

TEACH THE BASICS OF CONTRACT DRAFTING, CORPORATE GOVERNANCE & TRANSACTIONAL LAW IN ONE SENTENCE

Neil J. Wertlieb

N. Wertlieb:

Okay, I'm going to get started. I'm going to share with you my favorite part of the class that I teach at UCLA School of Law, and I'll get to that in just a minute. There are evaluations spread out around the room. I was told to tell you to fill them out. If you want to save some time, you can go ahead and fill out "excellent" right now and just be done with it, or you could do that after I'm done. I'll leave that up to you.

Perhaps Sue Payne might say this is not the sexiest program title, based on her earlier statements, but at least I don't have a colon in the title. I've got ellipses. Maybe that changes it a little bit. Anyway, you will see that I ask a lot of questions and then attempt to answer them. Sometimes I have my students answer them. Maybe I'll have you answer a couple of them.

Who am I? My name is Neil Wertlieb. I'm a transactional lawyer. I was a partner at a big international law firm, doing all kinds of corporate work for over three decades. I'm now doing expert witness work and spending most of my time doing that. Expert witness work in attorney ethics and attorney misconduct—that's about half of my expert practice. The other half of my expert witness work relates to business transactions, corporate governance, and fiduciary duties.

In addition, I teach at UCLA School of Law, where I've been teaching a transaction skills course for the last 17 years: about half of my career. The class that I teach is called "Life Cycle of a Business." The course is designed to introduce my students to typical corporate transactions throughout the life cycle of a business. The class provides students with the opportunity to gain experience with contract drafting, negotiation, and other analytical skills—to do the work, basically, of a first-year associate in a law firm, doing corporate work or transactional work.

How does the course work? On the first day of class, the students pick a hypothetical business. I want them to be invested in this, not monetarily, but I want them to be involved. I want it to be interesting to them. The very first day of class, they pick a business. Interestingly enough, because typically I teach in the spring, so it's mid-January, and the students are coming off of their winter break, the businesses tend to have something to do with what they've been doing over winter break. So the

businesses they choose are usually ski related, or it's a casino, or one year it was snow tires, which was not the most interesting business.

They pick the business. They give it a name. This last semester, for example, it was self-driving cars, and the company was called "iRide Inc." That business forms the context for experiential exploitation throughout the course of the semester, and the course examines the life cycle of that business, focusing on sample transactions in, basically, the three stages of the life cycle of a business. The first stage is formation and initial financing, which includes choice of entity, early stage equity, and venture capital. The second stage is ongoing operations and how to fund those through debt financings and later stage equity financings. Then, the third stage in the life cycle is an exit or a sale of the business. In my course, I touch a little bit on IPOs and bankruptcy, but the real focus in this third stage is on selling the business that we formed at the beginning of the semester. We sell it or exit the business at the end of the semester.

The exercise that we're going to focus on is a drafting exercise, and I do drafting exercises every week in my class. With the technique that I use, we only draft one sentence. This particular one I'm going to go through is not unusual in that sense. Every week, we do a drafting exercise that's just one sentence. There's a lot that happens in my class. We're covering a lot of ground. I don't want the students to really spend weeks writing a full-blown agreement. Write one sentence and learn the contract drafting skills associated with trying to achieve, in that one sentence, one particular goal. They are writing that one sentence, and then we're going to drop it into a deal-related agreement. I tell the students, "don't worry about what the rest of the agreement says, just think about the context generally, and we're going to prepare that one sentence."

I think having that focus really lets them develop their own contract drafting skills. They're not distracted by boilerplate provisions or different types of things within the same agreement. They're really focused on one aspect of it. I find that drafting one single sentence can be a very powerful learning experience on how to draft, and as you'll see, it provides the context for a lot of other opportunities for learning about what it means to be a transactional lawyer and about some really important concepts.

