

TEACHING CONTRACT DRAFTING USING REAL CONTRACTS

SHELLEY DUNCK¹

BRIAN KRUMM²

SHARON POCOCK³

BRIAN KRUMM

INTRODUCTION

My name is Brian Krumm, and I am going to moderate this panel entitled Teaching Contracts Drafting Using Real Contracts. What does that mean? All contracts are real contracts, but I guess these are contracts that were used in practice or have been used for some commercial purpose. On the panel with me is Shelley Dunck from Loyola University of Chicago and Sharon Pocock from Touro College Jacob D. Fuchsberg Law Center, and we'll go in order as it appears in the agenda.

SHELLEY DUNCK

My name is a Shelley Dunck, and I teach at Loyola University Chicago School of Law in Chicago. This is my eighth year teaching Contract Drafting and Negotiation class. I started teaching the class as an adjunct in 2003. In 2007, I joined the school as a clinical professor in the Business Law Clinic which is unrelated to the Contract Drafting and Negotiation class, but I include materials from the clinic in the class. The class is two-credit-hours and I try to limit it to sixteen students just to protect myself and my time for grading. The goal of the class is to learn the basics of contract drafting and negotiation. My approach is very simple; I want students to learn to create and revise simple, clear, and meaningful documents for their clients. I also want them to learn to start thinking like a business lawyer.

Introduction to the Course

When I originally started teaching Contract Drafting and Negotiation, there weren't that many teaching sources to choose from. I met Tina Stark⁴ at a conference years ago, and I started using a draft of what later became her book. She had e-mailed me a working copy, and I used her materials, and then I also used a comprehensive commercial real estate that I

¹ Shelley Dunck is the Assistant Director of the Business Law Center at Loyola University Chicago School of Law. B.A., University of Michigan-Ann Arbor, 1986; J.D., Loyola Chicago, 1989. She may be reached at sdunck@luc.edu.

² Brian Krumm is a visiting professor at The University of Tennessee College of Law, where he teaches Business Associations, Secured Transactions and the Business Clinic. He was formerly a policy advisor to Tennessee Governor Don Sundquist. He may be reached at bkrumm@utk.edu.

³ Sharon Pocock is an Associate Professor of Legal Process at Touro College Jacob D. Fuchsberg Law Center, where she teaches Legal Process, Drafting Commercial Documents, and Law and Literature. B.A., University of Michigan, 1975; M.A. 1977, Ph.D. 1984, University of Chicago; J.D., University of Pennsylvania School of Law, 1987. She may be reached at spocock@tourolaw.edu.

⁴ Tina L. Stark, Emory University School of Law.

had worked with in practice when I was at Equity Residential.⁵ The real estate contract was 33 pages plus exhibits – which were quite comprehensive. It is updated all the time, so it was really as state-of-the-art as a real estate purchase agreement could be. Class materials were supplemented with in-class negotiation exercises and one-off drafting assignments that I created. So, while I did use a “real contract” in the early classes, what I found in the second or third year of this was that maybe it wasn't the right contract. I continue to use the real estate contract as the base agreement, because it contains a lot of well-written provisions but I no longer use it as the focus of the class because it wasn't energy producing. While the real estate agreement was comprehensive it can be difficult to understand if you are not a real estate attorney – for example, there are three pages of title and survey requirements in the agreement. I don't think the students were really motivated by that. A lot of them didn't have a background in real estate, and the material was abstract. I concluded that I wasn't teaching a real estate class, but that I was teaching contract drafting and negotiation class, and I needed to supplement materials. That's not to say that I don't think the students got something out of the original class – I definitely think there was value, but it really wasn't interesting at the end of the day.

Once I started working in the Business Law Center Clinic, which is a live transactional clinic at Loyola, I had immediate access to what I have found to be meaningful teaching materials. The clinic has about 140 active clients at any given time, 65 percent of which are not-for-profit, and 35 percent of which are for-profit. The for-profits are mom-and-pop types, web-based entrepreneurs, or inventors, so it is a pretty interesting mix. I found myself coming into my Contract Drafting class with a clinic based story such as “you have this kind of client, and they want us to draft this kind of contract,” or “a client came in with a contract that had these problems,” and the students, all of a sudden, could relate to, and focus on, these for-profit clients in a way that they couldn't really relate to the comprehensive real estate document. Of course, I don't use these materials without getting explicit permission from my clients, and I change the names and redact certain confidential information.

The Use of Real Contracts

The benefits of this change were seen immediately. The small-business-focused agreements increased the energy level of the class, and allowed students to started participating in a more tangible way. I think the material allowed the students to be more confident because they felt like they could relate to the clients better, and the concepts were more accessible. Then we started asking questions, such as, when looking at an agreement: what do you think this language means; what do you think the clients were intending to do; what do you think the drafter was trying to do; and what do you think the client thinks this provision means? The students started to see that contracts are planning documents that they were going to create for their specific client. They began to shift from a litigation perspective to business transaction-oriented focus.

Course Structure

To begin the class, we start with the basic building blocks that are outlined in Tina's book,⁶ with half of the classes period spent on a lecture of a concept or area of law, and the

⁵ Equity Residential Properties Trust, for which Professor Dunck was once the Associate General Counsel, First Vice President, and Associate Secretary.

