

LEGAL WRITING PROFESSORS MORPHING INTO CONTRACT DRAFTING PROFESSORS

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UNFOUNDED FEARS

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CONTRACT DRAFTING AND LEGAL WRITING:
SHARED STRATEGIES FOR IMPROVING STUDENT'S
LEARNING OUTCOMES

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ROOKIE MISTAKES TO AVOID

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Introduction

My name is Grace Hum, and I teach at the University of San Francisco. I teach legal writing, contract drafting and legislation. There are four other speakers. We will all introduce ourselves, give our formal presentation, and leave about 20 minutes for questions and answers. In that way, we can know that we're going to get through everybody's presentation. The first thing I'd like to do is to thank Tina Stark, Emory, and all the people on this committee, and especially Jane Scott, who helped to organize our panel, so that we can find each other and figure out what it is we were doing together.

Unfounded Fears

The title of my presentation is Unfounded Fears. This is directed at somebody like me who came to this conference two years ago. I had been teaching legal writing for six or seven years by then and had never taught contract drafting. I had proposed to teach the class to my school, but didn't really know what to do or how to get started. And I came to

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this conference as a way of figuring things out. For all of you legal writing teachers, there are some of you are already teaching contract drafting. But if you haven't ever taught this before, hopefully what I talk about today will allay some of the fears that you may have.

As I thought about whether I could teach contract drafting, I held onto sort of two ideas, and I continue to hold onto them.

The first is that law professors teach things that they don't know about all of the time. For example, your tort professors, they might never have practiced personal injury law before they became tort professors. So I thought if they can do it, I can do it. It is just a matter of figuring out how to do it.

The second thing was really a mantra that I came up with to ease my fears, and other people's fears who asked me about teaching contract drafting since I had not been a transactional lawyer either. The mantra was "good writing is good writing." No matter what context you're writing, whether it is fiction, nonfiction, legal writing in terms of expository writing or contract drafting, when it's clear, concise and unambiguous, you know it is good writing. These are paramount principles no matter what type of writing you do. I held onto that idea – that there was a skill that I could teach about good writing – no matter what the context of writing.

So you might first think as I thought, "I don't know anything about contract drafting." And the reason is that, at least for me, I was not a transactional lawyer. I was even not much of a lawyer before I started teaching. So, I had to dig deep and think about how it was that I was going to teach something that I had no experience doing. As we all know, we always know more than our students. Sometimes it's a hundred percent knowledge more than our students because they don't know anything. As for contract drafting, I can know at least 5 percent more than my students. If I own that 5 percent, if I am confident about that 5 percent, and if I can show them that I am confident and comfortable in my teaching of these skills, then they will have some confidence in me. I really felt if I could demonstrate that knowledge during the first four or five weeks, then the rest would be home free. And I did, which is part of the reason why I'm here now. I felt like it was pretty successful.

Some of you may have hated contracts when you were in law school or you thought you were not good at it or you didn't understand it. But you all know that teaching contract drafting is not about teaching contracts necessarily. There are obviously some important concepts that we bring over to contract drafting. But once we relearn those concepts, which are just buried deep in our brain, we are good to go in terms of teaching contract drafting.

The next one is "I have never written a contract before." If you have never been a transactional lawyer, you may feel as though you have never actually written a contract. The reality is that as a legal writing teacher, although you've written many things that you might not consider to be full contracts, you've written parts of contracts. If you've written clear concise e-mails, memos, and legal writings hypos, then you are doing pieces of contracts, just not the whole contract. For example, when you are defining things, you're writing definitions. When you're obligating people to do things, you're writing covenants and rights. When you're writing statements of facts, you're writing representations and warranties. You're thinking about what the consequences of people's actions are – end-game provisions. So, you are writing different pieces of a contract and putting them together.

"How do I *teach* contract drafting?" As legal writing teachers, we teach skills. We teach by doing and don't teach necessarily by lecturing. We might do a little bit of lecturing,

but for the most part we are encouraging our students to practice the skills that we are trying to convey to them.

All of the things that work in your legal writing class, such as peer review, pair shares, group work and individual review, can work in contract drafting class. With a fairly heavy load of legal writing classes: I taught two sections of 20, that is 40 students in legal writing, and a whole other section of contract drafting. So I felt pretty overloaded with the amount of paper I was going to get and how I was going to get through it all. I found that the way to put it all together, at least with contract drafting, was to do a lot of peer review and group review. We would look at the contract or pieces of the contracts together in the classes so that I was not overloaded with a lot more to read. But of course I did individual review of their work, as well.

“I don't know how to grade a contract.” That worried me a lot because I didn't know what I was looking for. But the reality is that we, as legal writing teachers, grade documents that have subjective and objective components all of the time. There are things that we want in those legal writing documents, memos, and Ps and As. And we know that our students can use a lot of different paths to getting to the answer that we want them to get to.

Grading contracts is the same thing, which is that if we can isolate what we're teaching them and what we want them to learn, we can isolate that in the contract and look at that and figure out whether it expresses what we're trying to teach them, and what they should be explicitly or expressly providing in this contract, given the terms of the deal. Although we will grade the whole contract, we can think about the pieces, representations and warranties, and covenants. If they are expressing the thing that we are teaching them to express, we can absolutely grade a contract.

So what do you say when a student asks “what did you do in a situation when you were practicing transactional law?” For many of you this isn't a problem. You actually practiced transactional law. You did actually draft contracts. For me it was a problem, and I really struggled with what to say and how to deal with that question. Fortunately it never came up; I don't know why nobody asked me that kind of question. But I would have said, “well, I've looked at a lot of contracts and this issue never came up,” and that is true. Or it might have been somewhat true at least. I have looked at a lot of contracts. Maybe I didn't draft them but I have looked at lot of contracts - mostly, because I am a human being and not because I'm a lawyer.

Another question that I really had great fears about what I would say is “what kind of contract law did you practice?” And again, since I was not a transactional lawyer, I didn't have an answer to that. My true but ambiguous answer was, “when I worked for the Department of Labor, there were lots of different contract issues and when I worked for the 9th Circuit, there were lots of different contract issues.” So it was for me trying to figure out what to say to these questions, that I thought would come up, given my students would know that this was a contract drafting course being taught at this school for the first time.

“I have no idea where to start. What do I do?” I think that the first thing you can do is that you go to conferences like these where you can get information, talk to people, and find a little bit of confidence because you're around other like-minded people doing the same thing. The next thing you might do, is you might go to the Emory Law School's Center for Transactional Law and Practice website. They have a ton of resources. And it turns out that the organizers of this conference were smart enough to put that in hard copy

in these bags that you've gotten. There are resources that tell you for example, all the contract drafting textbooks that are out there. That is a great list to start with. I ordered all of those textbooks and put them in front of me, taking a look at all of them and trying to figure out which of them made sense to me, which of these teaching manuals I liked, and what was I supposed to do with all of the resources.

Once I figured out which textbook I liked, I contacted the author saying, "I'm teaching contract drafting for the first time. Can you help me out a little bit?" And as you all know coming to a place like this, it's really great to see how much everybody will mentor you and how much advice they are willing to give you and how much they are willing to share their syllabi and exercises. So go find people to talk about syllabi and exercises and to gain a little bit of confidence. Another way to do this is to go to the different list serves. If you're a legal writing teacher, there are Legal Writing Institute listservs. There are the contract drafting list serves and the deal list serves. I think Emory maintains both of the two bottom ones. So there are ways to get there.

