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THE FIRST YEAR: INTEGRATING TRANSACTIONAL SKILLS

LYNNISE E. PANTIN*

My name is Lynnise Pantin. I teach at New York Law School, and my talk today focuses on integrating transactional skills into the first-year curriculum.

As a first premise, the law school curriculum is dominated by litigation-oriented skills, and I can argue that there is a litigation bias that is pervasive in legal education. I am hoping that, by engaging with those of you who teach first-year students, we can start to talk about creating and developing transactional skills within a context that is already there in the first-year curriculum.

Students want to learn transactional skills. After I give my students my typical talk on the first day, I give them my bio. I tell them that I practiced corporate law. Many of them come up to me after class and want to talk to me. They want to meet me. They want to get to know me. They really want to practice corporate law. And they want to know how they can do it. I also have students who have sent friends to me. They say, “You know, you should meet this professor. She was a practicing lawyer. She did corporate work. My friend wants to do it. Can you talk to him or her?” Anecdotally, I think that there is a real need to teach corporate and transactional skills and that students really want to practice corporate law and they really want to learn transactional skills.

The bottom line is that many students want to be transactional lawyers, so I think starting from that premise of wanting to serve students or fulfill a need in law school is one of the arguments that you can make about why we should integrate and continue to work towards developing transactional learning in our first-year courses.

Additionally, how can students decide between litigation and transactional practice if they are not exposed to both? Some skills often transcend subject matter, so one of my focuses today is going to be about client interviewing and counseling. Typically, client interviewing and counseling often is framed in the litigation context; by thinking about it in a transactional framework, you can transcend that subject matter and bring transactional learning into the teaching of client interviewing and counseling.

We all know that law schools are giving more and more attention to developing practice-ready attorneys. This means that we must develop law

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students into attorneys who are ready for transactional practice. I am really excited about this trend, and I welcome the trend of pushing against the litigation bias in law school.

At New York Law School, I teach Legal Practice, and Legal Practice is an eight-credit, first-year course that integrates theory with practice in order to teach professional skills. We teach legal research, reasoning, writing, interviewing, counseling, and negotiation, and we also have an oral argument component of the course. Historically, these skills have been dominated by litigation-oriented assignments: memo writing, brief writing, and oral advocacy. But not all law students are going to become litigators, and even if all law students do want to become litigators, these future litigators need to have some exposure to legal drafting and the mechanics of transactional documents. Some litigators draft contracts. Some of them negotiate discovery agreements and settlement agreements—all of which require transactional drafting skills.

As part of the course that I teach at New York Law School, our students engage in several simulated exercises throughout the year. They work in a role as student attorneys. I often play the role of the senior partner. They are the junior associates in whatever particular exercise we are working on at the time. They have the opportunity to interview and counsel actors playing the role of clients. They interview three clients within the first semester, and they counsel one client in the spring semester. These are professional, paid actors who play the role of clients in our course. The facts that are gathered in these interviews are typically the basis for the memo assignments. In addition, our students participate in a negotiation simulation with their classmates. Because I teach legal practice—and I have a corporate background—I think that I have an excellent opportunity to infuse the first-year curriculum with transactional skills—skills which include interviewing, counseling, negotiating, and drafting.

I should also mention that I am a fairly new teacher to this course, and that this is the second year that I am teaching legal practice. This a new first-year course at New York Law School. We are on our second year of it. It is a mandatory course for all of our first-year students. When the course was developed there were some transactional elements there; however, my plan was to really think about the course and build on what already existed. I tried to pull out pieces where I could think about how we could incorporate transactional learning. So a lot of my talk today focuses on what I did in the last year, what I plan to do this year, and then what I hopefully can do in the upcoming year as the course further develops.

I have discovered that there are little transactional nuggets throughout the first-year skills course. If you teach legal writing, if you teach lawyering, any of

those classes, I am certainly including all of you in the discussion of what a first-year skills course is. My goal is not to revolutionize the first-year skills course, but to introduce what I call “easy to integrate” ideas. It is already there. We do not have to be totally revolutionary and throw the framework out the door. We can use little, easy-to-integrate nuggets of transactional learning to expose our students to transactional skills within the already existing underlying litigation framework that is now in law school. A six-week or eight-week module is not necessary. You can actually introduce concepts in one or two classes. For example, writing a client communication is something that I think is a skill that transactional lawyers need to know. You can introduce an exercise on the subject in one class and an overhaul of the curriculum is not needed.

