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### Teaching Multiple Skills in Drafting & Simulation Courses

Karen J. Sneddon

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## TEACHING MULTIPLE SKILLS IN DRAFTING & SIMULATION COURSES

SUSAN M. CHESLER\*

### INTRODUCTION

Today, our panel will be focusing on teaching multiple skills in drafting and simulation courses. While most transactional drafting courses focus primarily on teaching students how to draft some very specific types of documents, we believe that these courses also present a unique opportunity to teach students a myriad of other skills. This presentation will focus on how and why to design a transactional drafting course that includes a variety of other skills in addition to drafting. Each panelist today will draw upon his or her own experiences and discuss how they incorporate a particular skill into their transactional drafting or simulation courses, while providing some very specific examples of how they go about teaching that particular skill in their courses.

Now, I would like to introduce you to the other panelists:

Karen Sneddon is an assistant professor at the Walter F. George School of Law at Mercer University where she teaches legal writing, introduction to counseling, and trust and estates drafting. Prior to teaching, she practiced law in the area of trusts and estates in New York City. Today, Karen will be discussing how she teaches skills relating to interviewing clients in her trust and estates drafting class.

Elizabeth August has taught legal writing at Syracuse University College of Law since 1999. She teaches legal research and analysis to first- and second- year students. She has developed and teaches a transactional drafting class for second-year students and today she will be discussing her experiences in teaching students about counseling and advising clients in that transactional drafting class.

Mark Need oversees the Entrepreneurship Law Clinic, a clinical course distinguished by its focus on start-up ventures and high-growth potential businesses at Indiana University School of Law in Bloomington. Prior to joining Indiana Law,

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\* Susan M. Chesler is an Associate Clinical at the Sandra Day O'Connor College of Law at Arizona State University, where she teaches Legal Method & Writing, Legal Research & Writing, and Contract Drafting and Negotiating. She previously taught at Widener University School of Law in Harrisburg, Pennsylvania. Prior to teaching full-time, Susan M. Chesler served as an Adjunct Professor at New York Law School, served as the Director of Human Resources for a child welfare organization, and also practiced as a litigation attorney in New York City.

Mark spent 13 years in private practice representing businesses of all sizes. Mark will be discussing teaching critical private practice drafting skills in non-substantive areas.

I will be addressing teaching negotiations skills in my contract drafting class. We have reserved time at the end of our presentation to answer questions and hear your comments and ideas on additional ways to incorporate a variety of skills into a transactional drafting or simulation course. So, I ask that you please hold your questions and comments until the end of our presentation, and I have also been asked to remind you to please pull out the evaluation sheet from the packet you got and hand that to Paschalia at the door on your way out.

**KAREN J. SNEDDON\***

### INTRODUCTION

Good morning. I am really excited to be at this conference as a transactional lawyer who never drafted anything before she went into practice and had very, very little experience with any of the other transactional skills that I would be using on a daily basis. I am really excited to hear about the number of courses and opportunities that students have now. Of course, I am thrilled to speak about the opportunities that I offer the students in my courses.

What I do is provide two opportunities to learn about counseling. Every student at Mercer University School of Law takes a mandatory one-hour credit at the beginning of the second year that serves as an introduction to counseling. We focus on counseling for a variety of different settings, including a criminal context for plea bargaining. I also have students in their sixth semester in my elective course, Trusts and Estates Drafting, allowing them to focus on counseling in their very last semester before they graduate. And I really make a conscious effort in instructing on interviewing and counseling to try and kind of debunk two misconceptions that I think students bring with them into almost any drafting class.

The first is the “Hired Gun” concept. This, of course, is a common term in counseling literature referring to the idea that our role as lawyers is to simply do what the client wants without engaging the client and having them think about other issues. In fact, sometimes the “Hired Gun” model can actually ignore some of the client’s interests that are not really articulated. For my class, I sort of think about that idea as the “Scrivener’s concept”—students come in and say, “This is pretty

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\* Karen J. Sneddon is an assistant professor at the Walter F. George School of Law at Mercer University where she teaches legal writing, introduction to counseling, and trust and estates drafting. Prior to teaching, she practiced law in the area of trusts and estates in New York City.

easy—all we do is what the client says for us to do. I don't know what we spend all semester on.” And, of course the students are quickly debunked of that misconception.

The second misconception I try to debunk concerns this idea about it is just a collection of forms. Some individuals will dismiss drafting as simply a forms-based practice, as if that means that monkeys can be let loose with a bunch of forms and suddenly come up with all these wonderful documents. So, I really want the students to realize that it is more than the forms- we have to talk with the clients, we have to think about what we are doing for that particular client. Our true role is to facilitate the implementation of the client's goals, both articulated and unarticulated.

So, what I want to do today is highlight some interviewing and counseling basics that I try to instill in all the students. Then I want to talk about three very concrete, specific techniques that I use to make sure that I am incorporating a little bit of the material from the introduction to counseling in order to repeat that information as we go through the semester.

The first technique is “podcast potential,” and I actually have a podcast to sort of share with you- hopefully it works. The second technique is “Movie Magic,” since of course everybody likes to see movies during class. The third and final technique involves simulations, both structured and unstructured. Now, although I am going to be using examples from my Trusts and Estates Drafting course, these techniques work well with any course. They are adaptable.

## **I. INTERVIEWING AND COUNSELING BASICS**

In the overview of interviewing and counseling basics, what I do is build upon what the students are already exposed to, and I do that starting with the very first assignment that I give the students—the engagement or retainer letter. I use that opportunity to go through what I think of as the five elements of the initial interview: (1) introduction and roadmap, (2) identification of problems and objectives, (3) preliminary survey of possible actions, (4) decision to engage counsel by the client, (5) and a specific action plan.

When we are talking about what we need to put in the letter—fees, conflicts of interest, confidentiality, and so forth—we discuss things like how you would actually conduct that interview, how you would get that information from the client, and it provides some opportunity to learn about how to create that trusting, attorney-client relationship. And that is really one of the key things that I think the students need to understand. The client must feel comfortable telling us information

that, in my case, concerns finances and family, but in all situations is very, very personal—exactly how much money they have, how much debt they have, exactly how they feel about that brother-in-law who has spent seven years at the University of Georgia and is still just a freshman. Those points may seem like routine discussions for us to have since we hear lots of client conversations like that. However, for that particular client, it is very, very uncomfortable. So, how do we, as attorneys, start that relationship and how do we get that information?

I also take the time to review the different active listening techniques. I am not going to go through all of them, but one thing that I want to stress to students—and it is a common problem with lawyers and law professors—is that we simply talk too much. We can come across as thinking that it is all about us. We need to make sure that the clients are part of this conversation.

I focus on the active response—“go on,” “what happened next,” “yes”—to prompt the clients so that they continue to talk to us and give us the information that we need. I also bring up the idea of broad-to-narrow questions. Start with very broad— “what brings you to the office today”—and funnel those questions to more and more specific ones. My favorite active response is the clarifying summary—“Let me see if I understand you- you are concerned about who is going to take care of your children? You are concerned about who is going to pay the mortgage?” The idea is that we can sort of summarize what they have just said and put it in kind of our context or lingo to make sure that we are doing exactly what they want us to do.