As a legal writing teacher thinking about teaching contract drafting, when I started to get into the materials, all I could think of to myself was, "I'm used to writing in a narrative form and with paragraphs and thesis sentences. I'm not doing that any more in contract drafting. Instead, I can write numbered sentences." I thought I could do it, and I did it. I think it was a great experience for me because I learned something new, and I was fortunate that it was a great experience. So now, rather than just teaching one contract drafting section at my school, I'm going to teach two contract drafting sections this coming semester. I think that my school and my students are all the better because as a legal writing teacher I said this course isn't being taught here, so we need to do something about it and I was the one to do that.

Many of you are already teaching contract drafting at your schools so you might not have really needed this. But for those one or two out there who are still think being doing it, I hope this presentation has allayed some of your fears.

MIKI FELSENBURG & BARBARA LENTZ

CONTRACT DRAFTING AND LEGAL WRITING: SHARED STRATEGIES FOR IMPROVING STUDENT'S LEARNING OUTCOMES

MIKI FELSENBURG

My name is Miki Felsenburg and this is Barbara Lentz and we are here from Wake Forest University School of Law. We're glad to be here today. A little bit about us: like Grace, I didn't actually practice private transactional law; I was a litigator a long time ago. I'm about to start my 17th year of teaching legal writing. I have an MBA, but I found out it doesn't help me a whole lot when it came to this although I might understand a little bit more about business than most of my students. Grace was right about that. Grace has talked a lot about the similarities between teaching legal writing and teaching contract drafting. I've just finished teaching contract drafting for the first time. Barbara has taught it for ten years so she dragged me kicking and screaming through this first time. I couldn't have made it without her. But we're going to talk more about the differences between teaching legal writing and contract drafting.

Some of the differences are actually pretty helpful and some of them are a little bit scary. We're going to talk a little bit about developing problems. There are in your materials two exercises I gave my students this past semester for a grade.⁶ They also did a paper at the end, but there are two contract drafting graded exercises and I will have good news and bad news about those when I get to them. We will talk about developing business sense and skills, how to evaluate these, how to assemble a portfolio, and a few other things that are different than teaching legal writing.

BARBARA LENTZ

I am Barbara Lentz. Ted Becker and I were at the same firm very briefly, and were summer associates together at a firm with about 150 lawyers. Out of 150, 3 people did litigation and transactional work and I was one of those three. I wasn't there very long, and also balanced transactional with litigation at my second big firm stint, so I don't have a wealth of transactional experience. You can absolutely do a good job teaching drafting without years of doing deals.

When planning my class, I started with outcomes to focus first on the skills I want my students to get out of this course. I have been following the development of the draft Standards and Interpretations of ABA Student Learning Outcomes,⁷ and I am trying to think more intentionally about the new standards for defining and assessing the student learning outcomes. The five outcomes I have developed for my Contract Drafting course are: 1) knowledge of substantive law; 2) competency in writing; 3) developing business sense; 4) developing professional skills; and 5) assembling a learning portfolio.

I am a big believer in the outcomes and formative feedback: a key similarity of both drafting and legal writing is the requirement to provide formative feedback. As legal writing teachers, we already believe we should be teachers and provide feedback, so we start from that position. I'm going to spend a little time on each of these outcomes.

First, the students need to learn (or have a refresher) on substantive law. Second, there are writing skills they must develop: writing, revising, self-editing, peer editing, and annotating or redlining work. Those are skills they have to have. One of the proposals in the draft standards is to require students to attain the competency of an entry-level practitioner by the time they graduate.⁸ They need to competently perform these writing skills to have competency of a first year lawyer.

Third, students need to develop business sense. Develop might be charitable because they might not have any business sense. Some of my students come to school without watching the news or reading a newspaper. They don't even read it online. But they do sometimes watch John Stewart on "The Daily Show," and that is about it. To be

⁶ Miki Felsenburg, *First Graded Assignment* (Conference Handouts), http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Felsenburg/Felsenburg_Additional_Materials_BD_first_group_assignment_1-17-10.doc; Miki Felsenburg, *Second Graded Assignment* (Additional Materials), http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Felsenburg/Felsenburg_Additional_Materials_BD_second_group_assignment_3-10.doc.

⁷ The ABA's draft standards are available at: <http://www.abanet.org/legaled/committees/comstandards.html>. The April 17, 2010 and May 5, 2010 drafts were referenced during the presentation.

⁸ See Standard 302(b) Learning Outcomes of the ABA's May 5, 2010 draft standards.

competent lawyers, they must read the business press, learn about their clients and their clients' industries and competitors, and develop a deal sense.

How do you help them develop a business sense? The fourth outcome, developing professional skills, helps, because these skills are crucial and not just values and ethics. One of the first years I taught drafting, a student said, "I don't need to know ethics. I am going to be a transactional attorney." That is so funny, because at the time WorldCom and Enron were in the news every day. Ethics are not just for litigators, although many rules may be drafted primarily with litigators in mind.⁹ You should plan to review some common ethical issues, which is also supported by the new draft ABA standards.¹⁰

Finally, I want my students to assemble a learning portfolio. We will spend the bulk of our time drafting, revising and reviewing documents and forms, because I want my drafting students to know not just the process of drafting and how to do things but also to have samples that they can use and also have practice choosing and resetting forms. Not just of their own work but things they can take to practice. So that is where we want to start.

The first of these five or so outcomes is a basic understanding of substantive law. There is substantive law to learn. For example, students need to know what a representation is, when you use a representation instead of a covenant or condition precedent, when and how you draft these building blocks, and consistent use of "shall." There are common substantive considerations that they need to know for any kind of drafting and then there are substantive issues specific to the types of transaction that you want to do. And you might decide to specialize in one particular area. If you like real estate, then specialize in drafting real estate documents. If you like Hollywood movies then specialize in entertainment law because it helps your teaching to have an interest and a deeper understanding of the area of law for your longer drafting assignments.

I am lucky that I teach contract drafting in two different courses: one version for second years and one for third years. And the third years, when I get them in their second semester and they know they have to go to work in a few months, they are eager to draft and revise and want to have "hands-on" knowledge. And they have taken other courses and may have had relevant work experience. Teaching drafting as a capstone course is a very different world than teaching first semester second year students, so you should have the maturity and experience of your students in mind when you design your syllabus.

MIKI FELSENBURG

Remember that when they come into the class they have probably forgotten they are drafting contracts and if you are teaching a second year or a third year course, then their first year of contracts is in their rearview mirror. One of the things you absolutely have to do at the beginning of a business drafting class is review. Barbara told me you have to review parole evidence and you have to review basic contract concepts because they just do not remember it if you are teaching it in an upper level course.

⁹ See Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. L. REV. 153, 155 (2000) (arguing for new "functional ethics" rules to better guide lawyers in non-adversarial or non-litigation roles).

¹⁰ See Standards 302(b) Learning Outcomes and 303(a)(1) Curriculum of the ABA's May 5, 2010 draft standards.

SPEAKER

Well, do they need to know more about parol evidence than whether the jurisdiction uses the “four corners” test?

BARBARA LENTZ

The students need to know what is parol, or extrinsic, evidence to the contract and need to know how to guard against outside terms coming in to change the final agreement. So part of drafting is knowing where you are on a deal timeline, and when you have a final agreement. I think a cardinal rule for drafting that also makes you a better legal writing teacher is to draft precise documents because my student are second and third years and are learning to be exact, accurate and precise. They have to get the deal right. The goal is to have a document that maybe I (as a partner) can revise just one or two minor things or just send to the client. That's the goal. They are not there yet, but we start with an intentional process of drafting, revising and editing to develop competency in writing skills.

