

TEACHING TRANSACTIONAL SKILLS USING REAL CLIENTS FROM CLINIC TO CLASSROOM

SHELLEY DUNCK*
BRIAN KRUMM*

Shelley Dunck

My name is Shelley Dunck. I work at Loyola University Chicago School of Law. I am the Co-director of the Business Law Clinic and I teach contract drafting and negotiations, as well as a capstone course entitled, “Where Business Meets Law.”

We all understand that transactional lawyering is not litigation, but not everyone understands the differences between the two areas of practice when they first come to law school. They see litigators on TV, effective litigators at that, who successfully handle a whole case in a half hour.

However, a focus on business law, corporate governance and skilled-based experiential learning is rapidly growing and has become quite popular in recent years. Despite this trend, however, law school curriculum is still litigation heavy when looking at first year doctrinal courses and even most electives. Moreover, I think that because there is sometimes a lack of live client access, students do not get the full effect of what it really means to be a transactional lawyer.

So, our job is to teach students what translational lawyers do everyday. And again, most people do not really have an understanding of what that is unless somebody in their family is in business or has used a business lawyer.

As transactional attorneys, we counsel clients. We answer questions and strategize. We help our clients run their businesses. We build relationships with our clients because when you are a transactional lawyer, you want repeat business. We all need clients.

As a transactional attorney, you have to have good listening skills. You have to add value to your client’s business or you will not get invited back to the table. We add value by protecting the client from future bad outcomes or by putting the client in the best possible situation, given the circumstances of the transaction. And, again, I think it is really challenging to understand this concept when you are a student and you have not dealt with clients, but rather just your scary professors.

* Shelley Dunck is the Co-Director of the Business Law Center at Loyola University Chicago School of Law.

* Brian Krumm is an Associate Professor of Law at the University of Tennessee College of Law.

So, my talk today is really about how live client interactions have helped us in the business law clinic and how using live client deliverables (contracts) has helped in the contract drafting negotiation course that we teach.

I am going to start with the business law clinic. The business law clinic at Loyola has, at any given time, about 140 live clients in various states of forming or operating a business. About 60% of those clients are not-for-profit. The other 40% are primarily entrepreneurial for-profit businesses. We provide second and third year law students with the opportunity to create a mini law firm. At the beginning of each semester, we select 14 students -- primarily third year students -- to participate in the clinic. They each handle some new cases and some cases that are in progress because although we try to manage our clients on a semester basis, it rarely works out that way.

So, to reiterate, transactional lawyers work in a world of business and we do everything a business requires to be compliant with the law and then some. By allowing our students to practice their transactional skills with real clients they learn to appreciate the client interaction and experience first hand what they are going to have to do in practice. They find that while they are able to articulate a principle or ace an exam covering a principle, they might not be able to explain that principle to someone who is asking questions or who does not quite understand what you are trying to say or worse, who thinks they understand but are misinformed, you know, the client who has goggled the topic or used Legal Zoom. When you advise them, they tell you that what you are saying is not what they read or that is not what their friend's sister's husband, who is a law student told them. Dealing with clients is very different from the typical law student experience. You have to manage your clients, and that is a very interesting, but different experience for our students.

I want to highlight four case studies and obviously I am going to use successful clients because another interesting thing that happens when you deal with clients is that not all of them can achieve what they want to achieve. Some of them are difficult. Some of them are non-responsive. I am not highlighting those clients here although they provide good student learning experiences as well. I have four clients that I want to talk about; two are for-profit and two are not-for-profit.

The first client is Pyar & Co., whose founder, Paula Queen, started a high-end textile company. She had no design background when she came to us to start her company, but she was inspired on a honeymoon trip to India. This has been a tremendous learning opportunity for our students. Not very many people have a background in textiles. Plus, Paula is this super dynamic person. She presents interesting and unusual questions. We had to learn a lot about manufacturing and transport and logistics and things that she deals with every single day. Today her company is successful. She has been in business two and a half years but it is still a very small company, something you wouldn't necessarily know by looking at her press and her website. To understand that from a student perspective has been eye opening.