## II. THREE SPECIFIC TECHNIQUES

### Technique #1: Podcast

There are three techniques I am going to talk about. The first one is the podcast. I think it is always difficult to grasp ideas in the abstract. I can sit in my class and talk about how this interview is going to go and the students will all nod their heads and say, “Yes, that’s exactly how I would have phrased that, just the way that you said it.” So, what I want to do is give the students a chance to hear the interview but still retain some control over it. I love simulations, but you never know what the client is going to say, even if you have an actor. (At the law school, we get wonderful actors from the medical school’s standardized patients roster.) What I do for this technique is create the podcast with a particular actor and then edit the podcast to put in what I call “pause points.” So, there will be a conversation between an attorney and a client and then I’ll have Pause #1. I actually stop the podcast at that point and invite the students to participate in that conversation— “What would you have done differently? How would you have rephrased this? How would you start this? What would you then say next?” Let me go ahead and play the

excerpt if I can get that up there and you will kind of hear exactly what it is that students would hear. (*Podcast being played.*) So, we talk about whether my approach was the best way, and I'll ask you—is this the very best way to start this interview? No, of course not. There is no “icebreaker.” And the comments on the podcast even acknowledge that the attorney speaking is going off of someone else's notes and that the client hears that this “is not worth my time,” “I did not research or even consider this before the interview.” So, we have that discussion and we can pickup from there. (*Podcast being played.*) This comes right after the engagement letter assignment where the students have tried to bill at \$500 an hour for a will and are estimating the total cost at about \$50,000. The assignment makes the point that time is money, but it's perhaps not the best thing to tell the client in this manner as stated in the podcast.

(*Podcast being played.*) This point takes us to the idea that transactional work involves routine situations. We can likely predict what a client is going to want—they have kids, obviously they are concerned about guardians. They are going to think about who those people are, but this isn't at all a new experience for them. We don't really want to say, as in the podcast, “I know exactly what you are going to say ahead of time.” The clients are not going to feel comfortable really telling us about their goals if we immediately try to fit them into this little box right from the beginning. Just one more little bit before we click off of this. (*Podcast being played.*) The podcast goes on and shows how we can get back on track so that we can actually get the information that we want. The students really love the podcast, in part because it involves me playing the role of attorney sort of screwing up an interview. But it really gets them thinking about what is wrong with that particular question, not just how it is going to be phrased in the abstract.

Now, I like to give tips on how to stay organized when using this technique in the classroom. I create the transcript in word, and then I use the comment feature. I put the little bubbles down with how I would have rephrased the comments, thinking about particular things like “here is a narrow question;” “here is a broad question,” so that the students have a very good idea about how they would fix a problem. The bubbles are what I use to sort of guide the conversation.

It's easy to create a podcast. It does require just a little bit of technology. You will need a voice recorder and some software on your computer, but most IT Departments have those items now. It is easy to record the podcast, You can upload it to your computer and you can then upload it to your course management system so that the students can play it back at the end of the semester, in the middle of the semester, or whenever they feel like they need to have it. Your IT department can probably help you create the podcast, but, if not, the CALI website is helpful.

### **Technique #2: Movie Magic**

Let me talk about the second technique—“Movie Magic.” We all remember that moment in science class where someone wheeled in that gigantic projector and got out this big spool of who knows what—the birthing cycle of a butterfly—but there was a certain sense of euphoria, right? You are not going to hear the professor; you are going to see something different. And I think law students enjoy that experience just as much as we did in grade school. So, what I try to do is bring in some movie clips that are actually appropriate so that the students can see a client interview in action. The clips need to be picked with care, of course. There are a couple of clips that I show—one is from *A Civil Action*, which isn’t actually in my subject area, but is helpful nonetheless, and the other is John Grisham’s *The Rainmaker*. Now, let me share with you real quickly why I use those movie clips.

The first clip I show is from *A Civil Action*. I read the book before I went to law school. I think it is one of the reasons I went to law school—to fight all these injustices—so I became an attorney for high net-worth individuals. Anyway, I show the clip where John Travolta, as the lawyer, is meeting the clients who are going to be the class—they have just lost their children to leukemia, but the lawyer and clients are talking at cross purposes. He comes in and says, “Who are the deep pockets? Who do you want me to sue?” And the parents say, “All I want is an apology.” And he says, “Okay, that’s fine. Who am I going to sue? Whom am I going to get the fees from?” What I want to pull from the students is the idea that we can’t think about everything as only having a legal ramification. We want to explore exactly what clients are thinking about and engage in both legal and non-implications thinking about the client’s goals and how we can achieve them. What is an apology? Who do we need to talk to? How do we facilitate that conversation?

The second clip I show is from John Grisham’s *The Rainmaker*, which actually involves a situation where there is an elderly client who wants to have this very young lawyer draw up her will. She says, “I want to cut my kids out, I want to cut, cut, cut, cut my kids out.” And he says, “Okay, who do you want to get this money?” She says, “Well, there is a very, very nice man on TV and he needs a new jet.” The man on TV is a televangelist and the attorney is kind of faced with the question of “What’s my role?” He feels that he personally can’t just cut off the kids and give the money to the televangelist. What is his role given the possibility of a will contest? How would this Will actually stand up in court? What policies does this wish implicate? And what about the idea that the client may not be thinking about the family harmony—are the kids going to really love the mother after they read this will? Maybe the client has thought about that and maybe she hasn’t. This kind of thinking about what it means to go forward in this situation is helping the students focus on what topics to explore with clients.

### **Technique #3: Simulations**

The third technique involves simulations. The students love simulations because they get a chance to be lawyer when there really isn't that much at stake. I use both structured and unstructured simulations. (*Referencing PowerPoint presentation.*) This is just an excerpt from the client instructions—blue paper for the client, pink paper for the attorney—and I actually let the students go ahead and work on some smaller assignments where the simulation provides the facts for their assignment. All of the students will talk with the client, they will get that information, they will all have an opportunity to be a client at least once and an attorney at least once to do those assignments there. This, of course, is the drafting attorney instructions (*referencing PowerPoint presentation*)—they get instructions that help them sort of guide the conversation.

My favorite simulations are actually the unstructured ones. They are much more what I consider to be impromptu. We have some forms, some of which are actually statutory forms like a living will or an advanced directive. We may tweak some of the forms, but basically they are the same for each client. What I don't want the students to do is think, "Well, this is the form, I am just going to download it, input my client's information, hit print, and that's the end of the assignment." So, what I do with the unstructured simulations is distribute the forms in class and designate students as attorneys and clients, and then I give them a certain part of the form. For instance, I say "Okay, this set of attorneys is going to explain point number two. This set is going to explain point number three." And we go through the form that way so they have to explain it in real words. They can't just read what's on the form. For example, if explaining an advance directive, the students may have to answer the following questions. "What does it mean if there is an exception?" "An exception if someone is pregnant?" "What does it mean if your client is a woman?" "A man?" "Does it have to be included in the form?" So, the students really get a chance to think about that form, and what I've found is that when they go to draft it, it is a much more thoughtful form.

I hope I have given you some ideas to think about, some concrete ways to introduce interviewing and counseling.



**ELIZABETH AUGUST\*****INTRODUCTION**

My name is Liz August and I teach in the legal research and writing program at Syracuse University College of Law. Our program expanded last year beyond the previously required two two-credit semesters in the first year. We now have a required two-credit course that students must take in their second year that they take in either the Fall or Spring depending on what letter their last name starts with. Our curriculum is interesting because we have electives that they can choose from, such as my transactional drafting course, pretrial litigation, criminal litigation, and judicial opinion writing. We also have courses that are focused a little bit more on writing structure—I hate to use the word “remedial,” but these courses are generally for people who didn’t do so well in the first year and want to kind of revisit that type of structure again. So, overall we have a nice program.

