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### Closing the Deal in Contracts: Introducing Transactional Skills in the First Year

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# CLOSING THE DEAL IN CONTRACTS. INTRODUCING TRANSACTIONAL SKILLS IN THE FIRST YEAR

*David V Snyder*

THANK you. I'm going to talk about introducing transactional skills in the standard 1L Contracts course. By "transactional skills," I mean planning, negotiating, documenting, and closing the deal. In contrast to the much more scholarly and thoughtful presentations of the other panelists, I'm going to put forward a quick, cheap approach, with the idea that the less that is necessary to do, the more likely it is that innovation will actually happen. With this approach, there are no copyright permissions necessary, no things to buy. The idea is simply to make it happen if you want to introduce some transactional skills. That's why I have called this little talk "Closing the Deal in Contracts."

Introducing transactional skills does not require any change in orientation of the course, nor does it require a maverick disposition. My perspective is that of a particularly traditional Contracts teacher. In contrast to Professor Warkentine, who wrote an article saying that Professor Kingsfield doesn't teach her Contracts course,<sup>2</sup> my students would probably say that Kingsfield does teach their Contracts course. I start with *Hawkins v. McGee*.<sup>3</sup> I've been called a young fogey more than once. If teaching some transactional skills required me to reconceive or reorient the course, I probably wouldn't do it. The bottom line is that while I aim to expand the skills, and to a lesser extent the knowledge, that I hope to impart in Contracts, I can do this without any great deviation from traditional approaches to teaching the subject.

## I. OBJECTIVES AND GOALS

Let me be more specific about what I hope the students will get out of this effort, both in terms of short term objectives and longer term goals. I am trying to give them an introduction—and an introduction is all it can be—to a skill set and a perspective that is markedly different from what is typical either in first-year Contracts or the entire first-year curriculum. I want to introduce the students to who transactional lawyers are and what they do, especially given that many of the students—half? more than half?—are going to be transactional lawyers. Somehow this basic fact has been left out of the design of the typical Contracts course, the first-year curriculum, and for that matter, much of law school.

I would like to pause a moment to elaborate on the kinds of skills that are important for transactional lawyers. Much comes down to thinking as a planner:

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2. See Edith R. Warkentine, *Kingsfield Doesn't Teach My Contracts Class: Using Contracts to Teach Contracts*, 50 J. LEGAL EDUC. 112 (2000).

3. 146 A. 641 (N.H. 1929).

issue spotting as a matter of planning a transaction, as opposed to issue spotting in preparation for litigation, which we tend to emphasize. Structuring a transaction and organizing the contract is also important, and again very different from structuring legal arguments. In addition, I want to let the students begin to wrestle with drafting particular language, and to feel the bite of *contra proferentem* from the drafter's perspective.<sup>4</sup> Actually doing some drafting is particularly important because thinking and writing go together. As the adage goes, "You don't know what you know unless you write it." If the students cannot think clearly, they will not be able to write clearly. Insisting on clear writing helps lead to precise thinking. Learning by doing is always a good approach; when the doing involves writing, it is especially good. For that reason, I try to let the students feel some of the words flow through their fingers and to learn first hand how definitions, schedules, active voice, logical organization, and prominent verbal signposts can help hold together all the words that make up a well-lawyered contract.

At its fullest, transactional pedagogy can include some negotiation. I have used it in upper level courses when I have more time. There is always an unavoidable question of timing and priorities. Negotiation does not quite make the cut for my first-year course. The other skills I can usually reach in one way or another, and I will tell you in a few minutes some of the how-to details. The point for now is that there are some basic transactional skills that are often overlooked but that are important and that can be taught in the first year.

Teaching these sorts of skills is a relatively short-term goal; there are longer term goals as well, which I think of on a five- or ten-year frame. Even when the students are that far from law school, I want them to understand client needs from the standpoint of the deal. I want them to focus on the client as someone who uses the law to structure and control important parts of life. To some extent, this focus on the client is part of what Professor Testy will talk about in a little different way later. For my purposes, I want the students to understand how the client, or the client's business, is driving this deal. Without understanding how the client is trying to structure its environment and its future, you cannot understand the full function of contracts. More concretely, understanding the client and the business is crucial to understanding the deal itself, to thinking clearly about it, and to documenting it with precision. As I said before, you can't write about something you don't know about, and this is a lesson that I hope will stick, and for a long time.

