

## NEW WAYS TO TEACH DRAFTING AND DRAFTING ETHICS

LISA PENLAND <sup>1</sup>	TEACHING CONTRACT DRAFTING IN TWO WEEKS
DAVID THOMSON <sup>2</sup>	TEACHING DRAFTING ONLINE
SUSAN DUNCAN <sup>3</sup>	TEACHING DRAFTING ONLINE
KAREN J. SNEDDON <sup>4</sup>	TEACHING DRAFTING ETHICS USING VIDEO
& SUSAN M. CHESLER <sup>5</sup>	VIGNETTES

LISA PENLAND

### TEACHING CONTRACT DRAFTING IN TWO WEEKS

#### Introduction

Why did I decide to teach contract drafting as a two-week summer course? Initially, I just wanted to teach contract drafting. I had been teaching legal writing for about a year and I went to my first major legal writing conference in Seattle in 2004. I learned that there were other legal writing professors teaching contract drafting. It really excited me and I decided this was something I wanted to do. So, initially, I just wanted to teach contract drafting.

The question then is why teach contract drafting over the summer in the short span of two weeks? First, I chose summer because I could be equitably compensated for the course. I had learned that if I taught additional courses during the regular school year, I would be compensated at adjunct rate. If I taught a course during the summer, I would be paid at an equitable overload rate. So I chose to teach in the summer so that I would be fairly compensated.

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<sup>1</sup> Lisa Penland is a Professor of Law at Drake University Law School, where she teaches Legal Writing and Contract Drafting. J.D., Drake University Law School, 1985, Order of the Coif; B.A., Missouri State University, 1981. She may be reached at [lisa.penland@drake.edu](mailto:lisa.penland@drake.edu).

<sup>2</sup> David Thomson is LP Professor and Director of the Lawyering Process Program at the Sturm College of Law at Denver University. J.D., Vanderbilt University, 1982, B.A. Columbia College, 1979. He teaches Administrative Law, Lawyering Process, and Discovery Practicum. He can be reached at [dthomson@law.du.edu](mailto:dthomson@law.du.edu)

<sup>3</sup> Susan Duncan is an Associate Professor of Law at the Louis D. Brandeis School of Law at the University of Louisville. J.D., University of Louisville, B.A. Miami University. She can be reached at [shdunc01@louisville.edu](mailto:shdunc01@louisville.edu).

<sup>4</sup> Karen J. Sneddon is an Associate Professor of Law at the Walter F. George School of Law at Mercer University where she teaches legal writing, introduction to counseling, and trust and estates drafting. Prior to teaching, she practiced law in the area of trusts and estates in New York City.

<sup>5</sup> Susan M. Chesler is an Associate Clinical Professor at the Sandra Day O'Connor College of Law at Arizona State University, where she teaches Legal Method & Writing, Legal Research & Writing, and Contract Drafting and Negotiating. She previously taught at Widener University School of Law in Harrisburg, Pennsylvania. Prior to teaching full-time, Susan M. Chesler served as an Adjunct Professor at New York Law School, served as the Director of Human Resources for a child welfare organization, and also practiced as a litigation attorney in New York City.

Finally, I chose to teach the course for a condensed two-week span because it gave me more flexibility during the summer. I could fulfill my scholarship obligations and take a little time off in the summer if the course were taught in a two-week span.

So, in a nutshell I chose the course, the time, and the format because I was excited about it; I wanted to teach at a time when I could be equitably compensated; and I wanted to retain some flexibility in my schedule. Did I have any obstacles? There were a couple. My first obstacle was trying to figure out what kind of drafting I wanted to teach.

### **Getting Started**

So, initially I had to decide whether I wanted to teach a broad overview drafting course or a narrower course. I really liked what other legal writing professors were doing with contract drafting, so I decided to focus on contract drafting. It hadn't been taught at my school so I had to propose the course to our curriculum committee. In my materials, you'll find a course proposal, my syllabus, and my course expectations that I give the students. Proposing the course was fairly simple and straightforward.

The most difficult obstacle for me was not having a transactional background. Many of you probably have very intensive transactional backgrounds. I had written contracts, but my practice background was more general in nature. I wasn't sure if I was up to teaching contract drafting. I was very lucky to have guidance and help from some heavy hitters. My syllabus originated from Susan Irion, who was teaching at Northwestern at the time. Both Susan and Tina Stark were so generous in helping me fill in the gaps and giving me the confidence to teach the course.

Tina Stark provided me with a draft of her book and I loved it. I decided that it would be my bible for teaching contract drafting. Since it wasn't complete, I was an early disciple. Tina was available by phone and any time I was unsure of myself, she was just a phone call away to help me learn and understand the materials. So the biggest obstacle for me was probably something that wouldn't be an obstacle for a lot of other people and that was just mastering the subject. The wonderful part is that I began teaching the course in the summer of 2005, but now it's second nature to me. I would say that it's easier for me to teach contract drafting than my regular gig of legal writing because I teach it more often – twice each summer. So, there were a few obstacles to getting the course off the ground, but everything worked out fine.

### **Course Basics**

The basics of my course: it's two credits. We meet three hours a day for two consecutive weeks and the students get two credit hours out of that. I always say when Penland falls down, the course is over. It is exhausting and a hard two weeks. I have a 15 student cap. I started out with a 12 student cap. I like a 12 student cap because with 12 students I can usually get them all to participate at the level I want. My administration wasn't thrilled with my 12 student cap and so they pushed me up to 15. When I had a 12 student cap, I always ended up with 13 or 14 students. The nice part was that I got to choose the additional students; that is, I had some discretion about the extra students I added. With a 15 student cap, I always end up with 15 students and can't add any more and maintain the level of participation that I like. So I have no discretion to add one or two more students here and there. If you can get a lower cap, you have a little bit of discretion about allowing extra students into the course and I think that's much better.

My students satisfy their advanced writing requirement with the course, too. We do a lot of writing both as assignments and in-class writing. The students like fulfilling their advanced writing requirement by writing something practical.

Not only do I have a 15 student cap, I teach it twice during the summer. I teach it in the May interim and I teach it in August interim. The students really want to take the course and, until recently, we didn't offer it during the regular year. But in spite of now offering it this coming fall, I filled both my May and August interims with 15 students each. I'm at the limit. The students really want to take the course and if you're motivated to do it in the summer for a couple of weeks, it's extremely rewarding because the students are so anxious to take it.

My two credit course is structured for three hours a day, two consecutive weeks; there is a 15 student cap; and the students get their advanced writing requirement. The students don't do any reading for my course. I use Tina's book as the backdrop for my class, but I don't have the students read it. The reason we don't do any reading is because they do are doing so much writing for the course and because they are very busy. Most of my students come to class for three hours in the morning, go to a job all afternoon, and then they go home at night and work two or three hours on the writing assignments that I have assigned.

If you look at my syllabus I have a total of eight assignments. We do six smaller assignments. One of the larger assignments is a research project on boilerplate in Iowa. Each student researches some aspect of Iowa boilerplate, creates a PowerPoint presentation, and submits a report. In addition, their final is an extensive contract. I let them collaborate on most of their work on their shorter assignments. On the early assignments, I'm fine if they sit down and work together. They can even turn in joint assignments. I'm okay with that because in the early phases of the class, it's really important for them to be talking. It's really important for them to be talking with someone else and bouncing their ideas off of each other because they are in the process of learning.

So we don't do any reading, but we do lots and lots of writing. On the early assignments, I'm looking for effort over correctness. On almost every assignment, we go over the assignment in detail in the next day's class. The first time I taught the course, I realized that written feedback on every assignment was not the most effective and efficient method of teaching. I was giving feedback on every assignment, preparing for class every day, and teaching for three hours a day. It was just too much to do in that time period. We were also going over the assignments in class. I decided that rather than grade those assignments as well as go over them in class, it was more effective to spend the time going over the assignments in class and have them take notes as their feedback.

The students write a mid-sized contract about half-way through the class, and I do give them feedback on that midsized assignment. I like to time that assignment so that it is due the second Monday of the course—so they have a weekend to work on that.