We do this as a group exercise, and I have the students volunteer to draft language. I'll stand in front of the class and write the language on the chalk board or white board, and then we'll critique it and analyze it, but it's the students' words. I often divide the class into teams or parties, so that one half of the class could be lawyers representing our company, and the other half of the room will be lawyers for a counter party to a contract: an investor, a lender, or whatever it might be. In this particular

exercise, that's on the screen, and we're in the fairly early stage. We're raising money. We've already started the business. We formed the entity. The students, by the way, they're co-founders with me, so we've funded at least the initial formation. We're at the stage where we're going to outside money, and we find an angel investor who's willing to put a million dollars into our company, but the angel investor insists on, as a requirement, having a board seat. This is a precondition, basically, to the deal. She's not going to put in the million dollars unless she gets the board seat, and the company is willing to do that in order to get the money.

At this point in time in the course, we've already drafted different types of contract provisions, and we do a little bit of an exploration about the following: "How do you effectuate this? What is this type of contract provision? Is this a covenant? Is this a representation? Is it a closing condition?" It gives us the context to talk about, for example, "What is a deal? What's the difference between signing and closing? And what is the difference between those three elements—covenant, representation, closing condition—of a contract? How do you effectuate the investor's requirement?"

We can explore that. Today, I don't think we need to get into the detail of how we arrive at it being a covenant, but it's a prospective obligation on the part of the company to put the investor on the board of directors, so that she gets the benefit of her bargain. That's why she's willing to put in the million dollars. The test is to write the one sentence that's going to be dropped into the appropriate contract to effectuate this goal—again, focusing on this one sentence without worrying about the rest of the agreement. That's the exercise.

Before we put pen to paper, or for the millennials or Gen Xers in the classroom, before we start clicking away on our keyboards rather than pen to paper, there are certain preliminaries that transactional attorneys must address. The first one to explore here is, "why?" This is what I say to my class: "Assume you are the lawyer for the investor. The investor says, 'I want to be on the board.' Your obligation, your duty as the transactional lawyer is to, at least explore, perhaps even in your own mind, why the investor wants that." Here, it's an interesting question because they should know, and this exercise provides the context to explain that being on the board of directors entails obligations and fiduciary duties. Does the investor really want to have fiduciary duty obligations and potential liability? Does the investor want a bullseye on her back, basically, by being a board member?

The question that the students/lawyers should ask their client—and for this exercise, they are the investor’s counsel, and I am the client making the investment—I turn to my lawyers, and I ask them, “Is there anything you want to know?” The question they should pose to me as the investor should be, “Why do you want to be on the board? Why do you want to subject yourself to fiduciary duty obligations? What is it you’re really after?” [Asking the audience:] What might I be after, as the investor? Why do I want to sit on the board? What’s the benefit of being a director?

Speaker 2: Control.

N. Wertlieb: Control? Let me share with you, in this context, we have a board that’s five members, and I as the investor would only be one out of five. I’m always going to be, if I have definite opinions, I’m only one out of five votes, so I’m not going to have control. If I had a majority of the board, it would be a different story.

Speaker 3: Information.

N. Wertlieb: Information. I want to sit in on board meetings and hear what they’re talking about. I want to receive whatever board members receive. What else might I want?

Speaker 4: I’d want to be on audit and compensation.

N. Wertlieb: You want to be on different committees, so you get different information?

Speaker 4: And perhaps have control in the smaller group.

N. Wertlieb: Maybe a smaller group. Let’s assume, just for the sake of exploration, that I’m a minority vote in every situation. What else might I want?

Speaker 5: Input.

N. Wertlieb: Input. You’d want to participate in board meetings and talk to the other directors as they’re making a decision. All very important things for our client, the investor. The question they should ask the investor is, “Let’s explore alternatives.” Have you heard about something called ‘board observer rights?’ Why not? Let’s assume that you could get, and I think is generally true from a contractual perspective, as a board observer, you can get access to all the information. You can sit in on

those board meetings. You can have a say. You just don't vote. That's the only thing you don't get with contractual board observer rights.

A key part of this exercise is the investor's lawyers asking the investor, "Why do you want this? There's a downside to it. Why do you want it? What's the upside? Have you thought this through? Let's explore." This provides us with the learning opportunity to explore the role of counsel in that context. However, let's assume the end result is the investor saying, "Yeah, I don't care about the liability exposure. I want to sit on the board anyway. Maybe I want it on my resume. Maybe there's independent value to me in being a board member of this company. None of your business, but I know I want it, so you as counsel, just go ahead and make it happen."

