

EXERCISE SHOWCASE

MIRIAM R. ALBERT ¹	TEACHING DOCTRINE AND SKILLS SIMULTANEOUSLY
LENNÉ ESPENSCHIED ²	DEMONSTRATING THE ALLOCATION OF RISK
GRACE M. GIESEL ³	TEACHING ETHICS IN A DRAFTING COURSE

MIRIAM R. ALBERT TEACHING DOCTRINE AND SKILLS SIMULTANEOUSLY

Introduction

I'm Miriam Albert from Hofstra Law School, and I will talk a little bit today about the integration of skills and doctrine, how that affects my life and how it may affect your life.

I can't tell if I am the oldest person in the room or not, but some of you may remember, if you think back to the 70s, a commercial on TV where a young lady was eating peanut butter out of a jar, and a young man was eating a chocolate bar, and they bumped into each other in a rather fortuitous way, and the young lady exclaimed, "you got chocolate in my peanut butter!". The young man said "no, no, you got peanut butter in my chocolate!" And the tag line was "two great tastes that taste great together." That sums up my view of the worlds of skills and doctrinal teaching.

Many of our colleagues believe the law teaching can be divided into pure doctrine and pure skills. However, I think that may be pure fiction. My job as a Professor of Skills, teaching both doctrinal and skills classes, is to bring my skills teaching into my doctrinal teaching, and my doctrinal teaching into my skills teaching. Today's Exercise Showcase, for me, is an opportunity to take a corporate law case that appears in many business organization case books, and show you how to tackle it from a skills perspective, and then also from a doctrinal perspective. So, we are going to bridge the gap between skills teaching and doctrinal teaching.

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Skills Versus Doctrine

First, a little bit about my view on skills versus doctrine. When I speak of “skills,” I am referring to transactional business skills. And when I think about teaching law students transactional business skills, I think about teaching the students to think like lawyers, a phrase which was bandied about when I was in law school, and I was never quite sure what it meant. When I graduated and started practice, I realized that, in fact, I had not yet learned how to think like a lawyer. So what I want to try to teach my students how to think like transactional lawyers, by helping them analyze doctrine, and by bringing the practical world into the classroom a little bit.

To begin thinking about teaching skills in a private law context, we start by looking at the documents that are the basis of the relationships between the relevant parties. For example, when I teach Contracts, one of the first thing I do is show the students a contract, and there is an amazing moment for them when they realize that there were actually real people and a real document here, not just a judge or lawyer giving us a summary of what that lawyers thought was important.⁴

Before we get into the case I want to work with today, let’s examine the more macro issue: why do we teach skills at all? For one reason, most of our students are not going into law teaching and they are going to need some practical skills in this increasingly competitive employment market. My Business Drafting students leave after a semester with a portfolio of transactional drafting that is the beginnings of their form file. They have drafted a Shareholders’ Agreement, an Employment Agreement, an Asset Purchase Agreement, and they have set up various forms of businesses. Admittedly, not always at the level I would have liked, and certainly not what I would expect if I were their senior partner, but it is better than what I would have been able to do when I graduated from law school.

Speaking of which, I graduated in the late 80s. When I was a summer associate, I was wined and dined, went to the partners’ houses for dinners, went to baseball games, and mostly we talked about how pretty and nice I was, and what a good lawyer I was going to be. That was really the sum total. I graduated the next December, and returned as an associate that winter, and suddenly I was being asked to be a lawyer- to work on actual deals, and I remember thinking, “What do you think I learned in that one last semester of law school -- because I didn't take any classes that would suddenly prepare me for this! I still don't know anything.” It took me awhile to figure out to look at prior deals, and to find precedents to use as forms, and most importantly, to find a mentor. When students take a skills class, like the one I teach, they front-load a little bit of that experience, so they can hit the ground running much earlier in their careers than I did.

Another reason that I personally teach skills is so that I can bring students over to the dark side of transactional law. A lot of my students still think they want to be litigators. After a year of Contracts with me, or after a semester of Business Organizations or Business Drafting, I typically can bring a good number of them over to the interesting and challenging calling of transactional law.

Another reason to teach skills: all of our deans are talking about skills teachings, and the Carnegie Report, and how we should consider educating our students in the medical school model. But we are law schools, not medical schools. We can learn from what the

⁴ There is also a public law context for skills teaching that I admittedly don't work too much with—the examining of legislation and constitutions, but that can also be part of doctrinal skills.

medical schools do, but there are also things that they are doing that are not necessarily applicable to law schools.

There are pedagogical reasons to teach skills, putting aside the practicalities for a second. If we understand the underlying documents in a given case, it will inform our discussion of the black letter law concepts in a way that has no equal. If we can show students the actual provision that the parties are fighting about, and put the dispute in a broader context, the students will get more out of the discussion. So if we can concretize the situation, it also has the potential to make the information more accessible to different styles of learners. There is a lot of talk these days about how people learn; i.e., people that are more visual learners and/or people that like group work, people that do well with traditional lecture. We need to cater to all of these different learners in our classrooms. If we change up how we teach a little bit, if we cast a broader net, the odds are that we are going to catch more people- and reach more different styles of learners.

Benihana Case Study

Today, I want to talk about a particular case that shows up in the business organizations book that I use, captioned *Benihana of Tokyo v. Benihana*.⁵ Now, why did I pick this case? Because I am going to demonstrate to you, I hope, how you could teach the case with a doctrinal slant, and how you can teach it with a skills slant. So my business organization friends can use the skills pieces and then bring that in, and my skills people can use the business organization piece of it and bring the doctrine in.

What is nice about the *Benihana* case is that the facts are straightforward. But it's also juicy. We have intrigue, we have a beauty queen, and we have inter-family squabble. The case has a very clear drafting inconsistency, so clear that even folks in the absolute beginning of their drafting career will be able to see this inconsistency. The court correctly interprets the inconsistency. Lastly, everyone --well maybe not everyone -- but most people enjoy hibachi cooking. But everyone enjoys a family squabble, when it's not our family. That is why we watch Oprah and soap operas. We read the *Benihana* case and we think, "wow, this guy has all the money in the world and he is worse off than me." So let's take a look at a slide of a hibachi chef- mostly it's here just to show you that I know how to copy and paste a picture!⁶ Plus, my kids insist that we go to Benihana. They like when the hibachi chef flips the shrimp into his hat. I don't know if it is worth \$30 bucks a person, but it certainly gets a smile on their little faces.

Facts of the *Benihana* Case

Who are our cast of characters? We have Rocky Aoki, the aging protagonist, who is the Jheri-curl founder of Benihana.⁷ By way of background, Rocky came to New York in 1959 and was a member of the Japanese Olympic wrestling team. He drove a truck in Harlem selling ice cream and decided to open his first hibachi grill. After many failed relationships and two failed marriages, he married his third wife, the lovely Keiko Ono, a former Miss Tokyo. She is very beautiful. When you look at her—not to be stereotypical—

⁵ *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114 (Del. 2006).

⁶ See Miriam Albert, *PowerPoint Presentation*, slide 6, EMORY LAW: MORE THAN PRACTICE: CONFERENCE MATERIALS, http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Albert/Albert_PowerPoint.ppt [hereinafter Albert PowerPoint].

