Transactional Skills for Tomorrow

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PROFESSOR ECKART: We'll get started. I'm Adam Eckart. I teach at Suffolk University Law School in Boston. And among other things, I teach a transactional skills or contract drafting course. I want to thank Kelli, Katherine and Sue and the entire Emory team. Today, I wanted to talk about the broadening of transactional skills courses and curriculum. For a long time, I've viewed a contract drafting course or a transactional skills course as something focused on contract drafting. And traditionally, the textbooks and materials many of us have used for skills courses have been focused on contract drafting. But recently, in teaching the course, I've tried to deliberately increase the scope of the class.

The main focus of the class remains contract drafting and some of those bread-and-butter skills. But I think a transactional lawyer has to have a lot of other skills beyond contract drafting. And what I've tried to do is incorporate some of those skills into my course. So, what I want to think about today are transactional skills for tomorrow. I want to think not only about what the current transactional lawyer needs to do or what skills they need to be prepared for, but also what a lawyer of tomorrow needs to be doing and what they're going to be called upon to do in practice. Some of these skills are new, but some of them are things we have done in practice for a long time. Today, I am going to lay out five skills that I want to teach students, and that I think we should be increasingly teaching our students in our contract drafting and transactional skills curriculum.

Let's jump in. To preface this list, I want to note that I still think contract drafting is an essential skill and it is still the center of my course. I don't want this presentation to devalue that skill. Instead, I want to think about other skills that are as important as contract drafting. One such skill is negotiation. I haven't incorporated this into my presentation today, because I suspect many people are already teaching it, but I think negotiation is emblematic of the other skills we can be teaching in our transactional classes. Without further ado, the five skills I want to talk about today are:

1. Artificial intelligence;
2. Transactional research and due diligence;

3. Narrative and storytelling;
4. Providing regulatory advice; and
5. Oral advocacy skills.

I'll talk about each one of these in some detail and provide some context for each one. Then I'll share how I've integrated these topics into my class. My hope for today is that I leave those in the audience with a way to integrate at least one of these into your course. I welcome people to use any of my assignments on these topics, or to at least use them as a point of reference if you are interested in incorporating them into class.

Again, the first of these five is artificial intelligence ("AI"), which is one of the biggest ones we will talk about today. We will discuss ways in which we can embrace this technology and teach students to use it ethically and responsibly. Second, we want to talk about how to ethically conduct transactional research and due diligence. Third, we will talk about how incorporating aspects of narrative and storytelling into our bread-and-butter contract drafting can really make a difference. Fourth, we will discuss regulatory due diligence. I am not asking students to become experts in a variety of regulatory practices. Instead, I am trying to teach students how lawyers must be thinking about what regulatory practices are implicated by our deals or work that we are doing with our clients. Fifth and finally, we will talk about oral advocacy.

Let's talk about AI first, because I think it's top of mind for a lot of people and is kind of the biggest one in the room. I introduced AI in a variety of small, different ways into my class. I don't think it needs to be a huge portion of the course, but I do think it is an important skill. I think students will be expected to know how to work with generative AI in the future. To give students an introduction, I have used four different tools, and I'll talk about each of those. But first, I want to talk about my philosophy for using generative AI. I want to embrace the use of generative AI, rather than telling students that they're not allowed to use it. Because increasingly they are going to be having discussions about using these tools and five to ten years from now when these students are out practicing, they are going to be using some of these tools. I explain to students that five to ten years from now, the tools we are currently using might be outdated or no longer existent. Accordingly,

I try to introduce students to the concepts of how we use specific tools, which they can also apply to thinking about the new tools that are likely to be around five to ten years from now. I want the students to see conceptually how we can integrate new tools into our practice, and what we want to be on the lookout for when we are doing so.

As to the specific tools I train the students on, the first is Kaleidoscope,[1] which is a document comparison app. It is similar to other types of document comparison tools, but you can compare provisions against each other. You can compare full merger agreements against each other, or you can compare different versions of an agreement against each other. This is a quick and easy tool that allows students to gain familiarity with some technology in this space.

