

INCORPORATING TRANSACTIONAL SKILLS TRAINING INTO FIRST-YEAR DOCTRINAL COURSES

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After I had taught contracts for twenty years, I taught a contract drafting course three times. I found the effort to be very frustrating, because I spent a lot of time teaching things that were covered during the first year of law school, especially principles of plain English and concise wording. My students were not able to reproduce the quality that they had produced in legal writing class at the end of the first year, nor were they able to accurately read the contracts they were drafting and negotiating.

As a result, I began to re-examine the first-year contracts class that I had been teaching, to see what else could be accomplished in the first year. I realized that I needed to build some scaffolding in the first-year contracts course, building baseline competencies for predrafting skills by the end of the first year. I set the bar low. By the end of the first-year contracts course, each student should be able to read a basic contract, recognize the standard types of terms in that contract, and be able to articulate the effect of that contract.

The critical reading skills used to read contracts are the same skills needed to read code-based laws—statutes, regulations, and court rules. Once a student acquires this ability to closely read a contract, better drafting skills tend to follow. Otherwise, students are glossing over the material and missing a lot of details. I often tell my students that most legal disputes do not occur at the big-picture level, but at the more detailed level. Generally, there are very few overarching problems, but there are usually a lot of small problems that cause big domino effects. As a result, students who come in with a big-picture orientation really need to learn how to change camera lenses and go down to a more micro level.

To aid in these efforts, I have been trying to make students more familiar with the standard types of clauses during the first year of contracts. Nearly all of my students have a laptop with them in class, so I have students go through the click-through agreements and browse-wrap agreements they enter into on nearly a daily basis. Like most of us, they are not reading these contracts. This is the easiest place to start with first-year students, because the best e-commerce cases out there right now deal with mutual assent. Some of these cases deconstruct mutual assent into its

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subcomponents—opportunity to review, notice of existence of terms, and notice of taking actions that constitute assent. To set up these concepts, I give my students readings about click-through and browse-wrap agreements.¹

In a lively class that easily lasts a full two hours, we begin looking for defects in the assent process. In class, I post a URL, and all eighty of my first-year contracts students can go to the contract at the same time on their computers. We walk through the site together, as students analyze the steps of the mutual assent process. For instance, a website might obtain your assent, and then give you notice of the existence of the terms afterwards. But of course that doesn't work. You have to know what you are assenting to before you assent. Once, one student found a scrollable agreement that did not match the printable version. The scrollable version was one-third the length of the printable agreement, leaving us to ponder which one governs. In another class, four students, in their eagerness to track the assent process, inadvertently ordered goods because the links on the sites were not clear enough for the students to know what they were doing, and they ultimately had to undo the transactions.

We then tackle the problem of how to format a contract formation process on a website or a CD-ROM so that it reliably results in express assent, while still leaving a margin of safety. Websites that allegedly create browse-wrap agreements by implied assent are particularly tricky. If a website is only marginally valid, some users and customers will contest the validity of the online contract. Instead, the assent mechanism should be reliable.

Then we start to read the provisions of the contract. Students seem to be less reluctant to read contracts in this electronic setting. After this session, the students actually start reading online contracts, and I start getting e-mails out of the blue. Students come to me with a copy of an agreement they entered into the day before, and they ask, "Can they do that?"

The Ninth Circuit recently decided a major case, *Douglas v. Talk America*,² dealing with modifications of electronic contracts. The court tackled the problem of "terms subject to change without notice." The court stated that just because a contract states that terms are subject to change without notice, and the terms are indeed subsequently changed, the change is not necessarily legal. A valid

¹ Christina L. Kunz et al., *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW. 401 (Nov. 2001); Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279 (Nov. 2003).

² 495 F.3d 1062 (9th Cir. 2007).

modification must still meet the requirements of mutual assent, and the other party must receive notice of existence of the modified terms, an opportunity to review them, and then a notice that taking or not taking a certain action manifests assent. I have my students read this case, and then we examine a wide range of websites, looking their stated terms governing modifications.

Shifting gears slightly, I have a bigger goal regarding the implementation of such skills in first-year courses. Coming out of a first-year contracts course, a student should be able to recognize common types of contract clauses, as well as their standard variations. Rather than using form books, students use the click-through or browse-wrap agreements we have read in class to furnish sample clauses for class discussion. I have them locate three or four different contracts, and then compare the clauses in those contracts. When eighty students have read three or four different contracts, the class discussion is very robust. This exercise can be done with many types of clauses, including no-oral-modification clauses, indemnification clauses, and duty-to-defend clauses. For example, a merger clause can be worded very differently from contract to contract. It might say “four corners,” it might say “merger,” it might say “integrate,” or it might say “supersede.” The magic language differs quite a bit. As a result, the sum of the students’ comparative analysis is quite extensive by the end of this class session.

Through this exercise students also begin to learn how to use Google and other search engines to find examples of good and not-so-good contracts. This solves the logistical issue of eighty students converging in the library and using one set of form books in order to do the drafting exercises.

From these exercises, students begin to read a contract not just for the sake of reading the contract, but in order to discern the architecture of the contract. The students begin to become critical of badly written contracts and are more ready students to enter the upper-level drafting course with good critical reading skills for contracts, the ability to compare similar clauses, and an enhanced curiosity about contracts in general.

