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Amy Bauer

University of Colorado Law School

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FROM THE COURTROOM TO THE CLASSROOM: HOW A LITIGATOR BECAME A TRANSACTIONAL DRAFTING PROFESSOR

Amy Bauer*

Hello, my name is Amy Bauer, and I'm a member of the faculty at Colorado Law. It's a real pleasure for me to be here today, presenting at a conference where many of the speakers and attendees have—unknowingly—been teachers of mine. You see, I started teaching legal writing in 2010 after working for nine years as a litigator. During my visiting year at Colorado Law (essentially a year-long job interview), my dean asked me to create and teach a transactional drafting course. Since that time, I have taught Transactional Drafting twenty-one times (spring, fall and summer terms) to a total of almost four hundred students, created an Advanced Transactional Drafting course, and taught several Colorado Bar Association CLE courses on drafting.

While there is no substitute for experience, I am proof that a professor with the interest, dedication, and resources—regardless of his or her practice experience and background—should not shy away from the opportunity to enter the world of transactional drafting. Creating and teaching these courses have been among the most gratifying experiences of my professional life. In an effort to encourage more schools and professors to offer drafting courses, I will use my time today to share my lessons learned on the journey from the courtroom to the transactional drafting classroom.

I will start with a brief overview of the forces that were in play that resulted in me—a litigator and legal writing professor—becoming a candidate to teach Transactional Drafting. Next, I will share with you the things that I did in preparing to teach the course that I would do again and recommend to other, similarly situated professors. Finally, I will share what I would do differently—the lessons I learned the hard way.

The Increasing Need for Transactional Drafting Professors

It is undeniable that in recent years, largely in response to economic shifts, law schools are adapting to a “new normal” where “skills” is no longer a dirty word¹ and, thanks in part to ABA Standards

* Legal Writing Professor, Colorado Law.

¹ Early in my teaching career, I proposed adding Deposition Skills to our course offerings. I was encouraged by a more experienced colleague to not use the word “skills” in the

303 and 304², experiential learning is front and center. The demand for courses that cover practical lawyering skills is at an all-time high, as employers—in an effort to reduce spending by providing less training—focus on recruiting practice ready attorneys. Therefore, in order to ensure that students get a strong return on investment and are able to compete in this new landscape, law schools must expand their curriculum and offer practical skills courses well beyond the traditional first-year legal writing class that focuses almost exclusively on drafting in the litigation context. Many law schools, including Colorado Law, have responded to the new normal by offering a number of programs, clinics, and course offerings—including courses in transactional drafting. Of course, new courses require professors who are willing—and, more importantly—able to teach those classes. Oftentimes, schools turn to their legal writing faculty to teach practical lawyering skills. However, most legal writing faculty come from a litigation background and seemingly lack the skills and experience necessary to teach a course focused on transactional drafting.

This was exactly the situation in which I found myself during the fall of 2010 when I received an e-mail from our Associate Dean asking me to consider creating and teaching a transactional drafting course. While she was clear that my candidacy for the full-time teaching position would not be impacted by my decision, I said yes to her request because I was eager to prove my value to the school and excited to take on the challenge. However, immediately after committing to this task, I felt paralyzed by my lack of direction and what I perceived to be an overwhelming workload ahead of me. Making the transition from a practicing litigator to a legal writing professor seemed fairly natural. Having worked as a teaching assistant for the course during law school, I knew I enjoyed teaching. Having nine years of experience writing memos, briefs, pleadings, client letters and other documents, I felt confident that my experience would make me credible and capable as a legal writing professor. The same could not be said with regard to my feelings about teaching transactional drafting. Moreover, as a new faculty member, I had no idea where to start, and I found myself plagued with questions, including the following:

- What books do I use?
- What are the proper learning outcomes for a transactional drafting course?

name of the course if I wanted the faculty to support my proposal. Fortunately, the faculty supported the proposal without a name change—but it says something that the word “skills” raised a red flag.

² See generally STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS., Standard 303, 304 (AM. BAR ASS'N 2016).

