciated.

Even so, any time spent on drafting concepts is necessarily taking time away from teaching doctrinal contracts concepts as the courses are currently configured. I recommend that we consider reworking "Contracts" courses. Instead of carving out two or three hours for a separate contract drafting course, what if we carve that hour out of contract drafting and build it back in to Contracts to cover those analytical transactional concepts there?

Some might say another disadvantage is that at this stage in their education, some students have virtually no exposure whatsoever to "real" contracts, which may make it harder for them to contribute in class. By contrast, more second and third year students have had internships and part-time jobs with law firms, so they at least have the possibility of more exposure to "real" contracts (although my observation is that working law students generally spend more time researching than drafting contracts). Last but not least, though not necessarily a disadvantage, you really have to be committed to getting skills in a doctrinal course because it would be easy at times to let it slide when you have a great discussion going about doctrine.

I have been speaking about incorporating transactional skills into a basic contracts course; however, the idea of looking at the language that is actually litigated in the cases is something that can be used very broadly across the doctrinal curriculum. Perhaps the most obvious fit is in a contracts course, but these same techniques I've described can be applied in trusts and estates, in real estate finance, in property law, in securities, in corporations and business associations, in intellectual property, in licensing, in sales, in secured transactions, in legislation, and any other course where the language is litigated as a result of a contract or poor drafting. So, I love the ideas Kuney mentioned this morning, and I think a lot of us are simultaneously coming to the same conclusion that we need to cross into the doctrinal courses to demonstrate to our students, to help them connect the dots between the

[12] *See* http://www.ratemyprofessors.com/ShowRatings.jsp?tid=1711681.

substantive law and transactional practice, and understand how the substantive law influences contractual language.

I am going to let Bruce talk about integrating skills into secured transactions, and then I will talk a little bit about my experience with commercial law.

Bruce G. Luna

Integrating Skills into a Sales and Secured Transactions Classroom

My name is Bruce Luna. Prior to becoming a law professor, I practiced at a big law firm for about 10 years in structured finance, and I think I brought a lot of insight into what employers were looking for when I came over to Atlanta's John Marshall Law School. Every year, in September and October, when we had our fresh batch of first year lawyers, it always seemed to be a game of hot potatoes for the various departments. "You take them!" … "No, you take them!" And it was always about how first year lawyers were essentially a drag on our department for a certain amount of time because they did not come in with the ability to add value.

So, going from private practice into the academy and teaching sales and secured transactions, one of my largest concerns was how do I actually make this, one, relevant to these students, and, two, how can I communicate to them what the value is in this course when they go out and practice? How are they going to be able to take the commercial law concepts they learned and actually apply them in real world situations, if that is what they end up doing? So, with that in mind, essentially what I want to talk about was my process for how I am trying to, one, identify the skills that I thought students needed to start developing, and, two, how I started to integrate them into the classroom themselves.

Now, the first question is what exactly are we talking about when we are mixing or trying to put together, shaken not stirred, skills and doctrinal course work? You know we have heard, I think, over this last day and a half this idea that what we are looking for in new lawyers. When they graduate can hit the ground running? And I know Tina Stark in another presentation said she knows it when she sees it, which is a little bit disconcerting because I think we should be able to really come up with a better idea, or a specific idea, of what skills we are looking for and that we want our students to take from the courses that they are taking.

So, I thought a lot about it, and a lot of it came from my personal experience, which is when I was a first-year attorney myself, and I was a hot potato from department to department--I started off my career at the height of the tech collapse and was in a mergers and acquisitions department of my law firm. And there was no work for those two weeks, none, absolutely nothing.

On the second week I received a call from the managing partner, who appeared to be a kindly old man. He had silver hair, pretty blue eyes that sparkled, and I thought it was going to be a meeting about welcoming me into the firm. Instead he turned to me and basically said, "Bruce, I am a credit to the firm. You are a debit. You need to become a credit" And I think that has always carried with me, which is the sense that we want our students to be able to graduate and go out there and add value. And that is either to their firm or to their clients. And so my simple idea, if you are tired of hearing "hitting the ground running" as an example it is maybe are they "credits" or are they "debits" to their clients and their firms? Which is maybe a cold way of looking at it, but I think that it does address the reality. You know, unfortunately, I think a lot of students come to law school without realizing that we are a service-based profession. We serve the interest of our clients and that should drive a lot of the training and the experiences that a lot of new lawyers should have when they are entering into practice.

So when teaching skills in a doctrinal course, both the skills segments and the doctrinal segments should be reinforcing. It is peanut butter and chocolate together. It is two great tastes that taste great together--that kind of thing. But, which skills are we actually talking about? I divide it up into four broad categories. First, obviously, there is writing and drafting skills. Second, there is this idea of business skills. Third, there is professionalism. And finally, there is ethics, and I think--and I would be glad to hear from you if you think there are other aspects of these types of skills—but, these are very broad kind of conceptual things that I wanted to kind of integrate into my class.

And what I found out is that--and I will go into this in later detail--is that by doing this, especially since I teach the Uniform Commercial Code, actually trying to bring these skills into the classroom actually made it a lot more vibrant class. You know it gave a reality and a concreteness to what I was teaching that sparked a lot more interest in this class than might typically happen since it is a required course at our school. And our students are essentially a mix of--well they are all opportunity students, but quite a few of them are all going to be litigators and a portion of them probably will not do transactional work at all.

So let us talk about, I guess, the things that I was trying to do with each of these skills. With the writing and drafting side, I am teaching a doctrinal class--Sales and Secured Transactions. I did not want to have a situation like Lenné experienced where students were maybe upset about this turning into a drafting and writing class. But, I do not think you can teach, especially a transactional law related course, without making them do some drafting and writing. The other aspect that I thought was really important was expose them to the variety of commercial law documents that are out there so that if they ever run across them when they start going out and practice, they are not immediately terrified and calling me up.