Another more recent client is a company called SwapAdventure, and they are certainly interesting. They provided us with some good drafting assignments. We have also filed a trademark on their behalf, so students get a little bit of exposure to trademark counseling. The owners of SwapAdventure ask a lot of questions. They are a demanding client and students must learn how to manage them so that they can work together effectively.

Another of our clients is E195 Global Learning Exchange, which is a not-for-profit corporation. The founder of the company is an interesting client who runs an education-based venture, with the goal of linking principals, students, and teachers around the world in order to foster curriculum sharing and group think. Our students, through the opportunity to help the founder, actually got to pitch a television program and work with the business documents behind that initiative, which is a little unusual. Additionally, they have worked with schools on Indian reservations and they have worked in projects related to curriculum reform. So, again, they are learning substance in addition to law and counseling and how all of those things intersect. It is not a straight line learning experience and I think that is good for them.

The fourth client I want to discuss is kind of fun. They are called Beards4Balls. They are a testicular research not-for-profit corporation. We did trademark their logo, which is specific, and perhaps not what we would have advised, but we do have hats in the clinics for anyone who wants them. Their mission is to spread awareness about testicular cancer and raise money for charity. They give most of their money to Indiana University's foundation because there is a doctor there who has done a lot of research on testicular cancer and actually, Lance Armstrong was treated there, as was the founder of this not-for-profit.

They are fun guys. That was a good learning experience for our students also because the client initially experienced difficulty with their board of directors. Basically, there were a lot of people who were excited to be on the board, but not a lot of people understood what it was or what it meant to be on the board. So we got a lot of good exposure to counseling for the student clinician.

Basically, in the clinic we force our students to learn and deal with clients. Obviously, they sign up and it is self-selective, but they get a great experience where clients truly make the learning happen. Students who do not have the most valuable experience in our clinic are those students who did not reach out to their clients and have them come in and meet with them and become engaged in a way that forces all of these issues to happen organically.

The second place that we use the live client concept is in contract drafting and negotiation. Our goal is for students to learn how to draft a contract, how to think

about drafting a contract and to generally understand what that process is all about. We talk a lot about what a transactional lawyer does, how to add value, and how you have to understand your clients business. You want to know what their concerns are and what their risk profile is, which is hard for young associates at big firms. And ultimately you want your client to rely on our judgment and advice and to trust you.

We also talk about how to deal with opposing counsel and how to respectfully comment on a variety of contracts. I have taught a course at Loyola on this for ten years. For the first few years, I used a standard real estate contract as the background for contract concepts, and that was okay, it worked. But, when I started working in the clinic, it quickly became clear that there was so much material provided by our clients that make really great teaching tools. The subject matter of our client deliverables -- and I of course get permission from clients and the other parties in the transaction to use these -- are fantastic and varied. They included daycare provider contracts, floral agreements; music services agreements, wedding venue contracts, and much more. We have done web terms and conditions, confidentiality agreements, and in one case, a non-confidential disclosure agreement, which my client thought was a confidentiality agreement. So, we get to talk about appropriate labeling of what the content is.

So a lot of the subject matter we deal with varies, and I get new contracts in all the time that present fresh learning opportunities.

One case study that I'd like to discuss involved a vocalist who had entered into a music services agreement. We start each class with a the class discussion about what a particular contract should look Because there's not necessarily a right or wrong way to draft an agreement, contracts can take a variety of forms although we are used to seeing a certain form of contract as transactional attorneys. We talk about what we think are some provisions that we would normally expect see on a contract like this and what provisions are mission. Then, as a warm-up exercise at the beginning of class, I hand out a two or three page contract. In this case, we used what is called a rider, but really it is just a lease assignment. All we do is hand it out. We let the students read it for 10 minutes, 15 minutes tops. And then we ask them what they think. Is this what you would think this would look like? My favorite question to ask is if they think an attorney drafted this, because sometimes the answer is yes and you are surprised. Other times the answer is absolutely not; there is no way an attorney drafted this.