DEBRA POGRUND STARK*

My talk is focused on incorporating transactional skills into the first year of the law school curriculum. I began incorporating transactional skills in 1994, when I

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first started teaching property law. This came naturally because I had practiced law for eight years doing commercial estate work, and it seemed odd to me that anybody would cover a foundational course such as property law by focusing only on policy, history, and technical rules. Instead, I approached it as a live subject, focusing also on its transactional nature, particularly vis-à-vis real estate transactions.

As a result, when I started teaching property law, I decided to apply a transactional skills approach when we covered certain topics of property law such as landlord-tenant law. After spending a couple of weeks on issues such as the lease, tenant rights, and landlord rights and obligations, I then had the students perform an assignment in which I gave them a hypothetical situation where a dentist is entering into an office lease. A copy of this assignment is included in these materials.³

The students break into groups of two or three and negotiate the lease in class. The students are supposed to think through both the landlord and tenant's perspective. For example, how would you react to a form lease as a landlord? As a tenant? To make this subject easier to cover in an hour, I break students up into groups of three, and each group analyzes a certain portion of the lease from both the landlord and the tenant's perspective. To help them, I give them a handout describing what transactional skills are.

The focus is on three main transactional skills. The first is getting to know your client by finding out his or her goals, needs, and expectations. Additionally, a lawyer needs to know the client's business. The second step is to know the law regarding the transaction as well as the rules of construction governing the transaction and what is customary in this type of transaction. What will usually be in these types of provisions? What kind of boilerplate is relevant to this type of transaction? It becomes easier if you provide the students with a sheet denoting some of the underlying facts about the client's business. Finally, in light of this information, the third skill is to spot problems with the client achieving her goals and to come up with ways to alter the terms of the contract between the parties to address these problems.

Another area of property law that I have applied transactional skills to is servitudes and specifically a simple utility easement that unlike a lease can run forever. So, the students have to think ahead about what could go wrong not only in the near term but also in the distant future when there could be new owners of the property. When you think of a utility easement, it could be as simple as buying a house and needing electricity to run to the house. In our scenario, the client is the

³ See *infra* Appendix A.

grantor of a utility easement to Commonwealth Edison. Your client wants Edison to be able to bring utilities onto the property, and must give them an easement right to do it. Edison sends you a form, but I tell the students that before they even look at that form, they should figure out what they want in their own easement form first. A copy of this assignment is included in these materials.

When considering an easement, there are certain factors to be addressed, including the location of the easement, as well as any future changes in circumstances that might cause one or both parties to desire to relocate the easement. Additionally, can you build over the location of the easement areas? Interference between the easement holder's use of the easement and the owner of the servient estate is another key issue to address. So is the right to relocate. How long does the easement run and under what circumstances will it terminate? Who has liability if there is an injury to a third party? The list goes on and on, but I like for students to think about these issues before looking at the other side's form.

Questions Regarding Easements

1. What rights are granted by the easement?
2. What type of easement was created: an easement appurtenant or an easement in gross?
3. Will future owners of the servient estate have notice of the easement rights created by this document?
4. Does the document satisfy the statute of frauds requirement?
5. What covenants are incorporated in the easement document?
6. Will any or all of these covenants benefit and burden the successors and assigns of the original parties to the agreement? Why or why not?
7. Are there any changes that you would make to the easement form if you represented either party to the transaction?

After reviewing the easement agreement, I have the class focus on drafting as a means to problem spot and problem solve. Students are pretty good at identifying problems, but have more difficulty in becoming problem solvers through revising the terms of the legal documents their "clients" enter into. In addition to reacting to any problems they see in the covenants, conditions, and indemnification clauses, I often tell my students that sometimes the hardest thing to do when analyzing a contract is to see what is missing. For instance, one common mistake attorneys

make with easements is including a legal description for the easement area that is overly broad making the property virtually unmarketable—a huge mistake.

My hope is that the exercises I described regarding the dentist's office lease and the utility easement illustrate some of the options available to teachers to incorporate transactional skills into a first-year course.

RICHARD K. NEUMANN, JR.*

I spent over twenty years teaching the litigation side of the skills curriculum. Eventually, I got tired of teaching people how to fight with each other, and I started teaching contract drafting instead. But that quickly became frustrating because students came into the contract drafting course with little understanding of what a contract is and how it is supposed to work. That is not anyone's fault. It is because the traditional first-year Contracts course does not teach students how a contract works or even to how to interpret one.

Contracts is not traditionally a transactional course. It is a contract litigation course that aims to answer the question, "What do I do if my client wants to escape from a contract or wants a remedy after the other side has breached?" It teaches students how to think like commercial litigators. This is not an original insight. Others have noticed the problem, too. For example, this is how Ed Rubin begins an article on the subject:

Contracts have been a central feature of western law for at least a thousand years, and they form an extremely important part of American legal practice. However, American law schools virtually never teach the subject. As far as I am aware, there is no law school that includes a course on contracts in its first-year curriculum. A few teach contracts as an upper-level elective that a small number of students take, but even this very limited exposure to the subject is probably restricted to a minority of law schools.

To be sure, there is a course called Contracts that is included in the first-year curriculum of every law school, but this is not a course in contracts at all. It is a course in judicial adjudication of disputes regarding contracts. . . . Most of the students who take this course never read even a single contract, and even fewer read a thirty- or forty-page "long form" contract of the sort that is common in

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transactions between firms, or a “standard form” contract that firms commonly use in consumer transactions. . . . Their exposure to the subject begins at the point when the contractual relationship between the parties has broken down.⁴

I am probably the least-experienced Contracts teacher at this conference. But I had to re-conceive the first-year course because my contracts drafting students did not understand contracts.

