

YOU TOO CAN CREATE A SIMULATION EXERCISE (OR EVEN A COURSE)

PRAVEEN KOSURI*

INTRODUCTION OF THE PANEL

We will be talking about designing and implementing a transactional course, and we have three very distinct approaches to present to you. We want to keep it interactive. First, the three other panelists will tell you about the courses they designed at their particular schools, and then we want this presentation to be free-flow and interactive. I will pose some questions to the panel, but we really want you to ask questions as well.

I would like to introduce you to the panelists. First is Daniel Jaffe from Case Western, who teaches a mandatory second-year drafting and negotiation class. Second is Jeff Leslie, my former colleague from the University of Chicago. Jeff is a clinical professor, and he teaches what is called a “mini-course” in transactional lawyering. Last is James Hogg from the William Mitchell College of Law. Jim teaches an upper-level intensive deal simulation class that is based on a buy-sell transaction.

DANIEL JAFFE**

CONTRACT DRAFTING COURSE WITH NEGOTIATION SIMULATIONS

As Praveen said, my class is a mandatory two hour class. It is a two-credit class, and it is primarily contract drafting. Within that context, we also have negotiation simulations, and that’s primarily what I want to talk about. The class is part of a two year lawyering skills program that is mandatory for all four semesters, with two credits each semester. It is called the *CaseARC* Program. The first year is mainly a traditional skills program. The students work on interviewing, fact gathering, and counseling, along with the typical research, memo writing, brief

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writing, and finishing with oral argument. Each semester, there is a linkage to a doctrinal course, and I will give you a little more information about that later.

My course is a second-year course, primarily in contract drafting. It covers writing and negotiation in the transactional setting, and students are introduced to business transactions, the roles of lawyer in the transactions, and the basics of drafting. In addition to the classroom instruction, we teach negotiation through simulations. There are three full-time professors teaching the course. Each professor has about forty students per semester, so there are about 240 students over the course of the year. In addition, there are six adjunct professors who help teach the course, specifically with the negotiation simulations.

The entire course is graded. In terms of materials and assignments on the contract drafting side of it, we have three writing assignments. The writing assignments increase in complexity throughout the semester as the students learn more and more. We try to organize the writing assignments around a single scenario, and then we try to organize the negotiation simulations around the same scenario. During the fall semester this year, for example, the client was the Merion Fitness and Racquet Club, and there were two sisters who ran the racquet club. During that semester, the course was linked to the doctrinal business associations course, so we tried to put those together.

Over the course of the semester, the students were required to draft three contracts. The first was a simple contract to have a contractor build a bar in the club. It was designed to be drafted from scratch, focusing on simple operative provisions. The second contract, getting more complex, was to create an L.L.C. operating agreement between the sisters and some outside investors. It was created by working from a form. The third contract is drafted from scratch, and it's a more complex one. In this case, the U.S. Tennis Association rented out the club for one of their tournaments. That's how we did the three contracts.

On the negotiation side of the course, the club was luring a tennis pro away from another club, and they were negotiating for a contract as part of that. We primarily use the adjuncts to help teach the negotiations and the simulated negotiations side of the course. The students have two lectures, each about two and a half hours, with the adjuncts and myself, and we try to teach the basics of business negotiation. We do some very short simulations by having all the students practice with each other, with some critique. That, hopefully, prepares them to do the negotiation themselves.

We do two negotiations. The first is a fairly simple distributive negotiation where they are basically figuring out the price. In this case it was how much they are

going to pay the tennis pro, how long the contract is going to be, whether she will get a cut of sales from the pro shop, and items like that. So they are working out the basic terms. The second negotiation gets more complex. What lawyers really do is work on the language and work using drafts. For the second simulated negotiation, the students get a memo from the partner about what has happened at that point, and what their guidelines are for resolving the negotiation. But they also get a draft. The students are required to work off the draft, which has already been through two iterations and is redlined. We try to focus on language issues in that second negotiation.

You will see in that draft that there are a couple of representations that one side has demanded and the other side is adamantly opposed to.¹ Another issue in that draft is the termination provision. The students have to actually determine what is appropriate language for a termination provision in an employment contract. So they are working on language and working on standards. They are working on how to come up with language. The ultimate goal is to sign off on language in their actual negotiation. They are doing it live in front of our practicing lawyer adjunct professor. The first negotiation is done in teams of two, so they can work together. The second negotiation is done individually, one on one.

The other interesting thing is that we try to provide the opportunity for client contact. We do that through e-mail, and we actually allow the students to contact the clients to clarify whatever they want to clarify. We make sure they have the authority that they need to successfully bring the negotiation to a conclusion. The client they contact is actually the adjunct professor—the practicing lawyer who is going to be critiquing their negotiation.

The course has been going on for five years now, and we have managed to come up with new scenarios each semester. Coming up with new scenarios seems like the hardest thing. Once you get the scenarios, drafting the actual memos sort of becomes a little snappy.

¹ See *infra* Appendix A.

JEFF LESLIE*

MINI-COURSE IN TRANSACTIONAL LAW

I think a big issue lurking in the background for this whole conference is what resources a school is putting into its skills training for transactional lawyering. During my presentation, I will talk about ways to cram a lot into a resource and create an intensive kind of course.