I love this provision from the music service agreement. I highlighted my favorite part because I really like the word "mostly," as I do not think we have ever drafted a contract with the word "mostly" in it. As a class we decided that an attorney did not draft the contract, although I was told by the client that one did.

So, after we ask all these questions the end is a redraft of something short in the beginning of the contract, something very small. It could be a paragraph. It could be just a one-pager, and it is interesting because drafting is harder than it looks. After the

first assignment, students come to class surprised by how long it took them or they might say, "Wait I thought about this all the way in today, and I want to change something," and I encourage this. I tell them that is what I want them to start thinking about: changes that can be made for the betterment of the contract. And I believe that it is effective and it is something that they get more and more comfortable with, because we do this as an exercise every week.

So, my bottom line is that by exposing students to real clients and real contracts, instead of thinking up hypotheticals, they receive a more holistic learning experience, grounded in reality. I could not think up "mostly;" I would never put "mostly" in an exam hypothetical. You want the students to think about how contract drafting really works, what their clients are really doing, and how they can protect them, if possible.

Do you have any questions?

Audience: I have a client that works with [his own] clients, and one of the issues when you are drafting contracts [in this context] is short contracts, where you know if you give a client more than two pages they are not going to -- none of their customers are going to use it. So what is your experience with that process of editing them down?

S. Dunck: That is a great question because you are right. A lot of times it just looks too intimidating for their specific business. Recently, and this is crazy, I just started doing columns. If you format it in columns, you can get a lot more content in, and it does not look as long.

We edit a lot, and you do have to think about how the contract is going to be used. You want your client to use it rather than not use it or not edit it on his or her own, which happens a lot. Sometimes it has to be long though, out of necessity

Audience: I have a follow-up question to that. Could you talk a little bit about the difference between how you might approach a contract in your clinics versus your contract drafting class, where students have different expectations.

S. Dunck: You know, in the contract drafting class we talk more. In the clinic, we focus more on making the contract right, and then in the contract drafting class, we would really talk about client expectations. In the clinic we do not. We have a two-hour seminar, where we talk about other topics, sort of legal topics, not specifically contract drafting. Although, I could do the whole clinic on contract drafting. Also in contract drafting -- we spend a lot more time on each contract and

talking about what a contract should look like and how we can get this right and get it out to the client because we do not have live clients or tight deadlines in the contract drafting class.

Audience: In the clinic seminar, do you teach a contract drafting class?

S. Dunck: We have one two-hour class on it. It is an overview of what components you would typically see in a contract.

Audience: Do you work through an actual contract in that class?

S. Dunck: We do.

Audience: Okay. Something students are working on?

S. Dunck: Yes.

Audience: I had a question about your clinic. You said you are e running it like a mini law firm. So, when issues come up at the last minute, does the client typically get in touch with your students or with you?

S. Dunck: That is a really good question. It depends on who the client is and how long they have been there. They are supposed to, obviously, go to the student first, but because of the way it is structured, our students only have certain, specific office hours every week, so they are only in the clinic a certain period of time. But they are very responsive on email. They are expected to be available to their clients, although we do tell them not to give their cell phone numbers out. And every semester, one student gives their cell phone number out after I tell them not to do that. So, clients will get in touch with them.

If they cannot reach the student and it is an emergency or they want an answer right away, they will probably call me. And, clients that have been there a longer time that know me better will call me.

Audience: Will students respond directly to the client about their issues?

S. Dunck: No, we oversee everything. We are at every student meeting, and they send us emails to approve anything that goes out. So, it will go past my coworker, Assistant Director, Mary Hash, or me.

Audience: Do students write their own firm agreement?