When I considered the subjects that I thought necessary to introduce transactional skills, I thought, “What are the goals that I should have for students who would be transactional attorneys? How can I teach them to be practice ready?” Having practiced transactional law, what is it that I want my students to know or be exposed to if they were to come into my office as junior associates? It is completely unscientific. I have not looked at the whole canon of descriptions of what corporate associates and law students need to know, but I just thought, “What is it that I want my students to learn?”

I think, as a general matter, graduating law students generally need to have some substantive knowledge of the law. They should take corporations, real estate transactions, and accounting: the courses that give students substantive knowledge of what transactional law is. And then they need actual practice in applying their substantive knowledge. Maybe they should have taken a class in drafting and contracts or a course in negotiation. And lastly, they should just have some exposure to transactional law so they understand the contents of transactional law practice, in addition to having some vocabulary and some understanding of what the paradigm of transactional law practice is. I say this having practiced corporate law for eight years; however, when I graduated from law school, I had never seen a real contract. If I look at my background and how I came to teach this stuff, I think, “Wow, I would have been an amazing lawyer if I had this exposure in law school.” So, if we can get students to actually see what a deal is about, and what is a contract, and why are we looking at it, these simple things will help a great deal.

In the first year, I really think the primary goal would be simply exposing students to what transactional law is and what transactional lawyers do. I would like to teach them some vocabulary that is relevant to transactional law, like preambles, definitions, representations, and warranties. This simply helps the students see how the pieces of a contract fit together. Primarily, I would like to

teach them that a transactional document is a form of research. Reading a document is part of investigating facts and conducting legal research. This is a logical extension of my teaching since I already teach legal research. It is very easy for me to say to my students that the document itself is a source of law. Yet, I do not think that my students understand the concept at this point.

Obviously, we can develop more goals, but this is my initial thinking about what it is that I would like my students to know. We also all need to make choices about what our students are going to learn in the first year; so, I will walk through what I have done in my course and my attempt to meet some of the goals that I have identified.

As I mentioned earlier, there are skills that transcend subject matter. Client interviewing and counseling are two opportunities for transactional learning. Even if you do not have simulated interviews as part of your course—and a lot of people do not—you could have the students look at a contract. You can play the role of a client who has some questions about the terms of the contract, and the students could interview you about the terms. So, if you are teaching interviewing, it does not have to be a big deal, but it could be about the terms of the contract. It could be about the deal. It could be questions about the necessary provisions and whether or not those provisions are fair. There could be a research component prior to the interview component. But I think the goal here would be to expose the students to transactional law in the context of interviewing and counseling.

One of the problems we use at New York Law School is a landlord-tenant problem. The landlord, who is the client, comes into the office and wants to be interviewed on the issue of whether he is allowed, under New York law, to evict his tenant for suspicion of drug use. This entire interview scenario is completely focused on whether or not the tenant has a case. It is a litigation-based assignment. But what I did was I created a lease so that my students could see the lease agreement. All of my students live in New York. They have apartments. They all have leases. They all probably sign them without reading them.

In this particular context, I gave them a lease. I had them review it. It was completely unrelated to the problem, but I wanted them to see that the lease did not have the anti-drug condition, so obviously then the case law applied. But I really wanted to interject the transactional element into a litigation-based issue and meet the goal of teaching students that an agreement is a source of law.

Anecdotally, when we did this problem last year, before I started to show them the lease, every single one of the students asked the client for the lease in

their interview. “I need to see that lease.” But they did not really understand why they needed to see lease. They understood that it was something that they needed as a lawyer. In their minds, it was like they were going to create a record for trial. They did not understand that the lease is something that they needed to review, and it is part of their research and part of their analysis. I think if you interject these elements of transactional skills, it really enriches the students’ experience and their understanding of who they are as student lawyers. It was fascinating to me that they all wanted this record but really did not have a clue that the answer might lie in that document without having to jump on Lexis or Westlaw and find the legal issue.