What I describe here happens in a six-credit, two semester course. My school has no elective course in Sales, which is covered, though not fully, in the Contracts course. But I found that there is room in the course to cover the standard doctrinal material and still do everything I describe. According to an ABA study, a strong majority of law schools still teach Contracts at five or six credits over two semesters.⁵ So if there is room in my school’s course, there should be room at many other schools.

I taught Civil Procedure for 15 years before I started teaching Contracts. In Civil Procedure, my secondary and tertiary goals were to teach procedural law and general legal analysis. My primary goal was to teach students to think procedurally—to view any civil dispute instinctively in terms of the procedures that could resolve it, to think as litigators and trial judges do. In Contracts, my primary goal is to teach students to think transactionally—to think as deal lawyers and business people do. Civil Procedure is the only required course where procedural thinking can be taught. And Contracts is the only required course where transactional thinking can be taught.

In the first week of law school, I start by explaining to students that life is a series of deals. We go through life improving our lot, if we can, by making agreements in which both we and the other side hope to gain from the deal. If one side or the other is not likely to gain through the deal, that side should not agree to it.

Lawyers have two roles in this process. The more obvious is also the lesser. On television and in movies, students see lawyers litigating and doing nothing else. But only a tiny fraction—a *microscopic* fraction—of contracts are ever litigated. Most contracts involving serious money are put together by transactional lawyers (called

⁴ Edward Rubin, *Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It*, 41 SAN DIEGO L. REV. 55, 55-56 (2004). *See also* Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609 (2007).

⁵ Am. Bar Assoc., Sect. of Leg. Educ. & Admissions to the Bar, *A Survey of Law School Curricula* 26 (2004).

deal lawyers in big firms). Some students are actually unaware of transactional lawyering. In the first-year courses for which they already have some instinct, lawyers are not involved in creating the subject matter being studied. A lawyer ought not be involved in creating a tort or a crime, for example. Unless the Contracts course teaches some deal lawyering, it can seem to students that the words in a contract magically drop from the sky into the parties' laps.

I want to show students how a contract works, how to interpret a contract and how to see the bigger picture of contracting. Unlike other fields of law, a great deal of the law of contracting is not actually found in cases and statutes, but rather in the contracts themselves. The rules governing any contract dispute come from two sources: the law and the contract. Students need to learn how to interpret both.

So I start the course by having my students read contracts—several of them—before they even open the casebook. This takes two to three weeks. I have them read contracts that they have bound themselves to, such as the MySpace and iTunes click-throughs, the Access Group student loan contract, and the Hofstra dorm lease. Students are astounded at what they have agreed to in these contracts. We go through them section-by-section and line-by-line, and they learn the basics of how to differentiate, for example, a promise to do or not do something (a covenant) from the power to do something (discretionary authority). Some distinctions—such as the difference between a representation and a warranty—are too subtle to cover that early and have to wait until later in the course. I also ask students to figure out why certain provisions are in these contracts—the business reason why the drafting party has insisted that the provision be included.

Because I taught Civil Procedure for 15 years before doing this, I can be very confident that while I teach contract interpretation three other teachers—in Civ Pro, Criminal Law, and Torts—are teaching case interpretation. If I were to teach case interpretation at the same time they do, my efforts would be redundant. So there is plenty of room in the first-month curriculum for me to teach contract interpretation.

Besides, legal education under-teaches statutory interpretation, and contract interpretation skills are close to statute interpretation skills. If you can recognize a covenant in a contract, you can recognize a duty in a statute. Legislatures create duties, assign the power to act (like contractual discretionary authority), and declare things to be true (like contractual declarations). And they condition these things in pretty much the same way that contractual provisions are conditioned. So I am preparing students to learn statutory interpretation as well.

Afterward, we spend a few weeks in the casebook on offer and acceptance, consideration, and the statute of frauds. Then another teacher and I sometimes negotiate a deal in the classroom. Occasionally we interrupt the negotiation to ask

the class to determine what has happened. Had the students just heard an offer? If the other party added terms, was that response an acceptance? Or were we edging toward agreement without an offer or an acceptance? Had one of us promised to do something (a covenant)? Had we agreed that one of us would have the power to do something (discretionary authority)? Would that promise or power lie dormant unless something else happened (a condition)? We spend a long time in class deconstructing a deal as it is being created. Students are not learning negotiation skills during this. They are learning to think transactionally by deconstructing a transaction.

As in any other Contracts section, we spend most of the year doing the cases in the casebook. But when we discuss a case in class, I usually began by talking about the market involved, the industry involved, and the business strategies of the parties. After performing the classical case analysis, we go back in time to figure out if there was anything the deal lawyers could have done differently at the deal-creation stage to prevent the later dispute that ended in litigation. What, in other words, could the deal lawyers have done to prevent this case from being litigated and getting into the casebook? If lawyers were not involved at the deal stage, what advice would we have given or what wording would we have used in a contract to prevent the problem—if one of the parties had thought to consult us?

My two-semester course has two exams. Each exam requires students to interpret a contract and to apply the contract and the law to facts. Well before each exam, students are given the exam contract. During the exam—as in the real world—they will have to use two groups of rules to resolve the facts. One group comes from the law and the other from the contract. Unlike other fields of law, the parties can create many of the rules to which they are subject, and the rules they create are the contract.