⁷ *Id.* at slide 7.

but you don't think CEO material from this picture, right? You think, okay, she's cooking. She's lovely. But not necessarily ready to run a multimillion dollar corporation.⁸ She is disliked by Rocky's 6 loving children who believe that their new step-mommy is out to take their inheritance, which in fact may turn out to be true. Then Page Six gets involved. For the non-New Yorkers in the crowd today, Page Six is the gossip page in the *New York Post*. The lawsuit is filed in Delaware, but it's real life venue is the New York gossip pages.

Here is a little quip from Page Six:

The fight over the Benihana fortune is getting nastier. . . . Last Monday night, our spy saw the Ioki clan – including Devin, Kyle and Echo – at a Benihana eatery on West 56th Street 'fighting horribly over money and how Benihana was being run.' It was a very heated discussion. The children were in tears and begging their father to contact them and pick up his phone when they call.⁹

We know none of that is really true. We know the kids whose family owns the restaurant are not eating at that restaurant. There is no way. We know that they are not fighting horribly over the money, and we know they are not having a heated discussion in the ear range of a newspaper reporter, but it is potentially believable if we just imagine the Hollywood version of it.

Rocky had a little bit of a complicated life. He had many, many mistresses and he once boasted that he had three children the same age born to three different women. That fact is horrifying enough, and the fact that he boasted about it is somewhat problematic, but that gives you a sense of the personality that we have here. You should not be surprised to know that his character carried over into his business dealings. He had tax evasion issues and had a little problem with the government on some insider trading that he settled out of court, with what was then a very big fine. And as a result of the insider trading issues, he had to step down from running this publicly traded company and he had to put all of the Benihana stock he owned into a trust. And that's where the case starts- Rocky owned one-hundred percent of the trust, and the trustees are three of his kids and Darwin Dornbush, the family attorney. He's on the board of Benihana and he's essentially the general counsel.

As you may imagine, Rocky, in love with Miss Tokyo, changes his will and he gives her control over the Benihana trust. Her background in business is nonexistent. The kids flip out over her new role, and the president and CEO, to put it mildly, also had some concerns.

At the same time that the officers and kids are concerned about Miss Tokyo taking over, should Rocky perish, the Benihana restaurants were in desperate need of refurbishing. They all had that "fully amortized" look. Turning over restaurants and refurbishing them is an expensive proposition. So, they need to bring in money to refurbish the restaurants. To summarize, at this point we have control freak with a tax evasion conviction or settlement, who is not allowed to own the company, but is really calling the shots from behind the scenes, who has moved his new bride into the shotgun position. The business needs money. Rocky doesn't have legal control of the business. The kids are in the restaurant crying. No one is taking each other's phone calls. It is a big mess. So the corporation brings in

⁸ *Id.* at slide 8.

⁹ *Id.* at slide 9 (quoting Richard Johnson et al., *Benihana War Gets Bigger*, NEW YORK POST, Aug. 26, 2007).

financing people to try to figure out different ways to raise money to make the restaurants a little shinier and a little brighter so people will continue, as I do, to spend thirty dollars to see a guy flip shrimp into his hat. Okay, so those are our facts.

The Preemptive Rights Issue

At the time of this lawsuit, what did the trust own? There are two classes of stock outstanding. If I am teaching this case in Business Organizations, we have already covered the differences between common stock and preferred stock, so this concept fits in seamlessly. If I am teaching this case in Business Drafting, which has Business Organizations as a prerequisite, I review the differences between the two classes of stock. So what's the difference here in the two classes of stock? One class is entitled to elect the lion share of directors. They get one vote per share. The other class is entitled to elect just twenty-five percent of the directors and they each have one tenth of a vote per share.

In the process of trying to raise the funds necessary for the renovations, the trust attempts to issue preferred stock that has preemptive rights. I don't want to cause post-traumatic stress disorder for anyone in our audience who had a problem with Business Organizations in law school, but do you remember what preemptive rights are? Preemptive rights are the right to buy your proportional share of a new issue of stock. So if I own a chunk of stock that has preemptive rights attached to it, if the corporation plans to issue more of that stock, they have to offer me my proportional share first. I don't have to buy it, but I may, and if I chose to exercise this option, I will keep my ownership level stable. If I chose not to exercise the option, I will be diluted. And that's no fun. I could move from a majority position to a minority position, so I'd change from being the person that everybody needed in the room to somebody that nobody cares about. And that can be traumatic.

So the issue in the case, according to the court, is whether Benihana was authorized to issue twenty million dollars in preferred stock with the preemptive rights, and then whether the board acted properly in approving the transaction. That second issue, whether the board acted properly in approving the transaction, is a classic business organizations duty of loyalty/fiduciary care/business judgment rule issue that doesn't necessarily translate into a drafting context. But the issue of the preemptive rights on the preferred stock is a clear drafting issue. I have the opportunity to take the case in two different directions, depending on which course I am teaching. In exploring preemptive rights, I have a chance to review the black letter law concept with the students in the drafting class, and then to ask them to actually draft the provision. And then we can compare it to what the drafters actually did in the case.

Before addressing the director's conduct and motivation, which speaks to the duty of loyalty issue, the court must decide whether Benihana's Certificate of Incorporation authorized the board to issue the preferred stock with preemptive rights. In other words, before we evaluate the board's conduct in approving the transaction, the court has to figure out whether the preferred stock issued was actually valid. The first place to look is the corporation's Certificate of Incorporation. Preemptive rights must be articulated in the Certificate of Incorporation in order to be valid.

Keep in mind that this may be the first time my students have actually seen a certificate of incorporation. We've talked about them. We have seen cases about them, but now they see, "Oh, my gosh, this thing actually exists." And what I can do in class, but unfortunately don't have time to do for you today, is go through the sections of the relevant Certificate of Incorporation, and show them how it maps on to the New York or Delaware

corporate law, depending on the state of incorporation. So the students see not only that the Certificate of Incorporation exists, but where it comes from and why it looks the way it does.

Because this was a Delaware corporation, we examine the Delaware corporate statute.¹⁰ The Delaware statute has two different provisions. It states what *must* go on the certificate of incorporation and what *can* go onto that certificate of incorporation. You must provide for the capitalization of at least one class of voting stock, and you may provide the preemptive right to subscribe to any additional issues of stock. You must have a class of common voting stock. It may have preemptive rights, if you would like. Further, "[n]o stockholder shall have any preemptive right to subscribe to an additional issue of stock or to any security convertible into such stock unless, and except to the extent that, such right is expressly granted to such stockholder in the certificate of incorporation."¹¹

So the statute clearly tells us that if you want preemptive rights to attach to this class of stock, you better say so in your certificate of incorporation. You can imagine, from a drafting point of view, what we are going to look at now is whether Benihana's certificate of incorporation authorized the board to provide these preemptive rights or not.

The Drafting Conflict

And here comes the drafting conflict. Benihana's certificate of incorporation say in Article 4, Paragraph 2, that "no stockholder shall have any preemptive rights to subscribe to or purchase any stock . . . of the corporation."¹² That is pretty clear and unambiguous, right? So if it's clear and unambiguous, what is our interpretation rule? The provision has to be given its plain meaning. So, you are reading the certificate of incorporation, and thinking they cannot issue preemptive rights. It is just not allowed.