What I am thinking about doing this year is using this landlord-tenant problem and showing them the lease that does not have an anti-drug condition and doing an in-class exercise on drafting where I have the students think through what we would want to include in our lease if we were to have an anti-drug provision for the apartment. I would have them draft something in class. Though not an extensive drafting lesson, it reinforces some of the learning that I mentioned earlier.

Another example is that we developed a client-counseling problem. We are not counseling our client on whether to go to trial, but we actually have a transactional-based problem. The client is a high-end hairdresser interested in potentially hiring two hairdressers. And there are varying reasons why they want to hire these particular hairdressers. And our students really actually got into it. One of the hairdressers could do eyebrow threading. The other one could not, and there are all sorts of interesting scenarios about why or why not the hair salon owner is interested in hiring each particular hairdresser.

But one of the main issues is whether the potential employees were going to sign a covenant not to compete. So our students researched covenants not to compete, and they researched non-solicit agreements. My students were very energized by this. I was a little bit worried. There was a whole module about whether the hairdressers could do pedicures, manicures, and eyebrow threading. I thought that our students might not be so into it, but they really were into it. They were really into the issue, really into looking at the agreement, really into thinking about the terms and counseling the client about the varying options. And they really were invigorated by it. And a lot of my students said to me, “I don’t want to be a litigator. I really appreciate seeing this side of the law.” So that is one example. You are not really teaching drafting. You are not teaching that much about covenants or non-solicit agreements; you are teaching them client counseling in a transactional context.

A major part of my course is teaching legal writing. Probably 70% of what I do is teaching legal writing to my students. I teach them how to write a memo and how to write a brief. I teach predictive writing in the fall and persuasive writing in the spring, and these types of writing assignments are all set in the litigation context.

One of the things that you could do to inject transactional skills in the concept of first-year skills is to not make the focus of the memo or the brief a litigation-oriented subject. It may not be about whether our client will sue his or her adversary or whether our client has a case or not, the subject of the memo can be a transactional issue. For example, a contract dispute could arise between two parties. In our counseling problem, we have a force majeure clause in our contract between a catering company and a nonprofit organization. This year, because of Hurricane Sandy and its aftermath, it is very topical in New York. This is a non-litigation focused assignment, which meets my goal of coming up with assignments and class exercises that do not always stem from a litigation context.

Another interview problem this year involved an agreement between two property owners to share well water, which is an example of a problem that helps students understand that the memos were stemming from an agreement and teaching them that the agreement is going to be their source of law.

Another way the students are going to gain some exposure to transactional drafting is by creating a transaction writing assignment in addition to memo and brief writing. What I have up here is predictive writing in the fall, persuasive writing in the spring, and writing for transactions. Should we teach some drafting in our first-year course? I know that some people have strong opinions about whether it is appropriate. I think that introducing some drafting into the first-year course makes sense in my mind. Others might disagree, but I think that students would appreciate that and have a little exposure to a third type of legal writing.

As part of my teaching legal writing, I teach my students about precision in writing. I tell them every word of every sentence of every paragraph has to have a purpose. That advice does not always translate when I grade my students' memos. My students do not understand the importance of precision, or they think that I am just particular when I comment on their writing. That is a sense that I get from them when I am telling them that they have to be precise. It does not make sense to them that I get so detailed and comment on whether their comma use is inappropriate. I get the sense from my students that they think that level of precision is idiosyncratic to me and not about the importance of language and the importance of meaning. I think that, when you teach students drafting,

they can begin to understand the principals of precision more because they understand that the document itself stands for something in the agreement, and it has meaning so that every word becomes the law between the two parties. So I think that, if we are trying to send the message of precision to our students, then teaching them about transactional drafting sends that message. I want to teach precision, clarity, and clear meaning. How do I do it? It is more than just teaching predictive writing and persuasive writing. There is a third type of writing that I think would underscore that message and drive that message home a little bit more, which is writing required for transactions.

