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# TRAINING LAW STUDENTS TO BE INTERNATIONAL TRANSACTIONAL LAWYERS – USING AN EXTENDED SIMULATION TO EDUCATE LAW STUDENTS ABOUT BUSINESS TRANSACTIONS

DANIEL D. BRADLOW\*

JAY GARY FINKELSTEIN\*\*

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## I. ABSTRACT

The article describes an innovative approach to educating law students about the legal issues and the role of lawyers in negotiating international business transactions. It is based on our experiences in developing and teaching a course that is built around a semester-long simulation exercise and taught in counterpart classes at two law schools. The students in these classes represent the opposing parties and negotiate a cross-border business transaction involving a joint venture agreement, a licensing agreement and a long-term supply contract. The students,

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\*Professor of Law and Director, International Legal Studies Program, American University Washington College of Law, Email: bradlow@wcl.american.edu

\*\*Partner (corporate transactions), DLA Piper US LLP, and Adjunct Professor of Law, American University Washington College of Law, Email: jay.finkelstein@dlapiper.com



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who attend either the American University Washington College of Law or the Centre for Energy Mineral and Petroleum Law and Policy at the Dundee University in Scotland, utilize written communications, video-conferencing and teleconferencing in their negotiations. In the paper we discuss the value the course adds to the education of our students, the challenges and pleasures of teaching the course, the response of students to the innovative approach to teaching, and ways in which the course could be adapted and enriched.

## II. INTRODUCTION

### A. *What Transactional Lawyers Need and Law Schools Do Not Provide*

Legal education, traditionally, has not been designed to provide students with the skills necessary to function as effective transactional lawyers capable of negotiating and drafting workable business transactions. Law schools, which have historically focused on litigation-based instruction, tend to stress what has gone wrong with a particular transaction and to use these lessons to explain how future transactions “should be done.” This approach disproportionately emphasizes those legal issues that have resulted in legal disputes. While such matters are important and instructive, the heavy emphasis that they receive in legal education comes at the expense of other important issues to practicing transactional lawyers.<sup>1</sup> The focus on transactions “through the rear-view mirror” highlights issues involved in the unwinding of a deal through the dispute process rather than those most applicable to the creation of relationships that function effectively and satisfactorily for all stakeholders. Thus, law school devotes relatively more attention to matters like capacity to contract, “meeting of the minds,” fraud, fiduciary duties, choice of law and jurisdiction than to how a lawyer actually structures a business transaction, negotiates a deal, drafts a viable business contract, accomplishes a merger, crafts disclosure documents or, in general, translates the concepts of business transactions into the legal documentation that memorialize and govern such relationships.<sup>2</sup>

The result of legal education’s over-emphasis on litigation-based instruction is that those recent law school graduates that desire to pursue transactional practice

<sup>1</sup> A further, and wholly unintended consequence is that many potentially excellent transactional lawyers are not properly introduced to an entire area of practice and make career-shaping decisions based on having been trained primarily in the litigation, case-study model. The drama and challenge of litigation highlighted in the classroom is further emphasized through moot court exercises and most clinical experiences, sometimes followed by judicial clerkships. Naturally, most graduate law students gravitate toward practice areas aligned with what they have been taught and which has been reinforced through their summer associate and/or clerkship experiences. If they later find themselves reconsidering their litigation-based career choices, they are further hampered in shifting to a transactions-based practice since their experience and training is now further removed from the skills necessary to become a successful transactional lawyer

<sup>2</sup> For an excellent summary and critique of various methods by which law schools have historically taught transactions, as well as a summary of much of the literature regarding such methods and alternatives thereto, see Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475; see also, Stark Debra Pogrud, *See Jane Graduate. Why Can’t Jane Negotiate a Business Transaction?*, 73 ST. JOHN’S L. REV. 477 (1999).



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are generally ill-equipped to function as business lawyers. Their legal training—unless it is supplemented with prior business experience—does not equip them to comprehend a business transaction or to assist in drafting a transaction or assessing its structure.

This means that, in most cases, the practical education of a business lawyer commences on the day that the lawyer joins a law firm or corporate legal department. Depending on the lawyer, and the circumstances of his or her particular position, the learning curve may be long and steep. On the job training—for example, observing a negotiation in order to learn how to work as a transactional lawyer—can be fraught with anxiety. It is somewhat akin to walking into the middle of a film: it takes a while to figure out the context from the dialogue, if you can figure it out at all. Similarly, the first time a young lawyer is handed a “form” and asked to assist in drafting a document can be a daunting experience if the lawyer has no context for understanding the components of the form and how the various parts interrelate. For example, a securities prospectus is an extraordinarily complex document—and one of the most boring—unless you know how and why the information is organized and presented in a particular way. The same is true about the intricacies and interrelationships within merger agreements, or the documentation of asset securitizations or project financings. Without the assistance of an experienced practitioner to explain the logic underlying the document and to help navigate the morass of paper, the young lawyer is doomed to being overwhelmed, disillusioned, and frustrated. The task is even more complicated if the lawyer does not understand the context of the business transaction for which the document is to be tailored. Most practicing transactional lawyers working with a younger lawyer, particularly during the course of an active transaction, are either too busy or ill-equipped to provide this necessary training.