Their final assignment is due a week after the course is over. That works great for me in May because I have all summer to grade. It's awful in August because we have to have grades in before the first day of regular session of classes. The August drafting course ends about two weeks before regular session classes. I give them a week to write their final contracts and I am really busy grading those for that week before the regular fall session begins. I think it's important to give them some time after the course ends to complete the

final contract because we have been going at such a frantic pace. They really need some time to reflect.

I also have conferences with each student. The students each write a draft of their final assignment and we have conferences about those assignments. This year we held conferences after the course was over. That worked nicely because they students had some time over the weekend to really get into their drafts before conference time.

### **Assignments and Exercises**

Where do I get my assignments and exercises from? I create some assignments and exercises based on interesting hypothetical facts or things that have happened to me. I often get exercises and assignment from others as well. A fun assignment I created is based on a web page I found for Ken's Hatchery and Fish Farm. (Ken's Hatchery and Fish Farm actually also has boar hunting. I'm going to do a legal writing problem sometime with that.) The company had a great web page about what they do as a hatchery and a fish farm. For the final contract assignment, I wanted to do an employment agreement, but I was bored with the run of the mill employment agreements. So, for the final contract assignment, one of the parties was going to go work for Ken's Hatchery and Fish Farm. I went to the web site and I got a lot of information about what goes into running a hatchery and a fish farm. It was a really fun problem and I assigned it again this year. I have about three final writing assignments that I'm rotating. They aren't all quite as fun as this one. The website for Ken's Hatchery and Fish Farm brings this particular assignment to life. And that's what I'm looking for – an assignment that is fun and practical.

Some of my assignments are just jazzed up versions of what others have done. Some of them are based on real life. I used to assign Tina's auto purchase agreement as the mid-sized contract assignment. Similar to what Tina does in her course, on the first day of class we always go through a negotiation of an automobile. I would then assign that auto purchase agreement for their midsized contract at the end of the week. I got tired of repeating that assignment so I have a series of different mid-sized assignments that I assign. This year, one of my colleagues in legal writing came in and asked me to look at her lawn maintenance agreement. So for the mid-sized assignment this year, my students redrafted the lawn maintenance agreement. That was nice because the facts were all in the contract and you could see what they were trying to do. They had just not done a very good job of doing it. I think probably the lawn maintenance guy lifted it off the internet.

Another mid-sized assignment that I have assigned is a deck painting agreement because I had my deck painted one summer. For this particular assignment, I really had to add to the facts and conditions to make the assignment interesting. So a lot of the assignments and exercises are based on real contracts. The students like those sorts of things.

I also use Tina Stark's exercises for both assignments and for class exercises. The challenge with some of those is that the underlying facts are sometimes a little sophisticated for my students. Many of my students are going to practice on Main Street, rather than Wall Street. They haven't taken the courses that will give them a really in-depth business background. But they are going to go out and they are going to write real estate contracts and do a variety of general practice tasks.

One of my students' favorite exercises is writing a septic addendum. I created this exercise because I was selling my house and I was about a week from closing. There hadn't been a septic inspection. My septic failed and it was going to be a \$10,000 problem. When I

set up this fact situation for students, they can relate. I tell them that for me a \$10,000 problem was a big deal. As part of the exercise, we look at the provision that was in my real estate agreement and we go through that. They love it because we do this exercise about the fourth day of class and they are getting pretty savvy about contracts by the fourth day. We go through the septic provision in the original agreement and we talk about what you could do to better craft that provision. Then, I set up a few more facts and assign a septic addendum. The fact scenario then includes both an exercise in class and a writing assignment.

### **Course Method**

I spend a lot of time going back and forth between talking and doing exercises. Because they don't have reading assignments, I have to lecture and they have to listen to me to understand the contract concepts. Essentially, the class is a combination of going from writing and participating to lecture and back and forth.

I usually begin each class by going over the assignment they wrote the evening before. Whether going over an assignment or an in-class writing exercise, I just bring up Word and I ask the students how they began the writing assignment or exercise. I write as they tell me what they drafted. Students add to what we've written. We stop and we talk about changes we want to make. We just write as we go and I really get a lot of participation in the small group; it's great. What's really wonderful is that although I always have a template, they don't write exactly like the template which allows me to stress how good drafting comes in many forms. They always do a great job when we're working together and it's really fun. So we go back and forth between lecture, exercise, lecture, exercise. When you are up there for three hours, you need to break it up a little bit That's the method of my course and how I handle my three hours worth of time every day.

### **Conclusion**

The good part about teaching the course in a condensed format is that the students make a lot of progress in a very short time. I can really see the results. When they come in those first few days, they look at me like deer in the headlights. You can tell they are very confused and then I tell them that they just need to be comfortable with being confused for a few days. By Thursday, they are writing contracts and I can see the progress they've made. I can see as they correct themselves when they talk about a provision and that they're catching on. So they make a lot of progress in a short time and they can see the big picture really fast. And I think they like that. They feel like they have accomplished so much.

The downside is that we're all dog-tired. We are worn out by the time we get done; all of us. And along with that, is that we don't have enough time to practice. I wish we had more time to practice and I wish we could do this in smaller bits of time. I would prefer not to stand up for three hours nonstop. So that's the downside of it.

I would say that my ultimate positive comment about it, though, is that I hit a home run every time. My evaluations in this class are always stellar I wish my evaluations all year were that way. They love the class. I get students that will go out the next week and they will come back and they will say, "so I'm working at my job and already I have used this." They are amazed that they wouldn't even know what they didn't know. They are all very happy and excited and I hit a home run every time and that makes me happy. So we're going to save all questions for the end. So I will turn it over to the next person.

**DAVID THOMSON**  
**TEACHING DRAFTING ONLINE**

**Introduction**

Well, good morning every one. I don't know about you but I am exhausted now. Wow. Lisa, that's amazing – in two weeks! Dog-tired is right. Hi, everyone. My name is a David Thomson. What I'm here to do today is just to talk about teaching online and only to take a few minutes. Because really I want Susan Duncan to come up here and tell you about this great contract drafting class that she is teaching online. Susan is in the middle of walking across a tightrope teaching her first course online. She and I have been talking about this for a while because I taught legal writing online for four years in a master's degree program that we offer at the University of Denver.

It is called the Masters of Science in Legal Administration. It is a wonderful program, with students who are trying to become legal administrators in law firms. And they really need to know what lawyers do or they can't be a good administrator under the design of this program. So it has always had a one semester legal writing program within it. Imagine taking the entire year of legal writing and shrinking it down to one semester for a slightly different audience and that is the class that I taught online for four years. And in so doing I learned a few things about online pedagogy, and wrote an article about it, and Susan found it. I hope it has been helpful to her. But that is what I want to offer you today.

**Online Course Design**

There are really four things that I learned about online pedagogy as I studied it and tried to figure out how to do this. And the first thing is to focus on your outcomes. What is it you want your course to produce? What do you want your students to know when they are done? And, of course, there is this big effort going on today about outcomes in legal education. I am going to talk about that in just a moment and Susan quite a bit more. So first is outcomes; and then second to try to figure out what the best way to divide the material that you want to cover to achieve those outcomes? Third, what are your goals for each module? In other words, once you divide the material into separate modules, what is it you are trying to achieve in that module? And fourth in what technology, what delivery device will you use? What modality are you going to use amongst a panoply of options to achieve the goal that you have for that module?

So, first about outcomes. There is a substantial discussion going on about outcomes but, from my point of view outcomes is really about good teaching. What could possibly be wrong with describing what it is you want your students to know at the end of a semester or year? And even articulating those learning outcome to your students. What could possibly be wrong about that? That's just good teaching. Any good teacher is doing that anyway in one way or another. Second, once you have done that, what could possibly be wrong with trying to figure out how you are meeting those objectives? Anyway, that is my view of how important it is, but it is particularly important with online course design. You have to start with your learning outcomes just as with any course and then you have got to figure out how to divide what you want to teach into effective modules. And this is a different thing for teaching online. As you develop your syllabus, where you might normally have a Monday and a Wednesday class for an hour and 15 minutes, once you go online, that changes substantially because you do not have the ground class period twice a week. You have a very

different way of thinking about the time that you're going to ask the students to spend in class and outside of class.