⁶ TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2007).

other half – though, really starting after the fourth week – focusing on a specific agreement. For example, we had an aromatherapy store owner in Hyde Park, Illinois who wanted to sell local art on consignment in their store. The students were asked to draft a contract that the client could use with the art vendors. Although I suppose I could left it at that and the students could have looked for some percent, we had some in-class discussion about what kind of things the client would want to see in that agreement – and I have heard other people talk about this – and focused on whether what the client wants can be legally done in Illinois. There is a statute on the sale of consignment art in Illinois, so we started there, and this gives the students a real-world aspect of where they should start the process.

Then we talked about basic drafting concepts, including how to draft a commission sentence, how the client would be paid to display the art and upon sale, what the contract should look like, whether it's effective, how it will be enforced, who will be responsible for insurance, and what happens if a piece of art is damaged in the store. There are all kinds of issues that you can then flush out, which makes a seemingly simple drafting assignment more meaningful drafting assignment. It makes the students think. Sometimes, I have them e-mail me their assignments to me prior to the next class, and I will take some provisions that are either well drafted or poorly drafted to the class for discussion.

This approach also results in an unexpected emphasis on client counseling, which I think is equally as important as the drafting component. I practiced in a large firm, and then I was in-house for ten years, where I was able to know my clients really well, and that's a great thing to hammer home: the better and more meaningful relationship you have with your clients, the better able you are to create these effective documents. I think that by focusing on the types of agreements I have described, students really get the concept that the contract drafting is very client-specific, and it is not legal to just fill in the blanks. Sometimes drafting involves some filling in the blanks, but more often than not, the more you know about and understand your client, the better of an advocate you'll be, and the more meaningful and effective of a document you will produce for them. And that is the role of a transactional attorney.

This type of class also allows you to include some general mentoring. You can talk about what it's like to be a young associate at a firm where you're not going to be able to get first-hand information. More often than not, you are likely getting your information third-hand from a mid-level associate, who got it from the partner, who got it from the client. How do effectively you draft in that situation? When is it appropriate to ask questions?

Another benefit of using a variety of smaller, focused documents is that students really get into them, and they start drafting a lot. I notice that after a few weeks they become less afraid of “taking a crack at it” so to speak. The drafting assignments become a weekly creative problem-solving exercise: the topic may be something they have experienced, or something maybe they haven't experienced. After a few assignments, we discuss the practical aspects of contract drafting such as how to effectively communicate comments to opposing counsel and whether or not they want to be the drafter?

Another example of a learning aspect of this approach involves reviewing contracts. One of our clients was a massage therapist who contracted with a large local hospital to provide chair massages for nurses who come off duty after long shifts. The hospital initially drafted the agreement and gave it to our client to sign. She brought it in to the clinic for review. The contract turned out not to be very effective which was an interesting lesson to the students. That is, just because you are represented by a big name firm, the contract they draft might not be a clear or effective contract. The assignment for this class was to review

the contract and come up with the memo outlining which points they would go back and negotiate on behalf of our massage therapist client. We then talked about negotiation strategies, and the students eventually revised the contract.

The students enjoyed the class; it was incredibly interactive. I observed that many of the class discussions were unscripted but productive. The students were engaged and produced a lot of work this semester, and I felt that by the end of the semester like their work product was solid.

In my handouts,⁷ I have included a sample agreement used by a client who owns a florist shop focused solely on event floral services. She came in with an agreement that had been drafted by one of her friends who runs a similar business. Our client was using this contract for every single client that she had. The contract is not a particularly effective document: there are no signature lines, and there is no date on the agreement, but those are just the starting points. I hand out the agreement in class, give some background information about the client, and the students have 15-20 minutes to go over it by themselves or in teams, and then we discuss some specific provisions. You can either highlight certain broad based concepts, or you can incorporate specific sections of the agreement into your topic focus. For example, if your topic for that week is defined terms, and you can find a contract that doesn't have defined terms or uses defined terms inconsistently, a contract can be a useful framework to supplement a lecture.

BRIAN KRUMM

I have taken a somewhat different route than Shelley and Sharon have, and I focused on two specific assignments, both of which I participated in when I was in practice.

Exercises and Course Structure

The first exercise⁸ focuses on two non-competition agreements that my clients entered into when they were initially employed, and became the source of litigation after the corporate purchase of the business in which they were employed – I originally redacted the agreements, but since that time I have been given permission to use the unreacted versions by my clients. In the first fact pattern, Masco Corporation, a large building supply company, purchased a Virginia limited liability company that was doing business in Knoxville, Tennessee. One of the employment contracts for Tony Whitsell involved a choice of law provision of Washington State, and the other employment contract, for Tom Moore, had a choice of law provision of Virginia. I believe that, beyond contract drafting, business lawyers also interpret contracts for people, so I want the students to do some research, figure out what's necessary, and look at the statutory and common law in the jurisdictions that apply to the contract. Then I ask them to write an opinion letter to the general counsel of Masco, which is a Michigan corporation, telling them whether a chancery court in Knoxville, Tennessee will grant an injunction against these individuals if they try to go work for a competitor. Out of twelve students, four or five of them will write the opinion letter

⁷ See Shelley Dunck, *Using Real Client Agreements to Teach Contract Drafting and Negotiation* (Conference Handouts), http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Dunck/Dunck_Conference_Handouts.doc.