Some may argue that it is not the role of the law school to provide this specific form of practical education. If law schools succeed in training students to “think like a lawyer,” they will be able, once they start practicing law, to obtain the additional skills needed to function as a transactional lawyer. Others may contend that the “summer associate” or “internship”<sup>3</sup> programs in law firms provide the practical elements that supplement a legal education. Unfortunately, experience proves otherwise. In twenty-five years of corporate practice, one of the authors has only once seen a summer associate have a satisfactory experience of transactional legal practice. This particular summer associate was fortunate enough to arrive at the time a deal began and to remain through the time it closed. Most others not only arrive in the middle of the film, but generally have to depart before it is over, so the fragmented experience is both contextually flawed and potentially frustrating.<sup>4</sup>

<sup>3</sup> An “internship” (which in many law schools is referred to as an “externship”) refers to a program through which students receive academic credit for unpaid legal work outside of the classroom.

<sup>4</sup> From the entirely anecdotal experience of one of the authors over many years as both an interviewer and coordinator of law firm summer associates, only about one in ten summer associate candidates actually expresses an interest in experiencing transactional practice. Inevitably, those who express such interest have had a prior experience in business unrelated to law school.

The poor job that law schools do in training transactional lawyers results in experienced corporate lawyers generally attributing little value to the contribution that a new law school graduate can make to the legal team on a particular transaction. Consequently, many young lawyers are either given dull, routine, and/or boring assignments, often involving work that could be done by paralegals, or are asked to research esoteric issues with unclear relations to the transaction in which the rest of the team is involved.

It is expensive for law firms to provide this training to their new associates.<sup>5</sup> The institutional transactional law firms, such as the large New York firms handling the mega-billion dollar transactions, may be able to add a young lawyer or summer associate to a business team and effectively bill what may be less productive time as that lawyer gains “on the job training” and experience, often by osmosis rather than specific instruction. Other firms handling more traditional transactional matters for more cost-conscious clients do not have that luxury. Specific in-house transactional training programs offered by some law firms may help<sup>6</sup>, but again the process is devoid of the specific context and application of a deal.

Law schools are not unaware of this problem<sup>7</sup>. Professors teaching business law are now making greater use of a range of pedagogical methods, in addition to the case law method. Some use problem solving and role-playing exercises<sup>8</sup>. Others use actual contracts rather than court decisions describing contracts,<sup>9</sup> to explain the mental process of “thinking like a deal lawyer.”<sup>10</sup> For example, in his class, Professor Guhan Subramanian at Harvard Law School combines “a rigorous analysis of corporate law with case study examination of recent business deals.”<sup>11</sup> Professor Suramian “brings the deals to life” by inviting various deal makers, including CEOs and senior partners to discuss actual completed transactions and the issues that arose in the negotiations.<sup>12</sup> In some law schools

<sup>5</sup> Indeed, with recent associate salary increases in major markets raising first year associate salaries to \$160,000, the cost of such training has become nearly prohibitive. “General counsel reportedly believe that with more pressure on associates to bill hours to justify the new wages, firms are passing on the new costs to them in the form of higher billing rates. In retaliation, five out of 38 law departments surveyed said the recent increases led them to restrict outside law firms’ use of first- and second-year associates on their legal work.” Amir Efrati, *Associate Salary Wars, The GCs Strike Back*, Wall Street Journal Online, May 23, 2007, available at <http://blog.wsj.com/law/2007/05/23/associate-salary-wars-the-gcs-strike-back/>.

<sup>6</sup> For example, the law firm DLA Piper US LLP offers extensive in-house continuing legal education presentations approximately every other week that focus on transactional practice issues and related topics, including recent developments and practice issues from other areas of law that may impact transactions.

<sup>7</sup> See generally, Robert MacCrate, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap: Legal Education and Professional Development—an Educational Spectrum*, 1992 A.B.A. Sec. on Legal Educ. and Admission to the Bar, available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

<sup>8</sup> See generally, Carol R. Goforth, *Use of Simulations and Client-Based Exercises in the Basic Course*, 34 GA. L. REV. 851 (2000).

<sup>9</sup> Edith R. Warkentine, *Kingsfield Doesn’t Teach My Contracts Class: Using Contracts to Teach Contracts*, 50 J. LEGAL EDUC. 112 (2000).

<sup>10</sup> Tina Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL. EDUC. 223, 231 (2004).

<sup>11</sup> Michael Bates Deakin, *Designing the Deal*, Harvard Law Bulletin, Fall 2005.