The process of working your way towards teaching online, then, involves thinking about dividing up the material to achieve your goals in a different way. And then once you have divided up the material, I use the term modules to describe these units of instruction. But modules would be a way of saying: okay, this is the piece of the course that we're going to do at each step. Think of it as including an exercise or a discussion or a PowerPoint with voiceover, and perhaps including an asynchronous forum discussion.

Once you have decided what the purpose of that module is—I need to transfer information from me to the students or I need the students to talk amongst themselves and discover something together—then you are ready for the fourth step in online course design. The next step is a module by module effort to select the right technology to achieve that goal. Is it an online discussion or is it a PowerPoint with voiceover for lecture? Is it a live class where everybody has a headset on and we can all speak and hear each other? What is the technology best designed to support your educational goal? And the great news about the available technology is that the over the last few years, the technology to support online learning has really advanced and it works and it is effective.

### **Conclusion**

As foreign as it can seem to not be in a physical classroom with bodies sitting in the chairs listening, it is a very different way of teaching but it can be very effective. If you go through this process of developing and dividing outcomes, dividing modules, and selecting the right technology, it can work. And that is kind of a scary thought to some people. Perhaps not people who have come to this section today or to this conference about What's Next, but for many of our colleagues, this is kind of a scary thought – that you might remove yourself from this paradigm that we're so used to.

The reality is that although this might seem like a paradigm shift to us, it is not for our students. Many of our students like the flexibility that an online course provides to them because it involves technology, and they are generally very comfortable with it. [At this point, Professor Thomson displayed a cartoon about how our students go to Google for everything.]

We need to understand, although we look at that cartoon and particularly librarians look at that and recoil, we need to understand that is really how many of our students think. They cannot really imagine a life before Google. And so when you say to them "well we are going to do this class live and you are going to have a headset," they will typically—in my experience—respond: "Okay, I'm on." It is no big deal to them. Of course as we go with them into that brave new world, we also have to help them to understand that Google does not have all the answers. We have to teach them about what parts of the technology do work and how to make them work effectively to do what lawyers do. It is not about the technology. It is still about the teaching. And it is still about the learning, of course, but it can be done well and effectively online now. Susan is leading the way in the contract drafting environment. So let's get her up here to talk about that.

**SUSAN DUNCAN**  
**TEACHING DRAFTING ONLINE**

**Introduction**

This is my fourth week out of seven weeks teaching the online drafting class so I'm right in the middle of it. And today I was going to tell you the steps I went through to actually design the course. The first thing I did is I read a lot about online classes generally. So I read David Thompson's article.<sup>6</sup> He talked to me a bunch and then I went and got other books about how to teach online before I even decided to do it. I have a bibliography that should be on that CD.<sup>7</sup> I didn't put it in this session but it is on the CD and that has a lot of great books. The one I really like is by Susan Ko and Steve Rosen. It's called *Teaching Online: A Practical Guide*. And that book had real specific ideas for me on what I needed to do to make it a good learning experience for the students. So I would suggest that you review that first.

Then the next thing I did was learn what we had available at the University of Louisville. So I took a class -- do you all have Delphi centers or is that just the University of Louisville? Well, that's a center that is a campus-wide center that helps with technology issues. So they had classes that I actually attended about Blackboard: what I can do with Blackboard and with online classes. They had a whole online department that helped me. And they actually suggested a great idea for me to join a class; so I joined a communications class. I think it was a speech class and this professor had taught online forever and she gave me her syllabus; she got me set up for the course so I could see everything they were doing and that was really helpful. It wasn't law related because I'm the first one that's taught an online course in the law school, but I thought that was a huge benefit for me just to see how it worked.

**Getting Started**

Looking at David Thompson's on-line course for law and the communication's on-line course helped me a lot. But not only had I never taught on-line, I also had never taught drafting. So I agree with what we've heard in the last two days about being scared to death about just teaching the drafting part of it much less the online delivery. To help me prepare to teach the content of the drafting class I attended my colleague's Grace Giesel's drafting class in the spring. I went to all her classes because I wanted to see how much they could get done in that amount of time. Also, I wanted to know what the students' questions were. Attending the live class would help me to design the online course and I could have some credibility with the students that I wasn't going to make it too hard, too difficult. The students liked it when I told them that I audited Grace's class. Then when I tried to design the class, which took most of April, the Delphi Center introduced me to the Quality Matters rubric and they really encouraged everyone from the university to get this designation for

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<sup>6</sup> David Thomson, *Effective Methods for Teaching Legal Writing Online*, available at [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=721919](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=721919).

<sup>7</sup> See Susan Duncan, *Bibliography for On-Line Teaching* (Conference Handouts), [http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010\\_Conference\\_Speaker\\_Materials/Duncan/Duncan\\_Electronic\\_submission\\_Bibliography\\_for\\_Online\\_course.doc](http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Duncan/Duncan_Electronic_submission_Bibliography_for_Online_course.doc).



their online courses. It is like a seal of approval and the course is peer reviewed all over the country. You submit your online course and the reviewers are looking to see how well you have designed the course so it is clear to students. And it takes you through this rubric of things you need to do as you are designing the course. So that rubric gave me some direction on how to design the course efficiently.

The categories in this rubric include course overview and introduction, learning objectives, assessment and measurement, resources and materials, learning engagement, course technology, learning support and accessibility. And then they have things in each one of these categories that I had to check off that I did. So that checklist helped me to try not to make any mistakes as I was designing it.

### **Course Overview and Introduction**

With the course overview and introduction, they said right away you have to tell the students how to get started because you are not going to be meeting with them in person. So when they get to home page you have to put something that says, "start here." That way students know to start right there before they even get to the syllabus.

They also strongly encourage you to have self-introductions online because you're trying to make students not feel isolated. So I did two things there. I started a forum discussion that they had to post to in order to introduce themselves. I asked them to tell me if they have ever taken an online class and describe how that experience was. I also told them a little bit about myself.

And then I made a decision to make them all have a 15 minute telephone conference with me. I have 13 students and I just wanted to explain how it was going to work since they had never taken an on-line course in the law school. And I think only two of my students had ever taken any online course. So I just wanted to go over how we were going to proceed and that was really helpful because I could talk to them about how I did all of this research about online courses and this is what the experts are saying about online courses. So I think it helped right away that I admitted I was not an expert, and that they were guinea pigs and I was a guinea pig with this but we were going to try it together. I think they liked that.

### **Learning Objectives**

The learning objectives. David talked to you a little bit about those and I'm going to talk a lot more about that down in Marco. If anyone is going to come to Marco I will give you the ABA update. But they said at the Delphi Center that I should be avoiding words like "know," "understand," and "be familiar with," because you can't really measure anything. They encouraged me to use more of Bloom's (Bloom's taxonomy) active verbs. To illustrate the difference here is my first draft for what I wanted to do for the first class.

## First Draft

- 1. Explain how deals and drafting differ from litigating.
- 2. Understand the course's organization.
- 3. Become familiar with capsule definitions of seven contract concepts (representation, warranty, covenant, right, condition to an obligation, discretionary authority, and declaration).
- 4. Practice the new translation skill (determining which contract concept best reflects the business deal)) through a hypothetical of buying a house.
- 5. Identify contract parts (preamble, recitals, words of agreement, definitions, action sections, other substantive business provisions, endgame provisions, general provisions, signature lines) into which the contract concepts and business deal are integrated.



I sent it to the Delphi person and I said, “so does this look pretty good? How do you think this is?” She said, “well, some of these goals are so basic or they are too detailed” or I had those words that I wasn't supposed to be using on there. So she helped me revise it and this is what it looked like at the end:

## Revised

After studying chapters 1-5, students will:

- List seven ways deals and drafting differ from litigating.
- Define seven contract concepts.
- Determine which contract concept best reflects the business deal.
- Label contract parts.



It was really helpful to go through that process. That took a lot of time for each one of those modules for me to brainstorm what I thought and then articulate it the correct way for students to be able to do that.

### **Assessment and Measurement**

Then I had to assess and measure whether they could do all of those things. So I had to figure out how I was going to know if they could articulate seven ways how deals and drafting are different from litigating and how they were going to do the seven contract concepts. And I had to go through each one. I have never done this for my basic legal skills class. I think it will make me a much better teacher now when I go back to my first year class. I went back and I had to assign assessments. So one of them we did a forum discussion and then we took a quiz. Another one I just did Tina's exercises. I had to go through and determine each way I was going to figure out if they knew what I wanted them to know. So that was assessment.