You press on in their certificate of incorporation and Article 4(b) authorizes the board to issue preferred stock of any series.¹³ So this provision is a blank check provision that says that the board can put whatever bells and whistles it want on this class of stock, presumably including the authorization of preemptive rights. This feels clear and unambiguous as well.

We have two different provisions in the same certificate of incorporation. One says no preemptive rights, and one that seemingly, albeit implicitly, authorizes preemptive rights. So, the conflict that we have is that under Paragraph 2, no stockholder is entitled to preemptive rights. Under Paragraph 4(b), it seems the board is authorized to issue preferred stocks with various preferences, including preemptive rights.

So as a drafting mechanism, I get to look with the students at the certificate of incorporation and show them this conflict. The judge looks at the conflict and says that if there is an ambiguity, as we have here, the language must be construed in a manner that will harmonize the apparent conflict and give effect to the intent of the drafter. So, now the court is saying, we see that one provision is saying yes and one is saying no. We're going to take a look and see what the intent of the drafter was. The trial court finds that the language

¹⁰ DEL. CODE ANN. tit. 8, § 102 (2009).

¹¹ *Id.* at § 102(b)(3).

¹² Albert PowerPoint, *supra* note 6, at slide 17.

¹³ *Id.* at slide 18.

in Article 4, Paragraph 2, providing that no stockholder is entitled to preemptive rights, merely confirms that no stockholder has preemptive rights under common law. As a result, the seemingly absolute language in Paragraph 2 has no bearing on the availability of contractually created preemptive rights in 4(b). So, the court states that the first paragraph is a restatement of the common law presumption that shareholders do not have preemptive rights.

The legislative history of this section of the Delaware corporate law indicated that there had been a presumption that shareholders had preemptive rights unless it was stated otherwise. Delaware amended its laws in the late 1960s to provide the exact opposite conclusion. So the presumption was that you had to provide for preemptive rights in the certificate of incorporation or they didn't exist, and now the Delaware presumption has been reversed. The court views this first provision saying that no preemptive rights are available as nothing more than a corporation including boilerplate language in their charter to clarify that no shareholder possessed preemptive rights under the common law. Seems a little crazy. Why would you put it in there? What tends to happen is you have a boilerplate way that you set up a certificate of incorporation and nobody thought about it too hard. And when they went to do the preemptive rights, they just looked at the section that gave them blank check approval and they used that, not noticing the internal drafting inconsistency.

This gives me the chance to show the danger and pitfalls of using boilerplate language, and that it can wind up being interpreted by a judge. The court says the blank check provision in the certificate of incorporation suggests that the certificate was never intended to limit Benihana's ability to issue preemptive rights. Could you make the argument the other way? But the first section that says there are no preemptive rights reflects Benihana's intent that there be no preemptive rights. Because of the judicial and legislative history, the court decided to disregard that first provision. So they read the second paragraph, section 4(2), to confirm the common law presumption that it doesn't apply.

Conclusion

So what do we get to do with a case like this, as skills teachers, as doctrinal teacher or as some combination thereof? This kind of case and this kind of sub-issue in the Business Organizations class gives me a jumping off point to talk about the content of certificates of incorporation, the consequences of drafting choices in this case, the consequences of drafting choices on a broader level, and to get into the idea of a certificate of designation that sets out the rights and preferences for a class of blank check preferred stock.

So, I have the opportunity to teach preemptive rights in a doctrinal context *and* in a skills based context. So that is my magic trick for you guys. We ultimately show the students, going forward, how we could have avoided this. We read the contract. We read the provision. The judge says the drafters did a bad job. A neat question that law students never want to think about is, how could this have been avoided? Because if this had been avoided we wouldn't have a nice case to read, after all.

This could have been avoided if they said in the beginning, "unless otherwise provided herein, you don't have preemptive rights." It would have been consistent and it would have worked. That would have required somebody to read this five-line certificate of incorporation and think about it how it all fits together, in light of the statute and the intent

of the parties, which doesn't always happen. But hopefully my students will, when they get into practice. So that's my little exercise for you.

LENNÉ ESPENSCHIED

DEMONSTRATING THE ALLOCATION OF RISK

Introduction

My name is Lenné Espenschied and I am an adjunct professor at the University of Georgia where I teach an upper level course on contract drafting. I am the author of *Contract Drafting: Powerful Prose in Transactional Practice*, which is the book that I use in my class. In fact, I wrote the book out of the materials I had devised for my class.

One point from Tina Stark's opening comments that resonated with me was the importance of making a deliberate decision as a faculty regarding the transactional curriculum: what needs to be taught, in what order, and how best to go about teaching it. For my 15 minutes of fame today, I will speak about demonstrating the allocation of risk as a function of contract drafting. Since I teach a drafting class, my fact patterns are a little less substantively involved than the exercise Miriam Albert has just presented. Talking about demonstrating the allocation of risk is a tall order for a short time frame, but I will try to toss out a few ideas you can use.

My Philosophy and Drafting Emphasis

The first thing I want to share with you is my approach to teaching contract drafting in order that you will better understand how these exercises actually play into the class that I teach. I am very mindful of Richard Newman's thought-provoking presentation on negotiation earlier in this conference; Richard mused that we think we know much about a given topic from our individual experience, and yet what we really know is a tiny fraction of what we thought we knew, because the totality of any individual's experience is by definition limited to the experience of only one person.

I admit with all humility that I have the limited experience of one. Yet, my experience is deep because I graduated from law school 25 years ago; I have spent many moons in the trenches. My experience is also broad because I have worked as a certified public accountant at what was at the time a 'Big 8' firm; with a large national law firm for several years and a medium-sized firm for a few more; and as an in-house counsel at a Fortune 500 company. Later, when I started my family, I opened my own solo practice focusing on smaller representation of mom and pop technology-based businesses.

My philosophy on teaching contract drafting is based on this premise: I have never yet encountered a first year lawyer, or even a second year lawyer for that matter, structuring or negotiating a complex deal. One ongoing reason for this may be the potential liability an employer would face it if were to send untried and untested lawyers out to negotiate sophisticated transactions.

I do notice first-year associates doing quite a bit of drafting, however, so I focus my course on developing deep drafting skills rather than structuring or negotiating skills; I want my students to have a very clear understanding of what they will be expected to do well when they enter law practice. This is not to say that the other transactional skills should not

be taught in law school; certainly, they should. Negotiating and structuring transactions are important components of our curricula but drafting is the foundational baseline. In order to get to the point in practice that a graduate would need to have the other skills, he or she will first have had to demonstrate excellent drafting skills. If a new lawyer cannot draft well, he or she may never be promoted to the point of needing the other transactional skills. For this reason, I believe the best thing we can do to prepare our students to be successful in practice is to be sure they have mastered the art of drafting in terms of both form and function.

Critical Thinking in the Context of Contract Drafting

Even though most law schools now offer some form of transactional training there is a lingering resistance on some campuses to teaching transactional skills. This seems to be based on the preference for the casebook “think-like-a-lawyer” model, and the underlying assumption is that transaction skills do not require the same type of critical thinking. Actually, nothing could be further from the truth. Ironically, most faculties do not hesitate to teach litigation skills; for example, oral argument and moot court competition, trial advocacy, brief writing, and so on are taught at virtually all law schools. One of the tenets of the casebook method is teaching students to differentiate the relevant facts in one case from another, and to differentiate nuances of law that are applicable in each situation. Teaching them to differentiate develops their capacity for critical thinking, and this is exactly what I do in my drafting course.