And lastly, and some may debate this, but I looked at the writing part that I added into my class as preparation for final exams and bar exams, and some will say well that is not

really preparation or skills for practice, but for my perspective it was because essentially it is time management. My tests are a run, and if you do not know the law and you cannot process the information and get the answer right away, you are not going to do well. And I think the bar essentially tests that as well. And I tried to make it apparent to the students that that is part of being a lawyer--that one day you will come in the office. You think you have a free day. Boom. You are overloaded and you have to get answers out immediately. So that is one part of teaching skills – the writing and drafting, aspect.

Another skill is your typical business skills--what we mean by transactional law skills, you know, understanding the market industry of the clients and how important that is so that you can adequately represent them. The typical deal skills of being able to translate business concepts in the contract language, or at least being able to say, "Oh, here is what the client wants, and here in the document is what it represents, and what they desire."

The other thing I thought was important, especially when we are doing case law analysis, is digging a little bit deeper and seeing--getting those students to understand the distinction between legal and business issues and how potentially that can be–one, that it is a business skill, but it also can be an ethical issue as well. I try and introduce to them to the transactional process, the idea that essentially it is a very different world than the litigation world--a very different culture. I usually tell them, my students, that, "Hey, I wanted to do transactional work because it was not a zero sum game." Theoretically, everybody is trying to reach the goal line together. We are all trying to make a deal work, and so that collaborative process is something I think is a little bit unfamiliar to a large majority of our students. And then, you know, due diligence, risk management, those are other issues that I wanted to try and introduce to the class.

Next was professionalism--you know, we have a very diverse student body. We have Millennials. We have Gen X'ers. We have people that are coming to law school for their second or even their third careers. It is a very diverse student body. Some of them have no problems with professionalism. Some of them do. So, part of the goal of the class is also to see how can I introduce professionalism, or what to expect--especially in the transactional law field. Anything from competence to civility to how you have actually sent emails out to clients or to people outside of the firms or the market, want to introduce you know firm culture, maybe the economics of subtle practice. A lot of our students end up hanging up their own shingles. And finally, you know, just typical client relationship skills--what would you communicate to a client? How would you communicate it, and is that an appropriate way of giving that information? And at last, the ethics, which might be considered, obviously, a business skill, but I consider the pressure of billing to often fall into the ethical issues as well. Concerns about malpractice, distinction between legal and business concerns, again, and more importantly, ethics in drafting that a lot of people are only now starting to really address in their classes. So essentially, I want to take all of this and

somehow cram it into my Sales and Secured Transaction classes, and teach the doctrine as well--which is a challenge.

So, what I tried to do is I mapped out each course, and I tried to figure out by class, by material, by concept, and by the entire semester, how to slowly integrate at least some or all these skills. And, a lot of things I had to keep in mind were, one, the size of my class, the time of my class, the nature of the class, and the nature of the students themselves. So, it would be very different based on the class that I have. So, every semester I see myself having to completely change what I am actually trying to introduce based on my impressions of where the class is.

Audience: How big is the class?

B. Luna: The class I have now is 57 students. You know, it typically ranges between 50 and 70.

Also, when I am looking at problem designs, obviously I want to look at the format. We have a variety of students--some students have taken transactional drafting class in our school. Now we are having students next semester that will take an advanced transactional drafting class in our school that will be taking my class. And they will have a great edge on the student that wants to be a litigator that is required to be in that class and probably has no interest in contract drafting. So, trying to figure out how can I equalize this to some extent, how much detail should I be giving them, and that is something that I am still working with trying to understand and kind of kicking the tires on. And obviously, you tie all that to which skills you are trying to impart to your students.

So, all of that is in the context of this class. So, it is a required course at our school, which means everybody has to take it, obviously. The great majority of our students end up doing litigation work. Most of them I think probably come to the class wanting to kill themselves before the lecture has even started just by flipping through the Uniform Commercial Code. It is a large body of law to try to impact in one semester. It meets once a week. It is three hours, and an even more challenging aspect is it meets from 6:15 PM to 9:30 PM. But, what I found --

Audience: What did you do to the associate dean [to get that schedule]?

You know that is probably--we will save that for afterwards, I guess. It is better than last semester where it was on a Friday night, but what I found though is this actually worked to my advantage. I did not think it would, but when you are teaching these classes at night, you can tell that the energy level, obviously, is dropping. Most of our students, especially the evening courses, are actually part-time students. They have careers. They have families. They get to that classroom, and they are already exhausted. And so, actually, integrating skills into these classes is actually a great way to break it up and keep them engaged. So, I feel like it has actually been really helpful in keeping up the doctrinal part of

the teaching because it keeps them still alert. So, skills training can work as exercises to get the students back into the game of the lecture so that they are not back on Facebook or IM'ing each other, or whatever. And I often try to use their laptops against them by making them do things in class with them.

So, I break up into two different types of exercises--assignments that I give in my classes. You know, I try to at least give some kind of introduction to one area of commercial law and how it would look in practice. It kind of starts in layers, and each one is supposed to try and build upon the next. So, the first thing I do is, with their typical case law readings, is that they are assigned a position to take. They have to think of themselves as counsel for the debtor, or the secured party, or the buyer, or the seller, and they have to read their cases and when they are briefing them actually consider what their position will be as counsel for that client regardless of how the case actually turns out. And then, during the process of the class, you know, you change up the hypotheticals and you ask them, "-Now counselor, what would you do? Now counselor, in this situation what would you do?" And I think that helps them--well I think it forces them to not be passive about their analysis. It is one thing to learn the law, but I think by taking those rules and forcing them to do it in a Socratic lecture process helps them realize what the importance is to their clients. And then, typically we will switch it up from week to week.

Other things that we do is--when the case is relevant enough, we will actually have students fix drafting mistakes. Some of them are very simple, you know, issues like a case where a jury actually forgets to attach an exhibit to a financing statement. That is pretty easy to fix. Others on how you characterize collateral or the types of language used in a contract--that gives us an opportunity to have them work in groups. I typically assign them in pairs of two and just try to fix the language beyond what just the court indicated was the problem. And so, that also, I think, gets them more immersed in what they are doing and understand what the realities of what their practice will be like in real life. It also, I think, helps them to understand the nature of transactional lawyers, which is that we are essentially trying to reduce risk in the future for our client.

