

## CONFERENCE INTRODUCTION: MY FANTASY CURRICULUM & OTHER ALMOST RANDOM THOUGHTS

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Before I begin my talk, I have a couple of preliminary points. As you may have noticed, I have entitled my talk “My Fantasy Curriculum and Other Almost Random Points.” First, in case anyone was worried, my fantasy is G-rated. Second, this is my fantasy, my fantasy of a three-year curriculum for Emory, from first-year contracts to third-year capstone courses. What is appropriate for this school may not be elsewhere. So, I ask you to listen to my remarks with that caveat—and one other. I expect my fantasy to change by the end of the conference.

My fantasy begins at the end. What is it that I want Emory students to be able to do when they graduate? What knowledge and skills must they have? The Best Practices report talked about these as outcomes as will Phil Knott later on.

In thinking through what should be the outcomes, I start from the proposition that doing deals is fundamentally different from litigating and that therefore what we teach and how we teach must be different. Therefore, some of the skills I will discuss may be new to you, and others I will suggest require a rethinking of how we teach them.

For today’s purposes, I divide the outcomes into three categories: foundation knowledge, skills, and tasks. I include in foundation knowledge, knowledge of doctrinal law, business, legal practice, and ethics.

There are 12 skills, and by skills I mean a competency that a lawyer has that she uses in multiple contexts:

- Students should be able to think like a deal lawyer, which differs from the classical understanding of thinking like a lawyer.
- They should have a deal sense and the ability to analyze, draft and negotiate a contract.

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- They should be able to work collaboratively and know the basics of interviewing and counseling.
- Finally, they should be able to communicate effectively, problem solve, look at a contract from the client's business perspective, and be proficient in risk analysis.

The third category of outcomes I mentioned is tasks. A task is specific work that a lawyer is asked to perform. Examples would be due diligence, drafting resolutions, incorporating a company, and drafting a specific agreement. Performing a task usually requires the use of one or more skills.

All of this theory is nice to have, but the real questions are, "What do we teach, when, and how do we do it?" In other words, what is the curriculum? My fantasy is of an integrated transactional curriculum. This integration would have two aspects. First, the curriculum would be a series of building blocks, each one building on the one before so that they become progressively more sophisticated. The key would be to expose students to material more than once, a critical factor in learning.

We already have this type of curriculum on the litigation side. In their first year, students take civil procedure and learn how to research and write a memo and brief. In addition, they argue cases as part of moot court. Then in their second year, they take evidence. Finally, students move on to the sophisticated skills courses where they learn how to take depositions, argue motions, and cross-examine a witness.

The curriculum on the transactional side should mirror this progression. Unfortunately, what most schools have now are courses, not a curriculum. The curriculum would also be integrated in that courses would integrate cognitive and experiential learning and ethics—the Holy Grail of the Carnegie Report.

Before I turn to other aspects of the curriculum, I want to discuss one aspect of foundation knowledge: business. For a deal lawyer, not knowing about business is akin to a litigator not knowing the evidence rules. To do deals, lawyers must understand business, their clients' business, and the business deal. Business is discipline specific substantive knowledge that a deal lawyer must have to function effectively.

My fantasy curriculum would provide students with this foundation knowledge through two courses. The first is accounting, which I would turn from a two-credit course into a three-credit course. I would not teach accounting using debits and credits. Other than telling students that they were not learning about

debits and credits, those words would be banished from the classroom. Instead, my fantasy curriculum would divide the accounting course into three parts:

- **Part 1—Financial statement concepts.** In this part of the course, students would learn about the different financial statements and each of the line items on each statement. When doing so, they would learn about the line items in context. For example, when studying receivables, a factor would guest lecture about her business, making very real to students the importance of collecting receivables.
- **Part 2—Financial statement analysis.** In this part of the course, students would learn how to critically read both the financial statements and the notes—because if you have not read the latter, you have not read the financial statements. By learning financial statement analysis, a student will be able to analyze not only the client’s financial statements, but also the other side’s.
- **Part 3—Use of financial statement concepts in transactions.** Ultimately, students need to understand financial statement concepts because they are used in transactions. In this part of the course, students will analyze and negotiate, among other provisions, purchase price adjustment provisions, earn-outs, royalty provisions, and complex financial loan covenants.

The second course in this business curriculum would be a course called “B-school for Law School.” It would also be divided into three parts.

In Part 1, students would learn about the business world in general. Most students know next to nothing about the business world. Most of them have never even read the *Wall Street Journal*. Here, students would learn, among other things, about interest rates, currency exchange rates, insurance, the credit-rating agencies, and how stock exchanges function.

In Part 2, students would learn how companies function, including strategic planning, quality control, and their organization by profit and cost centers. Students need to understand the consequences for their practice if the “client” is based in a cost rather than a profit center.