### **Resources and Materials**

For the resources and materials you really have to figure out how you want to deliver each component of information to the students. So for my course I used podcasts. I usually give a podcast that's kind of like Lisa's lecture to begin the material. That might be 20 to 40 minutes and then they do in-class work so they actually do Tina's exercises and then I have homework. I also had them going onto websites about plain English. I had them listen to an NPR story. This week they had to figure out a contract – just one provision from any contract and then redraft it. One of the students was getting married and she sent me one of her wedding contracts.

So I had to think of all the different ways I wanted to deliver information. And then I had to make a decision: do I want to do it asynchronous or synchronous. And the Delphi people kind of said, “well, the whole point is that they can be in any time zone or they can do it any time,” so I decided not to have synchronous components this time. As a result, my on-line course is all asynchronous except for the conference they have with me individually and they will have one other telephone conference before the big assignment so that is the only time we are live. Everything else is done online.

### **Learning Engagement**

A challenge exists in making them engaged and not feel isolated, but the forums have been great for that. They make really thoughtful postings and I make them wait 24 hours before they post another one so we can get a better discussion. So I'm real clear in the syllabus about you have to post two times to get credit for this assignment. That you have to post after 24 hours. So it's helpful that they don't just post right away and they are actually talking back to the other people.

### **Course Technology**

Another idea that book told me to do is a water cooler forum. So I have that and they can ask questions and I give them 24 hours to try to answer each other's questions before I get involved. And then if nobody has answered it, I will give an answer. And they solve a lot of things that they would normally just e-mail me about. So they would say, “I can't get the NPR website to open up. Does anybody know how to do that? Or “how do you get the podcast to be a full screen?” And somebody else will answer that and I don't even have to do that; I just watch. I told them I am just going to lurk on that. It is not that I am at the pool or anything. I'm watching that.

That's helped, and then I've also paired them for one assignment where one person does the draft, another comments and then we switch this week and then at the very end I have them in small groups. And that might be the only time that they do a live thing because they do have a live classroom that they can all get on. So I'm going to let that group decide how they want to go about the task -- if they want to do it just through e-mail or if they are going to go on to the live classroom. And I am a member of all the groups so I can see what's happening.

The Delphi Center and David both told me to start small. You know, don't try all these things because there are so many different things you can do. So I don't have a live classroom this time since I was trying so many other ideas.

### **Learning Support**

I am going to show you my site real quick and you will see that it is kind of small. Not very fancy. In the syllabus one of the things I had to put for quality matters is what kind of technical support existed if things went wrong. So I have that all in there; academic support. All of that is in my syllabus.<sup>8</sup> That's how I satisfied that one.

### **Accessibility**

This one, the accessibility, I haven't really done that yet so I think the Delphi Center is going to help me with that to make sure that part of the course is going to meet the Quality Matters rubric.

### **Conclusion**

The experience thus far, I think they really like it. I mean it's a lot of work and I know the ones of you that are on the LWI listserv probably saw my post a few weeks ago where the student said, "there are just so many channels of information. I mean, can't you just streamline this? I am going to a class where it is usually all in my book and it is at a lecture so it would just really be helpful if you could streamline it. I have to look at a discussion section and I have to read her book and I have to listen to your podcast and it is just too many things coming at me." So I've used that post to say, "oh, you know this is a great thing you are exposed to because now you are above all your peers because now you know what law practice is like. In law practice we don't walk in and get a lecture when we get to work. We don't have our client give us the book with everything in it. So this is really fantastic that you have identified this issue and this experience you are getting in an on-line course is so much better than how our law school classes are usually designed." They accepted this, at least for now.

I will just show you the class real quick. The hardest thing from the professor's point of view is just to watch them all. I mean, it's great because they can't hide so I can watch when they are coming on and that's been good. But it is probably more than a regular class, I think. Harder to stay up with it all just from a professor's point of view. But what I love about it, being the first time I have taught a drafting class, is that I have time to think about their questions. I'm not standing in front of them. So when they ask me a question, I could really think about it or I can e-mail Tina Stark real quick.

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<sup>8</sup> For copy of the syllabus email [susan.duncan@louisville.edu](mailto:susan.duncan@louisville.edu).

So that was my “start here.” That told them welcome and explained how they get started. Here is the syllabus. Here is what you’re going to need for your technology. Then I had a syllabus. The syllabus is 18 pages. It’s really long. That’s on your CD and you need to call me because it’s updated since when I sent it in April, so I will be glad to give you that. Then you have the faculty information and then all the usual things are in these course documents. So class one, I have what we’re doing and then you’ll see the learning objectives.

The screenshot displays a Blackboard Learn interface within a Windows Internet Explorer browser. The browser's address bar shows the URL: [https://blackboard.louisville.edu/webapps/portal/franaset.jsp?tab\\_group\\_id=\\_26\\_1&url=%2Fwebapps%2Fblackboard%2Fexe](https://blackboard.louisville.edu/webapps/portal/franaset.jsp?tab_group_id=_26_1&url=%2Fwebapps%2Fblackboard%2Fexe). The page header includes the University of Louisville logo and navigation tabs: "My UofL", "Content Collection", "Courses & Catalog", "UofL Libraries", and "Help". The main content area is titled "Discussion Board" for the course "LAW 999-50: SEM-TRANS DRAFTING-Summer 2010 (LAW 999-50-4105)". A sidebar on the left contains a navigation menu with items like "Start Here", "Syllabus", "Faculty Information", "Course Description", "Announcements", "Course Documents", "Assignments", "Communication", "Homepages", "My Grades", "Tools", "Instructors Start Here", "Tegrity Classes", and "Course Evaluation". The main content area features a "Create Forum" button and a table of existing forums. The table has columns for "Forum", "Description", "Total Posts", "Unread Posts", and "Total Participants".

Forum	Description	Total Posts	Unread Posts	Total Participants
Introductions	Early in the week of May 10th describe yourself in no more than three sentences. In addition, please tell the group if you have ever participated in other online courses and what you liked and disliked about that experience. Finally, please let me know why you took this class. You will not need to reply to any postings with this forum. We are just trying to get to know one another.	30	0	14
How are deals and drafting different from litigating?	There are at least seven ways deals and drafting are different from litigating. Early in the week post one way you think they are different. Later in the week comment or respond to another post.	28	0	13
Exercise 8-3	Please post early in the week at least one error for one of the versions in exercise 8-3. Before posting look at what others have said and try to add something new. In your post identify the version and the error. Starting on Thursday of this week until Sunday at 11:55 p.m. (EST) post at least one idea on how to correct one of the errors previously identified in the discussion. Again review what others are saying and try to pick a solution not yet discussed. In your post identify the version and	43	0	14

Here is the forum where they introduce themselves. Then they watched a car video clip, the Tina Stark thing, and my husband and daughter did that and we put it on YouTube. Here is the forum. How are they different? This is the template to use for that car draft and the exercise. So that's the forums. And then I can go to communication and on my discussion board forums I can see all the forums, and look I can see four people posted since I've been gone. So I know I have got to look at those. One is a posting in the water cooler so somebody's got a question about something, so I can see that.

And the other really cool thing about Blackboard is that I can go see all the course statistics. So I can run this for each one of my students. For example, I can start it on May 10th, which is when the class started, for all my users and then I will be able to see when they have been on. I can tell what time of day they have been on. I can tell every part of my site they have been on. So I can really see if anybody needs some help or is waiting to the last minute. I can see everything. I have all their names. I can see somebody has been on 629 times -- and this one is 370. That's how many times they have been hitting my site. So just in the month of June I can tell what days and how many times. So it's really helpful to me. And at first when I started using the course statistics, I was trying to count and track all the postings. It was just overwhelming. Then I figured it out, and that's made it a lot easier. Because I can see how many times they have visited or posted to the site real easily.

I will turn it over to Karen and Susan and answer questions at the end.