MIKI FELSENBURG

And of course in teaching contract drafting you're working with an entirely different kind of document than you are working with in teaching legal writing. Here are a couple of very significant differences. First, students in contract drafting have to learn how to work from a form, which they are likely not getting in legal writing, although in legal writing they are constantly asking you for examples. The legal writing examples aren't too useful to first year students writing about a different legal issue, but when you are teaching contract drafting, students must be able to work from an existing form and that's a different skill than drafting from scratch. Of course they obviously also have to know how to and be able to draft from scratch.

Second, the audience for drafted work is different than what you are teaching about the audience in your legal writing class. Your traditional legal writing readers are the judges, the clerks, the senior partners in the law firm that you might be writing an objective memo for. The readers of your drafted documents and contracts are much more likely to be peers who have certain expectations. Your clients are your business customers and they have done this kind of deal before. The clients know what they want in this contract. There's an entirely different expectation from the drafting audience than there is in legal writing (memo or brief) audience. In drafting, there are also third parties involved.

Here is an example of how the audience is different for drafting than legal writing. In my drafting course, I had my students write a contract where they hired Mark McGwire as a junior high school baseball teacher. And one of the things they didn't think about as they were drafting that is that there are third parties - the kids and the parents have an interest here, too - not just the parties, the school who plans to hire and Mark McGwire as the employee. So the students had to contend with multiple audiences when drafting, which is a very different thing than what you are doing in legal writing.

BARBARA LENTZ

Another big difference from legal writing is that there is a drafting process that works for any kind of deal or any kind of document you're working on. Sometimes your process – or deal time line- is three hours and sometimes it's a year and a half. If Microsoft is buying a business and the deal needs antitrust approvals in different countries, then that takes a while – maybe 18 months or longer. A longer timeline might also mean a deal worth

a lot more money, so you can have many hours spent on a document and still have a cost-effective outcome.

I start my drafting class with the students doing an exercise developed from chapter 5 of Tina Stark's book¹¹ where, without any instruction, they draft a contract for the sale of a car. The car's worth about \$15,000. Working in teams, students told me how many hours they spent on it and then we figured that the bill was about \$10,000. This is on the sale of a \$15,000 car. The need to be cost-effective is a really good lesson for students to learn before sending a bill. If you know where you are in the drafting process and how long the deal should take, then you have a better way to gauge the level of sophistication and detail, for example, do we have some rough justice here or do we have a sophisticated deal? But you can't eat up all the value of the transaction with the lawyer's time, which is a real world skill.

The next goal is familiarity with the drafting process. There are typical provisions in every contract. Your students should know, by the end of the course, what is typically in every contract from start to finish. They should know the typical kind of "boilerplate" and they should have enough fluency and familiarity to pick and choose which provisions go into each document. Even for simple contracts, that is a good, fundamental goal to have by the end of the semester.

I have two points on audience. I have an audience exercise that's available online from the Emory transactional exchange. It is defining what is a snack cake.¹² I tell students to look in the vending machine and draft a definition for "snack cake" that is to be used by a school district in a contract with a vending company. Under state law you can't sell snack cakes anymore. It is pretty hard to write that definition. I ask them to consider whether the person operating under the agreement is a nutritionist sitting at a desk, or is it the guy in the back of the vending machine truck who has to pull stock from the warehouse to fill machines at companies he services? How do you write the defined term differently for each person? What if the audience is your general counsel who hasn't practiced law but is a trained reader and a trained drafter? For the assignment, the students have to come up with a definition that works for all three people. But they send three different letters, one to each user explaining the definition and how to use it. It's a great exercise and it is a snap to grade but it is a really valuable exercise for the students to think about writing for multiple audiences, which is a big difference from legal writing.

The last point on teaching drafters about their audience is that in a deal, unlike with litigation documents, the next time that someone sees the drafted document is likely to be when a party has breached it and is trying to get out of it. So you have a very hostile reader. So the students need to think about writing a document that will survive hostile review.

MIKI FELSENBURG

Yes, it is really different, again, from what you're doing when you are teaching traditional legal writing. The reader and the user of your contract are first of all sophisticated, and may be reading the document with an eye on, "How do I get out of it." It needs to be able to withstand the hostile review. One of the first things that really struck me in teaching this drafting is if I'm a litigator working with a client, that client looks to me as

¹¹ Tina L. Stark, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (Aspen 2007).

¹² The snackcake definition exercise was inspired by an exercise in George Kuney's book: *THE ELEMENTS OF CONTRACT DRAFTING* (West 2d ed. 2006).

the expert. For example, I fell down. Can I sue someone? Can I get any money for this? What's it worth?

But my business drafting client is expecting me to add an entirely different kind of value and is looking to me more as a consultant than as an expert. The client might say, "I need to get this deal done. How can you help me get on paper what I need to do? And I know what I need to do. I need to buy 150 thousand widgets." It's not a question of "how can I sue someone; what is your expert opinion?" They might ask us for some expert opinions in some areas. "Do I need a force majeure clause? What does that look like?" Although the client probably knows better than the lawyer when they come in the door. For my students, this different level of expertise was a real eye opener - that when they write a contract as a business lawyer or a deal lawyer, they weren't going to be the look-to experts who had all the answers. They would be the consultant and the relationship was going to be entirely different than the ordinary litigation.

BARBARA LENTZ

As a deal lawyer, your client is the expert in the business. You can start helping your students to learn about the research that is entailed in learning about your client's business. I have my students follow a company, publicly traded on a U.S. exchange, that they pick and they write a paper at the end of the semester. Each student conducts their own research of legal and non-legal sources: they set up an RSS feed; they know how to use EDGAR and how to find publicly filed documents; they have to know the SIC code for that company and learn about the company's industry - what's going on with competitors? What are the regulatory rules and what are the sources of law? If you are in banking and you make a lot of money off debit cards, is your client concerned about proposed regs? What could be happening? So they have to read the paper, trade press and follow all those developments that could be affecting their company.

I have alums, my former students, come to class, and the students hear from junior associates how the associates have to conduct that kind of company research every day without billing for it. So the students have reinforcement of the critical need for the skills they are developing in your drafting course. We all know from teaching legal writing that any time your students can refine their research skills they are so much better off. The students don't necessarily know how crucial cost-effective research skills are until they graduate and go to work.

Next, I think adding value is a little bit different outcome, or goal, than you have in a legal writing course. But because drafting is often in a consultant role, the students need to consider whether they are earning their legal fees, because that's the nature of the real world now for legal services. For example, suppose you have a fractional ownership deal for a private plane. Our company can't afford our own plane anymore, but we will share it. What are the typical brokerage fees? If there are examples in your course, then students can develop some of that deal sense. And we look at term sheets and provisions and if they learn enough about a certain type of deal, like private equity partnership agreements, we discuss which type of clawback provision to include. The students need to know the options, what the ramifications are, and be able to explain the choice to the client. In every deal a lawyer has to be able to prepare and counsel the client, and know the strategy for the deal. So, we try to do all those things so they can add value.

Moving on to our next point - which is professional skills. Unlike legal research and writing courses with first year students, if your drafting students are third year students, then

they might have taken professional responsibility by the time they come to your class. They are ready to hear about professional values and ethics every day and drafting provides an excellent opportunity to talk about ethics and being an ethical practitioner in every class period that you have in contract drafting.