In Part 3, students would look at the history of deals over the last 25 years. Today’s deal market is the progeny of the LBO market of the 80’s. Among other things, students need to know about Drexel and Michael Milken. They need to know not only legal ethics, but business ethics. The Predators’ Ball would be required reading.

To give all of this context and some fun, students would play two computer games. The first would be a business simulation game companies use to teach management skills to their employees. Each student runs a company, making such decisions as to whether to invest in inventory or research and development. Bad things happen along the way and students have to decide what to do. The winner is the student whose company made the most money.

The second game is known as the Stock Market Game. In it, students are given \$100,000 to invest in hypothetical portfolios. As the Dow Jones Average goes up and down, so does the value of the students' portfolio. The winner, of course, is the person with the largest portfolio when the game ends.

Now, I would like to turn to the other aspects of the transactional curriculum. It must of course begin with the contracts course. Although it is a doctrinal course, I see it evolving so that it is also one in which theory is linked to practice. For the record, I do not advocate dismantling the first-year contracts course. Students need to learn about the evolution of the common law, doctrinal subtleties, policy arguments, and theory. But I do advocate substantial and substantive changes. The pedagogical challenge is how to enrich the existing curriculum without losing what is important.

In deciding what changes to make, I think that we must take a step back and think about the course globally. I have concluded that we must address four issues:

- First, that most students learn about contracts without context.
- Second, what they learn and the way they learn it is disjointed.
- Third, students have little understanding of business.
- Fourth, most contract courses teach few, if any, deal skills.

All of these issues are exacerbated by the students' unfamiliarity with the deal world. When they enter law school, they have in their mind a picture of what it means to be a litigator. They have all watched *Law & Order*, *Boston Legal*, and maybe even some *Perry Mason* reruns. But students have no picture in their mind of what a transaction is or what a deal lawyer does. We must begin by creating that picture. And I mean that sentence literally.

I would create a mini-movie that was a series of vignettes showing parties and their lawyers working their way through a hypothetical transaction. These vignettes would be a tool to demonstrate the contract concepts in context. As

students studied a particular concept, they would see it play out in the movie in the parties' relationship. We would create for them an actual picture of a deal.

One ancillary benefit of this approach is that students would gain insight into the collaborative nature of deal work. They could see parties working together towards a common goal while at the same time advancing and protecting their interests. It would help set the stage for later courses in drafting and negotiation.

Watching these vignettes would also begin the process of giving students a deal sense, something that the best deal lawyers have. It is a uniquely transactional skill.

Partners throw around the phrase "deal sense" frequently when deciding whether someone makes partner. The candidate either has it or she does not. And if she does not, she has a problem. Deal sense is multi-faceted.

- First, a lawyer with deal sense understands the process of deal-making, from both the parties' perspective and the lawyers'.
- Second, she understands the economic and strategic consequences of the transaction and the parties' motivation.
- Third, she can assess realistically what can be accomplished in a particular transaction.
- Fourth, she has the skills and the knowledge to get it done.

While acquiring deal sense ultimately requires experience, we can accelerate the process for our students through what we teach. To give students further context, we need to broaden our concept of what a contract is. While the Restatement defines a contract as a set of promises, clients and their lawyers see a contract more broadly. There are representations and warranties, conditions, discretionary authority, and general policies governing the relationship. It is all of these together that state the business deal.

Students need to see all of these contract concepts in a dynamic context—that is, in a contract. By seeing how these contract concepts work together from both a business and legal perspective, students will learn their way around a contract and make connections between the contract concepts they are learning. In addition, the course will become less disjointed; theory will be linked to practice; and ultimately, students will gain a greater appreciation for the case law that they are learning.

By broadening the nature of what a contract is, we can also begin to teach students the translation skill—that is the analytical skill that deal lawyers use. It differs from the one litigators use—that is, the skill we typically think of as thinking like a lawyer. Litigators apply the law to the facts to create a persuasive argument. Deal lawyers do it differently. They start with the business deal (their facts—which are always changing) and then figure out which contract concept will best express it. Having this skill is essential in learning to draft or negotiate a contract.

Knowing the translation skill is also essential to learning contract and risk analysis, two other skills essential for negotiating and drafting a contract.

Contract analysis is not the same as contract interpretation. Interpretation assumes an ambiguity. Contract analysis precedes interpretation. In contract analysis, the lawyer looks at a provision and asks a series of questions, among them:

- What is its business purpose?
- Does the provision address it?
- Does it use the right contract concept? (Here is where the translation skill comes in.)
- Is risk allocated properly?
- What legal issues affect this provision?
- How can I better protect the client or advance its cause?
- What is missing from the provision?

Only by answering these questions can a lawyer decide what a provision should say. Therefore, having this skill sets the stage pedagogically for teaching negotiating and drafting.