In my experience, a large part of what a transactional lawyer does is communicate with the client on the phone. I spent a lot of time on the phone when I was practicing, but I primarily communicated via electronic communication. I remember that I would call my husband on the phone at 6:00 p.m. and I would say, "Okay, I just need to send out one email, and then I'll be home for dinner." And then it got to be 10:00 p.m. and I'm still thinking about how I want to send the email to the client. I do not know if anyone has ever experienced that, but just drafting an email becomes more than a five-minute exercise, right? There is a delicate art associated with communicating with a client over email. Just getting the "to" field and the "cc's" and who are you "bcc'ing" and all of that and the attachments together is a whole different conversation. But students, I find, do not yet know how to draft professional emails. They do not know how to pare down the content of their email and avoid speaking in legalese. A lot of focus on email communication is about tone and format and professionalism and having a salutation and a closing. A lot of the writing on client communication is just about being professional. But there is not a lot that I have found that teaches students how to take a legal document and translate it down into an email form, or how to take a provision in a contract and break it down and explain to the client what it means.

Anecdotally, I had a colleague share with me that a client once asked her to pare down a sixty-five-page construction contract into a two-page bullet point memo in eighth grade English. I used to have a client for whom I would draft a partnership agreement, and he would say, "You just put your legalese all over it." So students need to learn how to translate documents and communicate the information in a clear, succinct, and effective way, and I think that is something that we can teach them in the first year. I think that is something that is a huge part of transactional practice.

I think there is a need to incorporate assignments that teach these skills into the first-year curriculum. How do you do this? As part of my class, we do two research practice exercises. We call them research practice exercises, but they

are basically research reports. Before they write the memo, they turn in a research report that has ten questions on it, and then it sort of kicks off the writing about the memo.

For each research report, they complete their ten questions, and on the last page, they draft a memo to the client on the results of their research. For instance, they draft a memo to the client explaining X provision of the non-solicitation agreement, and that is a big part of the assignment. Students really bomb it. They really need help understanding how to communicate what the research says and what the contract says into an email that is readable and appropriate for a client. So, I do it twice. The first time it is hilarious; it is terrible because students just have no idea what that looks like, and then the second time they get better at it. Therefore, I think that it is something that the students need to work on in the first year. If we are talking about developing practice-ready attorneys, we cannot send students out of law school with the email skills that they have. So, I think that it is something that we need to work on and incorporate in the first year. I have had the students put the memo aside and tell me what it is that they want to say. They sometimes still struggle with that, but the students really need to be able to communicate their thinking to you in a way that is understandable. This type of communication will help in memo writing and their brief writing. Thus, not only do I think that email communication is a very strong transactional skill, but it will help the students with their writing skills in general.

Back to the drafting point, it is debatable whether it is appropriate to learn about drafting in the first year, but I want to incorporate more drafting into my class. I do not want to spend a ton of time on it mainly because we try to maintain parity of work within the same section, and I think I am in the minority for teaching transactional law. So I struggle with how much drafting to implement into my course. This year, I would like to do a bit of drafting, but I do not have a lot of time in which to do it. Therefore, rather than working on an entire contract, we will narrow our focus to specific provisions. I think that having a couple of class exercises concerning specific provisions and the client works for me, and I am happy to take suggestions or questions at the end. I would be interested in hearing what other professors think, but I think that having exercises concerning specific provisions of a contract in the first year meets the goal that I am shooting for, which is to expose my students to transactional skills.

I was thinking of things that may interest students. One of my students is an application developer. He develops an app for studying for the LSAT and getting into law school. All of the students used it. It is fantastic, and I thought,

“Okay, well let’s have an app agreement. Let’s look at one provision of the agreement, and let’s modify it. Let’s make it better for our students.” That is one idea that I had.

Another idea involves a morals clause in an endorsement contract between an athlete and a team. We are also looking at an “in the event of dissolution” clause, as well as a pre-nuptial agreement. These are little things that we could examine and spend a couple of hours working on and drafting, meeting my goals of exposing the students to the things that transactional lawyers draft and do.

Negotiating is also a big part of what transactional lawyers do. Many, if not all, lawyers negotiate, and most transactional lawyers negotiate. I think transactional negotiation and litigation negotiation are slightly different, but not all law students take a negotiation class, and many classes are set in a litigation context. At New York Law School, we teach negotiation. It is UNgraded, but we do a simulation. Students are paired, and we use our counseling exercise with the hair salon that I mentioned earlier. We use it as the subject for a negotiation where the students negotiate the terms of the employment agreement and whether the employer needs a non-compete agreement and a non-solicitation clause.