The second tool is Contracting Standards,[2] which is a document generation and comparison tool. Its comparison tool functions a little bit differently, and you can grab and view different provisions as you're generating the document. Contracting Standards has a lot of stock provisions, and you can also feed it as if you were creating your own library. However, the provisions are pretty segmented out. For instance, when it comes to identifying risks, it identifies the same risks for the buy-side and the sell-side. But if I am on the buy-side, I ask for something a little bit different than if I was on the sell-side. I think that's where the learning process comes in here, facilitated by this platform. You can also use the tool to compare against internal and external libraries and against what's standard precedent in the industry. For example, if you worked at a big firm and you were doing a lot of deals in a certain space, you could tell the tool, "Hey, on the last deal that we had for this client, or a client in a similar space what was the risk provision?" Then you can also ask it to compare with external libraries, like publicly filed agreements, and agreements available through Edgar. Then you can see how your provision matches up against some of those other agreements. It's a cool platform that I like to show students.

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[1]   *Spot the differences, merge in seconds*, KALEIDOSCOPE, https://kaleidoscope.app/ [https://perma.cc/ZKX4-MWQJ].

[2]   *Contracting Standards*, WORLD COMMERCE & CONTRACTING, https://www.worldcc.com/Resources/Tools/Contracting-Standards [https://perma.cc/G6HU-BYXF].

Third, I like to show students Donna AI,[3] which is a word plug-in designed for transactional lawyers. It aims at contract revision. You can put your contract in Donna, and run it through your agreement, and Donna will identify areas in which you could add revisions to your contract. It will identify undefined terms, and duplicative provisions, missing numbers, and overlapping provisions. It can identify potentially ambiguous language. It doesn't fix any of these issues but it's helpful for identifying places where you might not be saying what you mean. And for a junior lawyer, it is really helpful for them to see different perspectives.

Fourth, and the biggest one these days, is ChatGPT.[4] Of course, it's not lawyer or transactional lawyer specific, but it can be a tool for a variety of different content generation goals. I think that in terms of thinking about content generation, it is no different than the other tools that I discussed. One exercise I like to do with the students, is to use ChatGPT to help us define a term in a contract. It is a simple drafting problem. We talk about whether what Chat GPT drafted is something we actually want in our contract. We also ask ChatGPT to create one provision that is buyer friendly and one that is seller friendly and compare the two. When we look at the differences, they are not significant, which sparks a good discussion with the students about ways in which you could use generative AI for contract drafting purposes. By the end, students get the important concept, which is that they cannot rely on tools like ChatGPT to do it all. They can use these tools to develop or generate input, but as the transactional lawyer on the deal who is working on this matter, they need to think critically about whether that input makes sense in the context of this deal. Really, this is the same process as if I am taking language from previous deals or other transactional precedent. Students loved this assignment and exercise. We did in class, so it didn't take up a significant amount of time, but I think was a great way to bring it in, and the students really appreciated that we were talking about ChatGPT in class.

Our second topic is transactional research and due diligence. I'm often struck by our 1L Legal Writing and Research Classes, which I teach,

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[3] *Meet Donna AI*, DONNA AI, https://www.withdonna.co/ [https://perma.cc/N7H7-AHE3].
[4] *ChatGPT 3.5*, CHATGPT, https://chatgpt.com/ (last visited May 4, 2024).

and how oftentimes we don't mention how to research information for transactional matters. We teach students how to research cases and statutes on Lexis and Westlaw. But those are sources that I never used to crack when introduced to transactional research and due diligence. I want to think about how we can prepare our transactional students to conduct research as it relates to business entities and other legal aspects of due diligence. Because, at least in my experience in big firms, a lot of junior lawyers spend a lot of their time on due diligence. To model this, I described to my students some publicly available information that they can gather about three different companies. Of course, I show them Edgar, and how we can gather information on publicly traded companies. I show them how the Federal Trade Commission's website can be used to view and reporting requirements in the antitrust world, which is my former practice. Of course, there's lots of other similar sites that are similar to the FTC's website in this respect. And there's tons of other information that could be great transactional research resources as well.

As a sample assignment, I asked students to identify a publicly traded company of their choice—any publicly traded company. I had them go on Edgar to review publicly available information. Then, I had them draft a short due diligence summary about that company, of no more than four pages. I want them to be familiar with business information and the kind of company information they can access. And the students really liked that they could choose the company that they wanted and it helped them get familiar with business information, particularly for students who don't have a business background. It helped them get familiar with identifying pertinent information and identifying publicly available sources.