- S. Dunck: No. Should we do that?
- Audience: I do not know.
- S. Dunck: I think that is a good idea. I like it already and I do not know what that is. Just with rules --
- Audience: Engagement agreements?
- Audience: Well, we agree to not give our cell phone --
- S. Dunck: Oh that is a very good idea.
- Audience: We agree that you know if this happens --
- S. Dunck: We have a policies and procedures manual, but I guess they do not really have an employee manual where they agree to terms and conditions.
- Audience: Do you get any pushback from the Bar Association for representing for-profit businesses?
- S. Dunck: People ask that all the time. We don't and I think that is because no one really wants our clients when they first come to us mainly because they can't pay for a practicing attorney. Also, many of our clients are in the very preliminary stages of their business. When our clients get too big or too sophisticated, we refer out. But most of our clients are not people who can really afford legal services We are not funded in a way that requires us to only take clients from a certain income level, however, most of our clients absolutely cannot afford even a mid-sized or a small law office. So, we do not get pushback, and we have referred out with viable clients.
- Audience: How do you determine when they are too sophisticated or whether to refer out? Have you run into that? Do you have it written down?
- S. Dunck: It is more client-specific, so for example, we had a client that was doing international deals in London. There is no way we can handle that. Or take for example when a client gets to the point where they are using us as sort of a mini general counsel. Like they would use a mid-size lawyer but they do not have enough money to have a legal team. They might have a small legal budget, probably not. It is just

money coming out of the company. But that is when we sort of send them on their way.

Audience: Is that a “mostly” issue?

S. Dunck: It is mostly. But most of our clients are not -- I mean they run small businesses and maybe they are successful, but it is not – they are not killing it out there. So, it is hard. I mean it is hard for small businesses. But then they do not use attorneys, and then that is scary. They use Legal Zoom and think they are protected

Brian Krumm

My name is Brian Krumm, I am from the University of Tennessee, and I also teach in a business clinic. I taught doctrinal courses in business associations, secured transactions, introduction to business transactions and the like. This past semester I had the opportunity to teach a module of what we call “Representing Enterprises,” which is a capstone course for people who are in the business transactional concentration.

The unique part of this module, however, was that I taught both American students and Chinese students from the Renmin University China College of Law in Beijing. I did that and I gained a real appreciation for the people from Good Morning America, because I had to wake up at 3:00 in the morning in order to get to school by 5:00, because there is a 12-hour time difference, which stretches to 13 hours during daylight savings time. So, that was a little tricky.

From a transactional perspective, there are certain experiences that live clinics have a difficulty providing. One such experience is giving students exposure with working through, properly documenting and negotiating a complex transaction. Although I have had opportunities to work with students on a live asset sales transaction with a small software company and a venture capital transaction for a nutritional supplement start-up company.

By and large, you do not have those sorts of opportunities every semester to give students the understanding of the process you go through in not only documenting and drafting the transaction but also interviewing clients and negotiating the terms of the deal.

How many people are familiar with the LawMeets Competition? Sue Payne and I were both fortunate enough to go to the finals this year in New York. What I have done is to try to condense the LawMeets hypothetical into a four or five week module that we actually simulate a complex transaction in class. The important thing that I feel it adds is that under circumstances of that nature, the pressure of getting things done in a timeframe of four or five weeks really makes the students gain an appreciation of

working together under time constraints and drafting documents with precision. It is not only understanding the doctrine and the procedure, but also working together in teams that is important in the process.

So, what I want to try to do is give you some sort of idea as to how I took the LawMeets materials and condensed it into a workable module so that you can give your students some real life experience in a fairly complex training session. How can we give law students an understanding of the content, process, and complexities of a sophisticated transaction? What legal skills do we need to master? A lot of students will come in without a good understanding of the business context of the transaction. Now, how LawMeets works is that there is very rigorous guidelines on how the process will flow. They start you off with a case statement.

As for some background, LawMeets was created two or three years ago by Professor Karl Okamoto from Drexel Law School, who was a transactional lawyer prior to going into academia, mostly working with mergers and acquisitions. So, he has a good baseline of past experiences to come up with some great hypotheticals. I feel he has done an extraordinary job in putting together a simulation exercise that creates

Now, I am evaluating the students along the way. This is all done in a four-week period.. In the first class, we provide an overview of the transaction, give the students a case statement, answer any questions concerning the process and expectations, and then assign them to teams, which is basically like forming small law firms. I think we had 20 people in my class and 8 people in the Renmin University class, so they broke up into two firms. We used the 2013 Law Meets exercise.

