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Contracts**

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SAINT LOUIS UNIVERSITY SCHOOL OF LAW
Legal Studies Research Paper Series

No. 2016-24

Taste This!: Experiencing Transactional
Lawyering in First-Year Contracts

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THE LAW TEACHER, FALL 2016

The Law Teacher encourages readers to submit brief articles explaining interesting and practical ideas to help law professors become more effective teachers. Articles should be 500 to 1,500 words long. Footnotes are neither necessary nor desired. We encourage you to include pictures and other graphics with your submission. After review, all accepted manuscripts will become property of the Institute for Law Teaching and Learning.

To submit an article or for more information, please contact Emily Grant at emily.grant@washburn.edu.

Many students grasp the concept quickly when we discuss it in terms of changing the default outcome of the sentence. Students can take these “sentence starters” and easily put them into action. They can self-check their rules to make sure that their words are working for and not against them. When they discover that they have failed to state a rule persuasively, they can use a sentence starter to point the rule toward the outcome they seek. The positive effect of this is threefold: it increases the persuasive impact of the paper, it increases the students’ awareness of persuasiveness generally, and it increases their confidence in their own persuasive writing abilities because it gives them a quick and easy way to make their writing more persuasive.

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Taste This!: Experiencing Transactional Lawyering in First-Year Contracts

By Dana M. Malkus

In a prior submission to *The Law Teacher* (“Reflection, Reality, and a Real Audience: Ideas from the Clinic”), I argued that the clinical education model provides some simple lessons that should inform all law teaching. One idea I advocated was that law teachers bring reality into the classroom whenever possible. Among other ideas, I suggested law teachers run in-class simulations based on “real world” transactions.

Over the past few years, I have had the opportunity to experiment more with this suggestion myself. At my institution, I teach a clinic course (which includes supervising students) and a transactional drafting course. I have a colleague who teaches a large-section, first-year contracts course (a five-credit course spread over two semesters in the first year). Three years ago, I approached my colleague about the possibility of creating an opportunity for his first-year students to get a small taste of transactional lawyering, and he enthusiastically embraced the idea.

The purpose of this article is to share one example of an exercise I designed with that colleague to give first-year contracts students a taste of client interviewing, drafting, and counseling.

Background Reading for the Exercise

For this exercise, in addition to the readings assigned from the casebook (Tracey E. George & Russell Korobkin, *K: A Common Law Approach to Contracts* (2012)), my colleague assigns two supplemental, Missouri-specific cases dealing with the subject of exculpatory contract clauses: *Alack v. Vic Tanny International of Missouri*, 923 S.W.2d 330 (Mo. Sup. Ct. 1996), and *Easley v. Gray Wolf Investments, LLC*, 340 S.W.3d 269 (Mo. Ct. App. 2011).

The exercise is factually different from the Missouri cases and asks for a somewhat different work product. This is partly by design and partly because it is loosely based on a real clinic client matter (with more extreme facts to provide more client counseling opportunities). The exercise asks students to consider the available guidance and then apply it to draft a waiver.

Day 1: Meeting with the Client

On the first day, my contracts colleague explores the relevant case law with the class and introduces the exercise. He then introduces me in my role as the “client.” I introduce myself to the class and thank them for their willingness to help me with a document I think I need. After explaining some of the basic facts, I ask the students what other information they need from me, and we spend some time in the “interview” phase of the representation. In this process, I convey the following facts:

- I’m the executive director of a nonprofit organization called GoodHomes, and I’m pretty new to the job.
- I’m really passionate about the work of GoodHomes. We build affordable for-sale housing. (Here, I also add statistics related to housing in St. Louis and the benefits of stable housing.)
- I’m very focused on the mission, but I was recently reminded by a board member that I need to think more about risk management for GoodHomes. This board member seems to see risk everywhere! You know the type.
- In addition to building affordable housing, we also run a resale store that is basically like Goodwill, but for building materials. The resale store:
 - o provides additional financial support for the affordable housing work;
 - o offers a lower-cost alternative to a traditional hardware store for our homeowners and the community;
 - o helps ensure building materials stay out of landfills;
 - o helps build positive community relationships; and
 - o sometimes results in great donated items that can be used by GoodHomes in its work.

- Sometimes people bring donated items to the store, but sometimes volunteers from GoodHomes go to pick up items from the homes (at no charge).
- Some donated items are quite bulky and heavy and kind of difficult to move. The volunteers often have to go inside the homes and up and down stairs to retrieve the donated items and sometimes have to remove an item attached to a floor or wall (e.g., a sink, cabinets). The volunteers have training and are supervised by an employee of GoodHomes, but none of them are professional movers. Once in a while, they drop things, knock things off tables or walls, or damage a floor or wall. (Once, they even ended up smashing a donor's finger in a door in the process of moving an item! But, thankfully, that doesn't happen very often.)
- Having the volunteers come to pick up the item is a great benefit to the donor; it saves the donor from having to pay someone to move the item or take the time to move the item.
- Just after the board member encouraged me to think more about risk management, I went on a float trip with my family. I signed a form waiver and release when I rented the boat.¹
- That prompted me to start thinking more about this donated item pick-up aspect of GoodHomes. Should GoodHomes have the donor sign some kind of form like this? I didn't even really understand everything on the form when I signed it, but I felt pressured to sign it anyway. What should it say? I'm concerned about making the donors sign something; I don't want them to think something bad is going to happen. I really need these donations and positive relationships with donors.