The next level that I do is I give them mapping and annotating assignments. Now, I call it mapping. I am not exactly sure, I think Professor Kuney probably has his own terminology for it, but essentially, it is how I like to introduce typical commercial law documents. So, I give them a security agreement or a financing statement or a warranty or a typical purchase agreement, and I will try and I will just say take a look at this document. Usually it will be very short agreements, very simple ones, typically 2 to 4 pages at the most. And I do that because I am dealing with different skill levels. I want to slowly bring up the litigation-oriented students up to hopefully the level where they will be comfortable with documentation themselves. And what I am trying to do with mapping assignments is I will read through it, and then I will ask them to kind of circle or make a note next to relevant provisions of the document that relate to the actual code. So, they can actually see how the

doctrine evolutionarily creates the contract. You know contracts did not just form in a vacuum. They are impacted by the case law and they are impacted by the statutes out there. That is why people put in certain language. So especially with the UCC, I think it is very helpful for them to tie in, instead of randomly memorizing code section after code section, but actually seeing how that code section actually reflects itself in commercial law practice, in the documents they might see. So that is kind of a baby step. That gives them familiarity with reading documents.

Then, the next step typically is the annotative part, which is where you have the students identify and understand the contractual language", here is a disclaimer, here is a warranty, here is where you identify collateral. The next step is we will read the other parts of the contract. Annotate them. Tell me what you think they mean, and that at least familiarizes themselves with the process of reading to get them used to reading contracts and contractual language, which again, I try to do that in a way that I can create some kind of balance between the students that have more advanced skills in this area and the great amount of students that do not.

And then, finally, in class, as a form of assessment, I am constantly giving them quizzes that I then make them email to me because they all have their laptops. And I make sure that they use them for my class. And typically the class quizzes are designed to assess a specific topic I have just lectured on. But, I also try and use it as a way of instilling in them appropriate communication. So, the types of quizzes are going to be hypotheticals from the perspective of advising either a partner or a client. And they are supposed to write an email to me giving the answer of whatever the problem is, but also in the tone appropriate--we are talking to a partner or a client. And, you know, there are obviously some issues with what kind of information should people be emailing. But, typically I am just looking at trying to develop their professional attitudes and how they actually express themselves professionally.

Audience: Do you review all 57?

B. Luna: I do.

Audience: And general feedback?

B. Luna: I give general feedback. I give very general feedback. Obviously, this is very hard to do. It is a lot of work. I think from my perspective I cannot, I think, ethically feel like I teach Sales and Secured Transactions without trying to push as much as I can, and unfortunately that requires a lot of work. So typically, I try and reduce it because the answers are pretty simple. I mean, essentially, all I am trying to do is get a general sense of where is the class? Did the class generally understand what I lectured about or was there a problem? So, I assess that and then I quickly take a look at just how they wrote. And generally, I will only respond to ones that I think are really bad,

or I ask the students to actually take some initiative. If you want feedback, please tell me.

Audience: So, your purpose is not formative assessment from them. Your purpose is --

B. Luna: It is assessment for me to see that they learned it, but it is also an assessment on them to see what is their level of communication skills? I think it serves two purposes.

Audience: Well you are not necessarily trying to help them understand where they are--if you are only trying to get general feedback to them because a lot of studies have shown that the worst performers are the worst self-assessors. So, if you give only general feedback, this is what the people who did poorly will not see, "Oh, that is what I did."

B. Luna: Oh no, no what I do--and to clarify--is whenever I get an email that has a completely wrong answer, I tell them. You know that does not go away, but when those that are on point I say good work. You know, you have to actually balance what you give because it is such a volume of work.

Audience: So do you start the next class session by going over what that assessment was--at least some key aspects of it?

Typically what I will do is I will give the model answers and I will put them on TWEN. And that is an easier way to have them self-assess, you know, and that way it makes it easier and time efficient.

So, doing that in class it then builds up to the writing assignments that I actually handed out. Currently, I am giving four written assignments. These are the only graded writing assignments, and they are the only grades that they get other than the final exam. Everything else is homework or practice. You know, I guess it counts for participation. But really, what I try to do is try to hit some of the major themes in each of the sections of the code that we teach.

So, one example is with drafting a warranty agreement. I give them a problem based on a famous motorcycle helmet case, and ask them to prepare a warranty. And they do this after having mapped out a warranty and annotated a warranty. So then they have hopefully built up enough skills to kind of go out there and try to put it together. Now I let them use forms. I say go out there in the world and look away, and I do that because, one, I think it exposes them to additional examples of what warranties look like or what that type of agreement looks like so that they can see that they are not universally the same. I also let them do it because I want to, when I am actually assessing them, make very important points about the use of forms, which is you know you did not really think much about this. You know, if you are just cutting and pasting in names, you are not doing a very good job.

Now, I do not have a huge amount of grade percentage on this. It is not a writing course. This is just my way of trying to get them to take it seriously enough so hopefully they can develop these skills. And then I do the same thing with the security agreement. They will have a mapping assignment and an annotation assignment that they will usually do in groups in class or as homework. And then, as a writing assignment, I will give them a problem, and they will draft them. And I give them a form, but they can go use another form if they want to. You know, and some of it is this idea of just kind of cutting and pasting, but hopefully through the process of the mapping and the annotating they understand that they have to actually consider the fact pattern that they are given and alter the documents.

And this is where really a lot of the work and pain comes in because I do get 57 drafts. And I mark them up, and I give as much feedback as I can. And it takes a ridiculous amount of time, which is the way I control it is to try and limit the page count as much as possible. Yes?