**KAREN J. SNEDDON & SUSAN M. CHESLER**

**TEACHING DRAFTING ETHICS USING VIDEO VIGNETTES**

**Introduction**

Good morning. My name is Karen Sneddon. Today, Sue Chesler and I are going to showcase a technique to incorporate issues of ethics and professionalism into a drafting course. And that technique is Teaching Drafting Ethics Using Video Vignettes. Of course we know at this point that Carnegie's *Educating Lawyers*,<sup>9</sup> CLEA's *Best Practices*<sup>10</sup> have reinvigorated examination of law school curricula, mostly especially with the inclusion of transactional based skills increasing the awareness of issues involving professionalism and ethics. As those transactional focused courses are being added to the curriculum, professors are striving for a way to infuse those issues of ethics and professionalism into their courses.

Now thinking just for a moment about what your experience might have been like in law school regarding instruction in ethics and professionalism, it might have been similar to my experience. I, of course, didn't have any drafting courses or any real transactional basis skills courses at all, but I did have the required professional responsibility course. And I remember the very learned professor droning on and on about the model rules and the model code. And in my way as a student, I compressed those learned lectures, oversimplified them, into the golden rule. I didn't see the connections between what the professor was telling me and what would really happen in the daily practice of law, especially in the daily practice of law as a transactional lawyer.

To combat this, Sue and I put our heads together to think of how we could facilitate that conversation with students to get the students engaged in consideration of these issues. To that end, we came up with two carefully crafted vignettes to raise issues of professionalism and ethics that would arise in a realistic fashion, realistic in terms of what the students would experience when they went out into the practice of law.

We tried not to make these vignettes too cartoonish, so that the students could just dismiss the vignettes as "crazy," "outlandish," and "that is never going to happen to me." Each vignette also highlights a variety of issues. Issues that are very quickly spotted by the students and some issues that need to be teased out just a little bit. The goal of the vignettes is not to show the students definitive answers to everything that might come up in practice but rather to raise their awareness about these issues of ethic and professionalism. Sometimes that means highlighting those issues that are going to be unclear with no real answer.

First, I am going to talk briefly about the materials that you have received including the DVD with the vignettes. (By the way, the DVD is yours to take home.) Second, I'm going to show you a snippet of scene one of the vignette and get some of your reactions and thoughts. Then I'm going to turn it over to Sue who, with your help, is going to go simulate a classroom setting. This simulation will include highlighting the reactions the students might have to those issues using scene two.

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<sup>9</sup> William M. Sullivan et al., Carnegie Foundation for the Advancement of Teaching, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

<sup>10</sup> Roy Stuckey et al., Clinical Legal Education Association, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007).

On the conference CD and in the handout you have received at registration, you received the scripts and discussion guides. For each scene, the written materials include a brief summary of what is included in the scene, the scene script, sample discussion questions, and some sample discussion points. The discussion questions and discussion points are not intended to be exhausted, but rather are tools to help you facilitate this conversation and get the students engaged. You also have the DVD that has the full recording of both scenes. The playing time for both scenes is 10 minutes and 54 seconds. The DVD provides you the opportunity to can either show snippets in class for the students to see a little bit over a certain period of time or to view the entire scenes in class. The DVD may also serve as inspiration for you all to become movie makers yourself.

Now, before we get to the snippets of the vignettes, Sue and I would be remiss if we didn't thank those individuals that have made the vignettes possible. And yes, this does sound like an awards speech, but we are now in the movie business! We'd like to give a big thanks to Pat Longan and the Center for Professionalism and Ethics at Mercer Law School. For the pre-production, production (including actor compensation), and post-production, it could cost between \$50,000 and \$70,000 for these two scenes with a little bit less than eleven minutes of playing time. We didn't have that in our budget. So we gave Pat a digital recording device, three intrepid volunteers that I found lurking around the law school, five hours of filming time, and the program iMovie. With that, Pat performed movie magic. We'd also like to thank Fred Leary of Mercer's IT department for the generation of the DVDs and the labels. Now, on with the show.

The DVD is entitled "A Day in the Life of a Transactional Lawyer." The first scene centers on an interaction between a junior associate and a client. The second scene centers on an interaction between the same junior associate and a senior partner.

I'm going to show you a snippet of scene one that is approximately two minutes. As you are watching, you want to consider what your reactions are. After we've watched this little snippet, we will have a little conversation about it.

### Scene One Excerpt

*Emily is a junior associate. She is in a conference room with Robert, an accountant. They are discussing the draft of an employment agreement that will help Robert expand his accountant's firm. This provides an opportunity to consider a variety of issues. One issue is the consideration of who is the client – the individual or the business.*

*The scene begins in the middle of the counseling session. Robert is excited about the opportunity to expand his business and is looking forward to a bright future. Emily has the opportunity to explore the attorney's role as counselor, rather than as advocate. Part of that conversation is examining what happens if the proposed expansion does not go as planned. This also raises issues about the client's ability (or perhaps inability) to review and understand the document. This reminds Robert that he has some specific questions about a few of the provisions.*

*One of Robert's questions involves a provision about a restrictive covenant not to compete during a specified time period. Robert expresses the sentiment that the stronger worded the provision, the better. He mentions to Emily that this provision should be litigation-proof. This relates to the attorney's role as counselor, and it also provides an opportunity for Emily to raise some non-legal implications of the decision.*

*Robert points to another provision that he doesn't understand (both its applicability and what it actually means). Emily stumbles through an explanation.*



**Script for Scene One**

- Robert: Thanks again for getting this paperwork together so quickly.
- Emily: Happy to do it. I know that this is an exciting time for both you and your business.
- Robert: This is the perfect opportunity at the perfect time to bring in another accountant. I appreciate your help.
- [Robert flips through the voluminous contract.]
- Robert: I've got to say, though, that I was surprised by how long this is. This seems pretty long for such a simple deal.
- Emily: As we've discussed, there are a number of concerns that can be addressed in the contract. And we are trying to cover a variety of circumstances, some of which are likely to occur—and most of which are not likely. But this contract is intending to clearly establish the expectations and responsibilities of the parties.
- Robert: OK, I understand that – but I do have a couple of questions about a few things.
- Emily: Good, let's talk about those. It's important that you understand everything in the contract. Where would you like to start?
- Robert: What about this covenant not to compete? I don't think it is strong enough.
- Emily: Courts have held that these types of provisions are generally enforceable in situations like yours, where it is part of a contract regarding the provision of professional services.
- Robert: You say that "courts have generally held." Does that mean that this provision might not be enforceable at all?
- Emily: That's possible. There are some limits. I don't want to overstate the legal force of this provision.
- Robert: There isn't a loophole though, right?
- Emily: No, I wouldn't call it a loophole.
- Robert: Look, I want this provision to be strong. It should be in effect for at least three years – if not longer. And that's three years from the employee's termination.
- Emily: Okay. Other comments about this provision?
- Robert: I think that the employee shouldn't be able to work in any capacity as an accountant – anywhere in the US during that three year period.
- Emily: A court might find that a little bit extreme. . . .
- Robert: I have to do a lot of training. I don't want to invest that time only for him to open up shop across the street from me—and run me out of business.

- Emily: I don't want to promise you that the type of provision you're envisioning will work. I'll need to do a little bit more research, but I'll be able to get back to you in the next week or so. I do think that we'll probably be able to come up with something that will make you happy and will still be enforceable by the court.
- Robert: OK. At least it should give him some pause before leaving me.
- Emily: Right. But remember, he needs to sign this agreement and you do want to get him on board. You may want to consider not just the legal implications, but also what this contract does in terms of establishing professional relations.

### Discussion of Scene One

#### KAREN SNEDDON

As you know, the preamble to the model rules states that lawyers perform various roles, including the role of counselor. I'll open the floor to get some of your reactions to this little snippet. What do you think the students will react to? What are you reacting to? For example, what do you think about the covenant-not-to-compete?

#### SPEAKER

Well a couple reactions. One reaction was that I thought that the client had contradictory concerns. On the one hand, you know, the first is, "I don't want anyone thinking that person is my slave forever." On the other hand, "I don't want someone to move in across the street from me and compete." That was not pursued by the lawyer. It certainly is an opening for the attorney to explore the client's concerns. The other reaction was that I felt that the lawyer at key points was not responsive to the client's questions.