In teaching Contracts transactionally, I realized that the traditional course overemphasizes aspects of contract law that have little relevance to modern contracting. Offer and acceptance has some value in teaching concepts of agreement and in getting students into Section 2-207(1) of the Uniform Commercial Code. But in any complicated modern deal involving serious money the parties typically talk until they reach agreement, without anybody offering or accepting. We have to teach a little about consideration, but consideration issues rarely occur in modern contracting. Unconscionability is interesting to an academic, but it, too, rarely is an issue in the real world. A realistic Contracts course—whether or not it is transactional—would teach less of these things.

What needs more treatment? The following are much more important in modern contracting than the traditional course assumes: representations and

warranties, conditions, measurement of breach, and assignment and delegation. Representations and warranties—which are inseparable from each other, both intellectually and in practice—are essential tools for reducing and allocating risk. Conditions and measurement of breach doctrines like substantial performance are foundational and can and should be covered more fully in the required course. And the law’s attitude toward assignability opens students’ eyes to the relationship between law and markets.

A subject that should be added to the traditional course is a big-picture view of standards. In the traditional course, students typically see standards only in measurement of breach of a covenant, but standards permeate contracting—in representations, warranties, discretionary authority, and conditions as well as covenants. This is so basic that it is impossible to interpret a contract without the ability to spot a standard and determine its meaning and effect.

Another subject sorely in need of coverage is the balance for each party between opportunity and risk and the legal tools available for reducing risk. This, too, is so basic that many provisions in an ordinary contract make no sense unless a student can understand their risk reduction or risk allocation function.

These adjustments are necessary because a course in Contracts should, among other things, teach students how to interpret a contract. Any other result is baffling.

Why do so few Contracts teachers teach transactionally? An obvious part of the answer is that the course has been damaged by the litigation bias that pervades legal education.

Modern classroom legal education was invented by a litigator through the case method, which views the law only through the lens of litigation. In fact, the Contracts course itself was the first law school course to be converted to the case method, by Christopher Columbus Langdell in the nineteenth century. Langdell was a New York commercial litigator who left practice for teaching at Harvard in 1870. His Contracts casebook⁶ is considered the ancestor of all modern casebooks (although it might not have been the first).

Only a tiny proportion of law school faculty have transactional backgrounds. The principal means through which that is perpetuated are the law review article and the job talk.

⁶ CHRISTOPHER C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).

When an applicant is considered for a faculty job, the faculty invites the applicant to spend a day at the school. The applicant meets with faculty in small groups, and at lunch the applicant gives a 30- to 40-minute job talk to the faculty as a whole. The job talk should explore some problem the applicant finds interesting. In essence, the job talk is an oral presentation of an idea for a law review article, typically one that the applicant is writing or has just finished writing and is about to submit for publication. When deciding who to interview for teaching jobs, faculties tend to ignore applicants who have not been writing for publication. And in deciding whom to invite to visit the school, faculties often ask applicants beforehand to summarize the job talk they plan to give.

A typical doctrinal law review article focuses on litigation through case law, and many articles grow out of cutting edge or at least interesting cases litigated in part by the faculty applicant who writes the article.

Deals do not typically do that. I am not saying that deals cannot generate scholarship, or that deal lawyers cannot write scholarship. Deals create different types of issues, such as structuring the transaction, negotiation strategy, risk reduction and management, and opportunity enlargement. Deals are fascinating in themselves and deserve to be studied through exhaustive research. Law school faculties are not familiar with what these articles would look like or how to evaluate them. Instead, the law review article art form as it is presently understood tends to be based on disputes rather than deals. To study deals, a new type of law review article would have to evolve, and that has not yet happened.

And until that happens, faculty applicants will be hired on the basis of law review writing and job talks that disadvantage deal lawyers.

CYNTHIA M. ADAMS*

My presentation moves in a slightly different direction from the previous speakers, who focused on teaching contract drafting skills to J.D. students in a first-year casebook course. I will address teaching these skills to non-U.S. LL.M. students in a contracts course specifically designed for them.

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More and more U.S. law schools are offering LL.M. programs for non-U.S. lawyers. As part of the LL.M. program at my law school, Indiana University School of Law—Indianapolis, we require our LL.M. students who have not received a J.D. degree from an ABA-approved law school to enroll in a three-credit hour Contracts course designed specifically for them. This course, offered in the fall semester, formally integrates writing into a more traditional casebook experience. I teach the casebook component of the course while writing professors attend to developing the students' legal writing skills (i.e., drafting a common law analytical discussion). Writing assignments coincide with topics discussed in the casebook component of the course. Aside from discussions of cases and writing assignments, however, I try to interject into every class a hypothetical or problem scenario, arising out of the discussion topic, that permits a teaching moment for deal-making skills or drafting skills.

Teaching a Contracts course to LL.M. students is challenging. For some students, English is a second language, and their proficiency skills in listening, speaking, reading, and writing in English vary. Disparities in language skills can make conveying information more of a challenge. Even so, these students are often among the best and brightest in their respective countries. Furthermore, many of the students have been practicing in their respective countries as lawyers. All have some form of law degree from their respective countries and most come with a preconceived notion of contract law based on their previous legal education. Some come with contract drafting skills experience, learned either through their formal legal education or through law practice. All are enrolled in the law school's LL.M. program to learn about U.S. law.