In legal writing I think we do discuss just a handful of ethical considerations, like the need for confidentiality and --

MIKI FELSENBURG

Plagiarism.

BARBARA LENTZ

Plagiarism, yes, and a lawyer's duty of loyalty. But the coverage is limited because there are so many other things we have to do in a first year legal writing course.

MIKI FELSENBURG

Most students were shocked in business drafting class in how often ethical issues came up in the class in discussion. This was a really different experience for me than teaching legal writing. They really wanted to talk about ethical issues in business. When they started, at Barbara's urging I had them studying a company all semester and they would ask question such as "my company did X, do you think that was right" or "what do you think as a lawyer I should have done?" So I found in almost every class while we were trying to figure out how to write a covenant we were also talking about what was an ethical way in which to answer a business problem that came up almost every day.

A real eye opener for me was that my students did not understand collaboration. You always assign -- I know you assign them to work collaboratively, but this was what happened to me on my first assignment, the Mark McGwire contract. They wrote the contract in groups representing the school system. They were all in small groups and each group wrote a contract. Next, each group revised and commented upon another group's draft, and the students received feedback from me in addition to feedback from another group. Well, what happened is that the students in a group serially reviewed and added comments to the other group's document -- that independent, serial review was what they understood to be collaboration. Each group member commented and then the last student sent the review to me and back, with a copy to the group, and that's what they thought collaborative peer feedback was.

Well, the last student commenting on one other person's group wrote some sly, sarcastic comments and I had to upbraid the class. I said, you are never sarcastic when you markup someone else's work. It is unprofessional. You don't do it. And to that student's credit, he came to me saying the other members in his group didn't see that because he was the last one who wrote comments and he just sent them to me. So I had to sit down and teach the class what collaboration meant. We spent part of the class time talking about how when you collaboratively review someone else's work, that means you get together and you talk about it and you look at it together and as a group you decide what to comment on. Each of you surely get to throw your ideas in there but then nothing gets put on there if you don't all agree with each other or if you don't all think adding something to the review.

They really thought they were being collaborative in their review by passing it along and individually commenting and never changing anyone else's comment. So it was a wonderful opportunity to teach them how to work with a group. There might be an

appropriate time for that type of commenting but when you are supposed to do a group review of another group's work, that isn't it. In that case you do it as a group because that's an entirely different learning experience. You're learning from three or four more other people in addition to just yourself.

BARBARA LENTZ

I try to supply detailed, deliberate instructions, including how to work with their group. I also require each student to review, at the end of the term, the work and reliability of their group members. In most years, my drafting class might be the only time in law school when the students collaborate and write and work in groups. It's just another way that law school is at odds with the real world.

MIKI FELSENBURG

The real world is a little different because you don't usually work in groups with peers. You work in very hierarchical groups and there may be other professionals, accountants, engineers or other business people they interact with. But the legal team is very hierarchical with a partner, a senior associate, and then the junior associate a year or two out of law school.

BARBARA LENTZ

It could depend on the deal. If you have a big merger and lots of documents, then you have to split up the deal. You give them instructions on collaboration and I always allow some feedback. I give my students an opportunity to adjust a group member's grade at the end of the semester. Usually they say very good thing about their teammate. But just knowing that the evaluation is coming has taken care of the free loading and it has also prevented much of the expected whining because all students know there will be an opportunity to evaluate your team members. Don't ask the professor to intercede, but instead wait to get the form and put it on there. So I don't have to listen it.

Self-evaluation is a skill to reflect and figure out what you know and what you don't know.¹³ Students need to develop the ability to self and peer evaluate in law school because we can't make them a master of anything. I don't think you can be a master of anything in law school. But to figure out what you know and what you don't know and where to start and having a deliberative process that you can use for any kind of situation or any kind of drafting assignment, and to assemble a portfolio of work would be a great thing for the students to take away from your drafting class. It would also give your students some confidence that they can do it.

The last big difference from the teaching of legal writing is we want our drafting students to have a learning portfolio by the time they leave. So they have a wide variety of nature and number of assignments. Some are big and some are small. They get formative feedback on all of them. That is one reason you have them work in groups, to reduce the number of assignments you need to review, and also a second reason for students to comment on their peers' drafting assignments - so you can sleep at night and see your family. But you need to think about structuring assignments with formative feedback in mind, and design problems that can be reviewed and returned and built upon during the term.

¹³ See Interpretation 303-4 to Standard 303 Curriculum of the ABA's May 5, 2010 draft standards.

MIKI FELSENBURG

I used two longer drafting problems this semester. The first one was the Mark McGwire employment contract that I mentioned earlier. I think it was too early in the term, about a month into the course, to assign this kind of problem and have students write a full employment contract. The students really weren't ready to draft a complete contract, although I told them it didn't have to be complete. It didn't have to have a boilerplate. Just perform the essential function - do the hiring. But it was still a bit early. So there was a huge variety in what I got back as far as quality. I also gave them a form for feedback on each other's groups, which had some boxes to fill in for their review. That form turned out to be limiting.

When they did their second group project, which was when I had the groups comment on each other's work, I didn't provide a feedback form and the groups did a much better job evaluating their classmates' drafts. They wrote a memo to the other group on what the drafter had done well and hadn't done so well. They also redlined each other's contracts, of course. But the students invented the feedback memo by themselves. It was later in the course, so they knew better what they were doing, but the commenting process and comments were richer and not as limiting as it was when I had given a form.

Both of the assignments that I gave are in your materials that are online and on your disk. The first one was very detailed, hiring Mark McGwire and all that sort of thing.¹⁴ The second one I let them make it up.¹⁵ Students were divided into groups of two that worked together in a group of four, two sellers and two buyers. I wanted them to sell something that was patentable, scientific, or something that would be valuable. One of them made up a bark box that would enable a dog to talk. I just gave them that assignment verbally. I didn't give them written assignments because you know how often in practice you will get just a verbal assignment from someone. Again, I thought it was better. It worked better for them to not have a big, long list of things they had to do. They went out and they were really creative and they wrote some magnificent contracts that were useful in their own portfolios when they left the school.

BARBARA LENTZ

As to developing the writing or learning portfolio, I try to design in repetition when planning drafting exercises. For example, if I start with an executed document, the first thing students do is reset the form and then they will write it for one side and then they all review another group's work. And then they write it for the other side and review the work so they've seen this same document five times. But if you are a new drafting teacher, you only have to know this one small piece of the deal. It's a great opportunity for the students because they really know this deal and the process inside out. They know what to look for. If there is something missing from the form they can figure out how to add it. It's a small slice but it's great for them and, you know, it's a method to internalize the drafting process.

In addition to planning assignments to develop a portfolio, I think you also should consider grading rubrics in advance. Just like I start designing the course with skills or outcomes I want the students to take away, I start designing problems with the grading rubric in mind. What skills do I want from this particular exercise? Drafting may not be like

¹⁴ See Felsenburg, *supra* note 6.

¹⁵ *Id.*

a legal writing course where you have the appellate brief and everything comes together as a capstone assignment to the course. You don't necessarily have a capstone assignment in business drafting because you can't give formative feedback on that. You can do summative, but you can't do formative feedback on huge individual assignments.