- What do transactional drafting assignments look like?
- Is there someone I can talk to about teaching transactional drafting?
- How will students find me credible in spite of my lack of practice experience in this area?
- Have I committed career suicide by signing up for this?

Fortunately, during the months that followed, I found the answers to these questions and others. Over the course of the next several semesters, I was able to identify the things I did that were critical to my success as a transactional drafting professor, as well those things that did not serve me or my students. I will spend the rest of my time sharing these “dos and don’ts” with you.

The Dos

As I look back on the time I spent getting ready to teach Transactional Drafting for the first time, there are several things that I believe were critical to my success and the success of course, and they are the following:

1. Do your research.
2. Find a mentor.
3. Prepare.
4. Recognize what you do know.
5. Keep learning.

Do your research. In my case, this meant starting by typing “transactional drafting books” into Google. Today, having more years of experience as a member of a law school’s faculty, I would reach out to the various academic publishing companies and request review copies of relevant materials. However you get there, the results are encouraging! I recommend finding an introductory drafting book or two and reading them cover-to-cover. Enjoy being a student again—only this time with access to the teacher’s manual. This process will help you discover a book that resonates with you and will therefore likely resonate with your students.

In addition to researching books, I recommend that you expand your search to articles. My Google search for “teaching transactional drafting” resulted in several hits including Volume 10, Number 3 of this journal—Teaching Drafting and Transactional Skills: The Basics and Beyond³—the volume containing the transcripts from the inaugural

³ See generally TENN. J. BUS. L., Summer 2009.

version of this conference. There, among the presenters, I saw the names of many of the authors who I came across while researching books. In particular, I saw the name of the author whose book I had decided I would use—but more on that later. The articles I came across gave me easy access to tips on teaching transactional drafting, provided me with more education on the important issues and topics in drafting, and introduced me to new problem materials and rubrics.

The last step of this research process is to find other professors who teach or have taught a course on transactional drafting. In 2010, I was not yet aware of the wonderfully collaborative and supportive nature of my new profession, so I started by looking at syllabi that were available online. Eventually, I worked up the nerve to reach out to faculty members at other law schools who were teaching introductory drafting classes, and I sent them e-mails asking if they would mind sharing their syllabi. Once again, I recognized the names of these professors from the articles and books they authored. I was thrilled when almost everyone was willing to share a syllabus and more.⁴

Find a mentor. This might be the most important item on the “to-do” list. After I completed some research, selected a book, and reviewed several syllabi, I again felt paralyzed—only this time the problem was too much information and too many directions from which to choose. I needed to talk to someone with some experience. I said it before, and I will say it again—there is no substitute for experience.

Having practiced in Denver, I knew several good deal lawyers and figured that speaking with some of them would be a great place to start. I reached out to my former colleagues and, as anticipated, they were more than willing to talk to me about what they thought I should teach.

⁴ I'd like to thank the following authors and professors whose books, articles, and/or e-mails were invaluable to me while I was getting my start in transactional drafting: TINA STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2d ed. 2014); SUE PAYNE, *BASIC CONTRACT DRAFTING ASSIGNMENTS: A NARRATIVE APPROACH* (2010); CHARLES M. FOX, *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU* (2d ed. 2008); GEORGE W. KUNEY, *THE ELEMENTS OF CONTRACT DRAFTING WITH QUESTIONS AND CLAUSES FOR CONSIDERATION* (4th ed. 2014); KENNETH A. ADAMS, *A MANUAL OF STYLE FOR CONTRACT DRAFTING* (4th ed. 2018); and SCOTT BURNHAM, *DRAFTING AND ANALYZING CONTRACTS: A GUIDE TO THE PRACTICAL APPLICATION OF THE PRINCIPALS OF CONTRACT LAW* (4th ed. 2016). In more recent years my teaching has also benefitted tremendously from reading the works of and/or speaking with RICHARD K. NEUMANN, *TRANSACTIONAL LAWYERING SKILLS* (2013); STEPHEN L. SEPINUCK & JOHN FRANCIS HILSON, *TRANSACTIONAL SKILLS: HOW TO STRUCTURE AND DOCUMENT A DEAL* (2015); DAVID ZARFES & MICHAEL L. BLOOM, *CONTRACTS: A TRANSACTIONAL APPROACH* (2010).

