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# DEAL ME IN: LEVERAGING PEDAGOGY TO INTEGRATE TRANSACTIONAL SKILLS INTO THE FIRST YEAR LEGAL RESEARCH AND WRITING CURRICULUM

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ABSTRACT

*When nearly fifty percent of attorneys practice transactional law, why do only seven percent of first-year legal research and writing courses teach transactional skills? Despite a decade of emphasis by legal scholars on the need to teach transactional skills, most first-year legal research and writing courses still focus disproportionately on litigation-based instruction. When more incoming law students want to practice transactional law than litigation, half go on to hold transactional-based jobs, transactional drafting courses are the most popular legal writing electives, and employers say graduates are unprepared for transactional practice, something needs to change. A path forward for transactional skill instruction begins here. This Article describes the need to teach transactional skills, analyzes data behind how law schools are falling short, explores pedagogical techniques for transactional instruction, and provides examples of transactional assignments that can be implemented (in face-to-face and online formats) without rewriting the course syllabus.*

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## INTRODUCTION

Annalise Keating from *How to Get Away with Murder*. Alicia Florrick from *The Good Wife*. Harvey Specter from *Suits*. Jack McCoy from *Law and Order*. Movies and television regularly depict lawyers as litigators in powerful and dynamic courtroom dramas with high-stakes cases and high-tension trials.<sup>1</sup> They rarely highlight transactional aspects of lawyering such as due diligence, drafting documents, negotiating merger provisions, or coordinating a closing.<sup>2</sup> Perhaps this is because negotiating a merger simply does not make for good television.<sup>3</sup> But the media's portrayal of lawyering influences lay perceptions of what lawyers do, how lawyers interact with clients and opposing attorneys, and what an effective advocate looks like.<sup>4</sup> Not surprisingly, many students entering law school have a good understanding of what litigators do in practice but lack an adequate grasp of what transactional attorneys do.<sup>5</sup>

Furthermore, because of a pervasive litigation bias in the law school curriculum, including in the first-year curriculum, transactional skills are often marginalized in legal education.<sup>6</sup> While there has been an increase in courses, clinics, and transactional-focused experiential learning over the past decade, these opportunities are largely only offered after the first year.<sup>7</sup> In the first year of law school, many courses, including legal research and writing courses, focus solely on litigation-oriented assignments.<sup>8</sup> The lack of transactional skill development in the

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<sup>1</sup> See Lynnise Pantin, *Deals or No Deals: Integrating Transactional Skills In the First Year Curriculum*, 41 OHIO N.U.L. REV. 61, 72-73 (2014).

<sup>2</sup> See Louis N. Schulze Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59, 70 (2007).

<sup>3</sup> See Tina Stark, *My Fantasy Curriculum and Other Almost Random Points*, (Emory Law and Economics, Research Paper No.08-29, 2008). Few television shows or other depictions of lawyers in popular culture demonstrate the lawyer's role in negotiating, documenting, and closing a merger or a related corporate matter. Transactions such as non-contested real estate closings, of which there were over 6 million in 2019, or other similar transactions are seldom portrayed in popular culture. See *Quick Real Estate Statistics*, NAT'L ASS'N OF REALTORS, <https://www.nar.realtor/research-and-statistics/quick-real-estate-statistics> (last visited May 21, 2020).

<sup>4</sup> See Pantin, *supra* note 1 (describing how the litigation-focused popular culture perceptions of lawyers often predispose individuals to practice litigation-related areas).

<sup>5</sup> See *id.*

<sup>6</sup> See Lynnise Pantin, *The First Year: Integrating Transactional Skills*, 15 TENN. J. BUS. L. 137, 138 (2013).

<sup>7</sup> See Celeste M. Hammond, *Integrating Doctrine and Skills in First-Year Courses: A Transactional Attorney's Perspective*, 17 LEGAL WRITING: J. LEGAL WRITING INST. 409, 412 (2011) (discussing the additional transactional opportunities available to students in law school beyond legal writing courses, such as transactional clinics).

<sup>8</sup> See Pantin, *supra* note 6 (discussing the overwhelming use of litigation assignments in the law school curriculum); see Wayne Schiess, *Teaching Transactional Skills in First-Year Writing Courses*, 10 TENN. J. BUS. L. 53, 55 (2009) (finding that in a survey of 330 practicing lawyers, 79%

first-year curriculum is troublesome because the first year is formative for law students. They learn foundational skills used in upper-level courses, establish key skills used in internships, and form important career preferences.<sup>9</sup> If transactional skills are not introduced in the first year curriculum, students are unprepared for upper-level courses, transactional-focused internships and work assignments, and career decisions.

When both transactional and litigation skills are introduced in the first year curriculum, students gain a broader set of foundational lawyering skills.<sup>10</sup> This broader skill set allows students to dive deeper into law school electives, succeed with greater ease at first-year internships and jobs, and become more “practice-ready” graduates. In addition, integration of transactional skills into the first-year curriculum can bring greater awareness about transactional work as a career option and dispel the notion that transactional work consists entirely of repopulating forms or mindlessly updating predetermined contracts for each client.<sup>11</sup>

Integrating transactional skills early in the curriculum helps not only big law and corporate-inclined students, but also all kinds of other students. Transactional work applies to a wide swath of the legal profession, including small and solo attorneys who represent individuals in drafting real estate and conveyancing documents;<sup>12</sup> estate planning attorneys who draft wills, estate plans, and trusts;<sup>13</sup> public interest attorneys who engage in community and economic

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of respondents indicated that their legal writing course in law school did not teach transactional drafting but approximately 85% did teach litigation-based brief writing).

<sup>9</sup> See generally Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL ED. 223 (2d ed. 2004) (describing how the litigation-centric instruction of law schools teaches students to think like litigators rather than all types of lawyers, including transactional lawyers). By not having opportunities to understand the different types of legal work available, students often do not have a good understanding of different career paths available to them until later in law school. See *id.* Accordingly, students are not prepared for entry into the legal profession because they do not have an understanding of the various options available. See *id.*

<sup>10</sup> While a 1:1 ratio of litigation assignments to transactional assignments may be an aspirational goal, adding even a few transactional assignments into an existing litigation-focused legal research and writing course is beneficial.

<sup>11</sup> See Schiess, *supra* note 8 at 56.

<sup>12</sup> These documents include real estate leases, real estate purchase and sale documents, real estate loan documents, easements, deeds, and other related documents.

<sup>13</sup> Estate planning attorneys spend a significant amount of time with clients drafting preventive documents. These documents plan for the future and document the needs and desires of a client.

development work by helping communities with start-up and related legal work;<sup>14</sup> and even litigators who draft settlement agreements.<sup>15</sup>

While current scholarship has explored calls to increase the teaching of transactional skills, this Article adds to the literature in two ways. First, this Article examines data regarding how the litigation focus of law schools continues to marginalize transactional skill instruction, including recent findings from a survey I conducted during the Spring 2020 semester (the “Transactional Skills Survey”). The Transactional Skills Survey indicates that legal research and writing programs are, by and large, not answering the call to teach transactional skills in the required first year legal research and writing courses. Second, this Article proposes a path forward for transactional instruction with two discreet components of a) discussing helpful pedagogical tools, such as small teaching,<sup>16</sup> and b) providing examples of how professors can integrate transactional skills instruction into an otherwise full syllabus in face-to-face and online formats.<sup>17</sup>

In Section I, this Article defines transactional skills, including transactional research and transactional drafting skills, and discusses the well-established need for specific instruction in transactional skill development. Section II details important data that support the need to teach transactional research and drafting skills in the first year of law school, including the original Transactional Skills Survey I conducted for this Article.<sup>18</sup> In Section III, this Article discusses the path

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<sup>14</sup> See generally Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. UNIV. J. OF L. POL’Y 85 (detailing the rise of transactional clinics and their focus on community and economic development in communities); Scott L. Cummings, *Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001); Gowri J. Krishna, *Growing the Resistance: A Call to Action for Transactional Lawyers in the Era of Trump*, 7 TENN. J. RACE, GENDER, & SOC. JUST. 206 (2018).

<sup>15</sup> Even attorneys in adversarial settings draft preventive documents—such as a settlement agreement—to codify an agreement between two parties, plan for how the parties should abide by the agreement, and outline what remedies exist if the parties do not live up to their end of the agreement.

<sup>16</sup> See *infra* Section III(A). Small teaching techniques can help integrate transactional skills into the first year legal research and writing course. Small teaching is a concept used in a variety of different disciplines, but little scholarship is available on the topic of using small teaching principles in law schools. See generally JAMES M. LANG, *SMALL TEACHING: EVERYDAY LESSONS FROM THE SCIENCE OF LEARNING* (2016).

<sup>17</sup> See *infra* Section III(A). When legal research and writing programs are often pressed for precious time in a syllabus, the “small teaching” approach discussed in Section III is an ideal tool for increasing the frequency of and exposure to transactional skills in a first year legal research and writing course. Some current scholarship has focused similarly on “easy to integrate” ideas. See Pantin, *supra* note 6, at 139. This Article expands upon that idea, discussing pedagogical reasons for such integration and providing several examples for use in the legal research and writing classroom.

<sup>18</sup> The Transactional Skills Survey, combined with surveys from the Association of Legal Writing Directors/Legal Writing Institute, show two things. First, the surveys demonstrate the increasing number of opportunities for law school students in gaining transactional experience in upper-level

forward, explaining key pedagogical tools used to facilitate the teaching of transactional skills and offering suggestions for face-to-face and online assignments that legal research and writing professors can employ to integrate the teaching of transactional research and drafting into existing course syllabi.

## I. THE NEED TO TEACH TRANSACTIONAL SKILLS IN THE FIRST YEAR

### A. *What Are Transactional Skills?*

Transactional skills include transactional research, such as locating and interpreting transactional precedent,<sup>19</sup> and transactional drafting, such as writing and revising a real estate lease.<sup>20</sup> While some scholarship defines transactional skills broadly to include negotiation, counseling, collaboration, and transaction management, among others,<sup>21</sup> this Article focuses on transactional research and transactional drafting to emphasize the importance of these skills as requisite foundational skills in the first year legal research and writing program.<sup>22</sup>

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elective courses. Second, the surveys also demonstrate that first year legal research and writing programs have struggled to address the need to teach transactional research and transactional drafting in the first year legal research and writing program.

<sup>19</sup> See generally Aaron Kirschenfeld, Ingrid Mattson, & Kent Olson, *Transactional Law Research*, in PRINCIPLES OF LEGAL RESEARCH (3d ed. 2020) (describing transactional research skills).

<sup>20</sup> See generally Tina L. Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2d ed., 2014) (describing transactional drafting tasks).

<sup>21</sup> See David V. Snyder, *Closing the Deal in Contracts: Introducing Transactional Skills in the First Year*, 34 U. TOL. L. REV. 689, 689 (2003) (defining transactional skills as “planning, negotiating, documenting, and closing the deal”); Tina L. Stark, *Associations of American Law Schools, Petition for Provisional Status: Proposed Section on Transactional Law and Skills*, THE CONGLOMERATE, (Dec. 23, 2010) <http://www.theconglomerate.org/2010/12/aals-section-on-transactional-law-and-skills.html> (click on “here” in second paragraph) (defining “Transactional Skills” as both “skills” (including “negotiating, drafting, risk analysis, contract analysis, and collaboration”) and “tasks” (including “due diligence, third party opinion letters, resolutions, and transaction management”) needed to execute the various stages of a transaction).

