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Big Deal: Using Transactional Assignments to Teach Persuasion in the Legal Writing Curriculum

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Motions. Briefs. Oral arguments. For students interested in a transactional career, a typical legal writing semester focused on persuasion sometimes feels like it is centered on inconsequential litigation-style assignments. What many students do not realize, however, is that many skills learned in a persuasive semester, including through the context of litigation-style assignments, are transferrable to transactional contexts and help students prepare for careers in transactional practices.

By introducing transactional assignments to assist in teaching persuasive writing and oral advocacy, legal writing professors can help show all students that the core skills learned in a persuasive semester are helpful to all types of legal practices. By demonstrating the applicability of these skills to a range of practices, legal writing professors can increase student buy-in, demonstrate different types of legal work, and foster a deeper understanding of core legal skills.

1. Introducing Transactional Perspective

¹ Many thanks to my colleague, Professor Dyane O’Leary, for reviewing this article and providing comments.

While many law students will go on to practice litigation, 50% of law school graduates will practice in transactional practices.² Accordingly, our classrooms—including the legal writing classroom—should prepare students for that eventuality. Such preparation need not come from a complete overhaul of the curriculum, but instead, can be accomplished by carefully integrating transactional exercises into the curriculum. To this end, integrating transactional exercises into the traditional “objective writing,” “persuasive writing,” and “oral argument” components of the traditional 1L legal writing course help make the material more dynamic and applicable to many more students, helping to close the gap in preparedness between transactional and litigation-focused graduates.³

In the Legal Practice Skills course at Suffolk University Law School, I use both litigation and transactional perspective to teach and enrich the legal writing course. This article focuses on three ways I have successfully integrated transactional perspective into instruction on persuasive writing over recent semesters. In the context of introducing skills, practicing skills, reinforcing skills and assessing skills, many of these examples take place at the reinforcing stage, asking students to step out of their comfort zone to apply the skill to another context: transactional work.

2. Examples

Three examples⁴ that I have used involve using transactional perspective to see how transactional attorneys may use persuasive writing in practice. These examples center on utilizing precedent and analogical reasoning in order to persuade in transactional contexts and help students see the transferability of skills learned in the traditional legal writing classroom. While not significantly different than arguing a case in court, these transactional examples include working to

² See e.g., Lynnise Pantin, *Deals or No Deals: Integrating Transactional Skills In The First Year Curriculum*, 41 Ohio N.U.L. Rev. 61, 62 (2014); Adam Eckart, *Deal Me In: Leveraging Pedagogy to Teach Transactional Skills in the First Year Legal Research and Writing Program*, 21 U.C. Davis Bus. L.J. 125, 138 (2020).

³ According to a 2011 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. In the survey, 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. In comparison, the same survey indicated that only 16% of law students were “poorly” or “very poorly” prepared for careers in litigation. Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 Berkley Bus. L.J. 187, 211-12 (2012).

⁴ The examples provided in this article are described at a high-level here due to the nature and format of this article. Should readers be interested in the particulars of any of the exercises, please reach out to me at aneckart@suffolk.edu.

persuade counterparties, regulators, and clients, and demonstrate how transactional lawyers must use persuasion in their work.

These examples bring new perspectives to my students, show how many lawyers must learn to write persuasively, and enrich the learning environment by allowing students to practice (and hone) skills in a variety of contexts. While each of these examples are rooted in substantive law that students (and professors) might not have expertise in, students need not be experts in these areas of law in order to understand the basic concepts and practice the skills described.

2.1. Letter Writing

All lawyers write letters and emails, but many legal writing programs do not spend significant instructional time on such writing. Even when they do, students rarely hear about when transactional lawyers write persuasive letters and emails.

This exercise asks students to write advocacy letters in the shoes of a transactional attorney working to convince a landlord about a permissible use of its tenant's space. This assignment utilizes important advocacy letter writing skills and critical reading and analogical reasoning skills necessary for evaluating precedent. Students learn that, in this context, use of precedent and advocacy skills is just as important in transactional practice as it is in adversarial practices.

