

Teaching Non-Litigation Drafting to First-Year Law Students

By Lisa Penland

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Often transactional and non-litigation drafting is given scant attention in the first-year legal writing curriculum. The lack of attention given to transactional drafting is not due to the wish of legal writing professors to limit its coverage; rather, it is more likely a result of an already overtaxed curriculum and just not having a sufficient amount of time to cover the subject. Legal writing and lawyering skills professors would be hard-pressed to identify any nonessentials in the first-year curriculum that could be omitted to make more room for non-litigation drafting. Many schools have realized, however, that non-litigation drafting is an essential lawyering skill that should be integrated into the required curriculum and have incorporated a drafting course as a required or available third semester of legal writing.¹ In addition, non-litigation drafting is an animal of a different sort than the typical first-year topics and many legal writing and lawyering skills professors are not trained to teach transactional drafting.²

¹ Of the 181 law schools that responded to a 2007 joint survey conducted by the Association of Legal Writing Directors and the Legal Writing Institute, six law schools require law students to take a transactional drafting course and 54 schools offer a transactional drafting course that fulfills the advanced writing requirement. <www.lwionline.org/survey/surveyresults2007.pdf> (last visited January 12, 2008).

² Legal analysis and writing taught in the first-year curriculum are oriented to analytical and persuasive writing; the goal of non-litigation drafting is to use language in a very precise way to translate the intent of the parties into a legal document. The method of the latter is specifically and precisely different than analysis and persuasion. See generally Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2007); George Kuney, *The Elements of Contract Drafting with Questions and Clauses for Consideration* (2003); Charles M. Fox, *Working with Contracts: What Law School Doesn't Teach You* (2002).

The challenges for first-year legal writing professors are identifying the core drafting essentials and determining how to teach them in a very limited amount of class and curricular time. This challenge led me to develop a 50-minute drafting class incorporated in the legal writing curriculum that provides the students with the “bare bones” of transactional and non-litigation drafting.

In crafting a drafting class period, I had three essential goals. As a no-nonsense, skills-oriented teacher, I wanted to provide the first-year law students with information that would be useful and relevant to the practice of law. Also, because the law school curriculum generally fails to acknowledge the large role that transactional law plays in the practice of law (and that more than half of our students will practice in this area),³ I wanted to spark the students' interest in transactional practice. My thought was that if a student's interest is sparked early in her legal career, she might then be able to take courses that would be helpful once engaged in transactional practice. Finally, because Drake Law School has long emphasized ethics and professionalism in the law school curriculum,⁴ I wanted to integrate a discussion of how ethics and professionalism relate to drafting. Goals readily in hand, I set out to devise a class that would fulfill them. Little did I know that it would take three years to arrive at an optimal method for achieving those goals.

In the first year that I set out to teach a 50-minute class on non-litigation drafting, I crafted a general overview lecture based on a standard textbook on

³ I discuss these concepts in greater detail in another article. See Lisa Penland, *The Hypothetical Lawyer: Warrior, Wiseman, or Hybrid?*, 6 *Appalachian J.L.* 73 (2006).

⁴ The integration has developed into an ethics and professionalism orientation extending over the first year of law school focusing on the rules of ethics, conventions of professionalism, and concepts of integrity.

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legal drafting,⁵ integrated a chapter from an ethics and professionalism textbook devoted to writing,⁶ and prepared an assignment asking the students to draft a mutual release. The broad overview lecture certainly didn't provide my students with any concrete skills they could incorporate in the practice of law.⁷ The assignment did nothing to further skill development as most students ran to the form books and copied a mutual release from the forms. The 50-slide PowerPoint accompanying my lecture was dry and long and did little to create even the smallest spark of interest in practicing transactional law. I did find that the integration of the ethics and professionalism text along with an assignment related to it fulfilled my goal of shedding some light on how ethics and professionalism are implicated in non-litigation drafting. Having struck out on two of my goals, but having made some headway in developing the kind of class to which I aspired, I returned to the chalk board the next year.