Audience: Sorry to interrupt. I am most staggered by the four different assignments, and their different levels of complexity. You know a warranty, a nice modeling assignment. A financing statement that is about as easy as you can get. You know paralegals do that. Security agreement would be way over and then deposit account control even, oh my god. You need to be well-versed with the operations of the depositary to even represent the depositary. I mean --

B. Luna: The way I try to limit that, and that is an excellent point. The way I try and limit these assignments from that mass amount of detail is I tie into the theme that I am trying to teach. You know, so like with the deposit account control agreement, I am talking about literally perfection methods. And so that is when I introduce it, and I give them a very simple two-page nothing kind of form. I give them just a sense of the parties and methods that you need to perfect an interest in the deposit account. And I do the same thing with the security agreement. I am introducing it when I am talking to them about what makes a balanced security agreement. How is it enforceable? Well, look at this form and see how these elements tie into the commercial code requirements for what makes a balance security agreement.

Audience: But, like the ABA Taskforce spent over two years coming up with a model deposit account control that nobody uses because they are also heavily individually negotiated.

B. Luna: Oh absolutely.

Audience: Do you spend time explaining to students why those are not heavily negotiated and --

B. Luna: I do. I do. I do spend time saying that this is just one example and there is probably one for every type of deposit account institution out there. You know, essentially, what I am trying to do is reinforce, you know, the doctrinal message, which is how do we perfect?

Audience: When you are doing assignments like this for--all the students cannot go out and find anything they want. How is it that you reach a conclusion in your mind about how much of it is their work and how much of it just carefully polished and copying?

You know, I try and have enough of a fact pattern that I can see where they are throwing stuff in or they are not. And that is actually a hard--it is hard to judge that sometimes. I think with my experience level I tend to think that I can see where they are not thinking and where they have just cut and pasted and it is pretty obvious that they do not know what they are using, and sometimes it is not. And when it is not, then I think maybe they actually found a real good form, and maybe that is part of the message because you know we do use forms. We take from other people and you know if it works, why change it? And so, to balance that out, I do not add a lot of--this is not a huge part of their grade. You know, each of these assignments is like 5%. I think the largest graded assignment is the security agreement at 10%. So they are really designed with what the commercial law practice might look like and what they might see and to at least you know when they actually go out there hopefully if they run into this, it is not going to be a complete surprise.

Then, I think as I mentioned, you know, other writing assignments are the ones that I do in class. You know it is fixing issues with documents. What I will typically do if I need to take a break from grading is I will actually assign students with coming up with presentations in class to talk about commercial law issues, whether reaching out and looking at recent articles. Like a lot of professors, I ask them to read the Wall Street Journal and hopefully that will start familiarizing themselves, to some extent, with what is going on in the commercial world. Sometimes that has worked very well. Sometimes it has not, so that is definitely dependent really on the amount of effort and sometimes the base understanding that a lot of students have in fundamental economics and finance, things like that.

But, so far, other than having students very reluctant to take a required course and find out that there is all this writing involved, I got from them, I think, relatively favorable feedback from it. And I think it has helped them understand a lot better, at least how the Uniform Commercial Code works, which is ultimately my goal.

So, then, you know, assessing, again, it is hard. On one hand I have 56 students. Trying to grade this is very difficult. You know, I try to do it in a timely manner where they can still get feedback from it and integrate that with where they are learning and the process of the class is a challenge. And it is just one that I force myself to do, and I have unfortunately have not quite yet broken my big law hours habit that I have, so I will take

them and I will work on them until I am done. I try to give as many comments as I can, and I try to point out to them things that they did well and issues that they should be concerned about with respect to dealing with clients when they are drafting their stuff. So, I try to also give my comments, you know, broader feedback as well.

And the other thing I try, through my comments more than anything else, is to really point out to them the importance of being detailed-oriented. And I think that is probably one of the biggest challenges any lawyer has is the expectation of how exact are they supposed to be and how detailed-oriented should they be? And I usually tell them that the answer always is that they should be perfect. And you know that is not obviously possible, but it is certainly what a client would expect. You know, they do not like paying legal bills, and we discuss that.

Also, as a part of my assignments, I ask them to record their time. How long did they take to actually do the project? And that will introduce this concept of well do you think that if you were charge $100 an hour or $200 an hour, do you think your client would want to pay for that? And then, the other thing that I tell them is how do I grade the assignment? You know, typically I am very holistic about it. I generally tell them that I will give an A to somebody who I think did good enough work that I would be happy to send on to the partner or send out to a client. And then a B would be the kind of work product where there would be some issues or maybe that it needs revision. A B is work product that I would ask a junior attorney to fix it and bring it back to me and then we send it off to the partner or client. Then with C's there are issues. Anything lower than that there is much, much more of an issue, and that is kind of my process for grading.

So, that is essentially what I have tried, in some respects, to get some of those skills oriented objectives into this class. I am still kicking the tires on it. Every semester I am changing and building up my list of exercises. I actually have a lot more and I am happy to share them if you are interested. And I am actually very interested in hearing your feedback later about what you might well be doing in your classes.

Lenné Espenschied

Okay, so I would like to share with you what I did in commercial law. When I was in law school back in the dark ages we had three separate three-hour courses called Sales, Commercial Paper, and Secured Transactions. In my course, I taught the Uniform Commercial Code, which is UCC Articles 2, 2A, 3, 4, and 9 all in one semester--one 4-hour semester. I mentioned that in Contracts, I didn't want to over-burden my 1Ls with writing assignments, but in Commercial Transactions, most of my students were 3Ls who were long since past the stage of having many large legal writing projects so, therefore, I thought it was a good time to give them some writing assignments and I included three graded drafting assignments in this course. Because we covered sales, I had them draft a warranty. Because we covered banking law, I had them draft a promissory note. And because we covered

secured transactions, I had them draft a security agreement and a UCC1. (That was one assignment together, two different documents.)

