

ALL ABOUT THE FIRST YEAR OF LAW SCHOOL

MICHAEL HUNTER SCHWARTZ¹	TEACHING CONTRACTS FROM A TRANSACTIONAL PERSPECTIVE
CHAIM SAIMAN²	TRANSACTIONAL LAWYERING – A CONCEPTUAL APPROACH
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MICHAEL HUNTER SCHWARTZ

TEACHING CONTRACTS FROM A TRANSACTIONAL PERSPECTIVE

Introduction

As we begin, my initial thoughts will serve as an introduction to and outline of what, collectively, the three of us seek to share with you. First, I'll give an introduction and talk about the andragogical⁴ implications of teaching transactional skills in the first year; then, I'll talk about what I do in my second semester Contracts class. Chaim Saiman will then talk about what he does in his Practicum program, and Jessica Rubin will talk about what she does in her first year skills course, and then we'll take your questions.

I thought I'd start by giving you a test. What are the reasons we might think about integrating transactional skills in a first year curriculum? Before you answer, I'll offer a rather obvious benefit of integrating transactionally-focused instruction in the first-year, but I'd like to do so by telling you a story. I started doing a lot of transactional teaching in my Contracts class about three years ago. In the fall semester after my first year teaching transactional skills, one of my students visited my office and told me this story. He said, "I went out to interview for a summer job, and the lawyer came into the room, dropped a

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⁴ The word "andragogical" refers to teaching adult learners whereas the word "pedagogical" refers to teaching children. While some law students arguably are somewhere between child and adult, most are properly referred to as adults, making andragogical the better term.

contract on the table, and said, “Tell me what’s wrong with it.” My student told me that his first reaction was, “Oh my god!” His second reaction was to remember something I had told his Contracts class during their first semester with me: if you feel yourself getting stressed, in class or in practice, take a moment and breathe deeply. So he took a deep breath, and then he started slowly flipping through the contract. He decided to start with something he knew especially well; he looked at the liquidated damages clause. He said, “OK. I remembered drafting a liquidated damages clause in your class, and I remembered your feedback on my draft. Lucky for me, the liquidated damages clause in the contract described itself as a ‘penalty for breach.’” So he told the lawyer that describing the clause as a penalty was a very bad idea. Having had this one success, he started feeling confident; he knew something – and he went through the rest of the contract, identified other issues, and got the job. That true story is one of my reasons for teaching transactional skills, because our students need these skills. They’re valuable to them, and they use them, perhaps even in their first summer jobs. Now, on to your test. We’ll start easy with a true/false question. Take a moment and when you’re ready you can hold up a card – either “true” or “false”. True or false: teaching transactional skills helps students learn more.

QUESTION

What do you mean by “learn more”?

MICHAEL HUNTER SCHWARTZ

Meaning that they learn more deeply and they retain it longer. Let’s go with that. For example, in Professor Leah Christensen’s study of legal reading,⁵ she found that one characteristic of high-performing legal readers – meaning students who do well in law school, law professors, and judges – is that they read with problems in mind. In fact, if we don’t give good legal readers problems to analyze, they create them on their own. By and large, teaching through problems is also a more authentic way to train future lawyers. Working from practice problems, such as problems that raise the drafting implications of a particular doctrine, actually increases the likelihood that our students will learn the doctrine more deeply and retain what we have taught them; the problem makes the doctrine meaningful to the students. The benefits of teaching through drafting also reflect a generational difference. Millennial students are more likely to retain and use what they are learning if they can see how they will later use it.

Larry Krieger’s research⁶ found that law students are the most miserable of all graduate students, even though, when they come to graduate school, their levels of depression, anxiety, and substance abuse are about the same as other graduate students. So, anyone have a guess at why teaching students transactional skills might have the potential to offset law student depression issues?

QUESTION

The students are depressed because they get poor grades. They don’t get, I mean, that’s the whole reason they get depressed. They were all good students and then they get lousy grades, and the argument here would be that, you tell them that most great litigators

⁵ See Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 SEATTLE U. L. REV. 603 (2007).

⁶ See Lawrence S. Krieger, *Human Nature as a New Guiding Philosophy for Legal Education and the Profession*, 47 WASHBURN L.J. 247 (2008).

got C's in law school. That can ameliorate that feeling, because in reality, they may turn out to be good transactional lawyers anyway.

MICHAEL HUNTER SCHWARTZ

Actually, Krieger's research suggests that it's not only the grades that depress law students. Law students also become depressed because the process of legal education we have adopted causes them to lose their sense of personal autonomy, their sense of self-efficacy.

QUESTION

I was going to say that it might give them something to do, which could generate more of a sense of accomplishment.

MICHAEL HUNTER SCHWARTZ

That's a good one.

QUESTION

Is it because law schools currently focus very heavily on academic rather than on practical applications? Students who are applying for their first internship think to themselves, "Oh God, I've been in law school a year and I have nothing that I can actually say because I've only learned the academic side of things," whereas if they learn transactional skills, they can go into that first internship saying, "I know what to do."

MICHAEL HUNTER SCHWARTZ

Good point. Another reason that theorists believe that teaching skills might help – no one knows for certain yet – is that a lot of students, when they're in law school, get the message that the only way to practice law is by engaging in conflict. A transactional orientation may give students a sense that there can be practices of law where both parties win. This approach suggests that the students can choose less conflict-focused practice options.

QUESTION

There's just one other thing though – the depression doesn't come when students get grades; it comes way before that. So when you are giving them transactional things to do, that's one more thing on their plate which, along with legal writing, may overwhelm them.

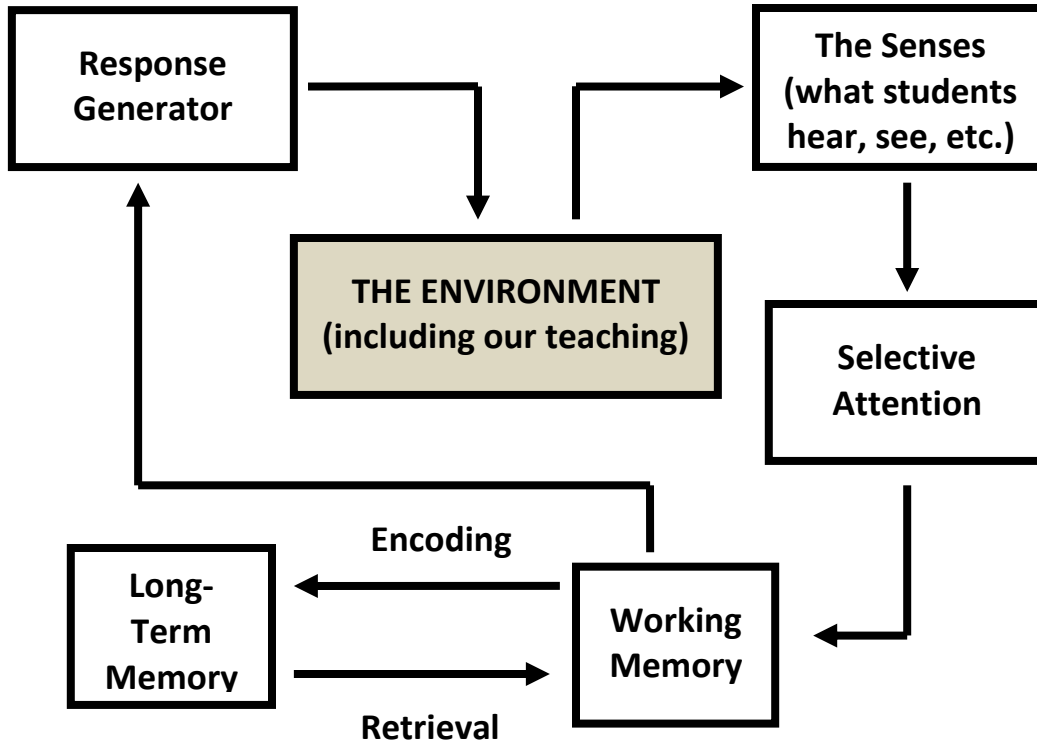
MICHAEL HUNTER SCHWARTZ

I'll talk about that later on; your question raises the issue of how much transactional stuff you ask students to do. For now, let's focus on the benefits of teaching transactional skills.