I teach, with two other clinicians at the University of Chicago, a seven session mini-course on transactional lawyering. The course gives students a taste of a bunch of different transactional skills, like interviewing, counseling, contract drafting, and negotiation. We try to do that within a framework where we have seven sessions of 65 minutes each.

The sort of historical background to this is, I teach a transactional clinic that focuses on real estate development for affordable housing. My colleagues teach a small business and entrepreneurship clinic, which is kind of a general transactional practice for small businesses. Each clinic had a companion seminar that went along with the clinic, as many clinics do, and each of those seminars had a skills training component. So, in the seminars, we talked about doctrinal issues, substantive law, and business related to the fields that our students were then practicing. But we also had sessions on interviewing, counseling, and negotiation. The idea of this mini-course was to move the skills components out of the clinical seminar and consolidate them into this mini-course. It is efficient, and it also allows us to offer that component of the course to more students, not just our clinic students, but the general law school population. This is not a required course. We generally have 60 to 70 students take it, and we have offered it two different times.

I would like to talk a little bit about how we run the class. We have changed the course in some ways from the first year to the second. I will talk briefly about that, and then just point out some disadvantages of teaching these kinds of skills in a very time constrained kind of way.

A. First Iteration of the Course

For the first iteration of this class, we used as our jumping off point a NITA exercise, "Quality Paper Products," which is an M&A deal involving the sale of a

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paper company.² Students in that class basically all represented one side of the deal. We were all one big law firm, and students would represent just the target company.

We started by having students draft a purchasing contract for a used car, just to get their feet wet and get them thinking about contracts. Second, we had them do a client interview in groups. We had 60 or 70 students and 3 instructors. We recruited a couple of volunteers so we could do this interview in groups of 10 or 12 students. Our format was for each student to prepare an outline of what they would ask in a client interview if they were doing this on their own. Then, within the class session, we went around the room and each student had basically four or five minutes where they were the lawyer asking the questions. The next student would then step into that lawyer's shoes and we would go around the table that way.

After this exercise (and many others), we had students write reaction papers to discuss what they did well, what they did poorly, and what they would change next time. That became an important way for us to identify the common themes and to critique students to figure out where their problems were, or what they perceived as their problems.

The next exercise was drafting a letter to opposing counsel, which included some contract drafting on some non-compete issues. Then everyone had to draft an employment contract provision regarding termination for one of the key principles of the target company. We did a draft exercise where they marked up warranties for the asset purchase contract, and we rolled in an ethics issue involving a potential trademark infringement problem of the target company. It had a low probability of success on the merits, and so students had to wrestle with whether it was their duty to disclose this to the other side.

The final exercise was to draft a complex purchase price provision from the term sheet for the ultimate asset sale agreement. So we were not drafting full contracts, but fairly complicated provisions within a contract.

We covered several skills. We started off with interviewing. We did a session on counseling, but that did not involve a simulated exercise. Obviously we covered drafting. And we had started off with a little bit of theory about what transactional lawyers do, relying on the Ron Gilson article about lawyers as

² NANCY KNAUER, TRANSACTIONAL PRACTICE SERIES: QUALITY PAPER PRODUCTS (NITA 1999).

transaction cost engineers, and kind of using that as a launching point for the discussion.³

B. Problems with the First Iteration

There were some problems with that iteration of the course. There was really no opportunity for students to practice negotiating, and that was a perceived weakness in the class. Also, we were using the NITA materials, and we found that we were really almost wholesale supplementing with our own invented facts and invented documents, to kind of enrich the material and allow students to have a more realistic and meaningful experience.

C. Second Iteration of the Course

For the second iteration of this course, we decided to just come up with our own materials entirely, to restructure the class and add a richer set of facts. We wanted to give students a more realistic view of what transactional lawyers do. So for the second iteration of the class, we used real companies and a real patent. It turns out that these companies and this patent had nothing to do with each other, but they could. This was our fictionalized attempt. One company we had was Handel's Ice Cream, a small to medium chain of ice cream stores based in the Midwest. The other company was Solo Cup, a paper goods manufacturer and supplier based in Illinois.

We divided the class into Handel's attorneys and Solo Cup's attorneys, and we kept that division throughout the scope of the course. The scenario was that Handel's Ice Cream had an invention that they had patented called "Catch Cones." It is a real patent we pulled off the patent website. It is a little gizmo that catches ice cream drippings. The story was that Handel's was using this and it was doing well in their stores. They wanted to outsource the manufacture of Catch Cones to Solo Cup. They also wanted to sell the patent and their machine to Solo Cup.

So we were working with two different contracts: the manufacturing supply agreement with Solo Cup, and the sale of the machine and the patent that went along with it. We had similar exercises. We had the same kind of interviewing exercise, but because we were using real companies, the students could do some web research and find out more about Solo Cup and its business. As a result, less of the interview questions were "tell me about your company" kinds of questions. We also had a

³ Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

negotiating component to have students negotiate a term sheet using information they pulled from the interview.