Moving on to our third piece—narrative and storytelling. Now this does kind of wade back into the realm of contract drafting. I recognize that I said I wasn't going to talk about contract drafting, because it's the bread-and-butter of the course. But I think I do want to make this this one distinction, because I think that there is one area to contract drafting that we do need to incorporate for transactional lawyers. In my opinion, not part of that bread-and-butter of what we do in transactional drafting, at least not yet. And that's teaching students how to use narrative and storytelling in contracts. I feel it doesn't sit within that typical contract draft, and within the

materials that many of use. I'm sure many of you are already familiar, but our colleagues Susan Chesler and Karen Sneddon have written a lot about storytelling.[5]

Storytelling, making things simple, is helpful for two reasons. One, in order to facilitate the performance between the transactive parties. Two, to encourage third-party decision makers, such as an arbitrator or judge, to interpret the agreement as was originally intended. I introduced these concepts to my students early on, and we talked about the different concepts of how we can use narrative and storytelling in our transactional documents. For instance, in our recitals we can talk about who the parties are, what their goals are, and what they want to get out of the agreement. I'm sure that you could draft an assignment focusing on this one topic. Instead, I encourage students to use narrative and storytelling in all of their agreements throughout the semester. Instead of having one assignment on it, I introduced this topic early on, and then ask them to use these techniques in all of their assignments as they draft throughout semester. I tell students that as they're working on their recitals, they need to think about how they can use narrative and storytelling to describe who the parties are and what they want to achieve in the agreement and so forth.

As a sample assignment, I have the students work on an employment agreement with a hospital as the employer. The students tried to think about how they could employ narrative and storytelling when they're drafting the agreement's recitals. They talk about who the hospital is, which you see in a typical recital section. But then they're also talking about what the hospital wants to do. The hospital tries to act with integrity, honesty, and respect. The students discuss what the hospital's goals are, and how it want to achieve these goals, and what the mission of the hospital is, and what the hospital wants to do in the community. We talk about how the hospital wants to collaborate with doctors and seeks doctors that desire to serve community. Then I'm talking about the fostering of a collaborative relationship between the hospital and their doctors. In many respects, these are the kinds of principles students need to be thinking about before drafting an agreement.

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[5] *See, e.g.*, Susan M. Chesler and Karen J. Sneddon, *The Power of a Good Story: How Narrative Techniques Can Make Transactional Documents More Persuasive*, 22 NEV. L.J. 649 (2022).

They need to be backed into any assignment. They always need to be thinking about who the parties are and what the parties want from an agreement. I think with some revision to some of our traditional assignments, we can think about how we want to incorporate or encourage students to incorporate narrative and storytelling in their agreements. It's funny, the students really liked this. I expected some pushback from students wondering why we were doing this. But I think it made students think creatively about this process. It also shows them that, while some may consider a contract drafter or transactional lawyer a scribe to document the deal, there may be other goals. I think it opened some of the students' eyes about other potential goals and what information they want to have when they are drafting these types of documents.

The fourth topic I want to talk about is flagging the need for regulatory advice. I want to at least introduce my students to the idea of regulatory practice. I don't expect them to become tax experts, or antitrust experts. But oftentimes, at least in my experience, the quarterbacks of these big firm deals need to know a little bit about each of these areas so that they can ensure that any of these regulatory pieces that the deal may have stay on track and stays moving forward. The students need to know enough to at least have the ability to flag where there may be regulatory risk or a regulatory process that they need to go through. In this sense, I share a lot about my former antitrust practice and how deals were either derailed or greenlit by regulators. One of the last deals that I worked on in practice was a potential merger between two sports betting websites and the agencies ended up blocking the deal. Our argument was that that there were other competitors and that there are some synergies here, but that was not effective with the agencies. We talked about how a regulator in that sense could stop a deal that otherwise was ready to be done. The parties, of course, had agreed on how they were going to combine these two complicated and large organizations. But the regulators were able to stop that deal. We also then look at a couple of other deals that were either allowed to go through with conditions or not allowed to go through altogether. And we look at a couple of other mergers and discuss how regulators can have a big impact on these complex deals. I remain at a high level to describe these for students.