Not only can transactionally-focused teaching help students learn the doctrine better because the doctrine becomes more memorable to them, but teaching in this way also has the potential to teach students skills and even to begin to develop their identities as professionals.

Finally, teaching transactional skills might help students maintain their focus. Below is the cognitive model of how human beings learn. According to "cognitive theory,"

students cannot apply skills and knowledge unless they have stored what they learned in an organized, meaningful and useable way.



Hundreds of pieces of information reach our students' senses every moment. Humans can attend, however, to only a few of these pieces of information so our students must decide: which stimuli warrant attention? The process of choosing a focus is known as "selective attention." Thus, the learning process is over at the spigot if our students decide to pay attention to their e-mail or their e-bay purchases. If we don't have their attention, they can't learn, and the research on multitasking is untrue. There is no research that suggests that students now are any better at multitasking than we were; they just go back and forth between tasks, instead of actually being able to think about two things simultaneously. So, one of the advantages of teaching transactional skills is that it's different. Any time we change teaching techniques or we do something the students haven't seen before, we have an opportunity to recapture their attention, and, once we have their attention, we have a greater chance that they'll learn and retain what it is we want them to learn and retain.

Now let me turn to what I try to do in my second semester Contracts class. I want the students to get at least some sense of what it means to think like a deal lawyer, so I have them read an excerpt from Tina Stark's article, "Thinking Like a Deal Lawyer."⁷ I want them to get a sense of how deal lawyers think. I also want them to have read and studied a bunch of contracts and to have more deeply focused on particular contract clauses. In this way, they can enter their summer jobs thinking, "Ah, I know what that clause is. I've at least

⁷ See Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223 (2004).

seen a merger clause, a liquidated damages clause, a force majeure clause.” I want them to be able to read a contract, and the documents collected in my handout⁸ are some of the contracts that I use to teach students how to read a contract.

The first contract is actually a contract right out of my new Contracts casebook.⁹ We initially study the contract to get a broad introduction to the skill of reading contracts; throughout the rest of the semester, the class refers back to the contract for examples of the contract clauses we are studying, and I ask multiple choice questions in class based on specific provisions in that contract.¹⁰

The third contract that you’ll see in the handout¹¹ is one that I use because it gets students excited; it’s the contract that people signed when they agreed to participate in that movie called “Borat.”¹² It’s a one-page contract, and for about twelve hundred dollars, the contract communicates that the signatories are waiving their rights to later complain about how they are depicted in the movie. Studying this contract is a fun exercise because – for those of you who have noticed this provision – the contract describes the film as a “documentary-style” film, a description that just seems to tickle my students.

A famous contract term that my students and I study at is the well-known “M&Ms clause” in the form contract used by the rock group Van Halen.¹³ The clause was an express condition that excused Van Halen’s duty to perform if there were any brown M&Ms in the bowls of M&Ms that the facility was required to provide to the group. There’s a whole bunch of literature on why Van Halen set up the contract that way, and the particular language they used and why they included the clause makes for an interesting story.

For lawyers who practice contract law, one of the most important, if not the most important, skill is the ability to identify ambiguities. I’m not trying to make my students experts at this skill in one semester; I just want them to recognize the importance of the skill and to begin to develop it. Let me show you quickly how I do that. For those of you familiar with Farnsworth’s wonderful contracts hornbook,¹⁴ this exercise will look familiar. These are the things that Farnsworth says can make a contract provision ambiguous: a provision can be ambiguous because the words are ambiguous, it can be ambiguous because of a misplaced modifier, or it can be ambiguous because of conflict between the terms (that is, one term says one thing whereas a different term says something that is both different and conflicting.) I thought you might find it fun to see the actual ambiguities. As an exercise in my Contracts class, I actually have my students pair off and reach a conclusion about what aspect of these promises are ambiguous and why that particular aspect is ambiguous.

⁸ See Michael Hunter Schwartz, *Teaching Contracts from a Transactional Perspective* (Conference Handouts), 10-22, http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Schwartz/Schwartz_handouts.pdf [hereinafter Schwartz Handouts].

⁹ See MICHAEL HUNTER SCHWARTZ AND DENISE RIEBE, *CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK* 413-18 (2009); see also Schwartz Handouts, *supra* note 8, at 10-15.

¹⁰ If you’ll look at the merger clause, you’ll see that it’s a problematic merger clause, but I deliberately made it problematic.

¹¹ See Schwartz Handouts, *supra* note 8, at 18.

¹² *BORAT: CULTURAL LEARNINGS OF AMERICA FOR MAKE BENEFIT GLORIOUS NATION OF KAZAKHSTAN* (20th Century Fox 2006).

¹³ See Schwartz Handouts, *supra* note 8, at 20-22.

¹⁴ E. ALLEN FARNSWORTH, *CONTRACTS* (4th ed. 2004).

I also use a teaching technique called “group-pair-solo.” First, my students work in five-person groups to identify a set of about five ambiguities and explain those ambiguities. Then, they work in pairs with a new set of five ambiguities. Near the end of the class session, I ask them to work alone with a third set of ambiguities. In other words, I devote an entire class session to teaching students the skill of identifying ambiguity.

I also want my students to have had the experience of drafting not entire contracts but individual contract clauses. I therefore require my students to draft about five contract clauses over the course of the semester and to become reflective about the drafting process. Over the course of the semester, they fix, for example, a flawed merger clause, and they create a liquidated damages clause from scratch for a hypothetical client who tells them that he wants a “bulletproof liquidated damages clause.” The liquidated damages problem is particularly challenging because the client also wants the clause to address a particular potential loss for which the client has no basis for estimating. Thus, the exercise creates a conflict between the client’s goal of a bulletproof clause and the student’s ability to deliver the estimated numbers. This conflict provides me with an entree into a discussion of professional identity. How do you deal with such a client? How do you talk to a client about a conflict in the client’s goals for a project?

I also have students draft a clause where the problem is one of ensuring timely performance. The client is a municipality that will be hosting the Super Bowl and the task involves drafting a clause to make sure the facility is completed on time.

