

CHALLENGES AND SUCCESSES IN TEACHING TRANSACTIONAL DRAFTING

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TRANSACTIONAL DRAFTING LABS: SETUP, SETBACKS, AND SMALL VICTORIES

Will Foster

I am going to spend a little bit of time talking about transactional drafting labs.

My perspective on these courses has recently changed. I have taught transactional drafting labs for three years now and have some experience with them in that capacity, but then I moved into an administrative role in the last few weeks. Therefore, I am starting to rethink these things and am looking at them pretty critically and deciding what is working and what is not. So, that experience will largely be the focus of my talk here.

I have a few examples of some things that we do that I think work, and I will at least flag some issues. My goal is to draw your attention to some items you might want to have on your radar (in terms of planning on the front-end or problem-solving) if your school either has these drafting labs or is looking at implementing them.

Initially, the concept for drafting labs, at least as we have implemented them, is that they serve as a supplemental class or “side-car” to a main course. These courses are designed to focus on, or at least incorporate, documents, drafting skills, and drafting tasks, if you will, that are fundamentally connected to that primary course.

Why have a separate course? Well, you know that focus in the classroom tends to be so distinct from what the actual practice of law is in a particular area. Also, we have lots of ground to cover in corporate law classes such as securities and M&A, or in estate planning or other similar classes. Therefore, even a few skills-based exercises in these classes do not provide adequate exposure to the real work of lawyers practicing in the field on a day-to-day basis.

Also, many students still finish their law school experience with no introduction to the documents that are used in practice – the agreements and

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filings that actually give effect to the transactions they study. And so, at the very least, drafting labs give students at least some exposure to document work.

I believe transactional drafting labs of one sort or another are employed at Oregon, at Boston College, Denver, and several other law schools. At the University of Arkansas, we have drafting labs as components in our Wills, Trusts & Estates courses, Nonprofit Corporations, Mergers & Acquisitions, Securities Regulation, Domestic Relations, and Real Estate Transactions classes. As you can see, these courses run the gamut in terms of content – with several transactional and business offerings, but also subjects that extend into very different practice areas. In each case, we are at least looking at the skill of drafting, but in a variety of contexts.

Stand-Alone or Integrated Course

I thought I would talk about our approaches to structuring these courses and some of the issues we have encountered, i.e., the “setup” and “setbacks.” The first issue I want to talk about is whether we have a stand-alone course or whether we integrate a drafting lab component into the regular course.

As the stand-alone course, oftentimes this is a separate course that meets at a different time from the primary case-book course, and you can even have different instructors. Often the stand-alone instructors are adjuncts who are meeting in the evenings for one or two hours each week. The downside to that approach is you may not have parallel enrollment in the class, particularly when these classes are at 6 or 7 o'clock in the evening when the adjunct is available. We might get a third of the enrollment or less than what we have in the main course. That said, there are some upsides to having smaller classes as well.

When I talk about incorporated or integrated classes for these drafting labs, I'm referring to something that we have done to adjust when those stand-alone drafting labs do not fill up in the evenings, or when we could not get the adjunct lined up to teach it. In those cases, we have taken the three-hour primary course and make it a four-hour course. We have also taken a three-hour course and made every sixth class a drafting class with a separate assignment—so if it's a three-hour class, it meets three times a week, and one class every other week will be spent reviewing the drafting assignment.

You can do the same thing with a four-hour class that meets four times a week. You could have every fourth class if you have the energy and the time to devote to that. It leads into some of your other coverage, but it can reinforce much of that casebook coverage. Even if you do not use that full class period, I would give at least some consideration to devoting class time regularly to drafting assignments.

We recently took the integrated approach for Nonprofit Corporations, when the separate class failed to meet enrollment targets. We rolled the drafting component into the main course, which had 25 students. The adjunct

instructor was kind enough to adjust her schedule to attend most of the drafting sessions. Perhaps not surprisingly, there was pushback from students. Students said, “I would not have signed up for Nonprofit Corporations had I known that every sixth class we had a drafting assignment.” They were upset in part because they had additional deadlines and assignments, and in part because the feedback was frequent and blunt. But, I was willing to take that criticism because more students got substantial drafting exposure.

