



UNC
SCHOOL OF LAW

University of North Carolina School of Law
Carolina Law Scholarship Repository

Faculty Publications

Faculty Scholarship

Summer 2009

Teaching Transactional Skills in First-Year Writing Courses

Wayne Schiess

Craig T. Smith

University of North Carolina School of Law, crgsmith@email.unc.edu

Pamela Wilkins

Danton Berube

Irene Segal Ayers

Follow this and additional works at: https://scholarship.law.unc.edu/faculty_publications



Part of the [Law Commons](#)

Publication: *Transactions: The Tennessee Journal of Business Law*

This Article is brought to you for free and open access by the Faculty Scholarship at Carolina Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

TEACHING TRANSACTIONAL SKILLS IN FIRST-YEAR WRITING COURSES

WAYNE SCHIESS*

If you truly have the support of your administration, you could stop teaching brief writing in the first-year legal writing course. My proposal would be to replace that course with a drafting course. To clarify, my proposal involves teaching how to complete a transaction through the creation of binding legal text. To me, labeling this subject “Contract Drafting” would unnecessarily pigeonhole the course. Similarly, labeling it “Transactions” would imply a discussion about all the ways you negotiate and make a deal. Instead, the focus of my drafting course would be getting words on paper to create binding legal text, though I acknowledge that this cannot be accomplished without some substantive instruction or some substantive knowledge as a background.

What if professors decided to quit teaching students how to persuade somebody in their writing and instead started teaching them how to create binding legal text? We need to teach this, but the fact of the matter is that it is difficult to convince people that drafting is a special skill that requires intense application.¹ If you have approached law firms to try to teach transactional drafting, quite often the concept is a non-starter.

For example, I once was hired to teach some summer associates about legal writing. The firm told its prospective summer associates that it would bring in a legal writing-teacher to teach them, and it was a selling point for the law firm. The firm then e-mailed me just one week before the class and asked me to arrange continuing legal education credit for the seminar because the firm had a couple of lawyers who needed the credit.

I showed up on the day of the seminar, and all of the summer associates were seated around a table. As the seminar began, two lawyers walked in and sat in the back. These were the lawyers who needed the CLE credit. At one point in the seminar, I told those assembled that if they were really serious about being good legal writers, they should read a book on writing or legal writing once a year. The two lawyers in the back scoffed and quietly laughed at my suggestion. I found out later

* Wayne Schiess is a Senior Lecturer and the Legal Writing Program Director at the University of Texas School of Law at Austin. J.D., Cornell Law School, 1989. He may be reached at wschiess@law.utexas.edu.

¹ ROBERT C. DICK, *LEGAL DRAFTING* 4 (2d ed., Carswell Co., Ltd 1985).

that they were transactional lawyers, so it was difficult to convince them that they needed any help.

With that story in mind, here are five reasons to replace the first-year brief-writing course with a drafting course.

I. FIVE REASONS TO REPLACE THE FIRST-YEAR BRIEF-WRITING COURSE WITH A DRAFTING COURSE

A. Students Want to Learn Drafting Skills

First, students want to learn drafting skills. Louis Schulze wrote an article in which he completed a comprehensive survey of incoming law students.² Through the survey, Schulze discovered that more students wanted to be transactional lawyers than litigators. Granted, incoming students may not know what they want and may not understand the market for those two broad specialties within the law. But more want to do deals than want to litigate cases.

So students want drafting courses. But supply is not meeting demand. If you look at the ALWD/Legal Writing Institute Surveys, the results show that only 28 percent of law schools are offering upper-level courses on legal drafting.³ That number is a bit hard to confirm because the Survey uses the term “drafting” without defining “drafting,” but it indicates a lack of drafting courses. To clarify, when I say “drafting,” I mean the creation of binding legal text, and I believe this definition gets to the core of this conference. Still, we can conclude that students do want more training in drafting.

B. The Profession Needs Legal Drafting Training

The second reason to replace first-year brief writing with a drafting course is that the profession needs legal-drafting training. With that in mind, if I were to categorize law practice into three oversimplified groups: the transactional lawyers, the litigators, and the appellate lawyers, which group would have the best writers? Which of those three groups takes the written word most seriously and treats the written word as a craft? I do not have to tell you that appellate lawyers would win,

² Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: an Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59 (2007).