It may be worth your time to look at one more example from my handout, a problem called “Practice Problem 5: Tribal Coal Mining Contract”.¹⁵ I constructed this problem while working with a tribal law expert who teaches at University of North Dakota School of Law. The problem involves a tribe that has huge natural resources that it wants to exploit to bring money to the tribe. This goal seemingly conflicts with the tribe’s cultural goal of respecting and preserving the land. So the student’s task is to draft something that makes sure that the oil company restores the land. My students came up with incredibly creative solutions. Some of them came up with a series of express conditions where, to get access to the next portion of the property, the company had to meet a satisfaction clause requiring an engineer’s approval. This kind of creative thinking is exactly what we want our students to learn in law school. Of course, it’s great if your students can learn to explain what an express condition is and what language unambiguously creates one; it’s even better if they can effectively analyze a contract provision that’s ambiguous as to whether it is an express condition. But if your students can learn to use express conditions to accomplish client goals, they’ve really mastered express conditions.

I’ll tell you one last story, and then I’ll be done. One of the people I consulted with in writing the contracts book and in creating problems is a guy who was the in-house counsel to a very large railroad company. He told me once, “Every law student can come and tell me about *Hadley v. Baxendale*,¹⁶ but what they can’t do is tell me how to solve this problem: our railroad is approached by a company that wants to ship a product that is volatile and the company tells the railroad that the product is volatile. The railroad wants to find a way to take on this contract because it will make boatloads of money. What should the railroad do? New lawyers tend to say, ‘If the company has disclosed that this stuff is

¹⁵ Schwartz Handouts, *supra* note 8, at 29.

¹⁶156 E.R. 145; (1854) 9 Ex. 341.

volatile, that disclosure would likely require the railroad to pay consequential damages based on Hadley and its progeny. The railroad should turn down the contract.” My consultant said that he is tempted to fire, on the spot, any lawyer who answers the question this way. The right answer is that the railroad needs to insure against this known potential consequential loss and charge extra for its services or work out a risk-sharing arrangement with the shipper. As my consultant said, “That’s the kind of lawyer I want – someone who knows *Hadley* but can understand how to draft around it.”

I’m going to stop here so I don’t usurp the time of my fellow speakers.

CHAIM SAIMAN

TRANSACTIONAL LAWYERING – A CONCEPTUAL APPROACH

In recent years, the traditional law school curriculum has been subjected to considerable critique. The most oft heard complaint is that law schools are designed to produce lawyers that may fit the romantic image of the profession—arguing appellate cases before final courts of appeal between visiting teaching gigs at Ivy League law schools—but represent no more than a tiny fraction of the actual profession. Critics argue that law schools offer little training for the more mundane forms of legal practice that constitute the overwhelming majority of lawyers’ work-hours.

But even as law schools aim to be more “practical,” they seem to forget that a large percentage of graduates will never enter a courtroom. That millions of lawyers practice transactional (or corporate) law would surprise anyone who knows the profession solely from inside a law school. While most schools now maintain upper-level offerings in contract drafting and business planning, the curriculum remains staunchly litigation-centric. To cite from my own experience, I worked in the corporate department of a well-known Wall Street firm after leaving law school. There, for the first time, I was introduced to the words “due diligence”—a concept that would occupy most of my professional life (and life-life) while in private practice. I recall the frustration—shared by many junior associates—that my initial experiences in practice centered on a legal concept I had not once encountered in law school.

If one is looking to introduce students to transactional practice early in their law school careers, Contracts and Property are the obvious places to start. While few students will ever litigate the core doctrines taught in most first-year classes, most will draft contracts, leases, sales agreements, or settlement agreements calling upon these foundational concepts. Moreover, the theoretical principles traditionally taught in the first year course can be reinforced and complemented by framing the class in a more transactional direction.

Returning from the first iteration of this conference, I was convinced that Villanova should introduce first-year students to the transactional side of practice. Together with other faculty members, we proposed a one-credit Practicum that would supplement the standard four-credit doctrinal course in either Contracts or Property. We further resolved that the Practicum section class would comprise the traditional “small section” in the first year, which would enable in-semester grading of assignments and substantive review of each assignment. Finally, my ambition was to leverage the Practicum to steer the traditional doctrinal course in a more transactional direction.

Yet, incorporating a transactional focus into the traditional course raises its own challenges. While I am in favor of educating students to become more sophisticated transactional tacticians, I am unwilling to forgo discussion of policy analysis, legal theory, legal history, and most importantly, the social consequences of the normative commitments embedded in contract law and doctrine. My comments are thus divided into four parts. Part I speaks to the tension between the conceptual orientation of the traditional doctrinal course and the mindset of a transactional lawyer. Part II discusses my reservations—at least in the context of the first-year course—with structuring Contracts solely around negotiating and drafting deal documents. Part III describes my attempt to construct a conceptual approach to transactional lawyering—one that repurposes the traditional course in a more transactional direction, yet retains the core of its rich conceptual and jurisprudential features. In Part IV I demonstrate how the method has improved the doctrinal elements of the course and strikes an appropriate balance between the practical and theoretical components of professional formation.

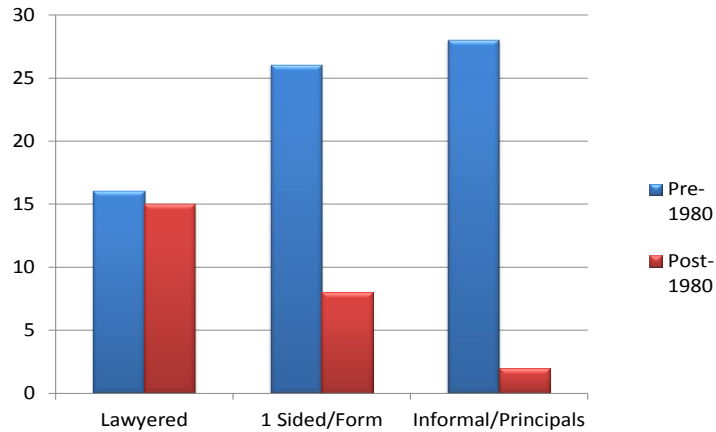
Part I—The Conceptual Tension between Doctrinal and Transactional Perspectives

This year, my Contracts class used the seventh edition (2008) of Farnsworth's *Cases and Materials on Contracts*. The four-credit class consisted of 95 cases assigned from the book supplemented by about 10 cases from outside the book. A quick survey of “main cases” from casebook assigned to the class yielded the following three categories.

- **Lawyered contracts**— contracts that are the product of bilateral negotiations between parties represented by counsel;
- **One-sided/form contracts**— contracts that are either form contracts where key terms are filled in, and/or contracts where only one side is represented; and
- **Informal/principals contracts**— contracts that are formed by principals through either: formal documentation; email, letters or faxes; single or multiple conversations, or by implications from the parties' actions. Lawyers are not involved in the formation of these contracts.