But I quickly realized that none of them had taken a course like the one I was putting together, and none of them had experience teaching. I took the notes from our conversations and set them aside in hopes that they would be useful down the road. As you will hear later, they did ultimately prove to be useful.

I then went back to the list of professors who had not only authored books and articles, but who had also taught transactional drafting. Admittedly, I was a bit intimidated by the prospect of reaching out to any of these individuals—some of whom had already been kind enough to share syllabi and course materials. I finally decided that if I was going to reach out to anyone, it may as well be the professor who authored the book I knew I would use—as well as several of the articles I had read while doing my research.

I e-mailed Tina Stark, and she immediately wrote me back and suggested that we arrange a time to talk on the phone. I was relieved and terrified. I would finally have to disclose my lack of experience and was unsure how she would respond. As anyone who has met Tina knows, my fears were unfounded. She was supportive, encouraging, and incredibly generous with her time and knowledge. I reached out to Tina several times during my first semester teaching the course, and each time she provided helpful responses and patient guidance.

I also benefited from the similar kindness of Sue Payne, Ken Adams, and John Hilson when I corresponded with each of them about various aspects of their books and classes. The good news for novice drafting professors is that today, as compared to even eight years ago, many more potential mentors are out there for you to turn to. While I would certainly encourage you to reach out to the authors or professors whose books, articles, or presentations resonate with you (and I expect you would receive the same support that I did), I also know that an increasing number of transactional drafting professors (like me) would welcome the opportunity to pay it forward and share our experiences with someone who is just getting started.

Prepare.

Before anything else, preparation is the key to success. — Alexander Graham Bell

Failing to prepare is preparing to fail. — Benjamin Franklin

This list of quotes about the value of preparation could go on and on. It is no secret to those of us who teach that preparation is critical to a successful class, assignment, project, and semester. However, preparation is even more critical when you are teaching a class for the first time. I can

admit that there are days when I am not as prepared as I should be to teach my legal writing class. While I am not proud of that fact, and those classes are seldom as strong as the classes for which I have prepared, my experience teaching the class and writing litigation documents enables me to successfully “wing it” if necessary. When I started teaching Transactional Drafting that was not the case.

Thanks to my mentor and the time I took to familiarize myself with the materials and to craft a syllabus, I went into my first semester of Transactional Drafting with a fairly detailed syllabus. Having a plan for the readings, lectures, homework, and graded assignments relieved a lot of the anxiety that goes with teaching a class for the first time. Of course, as you will see when we get to “the don’ts,” you also have to be flexible and open to deviating from this plan if doing so becomes necessary to the success of the course.

Recognize what you do know. When I was first asked to teach transactional drafting, my internal dialogue went something like this, “Who, me? Teach transactional drafting? But I don’t know *anything* about drafting contracts or what deal lawyers do! I’m a litigator!” While I am certain that I did not say this out loud, I said to my Associate Dean, “Have you seen my resume? I don’t have a lot of experience with drafting.” While I can no longer remember her exact words, I do recall that she asked me how many cases I litigated that did not involve a contract— either express or implied. She was not suggesting that this made me the clear choice for teaching the class, but she was reminding me that the world of contracts was not foreign to me. Truthfully, she may have just been saying what she thought I needed to hear to sign on to teach the course. Either way, it worked.

Right around the time that I was asked to teach the class, my legal writing colleagues and I engaged in conversations with our clinical colleagues about the transfer of knowledge problem we were having with our students. Some students would take a full-year of legal writing from us, go on to enroll in a clinic, and seemingly abandon their newly acquired writing skills. One of our clinical professors shared an article she had come across about transfer of knowledge that contained the following quote from James Deese’s book, *The Psychology of Learning*: “There is no more important topic in the whole psychology of learning than that of transfer of training. Practically all educational and training programs are built upon the premise that human beings have the ability to transfer what they have

learned in one situation to another.”⁵ My Associate Dean made me realize that I had knowledge that I could transfer to this new situation.