#### KAREN SNEDDON

Great reactions. One of the nice things about using the vignette in the classroom is that the students are not invested in the performance in the same way they are invested with a role play or demonstration by classmates. The students can sit back, they can observe, and they can respond. The students could recognize that the attorney was not responsive at points. The students can suggest questions for her to ask the client to explore the client's concerns. The students can also note that the lawyer's answers sound really rehearsed, and not customized to this particular client. (Of course, in the vignette, the answers were actually rehearsed. She was a very diligent actress.) While the students might be critical of the questions, responses, and overall approach of the lawyer, this scene showcases what a junior associate might say in a similar situation.

Other thoughts or reactions?

#### SPEAKER

A follow up question on the students' background and what they bring to the conversation. I think this is excellent. I think it is so much work to put together these vignettes and I think it is a fantastic tool. But what are the students are bringing to the table? As professors, we all know that this is obviously not a valid covenant not to compete. But if

would students who have never had employment law recognize this as ludicrous? Doesn't this inhibit their ability to take in the issues that you are discussing?

**KAREN SNEDDON**

The issues are multilayered. For instance, the covenant-not-to-compete in the scene is envisioned by the client as covering the entire United States. That is very expansive. Students have a suspicion that this just seems problematic, even if they can't necessarily formulate a substantively complex reason. The students recognize it as a potential problem.

The vignettes provide points for students to grasp that then can be used to open up the class discussion. That discussion can include the point that the client seems to be directing the lawyer to include language that he is dictating to her. The class can consider what the role of the lawyer should be. Is it just to accept the client's dictation? Should the lawyer's comments be limited to legal concerns? Should the lawyer include non-legal considerations that might flow from the inclusion of this language? This helps the students consider the role of the lawyer when not acting in the role of an advocate but acting in the role of the counselor.

**SPEAKER**

The junior associate in the vignette said a lot of times that "courts would do this," "courts will do that." If I were the client, I would be concerned that all the lawyer's thinking is if this were litigated. And, as the client said, "I don't want that, is there a loophole here?"—meaning will there be litigation. The lawyer responded, "Well, we can talk about that" and "I will do research on it later." And she is anticipating writing a document that's so long, has she not already done the research?

**KAREN SNEDDON**

Great observations. This scene foreshadows some of the issues that will be developed more fully in scene 2. But, as you note, the lawyer does emphasize courts. The emphasis on courts could be a hold-over from how students might talk about this issue in a law school class room where the emphasis might have been on litigation. The vignette presents the opportunity to think about this issue in the context of drafting.

I'm going to now turn the floor over to Sue Chesler.

**SUSAN CHESLER**

Just before we show this part of scene two, let me tell you what happens in this scene. In scene two, Emily becomes more and more uncomfortable in the meeting with the client as you have seen, and it becomes very clear that she didn't know what to expect in that client meeting. So she walks down the hall and she is now speaking to the partner about what happened during that client meeting and they talk a little bit more about this employment contract that she has drafted. And you'll notice that she makes some comments that I know that if I had made them when I was a young associate and talking to a partner—now, I was not in the south. I was in New York—there would have certainly been some negative consequences. However, the partner in this scene is very polite. But you will find that Emily isn't necessarily acting appropriately in many of the circumstances.

**Script for Scene Two**

Emily: Hi Frank, I just finished meeting with Robert about the employment agreement we are drafting for him.

Frank: Oh, great – how did it go?

Emily: I think it went pretty well. He wants me to make a couple of changes to our draft agreement and then send it to the employee's attorney as soon as possible. He really wants to get the new accountant on board quickly.

Frank: Great. What kinds of changes does Robert want you to make?

Emily: Well, the biggest one is that he wants the covenant not to compete to be drafted even more broadly than it already is. He told me that he wants it to be in effect for three years after the employee's termination and he wants to prohibit him from working in the capacity of an accountant anywhere in the United States during that time.

Frank: Hmm...remind me of which state's laws we decided would apply to the interpretation and enforceability of this agreement?

Emily: Connecticut law.

Frank: So what is the rule on enforceability of restrictive covenants in Connecticut? Do you think such a broad term will likely be enforced?

Emily: I'm not sure. I didn't research the law in Connecticut on restrictive covenants, but I do remember the general rule of enforceability that I studied briefly in law school. And based on my recollection, I think it is not very likely that it would be enforced with the broad terms that Roberts would like us to add. I definitely think that the geographic scope of the entire U.S. would be unenforceable.

Frank: Maybe then we should talk to Robert and advise him that we don't recommend making those changes.

Emily: But what's the harm, really? It's so unlikely that the new employee would have the money or wherewithal to sue Robert if he quits or is fired. And he'll probably be too scared to violate the covenant contained in his employment agreement for fear that he would get sued. Plus, it's what Robert wants, and we really want him to use our firm if he decides to purchase some new commercial real estate for his business.

Frank: That's a good point – and I don't think the restrictive covenant would be illegal, maybe just unenforceable. Let me think about it.

Emily: Okay.

Frank: Did Robert have any questions about the boilerplate provisions?

Emily: The only one that Robert and I specifically discussed was the force majeure clause.

Frank: Did Robert understand the need for that term?

- Emily: I'm not really sure. I don't know that he necessarily wants to change it or delete it – it's just that I couldn't explain it to him very well.
- Frank: What do you mean?
- Emily: Well, I basically copied it from that employment agreement you gave me – remember, the one that you drafted a few years ago for Foxy Communications when it was considering hiring Tara Talon for a new reality show?
- Frank: Oh, Emily – you can't just copy the boilerplate terms from a model agreement. You need to make sure that each term that you include is applicable to the specific transaction. And if you didn't understand a particular term, you should have come to ask me. Since this is the first contract that you are really drafting on your own, I want to make sure that you understand what each provision means so you can make an informed decision as to whether you should include it, revise it, or omit it entirely. Just leave me the draft agreement with me and I'll double-check that all of terms that you included are necessary and appropriate for this agreement.

## Discussion of Scene Two

### SUSAN CHESLER

I'm going to stop the scene here so we have time to discuss it a little bit. There are obviously lots of issues raised in this portion of scene two, so I just want to talk about and bring to your attention some of them and see how that discussion would go in a classroom setting. The first issue that becomes clear, and I think someone raised this earlier, is that Emily did not perform any research in the applicable jurisdiction of Connecticut with respect to enforceability of covenants not to compete. Obviously, that raises the question of what is the lawyer's obligation with respect to research in terms of including certain provisions in a written contract? It's pretty clear, and students recognize this immediately, that this just doesn't sound right. Professionalism certainly requires that the lawyer be competent and be able to have the legal knowledge, the skills, and the judgment, in order to help out the client. And clearly an aspect of that knowledge is knowing the substantive law. It is certainly not the client's responsibility. It must be the lawyer's responsibility.

But I find that in my drafting contracts class, law students tend not to even think about research when it comes to drafting issues. It is just not on their mind. Their thinking is more along the lines of you have this form and you do some research, you pick a state's law, but who cares about enforceability and interpretation – that's for when we get to litigation. That has nothing to do with the drafting process. So I think this is a good time to bring it to their attention. Let's for a second assume that we were in litigation because that's what you know so well. What would you think about a lawyer who submitted a brief to a court and did not fully research the law? And it's so obvious to them that that is completely unthinkable.

I can then explain to my students that this skill, that aspect of competence—knowing the substantive law—is not specific to litigators. It works with transactional lawyers as well. And so it really becomes clear to them that, okay, Emily, that's the

associate's name, is not competent here with respect to not even having done any research on that covenant not to compete. It also raises that issue of, and she brings up again, that the client Robert wants this covenant not to compete to be for three years throughout the entire United States. And she does not know enough to think that this may not be enforceable. So the question that it raises is whether it is appropriate for a lawyer to include a provision in a contract that she thinks might not be enforceable and I want to throw that out to the audience. What do you think? Can a lawyer do that? She does not think the term is illegal; she just doubts its enforceability.

**SPEAKER**

Sure.

**SUSAN CHESLER**

Perfectly fine? Why?

**SPEAKER**

As long as they understand the risk and it is a tactical decision there is no reason why you can't do that.

**SUSAN CHESLER**

Is it important that the lawyer knows the risk?