When we consider how drafting is actually done in legal practice today, we quickly realize that very little of it is zero-based drafting. Most drafting projects begin with a document from a prior transaction which is edited, refined, and modified to fit the current transaction, so students in my class are encouraged to review and use documents from outside sources. Assignments are typical of what new lawyers are asked to handle; they consist of a lot of facts with unique twists and turns, terms that are quite realistic but unusual in some way so students will not find a perfect example from a similar transaction to copy. The twists and turns force students to do original drafting in order to edit, refine, and modify the language they have either been given or have found from outside sources. Before we reach the point in the course where graded assignments are given, students are taught how to think critically about the language they inherit in drafting projects through authentic exercises like the ones we will discuss today. Ultimately, students learn to analyze the documents from prior transactions in order to be able to modify them properly to shift risk allocation and achieve the objectives of the client for the current transaction. Students learn to consider whether the source document has been drafted properly to begin with, whether its provisions are applicable to the current transaction, and whether it allocates risk successfully among the parties. Critical thinking is a fundamental component of excellent drafting, which requires more than mastering simple rules like using “shall” correctly and keeping sentences short, although certainly these techniques are necessary as well.

Start from a Winning Position

The first point I attempt to convey to my students is that a lawyer is ethically required to abide by the client’s decisions concerning the objectives of the representation and the means by which they are pursued. The language a lawyer creates should always advance these objectives. Virtually every sentence in a contract can be drafted so it favors one party or the other; most provisions can also be drafted more neutrally, so the right or obligation is reciprocal. The objective here may be better stated in a negative manner: don’t start from a losing position!

It is surprising how often in actual practice a client's "standard form" actually favors the other party. For example, buyers' purchase agreements for goods and services routinely exclude the warranty of fitness for particular purpose, yet this UCC warranty only comes into effect when the seller is *aware* of the buyer's intended use, and the buyer *relies* on the seller's recommendation that the goods are suitable for the buyer's purpose. Why would a buyer who has relied upon the seller's advice that the product is appropriate *automatically* exclude this warranty in its standard form? Sometimes, the parties negotiate to exclude the warranty but too often buyer's counsel excludes the warranty of fitness for particular purpose simply because the drafter retains familiar language from a prior transaction without considering the reason it was there in the first place; namely, to exculpate seller from responsibility for its recommendation.

Clients differ in their approach to the bargaining process, and lawyers are obligated under the Model Rules of Professional Conduct to follow the client's reasonable directives concerning the objectives of representation, within certain parameters. Model Rule 1.2, Scope of Representation, states that "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued." Over the years I have worked with some clients who have very aggressive, one-sided approaches to negotiation; they seek to ensure that every provision is drafted as strongly in their favor as possible. Other clients have been paternalistic with their small business partners, preferring that provisions be drafted in a more neutral manner that is considered equitable to both parties. Drafters are ethically obligated to abide by the client's decisions, so a drafter's first step is to determine what the client's policy is. How does the client approach negotiations with its business partners? Based on the client's preferences, the drafter may move to a more neutral position but even so should not begin the process in a negative position. For example, an indemnification provision can be drafted so either party is required to indemnify the other, or so both parties undertake a reciprocal obligation to indemnify. Absent a compelling reason, it would be a losing position to draft an indemnification provision that requires the client to indemnify the other party without receiving a reciprocal promise.

A lawyer should be aware of the client's philosophical approach to business relationships before drafting because the client's policies should permeate every sentence. Some clients might take a different approach with different types of contracts or when dealing with different business partners. For example, a company might adopt a more aggressive approach to protect its intellectual property rights, but that same company might adopt a more paternalistic approach to foster business relationships with minority and women-owned businesses or to provide support for charitable organizations. The best way to learn the client's objectives is to ask during the interview process. While lawyers can certainly offer advice and make recommendations, it is not ethically appropriate to ignore the client's preferences or to substitute their own.

Using Exercises to Teach Critical Thinking Skills

I will walk through the following exercises with you today as if I were teaching a class to demonstrate my approach to showing students how to allocate risk. The examples and exercises outlined below cultivate critical thinking skills by requiring students to analyze how seemingly minor changes in wording significantly affect the allocation of risk. Contracts serve to allocate risk among the parties to a transaction; therefore, the way a provision is drafted affects the level of risk and responsibility each party undertakes. Sometimes a single word or phrase can have an enormous impact. For example, inserting the phrase "to the

extent that” in an indemnification provision activates proximate cause limitations to reduce the indemnifying party’s risk. Students must be taught to identify what is a winning position in each provision, and of course, this depends upon which party they represent. The next step is to analyze the provision to determine who has the risk as drafted in the source document; after that, students must determine where they should place the risk with the provision in the current transaction.

Exercise: Consider the following provisions. Notice how the risk shifts between the parties based on relatively small changes to the wording:

1. Seller shall deliver the goods on or before July 31.
2. Seller shall use best efforts to deliver the goods on or before July 31.
3. Seller shall use best efforts to deliver the goods on or before July 31. For purposes of this Agreement, “best efforts” means that Seller will obtain the goods on the open market and absorb any additional costs incurred to fulfill its delivery obligations on a timely basis.
4. Seller shall use commercially reasonable efforts to deliver the goods on or before July 31.
5. Seller will attempt to deliver the goods on or before July 31.

The risk allocation between buyer and seller varies in each of the examples given above. Relatively simple edits in the language shift the risk from the Seller in the first sentence to the Buyer in the last. In the first sentence, the Seller has more risk because in order to comply with the terms of the agreement, the goods have to be delivered by July 31 without exception.¹⁴ The second example provides a small exception: the Seller will not breach the agreement if it uses best efforts but is unable to deliver the goods by July 31. The Seller still has the risk of ensuring that its efforts rise to the level of being “best efforts,” which can be a tough standard because “best efforts” implies that the Seller will do anything within its power to see that the goods are delivered on or before July 31, which may be financially unfeasible. The third example whittles away from the Seller another small degree

¹⁴ For purposes of this discussion, we assume that time is of the essence of the agreement, although that is not the case for contracts for the sale of goods under the UCC, which applies a reasonableness standard. In some states, it is necessary to state in the agreement that time is of the essence if the parties intend it to be. For example, under O.C.G.A. § 13-2-2, time is not of the essence of the agreement, but the parties can so stipulate. This means that if the parties do not stipulate in the agreement that time is of the essence, delivery on August 1st or 2nd would be satisfactory in most situations under “reasonableness” standards. This is the reason a “time is of the essence” clause is often included in the boilerplate.

of risk because the term “best efforts” is defined within the contract. In the fourth example, the risk is shifting more towards the Buyer, because Seller is only obligated to use “commercially reasonable” efforts to deliver the goods, which means the Seller is not obligated to use efforts that are financially unfeasible. In the last example, the Buyer has assumed the risk because the Seller has only agreed to attempt to deliver by July 31, meaning that the Buyer will have no recourse if the Seller attempts but is unable to deliver the goods.

The drafter’s responsibility is to ensure that the client assumes the correct level of risk. While a buyer client may ultimately wind up accepting no more than an attempt at delivery by the seller as a result of negotiations, by no means should the negotiation process start at this position. This is a losing position because the buyer has absorbed all risks if the goods are not delivered.