The goal: Because students often struggle with writing persuasive work that is too argumentative or too casual, this exercise is a good opportunity for students to write a letter in a persuasive tone while striking an appropriate balance. In addition, this exercise helps students practice using precedent, analogical reasoning skills, and narrative in order to craft a narrative of facts that is most favorable to the client. This exercise also shows students a frequent task of transactional attorneys working for clients in real estate, tax, securities, labor, antitrust, and other fields.⁵

The assignment: Students are given a provision of a commercial real estate lease and a case from Massachusetts centered on the definition of a sandwich.⁶ Students are assigned to represent a fast-food chain, an existing tenant in a shopping center,

⁵ While this example does not specifically address writing to a regulator, much of the tasks of attorneys in the fields mentioned herein are related to writing to a regulator (e.g., to Zoning Boards in real estate work, to the IRS in tax work, to the Securities and Exchange Commission in securities or compliance work, to the Department of Labor in labor work, or to the Federal Trade Commission in antitrust work).

⁶ This fact pattern is written around the ever-important question: Is a burrito a sandwich? See *White City Shopping Ctr., LP v. PR Rests., LLC*, 21 Mass. L. Rep. 565 (Mass. Super. 2006). The relevant provision from the lease is provided in the case.

and write a letter to the landlord as to why a new prospective tenant, Subway, should not be permitted to enter into a lease, based on the lease provision and established case law identified in the referenced case.⁷ Students read and interpret the contractual language in the real estate lease together with the court opinion and establish an argument as to why the new tenant should not be permitted to enter into the lease. Students carefully craft a persuasive letter to the landlord, using favorable precedent and explaining the facts of the case in the light most favorable to the client.

The results: In writing a transactional-focused persuasive letter, this exercise helps students practice key skills related to critical reading, identifying and selecting precedent, applying analogical reasoning, and presenting facts in the light most favorable to the client. This assignment also provides important transactional perspective for students, showing students how transactional attorneys may write persuasively in practice and how some skills related to persuasive letter writing are the same as traditional brief writing.

2.2. Oral Advocacy⁸

All lawyers must be comfortable in conveying legal analysis to clients, counterparties, regulators, or others. Although transactional attorneys may never set foot in the courtroom like a litigator, transactional attorneys are often required to employ oral advocacy skills in the boardroom, on the phone, or in front of regulators. With this context, I introduce a transactional oral advocacy assignment into my course to show my students why the skills discussed in our oral advocacy class (and used in oral arguments) are important in transactional practices too.

⁷ The lease provision, in short, precludes tenants who sell “sandwiches,” which is not defined in the lease but instead was defined in the aforementioned case law as, generally speaking, anything between “two thin slices of bread.” Under this definition, Subway, the national sandwich chain, would likely be allowed to enter into a lease because their sandwiches are not made with two thin pieces of bread. Students would need to think of arguments as to why Subway should be considered a sandwich shop, even though such categorization would be inconsistent with case law. Students draft arguments to convince the landlord that Subway should be precluded from signing a lease pursuant to this lease provision.

⁸ This assignment has been described or inspired by my previous work on this topic, including a blog post by the author, Adam Eckart, *Oral Advocacy: Not Just for Litigators*, Legal Writing Matters Blog (Mar. 23, 2021), <https://sites.suffolk.edu/legalwritingmatters/2021/03/23/oral-advocacy-not-just-for-litigators-legal-writing-matters-blog> [hereinafter Eckart, *Not Just for Litigators*], and an article on this topic, Adam Eckart, *From the Courtroom to the Boardroom: Transactional Oral Advocacy*, 34:2 *The Second Draft* (Fall 2021) [hereinafter Eckart, *Transactional Oral Advocacy*]. A sample of this assignment is contained in the appendix of aforementioned *The Second Draft* article.

This exercise asks students to review and apply law to a transactional setting and persuade a client of a particular action. I place this exercise between my initial oral advocacy class and student oral arguments. This timing allows students to see the applicability of oral advocacy to transactional practice, practice oral advocacy skills before completing a graded oral argument, and receive brief feedback before delivering their graded oral argument. As a class, we spend 25 to 30 minutes of class time discussing the relevant law and outlining an oral presentation on the topic to ensure students are on the same page and understand the relevant law prior to embarking on the assignment.

The goal: This assignment introduces students to practicing oral argument skills in the boardroom rather than in the courtroom and helps prepare students for graded oral arguments by allowing them to practice their skills and receive feedback on a low-stakes assignment prior to completing a graded oral argument in a courtroom setting. In addition, this assignment helps illustrate to students that all lawyers must practice and refine their oral advocacy skills – whether that be for the courtroom, the boardroom, videoconference, or just on the phone with a client or colleague.