The biggest difference that we both found from teaching drafting and legal writing is the amount of prep time, because after ten years I'm sure that I could teach legal writing from a post-it note. But there is no way I could teach a drafting class from a post-it note, even if I have done the same class ten times. There's a lot more that goes into teaching drafting, such as current examples from the business press and an in-class exercise and thinking through all of the stages of first do this once and then edit it, then it goes over here and then you rewrite from that side. So it helps to have a plan. So starting with the learning objectives is a good way to plan for that. But I think there is just more preparation and updating that goes into drafting than into legal writing. I think teaching drafting will make you a much better legal writing teacher, and better at teaching precision and other writing skills. I use definitions, a drafting skill, to teach my 1Ls how to write rules because a rule is really nothing more than a definition. It works really well.

MIKI FELSENBURG

I think that's it. Thank you.

CAROLYN BROERING-JACOBS

**TEAM TEACHING TRANSACTIONAL DRAFTING BY PARTNERING WITH
PRACTITIONERS**

I am Carolyn Broering-Jacobs. I teach primarily first-year legal writing, but after I attended this conference two years ago, my associate dean agreed to let me try teaching transactional drafting. Today I want to talk to you about the solution that I came up with for dealing with the fear of teaching contract drafting for the first time that Grace described in her talk. I experienced that same fear, and my solution was team teaching with a practitioner. I was a big firm litigator. I was not a deal lawyer. I did a lot of litigation involving business deals gone bad, so I knew something about the problems that crop up in transactional work. Because I wasn't confident that I could teach drafting well on my own, however, I latched onto the idea of team teaching, an idea that I had heard at this conference two years ago. Although I originally conceived of team teaching the course to deal with my limited experience in deal lawyering, I discovered that bringing two perspectives together added so much to the students' experience that I will team teach whenever I'm given the opportunity.

Today I'd like to talk about how we structured the course, how we approached the planning and the teaching, and the benefits of team teaching. I'll also talk a little bit about the students' responses to the team-taught course. Finally, I will wrap up with some interesting, but not necessarily surprising, phenomena that we saw in the course evaluations.

I'll start with some mechanics. We taught Drafting for the Basic Business Deal¹⁶ in a two-week compressed course. Because it was a two-credit class, we had to have twenty-four hours of teaching time, which we accomplished in three Saturday mornings and the Tuesday and Thursday evenings in between. We scheduled on evenings and weekends because we knew that most of our students would be working during the day, and we wanted to make the course accessible to as many students as possible.

We used Tina Stark's book,¹⁷ a great resource for folks teaching this kind of course for the first time. Not only is the book itself good, but the teacher's manual and the accompanying course website also are wonderful. The book worked just as well for me, someone new the area of the law, as it did for my teammate, a practitioner with greater substantive expertise.

We had two weeks, and we managed to get the students through two major agreements: a car purchase agreement and an aircraft purchase agreement. For our first time teaching, we used problems straight out of Tina Stark's book. The students also completed ungraded drafting exercises to complement their reading for each class, and they took two quizzes. It required a lot of preparation and a lot of commenting in a short period of time. We were really tired by the time we finished, and I think our students were really tired as well.

We approached the teaching collaboratively, trying hard to collaborate on all levels. We collaborated on course design, teaching, commenting and feedback. One model for team teaching is a kind of tag team in which team members alternate teaching but don't necessarily collaborate. We avoided the tag-team approach and instead worked together on all aspects of the course. In preparation for the class, I did some reading on team teaching and I learned that students respond more favorably to team taught courses where the collaboration is transparent. Sometimes faculty work really hard planning a team-taught class but the students don't understand the connections that the collaborators were trying to make because too much of the work is done behind the scenes. In response to that concern, we tried to let the students see as much of the collaboration as possible.

In course design we started off creating a comprehensive plan for the whole course, which we changed a lot as we went along. We were very optimistic about what we could accomplish together, so we had to pare things down as we went along.

In addition to creating a course plan, we also created a plan for each class. We would split responsibility for in-class topics so that we could take turns leading the discussion. Where one of us took responsibility for a topic in class discussion, that person also took responsibility for any exercises or in-class work that went along with that topic. For example, if the students did a drafting exercise on an issue that I covered in class, I also commented on the drafting. Splitting the commenting on ungraded work reduced our workloads slightly without diminishing the students' experience.

We also collaborated in teaching in the classroom. I learned an important lesson about team teaching from a friend who had team taught an interdisciplinary course in which

¹⁶ For a brief description of course content, see Carolyn Broering-Jacobs, *Team Teaching Transactional Drafting by Partnering with Practitioners* (Conference Handouts), http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Broering-Jacobs/Broering-Jacobs_Conference_Handout.doc.

¹⁷ TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (Aspen 2007).

she and her teammate alternated classes without even attending the other person's classes. My friend related that this kind of tag team approach didn't work well in the classroom, so I knew that we needed to take a different approach. Not only were we both present, we also both were engaged such that that even when one of us was teaching, the other might chime in to elaborate or ask a question. This kind of collaborative teaching allowed us to identify and clarify concepts that seemed problematic for the students. For instance, I would ask my teammate a question when I could see students looking confused or when I myself had a question that I also thought some students might have as well.

Another benefit of having both of us in the classroom is that we stayed much closer to the plan for each class than I typically do when teaching alone. We both taught in each class meeting, and we allocated time according to topic. Knowing that I needed to turn the class over to my teammate, I was careful about staying within the time we had allocated.

Our collaborative approach in the classroom also allowed us to model lawyerly decision-making for our students. I'd like to tell you that we set out to do this when we planned the course, but it happened quite by accident. Before the first or the second class, I was asking my teammate questions about something that I disagreed with in the text. I can't remember exactly what the issue was, but I recall that it involved a suggested resolution to a drafting problem that I would have resolved differently. As we discussed the possible solutions, my teammate pointed out, quite correctly, that our students would benefit from hearing our conversation. She pointed out that our conversation was exactly the kind of conversation that lawyers had with one another all the time. From that point forward, we tried to have those discussions of varied approaches to the same problem in front of the students instead of in my office.

In addition to collaborating in the planning and the teaching, we also collaborated on the feedback. While we split the commenting on the ungraded exercises, we both commented on graded work in both draft and final form. I had initially thought that we would need to harmonize our comments in some way to make sure that there were no inconsistencies. Shortly into the course, however, we realized that forcing the students to harmonize our comments would expose them to another essential lawyering skill.

Once we decided not to harmonize our comments for the students, we talked with the students about how they could expect to sometimes receive comments from us that seemed conflict. We explained that just like a lawyer who receives multiple comments on a draft agreement, they too would have to decide how best to proceed when faced with varied drafting suggestions. This provided another opportunity to help the students discover how lawyers work.

When it came time to grade, we did collaborate closely. We started by creating a grading checklist to guide our independent review of each student's work. After reviewing the work independently, we would meet to review our assessments and agree on scores. This process was much faster than I had thought it would be. Perhaps because we had been teaching together, we were looking for the similar things and were often in full agreement.

One thing that worked really well for a team-taught class was TWEN. I have used TWEN many times, but this class was the first time that I had ever had students submit assignments on TWEN. We had the students submit both graded and ungraded work via TWEN so that both teachers had access to everything the students wrote. We also used the TWEN gradebook, which meant that we both had access to updated grades at all times and

we both could input information into the gradebook. TWEN worked very well and it is something that I definitely recommend if you are going to try to team teach a class.

We discovered that the students really appreciated hearing two points of view. Additionally, we discovered that the difference in our expertise made a positive difference in the classroom. Our differences in expertise helped us to identify varied potential problems with a transaction.