In many respects, the Contracts course for LL.M. students is similar to the contracts courses offered to J.D. students, providing an introduction to general U.S. contract law and concepts. On the other hand, because of the pre-existing legal background of many of these LL.M. students, the class naturally invites some discussion of comparative contract law and often leads to conversations about transactional skills. Many LL.M. students have confessed to me a little disappointment that the course doesn't primarily focus on contract drafting skills. In response, I remind them that knowledge of the law, in this case U.S. law, is an important prerequisite to drafting. I should mention, however, that I also teach a contract drafting course to LL.M. students in the spring semester, after they have completed the Contracts course.

I use the Kuney and Lloyd casebook for my Contracts course.⁷ I like the book because, aside from offering an international perspective with problems applying the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of Commercial Contracts, the book addresses some practical aspects of deal-making and contract drafting. For example, scattered throughout the book are practice tips related to cases and discussions in the chapters. Also, the Introduction chapter of the book includes a discussion of a deal timeline and a sample asset purchase agreement. I refer to these repeatedly throughout the course.

Similar to some of the panelists who have already spoken about their Contracts courses, I, too, begin my course by looking at an actual contract—the asset purchase agreement in the Introduction chapter of the casebook. We spend a class going over the organizational structure of the contract and talk about how it compares to contracts that the students may have reviewed or signed in their own countries or perhaps U.S. leases they may have signed for an apartment or dorm room. Using the asset purchase agreement, we generally discuss the relevance of the introduction paragraph, the recitals, and what is sometimes referred to as the “statement of consideration.” We also discuss formatting, as well as the benefits and drawbacks of different macro organizational structures. Organizational structures for contracts can vary widely from country to country.

More substantively, we look at the “governing law” provision of the asset purchase agreement and discuss its purpose. This is a great transition to a discussion of the importance of this type of provision—that law serves as a contract gap-filler, that U.S. contract law is mostly a matter of state law, and how the CISG might affect a cross-border agreement. The “governing law” provision also nicely works to introduce the cases in the book, that many of the cases focus on allegedly failed contracts and how governing law helps resolve the dispute.

Similar to a typical J.D. Contracts course, my course covers offer, acceptance, and consideration in the initial classes. However, time constraints—this is not a two-semester course like many J.D. contracts courses—forces me to make choices about course coverage. I tend to concentrate more on contract law concepts that may be unfamiliar to non-U.S. lawyers. So, for example, we take some time to cover the statute of frauds and the parol evidence rule. These discussions help explain to the students why U.S. businesses are often prone to creating long, detailed contracts. Also, when “representations and warranties” are addressed in the readings, we take

⁷ GEORGE W. KUNEY & ROBERT M. LLOYD, *CONTRACTS: TRANSACTIONS AND LITIGATION* (1st ed. 2006).

time to discuss the meanings of “representations” and “warranties” in the United States.

Throughout the course, specific provisions of the asset purchase agreement are used as a “jumping off” point, where appropriate, for discussion topics. For example, we begin the discussion of the parol evidence rule by looking at the integration clause in the asset purchase agreement. Or, a discussion of liquidated damages begins with a discussion of the related clause in the asset purchase agreement. If a case or a hypothetical for class discussion involves a failed provision of the agreement, we take time to discuss ways to rework the provision at issue.

The writing component of the course is a big opportunity to supplement casebook topics with a simulated “real world” experience. Creating a writing assignment based on a contract drives home the importance of good drafting skills; it also underscores how governing law affects the interpretation and enforcement of a contract in a way that cannot be accomplished by mere discussion of cases in the textbook and short problems or hypothetical examples raised in class. For example, I created an assignment for the writing portion of the Contracts course that addresses the enforceability of a release of liability form, signed prior to engaging in a recreational activity. The release itself involves a few short paragraphs that set up the issue of whether the activity provider is sufficiently released from liability. Depending on time, students must either research the law in the forum state or the law is provided to them.

It’s a great learning experience for the students. One of the aspects I like most about the pre-injury release assignment is that it reinforces many of the topics raised in the casebook class discussions, such as law-imposed limitations on the ability to contractually excuse performance, the right of a parent to release a minor child’s pre-injury claims, and contract interpretation principles. The assignment also highlights the importance of word choice, sentence structure, and overall contract structure. After writing an analytical discussion, the students draft their own version of the release based on their findings; hopefully, they wind up drafting a release that more concisely and precisely expresses the intent of the activity provider in light of the governing law.

Next fall I plan to expand the opportunities for skills-building in the classroom by bringing in various types of contracts. I will incorporate a few group in-class exercises that involve redrafting contract provisions, which arise out of the readings. In my contracts drafting course, I’ve found that grouping together people from different countries is a wonderful learning experience because of different cultural approaches to negotiations and contracts. I think it will be beneficial to the students in the Contracts casebook course, too. Further, I also intend to coordinate

the writing assignments with our librarians, who provide a separate required course in research to the students. Together, I hope that we can come up with new assignments, especially some involving the UCC and CISG, that fully integrate the casebook readings, research, writing, and drafting.

APPENDIX A**DEBRA POGRUND STARK**

INTEGRATING TRANSACTIONAL SKILLS INTO THE CORE CURRICULUM: AN EXAMPLE TAKEN FROM PROPERTY LAW

This presentation will focus on how to integrate transactional skills into a Property course with two examples: negotiating changes to an office lease and to a utility easement. After spending several weeks reviewing case law on landlord tenants law and on servitude law, I have used the attached two exercises to reinforce the legal doctrines we have covered and to introduce them to “transactional skills” (problem spotting based upon (a) identifying the client’s goals/needs, (b) their knowledge of law and customs and (c) the terms of the documentation, and problem solving, by negotiating for and drafting changes to the documentation for the “deal”).