The assignment: This exercise asks students to read and analyze Franklin⁹ IRS tax law and tax opinions to prepare a persuasive video to members of an a cappella union advising on the availability of a tax deduction.¹⁰ I ask students to persuade union members why they should take advantage of an available tax deduction related to the expenses for specific neon suits used in performances. After discussing the assignment, the law, and a planned approach for the video in class,¹¹ students work individually to record and submit videos to the professor for feedback. Student videos explain (in no more than two minutes) why union members are eligible for the tax deduction. Students use the same structure of an

⁹ This assignment is based in the fictional jurisdiction of Franklin, which is also used by the National Conference of Bar Examiners. The law included in this exercise is modeled after U.S. Tax Law, but is set in Franklin so as to avoid any confusion or student desire to complete additional research.

¹⁰ Because of various pressures on students at this point in the semester, I did not include a requirement for students to draft an accompanying PowerPoint deck or presentation, but this could be added.

¹¹ Although the class time is somewhat significant, it is important to me for all students to know the law and the approach for the video before we leave class since I want students to spend their preparation time focused on delivering a clear and concise message rather than deciphering tax law. If professors wanted to devote less time to reading and understanding the tax implications, they could create more clear instructions identifying which arguments students should be making and what law they should be relying on for each argument. Personally speaking, I would rather take the time to foster students through the learning of the law because I feel like it makes the exercise more engaging and realistic and also helps students gain investment in what they are presenting.

oral argument to convey their position, and include in their video an introduction, an explanation of the law, an application to our case, and a conclusion. Although students are not interrupted with questions, I advise students to anticipate and answer a question (or two) that an audience member would have, if given the opportunity to ask.¹²

The results: This exercise helps students practice key oral advocacy skills and learn how such skills are used in different practices. Students report to me that they enjoy practicing their oral advocacy skills in this informal setting and that they appreciated receiving some encouragement and feedback on this assignment prior to completing their graded oral arguments.

2.3. Analogical Reasoning

While litigators are familiar with using analogical reasoning in brief writing, all lawyers use analogical reasoning skills in order to predict and persuade. By using analogical reasoning skills, transactional attorneys can predict whether a certain tax deduction may be available to a client, whether a securities regulation rule applies to a public offering, or whether a merger between two companies may be blocked by the Federal Trade Commission or the Department of Justice for its anticompetitive effects. By looking at relevant precedent in each transactional area of law, transactional lawyers can employ analogical reasoning skills to predict a likely outcome, or persuade a regulator of an outcome that favors a client.

This exercise¹³ puts students in a hypothetical merger between two competing ice cream conglomerates. The students must act as transactional lawyers analyzing the antitrust risk in the potential (non-consummated) transaction.¹⁴ This assignment utilizes often-discussed skills of persuasion, including using precedent, weight of authority, and analogical reasoning to

¹² While I used this assignment to show students the similarities between oral arguments and transactional oral advocacy, we also discussed the differences. One main difference in this situation is the audience, and I discussed with students how they should modify their approach and tone to be appropriate for this more informal (and potentially less sophisticated) audience.

¹³ I first presented this assignment at the Association of Legal Writing Directors (ALWD) 2019 Innovative Teaching Workshop, hosted by the ALWD Teaching Workshop Committee. I appreciate the feedback that I received at that workshop. Since then, I have used this assignment in my class and it has been very successful.

¹⁴ While this context might sound scary for someone unfamiliar with antitrust law, it is no different than trying to figure out if someone is likely to be indicted for a potential criminal act (although the antitrust laws in this context are not criminal). Students (and professors) do not need to know the ins and outs of antitrust law to complete this assignment; instead, the assignment is focused on reading and understanding precedent so that students can identify an argument that could help their client.

convince a potential counterparty of the relevant market definition to be used in the analysis of the merger, and accordingly, whether the merger is likely to gain regulatory approval or risk a red flag as to potential anticompetitive concerns.