I agree with what Bruce said that adding this transactional component into the course really reinforced the doctrinal concepts. The students were required--by the way that I drafted the assignments--to get into the Code, dig out the meat of the Code, and then apply the law while working with the facts to draft the designated document. They could get their template forms from anywhere; I didn't care where they got them. Some of them were working in law firms. They had access to form files, and they could bring in forms from their law firms. I was really pleased that the starting point for most of my students was very strong. They picked good forms to work with for the most part, which in itself simulates a necessary skill in transactional practice. With the facts they were given, there would be some sort of unique twist or wrinkle that would force them to draft new language even though they started with good forms Lawyers in transactional practice pick up a form and mark it up to fit the current transaction, and so it did not bother me at all to know that some of them had access to form files, and they could also use the internet or form books as a starting point

For example, in one of my exercises, Sparkles makes jewelry, and she is buying stones to use in her jewelry. So they are drafting a warranty, but the twist with this warranty is that they have been hired by Sparkles, hired by the buyer. It is not the traditional warranty that would be drafted by the seller, so you see that there were some little twists that forced the drafting; the twists might be slightly unlikely in practice, but, the process was very representative of actual practice. We will go through a couple of these exercises included in the handout.

I had 135 students in the fall semester in Commercial Transactions; 135 students, 3 assignments. I mean, you do the math. I would still be grading today if I had done individual assignments, so instead, I had them work in pairs. In the future, I will have them work in teams of three because this had some obvious benefits. If you get them working in pairs, you have cut your workload in half in terms of grading--if you can get them in teams, even better. That was my sole motivation at the time, I'm embarrassed to say right now, but it had some unintended consequences. At times they would--even though they're representing the same side--they would get into debates and negotiations among themselves as to how to handle the provision, what the Code actually meant, or what the language in the template they were using meant. So, it actually brought up issues that they might have been oblivious to if only one person were writing, which was a wonderful, if unexpected, benefit. In the handouts, I've given you some of the best work and some work that wasn't so great. Each of these assignments was worth five points. One challenge arose because drafting is not a required class at the school; it's taught only in seminar format, and so therefore really only a handful of these students had had any meaningful experience in drafting prior to this doctrinal course.

And so, what is my objective when I'm not teaching a writing class, and when the vast majority of my students haven't had drafting? I wanted the exercises to be educational in terms of the process of transactional lawyering. What is it that a commercial lawyer actually does? I tended to grade them not on the strength of the drafting per se. I did, however, look for grammar problems because many of these students struggle with grammar and are not aware of it. I wanted to point out to them not so much so that I could punish them for it but so they would be cognizant of their grammar issues.

I gave them a set of facts as shown below. I picked this particular assignment because it's shorter and we have time to work with it in this presentation. The other assignments tended to have more intricate fact patterns.

PROMISSORY NOTE ASSIGNMENT – 5 POINTS

YOU'VE JUST MET WITH A NEW CLIENT NAMED MS. GOLDHEART, WHO HAD A GENEROUS HEART AND LOTS OF LIQUID ASSETS. SHE WANTS TO LOAN HER FRIENDS, MR. AND MRS. PHILEO, $50,000 SO THEY CAN PURCHASE A LAKE-FRONT HOME, AND THE HOME WILL SERVE AS COLLATERAL FOR THE OBLIGATION. THE PARTIES HAVE AGREED THAT THE NOTE WILL PAID IN FULL NO LATER THAN OCTOBER 1, 2018 AND SOONER IF THE PHILEO WIN THE LOTTERY OR COME INTO AN INHERITANCE. IF THE PHILEOS DECIDE TO SELL THE HOUSE ON OR BEFORE OCTOBER 1, MS. GOLDHEART IS TO RECEIVE ONE-THIRD OF THE NET PROCEEDS FROM THE SALE OF THE HOUSE. IN THE EVENT OF THE DEFAULT, THE ENTIRE PRINCIPAL SUM AND ACCRUED INTEREST WILL BECOME DUE. MS. GOLDHEART TELLS YOU SHE WOULD LIKE THE NOTE TO BEAR INTEREST AT A FAIR RATE AND LEAVES THAT TO YOUR DISCRETION.

DRAFT A NEGOTIABLE PROMISSORY NOTE ACCORDING TO THESE FACTS THAT PROTECTS MRS. GOLDHEART'S INTERESTS.

GRADING WILL BE BASED ON:

- APPROPRIATENESS OF PROVISIONS INCLUDED;
- LANGUAGE THAT DEMONSTRATES UNDERSTANDING OF THE OBJECTIVES OF THE ASSIGNMENT AND PROMISSORY NOTE PROVISIONS, GENERALLY;
- CREATIVITY DEMONSTRATED BY "THINKING OUTSIDE THE BOX";
- APPEARANCE; AND
- GRAMMAR.

When I gave them this assignment we had just finished our unit on banking – Articles 3 and 4 of the Code, so we had discussed in class all of the requirements for negotiability. We had discussed what can be in a promissory note and what can't be in a promissory note to affect negotiability. My students pretty quickly caught on to the fact that the assignments were worth five points, so to simplify the grading, there were five triggers in the facts, five things that I'm going to be looking for broken down below:

1. The promissory note is due to be paid in full no later than 10/1/2018.
2. The due date is accelerated for lottery or inheritance.
3. In the event of a default, principal and interest is immediately due.
4. The note bears interest at a "fair" rate left to their discretion; perhaps a "fair" rate is the judgment rate per UCC.
5. The language regarding the net proceeds from the promissory note would defeat negotiability if included, so the students must discern that this cannot be included in the note.

I had an index card with these points in front of me as I graded papers, and in the handouts you can see tick marks or circled numbers where I'm looking for the five points in each paper. In some instances I even numbered it--okay, here's one, here's two, here's three--what I see in the students' work. After I've graded the assignments, then I would put this assignment sheet above on the overhead screen, and first walk through the process of identifying the triggers, that is, how to figure out the points they needed to include (or omit) in the promissory note, which simulates a necessary component of practice. I literally connected the dots by showing them on the page of the assignment itself how to work with the facts they were given and apply the law we had studied to produce an appropriate promissory note.

It wasn't often that I got all five points in the assignments that were turned in. If they got one item on the grading rubric, they got a one on the assignment. If they got two, then they got a two, and so on. I allowed a little bit of flexibility in the grading for forms that were extremely well written. I also made a deduction for forms that are not so well written.

I tried to make it a very positive experience for them, so these are not harshly graded, and remember, again, that I had an "opportunity" population, so some students were very, very bright and capable, but many were, … well, not likely ever to pass the bar. We'll say it that way.