Okay, so we've satisfied our initial obligation, the preliminary obligation of exploring, "Why does the client want it?" Sometimes it's really obvious and you don't even have to have the discussion, but here, there's a downside to what the client wants, so the duty of a transactional lawyer is to explore it. By the way, this also provides a context, not just for exploring the role of counsel, but to talk about negotiation, right? Because you could have sort of the same conversation with the company, where the company, if they're a little resistant to having the investor sit on the board for whatever reason, they could negotiate and say, "Why do you want to sit on our board?" In negotiations, it's important to ask questions, and it's important to listen to the answers and learn what's truly motivating your counter party.

Instead of just butting heads over a particular item, "No, you can't sit on our board." "But I really want it. If you don't give it to me, you're not going to get the million." It's an opportunity to explore a negotiation, and to say, "Why do you want to be on the board? Maybe there's another way we can give you all the benefits of sitting on the board that you're after. You just don't have the vote." Maybe as instructor this presents another context to explore, in the same single sentence, how we negotiate. A negotiation technique is really exploring with your counter party what they want and why. In my course, I touch on more academic concepts of negotiation—BATNA, ZOPA, reservation value—and quickly move past those and focus on more practical things. I think good listening skills is one of the most important things for a transactional attorney in this negotiation context.

That's the first set of preliminaries. The next set, which in my class we always do for a drafting exercise, is "where does this one sentence go, what contract, and who are the parties?" Again, we're not drafting the whole contract. We focus in on just this one piece. And let's just assume, so that we can move forward, let's assume that there's an investment agreement, pursuant to which the investor is committing to invest a million dollars in the company. And in return, the company is agreeing to issue stock for that million dollars, and this sentence gets inserted into that investment agreement.

It's also the place to talk about what type of provision it is, and we've settled on a covenant because it's prospective, and in this context, we could have talked about the difference between signing and closing, which gives us the opportunity to talk about the timeline of a transaction, and how those pieces fit together, and maybe the role of a letter of intent or a term sheet, that builds to a signing, and then to a closing. Again, this exercise could be a context in which we could explore other aspects of what it means to be a transactional attorney.

Now that we've dealt with the preliminaries, it's finally time to start clicking away on our keyboards, and we start the sentence, "The company shall . . ." I usually try to make this beginning part easy for the students. Once we've perfected a form of a covenant, I don't want them to waste time redoing what they've already done. I might start the exercise with this on the white board. We've identified who the obligor is. At some point in the course we've already talked about the importance of the word "shall" in a covenant and that there's no such thing as a contractual right. You can't just give somebody a right without having a person obligated to convey that right. In my class, by the time we get to this exercise, we've talked through that, and the benefit of writing it this way is that it's very clear who's obligated, and "shall" implies an obligation on the part of someone to do something.

Speaker 6: You've implied that it's a corporation. Is that what you mean? The type of entity, it's a corporation?

N. Wertlieb: Yes. Let's assume it's a corporation. It's issuing stock in exchange for the million dollars. Yes.

Speaker 7: Similarly, you may not want to answer this, but you said how many members are on the board, but you haven't said whether there's a current vacancy.

N. Wertlieb: Right, and that may be relevant. I'll come back to that a little later, or I'll give you a chance to offer that up as an alternative. That's a great question. Let's assume there is a vacancy for this investor to

come sit or there's another way for the investor to get on the board.

This is the beginning, now, of actually drafting the one sentence. I started it off, and then I really put it on the students: "Where do you go next? How do you word this? How do you deal with clarity, removing ambiguity, really working on and honing contract drafting skills, so you come up with the language that follows the set of ellipses here?"

Let's assume that after a lot of back and forth, and input from the students, we arrive at something that's nice and clean. "The company shall appoint investor to its board of directors." It's brief. It's not vague. There's no ambiguity. There's no passive voice. It's precise, and it's clear.