As to risk analysis, this is a skill we can only introduce to our students. It requires recognizing the risk, assessing it, and knowing how to protect against it. In a contracts course, we can address this skill at a basic level, for example, by demonstrating how representations and warranties are a risk allocation mechanism and how that allocation can be changed, sometimes by a single word. As an aside, this example shows how deal skills build on each other. By teaching students about risk allocation, we are also teaching them about negotiation and drafting.

Finally, we return to the students' lack of knowledge about the business world. Because of that lack, students often fail to appreciate the context of a case

and the underlying business issues that affected the drafting of a provision. To remedy this, we must discuss these business issues as part of case analysis.

So how do we fit all of this into a four-credit course? Much of what I have described is providing context which can be given through out-of-class assignments or when covering cases.

But the course would change. Less time would be devoted to some concepts, such as offer, acceptance, consideration, the parol evidence rule, and unconscionability. It becomes a question of emphasis.

With the extra time, new cases could be added so that students could better understand how contracts use different contract concepts. For example, typically, students learn about representations as misrepresentations and warranties in the context of the UCC. But deal lawyers regularly see these concepts in a different context: joined together for risk allocation purposes in sophisticated contracts such as acquisition agreements, loan agreements, and licensing agreements.

Using cases that deal with these concepts would not only teach doctrine, but also give students a look at these concepts in a dynamic context—that is, in use by the parties to memorialize the business deal. An excellent case that could be assigned is *CBS v. Ziff Davis*,<sup>1</sup> which demonstrates why parties ask for both reps and warranties. In addition, it provides the opportunity to compare the common law concept of warranty with that in UCC Article 2.

Other cases could be added to provide an opportunity to teach skills. For example, in teaching assignment and delegation, some textbooks use cases where the issue is whether particular contract language acted as both an assignment and delegation. As both the Restatement and UCC have interpretive provisions resolving this issue, it might be more fruitful to assign cases dealing with anti-assignment provisions.

Professors could assign two wonderful Missouri Supreme Court cases where the court reached inconsistent decisions on the law, but the same conclusion on the anti-assignment provisions—they were unenforceable.<sup>2</sup> These cases teach law, offer the opportunity to discuss fact-based decisions, and easily lend themselves to a short drafting assignment.

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<sup>1</sup> *CBS Inc. v. Ziff-Davis Publ'g Co.*, 554 N.Y.S.2d 449, 452-453 (1990).

<sup>2</sup> Compare *Dodier Realty & Inv. Co. v. St. Louis Natl. Baseball Club, Inc.*, 238 S.W.2d 321, 325 (Mo. 1951) with *Stand. Operations, Inc. v. Montague*, 758 S.W.2d 442, 444 (Mo. 1988).

As will be discussed in depth over the next two days, contract drafting and negotiation exercises should be incorporated into the contracts course. These exercises would provide students with further perspective and context.

I do not believe, however, that the contracts course should morph into a drafting course. There is too much else to learn in contracts. Instead, the fantasy curriculum includes a required three-credit contract drafting course. Now, here is where my fantasy comes the closest to being X-rated. I would have the audacity to put this course in the second semester of the first year.

But returning rapidly to my G-rated world, I recognize that the most likely place for this course to find a home is the first semester of the second year, where it would easily fulfill the requirements of ABA Standard 302(a)(4)—the standard that requires each student to receive substantial instruction in professional skills.

Regardless of its home, this course would emphasize learning how to

- translate the business deal into contract concepts;
- look at a contract from the client's business perspective;
- problem solve through drafting; and
- analyze contracts.

Students would, of course, also learn how to write clearly and without ambiguity. In addition, they would spend some time—not a lot—negotiating contracts, so they could better understand the relationship between drafting and negotiating.

Pedagogically, teaching contract drafting as soon as possible after the contracts course makes sense. It would solidify students' understanding of the material in the contracts course, and it would provide students with an essential building block for the material that follows.

A final thought about the first-year curriculum. It must address ethical issues that arise in transactions. Not knowing the Model Rules should not be an impediment. Generally, they do not provide an answer anyhow as they are so litigation-oriented.

The next step in the integrated transactional curriculum would be a course called Deal Skills. Its purpose would be to teach students how to do the work that lawyers do. It would be taught entirely through simulations.

In it, students would learn how to perform due diligence and draft third-party opinion letters, tasks commonly assigned to junior associates. It is imperative that we give our students the ability to do real work the day they walk in the door of a firm. We have done that for our students who litigate, but we have not done it for our students who do deals.

The skills necessary to perform due diligence would not be entirely new for students. Two facets of due diligence are contract and risk analysis, two skills that the students have been learning. They started learning about them in contracts and learned even more in their contract drafting course. Learning due diligence through a simulation gives them an additional opportunity to master these skills.