⁸ See Brian Krumm, Exercise 1 (Conference Handouts), http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Krumm/Krumm_Conference_Handouts_1.pdf.

according to Tennessee law – which I'm really not upset with, because when I went to the injunction hearing, the opposing attorney actually argued Tennessee law. In Tony Whitsell's case, opposing counsel argued Washington law, and as a result, not only did they not get the injunction, but I had my attorneys fees paid. It's eye opening to the students.

People think that boilerplate is not important, and we over look it. A well-trained attorney doing business in Tennessee all of his life automatically assumed Tennessee choice of law, because they were doing business in there, and didn't read the contract. He tried to argue that it was a mutual mistake, but I said, "I'm not objecting to it, your Honor." So the Judge said, "even though I don't understand why the contract contains a Washington choice of law provision, if you are not objecting to it and they drafted the contract, we will honor that state's law." As the students research – and I generally have to stretch this over two classes, because I think it's valuable for them – they become frustrated, because there are a lot of different ways that you can look at the choice of law provision. Then they come back and get some feedback, and then I let them do some more research.

The Virginia employment contract, on the other hand, is a little trickier in that it's reasonable that Virginia law should apply, since it was a limited liability company from Virginia, but what's interesting about that is the assignment provision. Virginia law doesn't allow for assignment of personal service contracts, so it's not enforceable against that person by the successor corporation – even though he's living in Tennessee – if they are applying Virginia law. As a result, it causes a lot of frustration, but if the students really gain an appreciation of the importance of boilerplate and understanding the surrounding jurisdictional law. I haven't found another sort of exercise that accomplishes the objective quite the way that this assignment does. So if you think that this sort of assignment is worthwhile for your class, I've given you both of the contracts⁹ and I will send you additional information if you just e-mail me. I can give you more fact patterns and maybe even the complaint if you really need it.

The second exercise¹⁰ I use stems from a much larger litigation matter. An asset purchase agreement went bad, and the owner of the entity that was purchased died two days before the deal went through and the purchaser wanted the son of the owner to continue working with them for a period of three years to make an easy transition. Within nine months, they felt like they had the company running well, and they wanted to terminate the son. They came back and said, "We will have you sign a non-competition agreement, and we will give you extra money for the non-competition agreement to extend it for another five years." The only problem is the non-competition agreement did not supersede the employment agreement, and the purchasing company didn't do what it took to make sure that the non-competition agreement replaced and superseded the employment agreement. My client didn't complain or even notice, really, but when he and his brothers started a competing business and the company sued them for tortious interference with contractual relations, breach of fiduciary duty, breach of contract, breach of non-competition agreement, and twelve other counts, we counterclaimed that they breached the employment agreement by not paying out the severance package within five days after termination without cause.

⁹ *Id.*

¹⁰ See Brian Krumm, Exercise 2 (Conference Handouts), http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Krumm/Krumm_Conference_Handouts_2.pdf.

The non-competition agreement was an amendment to the original agreement, and therefore it wasn't effective, either. It is difficult to teach students the importance of paying attention to detail in a complex transaction and to ensure that all the documents articulate with each other. Once again, the more time students spend trying to analyze these issues, such attention to detail becomes ingrained into the way they analyze contracts. Since I had such a personal experience with the four documents, I could raise additional issues; for example, in depositions, I found out that the person who signed both the employment agreement and the non-competition agreement didn't have the corporate capacity to sign those documents. In many acquisitions, the acquiring entity will create a new entity and merge the target entity into it every time they make an acquisition. And the individual who signed as President was not the individual who was named as President in the charter and bylaws. These were drafting errors on behalf of the lawyer representing the acquiring company, and it emphasizes the need for attention to detail.

I also asked the students whether there was any other issues that they could identify other than the issues that we raised in class, and one of the students – and a couple since then – have noticed that there is a subordination agreement in the non-competition agreement because it was set up through borrowed capital from Merrill Lynch Capital Markets Group that payments under the non-competition agreement were subordinated to the money owed to Merrill Lynch. This raises the possibility that the non-competition agreement could be considered a conditional contract. Since the payments to Merrill Lynch stretched out over a two year period, I thought was a good argument. Had I realized it I would have made that argument as well.

It was interesting, because this was a federal court case, and I went back to see if I could get some of the documents online, and my documents were there, but the opposing party had pulled their documents because there were some trade secrets involved and they didn't want other small, mom-and-pop operators to think that they made a practice out of buying somebody's business and then taking legal action against them to reduce the purchase price. These are two situations where I have used real contracts in class to teach valuable transactional and contract drafting lessons.

SHARON POCOCK

Well, today I'm going to talk about using oral presentations as part of a drafting class. And the way I use oral presentations is another way that's different from what Shelley and Brian do. My attempt to bring real life contracts into the classroom is in terms of the oral presentation.

Advantages of Using Real Contracts

What are the advantages of having this as an assignment in a contract drafting class? I have tried to enumerate them for you. Usually, my class really focuses on drafting issues, and you can see on the second page of my syllabus that I try to give students assignment that puts them in different roles in any transaction. We do a couple of assignments in which they are a drafting attorney, but our third written assignment puts them in the role of a reviewing attorney, where I give them a document and I ask them to write up their comments in a letter to the drafting attorney. Then, a fourth assignment places them in the middle of a transaction by giving them comments from a client and asking them to produce a red-line, strike-out version. I know that when I did this sort of work, we would go through perhaps

eight or nine drafts of a contract before we were ready to sign it, and in part, that was usually due to the client coming up with new terms of the deal as we were drafting it. So students at least get some experience with the revision process.