As we go through this, I'll skip over the more interactive parts where the students play the role and give me the wording. I think this audience is well-versed enough in this, so I don't need to go through that, so we can get to the more meaningful pieces of the exercise. Once this is on the white board, the students have some confidence. They can draft this. It works. However, this is where the fun begins, for me at least. Hopefully for the students as well.

Once we have the basic covenant on the board, I come over to the company side of the room, where now I'm in the role of CEO, and I whisper to the students acting as company counsel so that, "arguably," the investor's counsel can't hear me: "This is the deal, right? We've made this commitment, but what if the investor puts in the million dollars, we put her on the board, and the next day we just boot her off the board? Let's do that, right? Let's just sign this. I'm not really committing to anything. The company's not committing to anything. Let's just do it. It doesn't say we can't remove her."

Then, I wander over to the investor's side of the room, now in the role of the investor, and say, "I might have overheard something going on over there. I don't think this quite works. Let's try to fix this." Now we're thinking about how to really make it more precise, so the company can't remove the investor from the board or replace the investor from the board. Then, I go back to the investor's side of the room, and I'll whisper, "As this provision is written, I don't even have to close on the investment, right? I just have to sign this contract, and they're obligated to put me on the board. This should start immediately. If there's a closing condition that fails, or something happens such that I'm not obligated to invest, I still get to get on the board, right? That works, right?"

“Company side?” Obviously, this is a problem. We need to always address timing in our contract provisions. Always address timing, so we fix that by inserting “upon the closing.” “Wait a second,” I say as CEO, “that’s on the front end. What about on the back end?”

Speaker 8: May I raise a question regarding that drafting?

N. Wertlieb: Yes.

Speaker 8: You’ve got a clause separated by commas. Does “upon the closing” modify “shall not remove or replace an investor?”

N. Wertlieb: That’s a point we might want to clarify. There are other ways to do this, maybe better ways to do it. I’m not going to say, “Professor Hilton, you’re absolutely wrong and this is the perfect way to draft this,” but this is really for exploration.

Speaker 8: [inaudible 00:21:42].

N. Wertlieb: You just had to do that, didn’t you?

Speaker 9: Steve, put in a restraining order.

N. Wertlieb: Yes.

Speaker 10: I have a different question. It’s not usually the company that appoints-

N. Wertlieb: Let’s come back to that.

Here, what I’m whispering to the company, in my CEO role, is, “Wait a second. Okay, she’s got to put in the million dollars before she can sit on the board, but if she sells the shares, and she’s no longer invested in this company, don’t we want to be able to remove her?” We’ve got to think about timing, not just on the front end but on the back end. Let’s fix that, and now it’s only for as long as the investor owns, say, 10% of the company, and because of that fix, it also addresses the front end, so we don’t need the language at the beginning. With this new addition, we’ve covered the front end timing and the back end timing.

I think we’re good now, right? Okay, so again, as CEO to the company side of the room: “What if the investor engages in bad behavior? Shouldn’t we have the right to kick her off? And you guys on the other side of the room can hear me over there. I’m fine with that. It’s fair and reasonable, right?” Let’s consider exceptions, and this is a reasonable exception. Maybe Professor Hilton could word it better, but one exception is “if the investor is engaging in inappropriate behavior, however defined, we the company have the right to remove her from the board.” Here, this

is not only an opportunity to talk about exceptions in contract drafting, but also, maybe you've done it already, to talk about definitions. There is an article in the contract that may have a whole set of definitions, how we use them, why we use them, what might this definition "Cause" be? So it provides an opportunity to explore other aspects of the contract as well.

All right, so, again as CEO: "So, I've been doing some Google research. I know that there is something called board committees. What do you think about this idea? She puts in her million dollars; we put her on the board. We've fully complied with our obligations here. What if we then set up an executive committee of the board? The executive committee consists of all the directors except for her, and we delegate to the executive committee the authority to make all decisions on behalf of the board. We've honored our commitment. She's sitting on the board. She's entitled to all the information that the board members receive in their capacity as members of the board, so we've honored our obligation, but she's sitting on a board that's not doing anything interesting because all the interesting stuff is happening at the executive committee level. Doesn't that work?"