There are other long term goals as well. I want the students to remember, even if they aren't dealmakers themselves, how a dealmaker thinks. If nothing else, I hope the students will begin to think about risk from a forward-thinking perspective, and that they will understand that risk is often acceptable (a point I will return to later). I hope they will retain some appreciation for the enormous premium placed on closing the deal. When they hear from guest speakers who are clients and who are lawyers, as well as from me, about how much energy is directed at making sure the deal happens, and preventing it from running off the rails, I hope students will remember and perhaps begin to understand the primacy of the bargain itself and the

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4. *Contra proferentem* is the rule "[u]sed in connection with the construction of written documents to the effect that an ambiguous provision is construed most strongly against the person who selected the language." BLACK'S LAW DICTIONARY 327 (6th ed. 1990).

role of lawyers in effectuating it. Perhaps the students will also understand some of the excitement of dealmaking, and how possible it is for people to get caught up in and subsumed by the literal “big deal.” These goals are reinforced in the more traditional part of the course, which is focused on case analysis and understanding the deals that led to the litigation. So when the students read about the Texaco-Pennzoil-Getty Oil mess, they understand better what Marty Lipton and “his associate” are doing.<sup>5</sup> (And some of our students will be just like that associate in just two or three years.) When the students read about due diligence in *CBS v. Ziff-Davis Publishing Co.*,<sup>6</sup> I want them to have some idea what due diligence means and how that can play into the potential closing or renegotiation of the deal. When I was a brand new lawyer, I got sent out to do due diligence. I’d never heard of due diligence. I had no idea what I was supposed to do. I think I have a vague idea now

The longer term goals for those who are headed into transactional work are largely more modest, but in a sense more grand. In terms of real skills, I can only help them barely begin a skill set on which they can build. In a larger sense, I hope that by exposing some students to transactional practice in the first part of law school, they are more likely to see the interest and excitement of a transactional practice, are more likely to feel adequately prepared for transactional work when they first have to do it, and in the end are more likely to come to that kind of law practice—and even law practice in general—with a healthy attitude and a confident perspective. I want to help my students approach the real-life practice of law with pride, hope, and excitement.

## II. THE HOW-TO: A PROGRESSION, CULMINATING IN A DRAFTING EXERCISE

### A. Cases

“A nice set of goals,” you might think, “but how do I accomplish all of this?” The basic idea is a progression, culminating in an exercise or two. For those of you who want to approach transactional teaching in a minimalist way, you can start with some pieces and add others over the years. The first part is particularly quotidian. The first thing I do is to start from the cases. Let me give you some examples.

When you read *Frigaliment*,<sup>7</sup> the “what is chicken?”<sup>8</sup> case, you can ask the students, “How would you define “chicken”?” Why didn’t they think to draft it more clearly? Why ...?” Emphasize the idea of understanding the business and knowing what the deal is about. Gathering these sorts of facts is what enables competent issue spotting. Similarly, when we’re reading cases about specific performance, and we read some about ball players, we look at what those cases say.<sup>9</sup> At least two of

5. See *Texaco v. Pennzoil*, 729 S.W.2d 768, 786 (Tex. Ct. App. 1987).

6. 553 N.E.2d 997 (N.Y. 1990).

7. *Frigalment Importing Co. v. B.N.S. Int’l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) (Friendly, J.).

8. See *id.* at 117.

9. I use RANDY BARNETT, *CONTRACTS: CASES AND DOCTRINE* (2d ed. 1999). It includes *Dallas Cowboys Football Club v. Harris*, 348 S.W.2d 37, 42 (Tex. Ct. Civ. App. 1961) (“injunctive relief will be granted to restrain violation by an employee of negative covenants in a personal service contract

them discuss personal services contracts that involve “special knowledge, skill, and ability in the employee.”<sup>10</sup> Then I have the students look at the American League form for a baseball player contract.<sup>11</sup> You can either have them read the whole contract, or if you don’t want to take any significant time from the cases, just assign the relevant paragraph.<sup>12</sup> The students can see for themselves how the case law—the law of litigation—moves into the law of transactions.