Rather than simply describe these exercises, we will actually go through one of the exercises as I would in a class as if you were students in my course. After this brief simulation, and a review of the second exercise, we will discuss some of the challenges and options available to you in adding transactional skills into a substantive course.

OFFICE LEASE NEGOTIATION

After spending approximately three weeks analyzing the law relating to the landlord/tenant relationship, you should have a sense of some of the kinds of issues and problems that can arise, and the rules of construction and rules of law that can apply to resolving these issues. To test your understanding, and to provide you with an opportunity to try to apply what you have learned to a “real” situation you could encounter in the practice of law, consider the following scenario:

Dr. Terry Painkiller has decided to relocate her dental office to an office building (the “Office Building”) near the Apple Orchard Shopping Center. She had previously leased space at the professional building at the Apple Orchard Shopping Center, but was unhappy with the rental required by her landlord under a proposed new five-year lease. Her current lease at Apple Orchard will expire in ninety days. She was happy to learn that she could lease the same amount of space at a lower rental at the Office Building. The following are the proposed terms of the new five-year lease at the Office Building:

Term: Five years, with option to renew for an additional five years at a five percent increase in year six, and a two and one-half percent increase each year for years seven through ten.

Rent: Gross Rent of \$18.00 per square foot, per annum.

Security Deposit: One month’s rent.

Demised Space: Approximately 2,000 square feet on the fourth floor of the Office Building, in the area shaded red on the attached site plan.

Utilities: Landlord to provide HVAC (heating, ventilating and air conditioning), electricity, water, and gas (however, tenant to pay for its use of electricity and gas, which will be separately metered).

Common Area Maintenance: Tenant to pay its proportionate share (based on square footage), which is equal to 2,000/20,000 or 10%. CAM shall include, without limitation, utilities, janitorial services, real estate taxes, parking lot maintenance, etc. as said CAM increases over the amount of CAM in the first lease year.

“Tenant Finish” Work: Landlord to modify the space to provide for the improvements described in the attached Tenant Finish Rider at Landlord’s expense up to the amount of \$25,000.

Assume that you represent Dr. Painkiller and that you were asked to review the attached lease form (it is the form that the Landlord uses) in light of the terms agreed to above.

- Do you see any problems that could arise in light of the agreed upon business terms?
- What additional information would you seek to discover from your client?
- What changes would you try to negotiate for to the terms of the office lease form?
- What would you say to the Landlord’s counsel to persuade her to agree to the changes you request?
- Are there any changes to the form you would recommend if you were representing the Landlord here?

Please note that I have attached the simplest office lease form I could find. It in fact does not cover all of the “basics” from either the landlord or the tenant’s perspective, including not covering some of the basic proposed terms outlined earlier. This is not a good office lease form to use in practice, but, it best suits my previously articulated purposes for this assignment.

GEORGE E. COLE No. 868 REC

LEGAL FORMS March 1996

OFFICE LEASE

CAUTION: Consult a lawyer before using or acting under this form. Neither the publisher nor the seller of this form makes any warranty with respect thereto, including any warranty of merchantability or fitness for a particular purpose.



Above Space for Recorder's Use Only

TERM OF LEASE		
BEGINNING ENDING		
MONTHL Y RENT	DATE OF LEASE	LOCATION OF PREMISES
PURPOSE		

LESSOR

LESSEE

NAME

NAME •

ADDRESS

ADDRESS •

CITY •

CITY •

In consideration of the annual covenants and agreements herein stated, Lessor hereby leases to Lessee and Lessee hereby leases from Lessor solely for the above purpose the premises designated above (the "Premises"), together with the appurtenances thereto, for the above Term.

LEASE COVENANTS AND AGREEMENTS

1. RENT. Lessee shall pay Lessor or Lessor's agent as rent for the Premises the sum stated above, monthly in advance, until termination of this lease, at Lessor's address stated above or such other address as Lessor may designate in writing.
2. HEAT: NON-LIABILITY OF LESSOR. Lessor will at all reasonable hours during each day and evening, from October 1 to May 1 during the term, when required by the season, furnish at his own expense heat for the heating apparatus in the demised premises, except when prevented by accidents and unavoidable delays, provided, however, that except as provided by Illinois statute, the Lessor shall not be held liable in damages on account of any personal injury or loss occasioned by the failure of the heating apparatus to heat the Premises sufficiently, by any leakage or breakage of the pipes, by any defect in the electric wiring, elevator apparatus and service thereof, or by reason of any other defect, latent or patent, in, around or about the said building.
3. HALLS. Lessor will cause the halls, corridors and other parts of the building adjacent to the Premises to be lighted, cleaned and generally cared for, accidents and unavoidable delays excepted.
4. RULES AND REGULATIONS. The rules and regulations at the end of this Lease constitute a part of this Lease. Lessee shall observe and comply with them, and also with such further reasonable rules and regulations it may later be required by Lessor for the necessary, proper and orderly care of the Building in which Premises are located.
5. ASSIGNMENT: SUBLETTING. Lessee shall neither sublet the Premises or any part thereof nor assign this Lease nor permit *by any act or default any transfer* of Lessee's interest by operation of law, nor offer the Premises or any part thereof for lease or sublease, nor permit the use thereof for any purpose other than as above mentioned, without in each case the written consent of Lessor.
6. SURRENDER OF PREMISES. Lessee shall quit and surrender the Premises at the end of the term in as good condition as the reasonable use thereof will permit, with all keys thereto, and shall not make any alterations in the Premises without the

written consent of Lessor; and alternations which may be made by either party hereto upon the Premises, except movable furniture and fixtures put in at the expense of Lessee, shall be the property of Lessor, and shall remain upon and be surrendered with the Premises as a part thereof at the termination of this lease.