Coverage Issues

So, when you have the separate or stand-alone class, the question then comes regarding whether you are going to have independent coverage. Coverage can be an issue in a couple of different ways, in terms of timing and substance. Timing is going to be an issue, whether you have an integrated drafting lab or whether you have a stand-alone drafting lab. For example, your first M&A drafting lab may cover a confidentiality agreement or a letter of intent. But you may not otherwise address the substance of the letter of intent or a confidentiality agreement until week three or week four in the primary course.

Coverage timing can likewise be a challenge in the Nonprofits class. You might be talking about the theory of a charity or the justification for tax exemptions for nonprofits for a week, and your first-week drafting assignment is articles of incorporation. Aligning that coverage can be an issue especially if you have an adjunct teaching the drafting lab and there is not a free flow of communication between the adjunct and the primary professor. So, it is helpful if you can anticipate these issues and plan the coverage sequence for both classes to complement each other.

A separate issue is whether the substance of coverage will vary. We have two different professors who teach Wills, Trusts, and Estates. One focuses on Arkansas law and specific techniques that are useful in Arkansas. The other teaches out of another book and takes a broader approach to that course.

Well, what happens when you have a professor teaching a drafting lab and an early assignment is a beneficiary deed? One professor covered beneficiary deeds and the other did not cover them. Clearly, that does not mean that you cannot use the beneficiary deed as your assignment, but it does mean that the students initially are not going to be on the same playing field, and you might have to spend that time in the drafting lab going over what a beneficiary deed does, what its use is, and that is going to be a waste of time to some extent to some of the students who have had this already. That may not be the most optimal use of that drafting lab time for the others. So, again, it is not an insurmountable problem, but it is one where anticipation and open communication can help.

Non-drafting Assignments

I would like to emphasize the fact that not all assignments in the drafting labs have to be drafting assignments. By this, I mean that some can be reviewing examples of documents, finding different items, finding different provisions, and reporting on their functionality and utility. That is why I have included in the handouts an example from our securities regulation class. This is a very, very simple assignment, but it is really good at getting the students searching through the publicly-filed documents. I had them go on EDGAR, pick a company—any company that they were interested in—and look at their most recent Form-10K filed by their company, as well as the risk factors that are included in that.

So, give me some law. Go find out what law or what regulation is going to require the form and content of these risk factors—what are they, what is unique to your company, what is standard for all industries across the board, and what is standard for this particular industry, so they know what is unique to that industry and that company.

I then have them look at a competitor, and they are surprised. They see a lot of the same risk factors time and time again and how they are different and how they are similar. This is a very simple assignment to put together, but it is also something that they can do with very little background on SEC filings. It gets them used to using that system and the database, so I like that a lot.

One thing that I really like using in the M&A drafting lab is the publicly-filed transactional documents. I have students find four examples of a representation and warranty with respect to taxes. You know all taxes have been paid; nothing is due. Then pick the best one, and tell me why they like it. It is easy to do. It also does not require a lot of grading. Those types of assignments can be done more quickly without a lot of background on the use of the document and can give you a little bit of context.

Staffing Drafting Classes

Another issue that comes up regularly is whether we are going to staff these transactional drafting classes with full-time faculty or with adjuncts. Adjuncts are a natural fit. I think probably the primary motivating factor for us in starting to use these transactional drafting labs—I should say drafting labs in general—was that we have good adjuncts who do this sort of thing for a living. This is what they do day in and day out, and they are not necessarily trained or enjoy teaching doctrine, teaching from a casebook, or teaching cases. That is not what they do on a day-to-day basis. So, what is the highest and best use of their time? Well, they have probably drafted four promissory notes this week. Can we teach our students the things generally addressed in a simple promissory note? This not only informs our course work—these separate drafting labs—but also opportunities for adjuncts to come in and give single presentations, doc talks, or transactional tools talks. Again, the idea is trying to

make it easier for them to present, cutting down on their workload, getting up to speed, and then also using their strengths.