Exercise: Describe how the risk progressively shifts from one party to the other in these warranty provisions. What particular changes in wording affect the allocation of risk in each provision?

Warranties:

1. Warranty. Seller warrants that the goods will conform to buyer’s specifications.
2. Warranty. Seller warrants that the goods will conform in all material ways to buyer’s specifications.
3. Limited Warranty. Seller warrants that the goods are merchantable. Seller specifically disclaims the warranty of fitness for particular purpose.
4. Limited Warranty. Seller warrants that it will use commercially reasonable efforts to comply with the terms of this Agreement. Seller specifically disclaims all other warranties, including the warranty of merchantability and the warranty of fitness for particular purpose.
5. No Warranty. Seller disclaims all warranties under this Agreement, including the warranty of merchantability and the warranty of fitness for particular purpose.

In the first example, Seller has assumed a large risk for three reasons: first, this is a full warranty with no limitations, so UCC warranties of merchantability and fitness for particular purpose apply; second, there is no materiality limitation, so the goods must conform in every detail, not just in every material way; and third, because the buyer’s specifications are not defined and limited in the agreement; presumably, the buyer may

change its specifications from time to time during the term of the agreement, and the seller has absorbed the risk of conforming, no matter what those specifications may be. The Seller's risk is reduced in the second example because a materiality limitation has been added. In the third example, Seller's risk is reduced and buyer's risk is increased because this is no longer a full warranty and the UCC warranty of fitness for particular purpose is disclaimed. In the fourth example, by disclaiming UCC warranties, the Seller has assumed no more than the degree of risk associated with using commercially reasonable efforts to comply with the terms of the Agreement, which allocates a much greater degree of risk for nonconforming goods to the Buyer. In the fifth example, Seller has disclaimed all warranties for the goods, which shifts the risk entirely to the buyer.

Exercise: Describe how the risk progressively shifts from one party to the other in these conditions of transfer provisions.

1. The Transferring Owner shall have delivered to the Company a written opinion of counsel for the Company substantially in the form attached to this Agreement as Schedule 14.1 that the Transfer will not result in a violation of applicable law.
2. The Transferring Owner shall have delivered to the Company a written opinion of counsel for the Company or of other counsel satisfactory to the Company substantially in the form attached to this Agreement as Schedule 14.1 that the Transfer will not result in a violation of applicable law.
3. The Transferring Owner shall have delivered to the Company a written opinion of counsel reasonably satisfactory to the Company that the Transfer will not result in a violation of applicable law.
4. The Transferring Owner shall have delivered to the Company a written opinion of counsel that the Transfer will not result in a violation of applicable law.

The transferring owner has a higher degree of risk in the first example, because counsel for the company is going to be highly protective of its client's interests and the form attached is likely to be one-sided in advancing the Company's rights. In the second example, the transferring owner may be able to obtain an opinion of counsel from its own representatives (if the Company deems them satisfactory), who will advocate the owner's interests. In the third example, the owner may select its own counsel with approval of the Company, which now must be reasonable, and the legal threshold for the opinion has been lowered since the format for the opinion is not specified. In the fourth example, the owner may select its own counsel and the Company is bound by owner's counsel's opinion, which means the Company has been allocated a higher degree of risk.

Exercise: Describe how risk progressively shifts from one party to the other in the following grant of rights provisions.

1. Licensor grants Company all intellectual property rights in the Software.
2. Licensor grants Company the right to use the Software and all rights appurtenant to use of the Software, including the right to modify the Software and the right to create derivative works.
3. Licensor grants Company the right to use the Software in any manner consistent with the terms of this Agreement.
4. Licensor grants Company the right to use the Software for the specific purposes described in this Agreement. Except as stated in this Agreement, no other rights are granted by Licensor to Company.

Risk allocation shifts from the Licensor to the Company in these examples as the specific rights granted are progressively narrowed. Company has less risk when broader rights are granted, but Licensor has less risk as more intellectual property rights are retained.

Exercise: Describe how risk progressively shifts from one party to the other in the following assignment provisions.

1. Seller may not assign any rights or duties under this Agreement.
2. Seller may not assign any rights or duties under this Agreement without the consent of Buyer, which consent may be withheld for any reason or no reason.
3. Seller may not assign any rights or duties under this Agreement without the consent of Buyer, which consent may not be unreasonably withheld.
4. Neither party may assign any rights or duties under this Agreement without written consent of the other party.
5. Neither party may assign any rights or duties under this Agreement except to a parent, affiliate or subsidiary or except to a successor in interest in the event of a change in control.

Seller's risk shifts from not being able to assign in any event, to not being able to assign without Buyer's consent, to not being able to assign without *reasonable* consent. Note that in the first three examples, Buyer is free to assign under common law principles because no restrictions against Buyer's assignment have been included. The fourth and fifth examples impose a mutual restriction. Risk is lowered for the potential assignor in the fifth example which includes specific permitted instances where assignment is automatically allowed, but the non-assigning party's risk increases because it will not be able to veto the assignment in these situations. From these mutual provisions, the next step would be a provision that prohibits *Buyer's* assigning without Seller's reasonable consent.

After a few examples, it is not so difficult to observe how the risk shifts when provisions are presented side by side. Law students are sharp; they will quickly figure out where the risk lies and how it shifts from one provision to the next. The next step is to isolate one provision and start there:

The Transferring Owner shall have delivered to the Company a written opinion of counsel reasonably satisfactory to the Company that the Transfer will not result in a violation of applicable law.

Showing only this provision, can students identify whom it favors? Where is the risk? How would they modify the provision to make it more difficult for the selling party? How would they modify the provision to be more favorable to the company? How would they take it down a notch to be more favorable to the selling party? Allow students to mull these questions and come up with their own ideas by thinking critically.

Identify the Range of Risk

Once students are able to identify the risk, they begin to comprehend how we use relatively minor changes in language to allocate risk. This exercise requires students to create language that accomplishes a specific objective.

Exercise: Draft a set of provisions that demonstrates the range of risk for an indemnification provision beginning more favorable to the buyer and ending more favorable to the seller.

If students complete this exercise in class, they will not be able to consult other resources to find an answer, so their brains and critical thinking skills are exercised as they work through it. This is a great exercise to do in pairs or small groups. Students usually come up with something simple like this: "Seller shall indemnify and defend the buyer against any claim." Or, "Seller shall indemnify Buyer to any liability to the extent caused by Seller's negligence."

The biggest challenge for the new drafter is to determine the parameters of the range of risk for each contractual obligation. In other words, when "marking up" a document to fit the current transaction, how does the new drafter determine whether a provision is neutral or whether it favors one of the parties over the other? Where does this

particular provision fall in the overall range of risk as currently written? Does it advance the client's interests, or is it more favorable to the other party? If the client prefers a more aggressive approach, how does the new drafter determine whether the provision is one-sided enough or whether it needs to be tightened up?

To some extent, this knowledge is gained through experience, which is why it is called the "practice" of law, and why partners' billing rates are substantially higher than new associates' rates. For the diligent, however, some sources exist that can help identify the range of risk. The best source for identifying the range of risk is an experienced mentor; if a reliable mentor is not available, the next best source is the law firm's or law department's form files, using a form where the firm represented the buyer and comparing it to a form where the firm represented the seller. The final forms most likely have been heavily negotiated, so the best source is the first draft submitted to opposing counsel, if the firm drafted the contract, or the first revision, if the firm reviewed an initial draft prepared by opposing counsel. Study the revisions requested by counsel for each party and observe how experienced lawyers have fine-tuned the language to shift risk from one party to the other.