As I read through the course book, spoke to my mentor, and worked through various problems, I recognized the following as some of the skills and knowledge that I could transfer:

- I understood the importance of understanding the risk tolerance of the parties.
- I had a lot of experience interviewing and counseling clients.
- I understood the importance of clear and concise writing.
- I understood and had worked with the cannons of construction.
- Concepts including intent to induce reliance, justified reliance, avoidance, restitutionary recovery, various types of damage awards, the impact of ambiguity in a contract, and fraud were familiar to me.
- I had experience with specific provisions including non-competes, confidentiality agreements, liquidated damages provisions, indemnities, and choice of law provisions among others.

Once I created this list, I not only thought that I could teach transactional drafting despite my background as a litigator, but I started seeing the value in sharing my litigator’s perspective with students in a transactional drafting class.

Keep learning. Once you’ve put together your syllabus and taught your first semester, the hardest work is behind you; but as is the case with almost anything you want to excel at, the work—and learning—is ongoing. I strongly recommend getting and staying current with developments in the world of transactional drafting. Some steps you can take include the following:

- Review academic press catalogues for new, relevant books.
- Subscribe to relevant listservs and blogs.
- Attend conferences like this one.
- Join SSRN and subscribe to relevant eJournals.
- Attend CLEs hosted by your local bar.

⁵ JAMES DEESE, *THE PSYCHOLOGY OF LEARNING* 214 (McGraw–Hill 1952).

- Get involved with local professional groups like the Association of Corporate Counsel and Bar groups.

Not only does staying involved and current make you a better teacher, it makes teaching more enjoyable. Who knows—maybe one day you will find yourself teaching a CLE, writing an article, or speaking at a conference!

The Don'ts

Looking back on my development as a transactional drafting professor, I certainly made my fair share of mistakes. The following are the five mistakes from which I learned (and continue to learn) the most:

1. Don't fake it.
2. Don't hesitate to bring in reinforcements.
3. Don't bite off more than you can chew.
4. Don't expect perfection.
5. Don't let your lack of experience or expertise keep you from engaging in this collaborative and supportive community.

Don't fake it. When I first started teaching, I found it difficult to say “I don't know” in response to students' questions. Perhaps the most liberating day in my teaching career occurred when I sat in on the class of a professor I admired and whom I knew the students respected. I was sitting in her class when a student raised his hand and asked a question; she looked at him and said, “I don't know,” and carried on with her lecture. From that day on, I felt more comfortable admitting to students when I did not have an answer—that is, until I started teaching transactional drafting.

When I walked into my Transactional Drafting class for the first time, I was prepared. I had done my research, found a great mentor, and identified what knowledge would transfer from my life as litigator to the classroom. Despite all of that, I could not shake the feeling that I was wearing a sign that said, “No Practical Experience Here,” and I dreaded getting questions that I did not know the answers to for fear that I would lose all credibility. I was not giving my students (or myself) enough credit. I have found the following to be true when it comes to faking it:

- Just like you can tell when a student has not prepared or does not know an answer, students can tell when we have not prepared or do not know an answer.

- If the question is one you feel like you should know the answer to, simply offer to respond to the question via e-mail after class or during the next class.
- If appropriate, you can task the student, or the class as a whole, with finding the answer to the question and reporting back.
- “I don’t know” is an answer.
- Sometimes you may need reinforcements, which brings me to my next point.

Don’t hesitate to bring in reinforcements. Guest speakers can add so much to a class; I wish I started using them sooner. While the primary purpose of the presentation is to encourage others without practical experience as a transactional lawyer to consider teaching drafting, I want to also encourage those same people to invite those with experience to share their expertise with your class. Remember earlier when I said that my notes from discussions with former colleagues would come in handy later? Well, this is later.