Not only did the students like getting two perspectives, they also told us that they thought having two teachers made the class more interesting, especially with those four-hour Saturday classes. I think it was a nice change of pace to have us switch back and forth as we worked through the material. The students also pointed out that it was nice that one teacher could identify when the other teacher's explanation wasn't clear. Some students thought having two teachers helped them get more timely feedback. And the students specifically noted that they appreciated getting more feedback because they had more than one person commenting.

We did get some negative feedback: one student of the seventeen disliked having two teachers in the classroom. That student reported that our different experiences and points of view were interesting, but it often confused the student that we "weren't on the same page." For this student our effort to model lawyerly decision-making didn't work; instead, "our rather constant consulting" with one another was distracting. To deal with student discomfort with this aspect of a team-taught course, next time I will describe the teaching method early in the course to allow students who dislike the approach to find another class. We did not give our students such forewarning because it was our first time teaching and we didn't anticipate that the approach might be problematic for some students.

I observed two things on our course evaluations that were interesting to me: the students' positive feedback on "exploring alternative points of view" and their less positive feedback on "clarity and organization."

Our standard course evaluation asks students to evaluate whether the course explores alternative points of view. I always have seen comparatively lower scores on this category in my own course evaluations. In this team taught course, however, our scores were very high. While these were numerical scores on which the students did not elaborate, I suspect that students responded so favorably because the alternative viewpoints were very obvious. There were two of us with occasionally different points of view in front of the students in the classroom. And there were two of us commenting on the students' agreements, sometimes even offering conflicting feedback. As a result, our alternative views were easy for the students to see and understand.

I also discovered that team teaching seemed to make it harder for the students to feel like the class was clear and organized. While I rarely get negative feedback on clarity and organization in my first-year course that I teach on my own, I saw lower scores on this evaluative category in the team-taught course.

I see that I am running out of time, so I am going to close for now, and I will be happy to answer your questions during the question and answer period. Thank you.

TED BECKER**ROOKIE MISTAKES TO AVOID**

I'm Ted Becker from the University of Michigan. My part of today's presentation is to fall on the sword. I say that because my topic is rookie mistakes to avoid. Many of us up here on the panel aren't rookies but I certainly am. I just completed my first semester of teaching transactional drafting so I'm new to the game, and then when it comes to mistakes, oh yes, there's a bunch of them that we can talk about. Because the semester just ended, these missteps are as fresh in my mind as they could possibly be, and I hope that setting out some of them here will help other professors who are looking at teaching drafting for the first time to have a little bit easier time of things.

Going into this course, I certainly was not holding myself up to any sort of unrealistic standard, I don't think. I didn't expect perfection. Any time you teach a course for the first time, there will be inefficiencies, lots of things to improve. But what I really want to talk about today are the mistakes that I made, looking back at things from the vantage point of an experienced professor in other subjects, that really eat at me because I should have known better. I have been teaching legal writing for ten years so when it comes to teaching I'm not a rookie. In teaching transactional drafting for the first time, I was like an experienced baseball player who is called upon to play a different position.

So I had some idea going into this class, an inkling of how much effort it would take to get the course up and running and the problems that would arise when teaching the class for the first time. I felt some of the same fears and concerns that we have heard some of the other members of the panel discuss. We've heard a lot from the panel about ways to make the transition from teaching legal writing to transactional drafting a little bit easier by taking lessons that we already know from legal writing and transferring them over. That is absolutely wonderful advice as long as you don't do what I did, which was to, for whatever reason, put all that good counsel aside and forget about it.

In other words, we have all this great advice from people who have come before us about how to teach transactional drafting. I attended this conference two years ago. I read all kinds of materials while getting the class ready to go. And then what did I do when I started teaching the class? I just put it all aside. That's the first rookie mistake to avoid. Listen to people who know what they're talking about. I think I did this because I was overconfident, not from a subject matter perspective but from a teaching perspective. I knew I didn't know everything there was to know about the *substance* of transactional drafting, but as it turned out, I knew less than I thought about *teaching* transactional drafting. I was too hasty to throw away the lessons that other experienced transactional drafting professors tried to teach me and also lessons that I've taught myself through ten years of teaching legal writing.

Here is a simple example for the first one of these. Barbara's already alluded to the value of grading rubrics. I have no excuse here because I was at the conference two years ago and attended a presentation about this by Robin Boyle, David Epstein, and Sue Payne. I got the materials and yet for whatever reason when it came time for grading assignments this semester, I didn't use them. I didn't create my own grading rubrics in advance and I think that the results of this were probably inevitable. As soon as all those assignments started rolling in and I started grading them, I felt like I was back in the position I had been in

almost a decade ago in my first couple years of teaching legal writing. It was taking forever. I felt like I was making the same comments over and over. You magnify that by the fact that this was the first time that I had taught a graded course as opposed to a pass/fail course, because at Michigan legal writing is pass/fail. So I was particularly paranoid about grading uniformly and that in turn meant going back and re-reading all the papers, and then re-reading them some more, to ensure that I was grading consistently. And you can probably imagine how much time this took.

I'm not saying that grading rubrics would have been a one size fits all solution. We all know that from teaching legal writing or from teaching transactional drafting. Each individual assignment is going to have its own particular concerns that you want to focus on but equally obviously there is a lot of overlap between different assignments on bigger picture issues and things you want to point out repeatedly from assignment to assignment to ensure that it gets into the students' heads. That's true in my experience in legal writing. Others have advised that it's true in transactional drafting. I should have listened.

Now, how do I fix this going forward? The solution is easy, and I've already started. After the first couple of assignments, I realized I was going to need to start creating the rubrics that I should have taken the time to create before the class started. I did in fact manage to get some very basic ones put together as the semester went on, and one of the key things on my to-do list this summer is to make those a lot better, a lot more comprehensive. And at least all the effort and the time that went into grading this past semester is going to pay off because when I go back through and revise, I kept copies of all the student assignments, so I can pull out all the recurring written comments and transfer them into the grading rubrics that I am going to use going forward. That's exactly what I did in legal writing, too, after my first year of teaching. So that's the easy solution going forward from my perspective.

An even better solution for those who may be teaching transactional drafting for the first time, however, is to learn from my mistake and create those grading rubrics and grading sheets in advance. Otherwise it's going to be very difficult, at least in my experience, to try to create them in the midst of the semester.

A larger lesson I might take from this and other mistakes that I made, mortifying though they might be to me, is that they remind me to be more sympathetic to my students. It's easy to forget that they are learning something new, whether in legal writing or in transactional drafting, and that, like me, they might be told over and over again how to do it right, and they perhaps know how to do something objectively or at least that they should do it. Yet, for whatever reason, they don't put it into practice the first time that they do it. So maybe it makes me a little bit more humble in dealing with legal writing students and transactional drafting students where it is tempting for me to sit back and say, how many times have I told you do that or not to do that. It turns out I did the same thing when I was teaching transactional drafting for the first time. I knew what to do and I didn't put it into play, either, so maybe I should go a little bit easier on them.

Overconfidence was the first of the rookie mistakes. The second rookie mistake from my perspective is one of T.M.I., too much information. Not for me but for the students. I might have been overconfident about my teaching experience but I certainly was not about my substantive experience with transactional drafting. Looking back at this past semester, I realize that I was in the position of the student who does a lot of research on an office memo and who finds all kinds of materials and wants to find any way possible to work

it all into the final product, just to get credit for it. I have done the research and I want to use all of it regardless of whether the audience wants or needs that information.