In the second year, I invited a transactional lawyer to speak to the class. I continued to integrate the ethics and professionalism reading and assignment. In addition, in another assignment, the students were required to locate two different forms from the form books in the library. The transactional speaker was engaging; he relayed a few war stories and did a great job of giving the students some insight into the dynamic of putting a deal together. While the transactional speaker truly set off fireworks for transactional practice, the students gained very few skills useful and relevant to the practice of law. The ethics and professionalism continued to work well. I still wasn't where I wanted to be in achieving my goals.

⁵ Susan L. Brody, Jane Rutherford, Laurel A. Vietzen & John C. Dernbach, *Legal Drafting* (1994).

⁶ Melissa H. Weresh, *Legal Writing: Ethical and Professional Considerations* ch. 8 (2006).

⁷ I do not attribute this to the textbook on which I relied. Rather, I tried to include too many concepts in a 50-minute lecture. In part, this was due to my own inexperience in teaching non-litigation drafting. Until I had taught contract drafting, it was unclear to me which concepts were the most important concepts for first-year students to take away from a drafting class.

In the third year, I decided to use my experience from having taught contract drafting through three interim sessions to design the class. I knew I wanted the students to take away something useful; however, having taught an entire course on drafting, I was skeptical about being able to convey something truly useful, relevant, and practice-oriented in a 50-minute class. I put together a drafting highlights lecture in which I focused on what I considered to be the most important aspects of non-litigation drafting. It was clear that the most useful and relevant information would be highlighting essentials of drafting and highlighting those areas in which the students ought to educate themselves when engaging in transactional drafting.⁸ Thus, the class contained three components: a drafting highlights lecture, a quiz based on the lecture, and the continued integration of the ethics and professionalism text. At last, I had found the solution. The class provided useful, relevant, practical information to my students; it lit a spark in the students about transactional lawyering; and the students came away with a sense of how ethics and professionalism are implicated in non-litigation drafting.

The highlights lecture is introduced by noting the different types of legal drafting: (1) objective/advisory drafting in which documents are prepared that analyze the law in order to understand the law or advise a client; (2) litigation drafting in which documents are drafted as a part of legal or administrative proceedings; and (3) "deal and death" drafting, which are documents that have a legal effect in and of themselves. I always advise the students that I use the terms deal and death drafting because they have a nice "ring," but that non-litigation drafting is actually broader than these terms imply. It includes not only contracts, wills, and trusts, but legislation, corporate documents, and other similar documents. I like to highlight that the purpose of objective and

⁸ Indeed, in my view, the biggest danger is failing to give students enough knowledge to realize that, without further education (either in class or by self-educating), a law school degree does not in itself give them the competency to draft non-litigation documents.

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advisory documents is to think about a mess; the purpose of litigation documents is to fix a mess; and the purpose of deal and death documents is to prevent a mess. Essential to creating a spark of transactional interest in the students is emphasizing that the role the attorney plays in the transactional process, while representative, is not nearly as adversarial as the role of the litigation attorney. Clients are generally motivated to complete a deal and are pleased when it happens; preventing a mess can be vastly more rewarding than trying to clean up after the mess has occurred!

The highlights lecture then goes on to discuss the “bare necessities” of contract drafting, which include six concepts: (1) building blocks aren’t just for kids; (2) learn the language; (3) a good mechanic knows her parts; (4) have a love/hate relationship with forms; (5) there is no such thing as boilerplate; and (6) use plain language.⁹

In discussing the building block concept, my emphasis is that the students learn that a contract is made up of building blocks. To translate the deal your client wants to achieve into a document that will be legally effective, the lawyer must understand that there are components of a contract that affect that translation.¹⁰ Just as choosing a particular word is essential in translating one language into another, choosing the language you will use in crafting a contract determines what kind of a component you have created and its legal import. The building blocks are representations and warranties, covenants, conditions precedent, rights, discretionary authority, and declarations.¹¹ Within this portion of the highlights lecture, I transmit some basic

and essential information about each of these components.

Turning to the concept of learning the language, I emphasize that specific language in a contract connotes specific building block concepts. If the students take nothing else away from this class, I heartily desire that they understand that they *shall* always use “shall” to create a covenant. In addition, I caution that the words “must” and “may” and other terms of art must be used appropriately to create particular types of building blocks.