<sup>12</sup> See *id.*



there are transactional clinics, such as community development clinics, in which students can gain useful experience.<sup>13</sup> Each of these approaches adds a new and welcomed dynamic to the teaching of transactional practice.

The purpose of this article is to discuss the innovative approach that the authors have taken to training transactional lawyers. It involves a course built around a semester-long simulation exercise in which the students get to structure and negotiate a complex business transaction.

The authors, one a veteran international business law professor and the other a senior transactional partner at a large international law firm, have endeavored over a period of six years to develop a course model which seeks to enable the law student to appreciate how the multiple aspects of law interact to form the mosaic of a transactional practice, and introduce the law students to the process of negotiating, structuring and documenting a transaction. Based on the reception from students, the approach adopted not only has been well-received; it appears to have been highly successful in advancing these goals.<sup>14</sup> The next section of the article will describe the course model. The third section evaluates the course. The final section will discuss some ideas on how the course described in this article can be adapted and extended into new pedagogical opportunities.

### III. THE MCC-KJH SIMULATION EXERCISE

#### A. Description of the Transaction

The central vehicle for this class is a simulation exercise that endeavors to put the student in the actual negotiation environment of an international business transaction. The simulation, which extends over the course of one semester, is a transaction involving KJH Inc., a U.S. pharmaceutical company negotiating to acquire a secure supply of a raw material for a new patented drug from MCC, a government-owned, agricultural cooperative in an African country that has surplus supply of the needed raw material. The students enter the transaction after the business team has reached tentative conclusions that a deal may be viable, but without agreement on a specific structure. The transaction can take the form of a joint venture, a technology license, or a supply contract. Each party in the simulation is introduced with narrative and financial information, as well as detailed information on key objectives, constraints and conditions. The market for the new drug, costs of production, and the potential profit model are set forth. Each party also has certain problems and concerns to address (*e.g.*, the U.S.

<sup>13</sup> Susan R. Jones, *Transactional Law, Equitable Development, and Clinical Legal Education*, 14 *Journal of Affordable Housing* 213, (2005)

<sup>14</sup> Professor Bradlow conceived and authored the original simulation model and taught the course in its initial two years. A further dimension was added when the course was taught by both authors for one year, as more practice components and insights were added. Professor Finkelstein has taught the class alone for the past three years and continues to modify both the simulation and the structure of the negotiation sessions. For example, the class has evolved from one live video conference as the concluding session to four live interactions by video conference and teleconference. The instructional model is derived from, and annotated by, actual transactional practice.



pharmaceutical has recently been cited for certain environmental and drug testing violations), some of which can be alleviated by a successful negotiation and some of which are impediments to an agreement. The students are, therefore, cast in the role of the legal team charged with structuring and documenting the transaction. The goal is to reach an agreement on the terms of a letter of intent for a transaction between the two parties, although the failure to reach agreement presents as useful a learning experience as does success in reaching an agreement.

Most importantly, the course is taught simultaneously in two classes— one class is offered at American University’s Washington College of Law (generally representing KJH, the U.S. pharmaceutical company), and the second class is offered at the Centre for Energy Mineral and Petroleum Law and Policy at the Dundee University in Scotland (generally representing MCC, the African agricultural co-op).<sup>15</sup> Each class bases its representation of its client on the information included in the simulation exercise’s factual information and pursuant to “confidential” negotiating instructions that are provided solely to that class.<sup>16</sup> Over the course of the semester, the actual negotiation takes place using written communications, video conferences and teleconferences. The students must comprehend, communicate, negotiate, react, and, hopefully, reach agreement, all in “real time.”

The simulation requires the students to analyze the business transaction, identify the multiple and conflicting goals of the parties, and plan and execute a negotiation strategy that will lead them towards a binding and enforceable agreement. Creative solutions to impasses are required as the two classes negotiate on behalf of their respective parties. Virtually the entire business law curriculum is involved, as the students have to address corporate structuring, tax analysis, labor issues, environmental concerns, regulatory matters and the transnational legal issues that arise in the context of a cross border transaction. In addition, the classes need to understand the business motivations and objectives of their “clients” as well as the financial costs and benefits from the transaction. As a result, the rich dynamics of a negotiation develop in real time, as each class addresses actual issues raised by the successive rounds of negotiation.

Participation is the key to the exercise, and it is something that not every student is comfortable with. It is fascinating to watch the dynamics of each class as it starts off tentatively approaching the challenge of the negotiation and becomes bolder and more confident during the course of the semester.

This structure affords the students the opportunity to participate in a real life negotiation, under guidance of professors, in which they can endeavor to understand exactly how a deal is progressing and how the negotiators can control and impact its progress. They can encounter the victories, the failures, the compromises, misperceptions, miscommunications and frustrations of the actual negotiation process; and as a result, they can learn not only to appreciate how various areas of law combine and interact in the context of a transaction but can

<sup>15</sup> During the first year the course at Dundee was taught by Professor Thomas Walde. Professor Janeth Warden-Fernandez has taught the course every year since then.