But what this all means is that while we are talking about different parts of a contract, such as how to translate business terms into contract language and how to organize a contract, we really don't focus heavily on law of a specific jurisdiction or law as it pertains to a specific type of contract. I use the oral presentation as one of two final assignments in the class, and while their final written project is meant to bring together everything that we study about writing a contract, the oral presentation gives them a different sort of work experience, and it allows small groups of students to teach the rest of the class about specific types of contracts. This really allows us to go into a greater degree of depth regarding the types of provisions that certain contracts require, specific problems that may arise in that sort of business deal, and so forth. If you are teaching at a school from which most of your students will go into practice in that state, you can instruct them to focus on the law of that state, but if not, you can perhaps allow them to focus on the law of the jurisdiction in which they intend to practice. And I think I've included as the second page of my papers here, directions for choosing the oral presentation assignment.¹¹

I will usually suggest to students a number of types of contracts that they might want to talk about, and I will also ask them if they have a particular interest in any type of contract. For example, I normally wouldn't include an entertainment contract, but I find that, because I teach on Long Island, I have students who work for the music industry in New York City in our part time program, and they are very knowledgeable about licensing music rights and they like to do a presentation in that area. The list is not fixed, and it tries to respond to the interests of students in the class.

Course Structure

Technically, the course I teach is called Drafting Commercial Documents, but I really broaden the boundaries of the course for purposes of the oral presentations. I include a presentation on prenuptial agreements if that's a student's interest, or on a divorce agreement because many of my students will go into family law. If that is the type of contract that really interests them, then I don't see any harm in them doing a presentation on that type of agreement. I usually tell them by the third or fourth week of the semester – after the drop/add period has ended, so that we know how many students we have and who is definitely in the class – that we're looking for a presentation of anywhere from 15-25 minutes and I suggest to them what they ought to do: that they want to identify particular issues that are important and show us typical provisions that would address those issues, and that they would want to identify for the class the specific interests of each party in that type of contract.

I also ask them also to compile a bibliography, because the idea of these oral presentations is that each small group is teaching the class, and by the written materials that they prepare, they are giving other students something to leave with. And because I usually have many third year students in the class, the bibliography is something that might help them, as they go into practice, by suggesting some materials to look at. In terms of coming

¹¹ See Sharon Pocock, *The Oral Presentation: Integrating MacCrate Skills and Substantive Issues in a Drafting Class* (Conference Handouts), http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Pocock/Pocock_Conference_Handouts.doc

up with the bibliography, I suggest that the students look for treatises and other materials in the library that speak to their particular type of contract. I usually discover that my third year students have never, in their time at law school, used the library's electronic catalog, and they are not familiar with all those other sources in the library besides the case reporters and the statutory codes. So this assignment is meant to familiarize them a little bit more with the library, and I'll sometimes ask them to include a sample contract. In some instances students have pulled actual agreements from the Internet, as they prepared such a presentation.

Now, I want to talk also a little bit more about the logistics of organizing this assignment. So while I will tell them what this assignment is about, I usually suggest that they talk among their classmates and find someone who is interested in the same type of contract that they are interested in, and that they form a team. In the past I have usually done this with teams of two students, which seems to work well, but as you can imagine that means I have often had a fairly small number of students in the class. I think this Fall I face perhaps having to increase the number to 18 students, and I may have to use teams of three to have a manageable number of presentations in class.

Once they know the parameters of the assignment, I ask them to complete a handout. You don't want several teams doing a presentation on the same type of contract, because that's going to become boring, so you have to be sure that each team is working on a different type of contract. And you're probably not going to do all these presentations on the same day or days; I try to spread them out over the last four or five classes so that we also have some class time to complete whatever other matters we're working on. This means that, when students make their selections as to topic and date, I ask for three choices, and by asking for both topic and date, if I can't give a team their first choice or even their second choice in terms of topic, I make an effort to give them their first choice in terms of when they want present, whether earlier in the semester or in the last class.

Those are factors that you want to take into consideration. This exercise provides to the presenting students not only the opportunity to research and learn about that particular type of contract, but also an opportunity to practice other MacCrate skills. I think for the past almost 20 years, schools have been evaluating courses and their results in terms of which skills – as identified by the MacCrate Report¹² – are being taught. We can see that, for the oral presentation, they have to do some legal research on a particular type of contract, and perhaps in a particular jurisdiction. It also gives them exercise in oral communication skills, and it's not an oral argument or client counseling; the presentation is really a teaching presentation. Because we try to set these assignments up early enough in the semester that students have six to nine weeks to prepare, they get experience in organizing and managing the project with their partner, so that there is collaborative work required. Finally, I usually also ask them to identify an ethical issue that might arise in this sort of transaction. So it is a presentation that fulfills a number of the goals of the MacCrate Report.

Additionally, I guess I can say that my school has recently been interviewing to hire a new assistant dean for career services, and I was interested and pleased to learn that many of the candidates told us that law firms nowadays – particularly the mid-sized and small firms – are depending on their lawyers to bring in new business, which frequently involves giving a presentation to a group to tell them what the firm can do. So, again, I think this

¹² American Bar Association, Section of Legal Education and Admissions to the Bar, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap (the MacCrate Report) (July 1992).

exercise reinforces the idea that oral presentation skills are skills that lawyers should have and this is an exercise that allows students to get some experience in them.