In talking about the cases, then, you can also introduce the idea of drafting-related research, which legal research and writing courses typically do not cover. What if the parties agree in their contract that specific performance will be the remedy? Is that permissible? Or to take another remedies example, you can challenge the students to think about how to draft a liquidated damages clause or a non-compete agreement. I simply want the students to think about the kind of research that goes into advising a client about a transaction, about the real remedies if the transaction hits a snag, and about drafting the documents. At the same time, I often mention the role of the opinion letter—a creature rarely mentioned in most law school classes, much less in the first year. I challenge the students to think about what opinion they would give. This challenge has special resonance because they see the ultimate responsibility of the lawyer who has to state an opinion about the enforceability of contract provisions, and they see the role of the lawyer with a similar dignity to the role of the judge. All of these discussions can be generated from the standard cases.

### B. Guest Speakers

Cases are an easy place to start, but part of the point of this effort is to break away from cases and to widen the perspective. To that end, I also use guest speakers. They can add a different viewpoint and more importantly, serious credibility. Once you open the door to guest speakers, the number of topics and perspectives multiplies infinitely. I usually start with a librarian who will use half a class or less to talk about transaction-related research. They have brought in form books, as well as CDs and other electronic resources, generally orienting the students to the idea

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if the employee is a person of *exceptional and unique knowledge, skill and ability* in performing the service called for in the contract”) (emphasis added) (citing, e.g., *Philadelphia Ball Club, Ltd. v. Lajoie*, 51 A. 973 (Pa. 1902)).

10. *Harris*, 348 S.W.2d at 44 (quoting *Lajoie*, 51 A. at 973).

11. The supplement I use, *CONTRACT LAW: SELECTED SOURCE MATERIALS* 512 (Steven J. Burton & Melvin A. Eisenberg eds., 2002), reprints the American League Standard Baseball Player’s Contract.

12. Paragraph 4.(a) of the form contract states:

The Player represents and agrees that he has *exceptional and unique skill and ability* as a baseball player; that his services to be rendered hereunder are of a special, unusual and extraordinary character which gives them peculiar value which cannot be reasonably or adequately compensated for in damages at law, and that the Player’s breach of this contract will cause the Club great and irreparable injury and damage. The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing baseball for any other person or organization during the term of his contract.

*Id.* at 513 (emphasis added).

that they should not be starting to write a contract simply with brains and a blank screen. In very little time, twenty to thirty minutes, the students come to know that they do not have to re-invent the wheel for every contract, and that the library, Lexis, and Westlaw are full of resources to help prevent them from missing important issues.

In addition, I often bring in a lawyer who does business deals. Typically I use lawyers who have done bigger deals, asking them to bring in a sanitized version of the contract documents from a real deal. I assign those documents as reading ahead of time, and I tell my guest that this class is his chance to improve the new associates who will be coming in two years. I say, "Think of the new lawyers you get every year. I know you think that they arrive without key skills that they ought to have learned in law school. This is your chance to fix that. Whatever you want them to know about contract drafting or transactional work, you can try to teach them now." I suggest to the speakers that using a real deal and its accompanying documents is an effective way to approach this opportunity. They are usually grateful for that kind of structure.

These lawyers do an amazing job of conveying what the transactional lawyer is about. They talk about responsibility for the deal, dealing with clients, dealing with the other lawyers. They talk about identifying problems and solving them. And it is not abstract. With a real deal before the class and the actual documents on everyone's desk, the lawyer can talk about particular problems that arose, strategies that were in play, what worked and what didn't, what was won and what was lost. And these speakers have usually carried one capital, boldface message: the lawyer is responsible for the deal and has to see that it closes. To fulfill that responsibility, the lawyer has to know the deal: know the parties and what they want, and know who is trying to do what to whom.

I have also tried—just last year for the first time—bringing in a client in addition to a lawyer. The person I invited, Sid Good, heads a small, successful company that uses outside lawyers for frequent transactions. He was a great hit. He talked about what he and his company look for in a lawyer. What did he emphasize? Understanding the business, and even the industry, is crucial in a business lawyer. The person I used last year got this message across incredibly effectively by spending the first ten minutes talking about his business. It showed how important he thought that was, and when he had finished that long introduction, he showed through several examples how it mattered that his company's usual lawyers understand the dynamics of dealmaking in that industry. Plus, it was helpful that his business deals in children's products. As a bonus, he brought toys and candy as handouts, which was a very popular move. Aside from the fun, though, he talked about the importance of the quality of the lawyers' work. That point was especially interesting to me because it was coming from the mouth of the person who has to pay for the quality. All those typos that take so much time to get out he considers thoroughly worthwhile. He considers anything else shoddy. It was really amazing to hear that coming out of a client's mouth, rather than out of a lawyer's mouth. Still, it was all part of his greater idea that from the client's perspective, high quality is the essential ingredient of good value.