³ Association of Legal Writing Directors & Legal Writing Institute, *Survey Results* 21—22 (2008) (http://alwd.org/surveys/survey_results/2007_Survey_Results.pdf)

with the litigators in second, and the transactional lawyers in last place. Why is this so?

In an informal survey I conducted of 330 practicing lawyers, 79 percent said that their required class on legal writing did not cover legal drafting, but 85 percent said that it did cover brief writing. I was teaching class one time and asked my students, “Don’t you think you ought to have some training in transactional drafting, since you have training in writing memos and briefs? Why do you think drafting is not a part of the required legal-writing course?” One of the students raised his hand and said, “Because it is all just forms.” This is the unfortunate impression the profession gives our students.

Legal drafting is more than forms, and it is essential to many attorneys’ practices. Many lawyers say they would have benefited from a course in legal drafting, and they think law schools do not provide enough legal-drafting training. Most law students get very little exposure to the world of legal drafting, and it shows.

Providing more training in the fundamentals of legal drafting would likely diminish the learning curve that now exists when students enter practice. The writing expert Bryan Garner has said “everybody does some legal drafting at some point, even if it is just a settlement agreement.”⁴ Similarly, Reed Dickerson, the father of American legal drafting, said “the need for expertise in legal drafting is all the more striking when one realizes that, whereas only a minority of lawyers now participate in litigation, other kinds of lawyers are called on to prepare definitive legal instruments, almost daily.”⁵ Everybody drafts, but not everybody writes briefs, so why are we teaching brief writing and not drafting?

C. Law School is Litigation-Focused

Not only is law school litigation-focused, it is too litigation-focused. The underlying framework for nearly all legal education is the litigation model. The first-year curriculum emphasizes litigation, trials, and appeals primarily because the casebooks the students are reading are made up of opinions from trials and appeals.

Law schools train students to be litigators. They really do not train students to be transactional lawyers, and even those schools that are trying are not doing

⁴ BRYAN GARNER, *LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES* 89 (U. Chicago Press 2000).

⁵ REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 1 (Little, Brown and Co. 2d ed. 1986).

enough yet. Within the litigation framework, you could do something transaction-oriented, but all the memo and brief assignments tend to be set in a litigation context or raise issues that relate to litigation. Between trial briefs and appellate briefs, almost all students are going to write some kind of brief, but only a small percentage of students are going to write a transactional document. Law school's litigation-orientation and litigation-focus deprive students of the chance to learn about legal drafting.

D. Teaching Drafting would Improve Students' Substantive Mastery

If we started teaching drafting, or binding legal text, it would improve students' ability to conquer substantive concepts of law. Students would be forced to better understand the law as it relates to a specific transactional document. Sometimes that is a reason professors give for not wanting to teach drafting: it doesn't require enough substantive effort; it's just revising a form. They say that if you teach a student how to write a brief, the student has to master many aspects of the law in order to make the arguments in the brief.

But if you teach a student how to draft an agreement, the student has to, at the very least, know about contract law, representations, warranties, and risk allocation. On a drafting assignment, you could require a student to annotate every sentence of the contract. Why is this here? Why do we need this provision? Cite the legal authority that requires each provision. This is a way to require substantive mastery in a drafting course. If you give a drafting assignment like this, Tina Stark has co-authored a really good book that students can use to find a lot of examples and authorities.⁶

E. Improvement in Precise Writing Skills

Finally, a contract-drafting course would improve sentence-level writing, word usage, and mastery of the English language. As important as language is in a brief, it is usually not the grammar, punctuation, usage, and style that an opponent is attacking, but rather the argument. In a drafted document, the grammar, punctuation, usage, and style are crucial. This emphasis on close reading and writing would serve students well.

⁶ TINA STARK, *NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE* (ALM Publishing 2002).

F. Other Suggestions

Eventually, I'd like to get to the point that the brief-writing students would proceed to a moot-court competition, while the drafting students would enter some kind of drafting competition. I would absolutely love to judge a contract-drafting competition.