<sup>16</sup> The instructions are designed so that a negotiated solution is achievable within the range of independent objectives of the parties.



monitor the trade-offs of the actual negotiation. In the end, upon reflection on the results of the negotiation, they come to realize that they have actually employed almost their entire law international and business law curriculum as they not only “thought like a lawyer” but “acted as a deal lawyer.”

### B. *Description of the Course*

The course, which is comprised of approximately fifteen students<sup>17</sup> at each university, begins with two introductory lectures or discussions.<sup>18</sup> The first lecture is an introduction to the negotiations process, negotiation techniques, and the role of the lawyer in business transactions. The lecture stresses the non-legal aspects of functioning as a deal lawyer, particularly the need to understand the business context, goals and points where compromise is possible. The “theory” of negotiation is discussed in the context of the “negotiation cycle” of “Analyze, Establish Aims, Prepare, Plan, Negotiate, Review.”<sup>19</sup> The potential separation of business and legal issues for consideration during the negotiation process is addressed, as well as the role of the lawyer in overseeing both aspects in completing the transaction. A menu of negotiation techniques is discussed and explained, along with the need to utilize different techniques at different times, depending on the course of the negotiation and the nature of the parties. Psychology and perception are emphasized, as well as the need for compromise. It is underscored that the key to success in many negotiations is to “think outside the box” to overcome obstacles that block success. In addition, the class pays attention to the concept of Best Alternative To A Negotiated Agreement (“BATNA”)<sup>20</sup> as a measure of when a negotiation should end if it is not progressing as desired.

The second class is an introduction and analysis of the transaction. The primary focus is upon the two parties to the negotiation, their business objectives, what they bring to the transaction, and what obstacles they have to overcome. Each party’s strengths and weaknesses are assessed, and there is a preliminary examination of what can be expected to be the key issues to the other side of the negotiation. Possible structures to the transaction (joint venture, technology license agreement, or supply contract) are reviewed, along with the pros and cons of each from the perspective of both parties in view of their respective goals and objectives. Structural components, including tax planning, are introduced, as well as the types of agreements and key issues which would comprise each potential structure. Finally, the components of a “first communication” to open the

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<sup>17</sup> The American University class generally includes third year JD students and LLM candidates, almost all of whom were trained as lawyers outside the US, and occasional second year JD students.

<sup>18</sup> This article focuses on the course as offered at American University’s Washington College of Law. The course at Dundee University in Scotland is substantially similar, although the class schedule in Dundee results in certain modifications, principally at the beginning of the class, as the Dundee semester begins later than the American University semester.

<sup>19</sup> United Nations Institute for Training And Research Workshop, *Theory of Negotiation*, in Workshop materials on NEGOTIATION THEORY AND PRACTICE (1996)[hereinafter UNITAR].

<sup>20</sup> ROGER FISHER & WILLIAM URY, *GETTING TO “YES”: NEGOTIATING AGREEMENTS*, Bruce Patton ed., 2d ed. 1991.



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negotiation are addressed. This part of the class discussion tends to focus on those elements of the proposed business transaction which are likely to be discussed early in the negotiation.

By the end of the second class, the students have volunteered to form teams that will serve as “lead negotiators” for successive rounds of the negotiation, with the first team being assigned to prepare the opening communication to the other side (due to class schedules, the American University class leads off the negotiation with the first communication). This team is often hesitant and tentative (both in taking the lead in the class and in understanding what is expected of them) partly because of their lack of experience and training in how to approach a negotiation.<sup>21</sup> In addition to the class discussion of the first communication, supplemental readings and sample forms of letters of intent and related documents are provided as guidance.<sup>22</sup> There are frequent email exchanges between this team and the professor during the week between the second and third classes as the students grapple with the proper set of issues and positions to set forth in the initial communication and with the tone of the communication.

Each communication prepared by a team of students is provided in draft form to the professor on Sunday morning for review and comment (sometimes involving multiple exchanges) prior to class on Monday afternoon. After initial comments have been processed, the proposed communication is distributed to the entire class in preparation for discussion in class. Following the class discussion, the team of students makes further revisions to incorporate the agreed positions that resulted from the class discussion. Other students are free to comment on the revised communication before it is delivered to Dundee via email on Tuesday afternoon, in anticipation for their class on Wednesday afternoon. The Dundee class provides its written communication back to the American University (“AU”) class by Friday afternoon.