As my first semester of teaching transactional drafting progressed, I found myself wishing that I could answer certain categories of questions (those that were beyond my prior and newly acquired level of knowledge), give job advice, and help guide students in selecting courses that would help them in their pursuit of jobs as transactional attorneys. One day while reorganizing my office, I came upon my notes from those early discussions with deal lawyers. I realized that they might be able to answer those questions that I could not. Over the years, I have invited local transactional attorneys to speak on specific topics. Both my students and I have benefitted in the following ways:

- Hearing new perspectives.
- Learning about topics and issues that might not otherwise be covered.
- Creating networking opportunities.
- Often reinforcing concepts and ideas being taught in class.
- Showing students how the skills they are learning transfers to the real world.

One final advantage of having guest speakers in class is that it has enabled us to identify possible adjunct professors. Since its inception, Transactional Drafting consistently has one of the longest waitlists, and despite offering the course in the summer, spring, and fall for almost eight

years, my class is simply not sufficient to satisfy student demand. The school has recently started hiring adjunct professors to teach additional sections of the course. One of our current adjuncts was a student in my inaugural class and has returned as a guest speaker and co-teacher on several occasions.

Don't bite off more than you can chew. Warning! Once you enter the world of transactional drafting, you will immediately wonder why this course is not being taught to every single law student as a mandatory part of the law school curriculum, and you will feel compelled to squeeze as much of this vital information into your semester-long class as you possibly can while opening the class to everyone who expresses an interest. Do not give in to this temptation. Yes, transactional drafting is critically important to students who hope to become well-rounded lawyers. Yes, you will have a lot of ground to cover. Yes, lots of students will want to take the course and will ask you to raise the enrollment cap. Yes, it is difficult to choose what information and how many students you will exclude in recognition of the almost universal truth that quality is better than quantity. But, choose you must if you want to teach a quality course while maintaining your sanity.⁶

To be fair, Tina warned me that I would feel this temptation and cautioned me about the dangers of succumbing to it. While I had taken all of Tina's advice up to that point, I decided that I simply could not deny my students any of the knowledge covered in the thirty chapters⁷ of her book⁸, despite the fact that I was limited to two credit hours for the course. I learned the error of my ways early in the semester when several students e-mailed me to suggest that the pace of the course was proving difficult to manage, and that they were having trouble digesting each new lesson in time to apply it to the next. Again, experience matters, and I should have heeded Tina's advice.

The entire purpose of doing the work creating and teaching this course was to endow students with the skills and knowledge *that they could use* as they progressed in their development as lawyers. I quickly recognized that by trying to teach them everything, I ended up teaching them less than I would have if I slowed down and took the time to make sure they were really learning the material that I (with some advice)

⁶ Fortunately, my Associate Dean set the enrollment cap at fifteen and made clear that it would not be increased.

⁷ Technically, the book contains thirty-two chapters. The final two chapters contain additional exercises, exemplars, and guided reading exercises.

⁸ STARK, *supra* note 5.

deliberately selected. Also, by reducing the number of graded assignments, I was able to provide more detailed and useful feedback. As I have grown more comfortable with the material, I have increased the cap to as many as thirty students, but I have yet to teach the entire book in a single term, and I doubt I ever will. I take comfort in knowing that students own the book and have access to the information should they need it.

Don't expect perfection. One or more of the following things will likely happen the first (and probably second, third, and fourth) times you teach your transactional drafting course:

- You will get caught giving an incorrect answer to a question.
- You will make an error in grading.
- You will misjudge the amount of time it takes you to lecture on a given topic.
- You will feel out of your depth.
- You will try to create your own problem materials and realize, far too late, that an error in your problem makes it unrealistic, at best.
- You will wonder why you said yes to this adventure in first place.

But if you hang in there and embrace the imperfection, you will also experience the following:

- Feelings of gratification in knowing that you are giving students relevant, practical, and valuable information that they will use, regardless of their chosen career path.
- A renewed sense of accomplishment and enthusiasm for your job that only comes with moving outside of your comfort zone.
- Increased confidence in your abilities as a lawyer and a teacher.
- Gratitude from the students who take your course.
- The satisfaction of learning a new skill set.
- Introduction to a new network of professional colleagues who are committed to innovation and improving the quality of legal education.

It is for all of these reasons that I offer my last bit of advice:

Don't let your lack of experience or expertise keep you from engaging in this collaborative and supportive community.