Next, each student had to draft a complete contract from scratch, using a set of terms that we gave them. They were assigned either the manufacturing supply agreement or the asset sale agreement. Although they had all negotiated their own term sheets, we gave them a stock term sheet to use so we could have some uniformity, and so they could have a complete term sheet in case their negotiation did not reach a deal. The last exercise was to mark up the contract from the other side. So the students had experience both as the primary drafter and as the lawyer marking up a contract.

D. Overall Evaluation of the Course

I would say the course is successful for what it is trying to do, which is help students who are going into live client clinics. It helps them get their feet wet and get up to speed so they can continue to grow and develop as clinic students. It also gives the students who are just taking this course as a standalone course “a toe in the pool,” as someone said. It lets them test the waters and see what transactional lawyering is all about in a very modest way.

I will just close with two difficulties of doing it this way. One, we have not found a way to give individualized feedback on student exercises. With the demands on our time as clinicians, and with other courses that we are teaching, we do not have time to review every contract draft and give comments on every negotiation, which clearly would be ideal. The second best solution we came up with was to have a feedback session in the next class, where we highlighted common drafting problems that we saw in a lot of drafts that we looked at. We talk about issues that students raised in their reaction papers, which provide a way for us to give generalized feedback that at least was informed by student experiences in the class.

The last thing that I would point to as a disadvantage is that there is no time in the course for any progressive development of skills. I think this is a real weakness for students who have this as their only transactional lawyering experience. You do one interview and then you move on; you do one negotiation and then you move on. So there is no chance to refine your skills and get better within the confines of this limited course.

JAMES F. HOGG*

EXPERIMENTAL TRANSACTIONAL COURSE

I teach at William Mitchell College of Law at Minnesota. I am a recovering retired dean. I have a business background, a legal practice background, and lots of years of teaching. As a result, I know very little about a whole lot of things. We decided to create this new experimental transactional course last year. This course was designed by a friend of mine, and co-taught by my friend and myself. He is a partner of a large law firm in downtown Minneapolis with a substantial business practice in transactions of the kind that this course emulates. It is a long course. It is six credits, which is nearly half of a graduating senior's last semester. It focuses on the sale and purchase of a single business.

We limited the course the first time to eight students—four pairs. They were under the supervision of a senior partner, which was either my friend Ray or myself. We also doubled as the client when necessary. One of the innovations for next year, which I will talk about later, will be the client throwing a large rock in the pool after the first drafts have been circulated.

The assignments for this course involved the original client instructions, the lengthy discussion of the history of both client businesses, and summary financials and a description of the shareholder makeup of each corporation. This was critical in the case of the seller involving minority shareholders who were about to be trumped by the two majority shareholders, who would have become the lead managers of the buying business.

They went into due diligence through a large stack of real documents. I say “real documents” because they were made from the ground up by Ray and myself, and that took a significant part of a semester to do. The students did a retention letter, letter of intent, due diligence, and then they went on to report on research issues found in the documents. These research issues involved both strengths and weaknesses which had to be taken into account in developing a master plan on each side of the transaction. Somewhere along the line, after Ray and I had reviewed a variety of research memos, they developed a plan, which we critiqued. They then developed various strategies, depending on which side they were on, with respect to implementing that plan.

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Each side prepared a draft agreement, and they exchanged their drafts and had the first negotiations. Ray and I critiqued both the drafts and the negotiations. They redrafted and renegotiated, and we re-critiqued all over again. They prepared the final closing documents and everybody heaved a huge sigh of relief, particularly Ray and myself. Anybody who thinks you can do this on a time shoestring should think again. Each pair consulted either with Ray or with me each week on whatever the project for that week was, either in person or by telephone conference call. It's a lot of time. I think the happiest point of this course for me was the offer that came from two of the excellent students as they were graduating. They said they really enjoyed this course, and that they were both working for large corporate law firms in town. They said they would really like to help us next year, and believe me, that is an offer that we will pick up.

Rather than going any further, I think it will be much more interesting if we resort to at least some discussion among the panel and with you, as to elements of transaction course teaching.

QUESTION AND ANSWERS

PRAVEEN KOSURI

Jeff, you mentioned resources and how every school has a different allocation of resources towards courses like this. You talked a little bit about how your course originated. For the other two panelists, could you please describe whose idea it was for the courses that you teach? I am also curious about whether there was administrative resistance, acceptance, or support.

DANIEL JAFFE

I can expand a little bit, but not very much because it happened five years ago. It was a shift in curriculum, and the idea was to put more emphasis on skills in the curriculum so that the students coming out of law school are more ready to go when they hit the market. I cannot tell you anything about what kind of fighting it took to get there because I was not there at the time.

PRAVEEN KOSURI

And do you know how many people taught the class before you?

DANIEL JAFFE

My colleagues have been there since the beginning, five years ago, and there was just one person before I took over two years back.

JAMES HOGG

I will comment on cost first and foremost. Twenty years ago I asked for a committee report on the comparative cost of clinic-style instruction versus lecture-style instruction. The answer, as I vaguely recall, was a factor of about 8:1. You might think that putting one of these courses together involves a hard sell with the administration. In my particular case last year it did not. The inspiration for this course came, would you believe it, from the curriculum committee which in turn was inspired by the dean who had been inspired by our board of trustees to do something more creative about teaching transactional skills.