I did not go over anything about the assignment until they had their grades in their hands; I noticed that when I would go through the assignment after they had just turned it in

their anxiety level would go off the charts, and so I made it a point not to give them any feedback on it whatsoever until they had seen their grades and they were not so anxious.

At this conference a couple of years ago, Sue Payne mentioned that you've got to have at least three sets of exercises. That was at least her recommendation because the answers tend to recycle themselves if there aren't enough years between assignments. So, you will see in this package two sets of three exercises and one or two examples of the best work that was turned in by my students.

With respect to this promissory note assignment, each of these items is going to be triggering something specific in the Code. Most of these items can be included in the note; there are certain things you cannot include without rendering it non-negotiable, and for this assignment, students were specifically instructed to produce a negotiable promissory note. Therefore, students also had to discern that they needed to incorporate the seven aspects of negotiability and could not burden the language with the extra baggage, so they are required to work with the facts within the framework of the statutory law.

SECURITY AGREEMENT/FINANCING STATEMENT ASSIGNMENT – 5 POINTS

YOUR CLIENT, FIRST BANK, HAS COME TO YOUR OFFICE SEEKING REPRESENTATION IN A LOAN TRANSACTION. FIRST BANK INTENDS TO EXTEND A WORKING CAPITAL LOAN OF $600,000 TO A NEW CLIENT, LITTLE RED CORVETTE, INC., WHICH DEALS IN RARE AUTOMOBILES. LRC CURRENTLY HAS 27 CARS FOR SALE; IT ALSO CURRENTLY OWNS SEVERAL OTHER AUTOMOBILES THAT AREN'T FOR SALE, INCLUDING ONE DRIVEN BY LRC FOR BUSINESS PURPOSES. FIRST BANK ASKS YOU TO LOOK AFTER ITS INTERESTS WHEN CARS ARE SOLD, OR IF CARS ARE SWAPPED FOR OTHER VEHICLES. SOMETIMES, LRC SELLS CARS ON ACCOUNT WITH PAYMENTS DUE WITHIN 90 DAYS. OTHER TIMES, ODDLY ENOUGH, LRC ACCEPTS PAYMENTS BY CREDIT CARD FOR CARS SOLD AND RECEIVES REMITTANCES FROM THE CREDIT CARD BANK ON A REGULAR BASIS. LRC HAS A FLASHY, CATCHY TRADEMARK AND HAS ESTABLISHED SIGNIFICANT TRADEMARK RECOGNITION IN THE LOCAL COMMUNITY THROUGH BILLBOARD ADVERTISING. FIRST BANK WANTS TO TAKE A SECURITY INTEREST IN ONLY THESE FORMS OF COLLATERAL SUGGESTED ABOVE, EXISTING NOW AND IN THE FUTURE.

DRAFT A VERY SIMPLE SECURITY AGREEMENT (NO MORE THAN 2 PAGES) AND A FINANCING STATEMENT ACCORDING TO THESE TERMS THAT PROTECTS FIRST BANK'S INTERESTS. FOR COLLATERAL THAT CAN'T BE PERFECTED BY FILING UNDER ARTICLE 9, INCLUDE AN EXPLANATION OF HOW YOU WOULD PERFECT FIRST BANK'S INTERESTS.

GRADING WILL BE BASED ON:

- APPROPRIATENESS OF PROVISIONS INCLUDED;
- LANGUAGE THAT DEMONSTRATES UNDERSTANDING OF THE OBJECTIVES OF THIS ASSIGNMENT AND SECURITY INTERESTS, GENERALLY;
- CREATIVITY DEMONSTRATED BY "THINKING OUTSIDE THE BOX";
- APPEARANCE; AND
- GRAMMAR.

GRADING RUBRIC:

1. APPROPRIATE SECURITY INTEREST IN VEHICLE INVENTORY;
2. APPROPRIATE SECURITY INTEREST IN EQUIPMENT;
3. APPROPRIATE SECURITY INTEREST IN ACCOUNTS RECEIVABLE;
4. APPROPRIATE SECURITY INTEREST IN CREDIT CARD PAYMENT INTANGIBLES (UCC 9-102, COMMENT D)
5. APPROPRIATE SECURITY INTEREST IN INTELLECTUAL PROPERTY – TRADEMARK.

*STUDENTS MUST DIFFERENTIATE WHICH VEHICLES CAN BE PERFECTED BY FILING A FINANCING STATEMENT AND OTHERS WHICH MUST BE FILED WITH THE DMV.

So one trigger is that I'm looking to see that they've correctly omitted language regarding net proceeds of the promissory note.

The next assignment we'll discuss today required students to draw up a security agreement and UCC1 financing statement for Little Red Corvette, Inc. The fact pattern above and in the handouts you can see that I've marked what I was looking for in this example. They have some inventory. They have some equipment. They have some cars that have been sold on credit card accounts with payments due to LRC, so this is a payment intangible as explained in the comments to the Uniform Commercial Code. I will tell you candidly that nearly everybody misses those no matter how hard you hit it in class. In both semesters, I included something that had to do with payment intangibles, and I think I may have gotten two or three correct responses out of 80.

Audience: You sold goods, that generates an account not payment intangible.

L. Espenschied: But these are--they've been paid by credit card. They've been paid by credit card, so the merchant is due payment from the credit card bank.

Audience: There's a new comment.

L. Espenschied: Yes, I'm referring to the new comment.

Audience: It's the merchant's right to receive money--well we can talk about this afterwards. If you're talking about the merchant's right to payment from the customer, it's probably still an account.

L. Espenschied: In this case, we are referring to the vendor's right to payment from the bank as a result of the credit card payment, not from the customer, so this is a payment intangible.

Audience: Oh, okay.

But anyway, you see that it is actually triggering a specific part of the Code that would cause students to go through the same analysis you and I have just engaged in.

So what worked with these exercises? First of all, having them working in pairs and teams was wonderful. I loved that because it definitely affected my workload in a very positive way. At first, a few of my students were a little bit anxious about these writing assignments, but by the end of the semester, they loved it. They loved it! On the other hand, I had people actually transfer into my section at the beginning of the semester because they wanted to do this work. So they really appreciated it.