One happy coincidence last year was that both the client guest and the lawyer guest talked about risk. Both of them helped the students to think about risk from

the client's perspective: most business clients do not expect, or even want, to live in a riskless world. I was in practice for two or three years before this idea really came home to me, and I hope my students will have a head start. The lawyer's job, and the lawyer's value, is to help the client think about risk. Minimizing risk is nice, of course, all other things being equal. In the life of my guest speakers, other things generally are not equal. The lawyer helps the client to identify risk, to decide which risks are worth avoiding, and to devise strategies for allocating and planning for risks. The lawyer can also help implement those decisions. This is a crucial function of contract law, maybe even its centerpiece.<sup>13</sup> I wonder whether we do it justice when we teach it only from the after-the-fact standpoint of litigation. One benefit of the approach I am suggesting is that not only can these messages be taught from a planning or transactional perspective, but they come with the clearest ring and greatest heft when they come from people who make their lives and their livelihoods far from the university.

### C. Exercises

After the guest speakers, I usually move into an exercise or two. I tailor them to what the guest speakers have done or topics of current interest. The exercises are of my own making, which means they are better tailored to my objectives, goals, and timing.<sup>14</sup> For example, when my librarian guest gave a presentation that was particularly strong on different forms and approaches to distribution agreements, I assigned a distribution agreement.<sup>15</sup> That move was ambitious because distribution agreements are long and complicated relative to what I aim for in these classes. That year, however, the students knew where to go in the library and I was able to put some constraints on the assignment so it was not too burdensome nor too consuming of class time. I had the students e-mail me the drafts, and we went over them in class. Because I had them all in my computer from their e-mails, I was easily able to project different versions onto a big screen in the front of the class, and we would talk about how the students had addressed various issues. It worked great.

Much simpler is to use the ball player contract I mentioned earlier.<sup>16</sup> I have the students review it from the perspective of one of the clients. (I split the class in two and tell the students in one half that they represent the ball player and tell the others that they represent the ball club.) Then we talk about what the issues are, including

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13. See generally Edwin W. Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335 (1924).

14. In the end, it has seemed easier to use my own exercises than to find them in another source, although some books are available. For those who would like to consider the books, see, e.g., SCOTT J. BURNHAM, *DRAFTING CONTRACTS* (Michie, 2d ed. 1993); CHARLES M. FOX, *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU* (PLI 2002); THOMAS R. HAGGARD, *CONTRACT LAW FROM A DRAFTING PERSPECTIVE—AN INTRODUCTION TO CONTRACT DRAFTING FOR LAW STUDENTS* (Thomson/West 2003); GEORGE W. KUNEY, *THE ELEMENTS OF CONTRACT DRAFTING: WITH QUESTIONS AND CLAUSES FOR CONSIDERATION* (Thomson/West 2003); PETER SIVIGLIA, *WRITING CONTRACTS: A DISTINCT DISCIPLINE* (Carolina Academic Press 1996). Additionally, some course books for Contracts have drafting exercises.

15. See *infra* Appendix 1 at 737.

16. See *supra* notes 11-12 and accompanying text.

issues that do not appear in the form contract. We talk about what the ball player might want to add and what he would want to renegotiate. Then we work on some language. Again, I project it up on a big screen. The students always find missteps and ambiguities in each other's language, and they begin to feel the pressure of precision and to be appropriately haunted by the specter of *contra proferentem*. We also talk about different drafting and negotiating strategies and practicalities.

Let me also share with you an exercise that, admittedly, I have used only in an upper level course. The exercise requires the students to negotiate and draft a warranty provision for a powerful lamp popular with students. I split the students into teams, some representing the buyer (a large retailer) and the others representing the manufacturer. After they negotiate the warranty, they draft it.<sup>17</sup> A week or so later, before handing them anything back, I announce that these lamps are causing fires, some of them quite serious. I switch the teams and have them write prelitigation memos so that students are writing memos about warranties negotiated and drafted by different students.<sup>18</sup> That way the students negotiate and draft a warranty, then assess others' (and have their own assessed) in the bright light of impending litigation. The students have particularly liked that one.