<sup>22</sup> Although not discussed in this Article in-depth, additional aspects of transactional drafting include using narrative and storytelling in transactional writing. See generally Susan Chesler & Karen J. Sneddon, *From Clause A to Clause Z: Narrative Transportation and the Transactional Reader*, 71 S.C. L. REV. 247 (2019); Susan Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques and Drafting*, 68 OKLA. L. REV. 263 (2016); Lori D. Johnson, *Redefining Roles and Duties of the Transactional Lawyer: A Narrative Approach*, 91 ST. JOHN’S L. REV. 845 (2017). Transactional skills also includes more advanced deal-making skills. See generally Robert C. Illig, *The Oregon Method: An Alternative Model for Teaching Transactional Law*, 59 J. LEGAL EDUC. 221 (2009) (describing the “Oregon Method” of teaching deal logic and practical considerations for planning and executing a transaction).

## 1. Transactional Research Skills

Transactional research includes the skills required to locate, read, and interpret transactional precedent and important information necessary in transactional practice, including industry and company-specific information.<sup>23</sup> This research informs transactional drafting and includes determining relevant law, interpreting law, selecting appropriate transactional precedent or boilerplate, and identifying relevant company and industry-specific information used to inform drafting.<sup>24</sup>

Transactional research includes researching statutes or cases to identify law relevant to deeds, trusts, wills, articles of incorporation, bylaws or other documents. In addition, such research includes locating specific provisions used as models or boilerplate for specific documents, as identified in chapters in a published practice manual, a handbook, or on publicly-accessible and government websites, among others. Finally, such research also includes locating interpretations of federal regulations needed to understand a law or identifying company and business-specific information used to understand client positions, such as information published in a company's Annual Report.<sup>25</sup>

When transactional research is introduced in a legal research and writing course and differences between transactional research and traditional litigation-focused research are explained, students can learn to:

- 1) research the validity of provisions drafted for transactional writing assignments;
- 2) evaluate transactional precedent to determine applicability of precedent in certain industries or jurisdictions when drafting legal documents; and
- 3) identify business information, apart from legal information, which may affect the drafting of a transactional document, such as a contract or merger agreement.<sup>26</sup>

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<sup>23</sup> See Praveen Kosuri, *Beyond Gilson: The Art of Business Lawyering*, 19 LEWIS & CLARK L. REV. 463, 484-85 (2015) (discussing how transactional lawyers are required to research and understand business information in practice). In practice, transactional lawyers must research non-legal information, such as industry or company specific information, which is important in analyzing and solving a legal issue. *Id.*

<sup>24</sup> See generally Kirschenfeld et al., *supra* note 19 (describing how transactional research skills are used in connection with transactional practice). According to the authors of this chapter, it is the first chapter of its kind focusing on transactional legal research. *Id.*

<sup>25</sup> *Id.* (describing different types of transactional research skills, including both legal research skills and business- and industry-related research skills necessary for transactional attorneys).

<sup>26</sup> *Id.* (describing various types of transactional research tasks and the interplay between researching legal matters and business matters in connection with drafting legal documents); Lori D. Johnson et al., *Research Instruction and Resources in the Transactional Skills Classroom*, 18 TENN.

## 2. Transactional Drafting Skills

Transactional drafting includes the unique type of writing skill set which transactional lawyers employ in a range of settings, including in trusts and estates, real estate, labor and employment, business formation, and corporate practices.<sup>27</sup> This drafting, also known as preventive writing, is forward-looking and is used to create the “law” of a transaction between parties, outlining the obligations between the parties, and anticipating and resolving future interactions between the parties before they arise.<sup>28</sup>

Transactional documents include a wide range of documents from several different practice areas, ranging from real estate (*e.g.*, offers, purchase and sale agreements, deeds, easements) to employment (*e.g.*, employment agreements, policy manuals) to trust and estates (*e.g.*, wills, trusts), among others. Even litigators draft transactional documents (*e.g.*, settlement agreements). Transactional drafting requires drafters to think critically about the law, the legal text, and the relationship of the parties. In addition, drafters must take into account potential issues occurring in the future, engage in issue spotting and problem solving, and work collaboratively with opposing counsel to document a deal.<sup>29</sup>

By introducing transactional drafting skills in a first year legal research and writing course, students can learn to:

- 1) identify issues and client problems in a transactional matter, including critically consider a client’s stated goals and which documents (or revisions thereto) may assist in achieving such goals;
- 2) summarize and interpret transactional precedent, including critically read and interpret the purpose of a provision and identify the legal permissibility and ramifications of such a provision;
- 3) write, revise and negotiate a transactional document, including appropriately draft and revise a variety of transactional documents, including deeds, trusts, wills, articles of incorporation, bylaws, commercial agreements, employee manuals and settlement agreements, among others; and

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J. BUS. L. 641, 643-47 (2016) (describing various types of transactional research tasks required of transactional attorneys).

<sup>27</sup> See Linda H. Edwards, LEGAL WRITING AND ANALYSIS 3-4 (4th ed. 2015) (describing types of legal writing, including transactional drafting).

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* Because the goals of transactional drafting are, at least in part, different from those of litigation-based drafting such as objective and persuasive writing, many legal scholars suggest that the skill of transactional drafting is separate and unique from other types of drafting. See Stark, *supra* note 3. This is one reason why transactional drafting must be taught in the first year legal research and writing course. See *id.*

- 4) orally relate basic terms, drafting decisions and recommendations to internal clients (such as a supervising attorney) and external clients.<sup>30</sup>

### *B. The Need to Teach Transactional Skills*

Transactional attorneys and legal scholars have long addressed the need to introduce transactional skills into the law school curriculum, including in the legal research and writing curriculum.<sup>31</sup> While some improvements have been made in certain areas of the law school curriculum in recent history (including in the clinical setting),<sup>32</sup> changes regarding integrating transactional research and drafting skills in first year legal research and writing courses have been slow.<sup>33</sup>

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<sup>30</sup> Edwards, *supra* note 27 (describing the contract drafting process and the different skills required in transactional drafting). Oral communication in the transactional context is ripe with opportunity for discussion in teaching transactional skills, including the intersection between professional responsibilities and transcribing orally agreed-upon terms into a transactional document.

<sup>31</sup> See generally Tina L. Stark, *Transactional Skills Education: Mandated by the ABA Standards*, 20 TENN. J. BUS. L. 693 (2018) (describing the need to teach transactional skills); Carol Goforth, *Transactional Skills Training Across the Curriculum*, 66 J. LEGAL EDUC. 904 (2017) (discussing the need to teach transactional skills in law schools); Rachel S. Arnov-Richman, *Integrating Transactional Skills Training into the Doctrinal Curriculum*, 18 TENN. J. BUS. L. 439 (2016) (discussing four potential ways to incorporate the teaching of transactional skills in the doctrinal classroom); Pantin, *supra* note 1 (advocating for a need to teach transactional skills in the legal writing or legal practice curriculum); Pantin, *supra* note 6 (discussing how to integrate transactional skills into the first year curriculum); Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 BERKELEY BUS. L.J. 187 (2012) (discussing the history of the movement to introduce more skills into the law school curriculum); Schiess, *supra* note 8 (describing the need to teach transactional skills in the first year legal writing course); Snyder, *supra* note 21 (discussing the need to teach transactional skills in the formative first year of law school); Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475 (2002) (discussing teaching transactional skills in the legal writing curriculum).

<sup>32</sup> See Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551 (2018) (detailing the rise in experiential required credits in law schools); see also Jones & Lainez, *supra* note 14, at 92-94 (describing how law schools experienced significant growth in transactional clinics nationwide in the last decade, with over 140 transactional clinics in place at law schools by 2012). See generally William M. Sullivan et al., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (the Carnegie Report) (calling for more active learning techniques in the classroom and for practical skills courses to be required instead of optional electives).

<sup>33</sup> See ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., ALWD/LWI ANNUAL LEGAL WRITING SURVEY: REPORT OF THE 2017-2018 INSTITUTIONAL SURVEY (2018), <https://www.alwd.org/images/resources/ALWD-LWI-2017-18-Institutional-Survey-Report.pdf>. As of the 2017-2018 Association of Legal Writing Directors/Legal Writing Institute survey, only approximately 12% of law schools required contract drafting courses. *Id.* Pursuant to the Transactional Skills Survey conducted for this Article, only approximately 7% of legal writing

### 1. The Gap in Transactional Research Instruction<sup>34</sup>

Law schools introduce students to legal research by using computer-assisted legal research electronic databases<sup>35</sup> to locate, read and analyze primary and secondary sources of law. Law students frequently use these research techniques and the information uncovered to respond to assignments rooted in a litigation context,<sup>36</sup> but students seldom research cases or statutes to respond to transactional assignments.<sup>37</sup> Similarly, students seldom research company or industry information in order to understand or analyze a legal issue.<sup>38</sup>

Recent scholarship has explored the need to teach transactional research in law schools, including in the legal research and writing course and in upper-level elective transactional or contract drafting courses.<sup>39</sup> With lawyers increasingly focused on individual niches rather than general corporate or litigation practices, lawyers are increasingly required to conduct legal research in a specialized way. In particular, specialized transactional attorneys must be able to conduct specialized legal research in a business or transactional setting, skills seldom taught in the first year legal research and writing course.<sup>40</sup>

While some professors integrate transactional research skills into upper-level transactional drafting courses, few first year legal research and writing courses do. According to professors in this specialization, few textbooks and resources aimed at first year legal research and writing courses provide adequate resources to teach in-depth transactional research instruction.<sup>41</sup> Because of limited instruction and course materials available on this topic, law students rarely consider what type of research is involved in a transactional role. Additionally, student work

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programs include transactional drafting components in their required first year legal research and writing course. *See infra* Section II(D).

<sup>34</sup> This Article assumes that many law schools teach legal research and writing in the same first year required course, but I recognize that some schools have different approaches, including teaching legal research in a separate course. While the considerations for teaching transactional research and transactional drafting may be slightly different in those law schools because the subjects span two different courses, the assertion remains the same that instruction on both transactional research and transactional drafting is important (and often lacking).

<sup>35</sup> *E.g.* LexisNexis and Westlaw.

<sup>36</sup> *See* Brooke J. Bowman, *Researching Across the Curriculum: The Road Must Continue Beyond the First Year*, 61 OKLA. L. REV. 503, 504-06 (2008) (explaining law students' introduction to research).

<sup>37</sup> *See* Kosuri, *supra* note 23 (discussing the underrepresentation of transactional research instruction in legal research and writing courses).

<sup>38</sup> *See id.*

<sup>39</sup> *See, e.g., id.*; Johnson, *supra* note 26; Kirschenfeld et al., *supra* note 19.

<sup>40</sup> *See* Kirschenfeld et al., *supra* note 19, at 1 (discussing specialized research tasks required for transactional attorneys and resources available for transactional attorneys).