Professor Pocock's Suggestions

Just to talk a little bit more about the logistics here, I think I told you about the process for selection of the topics and the dates. Again, the sort of contracts you suggest really depends on your own student body; if you have students that largely go to big firms that mainly deal with security matters and finance matters, maybe you'd want to have them doing reports on some of those types of documents. If you really deal with a population that is going to be general practitioners or family law attorneys, you can suggest contracts that come up in those areas. I've had students really be wonderfully inventive here. I know of a student who once did a presentation on franchises and the typical terms of a franchise agreement, and he brought in for everyone a hot apple pie purchased from a local franchise, as well as samples of napkins to illustrate the sorts of terms that have to be covered. One group that presented a divorce agreement somehow managed to pull from the Internet the divorce agreement between Rosanne Barr and one of her husbands. So they were both able to bring in real contracts that interested the other students.

Again, just keep in mind here that you have to figure out whether you're interested in doing this and how it would fit in your own course. If you teach a really large course, I'm sure oral presentations could work well, but if you have a limited number of students, I think they work far better. You never quite know, until after the drop/add period has ended, how many students you will have and how many presentations the class will need to listen to at the end of the semester. That's the one variable that you have to deal with and finalize as the semester goes on.

I guess to end, I just have a bit of an anecdote for you, and since it's anchored in the use of the oral presentation in a contract drafting class, I want to tell you about it. If you're at a school where you don't have a developed transactional curriculum and you're hoping to see that go forward or you want to see more sections of contract drafting, I just want to tell you a little bit about the aspirations of the faculty at Touro. Long before I arrived there, the idea was that the school would have a spiraling curriculum, meaning that, in the first year we would introduce students to various oral skills (for example, counseling, negotiations, etc.), in the second year they would take a course that would involve them in simulations, and finally, in the third year, they would be in clinics where they would be putting their skills into use with real clients. This was the ideal, and the school actually made good progress with respect to the first year: the faculty reduced the student-teacher ratio in legal writing and research classes, and they added an extra hour of credit to each semester so that those classes have three hours in the fall and three hours in the spring and we are able to introduce students to client counseling, interviewing, and negotiations.

In the past few years, however, the school has been wrestling, if you will, with that second year requirement and what we do for these simulations. The idea here was classes of no more than ten students that everybody takes in the second year, and that really do focus on interviewing, counseling, negotiation to the extent that you have either audio tapes or video tapes of students engaging in the simulations so they could then evaluate themselves and how they are doing. Well, you're probably realizing that, right now, if every second-year student has to take this class, and with only ten students in the class, that's very resource heavy. The faculty came to realize that very, very quickly, and we had to become a bit more flexible. I guess another ideal requirement was that certain of the MacCrate skills – particularly the oral skills, the client counseling, the negotiation, and factual investigation –

were to be the skills that were focused on. We realized that a lot of the existing courses that students took in their second and third year wouldn't count, so we would have to generate all of these new courses and cover them with teachers, which just wasn't possible. So at that point the school relaxed its requirements a bit and decided that a simulation course like this, in order to meet the intermediate skills requirement, has to employ a majority of all MacCrate skills and might have to be structured to include classes of 20, some taught by adjuncts.

We've made progress on that ground. As to the third year, again it's a resource issue, and I'm not sure there's any school that really has the funds to require every third-year student to participate in a clinic. We have a lot of clinics, but I don't think we will ever meet that goal. How does this relate to what I've been talking about in terms of a basic contract drafting class? Well, I just finished my fourth year at Touro, and in my first year there, I noticed that Drafting Commercial Documents was usually offered once a year, that it was taught by an adjunct, and that it was over-subscribed. More students wanted to take it than could be fit in, so I immediately spoke up and said I'd love to teach an extra section as an overload. I had done contract drafting in practice, I had taught a class like this before, and if they wanted to add another section, I'd be happy to teach it. So my second year there, we had an adjunct teaching one class in the evening program, and I taught a class in the day program. We weren't entirely full, but we had enough students to go forward with two sections. The third year, we again offered two sections, but this time the adjunct's course had to be cancelled. In the fourth year, in the first week – before we even had our first class meeting – we didn't have sufficient registration, so the administration cancelled the class. That meant that the third-year students who wanted to take it were just completely out of luck. They graduated a week ago.

So my thought here was “What can I do about this, other than just publicizing the class, which I don't think will be very effective?” Being on the curriculum committee and knowing what the school wanted to do in terms of that intermediate skills requirement, I recognized that because I already had an oral skills component in my oral presentation, if I could just add one other component, such as a negotiation exercise, I would then satisfy the requirements. So this was what I did, in fact. I got the Drafting Commercial Contracts class certified as a class that would satisfy that intermediate skills requirement, and I think that's going to do a better job in anchoring it firmly in the curriculum. For the coming fall, we seem to have the required number of students and, in fact, it's been scheduled also for the spring.

So the point here, for anyone trying to get more transactional courses in the curriculum, is that we have to think about the purposes of a course in the law school's bigger picture. And certainly the coming dialogue, as we've heard in a couple of sessions today, is going to be about outcomes and assessments. Transactional courses, because of the many assignments and so much feedback, offer an excellent way to build into the curriculum what's going to be needed in terms of courses giving formative assessments to students. So whatever the view of your school is, and every school seems to have its own view of what it's seeking to teach students, my experience simply shows that because I already had an oral component through the oral presentation, I was able to tweak the course a little bit more and have it fulfill another requirement, by which it became more popular with students.