We have taught litigation skills for many, many years, and we are well known for it. But adding transactional skills instruction got a significant helping hand from the top. The curriculum committee asked if anyone had ideas, and that's when Hogg volunteered to create one of these courses. That's the origin of the course. Given the context, that explains why there was no difficulty from the curriculum committee in getting it approved, and that does help.

This course is one of many transactional skills courses that are now offered at Mitchell, and I am just describing this one as an illustration. I explained the cost component this way: Everybody criticizes law schools because tuition goes up six percent every year, versus the annual inflation rate, which goes up an average of approximately two percent. Where you see that money going is in the steady transformation over the last 20 years from the stand up type of substantive presentation to the much more hands-on transaction and litigation skills clinic type programs. You can literally see where that money is going. That increase in tuition cost is going into these hands-on programs, and I suspect everybody in this room will agree that they produce the optimal economic output.

QUESTION

I noticed that you used timesheets. I am playing with the idea of doing that, and I just wondered how effective you thought they were.

JAMES HOGG

I think it is a good idea. First of all, it emulates the lousiest job in practice and the one that calls for administrative jabs more than anything else. I found the information to be no better than confirmatory of what I could see from all of the other dimensions of the program. It was one of the requirements of the curriculum committee because they were interested in the level of effort that would be required, and demanded, of a six-credit course.

QUESTION

Do you see that the students themselves are surprised at how much time is invested in this? It is sort of a shock for anyone who starts in practice, I guess, to keep these timesheets.

JAMES HOGG

It is something of a shock for them, but it is nothing like the shock that they get in early practice when they look at the bill that finally goes out to the client, and most of the time that they have carefully billed to this account is stricken by the managing partner. There's no time like the beginning to start keeping track of your time, and what you do with it, and how effective you are. It can also offer the opportunity for senior partner critique, such as: "You could have done this more efficiently and in a much shorter time by doing this, this, and this."

QUESTION

What time do you spend on negotiation theory, or introduction to the terms of negotiation? And what are your pedagogical objectives in the negotiating exercises?

DANIEL JAFFE

We have two lectures that are two-and-a-half hours each that precede each of the two simulated negotiations. Each of those lectures is split, with about half the time spent on theory and half the time spent on an exercise. In terms of the goals of our course, it is not the first time they have had negotiations, but it is the first time they have had it outside of the litigation context. So part of it is just sort of disabusing them of some of the litigation concepts that they are getting at, but it is mostly to teach them what you can do to prepare for a negotiation. How to develop

a plan for a negotiation and what types of things to be looking out for. That's how I would summarize it.

JEFF LESLIE

In our mini-course we have maybe a 45-minute lecture on negotiations. We give them reading in a very condensed way that gives them the basics of a getting-to-'yes' approach, and then a more traditional positional bargaining approach. That is pretty much the preparation that they have going into negotiation. Again, it is just to give them a taste. We do have a three-credit negotiation course that I also co-teach with the same folks, for second- and third- year students.

QUESTION

Are there requirements for getting into your course, or is it open to all students? Do you teach things that are on the bar exam?

JAMES HOGG

I must confess that this is not exactly a bar exam-oriented course. This is a practice-oriented course for high-achieving, relatively high-end students. The admission is by interview. I think this is a course that would be really tough for somebody who is in the bottom quartile of the class. There are some prerequisites. We started off by stating them as absolutes. Corporations and basic tax, for example. We modified that a little bit, and we said you can decide on your teammate and we will require those and a couple of other things as part of the composite team background. I think that will work alright. But we deliberately insert problems into the materials that they have had no instruction on in any course they have taken in law school, because that's what happens the second day out in practice.

I do think there is a way to teach this sequence of objectives to middle-of-the-road students. The eight students we selected were far from the top eight in the class. By accident or miracle, two of them had accounting degrees, very strong financial analysis backgrounds.

DANIEL JAFFE

My course is mandatory. We teach the top of the class, the middle, and the bottom of the class. Of course, the results reflect whether or not they are getting it. The idea behind the course is that these types of skills are basic lawyering skills. Drafting a contract is a basic lawyering skill. I don't care what type of legal work you

do, you need to know how to negotiate and draft a contract. You need to know how to negotiate a contract, and you need to know how to draft a contract. Whether you are doing the most sophisticated work that our top student might be doing, or whether you are doing collections, you need to know this.

JAMES HOGG

I should have added that the course that Ray and I put together is one more of a number of courses offered at Mitchell that include both litigation and transactional skills.

QUESTION

Dan and Jeff, can you explain where your course falls within the larger curriculum? Is it the only course like this, or are there other courses that students can take to build upon the skills that they learn in your courses, and does that play a role? I have heard “capstone” more in the last two hours that I have ever heard it before. Jim’s class is a capstone class and your classes are more introductory, or as Jeff said, “toe in the water.” So where do they fall in the larger landscape of your curriculum?