<sup>41</sup> *See* Johnson, *supra* note 26 (discussing the lack of a robust textbook focused on or dedicated to transactional research topics).

performance suffers because students lack an understanding of transactional research. For instance, students do not understand that one cannot simply draft a contract, or a provision thereof, and assume that it is enforceable without knowing the underlying law of the jurisdiction and whether the as-drafted language will be enforceable if challenged.<sup>42</sup>

## 2. The Gap in Transactional Drafting Instruction

First year legal research and writing courses teach students how to draft objective and persuasive memoranda to respond to litigation-based assignments, but seldom do they teach students to read or write contracts, evaluate or revise contractual provisions, or think creatively about how to plan ahead to avoid litigation rather than respond to it.<sup>43</sup> The lessons that law students do learn, such as reading cases, evaluating doctrine, and drafting memoranda are helpful for many practices, but are not directly applicable to entering a transactional legal role.<sup>44</sup> New lawyers who take on transactional roles are often left without the skill set necessary to draft documentation for transactions, evaluate business risk, or negotiate deals upon graduation. In fact, many law students graduate without having read (let alone drafted) an entire contract, will, or any other transactional document from start to finish.<sup>45</sup>

Scholarship regarding the need to teach transactional or contract drafting skills is well established.<sup>46</sup> However, despite significant scholarship on the topic,

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<sup>42</sup> *Id.* (explaining the differences between transactional research and litigation-based research and why instruction on transactional research is important).

<sup>43</sup> *See* Fleischer, *supra* note 31, at 477-78 (describing how students often study transactional documents, such as contracts or wills, in law school but rarely have the opportunity to draft these documents in doctrinal courses).

<sup>44</sup> *See id.* at 478 (discussing the need for law students to work closely with transactional documents in law school).

<sup>45</sup> *Id.* at 477-78. Some of the blame with respect to failing to teach students transactional drafting could fall on professors who teach contracts and other topics in the first year curriculum that may be well suited for transactional drafting. *See id.* While this criticism may be valid, a more natural home for transactional drafting instruction is in the legal research and writing course where students are already learning how to write like lawyers. Since the problem cannot be solved by one course, however, there is room for doctrinal professors to assist in meeting this need too. For more information about how doctrinal professors may be able to incorporate transactional assignments into their classrooms, see my chapter on integrating transactional drafting into doctrinal courses. *See* Adam Eckart, *Chapter 13: Teaching Transactional Skills in First Year Doctrinal Courses (and Beyond)*, in *LAWYERING SKILLS IN THE DOCTRINAL CLASSROOM: USING PEDAGOGY TO ENHANCE TEACHING ACROSS THE LAW SCHOOL CURRICULUM* (Tammy Oltz, ed. forthcoming 2020).

<sup>46</sup> *See* Fleischer, *supra* note 31, at 480-81; Schulze, *supra* note 2, at 71; Schiess, *supra* note 8, at 56; Pantin, *supra* note 6, at 139; Pantin, *supra* note 1, at 64 (describing several options for students in developing transactional skills in upper-level courses); Goforth, *supra* note 31, at 905-06 (discussing the need to teach transactional skills in the law school curriculum); Joan MacLeod Heminway et al., *Where Do We Go From Here?*, 20 TENN. J. BUS. L. 403, 407 (2019) (discussing

legal research and writing courses have been slow to change.<sup>47</sup> Because most first year legal research and writing courses only feature instruction on objective and persuasive writing, students rarely learn about preventive drafting and the specialized skills necessary to think proactively about a potential problem, evaluate the law relevant to the issue, carefully draft relevant provisions of a contract or transactional document, and discuss recommendations to a client.<sup>48</sup> In addition, because students only learn litigation skills and do not receive exposure to transactional drafting skills, students do not receive a thorough education on the potential career paths and types of practice for a lawyer.<sup>49</sup>

A litigation-focused legal research and writing program leaves a student with two distinct disadvantages. First, failing to teach transactional drafting in the first year legal research and writing course puts students at a distinct disadvantage because they fail to learn a basic type of legal writing. While students learn how to write objectively and persuasively, they do not learn how to write preventively, a key transactional drafting style.<sup>50</sup> Second, failing to teach transactional drafting early in the law school curriculum does not expose students to the full range of career opportunities, skills, and jobs available to lawyers.<sup>51</sup> Changing the legal research and writing curriculum to include learning that better reflects the diversity of skills needed in the marketplace is key to producing more practice-ready lawyers with exposure to transactional work.<sup>52</sup>

## II. DATA SUPPORTING THE NEED TO TEACH TRANSACTIONAL SKILLS

In addition to calls for reform within the legal academy, the need for law schools to integrate transactional skills into the first year legal curriculum is also supported by data from inside and outside the law school.

Based on data from the Transactional Skills Survey I conducted for this Article, law schools are falling short of providing important transactional skill

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the need to teach transactional skills across the curriculum). *See generally* Stark, *supra* note 31 (arguing that the ABA Standards require law schools to teach transactional skills in order to prepare students for the legal profession).

<sup>47</sup> *See infra* Section II(D) (stating that only 7% of first year legal research and writing courses teach transactional drafting as substantial components to their courses).

<sup>48</sup> *See generally* Stark, *supra* note 9 (describing elements of preventive drafting instruction).

<sup>49</sup> *See* Schulze, *supra* note 2, at 100 (“[W]e should recognize that we fail in our role as educators of future lawyers by teaching only a portion of that group. What opinion would we have, for instance, of medical schools that taught only podiatry?”).

<sup>50</sup> *See* Stark, *supra* note 3 (stating the unique skill of transactional drafting is separate and unique from other types of drafting).

<sup>51</sup> *See generally* Schulze, *supra* note 2 (describing the importance of teaching transactional skills in the legal research and writing curriculum).

<sup>52</sup> *Id.* (stating that teaching transactional skills not only creates practice-ready graduates, but also facilitates professional development).

instruction in the first year legal research and writing course. In fact, only 7% of law schools include transactional skill instruction as a major part of their curriculum in the required first year legal research and writing course.<sup>53</sup> What makes this number so shocking is that data from the past decade has shown that students want and need transactional skill instruction, and previous studies and surveys have demonstrated such, as described in this section. Why then, are legal research and writing programs so slow to adopt it?

#### A. Unmet Law Student Preferences

While the law school experience is overwhelmingly litigation-focused, students entering law school do not come to law school with an overwhelming interest in litigation.<sup>54</sup> In fact, data from a 2007 survey indicates that only 41% of all incoming law students reported that they were “very likely” or “somewhat likely” to practice litigation whereas 46% of all incoming law students reported that they were “very likely” or “somewhat likely” to practice in a transactional setting after graduation.<sup>55</sup> More recent data confirms that students do not want a litigation-focused education. A 2014 survey found that almost two-thirds of pre-law students wanted an interdisciplinary law school education.<sup>56</sup>

Once in law school, the litigation-focused nature of law schools reinforce lawyer depictions from movies and television. The first year curriculum does not allow students with a transactional inclination to understand how a transactional attorney approaches a legal problem or uses research and drafting skills to work on a transactional matter.<sup>57</sup> Litigation-related assignments make up between 66%<sup>58</sup>

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<sup>53</sup> See *infra* Section II(D).

<sup>54</sup> See Schulze, *supra* note 2, at 72 (detailing incoming student preferences in law schools).

<sup>55</sup> *Id.* at 71. No more recent survey similarly measuring incoming student preferences is available. One potential reason why students have expressed interest in all types of law practice and in receiving an interdisciplinary law school education is their age. According to the American Bar Association, the average law students are between the ages of 22 and 25. See *Statistics*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/legal\\_education/resources/statistics/](https://www.americanbar.org/groups/legal_education/resources/statistics/) (last visited July 14, 2020). Accordingly, law students are often beginning their professional careers and may be seeking to keep their options open about future career prospects.

<sup>56</sup> See *Kaplan Survey: What Pre-Law Students Want in Law School Culture Might Be at Odds with Law School Reality*, KAPLAN, INC. (Dec. 3, 2014), <https://www.kaptest.com/blog/press/2014/12/03/kaplan-survey-what-pre-law-students-want-in-law-school-culture-might-be-at-odds-with-law-school-reality> (finding that 63% of pre-law students wanted an interdisciplinary law school curriculum).

<sup>57</sup> Because the first year curriculum is litigation-focused, students entering law school with an inclination to practice in a transactional area often struggle with litigation-based courses and can struggle to see how the traditional first year curriculum is applicable to a future transactional practice. See generally Pantin, *supra* note 1.

<sup>58</sup> See Schulze, *supra* note 2, at 71. It is likely that this number may under-report the litigation bias in the first year legal research and writing curriculum because a professor may not have

and 95%<sup>59</sup> of all first year legal research and writing course assignments (depending on the source). Transactional assignments constitute less than 5% of such assignments.<sup>60</sup> Upper-level elective drafting and writing courses that do not include transactional drafting outnumber those that do include transactional drafting by a two-to-one ratio.<sup>61</sup> Accordingly, the law school curriculum, and the first-year of law school in particular, increasingly creates a “subliminal push towards litigation” for first year students and fails to serve those students inclined to have a transactional practice upon graduation.<sup>62</sup>

### *B. Graduated and Unprepared: A Transactional Skills Gap*

Marketplace job data provides additional support to teach transactional skills. As one author stated, “[i]f law schools are not teaching transactional skills, then law schools are failing to teach over half of all lawyers the skills necessary to practice law.”<sup>63</sup> Approximately half of law students will assume positions with a transactional component or in a transactional setting after graduation,<sup>64</sup> and increasing numbers of graduates are accepting “J.D. Advantage” jobs,<sup>65</sup> often in corporate or business settings.<sup>66</sup> Columbia Law School reported that the skills gap

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indicated that an exercise such as a client interview was litigation-based. While the skill of interviewing is not in and of itself litigation-based, in the legal research and writing curriculum such a task is often conducted using a litigation context, thereby signaling to students that it is not a general lawyering skill but instead a skill needed only for litigation attorneys. Without asking the students to practice a skill in a transactional context, students may consider it a litigation skill even though professors may not categorize it as such.

<sup>59</sup> See generally Goforth, *supra* note 31.

<sup>60</sup> See Schulze, *supra* note 2, at 71.

<sup>61</sup> See Goforth, *supra* note 31, at 909.

<sup>62</sup> See Schulze, *supra* note 2, at 91-92 (discussing the professional development impact of the litigation-bias throughout the law school curriculum).

<sup>63</sup> Pantin, *supra* note 1, at 62.

<sup>64</sup> See *id.* at 61. (discussing the number of law school graduates in transactional positions).

