

THE COMMONPLACE MEETS THE MARKETPLACE: ACCESSIBLE ANALOGIES FOR TRANSACTIONAL DRAFTING

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Our presentation at Emory Law's Fourth Biennial Conference, Educating the Transactional Lawyer of Tomorrow, was based on an article we co-wrote that has been published in the University of Hawaii Law Review: 36 U. Haw. L. Rev. 403 (2014). The article describes a classroom exercise for a transactional drafting course. Before we get to the exercise itself, we want to explain our thought process in putting together this exercise, about the utility of the exercise, and about how it fits into the larger context of preparing our students to practice in transactional settings.

As we were preparing the class exercise and the article, we began to feel a tension in teaching skills and drafting courses. There is a need to teach drafting skills in a context in which our students will see them as practicing attorneys. For example, in first year civil procedure, students may actually draft a complaint or an interrogatory. In most transactional drafting classes, the students use Tina Stark's book and draft an aircraft purchase agreement. This is valuable and the students need that exposure, and it is critical that they see these documents before they are tasked with creating them in practice.

Our exercise does not do that. Our article details a classroom exercise to get students to focus on contingency planning in the drafting of a contract. It does so by walking students through a non-legal exercise: having the students plan a dinner party and think through the contingencies that might arise and how they might want to deal with those.

So in some sense it seems like we are taking a step backward from the goal of having them be practice-ready – away from practice documents and actual tasks that our students will be doing upon graduation. In reality, though, we think we are pushing the ball forward in terms of getting students comfortable with their role as a lawyer.

This is true for a couple of key reasons.

First, by using a non-legal exercise, we can isolate the skills that we want students to focus on, and we eliminate some of the barriers to learning that skill. We take away the legal concepts that are in play and allow students to practice the thinking and drafting process in an everyday context that is familiar to them (and

not at all as scary as buying an airplane). Adult learning theory research supports this notion of drawing connections between the new concept you are trying to teach and something familiar in the learner's own experience. A non-legal exercise can help us do that, so it serves as a supplement to the actual legal drafting tasks.

Second, although "practice-ready" is a laudable goal for our students and certainly one that both of our law schools subscribe to, it is not always clear what that means. Perhaps in reality the goal is to get our students "practice-prepared" – able to go into a firm or other practice environment and be teachable about how that employer wants its documents drafted.

In fact, to the extent that we have received pushback from attorneys when we talk about teaching drafting skills or about doctrinal courses with a drafting lab component, it is because to some extent, an employer will teach new attorneys the nuts and bolts of document creating.

Therefore, we are comfortable taking time in a transactional drafting course on non-legal things – things that do not involve actually drafting a lease or a purchase agreement that attorneys would create in practice. The exercise really is designed to supplement the actual document drafting that students will do.

The Exercise

Lawyers must be able to anticipate contingencies that may arise in the execution of any particular business deal and plan for those contingencies in their documents. In creating this exercise, we wanted to find a way to get students comfortable adding this kind of value to documents they draft for clients. We want them to start thinking like a lawyer and anticipating real world issues and contingencies on the front end of any given transaction.

The classroom exercise itself starts with the announcement that the class is planning a dinner party for a group of twenty or so friends. Most of class time is spent having the students hammer out the details of the party. Essentially, the set-up is that we are hosting a meal at someone's house, and three of us will be in charge of cooking for the guests.

The article walks through a list of questions we ask in class with the kinds of responses we work to elicit. For example, Steve has offered to host the party at his house. What are your expectations of what the place will be like when we get there? Put another way, have you ever been to someone's house for a social gathering and been unpleasantly surprised? Typical responses include issues about the presence of pets or a general state of uncleanliness.

Many assumptions are less obvious, though. What if Steve is excited about the party and repaints his living room the night before? We use these kinds of questions to illustrate that part of the planning process is being able to articulate assumptions about how the transaction will work and to begin thinking through the how to deal with uncertainties.

Jenny has agreed to cook the main course for the party. What promises do we want from Jenny about her main course? If we are going to go spend money and time doing our part for the shindig, what assurances do we want from her?

We are cooking food for a bunch of soon-to-be lawyers. Any concerns? Maybe issues about allergens, dietary restriction, or safe food handling?

That is the basic set-up of the classroom exercise. Again, the article provides more detail about other issues to explore and questions to ask students to help them think through some contingencies.

The handout attached to the article includes the primary sections of a typical stock purchase agreement in tabular format. Students can fill out this chart in class as they identify various provisions they want in their dinner party contract. We have included a few examples of notes that students might fill in.

In terms of work product, you could have students actually draft a contract for the dinner party. There is a sample student contract in the appendix to our article.

Or you could take the exercise to the next level and have a group of students draft contracts and then have another group respond to that initial draft as if for a client. Critically reading a document that someone else has prepared is just as essential for lawyers as doing the initial drafting. Many new lawyers have not ever red-lined a document or responded to comments from opposing counsel on something they have drafted.