I would like to think that students take my class because they have a real interest in transactional drafting. The reality is that they probably like the time that it is offered or that it somehow conveniently fits in their schedule, but my course is a two-credit class and I typically have two sections of it with about 16 students each. The course is transaction-based and we spend the entire semester on one case file, typically the purchase and sale of a business. I have one section that represents the buyers and one section that represents the sellers, which works nicely because each section can discuss confidential facts, strategy, and negotiation without giving up any of their leverage. And throughout the semester my students do some drafting—typically they will do a retainer agreement, a letter of intent, and ultimately a purchase agreement. They also negotiate either a stock or asset purchase that has an ancillary document, such as an employment agreement, a consulting agreement, a licensing agreement, or a lease. It is interesting because I think I am going to revise the course—after some of the presentations I sat through yesterday, I may add a sales agreement as well.

Because we are part of the required research and writing program, we also have a component requiring the students to revisit basic research and drafting of a memorandum. So, I try to choose subject matter that fits and integrates well into the substance of our transaction. We have done enforcements of non-compete clauses—we just did a trademark infringement memo, tortious interference—but I try to include the memo in such a way that it is related to the transaction and

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\* Elizabeth August has taught legal writing at Syracuse University College of Law since 1999. She teaches legal research and analysis to first and second-year students.

somehow either affects the negotiations or the structure of how the transaction will take place.

During the semester I try very hard to think of what I want my students to learn. Among many things, I certainly want them to learn to draft a contract. I want them to understand what the component parts of a contract are and how you use them to protect a client. But I also focus a lot on teaching them to identify what a transaction means to a particular client. What are the client's interests? What are the goals of the client? Are there some goals that the client might but wasn't able to articulate? I want them to learn that you have to kind of do a little investigating—some interviewing as Karen does—to get to the bottom of what the client is trying to get out of this transaction and what, ultimately, will make the transaction successful in the client's eyes. In the end, I want them to take home how to draft contract provisions or negotiate a contract that will protect the interests of a client so that everyone ends up happy.

## I. TWO SURPRISING DISCOVERIES

### A. Students have difficult anticipating the future

In teaching my courses, I have learned a couple of things that kind of surprised me. I went into this class a few years ago thinking that students need to learn how to write contracts because even if they don't become business attorneys, they are probably going to write a contract at some point. Whether a student becomes a matrimonial lawyer, an environmental lawyer, or even a litigator, he or she will likely have to draft some sort of contract. Not to mention that you can't get through life without signing a contract yourself. Most of my students have leases—they bought or leased cars or they have financed their education or perhaps their vehicle. They have signed a ton of contracts that they have no idea what they were really about. So, knowing how to draft a contract is just a good skill for everyone to have.

The first thing that surprised me is that although I anticipated my students wouldn't know much about contracts when they came into a drafting class, I didn't anticipate how much their lack of business or life experience would affect how well they could draft a contract. Most of our students come right out of undergraduate and are twenty-two or twenty-three years old and have worked as lifeguards or in a liquor store for most of their employment. So, it was interesting to see that the thing they had the hardest time with was anticipating what could happen in the future—what possible situations could arise that might affect the client, the transaction itself, and the goals of your client in the future. They had a hard time with that.

They also had a hard time realizing that the transaction was not about them as the attorney. It is about the client, and doing what is in the best interest of the client is not necessarily what is in their best interest of getting a good grade in the course or of their ultimate career and reputation as a lawyer. I've found that law students, and really everyone I guess, goes through life typically thinking about situations that have already happened to them—facts that are already in existence and how they have reacted to those facts. In the first year of law school, in most programs like ours that are litigation-based in their first year, students are given a set of facts concerning something that has already happened to a client, and they are told to somehow figure out what the legal implications of those facts are. But they never deal with question concerning what could happen next week, next month, what could happen to the parties in the transaction, or how some third party intervention might affect their client's rights.

So, it was very interesting for me in my first year of teaching to see the difficulties for the students and, because I hadn't anticipated that difficulty, how the contracts were really, very one-sided because they left off at the end of the transaction. The students protected their client, they did what the client wanted them to do or said that they wanted them to do, but they didn't do anything else. So, I really had to revisit that issue and explain to my students that being competent drafters involved anticipation. You are not just a technician that drafts a contract, but also a counselor and advisor that has to look out for the interest of your clients and anticipate the bad things that might happen or perhaps the good things that the client isn't thinking about when they are going into a transaction.

I tell my students to think about it like a marriage. People get married all the time and I have never heard of a person that went into a marriage thinking, "I am going to get divorced in a year and a half; this not going to work." Everyone goes into a marriage with the best of intentions but I checked statistics last night that put the divorce rate at 40% now, down from an all-time high of 48% in 1998. 40% of marriages do not work. I do not think that the statistics are that grim with regard to transactions. But it is the same idea. Things can happen in the future that are sometimes out of control of the parties that ultimately have different results—parties may want to get out of the transaction, parties may think what they are getting has changed, or they may want changes between the time the contract is drafted and closing.

How do I try to get them thinking about this? It doesn't happen in one class where I sit and lecture them about how they have to think about the future. I try to teach them through a series of exercises. I usually draft questions where there are potential problems lurking in the future and we talk a lot about issue-spotting. And I

also play a game which I call the “what if” game, which is in your packet, on which we spend half a class, or realistically probably less than that.

I divide my students into groups. I usually have between 12 and 16 students. So, I divide the students into groups of three or four and they have to come up with a team name and appoint a team captain. The students get very excited about their teams and it is kind of competitive. There is candy usually for the winner and they get very excited about it even though they have no idea what we are going to do.

Typically the way I organize this is by stationing my teaching assistant at the front of the classroom as a scribe—she writes down the names of the teams, keeps track of the points, and she also records the information that we are going to pull out through this game. Now, the game is designed to determine what kind of things could happen, the consequences that could result to the client, and what kind of drafting or contract concept we can use to protect the client in the event that a certain consequence does come about. And because my students are split so that one section is all buyers and one section is all sellers, it works really well because both groups have the mindset of their client, either the buyer or the seller. And the separation is also good because it makes things kind of linear, helping the students to understand the different contract concept and how it applies to the real room effects.

I tell the team captain of the first team to think of something that could happen in the future—to tell me something that they think could happen based on our facts. Now, because the students need to have a good familiarity with the case facts and have to understand some of the basic contract concepts, give the players until about the third, fourth, and fifth week of the semester after you have already have gone through what a rapid warranty of the conditions are. Now, maybe the students say, “What if the buyer dies before the closing date?” So, good, they get a point for coming up with a possible occurrence. Then I open it up to the rest of the class and ask, “Who can tell me what consequence that would have on our client?” Let’s say we are the buyer. The consequence would be that the buyer’s estate would not want to have to go through with this contract. They would want to make sure that they are not obligated to continue to buy this business in the event that the buyer is dead. Okay, great, that team gets a point.

I ask the students what contract concept or concepts they would use in their contract to protect the client that, conditions the closing on both parties being alive and kicking at the time of a closing. Sometimes there is not a contract concept. Sometimes, especially with some of the things that can come up post-closing, there is really no way to protect against it, but in most situations there is the opportunity to protect the client.

A lot of times I create a hypothetical where the buyer and seller are college roommates or somehow related. So, everyone goes into the deal very happy and then we talk about what would happen if there was a falling-out. What if the guy gets into a deal with his best friend and realizes that maybe his friend who sold him the business hadn't told him everything. Maybe the business isn't quite worth what they thought or maybe they were relying on the sellers sticking around and continuing to advise them to help them learn the ropes of the business. What happens if they have a falling-out and he backs out? At the end of the exercise, we end up with kind of a grid or a flow chart that lays out potential problems, their consequences, and how to protect against them in the contract, so that when the students go to draft and negotiate the contract, they have a list of what they have to worry about and what they have to protect the client from in the future. Overall, it works pretty well in getting them to identify future problems.