<sup>65</sup> J.D. Advantage jobs are defined by the ABA as positions “in which the possession of a J.D. by the graduate was sought by the employer, required by the employer, or provided a demonstrable advantage in either obtaining or performing the duties of the position from the perspective of the employer.” See *Employment Outcomes as of April 2019*, AMERICAN BAR ASSOCIATION [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2018-law-graduate-employment-data.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2018-law-graduate-employment-data.pdf) (last visited May 21, 2020). Such jobs do not necessarily “require passage of the bar exam or an active law license or involve practicing law.” *Id.* Examples of J.D. Advantage jobs include, among others, patent agent, FBI agent, paralegal or legal assistant, and positions in compliance. *Id.*

<sup>66</sup> Based on jobs data reported to the ABA from Suffolk University Law School in 2018, approximately 25% of graduates were employed in J.D. Advantage jobs, many of which were employed in business-related positions, such as compliance. See *Suffolk University Employment Summary for 2018 Graduates*, AMERICAN BAR ASSOCIATION [https://www.suffolk.edu/-/media/suffolk/documents/law/career/opcd/opcd/aba\\_2018\\_employment-](https://www.suffolk.edu/-/media/suffolk/documents/law/career/opcd/opcd/aba_2018_employment-)

might be even greater than these employment numbers suggest. According to Columbia, approximately 90% of their graduates work in a corporate transactional position or are litigators who serve corporate clients within just five years of graduation, demonstrating the need for a solid background in transactional research and drafting to succeed in their careers.<sup>67</sup>

Although many law students will take on transactional work as lawyers, very few are adequately prepared to do so when compared with their litigation counterparts. According to a survey by Carl Circo and the Professional Development Consortium that asked law firm training and development professionals questions about preparedness of recent graduates, law school graduates were unprepared in many respects for transactional practice.<sup>68</sup> Not one respondent indicated that law students were “very well” prepared for transactional careers while nearly 60% indicated that law students were “poorly” or “very poorly” prepared for transactional careers.<sup>69</sup> In comparison, the same survey indicated that only 16% of law students were “poorly” or “very poorly” prepared for careers in litigation.<sup>70</sup>

When students are unprepared for practice, they make mistakes. A Harvard Law school study indicated that “up to twenty-five percent of all contractual disputes were caused by poor drafting.”<sup>71</sup>

#### C. TRANSACTIONAL SKILLS IN THE LEGAL RESEARCH AND WRITING CURRICULUM: INCREMENTAL INCREASE

Data on incoming students, exiting graduates and new professionals gives law schools significant reasons to teach transactional research and transactional drafting skills, but the law school curriculum has made only small changes in recent history.<sup>72</sup>

According to data from the Association of Legal Writing Directors (“ALWD”) and the Legal Writing Institute (“LWI”), transactional drafting courses have risen in popularity and availability over the last decade.<sup>73</sup> In 2008,

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summary.pdf?la=en&hash=EAFB9E5C46066473C3045BF1B650213881F55EE3 (last visited May 21, 2020).

<sup>67</sup> See Fleischer, *supra* note 31, at 480.

<sup>68</sup> See Circo, *supra* note 31, at 211-12 (describing supporting data detailing how transactional attorneys are largely unprepared for transactional practice).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Goforth, *supra* note 31, at 917.

<sup>72</sup> See Goforth, *supra* note 31, at 906-08 (discussing changes in the legal curriculum over time).

<sup>73</sup> Although the questions in the ALWD/LWI survey changed after 2015, questions throughout the decade asked whether schools offered a contract drafting course (required or elective). While surveys in more recent years also ask questions regarding other types of drafting courses, for which

approximately 34% of law schools (representing 62 schools out of 180 schools surveyed) offered a contract drafting course.<sup>74</sup> After a decade of steady change, the percent of law schools offering a contract drafting course reached an all-time high at 60% (representing 88 out of 147 law schools).<sup>75</sup>

Figure 1: Percent and Number of Schools Offering Contract Drafting Courses<sup>76</sup>

Year	2017-18	2016-17	2015	2014	2013	2012	2011	2010	2009	2008
Percent of Schools	60%	54.1%	42.1%	42.7%	41.3%	40.7%	39.8%	36.3%	36.1%	34.4%
Number of Schools	88/147	80/148	81/178	76/178	78/184	75/184	75/188	68/187	60/166	62/180

While the reported ten-year increase from approximately one third to 60% of law schools surveyed offering contract drafting courses appears to be a welcoming development in transactional skill instruction, it appears little has changed in the last decade when looking at the raw numbers underlying such data. In fact, over the last ten surveys conducted by ALWD/LWI, the increase in schools offering contract drafting courses from 62 schools to 88 schools is only 16 schools. On average, less than two schools added a contract drafting course per year.

While the number of schools offering contract drafting courses has not increased exponentially in the last decade, there are glimmers of hope for those advocating for change. One such glimmer is that according to the most recent ALWD/LWI survey, the contract drafting elective was the most sought-after elective by students among the fourteen legal writing electives surveyed.<sup>77</sup>

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little underlying data is known, the focus of this section is on describing the contract drafting courses reported in the survey over the last decade.

<sup>74</sup> See ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., ALWD/LWI ANNUAL LEGAL WRITING SURVEY: 2008 SURVEY RESULTS (2008), [https://www.alwd.org/images/resources/2008%20Survey%20Report%20\(AY%202007-2008\).pdf](https://www.alwd.org/images/resources/2008%20Survey%20Report%20(AY%202007-2008).pdf).

<sup>75</sup> See ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST. LEGAL WRITING SURVEY, *supra* note 33.

<sup>76</sup> See ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY: 2008-2018, <https://www.alwd.org/resources/survey> (last visited May 19, 2020).

<sup>77</sup> *Id.* (reporting that nearly 40% of contract drafting courses had more demand than seats available, the highest such percentage of any legal writing elective course and six percentage points higher than the next most popular course).

#### D. TRANSACTIONAL SKILLS SURVEY SAYS . . . NOT EVEN CLOSE

In the spring of 2020, I conducted the Transactional Skills Survey to determine the number of law schools that include transactional drafting components in their required first year legal research and writing program and offer transactional drafting courses in upper-division required and elective courses.<sup>78</sup> By reviewing publicly available data for 195 ABA accredited law schools, including searching online course catalogs and reviewing course descriptions, the Transactional Skills Survey identified which law schools emphasized transactional components in their first year legal research and writing courses and which schools offered advanced legal writing courses focused on transactional topics.<sup>79</sup>

According to the Transactional Skills Survey data, upper-level transactional or contract drafting courses are even more widely available now than in 2017-2018. Approximately 86% of the law schools surveyed offer a transactional or contract drafting course as an elective, either as an advanced legal writing course or another type of upper level writing or skills-based elective focusing on transactional or contract drafting skills. As compared to the 2017-2018 ALWD/LWI survey, this increase from 60% to 86% is welcome news, showing a significant rise in the availability of upper-level transactional or contract drafting courses in only three years' time.<sup>80</sup> Having such a significant commitment to teaching transactional or contract drafting in the upper level divisions of law schools is important, and according to the Transactional Skills Survey, law schools have embraced that importance.<sup>81</sup>

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<sup>78</sup> This Transactional Skills Survey collected data from 195 ABA accredited law schools across the country. The Transactional Skills Survey excluded nine ABA accredited law schools for one of the following reasons: a lack of accessibility of online course descriptions, a teach-out plan making the law school no longer active, or website accessibility issues.

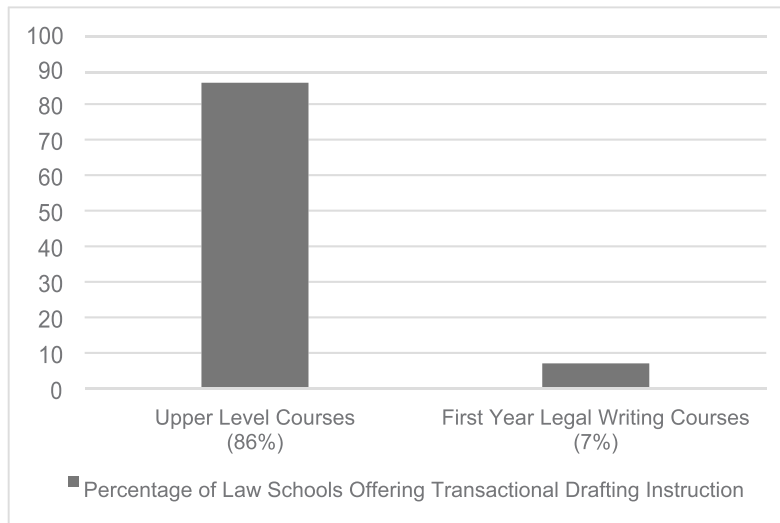
<sup>79</sup> While this approach of gathering data on law school curricular priorities may not capture all law schools that teach transactional research or writing, this Transactional Skills Survey was designed in such a way to avoid self-reporting (as used in the ALWD/LWI surveys). Additionally, the design of the Transactional Skills Survey aimed to objectively measure priorities of a legal writing program through their own words about their course. After all, the words of each legal writing program should accurately describe the priorities of their courses and if transactional drafting is not listed in the course description, it must not be a significant priority of the course. To the extent some schools do offer courses which include transactional drafting components, professors should ensure that course descriptions should include such descriptions such that students can identify which courses are likely to teach desired transactional skills. Full details of the Transactional Skills Survey and its results are available by contacting me directly.

<sup>80</sup> The 86% represents 167 schools in raw numbers, which, in addition to an increase in percentage over the 2017-2018 ALWD/LWI survey, also represents a significant increase in raw numbers from 88 schools to 167 schools. By these numbers, over 80 schools have added transactional drafting electives in the last three years.

<sup>81</sup> Although this is welcome news, significant work in this area is still required. Upper-level courses focused on litigation drafting and litigation skills (such as Trial Advocacy) far outnumber the upper-level elective courses focused on transactional drafting and skills, but increasing the

Despite the growing popularity in upper-level transactional and contract drafting courses, somewhat surprisingly, no such popularity exists in the first year legal research and writing class. Although nearly nine out of ten law schools have a transactional or contract drafting course available for students in upper-level elective courses, the Transactional Skills Survey revealed that no such importance was placed on teaching transactional or contract drafting concepts in the first year legal research and writing courses. In fact, according to the Transactional Skills Survey, only 7% of law schools include a transactional component in their first year legal research and writing course.<sup>82</sup>

Figure 2: Percent of Law Schools Offering Transactional Drafting Instruction in Upper Level Courses as Compared to First Year Legal Writing Courses<sup>83</sup>



Of the schools that do have a transactional component in their first year legal research and writing course, many include a “lawyering lab” module or a course segment that includes a simulation of a transactional matter focused on the teaching of transactional skills. Law schools integrate these modules or segments

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availability of these transactional courses is a welcome first step. The Transactional Skills Survey did not formally measure the quantity of upper-level transactional drafting courses that each school offers, but many only offer one transactional drafting course whereas a majority of law schools offer more than one upper-level course focused on litigation drafting skills (e.g., Appellate Practice, Civil Litigation Practice, Patent Litigation Practice, Trial Advocacy).

<sup>82</sup> It should be noted that this percentage does not measure the relative importance or emphasis that the course places on transactional skills, so although 7% of schools offer some instruction on transactional skills, it is often a small part of the legal research and writing course and is not proportional in instruction time to litigation-based skills instruction.

<sup>83</sup> Per the Transactional Skills Survey data.

into their courses in several ways, including by devoting a portion of their semester to transactional skills or by using an intersession course to offer an intensive transactional program focusing on transactional research, drafting, and (often) negotiation.<sup>84</sup>

In addition to the 7% of law schools that include a transactional component in their first year legal research and writing class, the Transactional Skills Survey found that an additional 6% of law schools require students to complete a required transactional or contracts drafting course after the first year of law school.<sup>85</sup> These courses typically serve as an extension of the first year legal research and writing curriculum, often in the third semester of the legal research and writing program or in another required course required after the first year of law school.<sup>86</sup> Of the law schools that institute such requirements, several include required upper level legal writing or skills courses, giving students the option to choose either a transactional or a litigation-based legal writing course to fulfill this requirement.