Staffing drafting classes with adjunct faculty also gives students a better understanding of the typical practice in the geographical area. Oftentimes, the norms of practice in a particular region deviate from what is covered in national casebooks are, particularly in something like securities regulation. Well, a lot of what we do is Reg. D work, and a lot of what you have in the national securities books is going to be publicly-traded companies' stuff, so it involves not only the substance of what the local bar covers, but also what the expectations are by the client. Clients may only be willing to pay for a particular type of document or a certain amount of detail in an operating agreement, and adjunct faculty are helpful in letting students know when a work product would be outside of the typical range of practice in the area. A separate reason I love working with adjuncts is that they are really candid with their feedback, which is much better to receive in law school than in practice.

When you are looking at whether or not you have full-time faculty involved, it is much easier to align the labs with the substance of the course—of the primary course. So if I'm teaching the primary M&A class that meets three times a week and the drafting lab, I know not only what is in the syllabus, but what we actually covered and how we covered it. That can help both in terms of the sequencing and the substance.

Grading and Assignments

Grading can also be significant hurdle, especially the volume of grading if you have assignments due regularly. This is the same for full-time faculty, part-time faculty, integrated, and stand-alone courses.

What I encourage for the first couple of times you go through this is to be pretty conservative with assignments. In my M&A drafting lab, I have them do a confidentiality agreement and letter of intent. I have them do the stock purchase agreement and opinion letter all in a one-hour class so they have something to do every other week in a one-hour class. The product is what you would expect a lot of times when you throw that much material at them. There is value to it in that they are exposed to a lot of things, but the grading and giving serious feedback can be overwhelming for everyone.

I know this is transactional drafting conference, but I thought this example from a Wills, Trusts and Estates class writing assignment was a good example.

So, we are talking about a trust agreement, but the task, if you look at it, is to draft the portion of the trust that would create a certain power of appointment and keep on the lookout for some of these issues. This is drawn from fact pattern for the (Lexis Skills and Values) text on trust in the states. Again, isolating a really small drafting task instead of doing a full document is really helpful for getting students to focus on the precision of drafting, so I thought that was a good example. And you can have more robust facts. You

can have few different drafting tasks involved. For instance, this professor took the approach where every fourth class there is a drafting assignment due. She has 60 to 80 students in that drafting class, so she has 60 or 80 papers to grade, which gets to the next point.

What do you do when you have 60 to 80 papers to grade? The colleague who used this assignment graded it in three general categories: “check,” “check plus,” “check minus.” The point is simply to ascertain whether the student got close to the mark: “Was this about what I was expecting?” “Did you do a great job or is there nothing that is really relevant?” Over the course of the semester, it takes a while to go through all the papers, but you can be more efficient if you limit the grading feedback to fewer, broader categories.

An ungraded drafting lab is one way to entice a busy potential adjunct who is on the fence about teaching it. But the student work product is often commensurate with the level of scrutiny they think is going to be applied to it. So, that risk tends to skew against ungraded classes.

Even if not graded, or even if feedback is limited, I still think there is a lot of value in getting students exposure to these documents, particularly if it is taught by a practitioner with significant experience the area. Getting students to see how the adjunct thinks about these documents and getting them to at least open up and start thinking about the actual process of drafting an agreement provides value, even if it is not ideal.