7. NO WASTE OR MISUSE. Lessee shall restore the Premises to Lessor, with glass of like kind and quality in the several doors and windows thereof, entire and unbroken, as is now therein, and will not allow any waste of the water or misuse or neglect the water or light fixtures on the Premises, and will pay all damages to the Premises as well as all other damage to other tenants of the *Building, caused by such waste or misuse.*

8. TERMINATION; ABANDONMENT; RE-ENTRY; RELETTING. At the termination of this lease, by lapse of time or otherwise, Lessee agrees to yield up immediate and peaceable possession to Lessor, and, failing so to do, to pay as liquidate damages, for the whole time such possession is withheld, the sum of _____ Dollars per day, and it shall be lawful for the Lessor or his legal representative at any time thereafter, without notice, to re-enter the Premises or any part thereof, either with or (to the extent permitted by law) without process of law, and to expel, remove, and put out the Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and to repossess and enjoy the Premises again as before this lease, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants: or in case the Premises shall be abandoned, deserted, or vacated, and remain unoccupied five days consecutively, the Lessee hereby authorized and requests the Lessor as Lessee's agent to re-enter the Premises and remove all articles found therein, place them in some regular warehouse or other suitable storage place, at the cost and expense of Lessee, and proceed to re-rent the Premises at the Lessor's option and discretion and apply all money so received after paying the expenses of such removal toward the rent accruing under this lease. This request shall not in any way be construed as requiring any compliance therewith on the part of the Lessor, except as required by Illinois statute. If the Lessee shall fail to pay the rent at the time, place and in the manner above provided, and the same shall remain unpaid five days after the day whereon the same should be paid, the Lessor by reason thereof shall be authorized to declare the term ended, and the Lessee hereby expressly waives all right of rights to any notice or demand under any statute of the state relative to forcible entry or detainer or landlord and tenant, and agrees that the Lessor, his agents or assigns may begin suit for possession or rent without notice or demand.

9. REMOVED PROPERTY. In the event of re-entry and removal of the articles found on the Premises as hereinbefore provided, the Lessee hereby authorizes and

requests the Lessor to sell the same at public or private sale with or without notice, and the proceeds thereof, after paying the expenses of removal, storage and sale to apply towards the rent reserved herein, sending the overplus, if any, to Lessee upon demand.

10. LESSOR NOT LIABLE. Except as provided by Illinois statutes, the Lessor shall not be liable for any loss of property or defect in the Building or in the premises, or any accidental damages to the person or property of the Lessee in or about the Building or the Premises, from water rain or snow which may leak into, issue or flow from any part of the Building or the Premises, or from the pipes or plumbing works of the same. The Lessee hereby covenants and agrees to make no claim for any such loss or damages at any times. The Lessor shall not be liable for any loss or damage of or any property placed in any storeroom or storage place the Building, such storeroom or storage place being furnished gratuitously, and no part of the obligations of this lease.

11. OPTION TO TERMINATE. In the event that the Lessor, his successors, attorneys or assigns shall desire to regain the possession of the Premises herein described, for any reason, Lessor shall have the option of doing upon giving the Lessee thirty days notice of Lessor's election to exercise such option.

12. CONFESSION OF JUDGMENT. If default be made in the payment of rent, or any installment thereof, as herein provided. Lessee hereby irrevocably constitutes any attorney of any Court of Record in this State, attorney for Lessee and in Lessee's name, from time to time, to enter the appearance of Lessee, to waive the issuance of process and service thereof, to waive trial by jury, and to confess judgment in favor of Lessor against Lessee for the amount of rent which may be then due hereunder, together with costs of suit and a reasonable sum for plaintiff's attorney's fees in or about the clarity of such judgment, and to waive and release all errors and right of appeal from any such judgment, and to consent to an immediate execution thereon.

13. PLURALS; SUCCESSORS. The words "Lessor" and "Lessee" wherever used in this lease shall be construed to mean Lessors or Lessees in all cases where there is more than one Lessor or Lessee, and to apply to individuals, male or female, or to firms or corporations, as the same may be described as Lessor or Lessee herein, and the necessary grammatical changes shall be assumed in each case as though fully expressed. All covenants, promises, representations and agreements herein contained shall be binding upon, apply and insure to the benefit of Lessor and Lessee and their respective heirs, legal representatives, successors and assigns.

WITNESS the hands and seals of the parties hereto, as of the Date of Lease stated above.

Please print or type name(s) below signature(s).