Although experienced drafters usually avoid them, some form books are well written and often include forms labeled as to which party they favor, like this: "Software License Favoring Licensee."¹⁵ Sometimes, form books are annotated with a running commentary as to why each provision is phrased a certain way, with alternative language included. By comparing forms favoring a licensee and a licensor side by side, for example, a new drafter can begin to identify the range of risk for each provision.

Exercise: How is risk allocated among the parties under the following provision? What words would you change to shift more risk to the Representative? What words would you change to shift more risk to the Company?

9.1 **Indemnification by Representative.** Representative shall indemnify Company from any and all claims, damages or lawsuits (including reasonable attorneys' fees) arising out of or related to Representative's:

- a. Fraud, misrepresentation or negligence regarding any of the Products, services or orders solicited; or
- b. Violation of any applicable law or governmental regulation.

It is relatively easy to analyze a collection of provisions printed side by side; a much more challenging endeavor to determine where a single provision might fit when the range is unspecified. This exercise takes students to the next level of critical thinking by requiring them to analyze which party is favored under the provision as written, and what modifications they would need to make to shift the risk towards one party or the other. Guess what? This exercise is a trick question of sorts because it seems sort of one way but it is actually more another, isn't it? The provision provides a broad degree of coverage but only in limited circumstances; it allocates less risk to Company than *no* indemnification

¹⁵ Look for form books that are subject-matter specific, but avoid form books that contain thousands of forms covering a multitude of legal practice areas.

provision at all but its coverage is very limited. Company's risk would be lowered, and hence, Representative's risk increased, if a. and b. were omitted and general language added after "Representative's" on the third line.

By using more meaningful, practice-ready exercises in class, students are better prepared to handle real drafting projects when they leave our hallowed halls. The best source for practice ready exercises is a "real" document actually used in practice. These are easily found on the internet, particularly on EDGAR.

GRACE M. GIESEL

TEACHING ETHICS IN A DRAFTING COURSE

Introduction: General Parameters of My Course

My name is Grace Giesel. I have been teaching for 22 years. I have taught Contracts almost that entire time. I teach Professional Responsibility as well, and I have taught that for many years too. About six or seven years ago, there were a couple of us on the faculty who got the wild idea that maybe we needed some sort of application course with regard to contracts. We started talking about a contract drafting class. Everyone thought such a course should be offered but no one wanted to teach it. In the game of musical chairs everybody else ran for the chair. I did not. I actually thought it would be a great productive endeavor to teach a contract drafting class. I thought I would enjoy the experience. I have taught Drafting six times. It is an evolving course for me still. I have used four different sets of materials. Every year some of the material is my own, some of it is from other sources. I am currently using Professor Tina Stark's book,¹⁶ but I am constantly looking for better ways to teach the important lessons of drafting. Because I have a background in teaching both Contracts and Professional Responsibility, and I try to bring both of those aspects into the Drafting course.

I teach at the University of Louisville. Our law school is small. Our entering class is about 140 students. We have two first-year sections and so I teach half of the first-year class Contracts. I know most of them very well after that year-long course. I teach a fourth of the second-years and third years every year in my Professional Responsibility class. By the time of graduation there are few people that walk across that stage that I have not had in a class. My drafting class is capped at 18 students, and it tends to be third-year students. I tend to know most of them before the Drafting class begins. I have an idea of what they have already been exposed to in both Contracts and Professional Responsibility. I know what is a review, or what should be a review.

I try to build from that base of common knowledge. I try to bridge the gap from doctrinal law to application. For example, with regard to contract law, I spend quite a bit of time with representations and warranties. I know the students had those concepts in the first year of law school. But in a different context, in a drafting context, the students don't know how to deal with representations and warranties. So we spend time learning how to use representations and warranties. Another example is the merger clause. We review what the

¹⁶ TINA STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (Aspen Publishers 2007).

students learned about parol evidence and merger clauses in the first-year course. Then we take the next step to apply that knowledge to merger clauses the Drafting course.

Teaching Ethics Early in the Course

The same is true with professional responsibility concepts. After teaching Drafting a few times, I noticed that the students, many of whom had taken Professional Responsibility, lacked an awareness of ethics issues in the transactional context, and, in particular, in the drafting context. I then contemplated how to remedy that deficit. Professor Stark's book and other drafting texts have chapters on the ethics relating to drafting. This approach is good, but I think it is better to talk about ethics issues as they arise just as I do with doctrinal contracts issues.

I finally decided that the Drafting students needed to have a conversation early in the semester about ethics and drafting. Having that conversation early in the semester would help raise the awareness throughout the course. Then the class can have more involved conversations later as other issues pop up in the context of problems that we are working on.

The Employment Agreement Exercise

Having decided to have an ethics conversation early in the course, I then had to develop materials for that conversation. Even before I used Professor Stark's book, one of the earliest exercises that I did related to an employment agreement. In the exercise, a corporation is hiring an executive and we, the students and I, represent the corporation. It is a simple set of facts that the students can understand. I did not practice transactional law, but I have several friends, including my husband, who long ago were transactional associates, and it seemed that an associate often drafts the executive's contract.

This exercise also tackles the issue of corporate representation in general in the context of drafting an employment agreement. With a little tinkering, I added facts to elicit an ethics conversation.

The "Wings and More" E-mail

Here is the problem I use.¹⁷ What I'm trying to do is give you something that you can take back and maybe tinker with yourself to make it your own. The goal is to use it to get at some of ethics issues and raise the class awareness and change some of the conversation later in the course.

First, I give the students an e-mail from a senior partner, Adam. Adam says that Callie over at Wings and More has called and asked for our help in drafting a new employment contract for Dan. Our client is Wings and More. As you know, Callie is an assistant general counsel at Wings and More and handles all the human relations matters. Dan is the present general counsel.

Now, how many alarms are going off for any of you in the audience who have been in that kind of practice situation? You know no lawyer wants to be anywhere near any of that! It is a situation fraught with problems.

¹⁷ See Grace M. Giesel, *Conference Handouts*, EMORY LAW: MORE THAN PRACTICE: CONFERENCE MATERIALS, at 2, http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Giesel/Giesel_Conference_Handouts.doc.

Let's go back to the e-mail from Adam. Dan is the present general counsel and he is not going to be our client but his employment agreement is what we're going to be drafting. The e-mail points out that the associate knows Dan and that the associate and Adam have dealt with Dan on a plethora of matters with Wings and More over the last several years.

Adam continues, "I've been especially pleased at the rapport that you have built between you and Dan and the lawyers working under Dan." (That's that partner reminding the associate that the partner has the associate under his thumb. It's in the e-mail or it's in that message on the phone that the associate picks up at 8:00 at night. Implicit in the reminder is the message – don't screw it up.)

Adam further explains, "I have grown comfortable with the thought that you understand the care and tending necessary to keep an important client like Wings and More satisfied and in the Law Firm fold. For obvious reasons, our contact on this matter is not Dan but Callie."