In addition, students can use their knowledge of contracts to see how the parties factor into the transaction the results of the due diligence. For example, the parties might decide to add a condition to closing to deal with a risk a student found in a contract.

In Deal Skills, students would also gain a working knowledge of several agreements. They would study letters of intent and five common risk reduction agreements: indemnities, guaranties, escrows, pledge agreements, and security agreements. The course would cover these agreements because they are commonplace in so many different types of deals. Again, having had contracts and contract drafting, the students will be able to approach these agreements in a more sophisticated way.

As part of Deal Skills, students would also learn how to interview and counsel a client and to negotiate a contract. One caveat here: Negotiating a dispute differs from negotiating a contract. Because of this, we in the academy must think through how this affects what we teach our students. The pedagogy that applies to dispute negotiation may not apply to contract negotiation.

First, deal lawyers and litigators negotiate different subject matter. Litigators usually negotiate settlements—that is money. But that is not what deal lawyers do most of the time. Generally, by the time the deal lawyers get the deal, the business parties have already decided most of the distributive issues. So, negotiations about purchase price, salaries, royalties, and the length of the noncompete do not reflect the reality of most deal negotiations.

Instead, the lawyers negotiate the contract, and this requires knowing both how to draft and analyze a contract. This is the typical chronology: One lawyer drafts; the other analyzes; the lawyers negotiate the business and legal issues found during the contract analysis; the drafting lawyer revises the contract, and the cycle

starts again. As you can see, drafting and contract analysis are essential elements of a negotiation. That is why in my fantasy curriculum contract drafting precedes negotiation. The former must be a prerequisite to give students a real experience of deal negotiation.

Dispute and contract negotiations also differ in the number of points to be resolved. Unlike dispute negotiations, deal negotiations can involve dozens of issues. If the contract is over 100 pages, the reviewing lawyer might well find 100 issues. In teaching negotiation theory, the academy will have to give thought to how this affects negotiation strategy and other aspects of negotiation pedagogy.

Deal Skills would end with a short course in transaction management and closings. Students would have encountered ethical issues throughout the semester because they would have been worked into the simulations. In addition, through the simulations, the students would have garnered considerable experience in working in teams—collaboration being one of the hallmarks of a transactional practice.

At this point in my fantasy curriculum, a student would be ready to take a capstone course, one which would synthesize all the material she has learned so far. All capstone courses would be simulations in which students role-played the lawyers in the transaction and business school students role-played the clients. Each course would focus on a different transaction. The hypotheticals in these courses could be quite sophisticated because students would not be performing tasks and learning skills for the first time. Instead, because of the earlier courses, students would be honing and mastering them.

At the end of one of these courses, I would not expect a student to be able to handle such a transaction on her own. That takes years of experience. Instead, I would expect that the student could participate meaningfully as a member of a team working on such a transaction, and, if we teach our students properly, that student would be able to reflect on her participation and learn from the experience.

At this point my fantasy ends, and I will quickly give you my two almost random thoughts. In the last part of my fantasy, I talked about capstone courses, each dealing with a different transaction. The reality is that most law schools will not have enough faculty with the real world experience to teach these courses. That means that adjuncts will teach these courses.

Over the years, adjuncts have gotten a bad rap. Here are three of the most common complaints:

- They do not know how to teach.
- They do not show up.
- All they do is tell war stories.

At Emory we have tried to deal with each of these complaints. Part of my job is working with adjuncts—to help them create their materials and to work with them on how to teach. In addition, we sometimes use a student-teacher arrangement where a new adjunct will attend a course for a semester before teaching it. Adjuncts are generally lawyers who have excelled and want to pass on what they know. Having excelled in practice, they also want to excel as adjuncts. I have yet to meet an adjunct who was not delighted to have help and guidance.

To deal with the real problem of conflicts with work, we have set up our deal skills and capstone courses so that two adjuncts teach each course. In addition to assuring coverage, this arrangement has at least three benefits.

First, the adjuncts can brainstorm together about the exercises and hypotheticals they are going to create. This usually results in a superior work product, as do most collaborations. Second, the adjuncts can divide the work. That makes it more likely that each adjunct will be able to prepare thoroughly for the classes he or she teaches. Third, in class, the professors can play off of each other, providing the students with two views of an issue, which, of course, is wonderful pedagogically.

Finally, there are the war stories. This issue is relatively easy to deal with. I tell the adjuncts that they can tell war stories if they have pedagogic value. But then, somewhat facetiously, I tell them that if their evaluations say that the course was mostly war stories, they will be fired and probably so will I. This works like a charm.

My second almost random thought is perhaps more of a challenge. I think that as we create a transactional pedagogy, we must always remember that deals differ from litigation and that we cannot simply take what works in one context and use it in the other. Only by articulating the differences will we be able to excel in this new pedagogy. From what I have seen of the presentations for the next two days, our presenters have risen to that challenge.