To the extent that you can either meet student goals, or perhaps meet the administration's goals in having enough courses that provide various forms of extensive

formative assessment, it's possible to create and maintain transactional courses, if they're something that are coming to the fore at your school.

QUESTION AND ANSWER SEGMENT

BRIAN KRUMM

Do we have any questions?

QUESTION FROM JOAN HEMINWAY

Yes, Joan Heminway of the University of Tennessee School of Law. Brian my question is actually for you. I'm delighted – given that we teach at the same school – at hearing your emphasis that boilerplate is not boilerplate; in other words, boilerplate not being this typeset that just gets kind of clumped on to the agreement. I was particularly curious about your exercise where you have the non-competition agreement of the employment agreement. I assume that one of the things you deal with in the boilerplate in that exercise is the integration clause, and I was wondering if you could say a little more about that aspect, because I try to teach that in another class and I would be interested in your thoughts.

BRIAN KRUMM

In the second exercise, in both the employment agreement and the non-competition agreement, there was an integration clause basically saying that this is the entire agreement. And in the non-competition agreement, there was no reference to the employment agreement saying that it superseded the employment agreement, or that it replaced it, or that it was replacing it as effective on a certain date. So I felt my position at that time was pretty strong, and I try to emphasize it to the students that to effectively supersede or amend, you have to look at the business purpose, then go through each provision and determine if you've covered every provision that needs to be changed in order to make an effective amendment to the original contract.

QUESTION FROM TED BECKER

Ted Becker from University of Michigan Law School. I have a couple questions for Sharon about the oral presentation. From your description, it sounds like some of the students really got into the franchise agreement and divorce agreement. I assume that is probably not true of all of them, and if that's the case, what was your role during the presentations? If one really kind of got off track, would you step in and try to guide them back to best tangential issues?

SHARON POCOCK

Thank you for your question, because it reminded me that I really didn't talk about the last part of my outline here. The last time I taught this class, I did not require students to do a PowerPoint, but they were welcome to do one if they wanted. That was the first time that I really saw from each group that they had no sense of how to use a PowerPoint. I told myself then that, the next time I teach this assignment, I would devote at least 15-20 minutes in talking about effective use of PowerPoint. I required, of course, a paper handout for students, but again, the students didn't seem to have a good sense of how to use both together. Sometimes they would want to show the class a specific contract provision but it

would be very long, and although we were in a small seminar class, not very far from the board, they had reduced the typeface of the provision so small on the PowerPoint that you couldn't read it; instead, you had to consult your print-out of it. So they really didn't have a good sense of how to use PowerPoint and how to use the paper copies to complement whatever they were using in terms of PowerPoint.

Overall, I would say I found that most of my groups did a pretty good job. I never really had to step in, because things were never so off track. Some did a better job than others, but the next time I teach this, I would point out some basic things about PowerPoint. And, again, I think each of us knows our own students. You may have a group of students to whom all you need to say is, "There are good ways and bad ways to use PowerPoint. Google 'effective PowerPoint usage' and you will get a variety of websites pointing out things not to do." That might be all you need to say to one group, but for another group, you might really have to talk in greater detail about the font size and good color choice. So in simply technical terms, that's something I would do the next time around, but in terms of substance, I can't really say that I've ever had problems so far.

QUESTION FROM SUSAN DUNCAN

What I wondered is – Susan Duncan from the University of Louisville School of Law – you identify particular issues, the special interests of each party, and the particular requirements – and I can see it being a great resource for students graduating – but I wouldn't know what those are for each one of those contracts. So how would I know if they were correct when they present it, or would I be sending out, to a whole class of students, the wrong information? How do you monitor that you're actually giving them the right information?

SHARON POCOCK

Well, that is something that they should have researched, and when they put it on PowerPoint or on their paper they should tell you, again, which treatise they have consulted that has identified those points. Again, it's part of the research they have to do, and it's a different sort of research than finding cases or statutes.

QUESTION

So you felt comfortable that they had it right?

SHARON POCOCK

Yes, and you have some control in listing the contracts that you want them to explain. Perhaps choose contracts that you're somewhat familiar with, or at least that you have heard in another presentation in the past.

SHELLEY DUNCK

Sometimes I've had friends come in with the special area of expertise, and I suppose would invite them to sit in class presentations. If IT is not your area, but you have a friend who practices transactional IT, they might be willing to sit in the class to double check content if you feel comfortable with that.

QUESTION FROM JEFF PROSKE

I'm interested in hearing from each of you – Jeff Proske from the University of Pacific McGeorge School of Law. I'd like to know how you guys go about teaching the due diligence element of the transaction? How do you teach your students to be smart about a

deal – even a simple deal like a basic employment agreement – before actually putting it in the paper?

SHELLEY DUNCK

In my class, we talk about due diligence as part of a transaction associates role. Also, it comes up when we discuss the subject matter of each individual contract. It is surprising what your students may know from prior experience and what they start asking when they feed off each other. It is almost like groupthink happens and they realize that they understand something. In some cases I will prompt them with questions depending on what the subject matter is and how familiar I am with it. It's difficult, because a lot of times students have never read an in entire contract and they don't really think about it as creating law. They are creating a document that's actually going to be used by someone and hopefully not litigated.