This isn't really a matter of over preparation, although I suppose there could be some aspects of that. You may say, "Do I really want to prepare my class notes? Do I really want to grade this assignment? Or can I put off whatever task I should get cracking on and instead go read some more background materials?" That was a temptation I had to fight all the time, and not always successfully. One reason was simple intellectual curiosity. I found much of the material I reviewed getting ready for the course as a whole or individual classes to be really fascinating stuff. But I also have to admit that I felt a little bit of anxiety about being caught short by a student's question during class so I kept wanting to go read another article or go read what various texts have to say about a particular issue to expand on what my assigned textbook covers. But ultimately I'm not sure that over preparation, excess preparation, whatever you want to call it, is a problem, per se. It is really just a matter of time management. And as long as you can fit preparation for class in with everything else you have to do, all your other obligations to school, family, or what have you, then I'm not sure that there really is such a thing as over preparation from my perspective when it comes to teaching and preparing a new class.

The more important problem, and here is where the "too much information" mistake comes in, is that I put all this stuff into my head and then it led me to want to do too much in class. In other words, sometimes all this extra information floating around distracted me a little bit or, more accurately, I allowed myself to be distracted. The blame is mine, not the background material's. I occasionally allowed myself to be distracted from the main focus of the drafting course as I see it, the actual skills that we're trying to teach our students about drafting. Not, of course, that transactional drafting is only about skills and not about substance. We all know that's not the case and that the technical aspects of drafting can't be divorced from substantive concerns. I'm not suggesting that at all.

But what I found myself sometimes doing in class was wanting to skip past some of the basics, spending less time on those fundamentals so that I could move on to what, to me, were more interesting materials. Again, this is something that I should have anticipated from my ten years of teaching legal writing. Over that decade I have been paring down what I cover in that class. I'd rather cover fewer subjects at greater length than provide a more cursory survey of lots of topics. That's true both on the level of individual classes and the course as a whole. You can't cover everything. I knew that objectively from my experience but I had a bit of a difficult time putting that into practice in teaching this new course for the first time.

Going forward, how I do try to resolve this issue? I have been reviewing my class notes trying to go through and cut things out. I'm trying to decide what is essential and what's not, thinking about what did and didn't work. I didn't have to wait until the end of the semester to start doing this, either. Over the semester, it started becoming apparent to me about half way through the course that my class notes were much too detailed for the amount of time that I had. So one thing I tried to do was start trimming all the background information that I used to try to wedge into the class somehow. I decided to make a conscious effort to try to pull that information back out. I stopped assigning that sort of background information before a class. I might allude to it during class very briefly. I would point students to it, I'd post it to my website after class so any interested students could delve a little bit deeper if they were so inclined. But I stopped providing a lot of this background information before class as part of the reading because I didn't want students to

get distracted from the essentials. I didn't want to shift their emphasis from what the text said and from the assignments that they were supposed to be working on. I wanted them to focus on those things a little bit more.

So that's the second rookie mistake. The third rookie mistake arises out of the recurring sort of "style versus substance" dichotomy that we often see in legal writing as well. I had a hard time figuring out how to balance things along these lines, how much time to devote to these sorts of issues. I think I may have devoted and emphasized it maybe a little too much too early in the class.

On the one hand I am an eager convert to the Tina Stark and the Ken Adams approach to drafting transactional documents. This seems to me to be as straight forward a way as possible to take even the most complicated transactional documents and make them readable. I 'm referring to eliminating legalese and doing anything you can to improve a reader's ability to understand the document, clearing out the deadwood of established drafting practices that's grown up over time and chokes out comprehension. So, during class when we had exercises up on the board, we might be done talking about substantive issues, whether a particular representation or covenant accomplished the substantive goals of the parties. I then might move on to discuss whether the provision in question was or was not written all that well as a matter of style. I'd ask, "What can we do to fix it? How can we change things?"

On the other hand, I started getting a little bit of push-back and questions from students about this. Some of this came from a pragmatic perspective. "Okay, that seems more clear as a matter of style but what's a senior attorney going to say what I make these sort of changes, what's the client going to say? And how am I going to find time to do that?" Some questions were a little bit more theoretical, along the lines of, "In drafting the focus is really on whether the document conveys the parties' intent, does it get the job done? And if it does, then polishing the language simply as a stylistic matter, isn't that a purely aesthetic exercise with no real effect?" I think some of these questions the students were asking came about because they were a little bit confused about the sorts of changes I was talking about. What sorts of changes have substantive effect and which are more stylistic in nature? What changes might look stylistic but really do make a difference on the substance? Their confusion was understandable because I didn't do a good job disentangling those different sorts of changes and explaining which are really the most significant and which aren't.

This is something that I'm definitely going to try to clarify going forward. I know all the standard responses about why students should try to draft as clearly as possible. I know why they should make the conscious decision to clear up what can often be lousy language from form documents. I've tried to appeal to their self-interest. I have tried to appeal to the interests of their clients and so on. But I am ultimately not sure how effective my responses were because I sometimes felt like I was climbing on a soap box. I don't mind doing that but I'm occasionally concerned that the students' reaction might be, "OK, we get it now. Stop telling us about it."

They did seem to get a better handle on these issues as the semester went on, both in terms of their work product and the questions they raised about these issues in class. The students' assignments kept improving along these lines and it's not like I expected the students to have some kind of communal "hallelujah!" moment. But in the end it may be that this is one of those issues that, just like in legal writing, I want to ensure the students know my position and why I think it's correct, but the students won't really be able to buy

into it until they learn it from experience. They can learn it objectively but they have to actually experience it in real legal work to truly understand the importance of it.

Finally, I'd like to conclude with a near miss. A mistake I almost made but luckily didn't. That mistake would have been not holding student conferences. Tina Stark recommended these in her teaching materials but I wasn't sure whether they would fit into my schedule. I was teaching two other classes besides transactional drafting. I was looking at my schedule trying to figure out just how it was going to work. Frankly I wasn't necessarily sure what I was going to say in a conference in any event. So I did not include them in my initial syllabus. I didn't decide to hold conferences until later, about five or six weeks into the class. I added them in part as a reaction to the amount of time I was spending grading assignments. I thought maybe I can short circuit this a little bit of this by talking with students individually.

So I scheduled conferences to discuss my comments on the first major grading assignment. To my surprise, although these were optional and although it is an upper level course and although many of the students were in their final semester of law school, almost everybody signed up and I thought the conferences went very well. They were valuable not merely in terms of answering their questions and explaining my comments, but also allowing me to help them on future assignments, hearing their suggestions about improving the course and their thoughts about the class, and getting to know the students individually.

Of course, none of this should have been new to me. I'm well aware as a legal writing professor of the value of holding conferences with students. But for some reason, I thought that conferences wouldn't work as well in an upper level course. I thought the upper level students might be a little more jaded. I thought the conversation might be a little more forced. It wasn't. In fact these conferences worked so well that I scheduled another optional set of conferences during our last week of class. These came right before finals to discuss the redraft of their last major assignment and again almost everyone signed up. I know 1L students want the chance to get direct feedback on their performance, and now I know that upper level students do, too. They want this interaction with faculty that they maybe don't get from many of their other professors. So the conferences are more important than I suspected for upper level students. They certainly seemed fruitful from my perspective. I know it's a small sample size but a couple of students commented on the evaluations that they found that face to face time to be very valuable. That's something that you hear over and over again from students in legal writing. I almost made the mistake of not transferring that over from legal writing to transactional drafting.