Speaker 11: Same problem with just increasing the size of the board.

N. Wertlieb: How do you mean?

Speaker 11: Well, at the moment, you said it has five members. Well, we'll make it 25 members. She'll be one of 25.

N. Wertlieb: We could do that too, but what if we want to talk about her out of her presence? This gives us the ability to set up an executive committee and defeats her purpose while still giving her exactly what she asked for, right? Okay, now I'm the investor: "What the hell? You guys are my lawyers. What am I paying you for? I'm putting in a million dollars. I expect to have a meaningful role on the board." This does not work. We've got to fix it.

All right, so here's the fix: give the investor the right to sit on board committees as well. We're now focused on loopholes. What's the problem with the construction of what we've done? Now, as CEO, "All right, they caught us on this one. I've got another idea. What if we set up a subsidiary, and the company now is just a holding company, and the subsidiary is the

operating company, and it does all the interesting stuff. The board up at the parent company isn't terribly interesting anymore. We'll do all the interesting stuff down at the subsidiary level where she has no right to sit, right?"

[As investor:] "I'm going to have to fire you guys. This is horrible. Now they can set up a subsidiary?" All right, so we've got to fix another loophole and not only for subsidiary boards but also for committees of those boards at the subsidiary level. All right, so by this point, the students are fairly exhausted. This actually takes the better part of an hour to get to this stage. Then the question becomes: "can we put a period at the end of this? Are we done? Does this really do it? Have we achieved our goal?" I'll ask the company side of the room; I'll ask the investor's side of the room. They know I'm setting them up, of course, but they can't think of anything to add. Maybe someone will come up with something like D & O insurance, or indemnification rights, or board fees, or something, but the guts of the board seat are here, and I get the students to say, "I think we're done."

Then, what happened? This comes back to your point [pointing to Speaker 10]. This sentence gets inserted into the contract. The contract gets finalized and signed. We get to the closing. The investor invests the million dollars. She gets stock in the company, and she e-mails the CEO to say, "When's the first board meeting? I'm really excited about getting started." He takes a couple days to reply, and his reply is, "You know, we've got a little problem here. The lawyers are telling me that we at the company don't have the right to put you on our board. It's the stockholders that have the exclusive right to elect you to the board. There's nothing I can do. Sorry about that. I can call the stockholders and encourage them to vote for you, but I can't give you what you thought you negotiated for. Your lawyers really screwed up here."

Then the students are very frustrated. Did we just waste a full hour negotiating this provision, putting it in the agreement, just to find out impossibility of performance? It just doesn't work? What happened? This is where we start to reflect on lessons learned: Check your work. Think about this: remember the preliminaries, and I glossed over it, and I did it intentionally just for the fun of it, but one of the preliminaries was what contract, and who are the obligated parties? We knew we had an investment agreement between the investor and the company, and we just assumed our one sentence would go in there and that the company would make this commitment, but we glossed over it too quickly, and that was a mistake on the part of the investor's side of the room. You've got to think about it: can the party that's committing to honor something actually make it happen? Is it possible? Yes?

- Speaker 12:** You've taught this several times, right?
- N. Wertlieb:** Every year.
- Speaker 12:** To 3Ls?
- N. Wertlieb:** It's about half 2Ls. Actually, a third 2Ls, a third 3Ls, and a third LLMS. That's the typical makeup.
- Speaker 12:** I can see my 1Ls not seeing this, but I'd be surprised, frankly, if 2Ls and 3Ls, who've had business associations or entity courses.
- N. Wertlieb:** In over a decade of basically doing the same exercise, the point that you raised, which is the correct point, has only come up once. One time. I kind of-
- Speaker 12:** That's really distressing.
- N. Wertlieb:** It's distressing, but I do very quickly gloss over that slide where I wrote, "The company shall . . ." I then encourage them to move on. I intentionally set them up for failure on that, but that's part of the fun of the exercise.
- Speaker 13:** Yes, but on this one, I find it disheartening, maybe that's the best way to put it, to think that people wouldn't, first of all, ask the jurisdiction, look at the law, and then ask what the charter and bylaw conditions were because vacancies can often be filled by the board, in which case the company could agree to take all action to ask the board of directors, except the board has to [inaudible 00:30:40] use the charter and the bylaws.
- N. Wertlieb:** I'll tell you this, they do-
- Speaker 13:** It's scary to think they can raise a lot of those points, you know what I mean?
- N. Wertlieb:** They don't make this mistake a second time.
- Speaker 13:** Oh, that's good to hear.
- N. Wertlieb:** After an hour of embarrassing them now with this, they're very confused, and they're upset that they