Whenever possible, giving individual feedback is really critical. One way—if you have a hard time setting aside the time or the affiliated faculty has a hard time setting aside the time to actually sit down and give in-depth feedback—is to do live grading. Legal writing faculty have done this for a long time now. The idea is simply, “Turn in the assignment, and I will go through and give you my feedback as I am reading it in a 15-minute session or a 30-minute session that we have set aside to meet.” You can say, “The structure looks good here,” “the format looks off here,” and “here are some consistency issues and terms that need definitions.” That is one of the reasons why I included this separate handout here, which is an example of student work product—this American (Drug, Inc.) letterhead.

If you take only two minutes to look at this letter of intent, several things are just going to jump out to you immediately. You have some formatting issues. You have deal terms that they knew should have been included that were not. They know who the president of each company is. You know who should be signing on the behalf of the company, but that’s left blank. If you go down to section 8, “Miscellaneous,” they talk about paragraphs number 10 through 15 and then there aren’t 15 paragraphs in this agreement. Those are all common mistakes and are not obvious for people that have not had exposure to document drafting.

Team vs. Individual Grading

Related to the subject matter of grading, one of the things that has cut down on the grading burden for faculty is using teams, particularly in M&A. I have the students work in teams of two for the buyers and teams of two for the seller. Now, I have tried teams of three once. Teams of three do not work. Teams of two work pretty well, and they take on that role of buyer or seller and really internalize the motivations in that role, “I am concerned that I am not going to get paid the full amount or the full value,” or “Am I have some sort of ongoing liability after the sale,” or “As the buyer, I’m worried that I am not really getting what I think I am getting in this transaction.” When you let students on teams or otherwise stay in their role for the full semester, these motivations and risks become more obvious to them.

As you have seen from the other presentations, there is some frustration when people are working groups together. It is very hard to know really what goes on outside of the classroom in terms of the relative weight. That is why I have included peer assessment sheets. The idea here is that you can ask them a few questions. If you show them the assessment sheet at the very beginning of the semester and say that everyone is going to fill this out confidentially about everybody else on their team, there is at least the threat of accountability. The threat that a teammate will say something about it helps minimize the likelihood of one student doing the bulk of the work.

I have a note here about grading and anonymity. I was glad to hear in other sessions that others struggled with whether to use strict anonymity or not in these drafting classes. If the drafting class is working the way that it should, there is a lot of feedback going to the students, and the students are asking a lot of questions. In the smaller class, it can be pretty obvious who the students are when they submit work to you if there has been a lot of back and forth over their drafts. If that is problematic, it is pretty easy to work around. You can have students select numbers and work with your faculty assistant to ensure anonymity. It’s possible, but it is not something that is a huge priority for me in these courses, particularly when we might end up with 6 or 8 people in a drafting lab course and they’re working on teams of 2 and you have four submissions.

Value

The last slide I have simply identifies some of the value I see in these drafting labs. Everyone at this conference probably appreciates the value of teaching transactional skills—of working through documents—but some of them are perhaps less obvious after you have been practicing a while. That is another reason why I wanted to include an example of student work. In these courses, you are teaching students skills and giving them exposure to a range of tasks. You’re giving them connection to the bar, to these practitioners who do this work all the time, and you are giving the bar an opportunity to interact with your students.

Getting students exposure to forms practice early on is really a fantastic thing. If they have to go out and learn how to find forms—what is a good form, what is not a good form, and what is appropriate for this transaction—it can be very useful. I guide them a little bit more in the M&A class than I used to, but when I told them to go out and find a form, I would get some people with a 70-page stock purchase agreement and some people with a 5-page stock purchase agreement. Which one was appropriate for this transaction? Well, neither probably; a 15 to 20-page agreement would have been appropriate in that circumstance. It is much better to learn that here in this environment where the worst thing that is going to happen to you is that you are going to get a disappointing grade than when you cross that threshold and go out into practice and make a mistake.

Learning how to modify forms is a breakthrough for many students. They learn for the first time that as a lawyer, you can actually modify a form document and make it better suited for the transaction. Oftentimes, you should not modify it too much, but sometimes it's both appropriate and necessary to make extensive changes.