BRIAN KRUMM

With the final project I have, I split the class up into two law firms, and they actually go through a deal and they draft the letters of intent and they do the negotiation, they initiate a draft, and they e-mail drafts back and forth, and due diligence is one of the elements. I've had them go to the register of deeds to look up property issues, and they catch on. It's probably not as thorough as one would expect of a seasoned professional, but they are getting an idea of the steps you need to take in order to feel comfortable about the transaction.

SHARON POCOCK

I guess I would say there's a not very thorough attempt on my part to deal with due diligence. I don't know whether anyone here attended the conference in Chicago that Tina Stark and Richard Newman organized about five years ago,¹³ but there was a speaker there who talked about how, in his initial classes, he had students get together and think about how they would draft a snow plowing contract for a small business. I usually like to do something like that in the very first class. I just ask students to get together in groups and consider the following questions based on common sense: what issues do you think you have to cover; when is it that you have to plow; how much of a snowfall is required; and how frequently should you plow? But a really important point of that exercise is, as a deal lawyer, you have to know the business, and if you don't know the business, you're going to have a lot of trouble adding value to the deal through your participation. It's an exercise that I hope brings home that point, but again, in a very basic contract drafting class, you don't have the possibility to teach them all about the business of any problems you're using and the laws that affect them.

BRIAN KRUMM

To follow-up that a little bit, I also bring in real professionals, such as a real estate developer, and I give them the opportunity to interview people who do this on a day-to-day basis.

¹³ Teaching Contract Drafting Conference, July 20-21, 2005, at Northwestern University School of Law, Chicago, Illinois.

SHELLEY DUNCK

I actually do bring on a real estate developer and his lawyer, and we talk about the connection or the disconnect that happens in that relationship, and that can be really interesting for the students.

RESPONSE

What do they talk about?

SHELLEY DUNCK

It depends on where they are in their deal. I have had people who were a bit adversarial or were angry with one another at the time that they were speaking. The client had done something that the lawyer did not want him to do, and three days before speaking to the class, it got a little heated, so that was pretty interesting. The client said it was really his business decision, and it was not a legal decision. The lawyer said, "But I am trying to protect you, and here is what you are not looking at." That was a very interesting class. I have also had a lawyer who's the partner in a smaller firm come in and talk about managing his client, which is a really big part of his business. That's a very interesting perspective for the students to recognize. How do you control your client? What if they don't tell you the truth? He advocates controlling your client without them knowing. So we try to talk about those kinds of issues.

QUESTION

Do you discuss the role of in-house counsel?

SHELLEY DUNCK

I do because that's part of my background. There are different roles for in-house counsel depending on where you are and what your shop looks like. An in-house legal department can be set up like a small law firm, or it can be just you, and there's anything in between. Our department was fairly active, and it could be quite rewarding, but it can be frustrating when your clients are as far away as you are from me right now and are always there. But it was really interesting, because the more you know about business of your client – as everyone has just said – the more effective you are at getting the deal down to the five basic points, and it can be so effective for your client to go do other work while you are working.

QUESTION

I wanted to dig a little bit further into the expertise question that's been batted around here, and I like the idea of using outside folks, but when you are having oral presentations on contract drafting – and the instructor, I assume, is working with the students – personally, I would feel like I was committing teaching or legal malpractice by advising outside of security regulations, corporate finance, or business associations, which are the courses I teach. If I were doing family law contracts, for example, I would feel like I really needed someone in there just for me to advise the student on how to present or draft the contract. I think it is nice to allow the students to do something that they are passionate about, so I am struggling with this expertise question. I have just chosen to narrow it down to what I thought is best, but I'm looking for help to see if I should be broadening my horizons of what I teach beyond inviting experts out to the classroom for the planning piece of the drafting and the oral presentation.

RESPONSE

The role of general counsel frequently is that, at any given day, you have a hundred different things that come across your desk that you have zero expertise in, but you are there to advise and provide that road map of where the land mines are, somehow.

RESPONSE

Plus, we are captive and they ask you questions that they never would get an attorney to ask. “Here, my kid got a DUI.”

SHARON POCOCK

And you know one way to get around this is that, if it does make you feel uneasy, you can use a fictional jurisdiction so you don't have to worry that you are infringing some statute that you don't know about. You can fulfill all the drafting goals I think, but it lacks that realism. But at least you know you are not wrong.

QUESTION FROM MARK OSBECK

I'm Mark Osbeck from the University of Michigan Law School. I guess this is mostly directed at Shelley, because you spoke on using real, contextual contracts. Do you ever find that students over-rely on the contracts as templates when you hand out a sample, and that they think this is the way it should always be?

SHELLEY DUNCK

And they just fill in the blank – yes. There are always a handful. That is not a large percentage; those are about three students who are doing that because either they feel like it's an easier (less time demanding) way to get an assignment done. The other students will go above and beyond, and you know that you are making an impact with them. Precedent is always important, and you don't want to unnecessarily recreate the wheel, but I do have two or three drafting assignments each semester where there is no precedent. It's mostly from my experience as in-house counsel where my clients would ask me to draft a very specific ancillary agreement, “I use those fact patterns, and it can sometimes overwhelm a student but if you remind them to just think about it, you can get some well drafted contracts. I also use agreements from the clinic that I have actually drafted, redrafted, and revised prior to using them in my class. I am pretty comfortable with them, but some of them are a little unusual. But yes, I think there will always be students who don't give you a hundred percent.