In the third class session, which is the first class in the simulated negotiations, the students focus on how to structure and draft their first communication to the other side, with various positions being weighed: Should the class take a definitive position on issues at the outset or just open discussions with a “looking forward to negotiate with you” letter? Students often have vastly different perspectives on how to open, ranging from extremely aggressive to

<sup>21</sup> Other possible contributing factors include the diverse learning cultures from which the students come, the general reluctance of students to volunteer first and forego the opportunity of seeing how others perform the expected task, and the fact that some of the issues that need to be addressed in the first communication are not legal.

<sup>22</sup> Although the course does not involve much reading and is focused on participation, there are certain materials – principally articles or excerpts – which have proved very helpful for background purposes. See UNITAR, *supra* note 20. This piece is particularly good in introducing the theory of negotiation while being more manageable than Fisher and Ury. See Fisher, *supra* note 19. Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223 (2004). Ms. Stark’s article conceptualizes the difficulty of teaching students to think like deal lawyers and provides a context for the creative thinking required by this course.

In addition, some basic introductory materials on financial statements are used and various sample transactional documents, including letters of intent, technology licenses, and definitive agreements provide a basic introduction to the types of documents that might emerge from a successful negotiation. Various parts of these documents are often referenced in class discussions.



passive and meek; accordingly, the discussion generally encompasses issues of perception of strength and weakness and the risks of a less aggressive opening statement being seen as a sign of weakness. The first issue that the class discusses tends to be which of the three potential structures of the business transaction—joint venture, licensing agreement, or long term sales agreement—to propose to MCC. Generally, the students favor the joint venture, in which case the next issue to receive attention is the percentage of ownership of the two parties. Interestingly, students typically take different positions on how to approach this issue. In particular, they disagree on whether to propose a specific ownership allocation or not, with the discussion focusing on how the class would react if, upon being silent as to ownership percentages, a subsequent proposal by the other side is not to their liking. Where the ultimate negotiated business transaction is to be a joint venture, the issue of percentage ownership generally becomes the dominant issue in the whole exercise. Often it is necessary for the students (with the encouragement of the professor) to postpone resolution of this issue so that other issues can be discussed before the final ownership division is resolved.

A secondary dynamic of the negotiation simulation is the power of the respective parties. Actual and perceived power issues are embedded in the posturing between, on the one hand, a multinational pharmaceutical company accustomed to many transnational deals and the owner of the patented technology for a promising new drug, and, on the other, a geographically limited agricultural co-op with the most likely secure supply of the raw material needed to manufacture the new drug. The negotiating strategies often clash over these issues of power as the two classes try to structure a relationship in which each party can achieve its objectives. The African company (and the government that owns the majority interest in it) wants to gain new markets for their agricultural products, new training for their employees, and foreign currency for their economy. The U.S. company wants to secure the supply of raw material, control as much of the operations of the venture as possible, and maintain ultimate control over the technology and any related improvements. To the extent that ownership and technology control is perceived by the African company team to be a key objective of the U.S. company, the negotiation often struggles over how much the U.S. company is willing to give up in terms of financial investment, training benefits, management involvement, market distribution rights, and other benefits to retain ownership and technology control. The team negotiating for the African company often holds out the carrot of increased control for the U.S. company long enough to extract numerous concessions. It is a true “lion versus the lamb” process.<sup>23</sup>

The challenge, and the thrill, of teaching the seminar begins with the response from the students at Dundee University to the first communication from the American University class. At this point, the teaching effort becomes completely dynamic, with the substance of the class sessions being determined entirely by the issues presented by each round of communications in the negotiation. Each communication raises new issues and directions as the two sides

<sup>23</sup> Jeswald W. Salacuse, *How Should The Lamb Negotiate With The Lion? Power In International Negotiations*, in *NEGOTIATION ECLECTICS: ESSAYS IN MEMORY OF JEFFREY Z. RUBIN* 87-99 (Deborah M. Kolb ed., 1999).



try to reach agreement. Although many of the issues that arise have been built into the simulation model and have been seen in the previous years' classes, new twists are always occurring, so the sequencing of issues to be discussed and the way in which they present themselves in class are unpredictable. Based on the objectives that each side has been given in their "confidential" negotiating instruction, the topics that will generally arise over the course of the semester are, in addition to ownership and control: organizational structure; distribution rights; financial contribution (which may not follow ownership percentages); issues involving loan financing for contributions; management allocation; terms for licensing the patent to the joint venture; terms of a long-term contract for providing the raw material to the joint venture; ownership of (and licensed use of) improvements of the patented technology; term of the venture; rights following termination (particularly for the African co-op to use the technology after the venture ends); non-competition in relation to such post-termination use; and training (potentially via secondment or shadowing) for the employees of the African cooperative.

There is no pre-determined sequencing of issues or outcomes. The professors of the two classes correspond and will encourage the classes to consider as many issues as possible and will work to move the classes towards a successful outcome.<sup>24</sup> However, a failure to agree has occurred almost as frequently as an agreement. Since learning and participating in the process is the true goal of the class, the outcome is less important, and the lessons learned from the process (which are the subject of two concluding sessions of the class) are equally effective whether there is an agreement or not.