One other thing that we have alluded to here is working with word processing software. Many students do not know how to redline a document and send it back and forth. So, when we have these students working on teams, I will say, "Okay, send a clean and redlined copy to opposing counsel." Then they will send a PDF document to the opposing counsel or they will email me and not email opposing counsel. And of course, it's much better to address these things in the classroom than in practice.

Resources

I'll quickly mention some of the resources I use. I'm fond of the Practical Law Company materials, especially the drafting notes. The forms may not be optimal for everything, but there are a couple of examples of most of the forms you would want to use. It is available via Westlaw now. Oregon's program started off using that at least. We followed that model. It works pretty well, at least for initial exposure.

The ABA Model Stock Purchase Agreement with Commentary is extensive and complicated. However, it is also a nice contrast to the simpler PLC documents if you want to show students a more robust agreement.

Lexis Skills and Values series has not migrated as much over to the transactional stuff, but if you are looking to expand these drafting courses into the first year curriculum, I think the Skills and Values may have a lot of those smaller isolated assignments that are at least good inspiration for your class even if it is not directly related.

I also mentioned Stacey Bowers at Denver. She has a good corporate drafting book that is transactionally oriented, and I have been really pleased with using those resources.

*Teaching Transactional Drafting in a Jurisdiction with a Business
Court Calendar*

Bill Delaney

Good afternoon. I'm Bill Delaney. I am an adjunct, teaching at Roger Williams Law School up in Rhode Island. I have been teaching up there about 16 years now.

My background is a little bit different from many of the adjuncts up there. I have an MBA and JD in my field, and I also have an LLM in banking law from Boston University, which got me basically in the front door 15 years ago. What I have been doing over the years is formulating, and I have taught sales, secured, and payment systems. Although it is no longer in place, we had a night school at one point and we needed to increase the faculty to handle the night program; I was one of the people who they brought in to assist them with that.

While I was there, I started putting together a document-drafting course a little over 10 years ago. I first started out with a good loan model template where we went from literally the commitment letter up to the closing, and we did that over the course of the semester. It was a three-credit course.

As I said during Will's presentation, we have a prerequisite that the students take one of the doctrinal courses, but normally the size is about 14 to 18 students in each class over the years. I normally split them up into fours, which, for me, I can see the comments that you were making with regards to twos and threes. I find that with four, there's always someone who's really pushing really hard and there's always someone who's outside this room right now looking for the soda. We pretty much know who they are after about week two, but we start them off in a group starting the second week.

Then, about eight years ago, I put together a bad loan document course, and that's where the loan, after the closing, all of the sudden goes to hell in a hand basket. There is then the decision with the bank to make the determination to send a default letter and all of the things that go with that in Rhode Island we have a very big receivership practice. As opposed to a traditional bankruptcy Chapter 11 reorganization, we seem to draw a lot of people to the receivership model. I have not only the bankruptcy judge come up to speak, but i also a business calendar in Rhode Island that has been in effect about 15 years now modeled basically, I think, on a Delaware system. We've had one judge who has been appointed to that bench for the entire period, but now we also have one and a half judges assisting him up there.

We have a very good text that we use. Our state is a mandatory CLE state, and we have a very sophisticated commercial bar within the state; they put together a two-day seminar on commercial lending each year. We use their binder and their materials for the course, which has, among other things, the entire set of closing documents—72 of them, as a matter of fact, with the

traditional commercial closing. It works out very well for both the good loan and the bad loan courses. That material, plus the selected commercial statutes in our court rules, is what we use in the document drafting classes.

We have guest speakers in addition to the business calendar judge. He sits in for about 3 of the 14 classes, so he is there for almost a fifth of the class in one capacity or another. I just wanted to call attention that we have a 0- to 5-year CPA in a mid-sized firm. I am very emphatic in bringing to the student's attention the people that they really need to meet in this area of the law when they get out of school, and one of the most important people from my perspective that they need to meet is a CPA because they can give them work, etc.