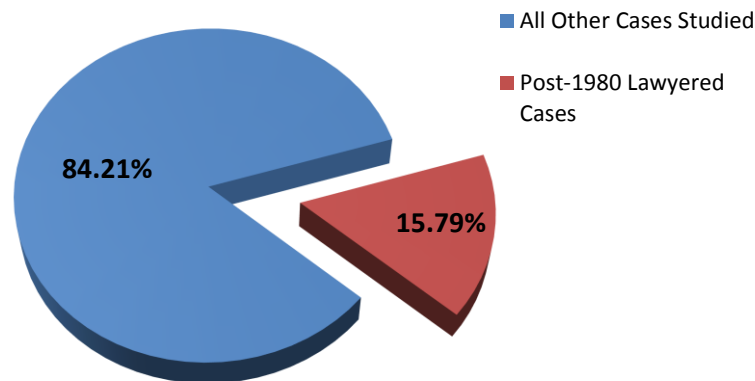
Using this schema, the cases divided into roughly even thirds: 33% were lawyered contracts, 36% represented one-sided contracts, and 32% were informal/principals contracts, meaning that only about one-third of the cases arose out of contracts in which both parties engaged in some degree of legal planning. However, the cases in the book tend to be somewhat dated, in fact, 70% of the cases studied were decided before 1980. Thus, to the extent I wanted to focus on lawyered contracts reflecting the realities of “modern” transactional practice (defined somewhat arbitrarily as those decided after 1980), just over 15% of the selected cases met these criteria.

Number of Cases in Each Category by Year Litigated



Thus, while roughly half of the lawyered cases arise from contemporary transactional practice, these cases represent only a small fraction of the overall course syllabus.

Post-1980 lawyered cases as a % of cases studied



I will be the first to note that this is not a scientific statistical analysis. My sample did not account for every case in the casebook, but only the ones I assigned (though I certainly did not intentionally skip any post-1980 lawyered contracts). Further, the categorization scheme is not very sophisticated, and the 1980 cut-off date is inevitably

arbitrary. Lastly, some cases were difficult to classify, and I had to rely on an intuitive reading of the appellate opinion and, if available online, the trial court's decision.

Nevertheless, the basic impression rings true. It comes as no surprise that most cases in the casebook do not reflect contemporary transactional practices.¹⁷ They recall either the era of *Dickinson v. Dodds*¹⁸ and *Kingston v. Preston*¹⁹ when significant deals were hammered out between two principals unassisted by counsel; or reflect the more contemporary reality where litigation is occasioned by the lack of representation or planning by the weaker party; e.g. *Hill v. Gateway*²⁰ and *William v. Walker Thomas*.²¹ In a majority of these cases however, lawyers were not engaged in diligence, negotiation and drafting—the core features of contemporary transactional practice.

Further, these cases are poorly suited to facilitate discussions regarding deal structure and planning. How can I inquire: “What should the lawyers have done?” when the litigation is driven by the fact that at least one of the two sides was not represented by counsel. Moreover, when asked to “fix” the contract, students typically opt for the easiest solution (“they should have put in a merger clause”). Though often technically correct, this answer fails to engage with the business, tactical and strategic reasoning required of effective negotiators and drafters. Serious discussions about lawyering must analyze the litigated provisions in the context of the deal as a whole: Which party wanted the term? What purpose was the term designed to serve? Why was a clearer term not drafted? What tradeoffs would be implicated by alternative approaches? Unless one starts with a planned transaction, this line of questioning is rarely fruitful.

The cases presented in *Farnsworth* are not bad, but they serve a different purpose. The casebook is designed to teach students to identify the outer boundaries of contract law, rather than the fundamentals of transactional lawyering. For this reason, the classical hypos used by generations of professors test the doctrine's limits: What is the least amount of consideration you can get away with? How large does the mistake have to be before the contract is void? How one-sided can a contract become before a court should refuse enforcement? Will a poorly written condition obligate the counterparty? When should the law imply a duty of good faith?”

Finally, law school habituation trains us to read these cases as litigators and policymakers, rather than planners. Because the casebook is largely concerned with the “frame” of contract law, class discussion invariably focuses on validity and enforceability, rather than prudence and good lawyering. What emerges is a version of contract law interested almost exclusively in the boundaries of legal concepts. But within these limits—the arena of transactional practice—the commitment to freedom of contract leaves the law with fairly little to say. To continue the metaphor, while the standard course explores the boundaries of the box, it does not effectively teach how its contents should be organized.

¹⁷ For a related analysis regarding the composition of contracts casebooks, see Ethan Leib, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 QUINNIPIAC L. REV. 1, 9-11 (2005).

¹⁸ *Dickinson v. Dodds*, 2 Ch. Div. 463 (1876).

¹⁹ *Kingston v. Preston*, 2 Doug. 689, 99 Eng.Rep. 437 (K.B. 1773).

²⁰ *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

²¹ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

Part II—The Deal-Centric Approach

One potential solution to this problem is to approach the course from the opposite perspective and center it on contract drafting and business planning. Such a course would presumably start with a term sheet and divide the students into teams of lawyers and clients who must produce a negotiated contract. While I have no qualms about offering such a course in the law school, I do have reservations about making the drafting of a deal the primary orientation of a first-year class.

First, the “real world” deals that merit significant attention by professionals invariably draw on issues of corporate and agency law, securities, bankruptcy, secured financing, insurance, and other substantive areas of law beyond the grasp of 1Ls. Secondly these deals require a working knowledge of the business climate and key financial terms (e.g. mezzanine financing) that similarly elude most first year students. Finally, and more fundamentally, I fear that the skills addressed in such an approach are too specific to a certain type of legal practice to be transferable, and come dangerously close to a semester-long CLE in “How to Draft a Business Agreement.”

For this reason, I devote a limited amount of time to drafting specific contractual language as opposed to exploring the concepts that should be addressed by a contract. Any lawyer worth his salt must know the differences between “best efforts” and “reasonable best efforts,” or how to draft an airtight confidentiality provision. Yet, the ability to constrain the counterparty while subtly granting your own client breathing room will come with experience in a business practice. By contrast, the broader social and jurisprudential themes embedded within each of these provisions are best explored in a law school classroom.

Part III—The Conceptual Approach to Transactional Lawyering

In toying with Practicum over the past few years, I have (re)discovered that legal academics are not better than hornbooks at teaching doctrine, and not better than law firms at training practitioners. Our comparative advantage lies in our ability to conceptualize legal issues and investigate the content, rationale and advisability of the law's many categories and distinctions. For this reason, my course aims to convey a conceptual, rather than practical, introduction to transactional lawyering. To a large extent, this approach is modeled on the standard first-year course. Though litigation-focused, a typical course does not teach students how to litigate contracts claims, but rather, uses appellate cases as a vehicle for attacking the conceptual questions embedded in the phenomenon of contract. More than teaching “contracts doctrine,” the classical course uses contract law as a vehicle to train students to “think like (litigating) lawyers.”

With some modification, this should be the animating principle of a transactionally focused course as well. No doubt, “transactional purists” might find this approach too timid and set at too high a level of generality. But just as civil procedure professors do not require 1Ls to draft interrogatories or complaints, I do not expect my students to generate perfect, or even satisfactory, documents. Instead, I use the transactional setting to discuss three themes relevant to transactional lawyers:

- (i) the relationship between legal doctrine and transactional practice;
- (ii) the value that a good lawyer brings to the transaction; and
- (iii) the ethical and policy questions facing transactional lawyers.

In the remainder of this paper, I will demonstrate how these themes are developed through two Practicum assignments.