didn't get it. This provides an opportunity for me to explore with them not only what they did wrong but also what were alternatives? Like your point about a vacancy. The board, which would be obligated if the company's obligated. The board would fill a vacancy with the investor. There are other ways to get to this, basically the same result or something comparable, that should have been considered. Any ideas?

Speaker 14: To me, the vacancy is worse for the first [inaudible 00:31:34].

N. Wertlieb: Right.

Speaker 14: I mean, if it's conceivable, and you really need either shareholder agreement to do it, or you'd have to get very elaborate. You have to have a special class of stock that has a right to elect a director. This is not easy.

N. Wertlieb: It's not easy, but actually in my course right after this exercise, we then explore an investment in series A convertible preferred stock, which has a dedicated board seat associated with it. There are ways around it. Another thing that's come up as I've explored this with my students is to forget about a covenant. Just give the investor a remedy so parties are incentivized to put her on the board. The covenant would not be to put her on the board. The covenant would instead be, if we fail to put you on the board, you have a remedy. You can have your shares redeemed, maybe at a premium, or some other right being conveyed to the investor if she doesn't get what she thought she was getting without committing to give it to her. That's a possibility too. Yes?

Speaker 15: Do the students bring up the fact that the company has a business incentive to get that right, in the contract, to begin with? This is an investor.

N. Wertlieb: Right.

Speaker 15: And it's an angel investor. You've got an incentive to bring other people into the company, and if they're messing people around over mistakes that

could be solved by looking at the [crosstalk 00:33:12] bring that up as a practical matter, if basically not an ethical, necessarily, but-

N. Wertlieb: I'll touch on that in one of the remaining slides. They don't typically bring that up, but we do explore that side of it. We explore the value of having an angel investor sitting on your board. This may be something that the company wants more than the investor wants, right? So we do talk about that. Anyway, so there are alternatives, and in class we can explore some of those alternatives.

What else did we learn from this single sentence? We learned it's our responsibility as lawyers to explore what the client's goals are. Make sure they want what they say they want because they don't always know. They don't have the training that transactional lawyers have. They may not quite see the consequences that flow from the context in which that provision might come up. We've also talked about basic contract drafting techniques, including which document, and who are the obligated parties (which we missed), and other aspects of how to do good drafting. It also provided an opportunity to talk about definitions, to talk about the difference between representations, covenants, and conditions, to talk about the difference between a signing and a closing, and maybe to talk about the full timeline for a transaction.

Depending upon how you use an exercise like this, we may spend some time talking about negotiating techniques and strategies, and alternative structures for investments like a series A convertible preferred stock investment. By the way, this picture is of my kids. Yes?

Speaker 16: You always keep it to one sentence?

N. Wertlieb: There are times when it may work better if it's not a single sentence. That is something we talk about too. I really want to focus them on one sentence to keep it as simple as possible, but like this example, it can get complicated.

Speaker 16: [inaudible 00:35:44].

N. Wertlieb: A few other lessons that you could use to explore, in the context of the single sentence, are fiduciary duties and board observer rights. Corporate

governance. What does it mean to be on the board? How are directors elected? How are they removed? What's the committee structure? Talking about the overall corporate structure, with subsidiaries and holding companies. At this point, I think what's nice is the students finally get it. The light bulb goes off, and they look at this and they think, "Okay, this contract drafting stuff is hard, but I think I'm starting to learn how to do it." Looking around the classroom at that point in time, it's kind of gratifying because I've tortured them, basically, to get to this point, and now they're thinking, "All right, okay. I think I can maybe get there. It's tricky, but I can get there."