So, in conclusion, my focus today has been on mistakes, but please don't read me as accentuating the negative in teaching transactional drafting because that is certainly not my intent. I love teaching this course. It has been very enjoyable so far. I have one semester down and I am looking forward to teaching it again this fall and going forward. That, of course, will allow me to keep adding to this list of mistakes because I'm sure I'll make some new ones come September.

That brings us to the end of the formal panel. I'd like to remind you that there will be a lunch roundtable tomorrow that continues this conversation about making the move from legal writing to transactional drafting. We have only ten minutes left so I'd like to open the floor if there are any questions for any of us on the panel.

QUESTION AND ANSWER SEGMENT

QUESTION

I don't know how to phrase this. You see it a lot of times in legal writing where you spend a lot of time working with memos and briefs. Do you see overlap in that kind of concern about lack of organization as a class to contract drafting?

TED BECKER

The question is whether or not there is any overlap between the organizational focus, which is one of the key focuses in legal writing, and organization as a focus for contract drafting. I'll give you my classroom experience and certainly others on the panel can chime in. In fact, I think most of the drafting texts out there try to establish a general organizational approach that makes sense, at least in the context of most deals. That's one of the things I rely on Tina Stark's book for, trying to give the students a basic template or basic approach that they can start with. Then, we can talk about instances where they might need to deviate from that starting point, just like they often do with legal writing documents. Or they might run into differently organized documents in the real world as well.

MIKI FELSENBURG

One thing I did, the two assignments that I mentioned several time is I had them turn in a separate document which I asked them to list their business concerns and where they were addressing them in the proposed contract they were turning in. Were they addressing it as a covenant? Were they addressing it as a representation? Were they addressing it not at all? Why? So that forced them to think about how they were going to organize it. Also it taught them a little bit about what might be on the light of the business of a deal. Working in groups, a lot of them brought experience into that that others hadn't had. So it was a way of getting them to think about organization differently and different than I do in legal writing.

BARBARA LENTZ

I have my students do some exercises from a book that George Kuney co-wrote.¹⁸ I think it is an excellent resource, especially the first time you teach. The book includes a good list of organizational considerations. For example, do you list items by potential significance to the deal, or by expected frequency? Consider a manufacturer's warranty for commercial airplane seats: does the potentially significant issue (the very unlikely event the seats catch fire) precede the frequency issue (the routine maintenance of the seats each month)? You can discuss the options and how you might organize a document. Also, you want your students to learn the general rule and then have enough practice where they know when to follow conventions. An employment contract work pretty well to discuss how to structure the deal, because if you're an employee the most important thing is money. But the employer may value something else, and organize the document differently. It may be that your drafting students learn what to consider when deciding how to structure a document

¹⁸ THOMAS R. HAGGARD & GEORGE W. KUNEY, LEGAL DRAFTING, PROCESS, TECHNIQUES, AND EXERCISES (West 2007) (see chapter 8, "Organization").

rather than learn that there is one way to organize the product, as they might with an appellate brief.

I posted a sample assignment on the electronic exchange. I had my students rewrite the 2008 exclusivity agreement between Citigroup and Wachovia. It is a two and a half page letter that was the source of a billion dollar lawsuit. It is a terrible letter. It's not even on letterhead because someone forgot. And so the CFO of Citigroup had to scratch out where it says "[DATE]" in the agreement and hand write in the margin the actual date that the exclusivity agreement ended. But while parts of the letter are really awful, parts of it are quite good. And so I asked my students a list of questions and gave them the option to rewrite as a letter or standard contract. I think it is a good idea to have your students make a choice of format to understand the opportunities each option provides. It is the same idea as changing the organization or the order of contents in a contract.

QUESTION

This is a question for all of you and I am just kind of asking for your advice for what I think I have got a standard answer that I give my contract drafting students but not a very good answer. And this goes -- I have taught legal writing for years. I can be a hundred percent confident in telling them, you will do in your firm what I am teaching you to do here. You will write an objective memo. You will write an appellate brief and know what it is. The hardest question I get on the contract drafting side of it is I am upper level third year student. I have been working in a law firm, working for different partners and working in different businesses. None of them draft contracts this way. I am told not to spend time drafting this way. I am told we don't have the time resources to devote to best drafting practices. And I feel like I am a little in this la land sometimes wishing things would be this way in terms of waiting for them to become senior members of firms before it starts making its way. Do you have any answer to those questions?

CAROLYN BROERING-JACOBS

I think Brian Garner has a great answer to that question, and that's the answer I give my students. When you control the draft, then consider X, Y and Z. Often times newer lawyers are in a situation like you are talking about: they don't control the draft. Lawyers very rarely are going to control the draft early in their careers. In class we're learning best practices, and I try to help the students understand that they won't be able to implement these best practices in every instance.

SPEAKER

Anyone have a different answer?

SPEAKER

Not right now, because I'm going to steal that one.

TED BECKER

I do think, though, that you go back to the problem that there may be some drafting "best practices" where they have to wait to implement them until they're more senior. Maybe all we can do is flag these issues so when they reach a point where they control the draft or have more job security and credibility, they can make these changes. Just raise these issues and hope that maybe five or six or seven years down the road they can make these sorts of adjustments when they have more control over the documents.

BARBARA LENTZ

One quick response. If you talk about forms, hopefully your students will know enough to know when they have a good form or a form with problems in it. What should they do? How do you evaluate a form? You can pick out the big problems. You may not fix the whole thing but you can do some triage. If the standard process is to go through it and if they know the process, it will work for any kind of deal.

MIKI FELSENBURG

As we mentioned, you know, teaching them to work from a form is an essential skill in teaching contract drafting. It is quite different than drafting from scratch.

QUESTION

I have a question as to the popularity of your courses. Are they typically oversubscribed?

BARBARA LENTZ

My third year course fills in about 6 seconds and it's got room for 20 students. One of my teaching assistants tried to register. He thought it took about 8 seconds and he was on the wait list.

SPEAKER

So your course is limited to the size of 20 and it fills very quickly.

CAROLYN BROERING-JACOBS

Because I am the director of legal writing, I look at the waiting lists for all the writing courses. This spring, the transactional drafting class had a longer wait list than any other upper-level legal writing course. Right now we offer fewer drafting classes than litigation oriented writing classes, so it is not surprising that the wait lists are longer.

GRACE HUM

So I had a limit of 20 students in one section, and I had a huge waiting list. And so now I'm teaching two sections of contracting drafting this fall.

BARBARA LENTZ

We have gone to four or five sections just within the last few years and they are all filled. Some students tell us their firms are requiring them to take drafting classes. Hopefully, the fact that firms want or require their 3L students to take drafting, in addition to the new draft ABA outcomes that encourage courses like drafting, will help schools add drafting courses or multiple sections because otherwise it can be hard to justify the resources for 16 or 18 or 20 students, except that they all want it, their firms want them to take it, and the ABA's new draft standards show that students need these drafting skills to graduate with the proficiency of an entry-level attorney.

MIKI FELSENBURG

We've actually changed our curriculum. We have the first year legal research and writing goes all year, one and two. And it used to be that for third semester you had to take appellate advocacy but now students can take a third semester of either appellate advocacy or contract drafting or litigation drafting and they can take it any time in their second or third year.

BARBARA LENTZ

Some students try to take all three.

MIKI FELSENBURG

And some do. They can take more than one but they only have to take one.

SPEAKER

We're done.

TED BECKER

Are there any other questions? Thank you, thank you very much.