So, the exercise involved two companies: American and Butler. Butler was a pharmaceutical company that had some diagnostic tests for cancer and American Pharmaceuticals was buying them. As with any transaction, things do not go the way you want them to.

The companies had a stock purchase agreement drafted. Right before closing, the Federal Drug Administration comes in and makes an inquiry into one of the drugs that is being used during the diagnostic test that Butler is selling. In addition, another company comes out and says that they are going to file suit against Butler for their diagnostic test because they think it is infringing upon their technology.

So, what do you do? You have to write an amendment to the stock purchase agreement to address these two contingencies.

So, for the second class, each group uses class time to analyze the case statement and begin discussing the dynamics. There is actually a mock interview with the client. The CEO for American Pharmaceuticals was John Savage and Butler's CEO was Deana

Winston. They both have diametrically opposed objectives. So, the lawyers are learning what the business objectives are and are trying to craft an amendment to the stock purchase agreement that will work for both companies.

Besides class time, the students are having to work in groups outside of class, but by and large, they are getting together in class to figure out what they have to do, how much they have to do, and who has responsibility for coordinating the firms input, because, again, they are working in teams and some days some students might have an exam the next day. One of the other team members may have other pressing matters, which is a lot like real life. If I am working on several different transactions, I might have demands on me one day to the point that I cannot contribute as much to the firm on this particular project as another one of my colleagues.

As for work product, basically, they send original drafts to me, and I will grade them using a very standardized rubric. I then distribute to the other side what the opposing counsel had drafted.

After the students have received opposing counsel's draft, a second client interview is conducted to see how the client wants to respond to the provisions drafted by the buyer or seller. After the second client interview, the "student firms", provide a responsive mark-up by black-lining opposing counsel's draft.

Once the opposing counsel receives the responsive mark-up, the "student firms" meet to further discuss their negotiation strategy. The teams then meet for a 40 minute negotiation which is again graded with a standardized negotiation rubric.

I ask at the end of it for the students to prepare a 20-minute presentation basically explaining what their learning experiences were. How did they grow professionally from this? Then I ask each one of the students to grade the students on their own team. What did the individuals contribute? Because I do not want one person in the law firm to basically do all the work. I also break the peer evaluations down into several categories. You know, who intellectually contributed the most? Who did the best in terms of organization and leadership, who did the best in legal analysis and problem solving? You get a good understanding of a student's capabilities based on all that. I also said that they could not give them all 10s. So, if there are four people, 10, 9, 8, 7. You get a good idea (as an instructor) exactly what went on when you were not around.

Well, that was that. Are there any questions on that sort of exercise?

Audience: Do they have to draft a final document after they negotiate?

B. Krumm: They do.

- Audience: Because that is a good exercise sometimes. People negotiate and they get a little crazy but do not write it down.
- B. Krumm: I am sorry. They do not have to do the final document post-negotiation. In this sort of setting, I think you can do that. In the LawMeets competition they do not but that is an interesting concept. If I had another week, I think that would be a great addition. Bob?
- Audience: Brian, yeah I am just curious. So, you use the prior year Law Meets program. Does that get those students excited to participate the following year?
- B. Krumm: This is the first time I have done it, so we will see what happens. I know a lot of -- I know Cornell actually does an intramural competition in order to select the people that they sent.
- Audience: Ken Chestic. So, you gather the information about -- they grade their other teammates. What do you do with that information?
- B. Krumm: Oh, I use that to grade them for the final grade. I have no idea what is going on within that team when they are working by themselves outside the classroom. And there is always one slacker. I mean I know that it is somebody's birthday, and they wanted to go to New York. Well, that is fine. In real life that happens.
- Audience: How big are your teams?
- B. Krumm: I had four groups of five on my side. And then in Redman, it was two groups of four. Actually, 35 people had signed up at Redman until the first lecture. And please do not take that the wrong way because you must realize -- and I told all these students -- there is nobody at my law school that can do in Chinese what they were doing in English. But for students that are between 20, 22 years old to accomplish that was probably pretty daunting.
- Audience: Were the Chinese students undergraduates?
- B. Krumm: Well, there were two LLM students and the others were undergraduates.
- Audience: How did you get involved in this?