Adam continues, "Callie says the terms of this contract should mirror Dan's last contract with a minor change. Dan's current contract had a term of five years and Callie now wants the new agreement to have a two-year term." One can imagine that perhaps Dan is getting on in years or maybe there is already some conversation about the direction Wings and More wants to take after Dan's tenure.

Adam concludes the e-mail, "Dan is going to represent himself in the matter. Please assist Callie in taking care of this. Call me if you need me."

The Background Noise: The Duties of Competence and Communication

I begin the ethics conversation by talking about background noise—ethics issues present in almost any setting. The duties of competence and communication are such noise. In discussing the ethics issues raised by the e-mail, I refer to the ABA's Model Rules of Professional Conduct. Most jurisdictions use rules that are pretty close to the Model Rules substantively. Rule 1.1 is our competence rule¹⁸ and it states the basic duty of competence. We're representing Wings and More. Our contact is Callie. We owe a duty of competence to our client. That shouldn't be a problem.

We also have the background noise of Rule 1.4, which states our duty to communicate with the client.¹⁹ Rule 1.4 is divided into several parts. The gist of Rule 1.4 is that we have to stay in contact with our client. We have to consult with our client and obtain our client's ideas about everything. We have a duty to keep the client reasonably informed and promptly comply with reasonable requests for information. Rule 1.4(a)(5) states that we must tell the client we can't do something the client wants us to do if that something is unethical. Finally, we must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.²⁰

We then talk about what the duties of competence and communication mean in the context of a corporate representation. If Callie is our contact, are we talking to Callie often? How is this conversation going to take place? Usually, there is a student in the class who has had another life before law school and has seen this sort of thing. Maybe a student worked

¹⁸ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004).

¹⁹ *Id.* at R. 1.4.

²⁰ *Id.*

as a summer associate and was pulled along to a client meeting, so the student has some idea about how this communication might work and can explain to the class what he or she has seen.

Dan's Modification

I then tell the class to assume that we draft an employment agreement in accordance with Callie's instructions, and Callie approves the draft. Then we send the draft to Dan. Dan calls to tell us that in light of the shorter term, he would like the agreement to contain a severance package in the event Wings and More chooses not to employ him after the conclusion of the two-year contract term. So, he wants little bit more on the end. I note for the class that Dan calls us, the associate. Why would Dan call the associate and not Callie or Adam? Because Dan knows the associate. There is a connection. Dan is familiar with calling the associate and asking a question or two. He has done this often as the general counsel of Wings and More.

We talk with Callie about Dan's call. Callie says, "Draft a lowball approach to this severance package." What do you think? Draft a lowball approach to the severance package. What is popping into your mind at this point? What do you see?

Who is the Client?

Even students who have had Professional Responsibility often are confused about who the client is in this context. They want to say Callie is the client. I am always careful to say Callie is the *agent* of the client. Someone usually says that, Dan is a client too. We spend a lot of time right there early in the class with this issue because most of the exercises later in the class involve corporate representation. Maybe the exercise involves a sale of assets. The students need to understand how the relationship works between the agent of client and all the other parties that might be involved, such as counsel.

What else do you see in addition to the basic question of who is the client? Rule 1.13 specifically states the lawyer represents the entity.²¹ It is possible that an entity lawyer also represents an individual affiliated with the entity. To be absolutely clear here (because I just wrote this article on this²²), for purposes of this problem, Dan has never been represented individually by this firm for any purpose. Sometimes that happens, too, right? So, let's just say he's never been represented by the firm. The law firm has never gotten themselves in any kind of ambiguous representation of Dan such that Dan might think that he was being represented individually by the firm.

Once we establish that our client is Wings and More and Callie is the mouthpiece, the agent, that tells us what to do, what else do we know? The rest of Rule 1.13 talks about how the lawyer is to act in the best interest of the client, the entity. So one of the things that the lawyer is supposed to do (and this, of course, is part of that whole Sarbanes-Oxley debate that has been going on for about ten years) if the lawyer is supposed to be acting in the best interest of the corporation, at least at some level, is evaluating what Callie is saying to determine whether Callie is acting reasonably and in the interest of the corporation.

The Model Rule is written in a way that creates a pretty awful situation. Perhaps the lawyer knows that an employee like Callie is engaged in an action and tends to act and

²¹ MODEL RULES OF PROF'L CONDUCT R. 1.13 (2004).

²² Grace M. Giesel, *Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. MIAMI L. REV. 109 (2010).

refuses to act in a matter related to the representation that is a violation of legal obligation or a violation of law. Perhaps the matter is something substantial. The idea that we must come away with regarding Rule 1.13 is that the lawyer must act in the client's best interest. If we were representing an individual, of course we would say that. And so sometimes students must be reminded that the same concept applies with a corporation, a sophisticated client.

Conflicts of Interest

What else do you see in terms of ethics issues? We're representing Wings and More. We're drafting an employment agreement that's going to control Dan. We have a prior relationship with Dan. Didn't we have an obligation in the beginning to inform the agent of the organization before we accepted this job that we had a potential financial conflict of interest?

The conflict is created by the fact that we are going to negotiate and draft an employment contract for Dan, the decision-maker for legal representation of Wings and More. Dan, for the next two years, will decide what work our firm gets and what work we don't get from Wings and More. Callie has asked us to lowball the severance package. If we draft a lowball package in the employment agreement, Dan is not going to be pleased. We don't want to anger Dan because in a month he is going to decide whether we get more work from Wings and More or not.

This is where I talk to the class about conflict of interest--just the basic idea. This is not a situation in which we've got one client directly adverse to another client, but it is a situation in which there might be a significant risk that our representation of Wings and More is going to be materially limited. And I try to focus the students on those terms from the conflicts rule, Rule 1.7, so the terms become second nature--significant risk; materially limited.

Here we're really talking about the personal interest of the lawyer creating the conflict. I have a friend who is a bit older; he has been a corporate lawyer forever and he practices in Kentucky. In Kentucky, there is Louisville and then there is the rest of the state. That is just how it is. I'm not from Kentucky, so I can be objective a little bit and that is really how the state is divided up. This lawyer represents little banks out in the state. He regularly has to draft employment contracts for various bank officials. The banks would not dare consider going to anybody else because they trust him. He's the "Louisville" lawyer – which carries *all* kinds of connotations. I guess here in Georgia it is the "Atlanta" lawyer. My friend finds himself in this kind of conflict situation often.

I asked this lawyer what he thought about this situation--did he ever worry about this kind of conflict? He told me that he always has that conversation with the client in the beginning. Now, what the rule actually says is if you think you have a significant risk of material limitation on the representation, the lawyer must get informed consent from the client. It's not enough to have a conversation with Callie. We need to get the official informed consent of Wings and More. As the rules say, we have to tell the client about the risks of what it is doing by using us for the employment contract and the alternatives to using us. Nobody wants to say that. No practicing lawyer wants to say what the alternatives are.

Usually the students do not see the conflict and if they do, they do not see why practicing lawyers might not want to make the proper disclosure to obtain informed consent. In Professor Stark's book, one of the earliest problems is an employment arrangement. The person is being hired for the very first time to be a hospital administrator. Adele

Administrator is the character's name. I do this Wings and More problem before we hit the Adele exercise. When we get to Adele, my class sees the same sort of conflict. It is there even if the administrator is new; the class sees that she is going to be in a position of power within a month or two. She is going to have influence over who gets hired or fired.