The results of the Transactional Skills Survey demonstrate that while nearly 90% of law schools have at least one transactional or contract drafting elective for upper-level students, a significant gap in transactional and contract drafting instruction in the first year curriculum remains. A meager 7% of first year legal research and writing courses cannot prepare the number of graduates that will become transactional attorneys after graduation.

While the Transactional Skills Survey only reviewed legal research and writing courses that teach transactional or contract drafting skills, few (if any) legal research and writing courses appear to teach transactional research skills.<sup>87</sup> While the Transactional Skills Survey and a review of current scholarship did identify a few schools that offer advanced legal research elective courses that contain a transactional research component,<sup>88</sup> little evidence suggests that law school research and writing curriculum emphasize transactional research.

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<sup>84</sup> These schools include (among others) Boston University Law School and University of Connecticut Law School.

<sup>85</sup> These schools include (among others) UIC John Marshall Law School and Florida Coastal School of Law.

<sup>86</sup> These types of requirements are separate and apart from upper-level required courses that fulfill a legal writing requirement. Instead, these required courses act as a continuation of the first year legal research and writing program.

<sup>87</sup> One may conclude that the general lack of transactional drafting skills in the first year curriculum indicates that legal research and writing programs are similarly failing to teach transactional research skills.

<sup>88</sup> These schools include (among others) the University of Missouri School of Law and the University of Pittsburgh School of Law.

### III. PEDAGOGICAL TOOLS AND APPROACHES TO TEACHING TRANSACTIONAL SKILLS

While the legal academy and the data support the need to integrate transactional skills into the legal research and writing curriculum, legal research and writing syllabi often lack flexibility to accommodate additional subject matter. In addition, competing priorities placed upon the professors who teach first year legal research and writing courses make adding content to the course difficult.<sup>89</sup> With obligations to teach many key lawyering skills, such as legal research, objective writing, persuasive writing, client interviewing, oral communication and many other key skills, there is resistance to teach yet another topic in the first year program. Even worse, some legal writing professors with prior litigation expertise may feel ill-equipped to teach transactional skills.

Although time pressures and relevant experience are potential barriers to integrating yet another skill into the first year legal research and writing courses, professors can integrate transactional skill instruction by rooting small-scale assignments within larger litigation assignments, requiring only a small portion of class time. By expanding upon prior scholarship regarding integrating transactional skills into the existing curriculum<sup>90</sup> and understanding certain pedagogical tools and learning principles, teaching transactional research and transactional drafting—and fitting it into an existing legal research and writing course syllabus—is more achievable than ever.

#### *A. Starting Small with Small Teaching*

Small teaching<sup>91</sup> is a pedagogical approach rooted in learning sciences aimed at facilitating active learning<sup>92</sup> by utilizing the retrieval effect and the

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<sup>89</sup> See Kosuri, *supra* note 23 (pointing to the lack of available time in a legal research and writing syllabus as one reason why professors are hesitant to include transactional skills instruction in their courses).

<sup>90</sup> See Pantin, *supra* note 6, at 139 (discussing the potential for integrating transactional drafting skills through “easy to integrate” ideas).

<sup>91</sup> Small teaching uses principles from the learning sciences to create incremental but powerful changes in student learning using small-scale low-stakes exercises and examples that can be incorporated into an otherwise full syllabus. See Lang, *supra* note 16, at 5.

<sup>92</sup> Active learning techniques allows students to retain information more efficiently and successfully, learn how to problem-solve, practice higher-order thinking, and have a greater overall aptitude for learning. See Paula M. Young, *Teaching Professional Ethics to Lawyers and Mediators Using Active Learning Techniques*, 40 SOUTHWESTERN L. REV. 127, 155-56 (2010). Active learning techniques are accomplished by engaging the brain in various ways, including asking students to complete tasks, make connections, recall information, or engage in other similar activities while learning (as compared with passive learning which focuses on passively taking in information, such as completing reading assignments or listening to a lecture, without engagement or interaction with the material). *Id.*

educational principle of scaffolding.<sup>93</sup> Used together in a small teaching type of problem explained below, these pedagogical tools can introduce transactional research and drafting skills into an existing and already full legal research and writing course.

Small teaching facilitates active learning among students and asserts that small changes in a course or in a particular day's lesson—such as integrating a short quiz or activity designed to promote recall of a prior topic or application of a skill—can have significant impact on student cognition and learning.<sup>94</sup> Small teaching also assists students with retrieving information from their memories while building new skills on top of existing skills, transitioning students from passive to active learners and helping students better understand concepts and examples discussed in class or assigned in the course reading or homework.<sup>95</sup>

In any instruction on any topic, small teaching includes the use of examples, assessments, and group exercises, each of which allow students to practice or apply skills or concepts learned in reading or through instruction.<sup>96</sup> By asking students to complete these examples, assessments, or group exercises, students recall the information learned in the reading or in class and are therefore more likely to remember the information for a formal assessment, such as when drafting a paper or taking an exam.<sup>97</sup>

Examples of small teaching can include a variety of exercises conducted after a lesson to help trigger the retrieval effect and get students actively thinking about their learning and the concepts discussed in class.<sup>98</sup> Examples of small teaching need not be complex, but can be employed regularly to facilitate the retrieval and prediction of knowledge, create connections in understanding the material, and grow and expand a student's mastery of a topic.<sup>99</sup>

In legal research and writing courses, professors may institute small teaching techniques in a class by asking students to:

- 1) complete a group assignment after a lesson on a particular type of writing or a particular concept to solve a problem, analyze a case, or outline an answer;

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<sup>93</sup> See Lang, *supra* note 16 (setting forth a strategy for improving student learning by asserting that small but powerful changes in a course can make a big difference in student learning).

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* (describing the types of exercises relevant to small teaching).

<sup>97</sup> See *id.* (explaining the learning sciences principles behind small teaching techniques).

<sup>98</sup> See *id.* (describing examples of small teaching).

<sup>99</sup> See generally *Small Teaching Strategies*, UNIVERSITY OF NEBRASKA-LINCOLN CENTER FOR TRANSFORMATIVE TEACHING, <https://teaching.unl.edu/small-teaching-strategies> (last visited May 21, 2020); Schiess, *supra* note 8, at 56 (discussing how integrating transactional skills into the first year curriculum can also help facilitate mastery).

- 2) respond to low-stakes multiple choice or true or false questions at the end of a lecture to recall and reengage with the material; or
- 3) apply previously-developed skills to complete a new assignment or task.

These examples are ones that legal research and writing professors often employ regularly in classes to measure and facilitate learning, but these exercises can also introduce new topics and skills, including transactional research and drafting skills.<sup>100</sup> Based on the premise that large parts of learning can take place in minimal amounts of time, using small teaching to incorporate transactional research and drafting skills into a course need not absorb significant time. In fact, some small teaching examples, such as asking students to respond to a short quiz at the end of a lecture or drafting a short clause or document after a class, can take no more than five to ten minutes of class time (or can be completed outside of class as homework). Because of the minimal time required to implement small teaching examples, the principles of small teaching allow professors to integrate transactional research and drafting skills into a course without requiring significant revision to an existing syllabus or sacrificing substantial class time.

### 1. The Retrieval Effect Drives Learning

Small teaching is built upon the retrieval effect, the cognitive practice of deliberately recalling information to improve memorization and learning.<sup>101</sup> Also known as the testing effect, this strategy fosters long-term learning retention by requiring the brain to actively retrieve knowledge.<sup>102</sup> Retrieval is especially

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<sup>100</sup> See *infra* Section III(B) (discussing examples of small teaching exercises for use in transactional research and transactional drafting contexts).

<sup>101</sup> See Lang, *supra* note 16.

<sup>102</sup> *Id.* at 21. An example of the retrieval effect that resonates with my students is the example used in SMALL TEACHING: EVERYDAY LESSONS FROM THE SCIENCE OF LEARNING. In short, the author is a regular customer at a coffee shop and orders the same drink from the same barista each day. In order to test the retrieval effect, instead of placing his regular order one morning, the author asks the barista if they remember the author's order. When the barista admits that they remember him but not the order, the author places the regular order once again. The next day, when the author walks into the coffee shop, the barista is able to recite the author's regular order without being prompted. Although the barista was not able to remember the order the first day (because the barista had simply been passively accepting the order each day previously), the retrieval effect caused the barista to think about the order (even after an incorrect guess) and thereby help the barista remember the order once the author entered the coffee shop the next day. This is an excellent example of how the retrieval effect works in practice—bringing a student from passive listening to active learning—and is a helpful example for students to hear when introducing the concept of small teaching and the retrieval effect. See *id.*; see also Adam Eckart, *Small Teaching Transactional Skills in the Legal Writing Classroom*, 32:2 THE SECOND DRAFT (Fall 2019) (discussing using small teaching to introduce transactional skills into the legal writing classroom).

successful in the classroom setting. When a student is tested on material as part of the learning process, they are more likely to recall that information later.<sup>103</sup>

When assessing the utility level of the retrieval technique, scholarship notes that retrieval is superior to many other types of learning, such as reflection, mass study, highlighting, and re-reading.<sup>104</sup> While the practice of rereading notes gives a student the “illusion of mastery,” the knowledge is not stored long-term and a far more effective way to study is through the retrieval effect.<sup>105</sup> The retrieval effect is so effective because it engages the brain and stores the information in the memory in a different way than before, allowing students to recall the information more easily without having it in front of them.<sup>106</sup> For this reason, retrieval ranks among the highest level of utility of learning techniques, along with self-testing and periodic review (or spaced study), well above the other learning techniques often employed by students.<sup>107</sup>

## 2. Scaffolding Enables Addition

In addition to the retrieval effect, small teaching and similar learning science principles are also built upon the scaffolding method.<sup>108</sup> Educational scaffolding is a teaching method in which concepts build upon one another incrementally, with instructional support along the way.<sup>109</sup> Scaffolding often comes in the form of instructor questions posed to students to stimulate learning and problem solving and to support students in their understanding.<sup>110</sup> As students become comfortable with the concepts, the scaffolding fades and student thinking

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<sup>103</sup> See Lang, *supra* note 16, at 21.

<sup>104</sup> See Jennifer M. Cooper, *Smarter Law Learning: Using Cognitive Science to Maximize Law Learning*, 44 CAP. U. L. REV. 551, 562-64 (2016) (describing research results on the effectiveness of different types of learning).

<sup>105</sup> See *Helping Students Pass the Bar Exam: Five Law Schools Share Their Successful Strategies*, THE BAR EXAMINER, (SUMMER 2019) <https://thebarexaminer.org/article/summer-2019/law-schools-successful-strategies> (last visited May 21, 2020).

<sup>106</sup> See Cooper, *supra* note 104, at 562 (describing why the retrieval effect is so effective).

<sup>107</sup> See *id.* at 561-62 (describing research results and the effectiveness of the retrieval effect in comparison to other types of learning).