JEFF LESLIE

Students in our course have opportunities to go on and take live clinics on the transactional side, so that is obviously a way for them to develop their skills. We do have an increasing number of upper-level courses taught by adjuncts and by some doctrinal faculty that do incorporate some drafting kinds of exercises, but not many. Next year we will have some transactional component in our first-year legal writing course which we haven’t had up until now. So it is getting there.

Our course is a very introductory course that is offered to anyone who wants to take it. Chicago does have a cap on skills courses that students are allowed to take. So students cannot get academic credit for more than ten credits of skills courses, and that includes their credits from doing clinics. We have very highly developed trial courses and pretrial courses. So one thing that is driving this class as a mini-course is to work within that ten-unit cap. It gives students some transactional experience while protecting their ability to take these other skills courses and still do clinics all within that ten-credits cap.

DANIEL JAFFE

We don't have the next course, which would be ideally something like Jim's course. There is a small business clinic that students can take and work on some of these drafting issues. Beyond that, it is just the upper-level doctrinal courses.

QUESTION

I have the responsibility and the privilege of trying to draft two courses. I just got a grant, and I need to come up with a first-year course for the second semester. I am also working on a capstone course. So I am not worried right now about the capstone course. That is what I look forward to. I am concerned about trying to put too much into the first-year, second semester course. What would you advise we cover and what you would advise us not to cover in the first-year, second-semester transactional course? It is a two-credit course.

JEFF LESLIE

I think the thing that I like the most about our mini-course is actually not so much the contract drafting stuff, but the discussions we have about deal structuring. We use an example that was pulled from a real estate deal that adds some complexity to it. How the development entities were formed, how they selected the business entities, and what their flow of funds was.

QUESTION

Bear in mind that these first-year students will be taking contracts and property simultaneously.

JEFF LESLIE

I understand that, but I think it is still possible to do it. The students that I am teaching are in their first quarter, second-year. So they have the first year under their belt, but really not much other than that. They don't know anything about tax or corporations, so it is much more an exercise of giving them some very basics. They are learning to work with those concepts and trying to figure out how you would structure a deal. To me, the more interesting part of being a transactional lawyer is deal structuring, not so much the nitty-gritty of contract drafting, although that is certainly important. So I would encourage you to think of some ways to have a deal structuring component to it.

DANIEL JAFFE

Since it is a two-credit course, it might be similar to my course. I primarily discussed the negotiation side. On the drafting side, essentially it goes from organization and structure and format of a contract, to operative provisions, covenants representations, warranties, conditions, declarations, rights, indemnities, releases, clarity of drafting, brainstorming, recitals, boiler plate, default, and remedies. Then we spend a good week and a half using forms: how to use them and how not to use them. So those are your basic classroom lessons, and then they need to apply those lessons in writing contracts, which means the instructor has to read them all.

QUESTION

You mentioned that your course is linked to doctrinal courses. How exactly?

DANIEL JAFFE

In the fourth semester we are linked to business associations. So inevitably in the Fall semester we have been drafting a L.L.C. operating agreement. We found that to be the only business structure that really works for a contract. There is continuity of the client throughout the semester. So the client is the entity that becomes the L.L.C. In the spring we are linked to professional responsibility, which is a more difficult link in terms of creating problems. We found that it is difficult to shoehorn professional responsibility into the actual exercises of drafting and negotiation, but we have been able to do it. For example, this past semester we had a client who had told the attorney that they are contemplating committing fraud. This was in the context of a timber supply agreement. It was supposed to be certified sustainable wood, and the client was contemplating substituting trees that were not certified as sustainably grown. So that created an interesting problem from professional responsibility point of view.

QUESTION

This is a question for Jeff. You mentioned that Chicago has a ten-credit cap on skills courses. Is that a decision based on limited resources, or is it a pedagogical decision?

JEFF LESLIE

I was not around when that cap was put in place, but I think it's a combination of both. There is a pedagogical aspect of making sure that students

enjoy other parts of our curriculum and do not spend too much time away from the core kind of doctrinal curriculum. Then also it is a fairness and resource allocation decision.

PRAVEEN KOSURI

There are some schools that have caps like that, but they encompass larger groups of activity. I teach at Penn and the cap is on non-classroom activity. So that includes moot court, law review, and anything that is outside the classroom. Those types of credits are capped, and clinics count in that category. A class like this would not count against the cap, however. I think the ABA got rid of those standards, but I think some states require it in terms of sitting for their bar exam. I think that's why the cap exists at Penn. A lot of the students take the New York bar, and I believe that they have that requirement. But this is all hearsay from my perspective.

QUESTION

All of you use different materials, but it seems like you have all come to the point where you have created your own. What if I wanted to start a course like this and I don't have the time to create my own materials? I think Jimmy said it took you a full semester at least to create those materials.

JAMES HOGG

It took the two of us a chunk of a semester—perhaps a third to a half of a semester.

QUESTION

Where would I look to find materials that I could use? Where did you guys look originally? Then, in terms of creating your own, what was that process? Where did you start from? What did you do? How long did it take? Please tell us about that.