**SPEAKER**

The client needs to know the risk.

**SUSAN CHESLER**

So first the lawyer needs to know enough to know that there is a risk. The lawyer needs to communicate that risk to the client and ultimately it's the client's decision. And the Model Rules don't really address this as they don't address many of the issues that come up in transactional drafting. The one aspect of the Model Rules that may come into play here is what if the inclusion of that term somehow misled the parties. If it misleads the parties, there have been ethical opinions that have held that that's considered fraudulent. And so under Rule 1.2(d), it would be clear that the lawyer assisted the client in conduct that he or she knows is fraudulent. But would this inclusion of the term mislead the other party? That raises one other question— Was that other party represented by an attorney or not? And so then we talk about how that might make a difference.

This is an employment agreement. It's very possible that the employee would not pay a lawyer to look at his contract and he would just go ahead and sign it. Might that make some difference in the lawyer's professional responsibility as to what is included in that contract? I don't think there's a definitive answer, but certainly it seems as though if we knew both sides were represented by lawyers, there would be a little less risk in acting unprofessionally here because that other side has a lawyer who can consult him and hopefully tell him that this term is probably not going to be enforceable. And advise him of the risk of going ahead and signing it. Here's what may happen: We may need to file a lawsuit at that point in time to determine its enforceability. Do you want to do that? This goes back to question one in terms of the research. In my drafting contracts class, I do require my students to draft an employment agreement with restrictive covenants so they know a little bit about it at this point in time, but does it matter if the state has a blue pencil law? So then if the covenant is not enforceable, the court will just fix it. But that means we

have to go to court. And so we talk a lot about what it means to be the lawyer who drafts the contract and how part of the goal is to avoid litigation.

Unlike what we teach them in almost every other class in law school, as a transactional lawyer, very often that's the primary goal of the client. I want to have this deal. I want to enter into this contract. I want this relationship, but I don't want to have to go to the court for it. So that may impact how you discuss changes to the contract with your client.

One other issue that this scene raises—a related issue, is that Emily included a provision, the force majeure clause, because she got it from a model agreement and it is clear that she doesn't know what it means. Again, this raises the issue of professionalism. But let's think about what Emily did. Technically what she did is she copied this boilerplate provision from a model agreement - an agreement that this partner had used in the past. This seems pretty typical. This doesn't seem like such a bad thing to do. Why might it be considered unprofessional conduct?

All of my students say well that is what I do for all your assignments. I start with this model and I include it and sometimes you tell me I shouldn't have – it was obvious that I didn't know what it meant. This goes to a lawyer's competence. It addresses whether the lawyer understands the legal meaning of the words that are being included in the contract. In fact, the preamble to the Model Rules and I am going to quote now, states "as advisor, a lawyer must provide a client with an informed understanding of the client's legal rights and obligations and explain their practical implications."<sup>11</sup>

So what we then talk about in class is that when you draft a contract and hand it to the client, you're doing a lot of things. Number one, you are basically recommending that the client sign that agreement. By signing the agreement, that client is legally bound. So it is part of your obligation to explain to that client exactly what those legal obligations are. And if you can't understand or don't understand every single provision in the contract, how are you going to be able to adequately explain to your client what his or her legal obligations are? And I think that makes it a lot more clear to my students because I ask them to pretend that they are the client in this scenario. Imagine that you have paid your lawyer and your lawyer says go ahead and sign this contract. And then your lawyer says, well, I don't really know what that one provision means, but it is fine. Go ahead and sign it. And now as law students they realize that there is no way that they will do that. But if they think back five years ago, would they have probably done that? I tell them they have probably signed lots of contracts that they didn't even look at prior to being in this class. So I think that also really helps them understand the aspect of what it means to be a transactional lawyer and the relationship between the lawyer and the client.

#### **SPEAKER**

She assumes that his provision is correct because he is a partner. But his might have been bad but she wouldn't even criticize him probably and so she assumes that it is a good thing that she took his without any question

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<sup>11</sup> ABA MODEL R. PROF. CONDUCT Preamble Sec. 2 (2010)

**SUSAN CHESLER**

Absolutely. Emily says it proudly and I think that could be a whole other discussion actually—what does it mean to be an associate in a law firm with a partner and that whole working relationship?

**SPEAKER**

It seems to me that you know the best job of the lawyer is to understand what the deal is by talking with the client. And a competent lawyer should be able to draft an agreement without a boilerplate form contract. And if you did that, then you will be able to capture the real interest of the client and she would have avoided the problem of pulling up a boilerplate term and force majeure clause. And she also would have avoided this issue of not knowing what the substantive law is. So it seems to me that the starting point of the whole thing is that something is missing.

**SUSAN CHESLER**

From a practical perspective, using form model agreements are what our law students are going to do when they become lawyers and there is just no doubt about that. But from my perspective, it is about how can we combine that with drafting from scratch? How can we teach them to use forms effectively and professionally, which doesn't mean just copying all of the provisions into your own contract, but instead it means analyzing, understanding a provision and making an educated determination. Does it go in? Do we modify it or do we just not include it here? I don't think it's very realistic to tell students that every single contract they will ever write as a lawyer should be written from scratch on a computer screen or a yellow pad.

**SPEAKER**

That's not what I'm saying. I'm saying you should be able to do that. If you are able to do that then you know if you are picking from something, you know why you are picking it.

**SUSAN CHESLER**

Yes, I agree. And that's hopefully what the students know at the end of the class. Now we have 15 minutes left and I am just going to open up the floor to general questions for anyone on the panel.

**QUESTION**

I was wondering if after you do this and after you have this discussion whether you have given thought to then having another vignette which is a display of expertise?

**SUSAN CHESLER**

I will answer and then I will turn to Karen for a second. This is vignette one. It will be in a series of at least four vignettes. So in some of the other vignettes, clearly we will show what a competent lawyer should do. We do have more of a blend in this vignette and there are some parts where the lawyer does the right thing. We just haven't shown them because, honestly, it is more entertaining to watch the scenes where Emily acts unprofessionally and does something funny. But our goal is definitely to also show lawyers acting professionally and competently.



**KAREN SNEDDON**

Pat Longan has actually produced a vignette relating to counseling that shows a three minute scene of an interaction between a client and a lawyer where things just go horribly wrong. The lawyer doesn't ask any open-ended questions. The lawyer is ignoring the client's concerns. After this vignette is shown in class, there is a class discussion. But there is then a showing of another vignette, using the same client and the same lawyer, but the interaction is handled properly. The interaction still is not perfect, but that interaction "fixes" many of the problems that would be identified in the class discussion.

**QUESTION**

My question is actually for Lisa. I have tried drafting once in a compressed setting and one of my worries and kind of open question is about retention rates in learning in that way. I just wonder since you've done it a number of times whether you've even gotten any anecdotal feedback from students or whether you've looked at this and what you know?

**LISA PENLAND**

That's a good idea. I should look at that. I do get anecdotal information back from my students, not just when they go out in the summer but usually a year or two down the road. I may get a question back where they will say I got a really interesting agreement and it was messed up. So I'm going to send you a copy of how I fixed it. So I do have some informal feedback on that but I think you're right. I'm also concerned whether they are retaining because they haven't practiced enough. I do give them a lot of handouts on my TWEN site. I hope that they will use the checklists for reference and to prompt their memories. So hopefully those help. I don't have any real hard information about retention, but it's an interesting idea. So maybe I will work on that.

**QUESTION**

I want to know where you get your students from and how you advertise?

**SUSAN DUNCAN**

We limit it to just the University of Louisville students this year so I didn't take anybody outside of our law school and it was just advertised like the regular courses. They have to pay 130 percent tuition. This is the university rule I guess because of the Delphi Center and the law school gets the 30 percent back so it was a real motivation for the law school because I think they told me they made more than my salary doing it this way with 13 students. Of course the administration likes it a lot. Some the professors thought it wasn't going to be a good idea so we will have to see. And then I think if it works we can open it up to other students or CLEs or something. Do it that way.

**QUESTION**

I have another question. So why did you do it that way. I mean, it sounds interesting. Did you do it because students aren't there and to give people an opportunity to take summer courses?