The second thing that I was surprised to find was that my students struggle with advising the client. Again, they want to do what the client wants to do, especially in a class where they are getting graded. They think, "Hey! The clients say they want to do this, so let's do this—that's great!" Or, if the client doesn't want a non-compete clause because the seller is his best friend, then he doesn't want it so they don't think they should put one in the contract. They need to understand that sometimes being the good lawyer is identifying the problems for the client and making them aware of the problem, even if the client ultimately makes a decision that you don't agree with. That's their responsibility as lawyers and they have to protect themselves by making sure that they identify and communicate any problems that they see.

My students struggle two ways. First, they want to be the hero. They think that they are going to get the client the most money, and they lose sight of what the client's goals are by resolving to do what is best for the client regardless of what the client wants. The second way they struggle is that sometimes they are too aware of what the client wants and can't bring themselves to tell the client that they may not be approaching something in the best way.

So, we go through an exercise where we sit down and determine what the client's goals are because the students have a hard time understanding that the goals might be very different from simply wanting to buy a business for X amount of money or selling a business for X amount of money, and that sometimes the clients can't articulate those other goals, such as family considerations. A lot of times I make up a hypothetical where there is a sick wife at home or a sick husband at home; maybe the client hasn't really thought about what they are going to do if the spouse's health takes an even greater downturn. So, we end up doing a client letter where the

students provide a significant amount of advice for the client, and to help them with that, I make a chart with the student's input in class that lists the client's goals.

A lot of times I use a fact pattern involving an insurance company that we are helping to sell to another insurance company that wants to expand its business. However, though the buyer wants to expand its business, the buyer is friends with the seller. The fact that both parties want to maintain this friendship is a goal that a lawyer needs to take into consideration even though it is a goal that is separate from those of the actual transaction and really has nothing to do with how much the company is being bought and sold for. But it is important in understanding how you should behave in negotiations, how cooperative negotiations need to be, and ultimately whether there is something you can do to protect the deal through your behavior rather than by just the terms of the contract.

So, where I went in thinking that I was just going to be teaching my students the technique of drafting a contract and helping them to understand specific contract concepts, I found that I spent a lot of time trying to change the way the students approach legal issues. But, like I said, I am going to be revising my course a bit to add a little more drafting into it, so I am interested to know at the end whether anyone else has had similar issues with students not being business savvy and how that effects your ability as an instructor to really teach a business transaction.

### **MARK NEED\***

#### **INTRODUCTION**

Good morning. Thanks for hanging in there. My name is Mark Need. I am the Director of what was the "Entrepreneurship Law Clinic" at the IU School of Law in Bloomington. There are two Indiana University Schools of Law if you don't know that. There is one in Indianapolis and one in Bloomington. We are separate law schools, but both are part of Indiana University. I'll start out by saying that I didn't know there were such things as lifeguards for liquor stores—we don't have those in Indiana.

We are the Elmore Entrepreneurship Law Clinic now. We were lucky enough, last October, to be given what was, at that time, the largest single gift the

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\* Mark Need oversees the Entrepreneurship Law Clinic, a clinical course distinguished by its focus on start-up ventures and high-growth potential businesses at Indiana University School of Law in Bloomington. Prior to joining Indiana Law, Mark spent 13 years in private practice representing businesses of all sizes.

law school had ever received—a \$3 million gift from a local entrepreneur who really believed in the clinic and its principles. Both he and his father are alumni of our law school, so it was a good year for us at that point.

Quick plug, we are hosting the Midwest Clinical Conference this Fall. I'm happy to talk to anybody about that. We are trying to invite people and get participation, and we will have a very expansive definition of what Midwest means. So, if you are interested in participating or someone from your school is, please put them in touch with me.

I teach a live clinic for start-ups as was mentioned earlier. It is not just a drafting class. To give you a little background, so you understand how the drafting comes in, my clinic is kind of unique. We have a four-year joint-degree MBA/J.D. program in Bloomington. Lots of schools have those now, but we are one of only three law schools in the country that has a three-year J.D./MBA program for those students who are sick enough to take the four-year program that is already pretty rigorous and compress it into three years. We currently have two students who are in the three-year program.

My clinic is actually a joint venture between the law school and the Kelley School of Business. They have a world-renowned MBA program at Kelley, and I maintain an office at the law school, and I am also a faculty at the Johnson Center for Entrepreneurship and Innovation, which is an independent innovation center inside the Kelly School of Business and an invaluable resource for an entrepreneurship live client clinic. I can walk ten steps in any direction and put my hands on real clients who are start-up ventures right out of our incubator or otherwise who need live client assistance. Any of you who have done small business representation know, and I say this all the time, look at their budget—the line item for legal expenses is usually half or less what you know it ought to be for legal assistance. So, in the clinic, I get to bandy about that four letter word “free,” which causes lot of people to come my way. We don't have any trouble finding good clients.

I'm here today to talk about my clinic drafting class. The clinic is three years old. I have been doing it for two years and I look at all the drafting that we have done and the instruction across all the areas—choice of entity and everything that goes with it, bylaws, certainly operating agreements. In my thirteen years of practice, well over probably ninety percent of the entities I formed were L.L.C.'s, so drafting operating agreements and explaining operating agreement provisions to live clients is a big part of what we do. Because we principally represent entrepreneurs and start-ups, we have lot of people coming in with new concepts and new ideas that they need to talk to us about or talk to third parties about and that they need to protect.

So, we spend a lot of time talking about provision-by-provision drafting for actual live clients—nondisclosure agreements, confidentiality agreements, sometimes non-compete agreements, employment agreements if they have some key employees who are bringing technology or ideas.

We also participate every spring in an international competition sponsored by UNC called VCIC, which is the Venture Capital Investment Competition. Ten seconds on that so you know where the drafting comes in my clinic. If you have ever been around a business school, you can throw a rock in any direction and hit a business plan competition. By the end of your MBA program you are sick of business plan competitions and don't want to see another one.

UNC has done a neat thing. They have taken the business plan competition model and sort of turned it on its side. They have placed students in the role of venture capitalist. There are teams of five from each participating university, a panel of judges who are actual VCs, and then they bring in real entrepreneurs with business plans. All of the teams sign nondisclosure agreements and these small businesses, these entrepreneurs who are usually looking for B rounds of financing—a million to twenty million dollars—actually make a pitch to the students. The students then have forty-eight hours to go away, look at the business plans, and develop the due diligence. Each group has fifteen minutes to ask questions and cover all the due diligence they want to cover with each entrepreneur. But, from a drafting perspective, they have to go away, generate their own valuation that compares to what the clients thinks the value of the business is and draft the terms sheets to tell whichever business they are going to invest in. They also have to draft an executive summary, and, on the last day, all the school teams come forward and make a presentation to the real venture capitalists detailing what they invested in and why.

So, you can see that, during the course of the semester, we are drafting across a number of areas. There are two problems I routinely experience in the clinic with that. The first I mentioned briefly in a question to one of the other panels yesterday. I am sure we all run into this- I routinely find that I am at one extreme or the other. We might get an employment agreement with a live client where there is real drafting to be done, so my choice is either to give the students nothing or hand them a sample employment agreement.

If they are in their third year of J.D. or fourth year of their J.D./MBA, they probably have never drafted anything before, and you are asking them to literally pull things out of the sky. I don't have the luxury in a live client clinic to spend three or four weeks leading them through contract drafting principles. So, I don't want to leave them with nothing. But, on the other hand, you don't want to hand them a



sample employment agreement—I always invoke the old Monty Python bit that they are just going to take a dog license and scratch out the word “dog” and write “cat” in there in crayon. They essentially are going to do a cut and paste job, and they are not going to have a valuable learning experience from that either. So, that is one of the problems that we all run into, and I have gotten some good ideas here in the past couple of days of how to kind of strike that balance.