LESSEE:

LESSOR:

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

RULES AND REGULATIONS

1. No sign, advertisement or notice shall be inscribed, painted or affirmed on any part of the outside or inside of Building, except on the glass of the doors and windows of the room leased and on the directory board, and then only of such color, size, style and material as shall be first specified by the Lessor in writing, endorsed on this lease. No showcase shall be placed in front of Building by Lessee, without the written consent of Lessor endorsed on this lease. The Lessor reserves the right to remove all other signs and showcases without notice to the Lessee, at the expense of the Lessee. At the expiration of the term Lessee is to remove all his signs from such windows, doors and directory board.
2. Lessee shall not put up or operate any steam engine, boiler, machinery or stove upon the Premises, or carry on any technical business on Premises, or use or store inflammable fluids in the premises without the written consent of the Lessor first had and endorsed on this lease, and all stoves which may be allowed in the Premises shall be placed and set up according to the city ordinance.
3. No additional locks shall be placed upon any doors of said room without the written consent of the Lessor first had and endorsed upon this lease; and the Lessee will not permit any duplicate keys to be made (all necessary keys to be furnished by the Lessor) and upon the termination of this lease, Lessee will surrender all keys of Premises and Building.
4. All safes shall be carried up or into Premises at such times and in such a manner as shall be specified by the Lessor; the Lessor shall in all cases retain the power to prescribe the proper position of such safes, and any damage done to the Building by taking in or putting out a safe, or from overloading the floor with any safe, shall be paid by the Lessee. Furniture, boxes or other bulky articles belonging to Lessee shall be carried up in the freight compartment of the elevators of the Building; packages

which can be carried by one person and not exceeding fifty pounds in weight, many, however, be carried down by the passenger elevator, at such times as may be allowed by the management.

5. No person or persons other than the janitor of this Building shall be employed by Lessee for the purpose of taking charge of Premises without the written consent of Lessor first had and endorsed upon this lease. Any person or persons so employed by Lessee (with the written consent of the Lessor) must be subject to and under the control and direction of the janitor of the Building in all things in the Building and outside of the Premises. The agent and janitor of the Building shall at all times keep a pass key and be allowed admittance to the Premises to cover any emergency of fire, or required examination that may arise.

6. The Premises leased shall not be used for the purpose of lodging or sleeping or for any immoral or illegal purpose.

7. The rent of an office will include occupancy of office, water to Lessor's standard fixtures, heat, and elevator service during reasonable working hours; but Lessor shall not be liable for any damages from the stoppage of water, heat or elevator service.

8. If Lessee desires telegraphic or telephonic connections, the Lessor will direct the electricians as to where and how the wires will be permitted.

9. If Lessee desires Venetian or other awnings or shades over and outside of the windows to be erected at the Lessee's expense, they must be of such shape, color, material and make as may be prescribed by the Lessor in writing on this lease.

10. The light through the opening into the hall shall not be obstructed by the Lessee. Birds, dogs, or other animals shall not be allowed in the Building. All tenants and occupants must observe care not to leave their windows open when it rains or snows, and for any default or carelessness in their respective or any of them, shall make good all injuries sustained by other tenants, and also all damage in the Building resulting from such default or carelessness.

11. No packages, merchandise or other effects shall be allowed to remain in the halls at any time.

12. The Lessor reserves the right to make such other and further reasonable rules and regulations as in his judgment may from time to time be needful for the safety, care and cleanliness of the Premises and for the preservation of good order therein.

13. It is understood and agreed between the Lessee and the Lessor that no assent or consent to change in or waiver of any part of this lease has been or can be made unless done in writing and endorsed hereon by the Lessor; and in such case it shall operate only for the time and purpose in such lease expressly stated.

ASSIGNMENT BY LESSOR

On this _____, 20____, for value received.
Lessor hereby transfers, assigns and sets over to
_____, all right, title and interest in
and to the above Lease and the rent thereby reserved, except rent due and payable
prior to _____, 20_____.

_____(SEAL)

_____(SEAL)

GUARANTEE

On this _____, 20____, in consideration of Ten Dollars (\$10.000) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned Guarantor hereby guarantees the payment of rent and performance by Lessee. Lessee's heirs, executors, administrators, successors or assigns of all covenants and agreements of the above Lease.

_____(SEAL)

_____(SEAL)

"Utility Easement"

GRANT OF UTILITY EASEMENT

JOINT VENTURE, an Illinois general partnership ("Grantor"), does hereby grant to and reserve for COMMONWEALTH EDISON COMPANY, its respective successors and assigns ("Grantee"), a non-exclusive easement to install, operate, maintain and remove, from time to time, facilities used in connection with underground transmission and distribution of electricity ("Facilities") in and under the surface of the easement area ("Easement Area"), which is legally described on Exhibit A attached hereto, together with the right to install required service connections in locations and in a manner as approved by Grantor, and the right to enter upon such area of the Property which is immediately adjacent to the Easement Area as is reasonably necessary for the exercise of the foregoing rights. Grantor hereby reserves the right to locate other utilities in the aforesaid easement area and to use the surface area of the Easement Area for any purpose whatsoever, other than construction of a building on the Easement Area, so long as such use does not substantially interfere with Grantee's right to install, maintain, repair and replace the Facilities. The use of the surface area for vehicular parking, vehicular and pedestrian traffic and for landscaping shall be deemed not to substantially interfere with Grantee's right hereunder. After installation of any Facilities, the grade of the Property shall not be altered in a manner so as to interfere with the proper operation and maintenance thereof.

Relocation of Facilities will be done by Grantee at cost of Grantor upon written request.

Dated as of this ____ day of _____, 2009.

JOINT VENTURE,
an Illinois General partnership

By: _____

Its: _____

PREPARED BY AND AFTER RECORDING RETURN TO:

_____, Esq., Chicago, IL 60661

Property Index Number(s): _____, _____