The subsequent class sessions generally focus on interpretation of the individual communications and what may be motivating the response—the "reading between the lines" that comes from experience—evaluating appropriate responses, as well as the substantive law issues at stake. For example, when the topic of product distribution arises and the African company asserts that it wants to distribute the final product and not just the refined raw material, class discussion focuses, first, on whether it is practical for a final drug product to be packaged and shipped from the African source; second, on the costs of shipping a refined raw material in bulk to various regional packaging plants versus the cost of final product shipment worldwide from a single location in Africa; and third, on the challenges of meeting labeling, "good manufacturing practices," and other regulatory requirements for the new product's many potential markets by a company which has never dealt in drug distribution. The compromise discussion generally leads to an offer of African market distribution rights for the drug by the African company (partly because they are most familiar with the African market and the U.S. pharmaceutical company has no experience on that continent, and partly because it affords training in distribution in a context most readily within the scope of the African corporation's experience which can then potentially be generalized to other regional markets). Through this discussion, the class not only grapples with practical business issues which might confront a client but endeavors

<sup>24</sup> This may sometimes involve neutralizing a dominant personality within the class to better balance the negotiation teams. This most frequently occurs if a member of a class has had some negotiation experience and the class begins to defer to that student's positions.



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to structure a working compromise. In the process, they examine regulatory questions involved in drug distribution and the issues involved in documenting the compromise. In short, they learn the process of thinking like deal lawyers.

A similar exercise arises in the context of examining the key components of a long term supply contract for the raw material, in this case from a “sole source” supplier. The concept of structuring such a contract is generally not familiar to the students, so elements of a requirements contract need to be addressed. The discussion addresses concerns over price from a monopoly source over an extended period of time, leading to concepts of index pricing (and in the case of an African market and local agricultural product, which index is relevant). In addition, concepts of variable supply based on output demand, use of budget projections and advanced notice requirements for adjustment of supply, minimum obligations to purchase against budgets and rights to require additional amounts of supply (and at what price), and mitigation of supply interruption are all introduced and examined in the context of the business deal. While such topics could justify extended academic examination, the point of the exercise is to demonstrate (and dramatize) the scope of issues that must be considered in structuring a transaction. The point is constantly made that the lawyers do not need to resolve each of these issues, but they must be able to identify and articulate the concerns so that the business teams can address the practical business points. In addition, the students are reminded that lawyers will ultimately be charged with converting the business agreements to contractual language. The latter issue is not directly addressed in the seminar, although the students do get some drafting experience when preparing the written communications to the other side.

Another key topic that pervades the negotiation is training of employees, as one of the key objectives of the African company and government is to develop better employment opportunities within its workforce. As a result, issues generally arise regarding how the U.S. pharmaceutical company can provide training in an effective manner without disrupting its on-going operations. In addition to on-the-job training for employees who will work in the plant to be constructed to refine the raw material in the African country, secondment of employees from the African corporation to the U.S. pharmaceutical company’s other offices (often the marketing department) is usually proposed and discussed. Practical issues (how many and how disruptive) are interlaced with legal (*e.g.*, immigration matters) as well as allocation of costs for such a program (are the positions paid or not, and if so, by whom). Other creative proposals that have arisen from various classes include funding a job training center within the African country but not specifically linked to the joint venture’s operations, endowing a professorship at the local university to teach marketing skills, and developing a training program to be offered periodically in the country and to be taught by the pharmaceutical country’s professional staff. Each of the concepts presents challenges and costs, but each is tailored to a particular expressed or perceived need of the opposing party, and in most cases force the students to think “outside the box” about solving a particular problem. Again, it is this thought process which is key to the exercise of the seminar and not the full and final resolution or development of the concept.

Throughout the discussion of these topics, the process is continually illustrated with actual examples of similar issues from past and current transactions



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in which the professors have been involved. In this manner, the simulation exercise is both enriched and its lessons validated.

The contemplative process of negotiation through written communications is punctuated by several live negotiations between the two classes. The live negotiation sessions last three hours and are held on Saturdays to avoid conflicts with other classes. Four such sessions are interspersed with six rounds of written exchanges throughout the semester. The initial face to face “meeting” is via video conference a few days after the first written communication. The two teams, led by the “officers” of their respective clients (generally the lead negotiation team that prepared the most recent written communication) are introduced and initial issues are discussed. As positions are exchanged, the teams take frequent breaks for side bars to contemplate responses to presented proposals. These side bars often offer instructional moments in which professorial guidance can be offered prior to the teams rejoining the live discussion. Each live negotiation is discussed and evaluated at the subsequent class (in addition to preparing the next written communication) in order to assess both the positions of the opposing team and the personalities of the negotiators.