But which should a student enter if the student has a choice? Of course, the problem is that students do not really know whether they will like persuasive writing and oral argument or legal drafting unless somebody forces them to try both at least once. That is at least one good thing about the current curriculum: students have to at least try brief writing.

On the flip side, the same is true of transactional drafting. There are going to be people who like it and are really good at it, but law school never requires them to try it.

CRAIG SMITH*

I will address this question: Can a law school offer students some instruction in transactional analysis and drafting within a traditional, two-semester first-year legal research and writing program that offers students only two credits per semester? Vanderbilt's answer has been yes. We have done so by including a "transactional planning module" in the first-year legal writing course. Let me start by placing that module in context.

Vanderbilt's required first-year research and writing course introduces students to three broad areas of law practice: litigation, regulation, and transactional work. The course has a set of modules. At least one is explicitly linked to litigation, another to regulatory work, and a third to transactional practice.

In the transactional planning module, students work in a forward-looking, transactional context, and instruction aims to help them think like a deal lawyer. Students practice researching, analyzing, writing, and drafting. First, they conduct research in and about Articles One and Two of the Uniform Commercial Code (U.C.C.). Second, they communicate in writing their analysis of a client's planned commercial transaction. Essentially, a client has said: "Here's the deal I want. The other party and I have agreed on most things, but I have questions and concerns."

* Craig Smith is an Associate Professor of Law and the Director of Legal Writing at Vanderbilt University Law School. J.D., University of Michigan Law School, 1991; LL.M., Postdam University, Germany, 1995; B.A., College of William & Mary, 1985. He may be reached at craig.smith@vanderbilt.edu.

Finally, students draft, explain, and recommend for a client a simple contract provision. For example, the planned transaction may have an uncertain or unfavorable passage of the risk of loss under the default provisions of U.C.C. Sections 2-509 and 2-510. The students therefore must discern how they might help this deal happen favorably for the client.

A student's research typically focuses on finding and using key research sources: state annotated codes, the Uniform Laws Annotated, the U.C.C. Reporting Service, and various treatises. These contrast well with common law, statutory, and administrative sources, which students use in the course's other modules. As students research, we explicitly teach them several lessons. The first is how to work with a code. For example, they must find and use definitions and general principles. They must discern the scope and purposes of Articles One and Two. They must follow cross-references among and within those articles. They must grasp the role of default provisions and the parties' contractual freedom, particularly in explicit provisions such as Section 2-509(4) (subjecting Section 2-509's provisions "to contrary agreement of the parties").

Second, we also teach students how to work with a uniform law. For example, they must check for and deal with textual and interpretive variations among jurisdictions, including those that arise from amendments.

Third, we teach students about undefined terms and interactions of the U.C.C. with other laws. For example, if the planned transaction concerns stored goods and the risk of loss is at issue, Section 2-509(2) may be relevant. It uses the term "bailee," and neither Article One nor Article Two defines either that term or relatives such as "bailment." Hence students may need to get a definition from the relevant state's common law.

Finally, we address how to find, evaluate, and use forms. We critique forms in class. We ask what, if anything, we can take from the forms before tailoring a provision to our client's situation and preferences.

A student's writing typically focuses on analyzing the planned transaction in light of the client's preferences and the governing law, including the contractual freedom it offers parties. For example, students may analyze a deal that involves storage or shipment, and thus analyze and apply U.C.C. § 2-102 (the scope of Article Two), § 2-105(1) (the definition of "goods"), and Sections 2-509 and 2-510. First, they analyze likely outcomes under the default rules. Second, they explain the principles that govern the possibility under Section 2-509(4) of a "contrary agreement of the parties." Third, they draft one or more such agreements for the client to consider seeking through negotiation. Fourth, they explain the advantages and disadvantages of their draft provisions.

In sum, a transactional planning module can enhance a standard legal research and writing course by introducing students to work in a transactional, deal-enhancing context. That lays a foundation for further transactional research, writing, and study in subsequent semesters.

PAMELA WILKINS*

Our goal at Detroit Mercy is slightly different. We design our first-year course as a preparation course for advanced transactional drafting that students will be involved in later in their law school careers. We had to rethink what they do in this class based on what our goals are for our third-year students.