The beauty of the handout and of whatever work product you have students create is that it reinforces the basic substance of transactional drafting. It allows students to give a legal name to the contingencies and rules about the dinner party and to think about where in an actual contract that kind of provision would go.

Benefits of the exercise:

1. It presents a legal thought process in a non-legal context. Planning a dinner party is not scary, It is something that is approachable and familiar to

students, which makes it easier to focus on the contingency planning skill we want to highlight.

Moreover, the dinner party scenario allows us to use a common event in the lives of our students to show them, or rather have them show themselves, that they have the ability to plan for contingencies. There is nothing mystical about many of the contingencies we deal with; they can be anticipated and handled as easily as those issues we do not hesitate to address in our everyday lives.

2. The exercise is helpful in illustrating, substantively, the interrelatedness of various contract provisions. Even Jenny's seemingly straightforward offer to bring food for a dinner party can implicate all of the various parts of a contract.

Initially, the obligation to prepare and bring a certain dish would be addressed in the exchange provision of the contract—that Jenny has agreed to contribute ingredients and cooking services to the event. Students recognizing the dangers of cooking for potential lawyers will want to specify that the handling and preparation of the food is done in a safe manner. Because this notion of safe food handling will likely be used in several places throughout the document, drafters will want to identify a shorthand way of consistently incorporating that concept, which would logically be in the definitions section of the contract. Students will have to be resourceful in developing a workable definition. They may, for example, research the U.S. Department of Agriculture's website for guidelines on safe food handling and agree to abide by those recommended procedures.

The notion of safe food handling touches on representations and warranties with the hosts all acknowledging that they have read and understand the defined procedures (as laid out in the definitions). The concept implicates covenants as well, which would require that hosts abide by the safe food handling procedures at all relevant times between the date of the contract and the dinner party itself.

Compliance with the covenant to handle food in a safe manner would be a closing condition such that a failure by a host to abide by the covenant would possibly excuse the performance of other hosts. Depending on the type and timing, a breach of a covenant might, in some cases, trigger the indemnification or even the termination provisions.

Application to other contexts:

As we have presented the article at teaching conferences, we find the most useful part of a session is hearing what similar ideas others have.

We focused on introducing students to the idea of contingency planning, just because we know that new lawyers are sometimes too rigid in their mindset to effectively plan for contingencies or to incorporate that into their documents. However, there are many different ways to present the same concept as it relates to different kinds of documents.

There are other kinds of “thinking like a lawyer” skills to emphasize as well. Maybe you want to get your students to focus on the sequence of events necessary for a particular document or what’s going to happen down the road with the document they are drafting. For example, when you are forming a corporation, you are drafting documents with an eye to what you know is coming – election of officers or reelection of directors. You can incorporate a non-legal classroom exercise to help students focus on the sequence of events for a particular document they’re drafting.

To do so, first, identify a document that you have students draft and the contingency planning that should be involved. Maybe it is a will, a partnership agreement, a real estate purchase contract, an easement, a promissory note or a mortgage, a patent license, a healthcare power of attorney or advanced directive.

Then try to think of a non-legal scenario in students’ lives that might involve a similar type of contingency – a dinner party, a family wedding, maybe something from a popular television show, an agreement to travel somewhere with a group of people, a shared labor project where we barter and exchange services for yard work and home maintenance.

But spend some time thinking about how you could essentially have students act out that event and talk through the details and contingencies of the situation.

Finally, close the loop for the students by drawing specific parallels between the non-legal situation and the document that students will be drafting.

After you have identified a particular kind of contingency you want your students be able to anticipate, and once you have come up with a non-legal situation that illustrates that thinking process, you can turn it into a classroom exercise with a little bit of planning.

For the dinner party exercise, we started with a standard form contract that we liked, that had the specific parts of the document that we wanted to teach. We used that standard form document to create this handout with definitions and examples of each of the parts of the contract.

We spent some time hashing out the different kinds of contingencies that we could incorporate into a dinner party – food allergies, bad weather, expensive

ingredients, feral hamsters, etc. We plugged each of those details into a spot in the contract and made sure to have at least one or two facts in each of the boxes.

The part that can make a classroom exercise like this work well is the prep work thinking about which questions you need to ask to illicit the information you want. How do you introduce the fact of a food allergy? How can you get them to think about what they are expecting the apartment to look like and whether the host is going to paint his house that week? For us, it almost helped to script out some questions to start the conversation and a few other key questions to ensure that we drew out the relevant contingencies that we wanted to include in our dinner party contract.

Depending on how much class time you want to devote to this, you can make the analogical exercise as long or as short as you need it. Once you get the ball rolling in class, you can easily transition to the document itself and have students identify terms that would go in each section of the contract.