The first video conference helps make the negotiations “real” as the opponent takes on a “real-life” identity. The negotiations over the balance of the exercise are influenced by the impressions that are created in this first “live” meeting.

The second live negotiation is via teleconference so that the class can experience negotiation via the telephone as compared to video or in-person negotiations. The class evaluates the benefits and disadvantages of the two forms of negotiation, from the ease of using the “mute” button on the telephone to the greater difficulty of understanding which person is speaking on an issue. Not surprisingly, most students prefer the video negotiation, even though teleconference negotiations still are more common in actual business transactions. Following the teleconference, two additional video negotiations are held, including the final negotiation at which it is generally determined whether or not an agreement and successful negotiation will be achieved.

One of the fascinations of the seminar is the manner in which the class both melds and matures over the course of the exercise. From general unfamiliarity with the negotiation process, the students develop new confidence as the class progresses. They often become unified in positions as well as perceptions of the other team. They learn the importance of personalities in the negotiation process as they react either favorably or unfavorably to certain negotiators on the other team. Since the structure of the simulation is truly international between AU and Dundee and their respective students, the students in the seminar develop an appreciation that certain issues understood or taken for granted in one culture may be mistaken in another, including the use of different terminology for comparable concepts.

The students also discover that multiple lines of communication are often superior for resolving complex issues. Accordingly, students often initiate “back-channel” email communications to raise questions, elaborate on issues or to elicit support on various points. These communications, some of which are conducted



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through the American University Blackboard program and others of which are off-line, are a less controlled component of the simulation, but can become a strategic element. For example, one AU class deliberately engineered an email campaign to various counterparts at Dundee in an attempt to push that team to respond to a number of outstanding requests. Some of these email exchanges were targeted at specific Dundee students in their native language by AU students from the same country as a way to build rapport. Ethical issues regarding these communications were discussed in class, and it was determined that either as business to business or legal to legal communications, the “back-channel” negotiations were acceptable.

A simulation is inherently constrained in its ability to recreate reality, which can limit the students’ acceptance of the lessons that they learn in the exercise. One of the benefits of a semester-long simulation is that the length of the role-playing leads students to take on the character of their respective parties. This mitigates the students’ skepticism and helps to create enough reality to accomplish the educational goals. Although inevitably there are comments during class sessions that “break frame” with the simulation and inquire as to how a particular issue might progress in a “real” negotiation or suggest what the students might do if “this were not a class exercise.” The “realism” of the exercise has been enhanced by various real life accounts of counterparts to the simulated negotiation (included with the class readings) which show comparable “real” transactions between U.S. multinationals and developing country suppliers of raw materials.<sup>25</sup>

The class, and therefore the negotiation, is on a time schedule, so the students are aware that an agreement, if one is to be reached, must occur by the end of the final video negotiation. While a cut-off may at first appear an artificial constraint, it does in fact parallel real transactional practice as no negotiation can proceed indefinitely. Business teams grow weary of protracted bargaining, and if a deal cannot be structured, the next opportunity often looms large. During the course of the semester, the students are aware of waning time, and the final negotiating session often commences with a series of unresolved issues and without any particular outcome assured. Oftentimes, the students find the opposing team, even if initially antagonistic, unyielding or abrasive, to be more receptive to proposals and compromises during the final session. However, there have also been times when the dynamics of the negotiations led to a hardening of positions and a failure to reach agreement.

Mistakes are often the best teachers, and there is no better environment for making and learning from mistakes than a simulation. Since no particular result of the negotiation is pre-conceived, there are numerous unpredictable twists and turns depending on the particular course of proposals and responses. Surprise is also a great teacher, and throughout real negotiations, surprises are inevitable. Similarly, this simulated negotiation is not immune from either mistakes or surprise, as students sometimes venture outside the confines of the simulation in an effort to advance a point. Both infuse the simulation with realism and instructional challenges.

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<sup>25</sup> See e.g., Peter S. Goodman *Demand for a Chinese Fruit Skyrockets*, WASH. POST, Nov. 18, 2005, at D1.



For example, during one exercise a student at Dundee, who undertook a financial assessment of the profitability model in the simulation materials, reached the conclusion that the production of the drug product would not be profitable. Based on this analysis, the Dundee class made certain proposals which surprised the AU class. The negotiation stalled as the class discussed Dundee's motivation in making this proposal, the context for the proposal and if this proposal was made in good or bad faith and contemplated making threats to discontinue negotiations. Once the underlying analysis was disclosed to the AU class, it was determined that the financial analysis by the Dundee student was flawed, but by that time, the negotiations were so impaired that they ended without an agreement being reached. However, the situation provided a useful pedagogical opportunity and the class devoted substantial time to analyzing the impact of misunderstanding and erroneous information on negotiations. It also was an opportunity to discuss how parties can avoid problems by questioning the basis of proposals that do not appear to make sense.