DANIEL JAFFE

Fortunately, with three of us teaching the same course, we could distribute the work. That really helps a lot. Each semester we have to come up with five major assignment materials: one for each of the writing assignments that the students do, and then one for each of the negotiation simulations. Splitting that among three people makes for much easier work, and for a multitude of eyes on the

material before they go out. Even with three of us reviewing them and going through multiple iterations of it, we still make mistakes. With each writing assignment there tend to be three or four e-mails out to the students providing clarifications.

In terms of where we go to find a basic scenario, each of the three of us tries to think about our own practice or people that we know in different areas of business. For example, this past semester the major client was a land conservancy and we were doing some documents related to land conservancy and conservation easements. So we went and talked to the people working there, and talked about what kind of contracts they come up with and what kind of deals they work in. We took it from there, and created the documents or assignments from that. We then went a step further, and at the end of the semester we had the lawyers from the land conservancy come in and spend a class talking to the students about what they do. It really was a good experience for the students to see that it is actually a real client, and it is an area of law that lawyers are practicing.

JEFF LESLIE

Within the constraints of our format, we found it very difficult to find materials out there that were readily adaptable. And the amount of work that went into adapting the NITA materials to what we wanted to use them for turned out to be just as much as creating materials from scratch. So we drafted our own materials, just so we could have total control over what was in there. We knew the problem much better as a result, too.

JAMES HOGG

I got a half-load credit for the semester because I co-prepared these materials. My co-teacher got three adjunct credits, which is peanuts, but nevertheless he was kind enough to do it. We had to develop a set of materials that would fit with the objectives that we wanted the course to fulfill. Some of those objectives involved due diligence and the analysis of a contract. Some involved risk assessment, the kind that Tina talked about this afternoon. Some involved ethical issues with the seller having several minority shareholders—that was a piece of cake.

We built in a tax problem, which was fairly complex. We went to a law firm file for resources, of course. We found a series of deals that had been handled by the law firm and we copied some of the basic documents in those files. We had to rewrite each one of those documents so they would fit precisely with the business descriptions and with the major issues that we wanted to plant. That's a very time

consuming process. Nobody has yet talked about the use and abuse of forms and form books.

We did point our students in the direction of several different form books, along with appropriate warnings. My warning is, “never ever use a word or a sentence in a form book that you do not understand the purpose of, or do not intend that purpose to be fulfilled in your particular transaction.” That proves to be, as was discussed earlier in the program this afternoon, a major challenge to students. And one of the subsets of skills that I am interested in is how to use and not abuse somebody else’s draft or form.

Another dimension that we wanted to include was “client management.” I use that in quotation marks, and might put along with it “senior partner management.” Dealing with a client is obviously critically important. Another Hogg aphorism is, “never create an expectation in your client that you cannot meet.” So part of this exercise involved managing the client, managing the client’s expectations, and getting the client to modify the client’s expectations as part of the process of negotiation and give-and-take along the way, which again is part of the fodder of this course. Managing the senior partner is a little more difficult.

QUESTION

This question is for Jim. How do you teach your class?

JAMES HOGG

With difficulty. I have got some ideas that will I think improve the process next year. This last year we left it pretty much free form. Where the team did not pick up a serious issue, the senior partner would say “what about,” and they would go away and then come back to the senior partner. We did not have any regularly set meeting time, and I think next time around we will schedule an hour or maybe two hours a week where everybody meets so that we can go over some of the problems that are relatively universal. I think we can cover those just as effectively in group meetings as we can two at a time, and save a lot of time. I think one of the most serious shortcomings in the drafting and negotiations was indemnification clauses. They are lousy in the form books, and they were rotten in the first drafts. They improved, but they did not improve to a level that I would ultimately expect. So what I would do next time is have a one week assignment on the role function of the indemnification and the kinds of business problems that trigger indemnification issues, which no form book ever discusses. Unless you have been out there and had it happen to you, you are not necessarily aware of those things. I think we can

improve on last year by picking several topics intensively and treating them as group topics before they get into the negotiations exercise.

QUESTION

Did you have a deal memo? Did you drive the course from a deal memo?

JAMES HOGG

The answer is yes. We had a separate memo for both clients, and that memo required some modification along the way. One of our seller couples was more concerned than the other pair about minority shareholder rights, and the fact that they were all going to become minority shareholders in the buyer. That team came up with the notion that it would be awfully nice to get a staggered put. To my surprise, they did not try and come up with an earn-out, as coming from a different angle. Earn-outs in practice, as far as I am concerned, will drive you around the bend. On the other hand, they are a very interesting educational topic.

Yes, we started with a very basic deal plan from both perspectives, and we made sure there was enough common ground for those two deal plans to mesh. They were told the price was 25 million. But they weren't told how it was to be paid, when it was to be paid, whether it was to be paid in stock or cash, or how much of each. We did inject an Internal Revenue Code section 336 problem because the seller was an S-corporation. That caused more than a few tweakings. Grossing up was an interesting issue.

QUESTION

What was your objective with the exercise? Do you try to add complex issues to the materials?