Each assignment counted five points. There were three of them, so this totaled 15 points out of 100 for their final grade. That worked because it was enough to motivate them. They dug in. It clearly reinforced the doctrinal. They could see it in action, or at least they could see it afterwards, you know, when we're discussing the assignment in class.

There was a lot that was required of them working in their groups. I think I mentioned that they were negotiating to achieve the final result among each other, or they would say well, I think this means this or I think that means that, and there were a couple of occasions where I was called on as arbiter. They would come into my office and ask which is right. They really were working on it. It made it more real to them.

What worked for me was tying it to very specific points, and I could show them then--first of all, it made it easy to grade because either this is here or it isn't here 1, 2, 3, 4, 5. You know it's either there or not. It made it easy to explain to them exactly what I was looking for in the assignment so they understood exactly why they got the grade they got; it made the grading seem less arbitrary to them. It taught them that there is a mix in transactional practice of dealing with the facts that you're given and applying the law, which some people seem to think that that only applies in litigation. I was able to demonstrate to them how to connect the dots.

For the first exercise, the responses were all over the map. They got really low scores on the first set, and I did that on purpose, too so they would work harder on the second and third. They hadn't caught on yet to the five point system, that there were five things that I was looking for them to achieve out of the assignment.

So, the second exercise they realized, okay, there are going to be five fact triggers here, and they got that. They're looking for the five. They may have missed one or two here and there, but there was a very clear improvement of working with the facts that they had been given; however, they kind of missed the law cause it was required to be a *negotiable* promissory note. That was my second assignment, so a lot of them forgot to apply the law for negotiability aspects and didn't work that into it. By the time we got to the third assignment, the progress was just remarkable; now they understood I've got to work with the facts I'm given, and I've got to apply the law. And it's got to come together in one document. And so, I felt like that really, really worked. Best of all, these exercises realistically simulated projects lawyers tackle in transactional practice.

One thing that I did that helped a lot is that I told the students if you need to make assumptions, if something isn't clear in the fact pattern that I've given you, then just write down your assumptions. Just write it down and hand it to me separately or together with your answer--but on a separate sheet of paper that "I'm assuming this . . . ." That reduced time in my office conferences. You know it was a really good thing. They could just keep going. They had confidence that I would handle that fairly. There was one instance, however, where the students said they assumed that this particular fact that I had included doesn't need to be addressed [one that did]. So, they tried some weird things to get out of doing the work. I guess they ran out of time.

And speaking of that, I had been a little bit anxious with the whole working in pairs, working in teams concept: how are they going to fit this into their day-to-day lives? You know, how are they going to meet? Are they going to have time? Not an issue with my group at all. It just simply wasn't; they somehow found the time. They somehow worked those issues out. I let them pair with anybody. I didn't try to assign pairs. I just let them work it out because I felt like that would take a lot of issues away. I even let them pair with students in the other section if they needed to. And so, they really worked all that out and I did not have to deal with it.

One thing that worked for me was sort of setting the stage, what Bruce was saying about giving them a lot of feedback. I told them before I handed the papers back, you know, sort of set the stage like these were pretty good or I was disappointed or you've shown a lot of progress, whatever was appropriate. I set the stage, and then I also told them that red ink is love. If you've got a lot of red ink, you got a lot of love. It took a lot of time to put all that red ink on that page. I also told them that this is a learning exercise, and most of the learning is taking place right now. When I hand your paper back and you see what you didn't get right, that's when the learning is taking place, so I set the stage, and that really helped them be in a proper frame of mind to receive the training I was providing.

I spent the time to go over each exercise in class when I handed it back because it saved me some time in conferences. We would actually go through it thoroughly so they did

not need individual conferences with me. We talked about the process of figuring out what to include, and then talked about the best way of drafting the provisions to accomplish the clients' objectives. Probably the best thing that I did to reduce the frustration with me -- students thinking that my expectations were unrealistic or whatever -- with this great overhead projector equipment, I would show them examples of students' work from their class. I would allow them to realize: here is the bar. These are your peers who are drafting, and this is what they're capable of producing, and it worked really very, very well. That was a great thing.

What didn't work? What was a challenge? The unusually broad range of ability was hard to accommodate. If I were grading impartially, some would have wound up with all zeros, which isn't my intention. I'm trying to encourage them and inspire them, not crush them. So you'll see if you look through the examples that I let a lot slide because I really wanted them to understand the process more than to teach them legal writing.

Audience: There's an easy solution to that.

L. Espenschied: What?

Audience: If you grade on a 5-point scale, then grade it 0 to 5, and then everybody gets a 5 to a 10, and you know you just add five points to it. And all of the sudden it looks better from their perspective, but when you go to compute grades, it works the same way.

L. Espenschied: That's a great idea.

The other challenge is the time that is involved. I don't care if you do a pair or a team or what, there is a lot of time involved in grading and providing meaningful feedback. And then, also the class time, you know, in a semester where I'm already trying to teach the entire Uniform Commercial Code to an "opportunity" population, taking the time to do this is a challenge, but I felt like it was well worth it for my students.

And so that's what my experience was and I'd love to hear your feedback and your comments and if you have any questions.

B. Luna: I'm curious. Do any of you do something similar in your courses?

Audience: So Business Organizations, I haven't done much of this because of the time issue. It's not just corporations. It's all business organizations smashed in one class, so I commend you both for taking subject matters [inaudible] to this. But, I still find that when I teach my drafting class, it's still helpful to have the doctrinal component because I'll see some of my students and say you remember this from this, you know, or I'll talk to other business organization professors and say what are you covering, what are you

talking about so I can at least bring that into the drafting class, and, again, make those connections and show that these are not separate, distinct courses that you're taking.