With these exercises, as with any rigorous teaching, we have to be clear about what is expected of the students: what work product, what deadline, how long, and how the grading will work. But with the approach I have taken, none of this is difficult or complicated. I can get the assignments done in a spoof of a senior partner's memo, "dictated but not read," and just a page or two long. All of these materials can be used year after year. Examples appear in the appendices. Little work on my part generates a tremendous amount of work, and I think benefit, on theirs.

I would offer a few practical pointers with respect to materials. For the exercises, you will want forms to be available electronically, either through CD or Westlaw or Lexis, so the students don't have to do a lot of typing. Alternatively, you can offer them typed forms yourself or use ones from your guest speakers. On that note, consider asking guest speakers for their materials and for permission to re-use them. I have thus begun to build up a number of contracts that can serve as forms, as well as a number of PowerPoint presentations far slicker than anything I could do. I have occasionally used these sorts of materials for extracurricular presentations to interested students and may some day use them in class if a guest speaker cannot be there in person.

Grading has been a harder decision. I began a few years ago by telling the students I would give them written feedback or markups, but no grade, thinking that the lack of a grade would let the students be more relaxed and have more fun with the exercises. I also told them that failing to hand in anything, or anything halfway decent, could count against their class participation grade—just to make sure the students gave the exercise a good effort. The students have often spent so much time on these exercises that they tell me they want a grade. My most recent solution, which works reasonably well but not ideally, is what I call law firm

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17 See *infra* Appendices 2 and 3 at 739-40.

18. See *infra* Appendix 4 at 741.

grading. I tell them I will write on their work product something that they can interpret like a grade, and I give them a translation guide:

“Send it to the client under my name”	A
“Send it to the client under your name”	A-
“Send as marked up”	B or B+
“Do [this or that], then I’ll review again”	B or B-
“Re-do” or “Let’s talk”	the C range
Silence	D or F

Real grading may be preferable for a variety of reasons. The students may want it because of the work they are likely to put into the project. You may want to add the drafting exercise to your instruments of evaluation, requiring a grade. If you are thinking about this route, realize that you will probably need to put an explanation in the syllabus, which requires a modicum of planning ahead.

### III. KEEPING IT SHORT AND MAKING IT HAPPEN

How do you keep it short? keep it manageable? make it happen? not take away too much time from *Hawkins v. McGee*? The short answer is: Don’t do everything every year, and it doesn’t take much time. I don’t do everything every year, and I don’t allot much time. You have to concentrate on pieces of the package and choose whatever fits with your tastes. Introducing transactional skills—and this is only an introduction—only takes a few minutes of discussion around selected cases you would be discussing anyway, plus two-and-a-half classes for guest speakers and the drafting exercise.

Aside from those large points, I have a few small tips. You can use videos for guest speakers. I sometimes need to schedule the guest during non-class time. If students can’t make the live show, they can watch the video. On a similar note, these sorts of assignments work beautifully for makeup classes, especially if you have any double classes or double makeups. Alternatively, you can avoid the makeup altogether. If you know you will have to cancel class, you can schedule your guest speaker for then. Another alternative, if you want to have two or three guest speakers but only want to allot one class, is to set them up as a panel.

With respect to grading or feedback, the key time-saving strategy is division. Notice the structure of the lamp exercise, for instance. I divided the class into teams, then I had the teams negotiate with each other to reach one written warranty. That means there is only one warranty for me to mark up for every four or five students. That exercise also has the benefit of peer evaluation, which is both a valuable teaching technique and a time-saving tool for the teacher. All of the warranties have been analyzed in the prelitigation memos before I ever see them. Of course, reading them and marking them up does take some time, but it is manageable.

## IV THE PAYOFF

I would like to conclude by talking about some of the benefits of this approach. The primary ones, like the structure of the bargain, the primacy of the client, and the precision of language, I have already discussed in the part on objectives and goals. A few others, some small and some large, also deserve mention. One, fairly straightforward, is that you can ask drafting questions on the exam in good conscience. I try to teach what I test and test what I teach. I can't consider giving a drafting question on the exam unless I have taught some drafting skills. There are various other incidental benefits. The students get a break from me. They get a break from the cases. They experience collaborative work. Transactional work emphasizes business deals. It emphasizes clients. It's different from idiosyncratic old family tiffs, which are featured in so many of the classic cases. Finally, I won't be embarrassed at the end of the course. Unlike many, my students can't say, "I never saw a contract in my Contracts course."

[Applause]