I find that later in the semester the students are more perceptive of conflicts of interest after having discussed the Wings and More scenario. I don't have to raise the issues every time myself. The students start raising these sorts of issues and saying, "I don't know if I will be comfortable here. I don't know if I should do that." We all know that out in practice an attorney with a conflicts question usually has to resolve the question by having a conversation with himself or herself. Big firm lawyers may have the benefit of a conflicts counselor, but for a lot of attorneys there is nobody like that. So I believe it is important to help the students develop the ability to see conflicts on their own.

Non-Compete Curveball

At this point in the exercise, I really throw a curve-ball. I tell the students to assume that we revise the draft agreement and we highlight the changes. Later, Callie calls and she says that the draft is good. She continues, "We've been talking over here at Wings and More and we think Dan should sign a non-compete. If he's going to get severance package, we need to get a non-compete to tack onto that."

Dan is the general counsel. He's a lawyer, right? The reason I put this particular issue, the non-compete, in the exercise for my students is that practicing attorneys ask me about this often. It has become clear to me that the practicing lawyers do not know the ethics of non-competes for attorneys.

I give the students a non-compete clause and tell them that Callie provided the language and has stated that this is what Wings and More wants Dan to sign. The language provided is a basic non-compete. I found the actual language in a contract out there on the web. It's not outrageous in any way. Is it going to be enforceable? If it were a non-compete for an employee who was not being employed as a lawyer, the provision might be enforceable in some jurisdictions and not in others.

I explain to the class that we tell Callie we will look into it. We do some research and we discover Rule 5.6, an ethics rule in most jurisdictions. Rule 5.6 states:

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.²³

I recently talked, at several Continuing Legal Education presentations, about this rule as relating to settlements. In-house attorneys in the audience came up after the programs to ask, "Does that rule apply to me?" After several of these queries I realized Rule 5.6 must not be well-known. These in-house attorneys explained that their corporate clients, their employers, have all their executives sign non-competes. Of course, the employers want

²³ MODEL RULES OF PROF'L CONDUCT R. 5.6 (2004).

their general counsels to sign non-competes as well. I thought that surely somebody catches the issue along the way. But when I checked some contracts available on the web I realized that general counsels, apparently, often sign non-competes. The non-compete in the exercise is from a general counsel's contract that is out there on the web that was done within the last ten years.

Let's say we find Rule 5.6. I ask the students, "Well, what do we do now? Now we go to our background noise, right? Rule 1.4, the rule regarding the duty to communicate with our client tells us that we're supposed to tell Callie that Rule 5.6 forbids us from including the non-compete. In particular Rule 1.4(a)(5) is relevant because it says we certainly have to tell the client that we can't do something that's going to require us to violate a rule of professional responsibility. Callie is the assistant general counsel, a lawyer. She's going to be violating the rule as well by participating in offering the non-compete to Dan in the agreement.

Candor in Drafting

We explain all of this to Callie. Suspend reality a little bit. I tell the students that Callie says we should draft the agreement with the non-compete anyway. Callie says, "Don't highlight it. Let's see if Dan sees it and if he catches the problem." Clearly, Callie does not like Dan as a boss! So is there a problem with this conduct?

We know we can't draft the agreement with the non-compete. It is a violation of Rule 5.6. But I tell the class to suspend reality. What if we did? Let's just act as if Rule 5.6 doesn't exist. Could we do something like this? Could we put a provision in a contract and not highlight it even though we highlighted other provisions that we changed in the negotiation and drafting process? Could we just wait to see if Dan happens to read it? Could we do that?

Let me tell you, the students get so uncomfortable about this. Some of them say this behavior is not nice. Other students say that Dan can read and find the differences. He can catch the changes. These students wonder why we have to take care of him.

We then review Rule 4.1. This rule basically says that a lawyer cannot make a false statement and cannot fail to disclose material facts to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by client.²⁴ Is Wings and More committing fraud on Dan in this contracting setting? Is that what's going on here? Have the students vote and see what the result is because they are all really iffy about it. Voting makes them commit.

We know that a lawyer cannot counsel a client or assist a client in conduct the lawyer knows to be fraud. If what Callie wants us to do is fraud, then clearly we can't do it.

Rule 8.4(c) says a lawyer is not supposed to "engage in contact involving dishonesty, fraud, deceit or misrepresentation."²⁵ I refer to this as my kindergarten rule. I always tell the students that so much of ethics really is what we learned in kindergarten. You don't take other people's things. You don't lie to the teacher. You don't lie to your friends. We usually have a really lively conversation about Rule 8.4 in the context of Callie's request.

²⁴ *Id.* at R. 4.1.

²⁵ *Id.* at R. 8.4(c).

Later in the semester I have the students do a couple of exercises in which they have to work with each other and exchange information. They negotiate a little bit. I see the effect of this conversation in the Wings and More exercise in terms of what the students are comfortable saying to each other in these later exercises. I think they are more aware of this issue and more deliberate in how they deal with each other.

You may think that if we follow Callie's instructions there is no ethical problem because we are not assisting a fraud. Perhaps. I will leave you with one thing to consider on that issue. There is a 1999 case out of Wisconsin, *Hennig v. Ahearn*.²⁶ It is a fairly recent case. Here's what happened. An employment contract negotiation was going on between a corporation and an executive. The executive had a lawyer. The corporation had a lawyer. Drafts went back and forth. Every time there was a change in a draft, the change was highlighted. The parties got to the point that they thought they were at the end of it. A final draft was created by the lawyer for the corporation. The lawyer for the corporation forwarded the last draft to the president of the corporation, the lawyer's contact and the agent of the corporation.

The president, at the last minute, looked at the draft agreement and decided that he did not want the executive to be making as much money as the agreement specified. The president changed a provision in the compensation section. You all know that in these employment arrangements, the compensation section is never a clear statement that so and so gets \$500,000. It's never like that. Compensation provisions often say something like so and so gets two percent of this or that or whatever is greater, and it goes on for pages sometimes in terms of how to calculate the amount.

When the president made the compensation change, he did not highlight the change. The draft was then sent to the executive and the executive's attorney. They looked through it and saw no highlighting. They did not read it. The executive signed the agreement. Later on, one would presume about the time that first check was due, the executive discovered that the compensation he thought he was getting was not what the document provided. The executive brought an action to have the contract reformed on the basis of fraud or misrepresentation.

The Wisconsin Court of Appeals said the executive's claim was a matter that should get past a motion for summary judgment. The court discussed that if, in fact, there had been this process of highlighting, and if, in fact, there was no highlighting on this particular item, perhaps that action outweighed the executive's (and the executive's counsel's) duty to read. Perhaps the lack of highlighting misled the executive. I throw that out to you as something else to think about in the context of what Callie proposes for us lawyers to do in the Wings and More exercise.

The end of the story is that I have my class go through this Wings and More exercise and then we move on with our other drafting exercises. Maybe I am mistaken, but I think that the class ethics awareness and conversation in the context of other exercises is better. The students' thoughts are more sophisticated in terms of responsibilities to the client, what the role of the lawyer is, and that sort of thing.

²⁶ *Hennig v. Ahearn*, 601 N.W.2d 14 (Wis. Ct. App. 1999).