Detroit Mercy does not have a traditional first-year legal writing program. We have really incorporated contract law into the course, and we have always had a drafting element. The curriculum, however, is still principally litigation-focused, and it will continue to be. Three years ago, however, we adopted a massive overhaul of the third-year curriculum and adopted a program called the “Law Firm Program.” We started to think about how we are going to prepare students in their first year for the two required third-year courses. The result is a five-hour course spread over two semesters, two hours in the fall and three in the spring.

We have all heard law firms complain that students are not adequately prepared for work when they graduate. So, we wanted to enhance our students’ abilities to hit the ground running, to provide a contextual learning experience so as to quit boring our third-year students. By the third year, the student has learned a lot of doctrine, so if a student does not know how to read a case by that point, we become quite worried. Accordingly, in the third year we wanted to move beyond an excessive litigation focus to provide a simulation exercise for the students.

Each student is required to take two courses. Ideally, these two courses are organized around a core transaction. For example, the sale of a company’s assets will be the transaction, and this transaction will have different modules such as an environmental module or an intellectual property module related to the core transaction. Ultimately, there will be more than 20 modules, all organized around a core transaction. The teaching method incorporates the hiring of retired partners at local law firms, so the class is run like a partner working with a team of associates on the deal.

* Pamela Wilkins is an Assistant Professor of Law at the University of Detroit Mercy School of Law. J.D., University of South Carolina Law School, 1993; A.B., University of North Carolina at Chapel Hill, 1989. She may be reached at wilkinpa@udmercy.edu.

Very little lecture is involved. Instead, there are many short assignments with feedback provided. Samples of some of the subjects that have been covered include international business, employee benefits, intellectual property, health law, and real estate. The second course puts the whole deal together and simulates a closing. Due diligence is performed, as are document reviews, interviews, and negotiations that are filmed and later critiqued. The students review a wide variety of documents such as asset purchase agreements, stock contracts, and software confidentiality agreements during the due diligence phase. Reviewing the documents helps students realize the importance of drafting.

Several documents are drafted, as well, including due diligence memos, letters of intent, definitions sections, non-compete agreements, and promissory notes. This is an ambitious program for our third-year students, but we believe it is beneficial. It prepares the students in their first year for their third-year experience.

DANTON BERUBE*

I am going to discuss transactional drafting in “ALTA—Applied Legal Theory and Analysis,” which is the University of Detroit Mercy’s first-year legal research and writing program. The purpose of this class is to establish a firm foundation for later transactional drafting, beginning in the first year of law school.

With law firms generally being critical of the third year of law school, we think our program is rather unique, especially because we want to give transactional drafting a greater emphasis. The Law Firm Program is sort of a capstone experience for the 3L students. It provides lots of advanced transaction drafting opportunities. We wish to lay a cornerstone for these opportunities in the first-year program.

Our first goal of the ALTA program is simply to give students experience with transactional drafting. Since most lawyers are not litigators and have to draft frequently, students need to be exposed to drafting. Thus, first-years should be taught transactional drafting as part of a well-rounded education. Secondly, we must emphasize the link between transactional drafting and litigation. At Detroit Mercy, ALTA is still primarily litigation-focused, but transactional drafting is important.

Finally, we want to reinforce the UCC’s consequential damages doctrine. The students write office memos about consequential damages and whether such

* Danton Berube is an Assistant Professor of Law at the University of Detroit Mercy School of Law. M.Phil., Yale University, 2004; M.A., Yale University, 2002; J.D., Vanderbilt University School of Law, 1991; B.A., University of Tennessee, 1988. He may be reached at berubeda@udmercy.edu.

damages were reasonably foreseeable at the time of contract formation. We want to reinforce this material substantively. In fact, the contracts relied upon require the ALTA professors to cover several different topics of contract law.

The ALTA program includes a three-part exercise, which, in some ways, is really a mini-simulation. We begin with a client interview. Then the students prepare multiple contracts and finally engage in pleading for the inevitable litigation. Essentially, this three- or four-week simulation is the capstone of the ALTA course, in the same way that the Law Firm Program can be viewed as a capstone of the entire law school experience.