Teaching students about transactional law in the negotiation context teaches them about professionalism and about what transactional lawyers do. Our students got a lot out of the negotiations. The assignment is ungraded, so we were a bit uncertain as to how students would feel about it because they spent a lot of time on it. There is a lot of outside prep work. There is a lot of group work. Students do not always love group work, but they got a lot out of it. The students learned the substance of non-competes and non-solicits, and they developed a strategy that was non-adversarial. I pitted my two sections against each other, and they were really aggressive in the beginning. They said they were going to come out and just win, win, win, win. Then they realized that the subject was non-adversarial: both parties needed something that was on the table. Otherwise, if there is no deal, then what is the point? They learned how to be non-adversarial and client-centered and focused on the client’s needs. I thought that they were very creative in coming up with options for both of their clients. So I thought the negotiation piece of our class worked really well, and I think the fact that it was based on an employment agreement and a non-compete was all the better.

Those are some of the things that I am thinking about and working on at New York Law School, and I want to build on them. I think there are so many

things that you can teach in the first year, and sometimes I think, “Okay, I want to just scrap brief writing all together in the spring and teach, you know, a whole contract module.” That is probably not going to be possible given the constraints that I have and the dynamics of our curriculum and our program, so I want to show things from my course that say, “Okay, these are some of the things I did this year that met the goals of teaching transactional learning.”

I think that we are working within the constraints of a legal writing program in which we have to teach two memos and two briefs; otherwise it is not legal writing. Maybe if you have the same number of graded, written assignments, or if you can estimate eight hours per assignments, that will suffice. I am working on it. I do not have an answer yet, but I would like to teach more drafting and, at some point in my career, to have students write an agreement. It is hard because the schedule is very packed, and the students already are writing two briefs in the spring with a negotiation and an oral argument. It is hard to pick and choose what students are going to learn.

Another challenge is finding textbooks that speak to the first-year skills course. One of the solutions that we have used at New York Law School is that we have worked with publishers to design custom textbooks. I think a number of law schools have done this as well. It is really great, but it has its drawbacks. You do not get the full universe of available material; you get whatever the publisher publishes. The beauty of it is that I have been able to pull some text out of Sue Payne’s book¹ for the spring and Tina Stark’s book² for the spring. The students do not have to buy a book, so we are able to pick and choose and curate the materials that we want our students to learn. In their textbook, the student can have very focused transactional-related readings as well as appellate advocacy and brief writing in one text—especially if you like these ten pages about electronic communications and those ten pages about reading and definitions. It helps you curate the materials to what you want your students to learn, so the custom textbook has worked for us.

The last point that I want to make is that one of the big challenges is winning over your colleagues and getting them to see the benefit of it. You know that that is an ongoing conversation. I do not have a solution for it, but I think a good starting point is going back to what the students want. I think they like learning about transactional law; they like being exposed to it in the first year. I

¹ SUE PAYNE, BASIC CONTRACT DRAFTING ASSIGNMENTS: A NARRATIVE APPROACH 1 (Vicki Been et al. eds., 2010).

² TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 1 (Vicki Been et al. eds. 2007).

think about when I was in law school and how much of a deer in headlights that I was. I had no idea what it meant to do a deal. So how could I know that deal work really suited my personality? That is something that I enjoy doing, but I did not get exposed to it in law school. I happened to have been sort of forced into it at my firm, and it really suited me. But if it had not happened that way, I might have been a litigation associate, which is fine, but students should have that choice. I think that the conversation with your colleagues starts with that thought and with putting the students at the center.

I will leave you with the reminder of why we are all here. We are cheerleaders for teaching transactional learning, and I think it should be taught in the first year. I encourage you to think of ways to incorporate it into your course. I think by taking those easy-to-integrate ideas, students get a lot out of it and exposure to the field. For me, that was my goal, and I think it sends the students out as well-rounded, second-year students who can build on those lessons and take the upper-level drafting courses. It helps them lay the foundation for becoming practice-ready students.