<sup>108</sup> The scaffolding method is derived from the education concept known as the zone of proximal development (“ZPD”), developed by psychologist Lev Vygotsky in the 1920s. See Karim Shabani et. al., *Vygotsky’s Zone of Proximal Development: Instructional Implications and Teachers’ Professional Development*, 3 CAN. CTR. OF SCI. AND ED. 237, 237 (2010). See also Eckart, *supra* note 102 (discussing the interplay between small teaching and scaffolding principles in the legal writing context).

<sup>109</sup> See *What Is Instructional Scaffolding?*, THE IRIS CENTER AT VANDERBILT UNIVERSITY, <https://iris.peabody.vanderbilt.edu/module/sca/cresource/q1/p01> (last visited May 21, 2020) (describing how scaffolding is used in the classroom).

<sup>110</sup> See Margaret Butler, *Resource-Based Learning and Course Design: A Brief Theoretical Overview and Practical Suggestions*, 104 L. LIBR. J. 219, 226 (2012).

becomes more autonomous.<sup>111</sup> The scaffolding method allows students to become active learners while taking on new material.<sup>112</sup> The instructor then becomes a facilitator of learning, as opposed to the dominant expert on the subject.<sup>113</sup>

Scaffolding instruction activates prior knowledge, reminding students what they have learned in order to reduce anxiety while approaching a new subject; breaks a task down into smaller pieces, allowing students to better comprehend what is happening and what they have learned; and provides an example of work, demonstrating what the outcome may look like before students must complete the task.<sup>114</sup> These approaches to learning help students build upon prior instruction and apply gained knowledge to different scenarios and contexts.<sup>115</sup>

Scaffolding instruction is not a new phenomenon in the legal research and writing classroom. Many legal research and writing courses use scaffolding throughout the year. For example, many courses begin with rule construction, scaffold into writing a “Discussion Section” of an objective memorandum, and finally scaffold into writing a full objective memorandum for a law office supervisor.<sup>116</sup> By applying the scaffolding techniques already used in the legal research and writing classroom, legal research and writing professors can integrate transactional skills into their classrooms by scaffolding new transactional research and drafting skills upon existing legal skills already in use in their courses.

### 3. Implementing the Small Teaching of Transactional Skills

Implementing the ideas of small teaching, the retrieval effect, and scaffolding may be overwhelming to professors who already have well-established processes and plans for their courses. Small teaching, however, is easier to implement than large-scale changes; a slight modification to one class, unit, or exercise can achieve the learning benefits described above. Accordingly, using small teaching to integrate transactional research and drafting skills does not

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<sup>111</sup> See *id.* (discussing how scaffolding helps to facilitate higher level thinking and learning).

<sup>112</sup> See *Instructional Scaffolding to Improve Learning*, NORTHERN ILLINOIS UNIVERSITY FACULTY DEVELOPMENT AND INSTRUCTIONAL DESIGN CENTER, <https://www.niu.edu/spectrum/archives/scaffolding.shtml> (last visited May 21, 2020) (describing the role of a student in scaffolding instruction).

<sup>113</sup> See *id.* (describing the role of a professor in scaffolding instruction).

<sup>114</sup> See Beth Lewis, *Scaffolding Instruction Strategies*, THOUGHTCO., <https://www.thoughtco.com/scaffolding-instruction-strategies-2081682> (last visited May 21, 2020) (discussing modeling in scaffolding).

<sup>115</sup> See Charlotte D. Schneider, *Using Scaffolding Techniques for Legal Research Instruction*, 2 LEGAL INFO. REV. 61, 73 (2016-2017).

<sup>116</sup> In addition to this example, many legal research and writing courses use scaffolding techniques by beginning with a “closed” memorandum assignment where the research has already been completed for students. Professors then use scaffolding to transition into an “open” memorandum assignment where students are required to conduct research before writing a memorandum.

require that a professor change an entire class, unit or semester. Instead, small teaching allows a professor to tackle integration of a few exercises on transactional research and drafting skills—either in a homework assignment, an in-class exercise, or an oral presentation—to help student recall, reinforce existing skills, and scaffold new and important skills upon the concepts or skills being discussed in that class.<sup>117</sup>

By using the principles of small teaching, including the principles of retrieval and scaffolding, legal research and writing professors can incorporate a variety of small teaching practices that allow students to learn a new skill, such as transactional research or drafting, in addition to an already-existing skill on the legal research and writing syllabus. By utilizing retrieval and scaffolding, professors require students to remember and retrieve the original skill taught, build competency and mastery in traditional legal research and writing skills, and learn new and related skills (such as transactional research and drafting skills) needed for all types of legal practices.

### *B. Teaching Transactional Skills in the Classroom*

Professors can incorporate transactional research and drafting skills into a legal research and writing course by integrating transactional research and drafting skills into the existing curriculum using the principles of small teaching, retrieval, and scaffolding.<sup>118</sup> Because of the COVID-19 pandemic and the widespread law school shift to online learning for the Spring 2020 semester (and beyond), this section also discusses how each assignment may be used for in-person face-to-face learning or online instruction—both synchronous and asynchronous.

Student feedback on the examples listed below has been overwhelmingly positive. Through the use of these and other similar examples during the last two academic years, I have received significant positive feedback from students craving transactional skill instruction in the first year legal research and writing course. Students report these assignments assist in providing a look into the office of a

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<sup>117</sup> The concept of incorporating small exercises into a class in order to develop comprehension is similar in theory to the problem method, originally used at Harvard Business School, for developing comprehension, which has been used successfully in a variety of curricular settings. See Jean Whitney et. al., *Across the Curriculum: Integrating Transactional Skills Instruction*, 14 TENN. J. BUS. L. 383, 387 (2013) (describing the use of the problem method in legal research and writing courses).

<sup>118</sup> These examples represent some potential examples for professors, based on practical experience in teaching at Suffolk University Law School in both the Legal Practice Skills required first year legal research and writing course as well as serving as a guest lecturer in Advanced Legal Writing courses. Additional examples of transactional skill problems and instruction have been included in other scholarship. See, e.g., Tina L. Stark, *Contract Drafting: A Prerequisite to Teaching Transactional Negotiation*, 12 TENN. J. BUS. L. 153 (2011); Whitney, *supra* note 117; Eckart, *supra* note 102.

transactional attorney and help develop different types of reading, writing and research skills. In addition, students report these assignments provide a greater understanding of the legal work and practices available to students after law school, which is often lacking in the first year curriculum.<sup>119</sup>

### 1. In Practice: Teaching Transactional Research

To assist students in preparing for legal practices of all kinds, first year legal research and writing courses must integrate additional legal research instruction, including transactional research. By integrating transactional research strategies into the legal research and writing curriculum, professors can illustrate different legal research skills helpful for practice and help students practice critical reading and analysis skills in a new context. In addition, such instruction can introduce students to transactional perspective and information currently underrepresented in legal research and writing courses, and assist in preparing students for legal practice upon graduation.

#### a. Goals and Objectives<sup>120</sup>

To integrate a quality transactional research assignment into an existing legal research and writing course, consider several goals and objectives. A good transactional research exercise 1) leverages underlying facts and law from a prior discussion or assignment, 2) asks a specific question that can be answered through transactional research, 3) provides a source or area from which a student should search for the research, 4) discusses how such research shall inform the drafting of a transactional document, and 5) is appropriately timed with drafting a transactional document to engage students in active learning and allow students to practice skills.

By utilizing the above framework, professors can achieve the goals and objectives of teaching transactional research and teach students to do the following:

- 1) analyze legal sources other than statute, regulations and case law (such as agency interpretations and no-action letters) to review and evaluate a statute for a transactional business matter;
- 2) apply traditional legal research strategies, such as reviewing statute, case law and other primary law, to confirm the validity of provisions

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<sup>119</sup> For more information about the specific examples, sample rubrics, or feedback on student experiences, please contact me.

<sup>120</sup> I designed the goals and objectives for transactional research and transactional drafting based on the pedagogical principles of small teaching, the retrieval effect, and scaffolding. In addition, these goals and objectives were also designed based on my experience as a transactional attorney at a global law firm ranked in *The American Lawyer's* Top 20 law firms and as a professor teaching legal research in a first year legal research and writing course.

drafted for a contractual agreement, such as a non-compete or non-disclosure agreements;

- 3) compare the use of transactional precedent, including how business entities similar to an existing client have used transactional provisions in prior similar documents and what transactional provisions a client should request in a negotiation; and
- 4) identify non-legal business information, including information available in a corporate public filings such as a list of subsidiaries, competitors, industry regulations, or plans for future development, to assist with understanding a client and understanding necessary information for a transactional drafting assignment.<sup>121</sup>

#### b. Assignment Examples

Listed below are four examples of assignments that assist with teaching transactional research in the legal research and writing course.<sup>122</sup> These assignments often pair well with an existing assignment – either a traditional objective or persuasive memorandum or a transactional drafting assignment – to show students how research and writing are complementary.

Each of the four following assignments can be completed in face-to-face or online learning formats. These assignments lend themselves well to online instruction because they can be completed independently as class preparation, after an online synchronous (or asynchronous) class, or during an in-class timed exercise in an online class meeting. While these assignments can be used in face-to-face instruction as well, face-to-face instruction is not necessary to achieve the learning objectives discussed above. Where professors seek to involve learning in groups or pairs, group meetings in breakout or online meeting rooms can facilitate group discussion and deeper learning. Where professors wish to share completed research, student work or sample answers, professors and students can use screen-sharing or discussion board tools to post and share samples to facilitate discussion.

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<sup>121</sup> These goals and objectives, as well as those appearing later in this section, include several of Bloom's taxonomy of measurable verbs, designed to assist with classifying certain knowledge, skills, attitudes, behaviors and abilities. See Jessica Shabatura, *Bloom's Taxonomy Verb Chart*, UNIVERSITY OF ARKANSAS TEACHING INNOVATION & PEDAGOGICAL SUPPORT (Sep. 18, 2014) <https://tips.uark.edu/blooms-taxonomy-verb-chart>.

<sup>122</sup> The assignment examples listed in this section are listed in the order typically used in my class during an academic year, but could be introduced in any order.

i. Assignment: Analyze a Legal Rule by Researching Agency Interpretations<sup>123</sup>

This assignment introduces the research task of identifying and understanding agency interpretations and gives students exposure to additional sources of law, often critical in transactional contexts and when representing transactional clients in a variety of industries.

*Setting the stage:* A client has engaged a law firm to write a memorandum regarding a Family Medical Leave Act issue. Looking for more information on a specific relevant provision of the Act, the assigning partner seeks clarification and requests a review of the U.S. Department of Labor interpretations to investigate the agency's interpretation of a specific provision of the law.

*Completing the assignment:*

- 1) Students are directed to the website containing published Opinion Letters from the U.S. Department of Labor and professors explain the importance of such interpretations, including how such interpretations affect enforcement of statutes and regulations.<sup>124</sup>
- 2) Students must find a specific agency interpretation, identified by the professor, which provides guidance on the statute in question for the statutory interpretation exercise.
- 3) Students must critically read the interpretation related to the statute and regulation, and consider whether the interpretation affects the statutory interpretation exercise.
- 4) Students de-brief the assignment with the professor in-person or online, discussing how the interpretation did or did not change the meaning of the statute and whether conducting research into the agency interpretation could change the outcome of a case or client representation, and reflecting on the assignment if sufficient time exists.