I. CLIENT INTERVIEWING

We begin client interviewing with a detailed lecture covering the mechanics of how interviews are conducted—everything from pre-interview preparation to post-interview follow-up. We also spend a good bit of time discussing the implications of the Model Rules of Professional Conduct, such as confidentiality or the establishment of an attorney-client relationship, and their application to client interviews.

Students are next divided into mini law firms of about six or seven “associates,” and they are assigned by a senior partner to interview a prospective client. During the interview students must ask questions in order to gather the facts that will be needed for the next stage of the sequence. A key test is whether they ask for relevant documents, because they will not be able to complete the drafting assignment without those documents. For example, there are often letters that have been written between different parties. Although these letters do not constitute a complete contract, they have essential terms that the parties have negotiated.

II. DRAFTING EXERCISES

The next exercise is a series of interrelated transactions involving opportunities to draft documents. One simulation involves an interior design firm that is refurbishing cottages at a lakeside inn, and the prospective client is a custom furniture finisher. In this exercise the students must draft two contracts. The first is a purchase agreement of unfinished furniture for the client, who is the purchaser. The second contract involves the client now selling the finished furniture to the interior design firm. The key factor is how best to allocate the risk of loss if there is a delay in performance. The lakeside inn has booked cottages based upon a date-certain for the completion of a renovation. Any delay is going to cause a loss in rental income.

Some focus areas of discussion in this stage include the advantages and disadvantages of forms. Additionally, we talk about the fact that the parties are not simply going to accept a disclaimer of consequential damages or a liquidated damages provision. The most important thing is for the client who is buying the unfinished furniture to put the seller of the furniture on notice of the potential for consequential damages if they are late in supplying the unfinished furniture. This notice, however, must be provided in a sophisticated manner. The drafter cannot simply draft a “scary” contract, because the seller will simply refuse to sign.

It is always easy to draft a contract that is favorable to your client if you do not have to worry about whether the other party is going to sign or not. Additionally, the UCC should do most of the heavy lifting with respect to allocating risk of loss. This introduces a real-world aspect that students must keep in mind. As a result, students lose points for things that are already in a sales contract, because that provision is covered by the UCC. Students should not repeat a clause that the UCC already covers.

Given that this is law school, inevitably the deal goes south. The seller of the unfinished furniture does not finish on time and, as a consequence, our client, despite hard work and payment of overtime, is late delivering the finished furniture. Further, the interior design firm is late finishing the refurbishing of the cottages and the inn suffers loss of profits due to cancelled rentals. The client subsequently seeks to recover the costs of those lost profits. The losses have been shifted up from the inn to the interior decorator to the client. Thus, the most important objective is to attempt to allocate the losses to the seller of the unfinished furniture, because it was the seller’s initial delay that caused the delay at the end of the sequence.

III. PLEADING THE CONFLICT

Finally, we arrive at the third part of the exercise, at which point we talk about the advantages and disadvantages of form complaints for purposes of drafting a pleading. The students have to draft a complaint based upon the contract that they wrote. As a result, the better job a student did in putting the seller of the unfinished furniture on notice about possible consequential damages, the easier time he or she will have in drafting a potentially successful complaint.

Student success will depend upon how well each student drafts the initial document. Hopefully, at the end of the exercise, several things will have been accomplished. The students will have the experience of drafting transactional documents, while also reinforcing their knowledge of substantive contract law. Students will also see the relationship between careful transactional drafting and either the avoidance of or success in litigation. Finally, students can build upon this

experience with more advanced transactional exercises in both the Law Firm Program and in other upper-level courses.

IRENE SEGAL AYERS*

Three years ago when I joined the faculty at NYU, I became part of a small faculty committee whose task was to create the program's first transactional skills simulation exercise. That summer, as we were struggling to create a new transactional exercise, we attended a workshop devoted to contract drafting. At that time, most of the faculty were former litigators with little to no contract-drafting experience. Many of us had not studied drafting when we were law students, and we seriously doubted that we could teach the subject to first-year students.

As a result of this workshop, we created a pass/fail, transactional skills simulation exercise for the NYU lawyering program. I will begin discussing a little bit about the program so you will understand how the new transactional exercise fits into the program. Then I will describe the exercise itself.