BRIAN KRUMM

It's interesting, because I ask students questions if they use a contract like that. For example, “there is an attornment provision in here, but what does it mean? Do you understand the provision you are putting in the contract?” If the provisions are complex and they can't explain it, then they shouldn't leave it in the document.

RESPONSE

We developed what I call “clinic commandments,” and one of them that comes out early on is “don't include it in the contract unless you can explain not only what it means but why it is important.” If they know what that means, but they don't know why it belongs in the deal, or if it doesn't belong in the deal, then they should strike it. Just because it was in the precedent doesn't mean it applies to the circumstances.

SHELLEY DUNCK

Yes. If you can't explain it when you're negotiating with opposing counsel, you're going to be embarrassed at some point in your career and maybe even in front of your client.

RESPONSE

The other thing that happens in the clinic and drafting – and I don't know what your experience with this is as well – is that there isn't an attorney that can't improve and massage a document. That contract might be something that was used or is used in my law firm, and that's been used 150 times before, but I might still see with my fresh pair of eyes something that somebody else didn't see. You have to make the students know that you are comfortable with them telling you about that. From engagement letters on – it's been eighteen years in practice, I guess, as well as four years in this class – I still have a student find something that no one else has seen in the document, and I tell them that's just like practice. You can make a change and make a suggestion.

SHELLEY DUNCK

I often look at agreements that I drafted four or five years ago, and I see things that I would do differently now. We also have similar assignments in which we have each student draft a specific provision, and when I compile them all anonymously, they are all different. Some of them might be more effective than others, and they all might be effective, but then the provisions are all put together, and that's what counts.

QUESTION

This is about the clinical transactional practice. Do Loyola-Chicago has any parameters or --

SHELLEY DUNCK

In clinical transactions?

QUESTION

Yeah, with respect to the size of the metropolitan area. Who do they expect would use the clinic?

SHELLEY DUNCK

There are several clinics in the area. Northwestern has a well-established entrepreneurial clinic that represents more technology-based clients than we do. Depaul has an IP clinic which is another area that we don't serve. Our clinic has mix of for profit and not-for-profit clients. There are no specific parameters other than we don't handle litigation, complex tax or matters involving intellectual property. It was set up ten years ago by Joseph Stone, who is the director of the clinic. We take everything, but we could be more selective, and probably should be. Most of our clients are referred by SCORE, the SBA or satisfied clients. There are currently 140 active clients, and we have a wait list of about 60. Substance-wise they run the gamut of teachable lessons. Some are just okay mainly because they are not really ready to proceed with their vision.

RESPONSE

Is it all free?

SHELLEY DUNCK

It is free to the not-for-profits, but we charge the for-profits a nominal fee. I think we charge \$100 to incorporate and then maybe \$75 per agreement that we draft, whether it is an employment agreement or an employee handbook. They have to pay their own filing fees.

QUESTION

In regards to clinical, I will ask a follow-up question on that. Do you have prerequisites for your business clients, and if so what are they?

SHELLEY DUNCK

Anyone can be a client of the clinic. As I mentioned, there is a waiting list and sometimes that dissuades people but as a general rule, anyone wishing to incorporate, start a business, lease a property etc. can be a client in the clinic.

QUESTION

How do you fund your clinic?

SHELLEY DUNCK

There's a very generous donor that funds the clinic and we make a bit of money from our for-profit clients.

BRIAN KRUMM

I think we discussed the other night that my current position is – until I am corrected and shown otherwise – that, as long as the entity doesn't have any income, we will do work for them. When they get to the point where they are going to have income, then they need to seek outside representation, and I have pursued this balance so that there's no concern from the practicing Bar that we're in competition with them.

RESPONSE

We generate an informational bill, because learning to bill hours is a part of the process. Then we say in the informational bill that, in the engagement letter we told the client that our services were free, but included in the bill is what they might have cost, had the client used outside counsel, and to feel free to make a donation.

SHELLEY DUNCK

We struggle with that. We have clients that start from nothing, and then they start being viable clients. They realize that they are being well-represented and that we have institutional knowledge, and they like that they can just call us without worrying about how much it will cost. We are in that situation now where we have to cut the cord on a couple of clients that have outgrown us.

BRIAN KRUMM

I can even argue to the Bar that we are educating these students to understand what they don't know, and that we're going to give them students that can bring in business upon starting work, so I think there is a benefit. You can sell it different ways.

QUESTION

Are business clients who don't pay a fee as flakey as other clients who don't pay a fee, like on a criminal matter? Or in other words, do you just have people that, for example, don't show up for meetings and that get really far behind?

SHELLEY DUNCK

A small percentage of our clients who don't take the services as seriously because they are not paying. We actually had a client cancel a meeting using the excuse that they "forgot they were getting married." I think that is our best one so far.

BRIAN KRUMM

It's interesting. Just like anything, if you give it away for free, either people won't appreciate it or they use it too much. I have one client who, if he's doing business with an attorney, he would call and ask us look them up in Martindale-Hubbell. He wanted our clinic to do his personal research for him, and I had to basically tell him that we would do documents for him and produce things, but that we couldn't be his sounding board for his decision making.

SHELLEY DUNCK

Difficult clients can be great for the students. Once in a while a student will be saddled with a really crazy or mean-spirited client that generate stress. But that is a good legal learning experience too, because not all clients will be the warm, fuzzy, "thank you so much" kind of clients.