B. Krumm: My dean and the Associate Dean for Academic Affairs went over to China, and they said that they wanted me to come over there to talk to them about clinics. After I started talking to Professor Jon Don, I realized that what he meant by a clinic was a simulation. So, I decided to try to do this sort of simulation. And again, I am going to do it next semester. But every time you teach any class, you are going to improve upon your experiences.

I do think that this is the sort of mechanism wherein you can recreate a real-life transaction without a lot of effort. I know I paid a licensing fee of \$199 for the package, but I think that it is well worth the amount of time

I actually constructed a problem based on the transaction I did while in practice and that works only because I know the intimate details of it. I would not want to try to do it without having that past knowledge.

Audience: I am Abby. So, you said it is a capstone course for folks who are already in a transactional concentration. What are the -- are there prerequisites for this course because I imagine the stock purchase agreement on somebody that --

B. Krumm: Yeah, you have to have introduction to business transactions, federal income taxation, taxation of business entities, contract drafting, corporate finance, and securities would be preferred. But you do not have to have those, but most students do.

Audience: So, they are mostly all third-year students?

B. Krumm: Yes, they are exclusively third-years. And again, another issue that you should be aware of, spring semester third year, students are not as motivated. And as a result, I had to do a lot of -- I was critical of some of their performances, as I would be to an associate who gave me a poor product. And I am not saying everybody did, but there was a tendency in the spring not to have as much discipline. How about that?

Audience: Can you talk a little bit about using the technology?

B. Krumm: Yes, and again there are always difficulties using the technology. For example, the synchronization between their voices and our voices. We had to work on that over time. There was a humming coming

from us because they were using a technology that was not completely compatible with ours.

And you know, like in any large university, we do not have a technologically advanced law school, so we had to go to central administration to work out those details. So, it took about a couple of weeks to make sure those things meshed.

I did have someone come in to help me set things up until I got very comfortable with it, and it is not easy to get someone to come in at 5 (in the morning), but we also recorded all these digitally, so I am going to be making a couple of -- some spots for our web page on the experience and doing everything so I can explain to perspective students what we did and why we are here.

Audience: Does UT own the equipment that you were using on your end?

B. Krumm: Yes, there is a conference room just off the library.

Audience: When you had the clients come into the interview for the simulation, who played the role of clients?

B. Krumm: I did, simply because that way I knew what information I was giving to each side so that I knew they were not making up things. And as a practical matter, I think that is what happens at the Law Meets experience. I have only been on one side of the transaction as coach of the Law Meets team, but I think Karl Okamoto plays both roles, again, just for consistency.

Well, it is something worth trying if this is a format that you think would work in your law schools, so I would be glad to share my materials as far as syllabi go. I cannot share materials that I licensed but you can obtain them from Karl, at Drexel Law School.

Audience: And there are like four exercises available.

B. Krumm: Yeah.

Audience: Great. Okay thank you.

S. Dunck: Another good resource is Practical Law Company. I do not know how many of you use it in your clinics, if you teach clinics. But they have excellent resources and most law schools have it – it is very

expensive if you are a practicing attorney, but most law schools have access to it for free.

B. Krumm: The Kaufman website, too, for those of you who do not know about the Kaufman Foundation website. They sponsor a lot of clinical transactional events that both Shelley and I go to. And they have a lot of materials. Bloomberg is great too, in terms of a newer player on the field. I mean some of their capabilities are really interesting, especially in terms of comparing different provisions in contracts. They actually manage the database for SEC now, and so they have all the SEC filings, and they have the capability of identifying what mergers and acquisitions indemnification provisions by law firms look like, which is amazing, since before negotiating gets done in law firms, you know going in what it is going to look like.

Audience: And is that licensed or is that free to all --

B. Krumm: That is available to law schools. You just have to talk to your Bloomberg representative.

End of Session