I. NYU'S LAWYERING PROGRAM

The lawyering program at NYU has been around for at least 25 years, probably longer. The most significant thing about the program is that it is committed to experiential collaborative learning. Students work together in small groups all year through a series of simulation exercises. They work "in role" as lawyers, and are given the opportunity to interview and counsel clients. This is not a real clinic; the "clients" are not real. Rather, it is a simulation. In the first semester, the clients are teaching assistants and upper-level law students. In the second semester, we use paid professional actors to play the role of clients.

In the first semester, the students perform client interviews, which are videotaped and then critiqued. In the second semester, the students perform negotiations, which are similarly reviewed. Historically, the lawyering program's curriculum, like the rest of the law school curriculum, has been almost entirely focused on litigation skills.

In the second semester, the program was traditionally devoted to methods of dispute resolution. There were three simulation exercises during this time that took

* Irene Segal Ayers is an Acting Assistant Professor of LL.M. Lawyering at New York University School of Law. J.D., University of Cincinnati College of Law, 1999; A.B.D., Indiana University, 1990; M.A., Indiana University, 1990; A.B., Bryn Mawr College, 1982. She may be reached at irene.ayers@nyu.edu.

place in the context of pending litigation. The first exercise was a negotiation of a commercial contract dispute. In the middle of the semester, the students performed a mediation of a landlord-tenant dispute. The semester concluded with brief writing and oral advocacy in a dispute between an Indian tribe and the State of California.

II. DEVELOPING A TRANSACTIONAL EXERCISE FOR LAWYERING

Finally, in 2005, we set out to create a new transactional exercise to replace the old litigation-focused exercise. This new exercise would attempt to provide students with an introduction to what it is that transactional lawyers do. The exercise would include legal research, client interviewing and counseling, negotiation of a business deal, and the drafting of contract provisions. One of the goals of the new exercise was to develop students' confidence in negotiating and drafting contract provisions that involved millions of dollars. Additionally, we wanted them to become comfortable using Excel spreadsheets as part of their negotiations.

This is a tall order for a five-week simulation exercise for first-year students, especially when only half of the students have taken contract law. The way things are set up at NYU, about half the students take contracts during their first semester of law school. The other half take contracts in the second semester. Our transactional exercise is the first lawyering exercise of the second semester, so half the students are completely unacquainted with contract law.

First, there is what we call an "Operations Memo," which provides an overview of the entire simulation exercise. The second document is a memo from the fictional general counsel to the student-attorney assigning tasks for the exercise. Additionally, there are two critique guidelines—a negotiation critique and a contract-drafting critique.⁷

The exercise we created is a patent license deal. In the fictional world of the simulation, researchers at the NYU medical school have invented a new AIDS drug called Septivir, a pill that only needs to be taken once a week. NYU hopes to license this drug to Aderson Pharmaceutical, a fictional big-drug company that is recovering from a Vioxx-like scandal regarding the adverse side effects of one of its best-selling drugs. To complicate things, the NYU scientists who invented the drug want any licensing deal to include free or low-cost distribution of the drug in poor countries with AIDS epidemics.

⁷ See Appendix A & B.

As with all of NYU's lawyering exercises, students are asked to research some aspect of the relevant substantive law. For this particular exercise, the students researched march-in rights under the Bayh-Dole Act. The Bayh-Dole Act is legislation that enables collaboration between a university and the private sector. March-in rights concern the circumstances when the federal government can essentially ignore exclusivity of patent rights and force the company to market the drug differently, at a reduced cost, or it can allow other companies to market the drug. The students must find out when such rights have been invoked, and they have to assess the risk for the Septivir deal.

Next, students meet with their client, either the fictional general counsel of NYU's medical school or the fictional general counsel of Aderson Pharmaceutical. The students must then obtain negotiation authority, determine what the client's real goals are, and counsel the client regarding realistic outcomes for the negotiation. The following week, the students negotiate various parts of the deal, including provisions for free or low-cost distribution in poor countries, financial payments exclusive of royalties, and risk allocation for the potential government exercise of march-in rights under the Bayh-Dole Act.