The second problem that I regularly run into is that the substance of what I teach in the clinic, from a drafting perspective, varies so much from semester-to-semester because it is driven by the mix and makeup of the clients in any given semester. So, I can't plan on exactly what we are going to be drafting in August because some of the most exciting, sexiest client projects we have are ones that a client or even my network of private practice attorneys don't know about until they arise that week. I will get a phone call saying, “I have got a client and they need this by next week—do any of your students want to jump in on this project?” So, I can't really plan neatly for a semester, with the possible exception of operating agreements that pretty much every student touches during the course of the semester. So, there is a little bit of background on my clinic. If anybody has any questions like how clients are funded, how our clinic is funded, how it works, or how we bring in clients, please stop me after the presentation and I'll be happy to talk with you about that.

What is consistent in terms of drafting and what I came to talk about this morning is my charge from the law school to run my clinic like the managing partner of a small law firm. The name of the section this morning is “Teaching Multiple Skills,” and I sort of asked myself in the beginning of the clinic when we got away from the more substantive, or, I should say, topical materials. After fourteen or fifteen years of practice in a large Indianapolis firm, what practice aspects, what administrative practice aspects of drafting stood out as important? And I don't think anybody else has covered this while we are here, but there are two that are near and dear to my heart.

The first is engagement letters. We'll talk briefly about how we teach writing engagement letters. We have engagement letters with each and every client, and there is as much art as science in drafting an engagement letter. And the second important practice aspect concerns time sheets. A question came up yesterday about who uses time sheets in their clinical settings or who teaches about time sheets, and we certainly do because we are a live client clinic. I am partial to these two aspects because I believe there is a place to teach about engagement letters and communicating value on a time sheet, whether you have a live client clinic or not. As an ex-private practice guy, I understand that these are two critical skills that you spend a whole lot of time on- backing up and spending valuable billing time with

associates, bringing up the learning curve, and I think it is something we can all teach in the clinic.

## I. ENGAGEMENT LETTERS

Why are engagement letters so important? Why do I tell the students that there is as much art as science in an engagement letter? The engagement letter is that place where you try to strike that balance between thinking about everything that can go wrong and establishing a relationship in which your client feels comfortable. You are essentially creating a contract. God forbid you would ever need to go back and point to your engagement letter, but you are establishing a contract with your client in all of its terms. If you have ever had unpleasant situations where you had to bring a suit against your client to collect an account or otherwise, you might have attached that engagement letter as a contract to the extent you could.

The engagement may be the first piece of correspondence or written document that your new client has received from you and you want them to be comfortable and feel comfortable with you. After all, they are handing their baby to you—their business—and want them to feel comfortable. You don't want to beat them over the head with something that appears to be a heavy-handed contract. So, we talk a lot about how to draft an engagement letter that strikes that balance.

How do I do that? I do that using the technique that a lot of us use—I lead the students down the garden path of ideas and then let them go away and make the mistakes for themselves. When we talk about engagement letters, I ask the students on the first day to brainstorm. I tell them to think about being a private practice attorney, think about being a client: what do you want? What areas need to be in that engagement letter? What shouldn't be left out? The idea is to show them how much this is like a contract and not a friendly letter, and how they are going to strike the proper balance. And eventually we always generate the same list of elements for the engagement letter, and I make certain that we generate the same list by asking the right questions.

### A. Scope of Work

The scope of work is extremely important. That seems like a no-brainer. Of course, the scope of work is going to be part of the engagement letter. What the students don't realize—and this comes up a lot in the private practice setting and now it is coming up in the clinical setting—is that the client's expectation is right there. You hate to use the engagement letter as the CYA letter, and you hope that you are able to maintain the client relationship so that you never get put in that

position, but if you are put in that position where you have a client at the end of the project who says, “what about this” or “what about that” or “I thought you were going to address this” or “what do you mean my ‘S’ election didn’t get filed within the proper time period,” you can always go back to the scope of work. You can say, “I made it simple—it was only one paragraph, but you will notice that you assured me that your accountant was handling the filing of the SS-4.” That’s one of a myriad of examples, but it’s very important to deal with the scope of work and not gloss over it.

### **B. Billing Increments**

Including billing increments in the engagement letter is very important—particularly if you have a new client starting a new venture. They probably haven’t dealt with an attorney before, and, if they have, they probably haven’t dealt with an attorney who billed in time increments, so we have to go through the discussion, both in class and with the clients, about the fact that the client is actually benefited by the fact that we bill-in time increments of 0.1 hours rather than 0.25. The clients say, “Really? You bill to the tenths of an hour? You guys are really trying to rip me off.” Then we have go through the exercise and show them what would have happened if we had billed them in quarter hour increments instead of tenth of an hour increments. So, that’s a good lesson for everybody. Of course, we go over the rates of all the professionals working on the matter—my hourly rate, how the associates that will be working on this are identified, the paralegal gets billed at an X-rate etc. And, I don’t have it on here, but in addition to rates of all the professionals on the matter, we go over in-house expenses, like whether we are charging for photocopies, faxes, and things like that.

Annual adjustment of rates is a huge deal. There probably isn’t any project or client that isn’t going to wrap around the first of the year, and any firm that your students ultimately are placed in will probably have an annual rate adjustment. You don’t want to go back and sign a new engagement letter every time there is a rate adjustment, so what you do is communicate that your rates are adjusted, typically with a ceiling of five percent, each year and that the client will subject to the new rates whenever the adjustment takes effect.

I also go over how third party costs are billed. Again, this is brainstorming. I write all these things on the board and try to get the students to think about what else that they need to include. What if you have to take depositions? What if you have to hire an engineer? What if you have to hire an expert? Is the law firm going to pay for that and then try to beat that out of the client? The engagement letter makes it clear upfront that we are going to establish a direct contractual relationship with the client and that they are going to be responsible for those bills.

### **C. Retainers**

We are all familiar with the word “retainers.” Retainer means a hundred different things to a hundred different clients. So, if you are clear upfront and say, “I know you already gave me \$5,000 and this is your first bill. Look back at your engagement letter—we hold the \$5,000 as an actual retainer and we refund the difference to you at the termination of our relationship, however that comes about.”

### **D. Right of Termination**

Another thing that is very important to talk about is the right of each party to terminate the relationship. This is the one that the students often forget when we are sort of brainstorming for the engagement letter. Those that come from a private practice background are familiar with what I am about to say, but it struck me as funny when I first began practicing that I have the right to fire my client as much as my client has the right to fire me. So, we spend a little time talking about the ethics of timing a termination. Of course, you can't leave your client in the lurch or on the eve of a hearing or otherwise. But it is important that the students, as future practitioners, understand why and how to put that in the engagement letter. I tell the students that an attorney is not a bus—there is not any client that comes along who has the right to get on and ride. If your client is doing something unethical or is making you uncomfortable, you have the right to terminate your relationship just like the client does.

### **E. Executing the Engagement Letter**

There is one more thing relating to the engagement letter that students often forget—they forget the necessity of executing the engagement letter before doing any work. How many times did we see this with associates in private practice? They get excited that their first client was there and that they are going to get credit for it, so they put down two hours of working, four hours of working. Then the client goes on vacation, the associates can't get a phone call back, and, before you know it, they are two, three, four thousand dollars into the case and the client flakes off and goes away. Then they discover that they don't have a signed engagement letter and that, if you really wanted to sue them, you would be taking this quagmire action before a judge you probably know who is going to say, “Why don't you have a signed engagement letter with this client, you fool?” So, I tell the students, “I know you are excited. I know the clinic is underway and it's different from anything you have done. But, it is your responsibility to stay on this client and get the signed engagement letter back before you do any substantial work at all, because you are risking an investment if you don't.”