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<sup>123</sup> Although this example is rooted in labor law, this type of exercise is applicable to other types of transactional and regulatory matters as well, including tax, employment, securities and antitrust. In each of these practices, agency interpretations exist to interpret federal regulations and could be utilized to introduce students how to use agency interpretations to interpret a federal statute or regulation.

<sup>124</sup> The U.S. Department of Labor publishes Opinion letters which are issued by the Administrator in response to questions received on certain regulations. *See generally FMLA Opinion Letter Search*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/agencies/whd/opinion-letters/search?FMLA> (last visited May 21, 2020). Like many other types of informal advice from the government agencies, these letters are typically not binding on third parties but provide guidance to businesses and lawyers on the current interpretation of federal regulations by the relevant authorities.

For this assignment, professors may wish to revisit this exercise or use a similar exercise in the persuasive portion of the course when discussing the persuasive documents that attorneys draft. Seeking comment from regulators is an excellent example of persuasive writing and is common in a transactional practice. Opinion Letters or similar requests to a federal regulator are often good examples of how a variety of attorneys must learn to write persuasively in a transactional context.<sup>125</sup>

ii. Assignment: Explore Underlying Law to Inform Transactional Drafting

This assignment introduces how traditional legal research is used in a transactional drafting setting, which is critical in determining whether a transactional document is valid and whether the provisions drafted for a client's contract or document are legally valid.

*Setting the stage:* A client has engaged a law firm to draft a will and a memorandum on the enforceability of a signature on a will.<sup>126</sup> The assigning partner requests a sample will and a client letter outlining how the will must be signed to be valid.

*Completing the assignment:*

- 1) Students use a boilerplate will downloaded from a free online source<sup>127</sup> and draft an accompanying client letter describing how it must be signed to comply with state law.

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<sup>125</sup> See Adam Eckart, *Transferability: Applying Principles of Persuasive Writing to Transactional Matters*, LEGAL WRITING MATTERS BLOG, <https://sites.suffolk.edu/legalwritingmatters/2020/05/12/transferability-applying-principles-of-persuasive-writing-to-transactional-matters> (last visited May 21, 2020) (describing how the use of agency Opinion Letters or Informal Interpretations can be used to teach transactional drafting in a persuasive manner).

<sup>126</sup> See David Horton, *Wills Without Signatures*, 99 B.U.L. REV. 1623, 1630 (2019) (outlining signature requirements of wills and subsequent enforceability).

<sup>127</sup> A variety of sources for free downloadable boilerplate wills are available online, including through LegalZoom, the online technology company that is popular for creating wills, business formation documents, copyright registrations and trademark applications, and was created in-part by Robert Shapiro. Sample wills are available on LegalZoom for free download. See e.g., *The Last Will and Testament of John Doe*, LEGALZOOM.COM [https://www.legalzoom.com/samples/last\\_will\\_and\\_testament.pdf](https://www.legalzoom.com/samples/last_will_and_testament.pdf) (last visited May 21, 2020). Although professors may bristle at using a free online will as a teaching tool, the online legal services market is a five-billion-dollar industry. See Catey Hill, *Don't Buy Legal Documents Online Without Reading This Story*, MARKETWATCH <https://www.marketwatch.com/story/dont-buy-legal-documents-online-without-reading-this-story-2015-11-23> (last visited May 21, 2020). Due to the ubiquity of online legal documents, the general population frequently uses such sites to download free legal documents from the Internet. As a result of the size of this industry and availability of such documents online, attorneys are likely to encounter such documents in practice and must evaluate

- 2) Students utilize traditional legal research strategies to research and understand the signature requirements for the relevant state to a) update the will template (if necessary) and b) draft the client letter.<sup>128</sup>
- 3) Students must discuss suggested edits to the will and client letter, given the transactional research conducted, including how such revisions will affect advice given to the client.
- 4) Students de-brief the assignment with the professor in-person or online. Students view the professor's sample mark-up of the will and client letter and prepare a reflection or assignment wrapper.<sup>129</sup> The reflection can ask students to reflect on a) the legal ramifications of not conducting the transactional research necessary to confirm enforceability and b) the utility and effectiveness of a downloaded will from free online sources.<sup>130</sup>

iii. Assignment: Evaluate Transactional Precedent to Inform Use in Transactional Drafting

This assignment introduces how transactional research skills are used to inform transactional drafting and how transactional precedent is used in the drafting process.

*Setting the stage:* A ski resort has recently settled a case with a skier arising out of an injury that occurred at the local ski resort. To avoid similar issues in the future, the general counsel requests an update to the ski resort's assumption of risk policy.

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whether these sources are good legal documents when clients bring these documents to their lawyer for a second look.

<sup>128</sup> Although students may be familiar with the legal provisions surrounding enforceability of a will because of their prior memoranda on the topic or discussion in a different course, students must research whether the provisions of the boilerplate will be enforceable in the relevant jurisdiction.

<sup>129</sup> An assignment wrapper is a short form students complete along with or after an assignment (such as an exam or a paper) which focuses on the student's learning process. *See generally* Sarah Schendel, *What You Don't Know (Can Hurt You): Using Exam Wrappers to Foster Self-Assessment Skills in Law Students*, 40 PACE L. REV. 154 (2020) (describing how to use assignment wrappers to facilitate student self-assessment and self-reflection).

<sup>130</sup> For this debrief and in conveying why a student made certain choices in the draft, professors can use "partner presentations" or other simulations to have students present their revisions to a supervisor and justify why such revisions were suggested. *See* Whitney, *supra* note 117, at 387.

*Completing the assignment:*

- 1) Students receive one assumption of risk policy from a ski resort website<sup>131</sup> and are asked to a) identify three other publicly available assumption of risk policies and b) create a chart of policy provisions for use in drafting a new assumption of risk policy.
- 2) Using a public schedule of subsidiaries<sup>132</sup> of another publicly traded ski resort holding company, students identify three published assumption of risk policies on ski resort websites and create a chart of the different provisions in each agreement. Using this chart, students can identify common provisions amongst the four assumption of risk policies and can identify other provisions which are only in certain policies.
- 3) Students use the completed assumption of risk policies chart to draft a cover email to explain the research completed, which provisions the ski resort should include in their assumption of risk policy, and what additional research may be required.
- 4) Students de-brief the assignment with the professor in-person or online, viewing the best three submitted emails and charts, and reflect upon the transactional research process and the critical analysis required for each email draft.

iv. Assignment: Examine Non-Legal Business  
Information to Advise Transactional Drafting

This assignment introduces how research on specific business information contributes to understanding a client's legal or business issue and informs a transactional document or type of advocacy.

*Setting the stage:* When drafting an initial merger agreement for a client, the assigning partner seeks to present the client in the best light and establish a positive impression on counterparties.<sup>133</sup> The assigning partner requests a review

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<sup>131</sup> Examples of ski resort assumption of risk policies are posted online and may be an example for students to use in this exercise. See *Assumption of Risk*, MOUNT SNOW LTD, <https://www.mountsnow.com/risk/> (last visited May 21, 2020).

<sup>132</sup> Examples posted on the Securities and Exchange Commission's Electronic Data Gathering, Analysis and Retrieval ("EDGAR") database can be helpful for use in this type of exercise. For example, using a publicly available subsidiary list of Vail Resorts, Inc. can help students identify additional ski resorts with publicly available assumption of risk policies posted on mountain websites. See *Subsidiaries of Vail Resorts, Inc.*, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/812011/000081201119000077/exhibit212019-q4.htm> (last visited May 30, 2020).

<sup>133</sup> Current legal scholarship has begun to discuss the role of narrative or storytelling in transactional drafting. See Chesler, *supra* note 22 (discussing the role of narrative in transactional documents); see also Johnson, *supra* note 22, at 847-48 (discussing the role of narrative and storytelling in transactional drafting). This assignment focuses on having students act as advocates and explore using persuasion in transactional drafting.

of the company's publicly filed documents to draft a persuasively styled Recital or Background provision for a transactional agreement.

*Completing the assignment:*

- 1) Students locate the company's 10-K, the company's publicly filed Annual Report on EDGAR.
- 2) Students critically read the publicly filed information to identify how the company describes itself, its competitors, and its products. Students use this information to draft recitals or background provisions for a corporate transactional agreement, such as a merger agreement, describing the publicly traded company client in the most favorable light.<sup>134</sup>
- 3) Students carefully review and consider the information in the corporate filing and decide how to draft a persuasive narrative of the client.
- 4) Students de-brief the assignment with the professor and their peers in-person or online, sharing samples of their work and explaining how the research process into non-legal information assisted with legal drafting and what decisions the students made regarding what information to include in the draft agreement.

## 2. In Practice: Teaching Transactional Drafting

To assist students in developing the full range of legal writing skills, legal research and writing courses must teach not only objective and persuasive writing, but also transactional drafting. Instead of discussing transactional drafting in a separate course or separate semester of a legal research and writing course, by integrating transactional drafting with existing objective and persuasive legal writing assignments, legal research and writing programs can leverage the use of in-class problems to save time. In addition, such integration shows students that all problems can have different applications and professors can demonstrate the life cycle of a client representation. Finally, such integration can introduce transactional drafting in all types of matters, which may increase its adoption by

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<sup>134</sup> To make this task more challenging, professors can use current events to identify a public company that recently received negative press due to layoffs, lawsuits, or other reasons and ask students, after reviewing the recent negative publicity, to draft the recitals or background provisions from the standpoint of presenting the client in the most favorable light.

litigation-focused professors who otherwise may feel inadequately prepared to teach transactional drafting.<sup>135</sup>

#### a. Framework and Goals

Transactional drafting can be taught through various areas of law and assignments. Although many transactional drafting assignments involve the drafting of contractual provisions, even assignments rooted in adversarial situations can teach transactional drafting. By using existing problems to introduce a different type of legal assignment, professors can also discuss the life cycle of a client representation and more easily move the student's mindset from the original task of objective or persuasive writing to transactional drafting.

A good transactional drafting exercise:

- 1) leverages underlying facts and law from a prior discussion or assignment;
- 2) asks a specific question regarding revisions sought by a client;
- 3) provides limiting language or text for students to revise or draft;
- 4) discusses important aspects of client counseling and the intersection of legality and business issues;
- 5) provides students with a representative sample answer and corresponding rationale for the answer;
- 6) is timed before a formal assessment to engage students in active learning and give students an opportunity to "practice" skills and memory of legal doctrine to prepare for an exam or assessment. In addition, professors can ask students to reflect on the experience, often illuminating not only how well the exercise was carried out, but also whether students feel prepared for an assessment on the topic.