Originally, we had students negotiate royalties because we wanted them to work with big numbers, and we wanted them to become confident with the use of Excel spreadsheets and the negotiation of a large deal. What we found, however, was that the royalty negotiation usurped the entire negotiation—there was no room left to talk about anything else. As a result, royalties have been dropped from the negotiations.

These negotiations are 45 minutes long and are videotaped. The videotaped negotiations are digitized and placed on the school's website so that students and faculty can view them. Subsequently, we meet for critique sessions, in which two pairs of negotiators (four students) meet with a lawyering professor. During a critique session, the student and the professor start by looking at the openings of the two negotiations. The students are asked about the strategy they implemented for the negotiation, and how they departed from that strategy.

We chose to videotape the negotiations rather than having an actual professor there to observe and critique as the negotiation proceeds. We let the parties police themselves, because if they get sidelined or get into an argument, they do not end up with a deal. It becomes difficult to draft contract provisions when the parties have not agreed on anything. If a student acts like a litigator and fights with the other side instead of trying to reach a business deal, he or she will learn from that. If you allow yourself to get sidetracked on an issue that simply is not important to your client, you learn from that when it comes up during the critique.

After negotiation, students draft provisions for inclusion in a patent license. They are given a model patent license to work with that has blank spaces for the provisions that will be negotiated, so they are not drafting an entire license. As part of the exercise, the students study negotiation theory and contract drafting in a condensed form, but they also learn about the importance of first offers, the structure of contracts, and the challenges associated with drafting.

III. ASSESSING THE NEW TRANSACTIONAL EXERCISE

One of the weaknesses of the exercise is that we have to do everything in five weeks. I generally teach drafting for two classes before the students actually begin drafting. For example, contract drafting comes at the end, and that sometimes gets short-changed in the rush to get other things done. To be honest, the negotiation is a bigger deal to the students, and it receives a lot more of their energy and attention than contract drafting. Additionally, although we hope that our simulation exercises actually simulate reality, there are many ways in which the exercises depart from the reality of what a lawyer might do.

Pedagogical goals sometimes trump realism. For example, there is no way a junior associate is going to be working on a deal like that by himself or herself. Additionally, during the 45-minute negotiation, the student will have no way to contact his or her client. I can go on and on about the ways that this is an imperfect exercise, but there is a lot about it that we think is realistic enough that we think it is a great exercise for the students.

Another challenge has been finding adequate textbook support for these very brief glimpses of transactional negotiation and contract drafting. This simulation is only five weeks, so it is difficult to justify assigning an entire textbook in contract drafting and negotiation to students. Instead, an in-house lawyering textbook that has been written and rewritten over the years by various professors is used. There used to be a chapter on negotiation that was solely focused on negotiation as a way of avoiding litigation, but we rewrote it so that there is now a section on transactional negotiation, which is different than negotiation within a litigation context. We also allow the students to use forms when drafting.

Additionally, a short sub-chapter on contract drafting was added to our in-house textbook, providing a brief analysis of a contract's structure, as well as a few basic issues related to contract drafting. It is still a challenge, however, to find a better way to integrate this transactional exercise into the entire lawyering curriculum, which remains very litigation-focused. There are ways that we can introduce drafting and negotiation during the first semester so that when it becomes

time for the main transactional exercise during the second semester, it will not seem like such an anomaly.

APPENDIX ANegotiating a Deal

Contract-Drafting Critique Guidelines

Questions for the Contract Drafter:

1. Now that you have had the opportunity to read other versions of the contract provisions, is there anything about the provisions as you drafted them that you would like to change? Why?

2. What if your client, three years from now, calls you and says “Circumstances have changed. I would like to find a way to back out of this deal. Is there any leeway in the contract? Any loopholes?” Review the contract provisions that you have drafted, and consider whether there is any flexibility or gray area. If there is, would that flexibility also provide wiggle room for the other side?

Questions for the Attorney Reviewing His or Her Negotiating Partner’s Contract Provisions:

1. Do the other side’s contract provisions accurately capture the agreement you reached in your negotiation? If not, in what ways do they diverge from the agreement?

2. How could the other side’s contract provisions be made more concise? Give examples of any excess words or redundancy, and examples (if any) of sentences that are too long.