Those are the items on the short list of brainstorming that I do with the students. We get to the end of that as part of teaching how to do the engagement letter and the students say, “Okay, we understand. Now give us the form that we are going to use in here, because I know that there is a standard one that we are comfortable with that we use.” And I say, “No—I want everybody to take your brainstorming list and go draft an engagement letter for me to look at,” either for a hypothetical client or for a live client if we have one in the first week. And the common result is that I get an engagement letters that are at one extreme or the other. I have 8 to 10 students in the clinic in any given semester and of those 8 to 10, nobody that strikes the right balance. They either have a heavily-worded contract or a letter that is so generous and nice that it doesn’t even appear to be a contract. At the other end of the spectrum, you have this thing that is such a heavy-handed contract that I think any client would probably look at it and think that they needed to go and hire an attorney to help them negotiate the document that they are using to hire an attorney.

We talk about how to strike the right balance, and, ultimately, I have a form and am happy to share it. There is nothing proprietary or magical about it. We have a form, which I am happy to share, that we use in the clinic, and there is nothing super-magical about it. If anybody looks at it and says, “Did you ever think of this or that?” I am certainly open to suggestions. We have set out all of the hourly rates and at the bottom it says, “Of course, you understand that our services are free and we are not billing you for them, but this is part of the exercise that the students go through and we want to demonstrate to you what the value of these services would have been had you gone and hired private counsel.”

Quick little note before I move on to time sheets which are the second half of my presentation—I am open to suggestions about the sample engagement letter. There is no pride in authorship, so if anybody wants to look at this letter of engagement and provide a critique, please feel free. I have certainly learned from the students’ comments in the past. I have practiced for 13 years, I was in-house for a year, and I have been teaching for a little over two years—still, as many times as I have massaged all of the documents that we use, all of the contracts and even this letter of engagement, I am still pleasantly surprised when I have a student come in and say, “You know what this doesn’t say anything about?” And I think, “You know what—it doesn’t.” And we improve the form. So, I think one of the goals it to avoid being “form attorneys” and keeping those forms dynamic and listening to students who have good ideas on how to do that.

## II. TIME SHEETS

So, on to time sheets. Yesterday, I was happy to hear my colleague from the law school in Indianapolis ask one of the presenters if they taught anything about time sheets. Why teach time sheets as a drafting exercise? Again, part of my charge is to prepare these students for practice—something that, in my meanest moments, I say that no one else in law school has done during the two and half years leading up to the time that they walk into the clinic.

The clinic is the first time that they are doing anything that simulates practice, which they may be doing for the rest of their career. So, it is prep for practice. How many people are coming from a private practice background into the teaching that you have done? So, you guys have lived time sheets before. Most of you have lived time sheets before. Of all the wonderful things I got to do by entering academia and leaving private practice, I didn't get rid of time sheets. They are still hanging over my head. Although I don't keep my time, in my opinion, you can't start too early in teaching students that that horrible part of private practice—of living your life in 0.1's and 0.25's—is going to be a part of private practice out there. And there are really two reasons we do it inside our clinic. The first reason is that we have a live clinic, so we simulate a firm environment where we keep our time and generate a bill and show the students how the time entries get translated into a bill.

We also do an informal poll. At the end of the large projects, I have everybody write down on a piece of paper what they think we have invested in the project time-wise. And they underestimate every time by factors of 50%, some of them as low as 25%. They will think, "Yeah, between the two of us on this team, we have four or five thousand dollars worth of time in this." And then you show them what happens when their entries got generated to a bill and they have ten, fifteen, or eighteen thousand dollars in the project. And you get to go through the lesson about where too much time was spent and how to be more efficient with time, etc.

The second reason we teach how to use timesheets is that it is a real private practice skill. Those of you who have come from a private practice background know how the billing cycle works. And when a simple entry is not exactly right, or, even if it is technically correct but it is going to upset a client, you know that those things cost real money. The associates write that errant billing entry or use the wrong language in the entry, it goes through the pre-bill stage, and then it goes out to the clients. You send all your bills out on the same day, and, like clockwork, you can probably count, wait for the mail and then one day or two days after that phone calls start coming back from the same clients, you have got that set of clients that never

look at their bills and that set of clients that look at every entry and every bill which is also fine and that costs money.

Then I have to look at that entry and go back to those associates and say, “What does it mean? Why did you do it? Why is this on here?” And to the extent that we can prepare our students to better communicate value on times sheets—and I am told by my private practice counterparts and my old network that this is working—they hit the ground running in private practice and already have some of those skills under them. So that is just something else we can offer in the clinic.

So, how do I teach it? Each semester I kind of struggle to find an appropriate bill. Sometimes I have my ex-partners or my own ex-clients allow me to use a bill in class that I literally just hand to the students and say, “Put yourself in the position of a client. Go through these entry-by-entry. What would offend you?” This guy is billing you \$445 an hour for a top attorney in the Indianapolis market. If you are 22-year-old, 24-year-old student in Bloomington, that is a big number. That strikes you as a lot. Don’t you want to know what he is doing at \$445 an hour? I want you to go through and we are going to come back in class and go through this bill, piece-by-piece. You don’t always find the perfect bill.

Now, about three days ago, teaching billing entries in this way, I was handed absolute gold by the *Indianapolis Star*. I don’t know if any of you are basketball fans—after 42 years in Indiana, of course, I believe everyone is an IU basketball fan and should be. What you probably haven’t been able to avoid if you are a college basketball fan was our debacle with Kelvin Sampson and what the university went through. Long story short, for those you that don’t follow college basketball, there was a lot of buzz out there about it because it was very controversial.

When we hired Sampson, he already had some NCAA violations and was on probation. When they brought him in to coach IU’s team, he was accused of further recruiting violations. There were a whole lot of alumni who gave a lot of money to the school saying, “I told you so—why are you spending our money on him?” Also, because we are a public university, all of our salaries are of course public and available on a database, so it is not hard to figure out that he is the number one paid public employee in the State of Indiana as the coach of IU’s basketball team. So, there is a lot of sensitivity there.

I say all of this because the *Indianapolis Star* just absolutely handed me gold for this exercise in my class. Sampson has been fired or released or he resigned or however you want to use non-legal terms. The *Indianapolis Star*, about three days ago, probably through a public records request, secured the billing records of Ice Miller Donadio & Ryan, which is a big law firm in Indianapolis that does all the university’s

work in this area, for all the work they did for the university. The university spent over \$200,000 of university money to defend against the NCAA violations that were allegedly caused by Kelvin Sampson. So, when I have students in my class who are leaving a four-year program with up to \$200,000 in debt wondering why their tuition is going up, and I have a bill to their university that is over \$200,000 from attorneys who are 50 miles up the road from me, we can really pick apart a bill that is near and dear to their hearts. So, I am looking forward to that.

So, there are two parts to teaching billing. First, we talk about what to bill. What do I bill? That's always the question when you start practicing. I do some things that seem administrative. I do other things that are purely legal. I do some things that are in between. What do I bill and what do I not bill? There is no clear test. We always said in the firm, and this is what I tell the students—if you feel like you advanced the legal ball in some way, then you probably have performed an act that is worthy of writing down time for billing. But the important thing is that you communicate value in the drafting.

The second thing we talk about is not so much how to bill, but when we talk about communicating value, it is how *not* to bill. So, with my experience from 14 years in private practice, I tell them how not to bill and then let them go from there. I have what I call the top ten time sheet profanities, which is a term I stole from intellectual property.

If any of you do IP work, patent lawyers talk a lot about patent profanities. Those are the words that are going to kill your patent application. You never use the words “standard” or “obvious” or any of those words in a patent application—those are patent profanities. So, we talk about the top ten time sheet profanities in class, and I tell them that we will have a lot of work to do as I start reviewing their time entries and communicating value, and that we will have some adjustments and revisions and discussions, but that under no circumstances do I want any of these words that we covered on the first day to appear.