That person comes in and talks about how they go to golf outings, charity events, and try to solicit up bankers for the purposes of doing deals, and it has worked out pretty well. We use all of the big accounting firms in Rhode Island for purposes of drawing in a young CPA to be of assistance to us in that regard.

We also have a president of a small business development authority who comes in and speaks relative to the lending area and his role in trying to develop leads in the state. We have a senior real estate attorney who comes in and talks about mortgages and assignments, leases and rents, etc. We have at least one lending banker. Normally, I also bring in a commercial litigator. Last but not least, we have the associate justice of the Rhode Island Supreme Court business calendar. As I indicated, he, prior to going on the bench, was a commercial law practitioner. About 25 years ago, we had a credit union failure. State credit unions failed approximately 33 of them. This particular judge was very instrumental in drafting the state laws governing the cleaning up of the messes that were left behind, and, subsequent to that period of time, he was appointed to the bench. Also subsequent to that period, they created the business calendar. He really did a lot relative to commercial law in Rhode Island, at least over the last 50 years. So, it has been very helpful for him and for us.

We take a rather aggressive approach relative to the drafting. We put together a commitment letter, the note, the security agreement, the mortgage, the guarantee, and then finally the opinion letter. The teams put them together based upon presentations that are made.

The business calendar judge runs a court, and he and the other one and half justices are actually the gatekeepers to cases that come before the court. They, among other things, involve the UCC, corporations and shareholder disputes, insolvencies, and promissory notes. It is a wide gamut, but each case has to be argued before them before it goes into the business calendar.

Each of the judges allows and encourages the students to attend the trial. We have had the good luck on the last three times that we have taught the class to have a trial based on commercial law that the students can attend and

also discuss the cases with the litigating attorneys; this has been very helpful for us and for them.

As I indicated, Rhode Island now is an electronic filing state, so we have the ability to let the students go in and take a look at all of the pleadings that have been filed so they can get a flair for what actually occurs in the real world from a litigation perspective.

The business calendar also has the advantage of expediting—fast tracking cases that ordinarily would sit between four and five years in our trial court system—which really is important for the obvious reason.

The judges review the students' works and offer comments. They visit the court again, and they attend conferences with the permission of the counsel to the parties.

According to my observations, which are very, very brief, any course with a “how-to” component does much to advance the argument favoring practice ready. Back when I started law school 36 years ago this August—back in the dark ages, we had no drafting classes. We had nothing that had anything for the purposes of becoming “practice ready.” I mean, you went to school and you got called on. I can still remember the first day of school (*Pennoyer v. Neff*) and not really learning much relative to that in civil procedure except for that particular case.

A number of schools are trying to emulate this practice-ready component. I think that we are doing a pretty good job at Roger Williams, and hopefully we will increase that component. We have about four classes that are drafting courses on a commercial level at school; two are taught by full-time faculty, and two are taught by us adjuncts. In fact, one of the full-time instructors is the Director of the Entrepreneur Clinic. We have a clinic up at school that worked for the last couple of years for not-for-profits and was really instrumental in one city's development of a couple of not-for-profits. As a matter of fact, it was the city that went into bankruptcy. We had a Chapter 9 bankruptcy case in Rhode Island in the last five years.

The other thing that I think is very important is getting to know the judge—and these three judges actually come in and welcome questions and comments from the students. The students are that reluctant in offering their points to them as well.

But, the other thing I think that some of them come in for is to try to get a job and, as I said, we have rewarded a couple of students over the years. We are looking for someone for next year as a matter of fact, and we have got our eyes on a couple of people who have been in one or two of my classes.

Finally, at least as far as I am concerned, having participated in college athletics, teamwork is emphasized in the work product. Teamwork to me in this type of course (or these types of courses) is very crucial and very informative for seeing how people get along with each other, and sometimes

they are put in positions that they otherwise would not be put in and cannot get around it because they have a product to put together.

Those are my thoughts. Thank you.