When we discuss the concept that a good mechanic knows her parts, I provide the students with a contract that is annotated to demonstrate the macro organizational structure of most contracts: preamble, recitals, statement of consideration, definitions, action, representations and warranties, covenants, conditions, endgame, general provisions, and signature lines.¹² In addition, introducing the concept that students should have a love/hate relationship with forms emphasizes that forms are a helpful starting point, but because each contract or deal is unique and because there are countless drafting errors in many book forms, the forms should only provide a jumping-off point.

I also like to warn students that there is no such thing as boilerplate. Many lawyers merely lift what they consider to be boilerplate from other forms and contracts believing that these general provisions are interchangeable from one contract to another. In reality, these general provisions are often very important in aligning the rights and duties of the parties.¹³ In addition, the import of general provisions may vary depending on the jurisdiction. Finally, I caution the students to use plain language.¹⁴ Lawyers are prone to archaic, pretentious writing and nowhere is this more prevalent than in contracts.

⁹ My primary reference for my interim contract drafting course is Tina Stark’s textbook *Drafting Contracts*. See Stark, *supra* note 2. The bare necessities of my highlights lecture is based upon that textbook and what my experience in teaching the contract drafting course has led me to believe are the most important contract concepts.

¹⁰ See Stark, *supra* note 2, pt. 1.

¹¹ *Id.*

¹² *Id.* ch. 5.

¹³ *Id.* ch. 16.

¹⁴ *Id.* ch. 18.

The PowerPoint and handouts I've created for my PowerPoint lecture intentionally do not give the students all of the information that they receive orally in class. They are forewarned that at the close of class, they will be given a quiz that they must complete and turn in by the next morning and that much of the information is not going to be found in the written materials. This gives the students the incentive to listen closely during the class time.

Among the questions asked on the quiz are questions requiring the students to identify the purpose of some of the macro-organization components of the contract, such as the recitals, the statement of consideration, the subject matter performance, and the like. Because I have focused on the use of the word "shall" to signify a covenant, I generally include a question that requires them to choose the most appropriate phrasing for a covenant. The quiz is fairly short and it focuses on the essential concepts covered in class. Since the students have been forewarned that they will be

tested on the class materials, most of them pay close enough attention in class that they only miss one or two quiz questions.

Is this the last incarnation of this class? Probably not! My hope is that students leave the class with a taste of (and hopefully a spark for) transactional practice and how it differs from litigation. Additionally, the highlights lecture outlines the core concepts of contract drafting and at least puts the students on notice that they must educate themselves in order to become adept at deal and death drafting. Finally, it continues to integrate ethics and professionalism issues unique to transactional drafting. It is doubtful I will ever create the perfect "50-minute" drafting class because transactional drafting shouldn't be relegated to 50 minutes of the first-year legal writing curriculum. Nevertheless, after trial and error, my 50-minute class is coming close to being the best that it can be.¹⁵

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Another Perspective

“One of the joys of teaching is the endless variety of the classroom experience. We are free to experiment with different material and ways of presenting that material. As we master our subject areas, we can turn our attention to finding the best ways to engage students in those subjects. For example, we may ask students to ascertain the facts of a hypothetical by conducting a mock client interview. We might conduct oral arguments to have students address the constitutionality of a statute. Students in large classes can be divided into groups and asked to present or report their analysis of a particular issue. The possibilities are endless and are only limited by our imaginations.

The benefits of variety accrue both to students and teacher. The break in classroom routine for the student often brings relief from the sometimes tedious, traditional student-teacher dialogue. Of course, too many different experiments in one semester can send students a message of instability and can prevent students from getting good at anything in particular.

When these alternative forms of teaching are used selectively, however, they can engage all of the students actively in the learning process. This kind of involvement can promote more effective learning because each student is participating in the process. The break in routine also leaves a lasting impression on students. Former students often remind me that the experience of drafting a complaint and answer and arguing a false imprisonment claim was a high point of their first semester in Torts class.”

—Mary Kate Kearney & Mary Jane Kearney, *Reflections on Good (Law) Teaching*, 2001 L. Rev. Mich. St. U. Det. C.L. 835, 844–845.

¹⁵ The materials for the drafting class have been compiled and I'd be happy to share those materials. Send an e-mail request to lisa.penland@drake.edu.