By following this framework, professors can seek to achieve the learning outcomes and goals of transactional drafting assignments, including teaching students to:

- 1) recognize the life cycle of a client matter, including that some transactions may start by focusing on one area of law, such as litigation,

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<sup>135</sup> Many of the assignment examples in this Article are rooted in initial litigation-style assignments or adversarial situations because these types of problems make up the vast majority of first year legal research and writing assignments. Professors wishing to integrate some of these transactional research and drafting assignments may be more likely to integrate such an assignment if it complements an existing litigation-based assignment.

and subsequently transition to another area of law, such as compliance or transactional;<sup>136</sup>

- 2) write or revise documents in a preventive nature based on understanding of case law, including thinking critically about which provisions or information in a document may create a legal issue for the client based upon the understanding of statutory and case law;
- 3) modify transactional documents, balancing legality and business issues with the goals and desires of a client; and
- 4) communicate key information to clients regarding strategic suggestions and negotiation recommendations.

#### b. Assignment Examples

Listed below are three exercises that assist with integrating transactional drafting into a legal research and writing course. In these assignments, students have submitted objective or persuasive memoranda regarding an adversarial issue rooted in one or more areas of law. A professor indicates that the client from the previous assignment has called back and is seeking additional advice regarding a contract, employment agreement, policy manual, disclaimer, or other legal document that relates to the same law underlying the objective or persuasive memorandum assignment. Since the student attorney is abreast of the law and the client's goals for the underlying assignment, the client has requested that they work on the new matter.

Similar to the transactional research assignments discussed above, each of the three following transactional drafting assignments can be completed in face-to-face or online learning formats. These assignments can be executed online because they can be assigned individually or in small groups before or after online instruction or during a set amount of time in an online class meeting. Professors can ask students to draft as a small group or "law office" using screen-sharing platforms, such as Zoom, or document sharing platforms, such as Google Docs or Office 365. Professors wishing to share draft mark-ups, student work, or sample answers to facilitate in-class discussion can do so using screen sharing during a class or by posting documents before class.

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<sup>136</sup> In addition to understanding the life cycle of a client, using both litigation and transactional assignments can help students learn that not all client problems come to students in well-packaged assignments. Attorneys are required to work with clients to determine the real legal issue underlying a "real life" problem the client is experiencing and plan a way forward – perhaps with both litigation and transactional solutions or deliverables.

i. Assignment: Revise an Employee Manual based on Provided Precedent Following an Objective Memorandum Assignment

This assignment introduces students to transactional drafting by asking them to reflect on a litigation-style problem and use transactional drafting to revise an Employee Manual to avoid a similar future dispute.

*Setting the stage:* A Georgia shopkeeper is concerned about their liability stemming from a potential suit contemplated by a suspected shoplifter claiming false imprisonment by the shopkeeper. The shopkeeper seeks to dispel any liability concerns by utilizing the false imprisonment immunity provision of the statute,<sup>137</sup> which turns on whether the shopkeeper's employees held the suspected shoplifter in a reasonable manner.

*Completing the assignment:*

- 1) Students receive an excerpt of the shopkeeper's Employee Manual<sup>138</sup> and must provide guidance on whether the existing language regarding employee behavior in a suspected shoplifting situation complies with the law and appropriately instructs employees to act reasonably under the law.
- 2) Students evaluate the existing language of the Employee Manual excerpt to determine whether the language creates liability for a client, and if so, draft proposed edits to the language, indicating which portions of the law require a change.
- 3) Students must consider how to convey their advice to the client, how to balance legal and business advice, and whether suggested revisions are practical, given the client's business.<sup>139</sup>

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<sup>137</sup> See Ga. Code Ann. Adv. Legis. Serv. § 51-7-60 (2019) (identifying the preclusion of recovery for detention or arrest of a suspected shoplifter when certain circumstances exist and elements of the law are demonstrated).

<sup>138</sup> A sample Employee Manual from a public institution, such as a College or University, could be used for these purposes. In addition, a variety of Human Resources companies have posted free Employee Manuals online for downloading and customizing. See *Employee Handbook*, WORKABLE, <https://resources.workable.com/employee-handbook-policies> (last visited May 21, 2020).

<sup>139</sup> In using this example for several years, it is interesting to note student experiences as store clerks and the information shared regarding company shoplifting policies. Over the years, many students who have previously worked at large department stores have reported that these companies instruct employees to take no action when seeing a suspected shoplifter, even though the law suggests it would provide companies with immunity should employees appropriately question a suspected shoplifting. This, as one example, helps facilitate a class discussion between balancing legally permissible actions (e.g., politely asking a suspected shoplifter if they need assistance) with business-related considerations when crafting a policy on a topic such as shoplifting (e.g., conceding some inventory loss in exchange for avoiding bad press or potential liability due to poor employee training).

- 4) Students de-brief the assignment with the professor, viewing the professor's sample mark-up and proposal for conveying legal advice to the client.
  - ii. Assignment: Revise a Residential Lease Using Various Transactional Precedent Following a Persuasive Memorandum Assignment

This assignment asks students to employ transactional drafting skills to revise a contract by using a variety of transactional precedent found in sample residential real estate leases.

*Setting the stage:* A Connecticut tenant has sued a corporate landlord, claiming the landlord is liable for a dog bite that occurred on the property and injured their daughter. Upon advice from the attorney, the tenant seeks to hold the landlord liable under the Connecticut dog bite statute whereby landlords may be liable for dog bites occurring on the property if they are determined to be the dog's keeper.<sup>140</sup> The tenant is elected to a tenant's rights organization in the state and is tasked with the responsibility of drafting model lease provisions mandating the allowance of pets in apartments and determining which party may be liable if an injury occurs, under current law.<sup>141</sup>

*Completing the assignment:*

- 1) Students receive three sample provisions of residential leases and are asked to discuss what issues are present in the language of each lease relating to a landlord's status as a keeper. Students must also identify which provisions are most favorable to the tenant and what tenant-friendly provisions can be used in a new lease to achieve the client's objectives based on the statutory obligations of a landlord.
- 2) Students must discuss suggested language and use transactional precedent, with revisions, to draft a revised lease. Students must discuss not only legal issues, including those based on and implicated in the researched and analyzed law, but also business and practical "real life" issues inherent for the tenant and the tenant's organization.<sup>142</sup>

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<sup>140</sup> See Conn. Gen. Stat. § 22-357 (2019) (outlining which parties may be liable for damage caused by a dog bite).

<sup>141</sup> As a starting point, students can use a publicly available sample residential lease published by the Connecticut Association of Realtors available. See e.g. *Connecticut Residential Lease Agreement*, ASS'N OF REALTORS, <https://eforms.com/download/2015/10/connecticut-association-of-realtors-lease-agreement.pdf> (last visited May 21, 2020).

<sup>142</sup> Like in other examples, certain aspects of balancing legal rights and responsibilities with "real life" issues are often important discussion points in class. For this example, many students suggest an outright ban on having animals in a rented apartment. When discussing how that may affect a

- 3) Students must consider how to present their advice to the tenant and their organization, including what changes may be reasonable to a wider audience of landlords and landlord organizations.<sup>143</sup>
- 4) Students de-brief the assignment with the professor, viewing the professor's sample mark-up and proposal for conveying legal advice to the client, and may reflect on the assignment.

iii. Assignment: Draft Provisions of a Non-Compete Agreement Following a Persuasive Memorandum Assignment

This assignment asks students to use transactional drafting skills to draft provisions of a contract based on traditional legal research and experience with a prior dispute.

*Setting the stage:* Amid a pending dispute regarding a former employee's breach of a non-compete agreement and after writing a persuasive memorandum on the topic, a Massachusetts pharmaceutical company seeks legal counsel as to whether the non-compete agreement is enforceable in its scope and what revisions may be needed to ensure future enforceability.<sup>144</sup>

*Completing the assignment:*

- 1) Students receive a sample non-compete agreement and must discuss what issues are present in its language related to the corporation's legitimate business interests, the temporal and geographic scope of the agreement, and whether the public interest is advanced by upholding the agreement.
- 2) Students must discuss suggested language and draft suggested revisions to the non-compete agreement. Students must discuss not only legal issues, including those based on and implicated in the researched and analyzed law, but also business and practical "real life"

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landlord's business and how the landlord would have fewer tenants from which to choose (and tenants with pets would have fewer apartments from which to choose), students see how "real life" issues must be considered in conjunction with legal rights and responsibilities.

<sup>143</sup> This portion of the example focuses on finding common ground among different constituencies and can be an important part of a transactional drafting exercise.

<sup>144</sup> A sample non-compete agreement from Priceline.com, the travel website, is available through public filings and can be used as a starting point for a sample agreement used for teaching purposes. See e.g. *Non-Competition and Non-Solicitation Agreement*, PRICELINE.COM INC., <https://www.sec.gov/Archives/edgar/data/1075531/000107553113000016/exhibit991non-competeagree.htm> (last visited May 21, 2020). Professors wishing to utilize legal technology instruction can structure this assignment relating to a non-disclosure agreement and ask students to utilize document generator tools to generate a non-disclosure agreement.

issues inherent for the corporation in its ability to retain salespeople and protect company interests.<sup>145</sup>

- 3) Students must draft a new non-compete agreement and consider how to present their advice to the corporation, including how any changes might be received by a prospective new employee.
- 4) Students de-brief the assignment with the professor, viewing the professor's sample mark-up and proposal for conveying legal advice to the client, and may reflect on the assignment.

As the above examples identify, transactional documents—and transactional drafting exercises—can be tied into nearly any existing assignment and when using the principles of small teaching and related pedagogical tools, such transactional drafting exercises need not take up significant time in a course.<sup>146</sup>

#### IV. CONCLUSION

While litigators may always carry the day in movies and television because their work makes for better drama than the work of transactional lawyers, transactional lawyering should not be omitted from first-year law school instruction. Data regarding the desires of law students, the needs of the marketplace, and gaps in the existing law school curriculum leave one thing abundantly clear: students and employers want law schools to teach more transactional skills in the first year of the legal research and writing curriculum.

By integrating transactional skills in the first-year legal research and writing curriculum, law schools and law students realize several tangible benefits. Students gain exposure to transactional research and transactional drafting skills, learn concepts and legal doctrine in more fulsome ways because students are more engaged with the content when required to apply it to a different application, and become more “practice-ready” attorneys by having greater perspective on the range of matters an attorney may encounter in different practices. By implementing the pedagogical concepts of small teaching, retrieval and scaffolding, professors can seamlessly integrate transactional skills into their existing courses and syllabi with

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<sup>145</sup> Among others, these considerations may include whether a prospective employee is likely to sign the non-compete agreement if it is too favorable to the company and restrictive upon the prospective employee.

<sup>146</sup> Each of the examples provided in this section could be assigned as homework, group work, or a short in-class activity, taking minimal time away from face-to-face (or synchronous Zoom) class meetings. An introduction on transactional research or transactional drafting can be provided in a flipped lecture format using podcasts or videos such that no (or little) class time introducing the topic is required. See *Suffolk University Law School's Legal Practice Skills Program Podcast Library*, SUFFOLK UNIVERSITY, <https://suensemble.suffolk.edu/Playlist/Ta46SwFq?destinationID=pXXGIEZPsk2tBltuA4hguQ&pageIndex=2&pageSize=10> (last visited May 21, 2020).

minimal disruption on existing course plans while providing students with enormous benefit. Using the concepts and examples in this Article, professors can respond to student interest in and marketplace demand for transactional skills, integrate transactional skills into their courses, and prepare students for existing assessments, thus accomplishing three important goals at once.