JAMES HOGG

Our basic objective was to introduce them to transaction drafting, research drafting, negotiation, and closure. We picked the buy-sell as a typical example, but our intent was to improve their skill-set at the outset of doing any kind of a transactional deal. One of those skill-sets that to me is paramount is the ability to look into the future as best you can at the negotiating table, and foresee what the other side is going to want. If you have not made that estimate before you start, you are in deep weeds. Also, looking forward to after the deal closes, to determine what might happen and how those possibilities might reflect on both the drafting and the

negotiation of the deal. That ability to imagine is very difficult to teach, but as far as I am concerned it's foundational. If I am picking between one associate and another, as to who gets promoted and who does not, that's going to be one of the key things I am going to be looking for.

DANIEL JAFFE

In the context of the mandatory class, I am going to say that we never have trouble making it complex enough. The trouble is making it simple enough, because you cannot really put yourself in the position of a second-year law student. Concepts that you think they would understand intuitively because they are lawyers-to-be, they do not necessarily understand unless you have actually taught it to them. So just by creating a scenario, there is going to be complexity. We certainly encourage the students to brainstorm, at least in the context of the later part of the course. Really the struggle is that you have this real life situation that is complex, and you are trying to simplify it so that it makes for a good assignment, and so that we are not spending the rest of our lives reading contracts.

JAMES HOGG

That goes into the essence of one of the changes I plan on for next year. Our issues will be more structured and defined, and somewhat less freeform.

JEFF LESLIE

I do not really think you need to build in extra complexity. When we did the used car purchase agreement, the students found that to be plenty interesting. We also try to give students some sense of what additional complexities will be out there. Part of the deal structuring discussion we have is about impact of different tax considerations and choice identity. Even though they don't know those rules yet, by giving them some of the basic rules, they can start to see kind of how these business considerations affect what the lawyers are doing.

QUESTION

I would like to hear more about the students' interaction with the "client." Do you create situations with the client that are similar to those in practice?

DANIEL JAFFE

We do give the students an e-mail so they can talk to their client by e-mail. Of course, they have to do that at least a day in advance of the negotiation. I have toyed with the idea of having somebody readily available during the negotiation to talk to by telephone. We have not had the resources to do that in the past, although this semester, for the first time we are going to have some student TA's. I am thinking about trying to have them be the client and be available by telephone in the midst of a negotiation.

PRAVEEN KOSURI

I used to teach negotiation with Jeff at Chicago, and I will tell you about one of the things that we talked about doing, although I don't think we ever did it—the students would be negotiating face to face, and someone would bring in an envelope to one of the parties that would have new information, and they would have to adjust to it on the fly. So if you do not have the luxury of an actual person to speak to during the negotiation, that is one way to try to simulate reacting to real-time changes of events. That is a low cost alternative, but we never actually did it.

QUESTION

How do you address the possibility of situations with clients with only limited funds? Do you address how to keep it simple and at the same time serve the client and do the due diligence that is necessary?

JAMES HOGG

We do not, but we should. The question that was asked earlier about time keeping can be made to relate to that issue, as far as the economy of time efficiency, which in the eyes of the senior partner, of course, is just short of God. You know, the client may have very finite means. Whatever those means are, if you agree to take the client on, that is what you have to work with. I think that might be an interesting dimension for us to add.

JEFF LESLIE

We have done that successfully in negotiation class, although only on the settlement conference side, where there is a running clock in fees. So there is a time pressure on students. I agree with John that it will be worthwhile to include that in the transactional realm, too.

DANIEL JAFFE

I am going to say it is a great idea. I have discussed it anecdotally in class, but beyond that we haven't integrated it into the curriculum.

PRAVEEN KOSURI

How do you make the courses that you teach better? What do you wish you did better?

DANIEL JAFFE

I wish we could give more feedback. It is all about feedback and whether they are getting it. The limitation to that is time and personnel.

JEFF LESLIE

We have the same problem. We cannot give any individualized feedback in our current model. I think we need to push for more resources or more capital to find some way to provide more individualized feedback.

JAMES HOGG

Clearly, the feedback is essential to the course that Ray and I teach. I think one of the challenges is to be more effective, more efficient in that whole process. I have some changes in mind for next time to help with that process. But there is no question, in terms of the student comments and the evaluation of the course, that the feedback is the primary learning source for them.

APPENDIX A**DANIEL JAFFE**

TENNIS PROFESSIONAL SERVICES CONTRACT

This Tennis Professional Services Contract (“Contract”), entered into at Merion Pennsylvania is between the Merion Racquet and Fitness Club, LLC, a Pennsylvania Limited Liability Company (the “Club”) and Billy Jean Kerrigan (“Kerrigan”) on this ___ day of _____, 2007.

In consideration of the provisions that follow, the parties agree:

I. Term

The Club hereby engages the services of Kerrigan as its Club Tennis Professional for a term of three years, commencing on January 1, 2008 and ending on December 31, 2010, unless earlier terminated in accordance with this Contract or law.

II. Duties

Kerrigan shall devote her full professional time, attention and energy to performing the duties of the Club Tennis Professional, as outlined on the Club Tennis Professional Job Description, attached hereto as Exhibit A, and incorporated herein by reference.

III. Compensation**A. Base Salary**

The Club shall pay Kerrigan an annual base salary of \$45,000 (increasing by three percent each January 1 that this Contract remains in effect), in equal monthly installments, paid on the final business day of each month.