3. How could the other side’s contract provisions be made simpler? Give examples of any “legalese” or “lawyer jargon” that you find. Are there any unnecessarily fancy words that could be simplified?

4. In many ways, contracts are like instructions, telling each party what that party will be required to do and when. Look carefully at the use of pronouns (“he,” “she,” “they,” “it,” etc.) in the contract provisions. Do these provisions clearly instruct the parties about who will do what and when?

5. Ambiguity sometimes arises in contracts when modifying words or phrases are not placed near the words they are meant to modify. Here are a few examples of sentences with misplaced modifiers: a) “My client has discussed your proposal to fill the drainage ditch with his partners.” b) “Being beyond any doubt insane, Judge Weldon ordered the petitioner’s transfer to a state mental hospital.” c) “A trustee who steals dividends often cannot be punished.” Review your negotiating partner’s contract provisions for possibly unclear modifiers.

6. Ambiguity also arises when vague or overly general words are used. Re-read your negotiating partner’s contract provisions and note if any of the words used have more than one possible meaning or lack clear definitional boundaries or scope. Suggest alternate, more specific words.

7. In contract-drafting, as opposed to, say, essay-writing, elegant variations in phrasing are not the goal. Ambiguity can be caused by lack of consistency in word choices. For example, if one provision describes a party to the contract as “NYU” but a second provision refers to “the Medical School” and a third provision to “the patent holder,” confusion may arise about who is the subject of the provisions and who is obligated by the duties they describe. Identify any inconsistencies you can find in word choices in the contract provisions.

8. Would you advise your client to sign the contract with the provisions as drafted by your negotiating partner? Why or why not?

9. If you and your negotiating partner disagree about the way you each have drafted the contract provisions, can you think of a compromise way to revise them that both sides would agree to?

APPENDIX BNegotiating a Deal

Negotiation Critique Guidelines

To prepare for critique, each pair of attorneys should view both teams' tapes as set out in the Operations Memo. Each attorney should also review the other side's contract provisions. At least 24 hours prior to your critique, please email your answers (with time stamps as appropriate) to the following questions to the professor conducting your critique and please bring 5 hard copies to distribute at the critique. You should be prepared to discuss these answers in your critique. You are encouraged to make additional comments on the videostream about anything that seems interesting to you.

FOR EACH NEGOTIATION:Process (reflect as an observer of the tapes)

What stories did each side tell about the law and facts? What effect did these stories have?

How and when was the bargaining range identified? Who made the first offer, and how did the other attorney respond? At what point were both sides' offers "on the table"?

What did each side do to build the surplus? How much of this value did each side receive in the end?

What bargaining styles can be seen in the tape? What instances of strategic use of information or value-creating moves?

Were there missed opportunities? How can you tell?

Were any actions taken that might raise ethical issues?

Outcome (reflect in-role as an attorney)

How does the outcome compare with your reservation point and target deal point?

How completely does the outcome satisfy the interests and desires of both clients?

Compare your contract provisions with your negotiating partner's contract provisions. Do the other side's contract provisions accurately capture the agreement you reached in your negotiation? If not, in what ways do they diverge from the agreement?

Identify any ambiguities in either contract. Suggest ways to modify the ambiguous provisions so that they are clear.

Would you advise your client to sign the contract with the provisions as drafted by your negotiating partner? Why or why not?

Pre-negotiation planning (reflect in-role as an attorney)

Consider your expectations going into the negotiation. What parts of the negotiation met your expectations? What were the surprises?

Reflect on your client meeting. Now that you've had experience negotiating, what (if anything) else would you want to have discussed with your client? How might this understanding help you in preparing for future negotiations?

Feedback and evaluation (reflect in-role)

Consider your goals in this negotiation. What were they? (Capturing the most value? Creating the most value? Satisfying your client? Arriving at a deal that serves your client's best interests? Developing a good working relationship with the other participant? Adherence to ethical and professional standards? Larger concerns of justice, fairness and honesty?) How effectively did your choices meet these goals? Upon reflection, would you modify your goals or choices in future negotiations?

What role did issues of difference (in terms of gender, race, or any number of other factors) play in the negotiation?