After Class on Day 1: Team Drafting

Students work in teams outside of class to draft a document they recommend the client have donors sign before items are picked up. They email their submissions to my contracts colleague, and he reviews and compiles them into a single document, adding bubble comments along the way. He then sends that document to me, and I choose a representative sample of the submissions to discuss with the students in class on Day 2.

Day 2: Client Counseling and Discussion

In my role as the client, I tell the class that I have reviewed their submissions and have some questions about them. Starting with one team of students, I ask questions about specific provisions in the document and ask for explanations as to their practical effect. While I am doing this, my contracts colleague puts the document on the screen so that the entire class can see it, and he also follows my questions with some of his own (in

¹I provide this to the students in my role as the client. It is available here: www.adventureboatrentals.com/forms/WaiverAndRelease.pdf

the role of “law professor”). The goal of the questioning is to roughly simulate elements of client counseling and to connect back to the cases, policy discussion, and practical implications of the proposed document. Through our questions, these are some points we try to make:

- The fundamental purpose of a document like this is to shift risk. What risks did you actually shift? If you shift too few, you’ve not really accomplished much. If you try to shift too much (and make things too broad), your document might end up being unenforceable (giving your client a false sense of security).
- Learning to draft in clear English is not only an important habit for lawyers, but it is also especially important under these circumstances. Plain language in an easy-to-read font can help to mitigate an argument from the donor that he or she did not understand the document.
- How might a donor respond to being asked to sign this form? How might this affect GoodHomes’ business?
- Is GoodHomes protected from its own future negligence? Should it be? Is this “fair”? What do *Alack and Easley* say about the necessary components of an enforceable waiver?
- A document like this has practical limits as a tool for shifting risk, so consider “non-legal” risk management tools such as insurance, employee and volunteer training, and risk-reduction guidelines (e.g., donors bring the item out of the house to the curb for pick-up).
- What would happen if this document ends up in court? Do *Alack or Easley* provide any help in answering this question? Would the court care whether the donor was unrepresented by counsel in this transaction? Is there consideration here?
- Was the boat rental sample a “good” form from which to start for this task? Did you consider using the form specifically approved by the court in *Easley*?²

We proceed through the samples as time permits. After class, we give students an opportunity to self-evaluate by providing our own sample waiver and the bubble comments associated with the submissions. The students receive participation credit for this exercise.

Anecdotal evidence suggests that students learn from this exercise and appreciate the opportunity to apply what they are studying in contracts class. My hope is that, in a

²We find that the vast majority of students gravitate to the boat rental sample and seem to ignore the waiver the court approved in *Easley*.

small way, this exercise gives them a taste of transactional lawyering and helps them to see how doctrine and skills fit together.

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Ethics in the Practice of Law — The Nigerian Example

By Gbadamosi Olaide, Ph.D, B.L

Introduction

The legal profession is acknowledged globally as one of the most noble and honorable professions in the world. In this regard, lawyers are referred to as ministers in the temple of justice and as such could be described as custodians of the law, thereby having the unenviable task of interpreting the laws that regulate man and his society.¹ Herein lies the very essence and importance of having very strict rules that regulate the legal profession.² This essay will attempt to summarize some of those rules and also provide suggestions for how professors can teach and model them in classrooms.

Professional ethics contain the set of ethics that binds legal practitioners. Professional ethics (in this case, the ethics applicable to members of the legal profession) deals with moral values or natural set of ideas and beliefs of members of the legal profession.³ In Nigeria, the Code of Ethics that is binding on legal practitioners is contained in the Legal Practitioners' Act,⁴ the Rules of Professional Conduct⁵ and the Legal Practitioners Account Rules, 1964.

Legal ethics codes exhort lawyers “to maintain the highest degree of ethical conduct”⁶ and declare that the “future of the republic” and the “maintenance of justice” depend upon whether “the conduct and the motives of the members of our profession are such as to merit the approval of all just men.”⁷ Ethical conduct is the hallmark of the lawyer.

¹ “Regulatory Bodies of Legal Practice in Nigeria.” <http://thelawyerschronicle.com/regulatory-bodies-of-the-legal-practice-in-nigeria/>. accessed 6 February 2016.

² *Id.*

³ G. O. Abe, “Ethics and African Societies: The perspectives of African Traditional Religion, Christianity and Islam” *African Journal of Biblical studies*, Vol. VIII. No. I. April 1993. 107.

⁴ Cap L 11, Laws of the Federation of Nigeria, 2004.

⁵ Rules of Professional Conduct in the Legal Profession, Legal Practitioners Act, Laws of the Federation of Nigeria. Cap L 11, Laws of the Federation of Nigeria, 2004.

⁶ American Bar Association Model Code of Professional Responsibility (1981).

⁷ American Bar Association 1908 Final Report of the Committee on Code of Professional Ethics, Reprinted in 33 American Bar Association Rep., Report of the Thirty-First Annual Meeting of the American Bar Association at 575 (1908).