**SUSAN DUNCAN**

My students they either work full time in clerking jobs or I had a lot of moms who just didn't want to come back to school and then I did it personally because I'm limited to teaching the first year course during the year so if I was going to do it, it was going to have to be in the summer. But most of them did not want to come on campus. So like one mom

said, "I have three boys and I can do stuff but I can't leave my house so this is so fantastic that you are doing this so I can do it at night."

**QUESTION**

My question is also for Susan. Do you have any kind of formal faculty evaluations that the students complete?

**SUSAN DUNCAN**

They are going to have to complete -- they do some evaluation on their groups. So they are going to have to tell me how the groups did. Then I also have a Delphi Center evaluation for online courses that they are going to have to do that will be similar to my own evaluations for my first year course and then they will be shared with the faculty. Is that what you mean?

**QUESTION**

Yes, basically, yes. I have done this before. I have probably taught drafting contracts online about ten times. But the evaluation form is the one nut I can't seem to crack because they are not in a room. Is there a replacement for handing out the faculty evaluation forms? You disappear for 20 minutes. They fill them out. They go to the registrar. And when my grades are in I get to see them.

**SUSAN DUNCAN**

I think Delphi center is going to do that so I don't have to see it. So that's what I'm hoping because they contacted me and said you have to give these out and I was wondering the same thing. How are we going to do it? And it should be different than a normal law school class. We want to know different information.

**SPEAKER**

Maybe we should design a special form. Between not actually being at the school and I have told them they can use somebody's else's e-mail if they want to but I can't really keep track of them regarding who did it or who did not do it without compromising anonymity.

**SPEAKER**

E-mail it to your assistant.

**SPEAKER**

That's exactly what I'm going to do to get may be two –

**SPEAKER**

Actually at our law school all of our evaluations have gone online even for online courses and it's done through one of those survey monkeys. So it can be done through one of those. The form becomes part of the survey.

**QUESTION**

This is a question for Susan. How do you administer commenting and feedback on the written assignments?

**SUSAN DUNCAN**

Well I am just trying to figure that out right now because I am not for certain. And right now I'm just thinking that I'm just going to scan these back to them. I only have 13 so I've been just doing it like I normally do. But I wanted to see -- somebody here had audio feedback and I thought that might be a great way or I guess you could imbed that because I am getting them through Blackboard so I could open it up, do the Word track changes and then give it back that way. And then every class I have a podcast of all the homework they have given me. I kind of do your approach. I don't look at that homework individually. But I have a podcast the next week that goes over all that homework. So I said save your homework and part of what to do in class is to listen to that podcast and check your own homework and then contact me with questions. But I don't know exactly what's the best way. Well I guess the scanning is going to work for this week.

**DAVID THOMSON**

I use bubble comments so I was able to e-mail the paper back with the bubble comments visible. A couple of times in the course of the semester I actually turn that into a conference after the paper so they would have the commented paper in front of them, and I would have them with me on the telephone. So actually speaking to the student can be very valuable in the way that Susan described but also to effectuate a typical legal writing conference.

**QUESTION**

Do you think it took you more time to do this than a traditional class?

**SUSAN DUNCAN**

Absolutely. I mean it took a ton of time. But I think next year it won't because I already have a lot of the podcasts and I know what I'm doing a little bit more and the kinks of it, but absolutely. I have spent so much time just getting it up. And I wanted to make it really good because I think that we should have online classes for lots of things so I want the faculty to believe this will work so I had that self interest, too, that I wanted it to go well this time because if it's a disaster I don't think I could ever talk them into offering any online courses.

**DAVID THOMSON**

And it is typical that the first time -- the first couple times are very intensive in terms of the work and then it probably gets down, over time, to the level of a regular class. I do not think it ever is less than a regular class. That is sort of a typical trajectory and I experienced it as well. But the big concern is it's 24/7. We are already feeling that our students want us accessible 24/7. But in an online environment in particular they think that. So you have to draw some boundaries and let them know when you are available.

**QUESTION**

This question is for Susan and Karen. I'm just curious—Is this material used in a course that's a contract drafting course and it's portion of it or is it its own? I think a portion on transactional ethics is always something. And I am coming from a clinical background. I'm going to steal this for my clinic without a doubt. But I'm just wondering in what context do you use this?

**SUSAN CHESLER**

I use it in a contract drafting course. We don't have a transactional or business ethics course.

**KAREN SNEDDON**

At Mercer, we have two required courses in ethics and professionalism. The first required course is a first year course. It's a three credit hour course in the second semester that Pat Longan teaches. He incorporates issues of ethics and professionalism across a range of practice areas but it's not focused just on transactional or just on litigation. But part of this interest in developing these invitations is a deliberate effort to incorporate more material relating to transactional practice that could be used in a traditional professional responsibility course. It could be offered in a drafting course, such as I teach for sixth semester students. It could also be used in a clinic or even case book courses, such as contracts or employment law. The vignette provides concrete examples of ethics and professionalism in practice for students to consider.

**QUESTION**

Comment and a question. Just a comment is for those -- we are on our fourth online course -- we are building online courses now -- but particularly towards a masters in environmental law and policy. And since we're a stand alone law school, we do not have available to us technological assistance. For those people who want to do it there are learning partners that you can contract with. Some we use Compass Learning out of Orlando, there is Embanet in Toronto, these are some of them and they are incredibly competent at taking a professor who knows nothing and sort of walking him through it.

The question I have is do you make any direct effort to address the issues with students of learning to read and to write much more slowly than they do and are used to. The big problem I have is that students are used to absorbing enormous amounts of information. They want to move very quickly through information and I've had professionals come into the class and say it takes me an hour to read a page of the contract and everybody's like, whoa. Do you address that issue directly in any way—in slowing down?

**SUSAN DUNCAN**

Well, one thing I want to say to that book, that Ko and Rosen book, it talks about if you have low technology at your school, middle technology or high-technology and it shows you how to do it with all three ways. So we were obviously high-technology but that is a great book that would help, too.

**QUESTION**

Are there are programs -- we hired a director of business learning who had built a program with low technology because so many of her students were all over the world and at that time it had actually -

**SUSAN DUNCAN**

Yes, and they talk about that. When you design it, how you have got to think about that. I don't do a whole lot about that except make them wait 24 hours in that forum discussion so they slow it down and we can really have a conversation. But I think I

probably should have said that in my syllabus for this, for the content of the course. I don't know if it has anything to do with the online course.

**DAVID THOMSON**

It is important in the syllabus -- and in what I call the course policies document -- to outline for students what they need to know to be an effective online student.

**SUSAN DUNCAN**

I stole it all from him so it is in my syllabus.

**DAVID THOMSON**

So Susan has it on this CD for you. But it is important that students know that they need to be self-directed. There are some students that are not well suited to online classes. You do not want those students in your classes if you can avoid it. And you need to teach them how to use the technology and how to interact with the class. And part of what you're suggesting should go in that list: Take your time, slow down. But of course, we all know that one way to teach that lesson is to get them an assignment that challenges them, watch them make the mistake, and then point it out so they can improve.

**QUESTION**

My question kind of ties into that. I was going to ask—what is the duration of your course? Are there optimal durations for online teaching? What are those considerations?

**SUSAN DUNCAN**

Mine is accelerated because it's in the summer so it's 7 weeks instead of Grace's traditional drafting class which is 14 weeks. I don't know what they say about online. Do you know?

**DAVID THOMSON**

I taught it in both 7 week and 14 week semesters and I do not think there is a huge difference. The difference -- the variable -- is the bandwidth of the student and the bandwidth of the student might be fine at 14 weeks in the spring semester. It might also be fine at 7 weeks in the summer because they have less going on or they are home with kids and working at night and so that is the important variable. I do not think there is an optimal length.

One thing we didn't talk about is an optimal size of online courses and we should probably mention that. It is really hard to run an effective online class at more than 15 students. At 20, you're really pressing the envelope, but in my experience, 15 is about optimal. You also don't want 6 because then there aren't that many discussions that are effective for the students among themselves. But approximately 15 students is the optimal size we found for online classes. And Tina Stark says that in her book about a regular class in contract drafting, so these classes should be kept small for both reasons.

Okay. I see our time is up. Thank you very much for coming.