B. Summer Program

~~Kerrigan represents that she was the chief administrator overseeing a summer tennis camp program at the Merion Golf and Country Club during the summers of 2007 and 2008. Kerrigan represents that the summer camp at the Merion Golf and Country Club had at least 30 campers and that Kerrigan designed the camp curriculum, hired the instructors, and successfully marketed the camp. The Club shall pay~~

Kerrigan as salary a sum equal to one half of any Profits made by the Club in the Summer Tennis camp Program (the "Summer Program") for children. For the purpose of this Section III(B), "Profits" means the difference in a calendar year between the revenue generated by the Summer Program in tuition fees and the combination of the Summer Program's personnel costs (which includes ten percent of Kerrigan's base salary), court time at \$8 per court per hour and overhead costs set a 1% of the Club's annual electric bill for the prior year. The Club shall pay Kerrigan any salary from the Summer Program by October 31 of each year.

C. Pro Shop

~~Kerrigan represents that she was the chief administrator overseeing a pro shop at the Merion Golf and Country Club during 2007 and 2008. Kerrigan further represents that the annual revenues per member at the Merion Golf and Country Club for tennis-related items in 2007 was \$160.~~ The Club shall pay Kerrigan as salary a sum equal to one half of any Profits made by the Club's Pro Shop. "Profits," for the purpose of this Section III(C), means the difference in a calendar year between Pro Shop's sales and the combination of Pro Shop personnel costs (which includes ten percent of Kerrigan's base salary), product acquisition costs for each product sold, and a charge for overhead costs set at two percent of the Club's annual electric bill for the prior year. The Club shall pay Kerrigan any salary from Pro Shop Profits by March 31 each year for the prior year's Profits. **The Club shall pay Kerrigan any Pro Shop salary earned during the term of this Contract even if Kerrigan is not working with the Club on March 31. To calculate Profits for any partial year, the Club shall pro-rate the personnel costs.**

D. Instruction

1. **Kerrigan's Instruction.** The Club shall pay Kerrigan in salary on the final business day of each month the equivalent of 75% of all fees paid to the Club for Kerrigan's tennis instruction for that month.
2. **Limitation on Kerrigan's Instruction.** Kerrigan shall not provide private tennis lessons: 1) more than 20 hours in any week during the first year of the Contract; 2) more than 25 hours in any week during the second year of the Contract; and 3) more than 30 hours in any week during the third year of the Contract.

3. **Other Instructors.** The Club shall pay Kerrigan 35% of any increase in the Club's fees collected for instruction from all Club tennis professionals versus the ~~previous calendar year's~~ **Club's Calendar 2007** collections. **The Club represents that for Calendar 2007, the Club collected \$ _____ in instruction fees.**

E. **Accounting**

Kerrigan may review all the Club's accounts to verify income figures for Sections III(B-D) of this Contract.

IV. **Vacation**

Kerrigan may take three weeks of vacation per calendar year, at least one of which must be used between Christmas and the end of the year.

V. **Insurance**

The Club shall provide Kerrigan with same health insurance coverage it provides to its Executive Staff.

VI. **Termination**

The Club may terminate this Contract during its term if:

- ~~1. Kerrigan engages in any misfeasance, malfeasance or nonfeasance or any violation of the Club's rules and regulations;~~
1. Kerrigan is unable for any reason to teach tennis for more than six months;
2. Kerrigan is ~~accused of immoral conduct or is charged with a crime~~ **convicted of any felony**; or
3. The Club ceases to operate.

If the Club terminates the contract due to Kerrigan's death or disability, the Club shall pay Kerrigan or Kerrigan's estate two months' salary.

VII. **Noncompetition**

Kerrigan shall not perform any Services as a Tennis Professional for any person or entity during the term of this Contract and for six months following the term of this Contract or any extension thereto. Services as a Tennis Professional includes providing tennis instruction, working in or running an operation that sells tennis clothing or equipment, or running a tennis camp for children.

VIII. Extension

Either party may extend this Contract for an additional one-year term, with the other party's consent by giving the other party written notice of its intention to do so on or before November 30, 2010. If one party gives timely notice of its intention to extend the Contract, the other party must give notice of its acceptance or rejection by December 10, 2010. **If the Contract is extended under this provision, Article VII of this Contract will not apply beyond the original contract term.** If Kerrigan offers the one-year extension, but the Club rejects the extension, Article VII of this Contract will not apply beyond the original contract term.

IX. Miscellaneous

- A. *Severability.* This contract is subject to and construed in accordance with the laws of the State of Pennsylvania. Any provision hereof declared invalid or unenforceable by a court of competent jurisdiction is considered severed and the remaining terms continue in full force and effect.
- B. *Modifications.* The parties may not modify this Contract except in a writing and signed by both parties.
- C. *Complete Agreement.* This Contract contains the entire agreement between the parties and any purported agreement not contained herein, expressly or by implication, is not recognized.

By their signatures, the parties signify their agreement to this Contract.

Merion Racquet and Fitness Club, LLC

By: Rhonda Stuart, President

Billy Jean Kerrigan

Date

Date