So, coming in at number ten—these are all born of actual practice experience—what makes a client grab the telephone and call me angry as hell that they are paying for this? “Thought about”—don't ever use the words “thought about.” As attorneys, we know what that means. I did think about something—that's what I did. There are those times when you are analyzing the case that you are not necessarily in the library working on it. You are not necessarily composing anything. You are not necessarily talking to an associate or a partner about the nature of that case. You literally thought about it, which tends to make clients pretty angry. We tell the students about communicating value by saying “analyzed,



reviewed,” or whatever the actual underlying action is. Clients are very sensitive to paying you to “think about” something, even though that’s what you are actually doing.

Number nine—you’d think this wasn’t a big deal. This is a huge deal with clients. Misspelled names. Especially principals. We lose a lot of time and have angry clients who call because names are misspelled right there in the billing entries. This is a silly one and it is an easy one to correct, but you lose a lot of time going back and fixing things like that.

Number eight—successive round figures of time. I collect the student’s time sheets and, magically, they have worked 0.5, 1.0., 0.5, 1.0, 1.0, 1.5, even though we bill on minimum increments of 0.1. It is statistically almost impossible that they have billed neatly, that they actually worked for simply a half hour or an hour every time. We see clients that are upset about that as well.

Moving on quickly to number seven—stray entries from prior months in the same matter. Also easy to correct. Be sure you bill out every month someone else’s entry from another matter, also such clients of that my matter didn’t have anything to do with this so why I am paying you to work on this part.

Number six—phone calls with no description. This is a big one. I have paid for a half-hour phone call and it doesn’t say who it was with or what it was about or anything else.

Number five—reviewed work or memorandum of someone else. The client feels like they have paid for the work twice. He or she did spend time reviewing it, but there are different ways to communicate the value of that.

Number four—billing for the initial client meeting. I think this is a client development matter. It is just a mistake, quite frankly. I think you should sit down with the client for the first time, spend an hour with them, write everything down, and then show them how you are not billing for that initial interview.

The top two are the huge ones. Number two is voicemail. I do not ever want to see the words “voicemail” in a bill. Clients go through the roof. I left voicemail for somebody or I listen to the voicemail from somebody. That’s actually what you did, and in this day of technology, you get very in-depth voicemails with a lot of important information and that is sufficient. Clients don’t like it in bills.

And finally, based on my experience, the number one thing that angers clients is the dreaded conference circle. The entry that has four attorneys that all discussed the case and it says conference with the other three and the next guy's entry right next to it says conference with the other three, and the next woman's entry says conference with the other three, and they realize that they are paying some exorbitant hourly rate for four attorneys to sit around and talk about the case. There is probably a better way to communicate that, and the mistake that is often made here is the attorney responsible for the bill did not even make certain that all the time entries were the same. So, you have one attorney who is claiming to have spent a 0.4 on it, somebody else has a 0.8 entry and a 0.7 entry, but they are all sitting there on the same day in the same room.

So, anyway, that's how we teach time sheets. Again, we have one more presentation, but I will walk through questions at the end or afterwards about these issues.

**SUSAN CHESLER**

#### **INTRODUCTION**

I will try to go as fast as I can so that we have some time at the end for questions. Today I will be discussing how I incorporate negotiation skills into my contract drafting course. A little bit about the course itself—I have taught this course both as an elective and as part of a menu of choices for a required third semester of legal writing. It is a two-credit course and it is organized using the case file method that is very similar to the one Liz described. The students are split into groups at the very start of the semester and they represent the same client throughout the course.

The assignments are all based on a single case file where the students enter into a series of increasing complex contractual arrangements. For example, the students or the parties may initially enter into a sales agreement or consultant agreement which is then formalized into an employment agreement. Ultimately, one or both of the parties wants to end the contractual relationship and they enter into a settlement agreement. For each graded assignment I add more information to the case file and I also add some privileged information so that each party knows something about their client's interest that the other side does not. My course focuses on learning how to draft contracts in a transaction where both parties are represented by attorneys. Thus, the contracts will likely be negotiated by those attorneys, which is why I think an introduction to negotiation skills is a natural fit for

this contract drafting course, and, in fact, I also think it heightens the practical perspective of the course itself.

### INCORPORATING NEGOTIATION SKILLS

I had three basic goals when I developed this course to incorporate the teaching of negotiation skills. The first goal as well as the primary focus of the course is to teach students how to analyze and draft contracts. It, of course, would not be feasible to teach the students everything they need to know about negotiation. So, my goal was simply to introduce the students to negotiation techniques and to expose them to the basic principles of ethical and effective negotiating.

My second goal was to teach students about the benefits of interest-based negotiation and effective communication. I emphasize the benefits of moving away from a purely adversarial approach to negotiation, which often results in a win-lose result, and to moving towards an approach that is aimed at finding a creative win-win solution to the conflict.

To illustrate this concept to my students, I use the well-known example of two sisters arguing over an orange. In this illustration both sisters want the orange for undisclosed reasons. So, their conflict appears to be distributional. In other words the resource over which they are negotiating is fixed and limited. As long as they continue to argue about who gets the orange, the result will be that one sister gets the whole orange and the other sister gets nothing. In other words, one of the sisters wins the whole pie and the other sister loses everything and doesn't even get a slice of the pie.

Incorporating the concepts of underlying interest and effective communication can bring a new dimension to the negotiation about the orange. If the sisters engage in interest-based bargaining and disclose their underlying interests to wanting the orange, it is more likely that they will be able to find a creative win-win solution to the conflict. In fact, one of the sisters wants the orange so she can use the juice for drinking, while the other sister wants the orange so that she can use the rind for baking. So, if the interests of the sisters are considered in the negotiation, they can actually reach a settlement where both sisters win. One sister gets the whole outside of the orange to use for baking and the other sister gets the whole inside of the orange to use for juice. Using interest as the basis for bargaining and finding a creative solution to improve the negotiation is sometimes referred to as "expanding the pie" or "creating value" in the negotiation. So, I focus the introduction to negotiation on teaching students how to become lawyers who seek creative solutions in order to reach value maximizing solutions via interest-based bargaining.

My third goal was to provide my students with the opportunity to actually practice these negotiation techniques and to start learning and developing their own negotiation style. The way I do this is by dedicating approximately two hours of in-class time to introducing students to the concepts of interest-based bargaining and negotiation skills in general. In addition to the two sisters and the orange illustration, we also talk about how to prepare for negotiation, understanding how and when to compromise during negotiation, how to effectively analyze your client's bargaining position, and also a bit about understanding how the personality of the negotiators themselves actually impacts the negotiation.

We then do a mock negotiation exercise in class. The students are divided in half and then matched up as attorneys representing each side to a simple two-party contract. I usually use a simple sales agreement and I tell the students the basic parameters that the parties have agreed to. Then I send them off with their teams to negotiate the specific terms of the agreement. After this negotiation, we review the results in class. It usually results in a pretty lively discussion because I gather feedback from the students and ask them to actually critique the results that their peers have reached in their negotiations. We also do some reflective thinking about what the students might have learned about their own negotiating style and how they might want to change or improve their negotiating personality.

The negotiation aspect of my course culminates in a graded assignment where the students are required to negotiate and draft a settlement agreement. The students represent the same clients that they have represented all semester and are paired into teams of two, one representing each party to the settlement. I instruct the students that they cannot simply agree on a dollar amount as the consideration of the settlement agreement. While an exchange of money can be part of the consideration, it cannot be the entire consideration. By doing that, I force my students to think creatively about their clients' needs and interests, and to work towards negotiating a value maximizing win-win agreement. I also require them to collaborate and work together on drafting a portion of the written settlement agreement, generally addressing the consideration portion of the agreement.