A. Transactional Issue Spotting

The first assignment begins with a simple fact pattern that describes a Buyer and Seller negotiating the purchase and sale of a \$15,000 car. Buyer does not want to commit to Seller unless the car is inspected by a mechanic. Seller is confident in the mechanical condition of the car, but does not want the Buyer to drag out the inspection process to shop around for a better price. Thus, Seller is willing to agree to the inspection, so long as he is assured that Buyer will close the deal if the car passes. Students are tasked with representing Buyer.

In class, we develop the idea that the parties should agree to enter into a contract on January 1, and schedule the closing for January 10. During this 10-day period, Buyer has the right to take the car to a mechanic, and if the car gets a clean bill of health, Buyer will be obligated to deliver the purchase price and then Seller to deliver the car.

Students are then given an official looking “Bill of Sale” form found in *Dunlap-Hanna Pennsylvania Forms*. The form is designed only to transfer title to the car. The first assignment asks students to send me an email of no more than 500 words explaining whether the form is appropriate for our transaction. Most students are impressed by the legalese and fail to notice that the form does not accomplish our client’s goals.

This assignment teaches one of the most fundamental, yet challenging, concepts in the course—the distinction between the *sale* and the *contract*. In the past, students have gone through the entire course never fully grasping the core idea behind a business contract. Following this exercise, students have not only acquired a healthy suspicion of legal forms, but a firm grasp on the structure of a basic business transaction and the lawyer’s role in planning it.

The second part of the assignment focuses on the issues generated by the more complex transactional structure, or “transactional issue spotting.” We begin by analyzing the conceptual problem generated by the proposed structure. When the contract is signed, Buyer will not own the car, nor will he have any rights to the car (save the ability to take it to a mechanic). However, should the mechanic give the car a clean bill of health, Buyer will be liable for damages if he fails to perform. After highlighting these legal consequences, students quickly understand that Buyer requires some legal protection.

Students are then tasked with spotting other issues implied by the more complex deal structure. In-class discussion typically generates the following list:

- Risk of loss during diligence period (including at mechanic’s shop)
- How will the mechanic be selected?
- Who should pay for the mechanic’s inspection?
- What are Buyer’s remedies if the car fails inspection?
- Should there be a deposit? Should it be forfeited if Buyer breaches?
- Can Seller continue using the car during the diligence period, and if so, under what conditions?

At this point, the “law” re-enters the picture. Students are called upon to conduct research as to what law or default rules say about these and other questions. Here, I reference not only cases studied in Contracts, but draw on the basic principles learned in Torts and Property as well.

For example, students know enough property law to realize that as long as Seller owns the car, he can use it as he pleases, such that any restriction on Seller’s usage must arise contractually. We then consider how Buyer might induce Seller to accept such restrictions. Is Seller desperate enough to simply accept a restriction? Should Buyer offer a higher purchase price? A nonrefundable deposit? Demand a price reduction if more than *X* miles are driven? Should Buyer demand that Seller’s insurance cover the vehicle during this period?

Here, students are introduced to the concept of default rules and the interplay between the rules of law and contract drafting. Not only does this exercise help solidify how contract’s largely default rules are very different from the mandatory injunctions of criminal law, but it also allows students to develop a concrete appreciation for how contractual terms can impact the deal’s overall value.

The class then moves to consider a number of related issues. How should a mechanic be selected? At Buyer’s discretion? By mutual agreement? Or should a mechanic be designated in the contract? And what happens if the mechanic says that the car needs a \$400 brake job? Did the car “fail” inspection?

Further, what should happen in the event of breach? Students dutifully trot out the damage formulas, but I encourage them to consider how they will play out in the context of this deal. Can Buyer obtain “cover” if Seller breaches? (Probably.) Can Seller find an alternate buyer if Buyer breaches? (Probably.) Should the apparent absence of meaningful remedies at law impact the drafting of damages provisions? Does this deal warrant a non-refundable deposit for the benefit of Seller and a liquidated damages clause for the benefit of Buyer?

Students quickly realize that deceptively simple contract can become quite complex. But while greater specificity produces more certainty, it also generates further cost and complexity. At some point, we must step back and ask whether the added specificity is worth it. Is the lawyer still adding value to the transaction?

I therefore encourage students to consider the concept of the contract’s potential risk and Buyer’s legal exposure—in short, the worst case scenario. Here, we again return to the law. Basic research into the law’s default rules teaches—

- If the car turns out to be a worthless lemon, Buyer will have little recourse to Seller.
- If there is a lien on the car, the lienholder’s rights will take precedence over Buyer’s.
- If Seller does not have good title, the sheriff may repossess it.
- If the brakes fail and Buyer paralyzes a pedestrian, he may be held liable in tort.

The most significant potential liability lies in tort. But since the mechanic’s inspection will significantly reduce the probability of this happening, it seems worth

contracting for the inspection—even if the minute details are not spelled out. By contrast, the other risks are capped at the price of the car. The lawyer should advise the client as to what is reasonable to spend on legal fees to prevent a loss of no more than \$15,000.

These exercises do not emphasize precise contract drafting. However, by assessing whether a deal warrants additional complexity, the interplay between default rules and contract provisions, and whether a lawyer adds value to a transaction, the class introduces students to the core skills required to think like a **transactional** lawyer.

B. Reading Cases Like a Transactional Lawyer

The next skill I focus on is “reading cases like a transactional lawyer.” By the middle of the spring semester, students have had the better part of a year to learn to analyze caselaw. Therefore, in reading cases, my goal is to strengthen the connection between what the cases say and what the corporate lawyer does. This can be illustrated by the doctrinal confusion surrounding Letters of Intent (LOIs).

In preparation for this assignment we read the traditional battery of LOI cases: *TIAA v. Tribune*,²² *Channel Home v. Grossman*,²³ and *Cyberchron v. Calldata*.²⁴ Students are then presented with a more complex set of deal facts that build on the first assignment, where an LOI offers an appropriate solution. Here, we examine how we can insure that our LOIs will be “boring” and avoid the doctrinal minefields animating the caselaw. Specifically, the cases demonstrate that:

- (i) Lawyers and judges have difficulty distinguishing between LOIs and fully executed agreements on the one hand and nonbinding documents on the other. Students are to assess whether their LOI is at risk of being misinterpreted down the road.
- (ii) Courts differ as to how to define the obligation to proceed in good faith negotiations. What steps can be taken to minimize the chances that Buyer (our client) will be found to breach this duty? Conversely, what mechanisms are available to ensure that Seller’s feet are held to the fire?
- (iii) There is considerable uncertainty as to the appropriate remedy for a breach of the duty of good faith. What tools can be employed in our LOIs to address and simplify this issue?

In grading the LOI, I do not test whether students have produced a perfect or even serviceable document. Instead, similar to a traditional exam, I look for the degree to which students have (i) understood the conceptual difficulties presented by LOIs, and (ii) developed a contractual framework to avoid the pitfalls reflected in the caselaw.

Part IV—Payoffs

The conceptual approach to transactional teaching not only improves students’ preparedness for legal practice, but also increases their appreciation for the course’s theoretical and ethical dimensions.