Just to cover another area of lessons learned, there may be an opportunity to talk about ethics. I do try to find every opportunity I can in my transactions class to talk about attorney ethics and the rules of professional conduct. Professionally, that's part of what I do as an expert witness, and I try to bring that into my class as well. This could be a context where you talk about, for example, competence, right? [To the investor side of the room:] "Because guys, I'm sorry, you really screwed up." Not you, but that's not the point. So competence is an issue, communication with client, exploring what they want and why, and how to best implement it.

We can also discuss the rules related to an organization as a client. The organization here is on the company side, but what if the investor is a venture capital fund, and the woman who's leading the investment, who's saying, "I want to be on the board," wants to do it for her own personal reasons? She wants to put it on her resume. You have an obligation as a transactional attorney to think about if she's sued for breach of fiduciary duties, is that a liability to the venture fund? To the venture capital firm? Is she acting as a representative in saying, "I want a board seat," when you've presented an alternative that appears to satisfy her legitimate requirements? It's different if the investor is just a person, but if she's a representative of an entity, and you're a counsel to the entity, your obligation might be to go to her boss and say, "You okay with her sitting on the board? Because that's the direction we're going on this deal." We could talk about that ethical issue as well.

Speaker 17: You could have the same issues on the other side too.

N. Wertlieb: On the company side, yeah.

Speaker 17: Because what the shareholders want and what the company wants might not be the same.

N. Wertlieb: Right. I mean, there are ethics all around. Those are just issues related to the rules of professional conduct. I think one of the thorniest questions, and frankly one that is very difficult to come up with a definitive right answer, is the following, and I cover this because I want my students to think about it: what do you do if you're the lawyer for the company and you realize that the investor's side has screwed up, and they haven't covered committees, or they haven't covered subsidiaries, and they're not going to get the benefit of the bargain that the investor's insisted-

Speaker 18: Or they don't have the right party.

N. Wertlieb: Or they have the wrong party. That's a little dicey because you're going down this path where you're committing your client to something you know they can't do. Let's make it a little cleaner. You know that the wording itself can be easily defeated. You have a client who's saying, "I intend to defeat it." What's your obligation at that point?

Ignoring the impossibility of performance issue—you have a perfectly well drafted covenant. It does exactly what the investor wants or says she wants. It does exactly what the investor's counsel wrote. Maybe they wrote the provision, and you just let them have what they want, knowing that it doesn't work, that it can be avoided. What do you do? I'm not suggesting there's an answer, but I want my students to think about their professional obligation. Yes?

Speaker 19: This is somewhat a self-contained problem, in that if you spend enough time trying to draft it, there seems to be a solution. I'm wondering if your students ever draw this conclusion: it seems like it's impossible in negotiating with another party to anticipate every possible outcome, every possible trick they might play, every possible contingency in the real world, and they're . . . so my question is, do they ever get to that point where they see that

it might be impossible to draft against every contingency? What is their reaction to that, and what is your reaction to it?

N. Wertlieb: Do they just give up and say, “We can’t be held to that higher standard?”

Speaker 19: Do you ever say to them, “Once you’ve run the meter for so much time, you’ve just got to take your chances and hope that that particular clause never winds up being the subject of litigation?” I’m curious. Do they ever see that? Do they ever get to that point?

N. Wertlieb: Sometimes they do. I don’t want to take it so far that they get so frustrated they give up, and that the task is impossible to do, but I think the goal is to make them realize it’s not really simple, and you’ve got to be very thoughtful. If you’ve come up with a provision, especially if it’s an important thing, think about it from the other side. Think about, “Okay, if they want to avoid giving you the benefit you just negotiated for, is there an easy way around it?”

I think transactional lawyers need to do that, and I think the students need to learn that they’re obligated to think in that way. That’s really what it means to be an attorney. I think that’s an important lesson for them.

Anyway, this is how you teach the basics of contract drafting, corporate governance, transactional law, and so much more, in one single sentence!