The majority of the final written work product detailing the settlement agreement is the individual student's work. However, there will be some provisions between the teams that are identical since both sides have negotiated and agreed to certain terms. In addition to receiving a grade on how well the settlement agreement was drafted using all the techniques learned throughout the course, part of each student's grade is based on how well he or she negotiated on behalf of the client. In making that judgment, I consider whether the client's particular interests were

protected and also whether the two students reached a creative, value-maximizing result to the conflict.

Before I actually send them off to negotiate on their own, I also do an in-class simulation exercise. I hand out the settlement agreement assignment in class and give the students about ten to fifteen minutes to independently assess their client's particular interests with respect to the settlement. I also ask them to start thinking about creative ways in which they can approach this negotiation. I often suggest that they make a list of all of the areas in which they cannot budge and a list of those areas in which they are willing to compromise before they start negotiating, and then I ask them to break into their teams and actually start the negotiating in class.

During this class I act as a mediator and I encourage the students to come speak with me, either individually or as a team. Through those negotiation sessions, I am able to guide the students towards reaching a value-maximizing, interest-based negotiation. We talk about and analyze the individual client's interests. We talk about the strengths and weaknesses of both parties' positions. And we also throw around some possible creative solutions to some of the roadblocks or problems that they are encountering.

Often my job as the mediator in this class is to help get the uncompromising student to understand the benefits of moving away from this purely adversarial approach to negotiating. I often have to underscore the fact that since both parties' goal here is to reach a settlement agreement, or, under other circumstances, that both parties' goal is to formalize a contractual arrangement that both parties really want to enter into, no one party is served when the other party walks away from the negotiating table. And I really believe that this mediation exercise gives the students just enough hands-on guidance to help them put the interest-based techniques into practice while still giving them enough independence to let them develop their own negotiating style. Through these two class sessions, the couple of mock exercises, and the final assignment, I think I at least succeed in introducing my students to the concepts of effective communication and interest-based negotiation.

Now, we only have about five minutes left, but we would love to hear any questions or comments.

### QUESTION

First of all, I am glad to hear about the negotiation thing. I have actually been a little bit surprised that at what has otherwise been a wonderful conference just how little discussion has been devoted to teaching negotiation. Will any of your

students have had any other exposure, either in their legal writing class or any separate course, to negotiation before you have them in your contract drafting class?

**SUSAN CHESLER**

Okay, so the question was, “Will any of the students have had any negotiation experience before the contract drafting course?” Probably very few. In the first-year legal writing class, there is no negotiation whatsoever. We do have a separate course, a skills course, that is focused solely on negotiation, but rarely do students take both. So, for most students, this is it. And I also agree that it is too little, but in a two-credit class it is pretty much all I can do.

**QUESTION**

What reading materials do you give the students on negotiations?

**SUSAN CHESLER**

I find a lot of material on websites, I give them negotiation handouts, and I have a top-ten list that I put together—the ten things that you need to know about negotiation. But there is no real text reading, just a couple of handouts. And if you are interested, then you can email me and I will be happy to pass those along. It took me a while to find ones that I thought were general enough to work for any type of negotiation.

**COMMENT**

This is a comment rather than a question. And the comment is about transactional documentation—the thing that I try to stress in classes, especially for the people who don’t have a good business background, is that what we are doing is allocate risk between the parties. That’s good focus, that’s something they can understand. If you have a hypothetical where both parties are willing to go into a relationship to perform some sort of obligation, then what you have to do is ask what risks each party is willing to accept. And I think that gets home a little easier with students that don’t have a business background.

**QUESTION**

I am concerned that we are talking about topics that have their own style of teaching. Negotiations, contract drafting, client interviewing, and counseling are

generally all standalone courses. So, when we start taking little chunks of these skills and inserting them into other courses, I start getting nervous about who is teaching what to whom. If someone is teaching a class and they decide to do a piece on client interviewing and counseling, that makes me nervous, because I don't know if they know anything about client interviewing and counseling other than—well everyone should be able to talk to clients. So, when I decide to put a contract drafting piece into my real estate course, I feel like, "What gives me the right to teach contract drafting?" Because I know there is a whole pedagogy out there. So, I think we need to respect these fears and try to figure out whether we are just dabbling in this and having fun, or whether we are actually teaching a skill. I worry about this happening. Does that make sense?

**SUSAN CHESLER**

Yes, it does, and I will just put my two cents in. I tell my students right off the bat that they should take a full negotiation class if they want to know everything there is to know about negotiation. And I do worry, which is why I only teach this little snippet that I do know about. But unfortunately, I think the reality is that students may never get any exposure to some of these skills because I'm not sure how many students will actually take an interviewing class, a negotiating class, a drafting class. So, I am not so sure that the benefits don't outweigh the negatives, but that's just my take.

**MARK NEED**

I suppose that, institutionally, it is also just a matter of communication. I know that because I am teaching a class that synthesizes a lot of areas, I am in regular contact with the doctrinal professors to make sure that there are not—implied in your question is that we might be teaching something inconsistently with someone else—that there aren't inconsistencies in there, and that we are building upon whatever the students learned in those doctrinal areas.

**ELIZABETH AUGUST**

We have no one who teaches human counseling—I mean, we are it. So, again it goes to the idea that if we don't teach it, the students may not get any exposure to it throughout their whole law school career.

**KAREN J. SNEDDON**

And my course is much more of sort of a capstone course because all of the students have had the required introduction counseling, which I am also a part of, so I definitely know what's in that. They have all had the underlying trusts and estates course, and I talk with that professor so that I know exactly what they have covered and what they have not covered. So, it is much more of bringing together concepts where they can think, "Oh! You know I learned about this." And they have also had some time for reflection over the summer, so that has sort of changed what they thought. Maybe they thought that this was really, really wonderful when I learned it, but I couldn't do it here and I would like to try it again. So, it is much more of an integrated part of the curriculum and there are no surprises. Someone in the counseling department isn't surprised at what I am doing. But I think you make a great point.

**COMMENT**

There are two things about an engagement letter that I always teach. The first is re-plunging the retainer. And the second is that at the end of engagement, I always send out the termination of the engagement letter.

**MARK NEED**

That's a great idea.

**QUESTION**

The other comment that I had, and we talked about this in the back of the room yesterday—the phenomena that I see sometimes in your sphere of the world when you were practicing, we see it back East, we were billing according to tax—incorporating five hundred bucks. The last comment I have is something I mentioned yesterday—I'm out twenty-five years now this summer from law school. When I was in school, there was no negotiating class, though I'm told now that there was. No negotiating class, no clinics, no nothing. Nothing with regards to government or anything—now they do. Do you see a reticence from people in our generation, fifty and above, relative to the clinics that you are getting involved with as far as perhaps practitioners trying to send clients to your clinics, or are you seeing collegiality and collaborative effort?



**MARK NEED**

I am happy to talk about this after we dismiss, but the short answer is that I benefit from that fact that the closet market for the good clients is the market I practiced in for so long. So, I already have those relationships which is a little bit of a head-start. I am going back to a town that really only has five large law firms and I know the players at all those law firms and practice with them, so that is one of them. The second thing is what I remind the firms of all the time—the clinic can't compete with them. If, when I was in practice, I went to another firm and said, "Hey! Why don't you find a project that you can't really get to, that your client can get to and I'll do it for free," they are going to say, "Know what? I'm going to lose my client to you." The clients only see the use of my clinic as another way that their attorney is helping them, not only am I getting to the thing that is a triage matter but this project up on the shelf, I have a way to get that done for you free. So, it has been pretty cooperative in that respect.