For example, in teaching contractual interpretation, I discuss the different possibilities of why a contract may be deemed ambiguous. Is it because: (i) the parties

²² *Teachers Ins. and Annuity Ass’n of Am. v. Tribune Co.*, 670 F. Supp. 491 (S.D.N.Y. 1987).

²³ *Channel Home Ctrs., Inc. v. Grossman*, 795 F.2d 291 (3rd Cir. 1986).

²⁴ *Cyberchron Corp. v. Calldata Sys. Dev., Inc.*, 47 F.3d 39 (2d Cir. 1995).

neglected to be explicit; (ii) the parties could not have foreseen the circumstances that ensue; or (iii) the term was deliberately left ambiguous to facilitate the agreement?

Because students have taken initial steps towards drafting agreements, they have a more sophisticated appreciation for the value of deliberate ambiguity, and are more attuned to these subtle distinctions. The class can therefore be more effectively framed in terms of recent scholarship arguing that each form of ambiguity warrants a different doctrinal response.²⁵ Similarly, in years past, few students internalized the idea that “deal terms are simply another way of adjusting the price.” However, once students have had experience in negotiating terms for price adjustments, the idea resonates with greater clarity. More generally, the distinction between *ex ante/ex post*—which stands at the core of law and economics scholarship—becomes much crisper when students have inhabited the roles of both the *ex ante* planner and the *ex post* judge.

Finally, I make use of the transactional context in discussing the traditional domain of the Contracts course—the outer edges of contract law. Having learned just how much “value added” a lawyer brings to a transaction, students gain a deeper appreciation for the social difficulties that arise when only one party has access to professional guidance. My discussion of these issues has evolved from locating the moral issue in the abstract (i.e. how should “*the law*” view an unconscionable contract), to placing it on the moral horizons of the individual student. Viewed from the perspective of the contract drafter, the “policing the bargain” materials force students to take responsibility for how they will use their legal knowledge. Will they consider the social consequences of the provisions they author? Or, as Llewellyn feared, will they be encouraged to draft “to the absolute limit of what the law can conceivably bear.”²⁶

The idea for the Practicum emerged from the first iteration of this conference. When I began thinking about implementing a Practicum, most of my colleagues were supportive, yet surprised that I—someone who is generally perceived as being more interested in the “academic-theoretical” side of legal education than in practice—was interested in this method of teaching. As a result of considerable collaboration and revision, we are in the midst of developing an approach that engages contracts at the point where theory, doctrine and practice converge.

JESSICA RUBIN

TEACHING INTERVIEWING, NEGOTIATION, COUNSELING, AND DRAFTING SECOND SEMESTER

Introduction

Hello. I am Jessica Rubin, and I direct and teach the legal skills program at my law school. I want to describe to you how I’ve incorporated transactional skills teaching into our first year curriculum. We’ve talked already about the motivators for bringing transactional teaching into law schools, and there are the general reasons that we’ve already heard about.

²⁵ See, e.g., Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581 (2005).

²⁶ Karl Llewellyn, 1 STATE OF N.Y., REPORT OF THE LAW REVISION COMMISSION FOR 1954 AND RECORD OF HEARINGS FOR THE UNIFORM COMMERCIAL CODE, Legis. Doc. No. 65, at 177-78 (1954).

But for me, a great motivator was the fact that I wanted to see them addressed in the first year because, by doing that, I felt like it would put transactional skills on the same level as the other fundamental skills that are introduced during the first year. If integrated into the first year curriculum, they would become equally important to research and writing in a litigation context. I was motivated by the lack of transactional teaching that was going on, the market need for transactional skills training, and even more so, the need to have those kind of skills addressed and taught during the first year of law school.

Curriculum

Let me first describe to you what we had in place at my law school, which was a traditional first semester legal research and writing class. We put most of our research and writing teaching into the first semester. In the second semester, we tried to teach our students what we call practical lawyering skills - interviewing, counseling, and negotiating. And traditionally this was done by having the students rotate through simulated exercises where we gave them fact patterns and said, "Pretend you're a lawyer or pretend you're a client, and do this interview or negotiate this problem." And we were fortunate to have adjunct faculty who observed the simulations and gave feedback to the students.

But, the problem was that each week, the students encountered a different fact pattern, different area of law, and different partners. And I think their heads were spinning; I know that my head was spinning. I wanted to change the way things were done. What I did in designing a new course was to add the important skill of contract drafting to that second semester course. So now they learn interviewing, counseling, negotiating, and contract drafting. But, what I did with all of the exercises was to take them out of the litigation context.

I added the skill of contract drafting and I pulled all of the simulations into the context of a transactional practice setting. I also hoped to give them a sense of a more sustained client experience. Rather than having different fact patterns and different clients for all the simulations, I had them stay with the same client for at least half of the semester. And my hope was that by doing that they would have a more holistic view of the role of a lawyer.

A lawyer sees a client really through many stages of its business life. I wanted students to have that experience. I also wanted students to have the experience of engaging in deep thought and time to deliberate, because so often in law school, I feel like we train our students to have quick answers in class and quick answers on exams. I really wanted to cultivate in my students the ability to deliberate, sleep on things, and have a long-term experience with a client. Those were my goals in really creating a new course.

I want to describe to you the course that I created, and please interrupt me with questions as we go if you'd like. We have large classes, and so I was faced with a class of about 44 students. I had the privilege and have the privilege of having four adjunct faculty members, practicing lawyers, assigned to my section. Our law school's administration is very supportive of our program and funds adjunct faculty positions for the class.

What I did was structure a class where I spend the first six weeks of the semester giving them, before we turn to a specific transaction, a basic introduction to the fundamental skills. We spend a week learning about interviewing, a week on counseling, a week on negotiating, and a week on contract drafting. I explain the skills, we talk about them, we demonstrate them in class, and then they practice them on business problems.

For interviewing and counseling, students interview and counsel a client regarding the sale of business and the signing of a covenant not to compete. By going through that isolated little problem, they try out their vocabulary and try out their skills for interviewing and counseling. To teach them negotiating and contract drafting, I have them work on an employment agreement. They negotiate against each other and then try drafting the agreement. Again, these are small steps to hopefully cultivate some fundamental skills.

With that foundation of a few weeks and some basic skills behind them, I move them on to what I call, our business deal. We start the business transaction. The way I structure it is to have students paired together for the remainder of the semester. Two students work against two students, and each team of two students has an adjunct faculty member or me. That adjunct faculty member or me stays with the pair of students for the duration of the transaction remainder of the semester.

The adjunct faculty member really serves two functions. The adjunct faculty member is a source of factual information for the students. They interview that faculty member as if they're interviewing a client to gather information, and I supply the adjunct faculty members with weekly role instructions. I'm feeding the facts to the students via their clients. The second role that the adjuncts play is that they are observers and critiquers. After each client meeting with the adjunct, the adjunct, after giving all the client information the students have asked for, then steps out of role and gives them feedback on their performance. What did they do well, what did they do poorly, what information did they miss?

I feel very fortunate to have a wonderful staff of adjunct faculty members who come back year after year.

I try to recruit adjuncts from different areas of practice. Each adjunct comes from an area of practice that at least touches on transactional work. But I have bankruptcy lawyers, I have environmental lawyers, I have intellectual property lawyers, so that my students get a variety of exposure. The challenge in having the students go through a transaction during their first year of law school is that they know nothing about transactional substantive law. I feel like I need to teach skills through the lens of transactional law.