The goal: Because some students struggle with using legal reasoning skills to apply precedent (as opposed to making original creative arguments) in the persuasive component of my course, this assignment forces students to make arguments based on precedent using analogical reasoning (rather than coming up with original creative arguments). This assignment emphasizes precedent and refining reasoning skills while also exhibiting to students how transactional attorneys may use persuasion—here, using litigated and consummated prior mergers to convince a counterparty as to whether the counterparty should participate in the merger (or not).¹⁵

The assignment: In this in-class discussion-based assignment, I introduce students to a short exercise where students represent two ice cream brands engaged in a hypothetical business combination—Ben & Jerry’s and Breyers—and must brainstorm arguments in support of the transaction, including those that show a pro-competitive nature of the transaction.¹⁶ Students apply legal reasoning skills to analyze market definitions for real-life mergers and then use this precedent to brainstorm persuasive arguments that would help support the argument of a pro-competitive impact of a hypothetical business combination between the two ice cream clients. Using supplied precedent and a short problem set, students practice legal reasoning skills and understand the use of precedent in a transactional context that is relatable to students through use of “brand name” mergers.¹⁷ After completing their work, students discuss their prospective arguments with the class and professor.

¹⁵ As identified above, students need not understand the ins and outs of antitrust law to complete this assignment. Instead, students must identify and use legally significant facts from the identified precedent cases and use analogies to the case in front of them to make their arguments. Those arguments in the antitrust space are whether the merging companies are competitors—e.g., generally speaking, the FTC said that Whole Foods and Wild Oats were competitors, that DraftKings and FanDuel were competitors, and that Cabela’s and Bass Pro Shops were not.

¹⁶ As opposed to an anti-competitive nature of the transaction, which might lead the Federal Trade Commission or the Department of Justice to block the transaction.

¹⁷ The materials for this exercise include case summaries of two contested mergers (available on the Federal Trade Commission’s website) and a news story for a completed merger that was not challenged by the Federal Trade Commission. Although documents filed with the courts could also be used for this exercise, such documents are often technical and less accessible for students unfamiliar with antitrust law. For this reason, I have used the case summaries. See *Whole Foods Market, Inc., and Wild Oats Markets, Inc.*, Federal Trade Commission (Jan. 23, 2009), <https://www.ftc.gov/enforcement/cases-proceedings/0710114/whole-foods-market-inc-wild-oats-markets-inc> (using a relevant market

The results: This exercise helps students practice key skills related to any persuasive assignment, including critical reading, evaluating precedent, applying reasoning skills, and demonstrating persuasive communication skills. In addition, students gain important perspective on using persuasion in transactional contexts.

3. Conclusion

The above examples are designed to help integrate transactional perspective into traditional legal writing assignments. A variety of additional assignments could likewise integrate transactional perspective, including incorporating narrative and storytelling.¹⁸ Through using these examples—and others¹⁹—I hope that legal writing courses continue to show both litigation and transactional applications of important lawyering skills and give students important perspective while teaching and honing important skills.

definition of premium natural and organic supermarkets); *DraftKings, Inc. / FanDuel Limited, In the Matter of*, Federal Trade Commission (July 14, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/161-0174/draft-kings-inc-fanduel-limited> (using a relevant market definition of paid daily fantasy sports contests); Thomas Gounley, *Investors are increasingly pessimistic about Bass Pro's acquisition of Cabela's*, Springfield News-Leader (Feb. 16, 2017), <https://www.news-leader.com/story/news/business/2017/02/17/investors-increasingly-pessimistic-bass-pros-acquisition-cabelas/97863156> (describing the fragmented market for the outdoor merchandising stores in the United States).

¹⁸ See generally 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).

¹⁹ In other scholarship, I offer additional examples of how legal writing professors can integrate transactional perspectives and skills into their courses. See Eckart, *supra* note 2; Eckart, *Transactional Oral Advocacy*, *supra* note 8; Adam Eckart, *Chapter 13, Teaching Transactional Skills in First Year Doctrinal Courses (and Beyond)*, in *Lawyering Skills in the Doctrinal Classroom: Using Legal Writing Pedagogy to Enhance Teaching Across the Law School Curriculum* 209 (Tammy Oltz, ed., 2021); Adam Eckart, *Small Teaching Transactional Skills in the Legal Writing Classroom*, 32:2 *The Second Draft* (Fall 2019); Adam Eckart, *Convincing Contracts: Employing Persuasive Drafting Techniques in Transactional Documents*, *Legal Writing Matters Blog* (Jan. 13, 2022), <https://sites.suffolk.edu/legalwritingmatters/2022/01/13/convincing-contracts-employing-persuasive-drafting-techniques-in-transactional-documents>; Eckart, *Not Just for Litigators*, *supra* note 8.