I also discuss with students the need to consider certain tax functions of different transactional issues, and how they need to be thinking of and providing advice on that aspect. I give the students a fun assignment that asks them whether an acapella group can adopt the cost of their old timey neon suits they wear for their performance. I give students tax opinions, which say that business suits, like a lawyer's suit, are not tax deductible, but costumes for actors in movies are deductible. Then I tell my students to create a two-minute video explaining the pertinent regulations to the members of the Acapella Union and the Union President at their annual meeting. Now I am not a tax lawyer or tax expert, but I want students to understand what we can do with regulations, and how we can help provide some interpretation of regulations by agencies to clients. This topic is a bit of a taste test on this regulatory piece of practicing transactional law. Again, not trying to get the students to become experts in antitrust merger regulations or tax opinions, but instead trying to get them thinking about whether there's a regulation somewhere that might be implicated here, and whether it's something that they need to run down as part of the deal. Students really liked these assignments, especially the visual silliness of the neon suits and being able to think about how to distill advice into a 90 second sound bite.

My fifth and final topic is oral advocacy. I call this oral advocacy in the boardroom, as opposed to oral advocacy in the courtroom. Oftentimes I hear first year students, and even some 3L transactional students say that they are going to be transactional lawyers and so they don't need to practice their oral advocacy. And of course, we know that is not true. Why do they think that? I think part of it is based on popular culture, and the way in which we portray lawyers on TV. You always see lawyers in a courtroom litigating a legal issue, but it's hard to have a TV show about drafting contracts. But in practice, transactional lawyers have to be oral advocates all the time. My classic example for students is that when your client calls you and asks you something, you need to be able to provide that advice over the phone, so you have to be good oral communicators. I tell them they will need to represent clients in negotiations and from time to time may need to make presentations to regulators, all of which requires them to be good oral advocates. I explain

to them that they might need to preset in front of a Board of Directors, or advocate in the board room in other contexts.

There are a couple of assignments that I do to encourage students to practice these world advocacy skills. Of course, the first is the Acapella Group assignment that I just discussed, which has the students provide advice in a short soundbite. Another example, and this is actually my favorite exercise I have ever done, is tasking students with creating and delivering a presentation identifying potential bidder or potential buyer for a client. This requires the students to research the potential buyers and consider which of those buyers would be a good strategic fit. This is a great capstone project in connection with all of the other skills I have talked about because it brings together all five topics, and to some extent, I think it is representative of what lawyers are going to be doing in practice. A deal lawyer probably isn't going to be identifying potential bidders, but they will have to evaluate different choices for clients.

As a thread throughout the course, we have this hypothetical client that is a small ice cream company. We follow the life cycle of the company throughout the course. We start the course with the company's formation, and we end the course with this company's disposition. It's a small ice cream company that operates a brick-and-mortar business with a couple of branches. But this company has this fictional proprietary IP that allows ice cream to be shipped without melting. At the end of the course, I tell the students that the two sisters who own the company want to exit, or at least partially exit, the business. I tell the students they are going to be in charge of identifying what objectives the seller will have for the process and what the sisters want to get out of it. We talk about the different considerations that the business may have in connection with regulatory advice. Then the students have to identify a suggested bidder and put together information on who the bidder is and what their background is. They have to come up with a potential structure of a deal. They have to tell me why the deal makes sense from either a financial standpoint, or strategic standpoint, or both. They have to discuss what diligence matters would be necessary if the client was to pick this buyer. They have to identify what regulatory risks the deal creates. Then, I ask them to put together a slide deck and present it to the class in short presentations. And the students came up with a whole range of different

buyers, from other ice cream companies to Pfizer and FedEx because the students thought there might be interest in the shipping-related IP. The potential buyers ranged from strategic buyers to financial buyers. The students were creative about this, but also very thoughtful in the way in which they identified potential bidders and pitched them as beneficial to our client. In course evaluations, students reported that they loved this portion of the class and that it was one of the best portions. They loved having the ability to identify the companies, research on them, and present their goals on the deals. Students also loved hearing other people's presentations and pitches. We did these presentation in one of the last classes and because I allowed the students to pick their own bidders, there was limited overlap but also tons of creativity. They even gave code names to the deals which was all kinds of fun. It was a great capstone project.

That's kind of my list of my five skills that I think are important for transactional lawyers for tomorrow. Again, I do want to thank the entire Emory team for having me. Thank you.