We meet twice a week, usually on Tuesday and Thursday. In class, every Tuesday, I address to them some area of substantive law. We start these substantive lectures by talking about what business entity is appropriate for your client. Then the following week, on a Tuesday, we discuss how to decide with your client what they want to do, buy stock, sell stock, or buy assets and sell assets. What are the advantages and disadvantages of each strategy? Then, the following week, we discuss issues relating to selling and buying assets. In subsequent weeks, we discuss real estate issues, intellectual property issues, and environmental issues, each with a focus on their place in a transaction. Each week on Tuesday, we talk about substantive law. Then on Thursday, they meet with their adjunct/client and they interview and counsel that client about the law that we've talked about. After a few weeks, they've gotten enough bargaining authority from their clients to start meeting with their opposing group of lawyers and start negotiating, so that in the end, the group of four student lawyers produces one final contract, an asset purchase and sale agreement.

I've found that, as we talk about the substantive law in class, not only do I explain the law, but I do it in a very practical way for them. For example, I might say, "If you're representing a buyer, what kind of issues concern you when you're buying intellectual

property?” Or “if you’re representing the seller, what are your concerns when you’re selling machinery?”

I have found, much to my pleasure, that they’re really able to articulate the concerns from their guts. If I say, “Your client has been asked to make a promise that the intellectual property they will sell is owned by the client. What worries you?”

If I tease it enough out of them, they realize “Well I want to be sure that the client really owns the intellectual property. I want to be sure that my client’s employees have assigned it to the client under their employment contract.” Even if they don’t have the legal vocabulary to articulate contract terms, they are aware, at least in their guts, that “I can’t make that statement unless I do some homework. I can’t make that promise or that representation.” Similarly, when we talk about buying machinery, if I say to them, “You’re representing the buyer. What are your concerns?” They usually respond, “I want to know that it works. I want to know that it’s been maintained and you’re going to fix it if something goes wrong before closing.” They know in their guts what the issues are, and class is really designed to connect those gut feelings to contract terms. That’s what happens in class on Tuesdays, and then on Thursdays, as I said, they are able to go forth and meet with their clients and interview and counsel and then go even further and meet with each other to start negotiating and drafting.

Evaluation

One challenge that the class faces, in my opinion, is how to evaluate the students. Most of them do not want to be evaluated on their performance. For most students, this is their first time for engaging in these lawyering skills, and they don’t like to be watched and graded. To encourage participation and preparation, while alleviating their concern about being graded, I give them a soft scale for participation, and I’m very careful to explain to them that they’re not being graded on the results. They are not graded on the monetary result of the transaction, but instead on how they demonstrate effort, thoughtfulness, and preparation. So I try hard not to attribute too much grading to the early stages of the exercise.

I grade the final contract that’s produced by the group of four students. One potential problem of this is that students end up resenting the fact that they’re getting graded on a four-person work product. To address this concern, I’ve built in other assignments on which the students are graded individually; so they don’t feel like their entire grade rides on the group project. We have a few other pieces of writing along the way where the students submit a negotiation plan or a counseling outline. So they have some ability to rise or fall based on their own merits.

In addition, I assign a final project that is basically a mini transaction and I ask them to address various aspects of it. How would you negotiate it? How would you draft a contract to reflect the following settlement agreement? There’s a combination in my class of grading on group work and grading on individual work. It has been lots of fun to design the class and teach it, but it’s not a perfect model for doing what I’m trying to do, which is to get first year students at least versed in transactional work.

Challenges

I'm left with, among other challenges, this list that I've generated on this slide.²⁷ The fundamental question I have is whether it's too much for first year students, whether it's too much for a very short semester (13 weeks) whether I am watering down important skills and important concepts for the sake of exposing them to the masses. Over the years, some students have complained about having to work on the same facts for half or more of a semester, and some students get frustrated by a bad partner. To those concerns, I tell them that's true of life, so I don't feel too badly about those concerns.

But I wonder whether it's too much and whether using adjuncts and relying on adjunct faculty to such a large extent runs the risk of the students having unregulated feedback. I give my adjuncts guidelines for feedback, but at some point they are free to give their feedback as they wish. So, for me it's been a very, very great experience. It's been well received by the students.

Conclusion

So is it doable? I think so. Has it been worthwhile? I think very much so. Is it perfect? Not at all, but it's really a first step in getting transactional teaching and business skills on the same playing field as litigation skills. And I think it's really important that the title of this weekend's conference is "What's Next?", and my hope is that a full integration of transactional skills into a first year curriculum is what's next. So at this point, I'm the last person standing between you and the cocktail reception, so let me hand it back to you.

QUESTION AND ANSWER SEGMENT

MICHAEL HUNTER SCHWARTZ

We are very open to questions. This is what happens when you have people with a transactional focus collaborate on a presentation - they actually stick to their times, which never happens on other panels.

CHAIM SAIMAN

And now for my grand theory on contract law...

MICHAEL HUNTER SCHWARTZ

So we are glad to take your questions, either all of us, or if you want to direct them. Yes?

QUESTION FROM HOWARD WALTHALL

My name is Howard Walthall from Cumberland Law School. This question is particularly for Michael and Chaim? The conceptual approach versus the actual drafting approach I think is a division I'm seeing between you. I have tried, Michael, actual drafting in the second semester of contracts and I didn't find that worked out so well, and any thoughts you have on how to set that up so that it functions better, I would appreciate. I

²⁷ Jessica Rubin, *Teaching Transactional Skills to 1Ls Using a Simulated Deal* (PowerPoint Presentation), 14-15, http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Rubin/Rubin_PowerPoints.ppt.

tend towards Chaim's approach, which is to walk right up to the drafting and explore how a provision, a merger clause, a liquidated damages clause would work, why it's important, what the legal base is, what the legal context is, and then stop. So that's where I'm at now. I would like to try drafting again, but I'd like to--

MICHAEL HUNTER SCHWARTZ

So it's Howard Walthall. He's at Cumberland Law School. His question was about things that can make the drafting model more workable in the context of a basic contracts course. Let me start by saying that I have been really satisfied with how drafting exercises have worked in my contracts classes for the last few years. First, use very narrow drafting problems; have your students draft single provisions, not contracts. Second, the stakes matter; how they do on the drafting exercise has to count towards their grade. In my class, the drafting tasks collectively things count for five percent of their grade in the course, and the students know that the final exam will include one drafting experience. Third, one of the things that Jessica talked about is the quality of feedback. I think the feedback is the most important piece in terms of producing a robust learning experience, and so what you comment on and how you comment on it and then how you debrief the exercise is crucial.

This semester, for example, I held an extra class session where we used some examples from things they had written for the first two or three drafting experiences and talked about what worked, what didn't work, why I was concerned about it. A lot of the points that came up were the things that are core drafting principles like avoiding needless uses of legalese, avoiding misplaced modifiers that change the meaning of a provision, making unambiguous word choices. These points essentially became a grading rubric for the future assignments and for when I graded their drafting experience on the final exam.