L. Espenschied: I thought it was just me, as a first year law student, how I really didn't get that legal writing was foundational for all of my other classes--it just didn't click in my brain at the time that this is actually useful or that it's relevant. In a way, I resented how the assignments in legal writing took so much time away from preparation for doctrinal courses; I just missed the relevance of legal writing to the other courses. I realized in teaching my contracts course that they were missing the connection, too. My students would ask, "how do we do well on your exam?" How do we do well? And I said, well you need to master what they're telling you in legal writing and use it on my exam. And even so, (we did midterms at Charlotte) I had some people, even though I had so clearly said this, they still didn't understand that the cases that we have covered in class were relevant to exam prep or answering exam questions. So despite the fact that I clearly said "I want you to discuss the cases in your essays the same way you would with your legal writing." And they're like, "Well, we couldn't do that, you know?" Somehow, they just didn't grasp the novel idea that legal writing was relevant in exams that consist, entirely, of *legal writing*! I think that doing these exercises and bringing transactional skills into the doctrinal setting is how we help them connect the dots, how we get them to see the relevance of what we're trying to teach them. And the closer that you can make it to what their actual practice will look like, I think the better off we are.

Audience: I do very limited amount of stuff. My drafting courses were--I integrate doctrine, but I'm primarily trying to teach skills. And then I have my doctrinal classes, where my exercises are really designed, as I think about it and I listen to you, my exercises are not at all designed to teach drafting skills. They're designed to teach doctrine through drafting. So for example, in class without any preparation after we've covered UCC 9-203, I give them a two-sentence fact pattern and say okay you now have three minutes. Write the security agreement. Don't use more than two sentences. You can write a security agreement in two sentences, but it's solely a function of getting them to translate 9-203 into the practice setting. But, it sounds like you're trying to do more than that. You're trying not just to teach doctrine

through the exercises. You're also trying to teach the transactional skills through the exercises.

B. Luna: It's a mixture of both, and I think there's kind of a feedback loop between the two that you need to be able to--it's hard to I think teach the doctrine and use drafting or writing exercises as a way to teach the doctrine without also having to teach them in some respect drafting as well. And that is a challenge, and my grading reflects that. I mean like Lenné I don't grade them on their drafting ability necessarily because there's wide variance of skills between the students. But I do think that we have to push them to put pen to paper, to actually practice writing this way so at least at the very least, you know, they're going to have a problem when they actually graduate, pass the bar, and get a document. They're not going to have a problem with at least reading it or at least going through the process of understanding how to read it and understand the contract, and even more so not to be surprised by it and that's part of my goal because not every student at our school takes transactional drafting. And my personal perspective is that it should be a required course for every student period.

L. Espenschied: Me too.

B. Luna: So does it belong there? I think it does, but it's an added challenge.

L. Espenschied: Yes?

Audience: Well I'm not sure that I'm trying to teach doctrine through drafting or vice versa [inaudible] my mind about it, and I'm pretty new at this. I practiced forever, and this is my second year teaching. I teach a course in commercial leasing where I had them do some drafting, and I start out by having them do a couple of just one of the clauses and I tell them not to look anything up actually--initially. And the rest of the [inaudible] watching and negotiating stuff. So, for example, an option to renew or an option to extend, just go draft this, and I have them do it in teams. You know, the class is not that big [inaudible] thirties that I thought about going to three because my fear about 3-person teams is the free-rider effect starts with number 3, so that's why I'm pretty diligent about leaving it to 2. Well, my experience is that they really like it.

And then the thing that I've found by having them draft some of this stuff from the beginning is they don't even know some of the mistakes that they're circumventing when they see some of the

forms. So, for example, I know for sure when they draft these options, that you have to renew the option by a certain date. For sure there will be nothing in there about when a notice is being given or whether it's being received. I mean to their minds it'll be [inaudible] some notice provision and the boilerplate that they'll never look at anyways. And it's in the process of putting this up and just quietly pointing out how they're going to be in litigation one day with the clause that they drafted. Take no offense, but that's the way it's going to happen. So, at least coming out of the gate I've found it helpful to have them completely draft from scratch. Later on, you know we expand it a little bit. And, like I said, I'm just beginning to weave in doctrinal stuff. [Inaudible] one's not serving the other. Maybe it should. I haven't thought it through that deeply.

Audience: I have more of a question. So, I teach skills separately and then I teach commercial paper, and I'm trying to get more skills in my personal paper classes. One of the skills I see in my skills classes that students struggle with the most is client interviewing. They totally miss the whole point of it. They come in with all the technical skills and they forget you need to listen to the client and really understand what the client's [inaudible]. The challenge that I'm coming up with is when I teach client interviewing that takes a lot of time, and I don't know how to get all of this in. And yet, I feel like if I did a skill like that it would be so valuable because a lot of students don't take skills courses. They don't do any client interviewing. When they come into a commercial paper class, they've never done it. But, I don't know. I was curious if you've done this if you think there's any --

B. Luna: Well, I've actually taught client interviewing and counseling, so I try-- I'm not sure I've ever actually internalized it as trying to impart that specific skill but when I'm doing my in-class hypotheticals on the case law and I've already signed positions, typically I'll point out, "Well what does the client actually want. Where is the client going to get this in changes? How does that change [inaudible]? What if the client says he wants to do this?" And that way, they're at least trying to respond maybe to what clients' needs are, which I think is a very tangential way of introducing that type of thought processing skill anyways.

L. Espenschied: It is a commitment, and you have to be really committed to getting it in. You know there's always more to teach. You know, there's always more to teach substantively. There's never enough time.

Audience: You've got to take some substance out to get those kinds of skills.

B. Luna: But, I think it's really rewarding. I think the students are far more engaged. I remember the first time I taught sales, and I did not really try to integrate skills at all. I had thought about it but just didn't have the guts to do it until I had more experience teaching the course. And I think teaching skills in a doctrinal class has improved my interactions and responses with students. I get a lot more--I mean classes are fairly lively, even at 9:30 at night.

L. Espenschied: Evaluations--when you're speaking of responses, as far as evaluations go, across the board I had no negative feedback whatsoever on the exercises. They were all positive and they really enjoyed putting time and energy into something they could comprehend because the Code can be so obtuse.

B. Luna: And they're desperate for learning skills.