I actually had a student come to my office and say, "Schwartz, you gave me too high of a grade in contracts." This happened yesterday. And I said, "No, look at what you did on the drafting thing." He said, "Oh no, drafting just comes easy to me." It seemed so interesting to me that he felt like he was somehow getting away with something because drafting is something he just does particularly well. So the reason I partially believe in the drafting experience is because the students love it and because it's an opportunity - not to get them to where they get from Jessica's course, because I don't believe they're getting there - but to get them to feel capable of doing writing projects and to think about the kinds of considerations that were the product of my grading rubric.

QUESTION

One follow-up, Chaim. Why not do it?

CHAIM SAIMAN

I do not think that there is as much space between Michael and myself as has been suggested. My classes do address reps and warranties and my students are responsible for some degree of drafting. However, I tend to focus on the big-picture issues, rather than the precise details of drafting. The subtleties of contract language (for example the difference between "in the best of your knowledge versus "in your reasonable knowledge") are certainly important, but too subtle for the 1L. My goal is for students to realize that a knowledge qualifier exists and later, they will come to appreciate its consequences.

In past years I wrote a drafting question into the final exam. After asking them the standard questions on the busted deal, I would have them go back in time and advise the

client *ex ante*. They are asked to write the memo explaining to the client how the contract can be improved and then draft the language that accomplishes this.

In the future, I will ask the students to mark up rather than draft a document from scratch. I will present them with a form that contains a number of mistakes which they will be expected to identify. I expect that half of the points will be come from correctly identifying the mistakes and the other half based on what solutions are proposed. Further, marking up is easier than freestyle, and in any event, that is how lawyers do it in practice. I hope that this can track the middle ground between the big-picture approach and focusing on detailed provisions of individual contracts. Yet, I still need to experiment with this approach.

MICHAEL HUNTER SCHWARTZ

One of the things that Chaim just said actually really sparked something. On my final exam, students are asked to can explain their drafting choices so that they can communicate, “Here’s what I was trying to achieve.”

QUESTION FROM PETER LINZER

Peter Linzer from the University of Houston Law Center. It’s not a question, it’s a comment. The biggest problem that I see in this whole field is the fact that contracts classes will have been cut down to four credits, making it almost impossible to do this thing. I teach a four credit course, and I’m going to have night students next spring. And I try to figure out how to do it. I do assign a drafting book. I use the Haggard book because it’s skinny. Because I can’t justify them spending a lot of money on a book that I’m going to use four days. And I can’t spend more than three or four days on this, but I think, increasingly, I can look at every case and say to them, how could they have avoided this problem, what could you do? I may be able to do something with that. I don’t know; I’m going to try. I’m interested in the book you’re coming up with.

I think that to me the reason for teaching it the first year course is to temper people, to acculturate them to this whole idea that we’ve all been talking about - that contracts is not litigation of busted deals but is planning and encouraging a client and helping the client to achieve the client’s aims. I think one of the things to think about in drafting in a very precise manner is how does that fit in with relational contracts which essentially are very loosey-goosey? And that’s a tough problem. I don’t have an answer to that. I’m a big relationalist. I’m also a big transactionalist, and that’s a hard thing to put together. The biggest problem though is I think everybody has to go and fight any change in reducing the first year course, because the more you move it down to four credits, the harder it is to do anything but busted deals.

MICHAEL HUNTER SCHWARTZ

That was Peter Linzer of the University of Houston, and I’m not capable of repeating his great insights.

QUESTION

I don’t think you did address my question about what happens when students get overwhelmed having to do drafting along with legal writing and procrastinate. How do you - I mean, they procrastinate their legal writing projects already, and how many credits is your course, and how do you grade these things?

MICHAEL HUNTER SCHWARTZ

I'll go ahead and answer. The five draft exercises the students do during the semester things are all pass/fail assignments, and they pass if what they do reflects a good faith effort. They are very short turnaround assignments so that they get it on Tuesday and it's due Thursday at the beginning of class. My students are not drafting pages and pages. They're not drafting more than a single contract term or maybe two. I also think another good idea is coordinating with your legal writing faculty. One of the things that we do at Washburn is we meet each semester to coordinate our schedules so that we don't overlap. This information allows me to sequence the drafting experiences to coordinate with the legal writing class.

JESSICA RUBIN

In my experience, students are not taking legal writing at the same time as my course, so I don't experience that conflict. They absolutely procrastinate the writing that they do for my course. I break up the grading and I give them a grading rubric for each document, even the contracts. There are basic concepts that I tell them that they need to have in their document, and I encourage them to address quality over quantity. Early on, I tell them, "I don't care how many issues you address in your contract. What I want to see is that you've thoughtfully addressed whatever issues that are there." I'd rather see them trace the stream of money through all the possible outcomes rather than have a scattershot approach to many issues.

CHAIM SAIMAN

We have a four credit course with a one credit practicum. The practicum accounts for 20 percent of a combined grade.

QUESTION

So it's a five credit grade?

CHAIM SAIMAN

Yes, a five credit grade. Yes, the students do procrastinate. They kvetch, about the legal writing and I consistently remind them that this is the reality of legal world. Grading is complex: the difficulty arises from the fact that some students use forms and others do not. When it is clear that a student used a form I ask the student: "Did you understand what you wrote, or is there something ridiculous in there?" In the latter case, I tell students that I will deduct more points if it is clear that they just cut and pasted from a form, as opposed to free-style drafting. In the future, I plan on giving my students a form that does not quite fit for the transaction test their ability to mark it up. This way, the assignment is like a traditional exam where I can check to see whether they spotted the relevant issues and use more standardized evaluation techniques. It will also insure that they read and scrutinize every word of the form—a valuable exercise in its own right.

MICHAEL HUNTER SCHWARTZ

That was Brenda See at Faulkner, and her question was about procrastination and student assignments and motivating students. I actually really do believe - by the way, I just want to make sure I said this - that the students are way more motivated when they're doing these kinds of exercises than when they're doing more traditional exercises. They've already had a whole semester of case crunching by the time they do these drafting exercises. I've actually found them to be excited about it.

QUESTION FROM MARC MIHALY

I'm Marc Mihaly and I'm from Vermont Law School, and I have, I guess, two questions, Chaim. How do you feel about this four plus one? I'm about to pursue four, and I want to integrate transaction into it. Do you have frustration that it's separated that way? Do you think that's fine? And Jessica, I just have a quick question which is, who assembles your groups? Do you or do your students?

JESSICA RUBIN

I do.

QUESTION

The group-- you do? The group of two and two?

JESSICA RUBIN

Yes. I pick them.

CHAIM SAIMAN

Because we went through a curricular change and everything became four credits, the "four plus one" structure helped sell the program to faculty. We do have a practicum hour, and at times, it is early in the morning in order to accommodate the practitioner's schedule. However, since I am in charge of the entire five credits, I can distribute the time more evenly. Doing some type of practicum in a four credit course is hard, but effective what I called "modern lawyered cases"—the 15% of the casebook that is most relevant—in the way I described can go a long way.

MICHAEL HUNTER SCHWARTZ

That was Mark Milhaley of Vermont Law School. He asked Jessica about how she forms her groups - whether it's student-selected or professor-selected, and he asked Chaim whether-- how he feels about the four-units-plus-one issue.