In another example, the Dundee students prepared an elaborate newspaper article which purported to report on the progress of the negotiations and contained commentary from interested citizen groups that were critical of certain government positions and tended to cast doubt on whether certain earlier agreements could be maintained by the African company. The article also was critical of certain aspects of the U.S. pharmaceutical corporation, particularly its past environmental problems in developing countries. This "article," which generated class discussion of breaches of confidentiality, internal leaks and the importance of the overall environment of a transaction, underscored the reality of negotiating with a government-controlled entity in a context where the press may be similarly controlled or influenced. The "external" surprise could have had a major impact on the simulation. However its impact was diluted by arriving at AU immediately prior to spring break, and by the time the class resumed, its effect had somewhat waned. Accordingly, another lesson was discussed: timing is critical to impact!

One of the most common "mistakes" in the simulation exercise regularly occurs early when the American University class, in its role of representing the U.S. pharmaceutical corporation, does not consider asserting its dominant position at the outset. The students often hesitate to propose a joint venture with a heavily disproportionate ownership (such as 90/10). They often debate on whether they should propose a specific ownership position or merely propose a joint venture arrangement, with details to be discussed at a later time. The authors once allowed the class to submit such a "we look forward to negotiating" letter as the initial written communication. Much to the AU student's surprise, the Dundee team responded that it too looked forward to negotiating, and it proposed a joint venture ownership of 60/40 in favor of the African co-op. The AU team was aghast that the African team had taken such a bold move, and a significant portion of the following weeks of negotiation was devoted to the AU class trying to claw back ownership to a more acceptable split in favor of the U.S. pharmaceutical corporation. The lesson learned was one of lost opportunity by not asserting their inherent power and yielding strategic advantage. In a later de-briefing, the Dundee class admitted that they never expected to actually end up at a 60/40 ownership, but they knew they could trade that point for other significant concessions, and



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indeed they did. That lesson was not lost on the AU class.

At the end of the final video conference, and occasionally at the end of other video negotiations, the students are asked by the professors of both classes to step back from their roles and provide feedback and insight to the other side. This often includes impressions of both tactics and personalities of the various negotiators (*e.g.*, the teams might divulge that they discerned that certain negotiators were more rigid than others and might direct questions or comments to a particular person in hopes of persuading them to abandon a position or to gain a concession). The background of a particular request or the expectations of the team from a specific proposal are often divulged. In this way, each class can see behind the tactics of the other team and, in so doing, gains a deeper insight into the negotiations process. The teams can understand how their particular proposals were perceived by the other side and why a response was different than anticipated.

Following the formal negotiations and the live debriefing, the AU class devotes one or two class sessions to assessing the process and evaluating the result of the negotiation. One aspect of this discussion is to demonstrate how many areas of law and business were integrated into the exercise and how the kaleidoscope of law, combined with business, was evident in the entire process. If the negotiation has been successful<sup>26</sup> in reaching a preliminary agreement on the structure of the transaction, the discussion focuses on analyzing both the course the negotiation followed and the next steps to be taken to conclude a final fully documented agreement. If the negotiation was not successful in reaching an agreement, the class analyzes the obstacles that caused the negotiation to fail and how such obstacles might have been addressed as well as whether the class would anticipate that the parties would re-open negotiations at a later time. Some of the most effective lessons arise in the context of a failed agreement because understanding why the negotiations failed often results in more rigorous analysis than understanding why they succeeded.

Since the conclusion of the negotiation exercise is generally a letter of intent, the final AU class is an effort to introduce a structure for understanding the next phase of the documentation – the definitive agreement. That lecture uses a merger agreement as the instructional document and provides a context for understanding any comparable document. The device used is what one of the authors has dubbed the “Game Show Analogy for the Merger Agreement,” by which each general section of the document is illustrated by comparison to a popular game show, (*e.g.*, consideration is “The Price is Right,” representations and warranties are “To Tell the Truth,” and indemnification is “Family Feud”). The students may not understand every nuance of a merger agreement as a result of the lecture, but the document is substantially demystified.

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<sup>26</sup> A successful result (*i.e.*, the parties conclude the negotiation with agreed terms) has been achieved by about half of the classes since the inception of the course.



### C. *Writing Assignments*

The AU class is required to complete two written assignments as part of the seminar. The first written project is to maintain a diary of their individual impressions of each round of negotiations, including perceptions of how the negotiation is progressing, criticisms of proposals by the class, and any related thoughts on the overall process of the negotiation. In these diary entries, students may look back on prior entries and record changes in their evaluations and perception regarding the negotiation. Following the conclusion of the negotiation, the students also are required to prepare a paper that examines the role of the lawyer in business transactions, an over all assessment of the negotiation, and what next steps may be required with respect to the transaction. Students are graded on both written assignments as well as their class participation. In the case of the diary, they are graded on how reflective they have been about the negotiating process in each entry. In the final paper, they are expected to answer a short list of questions that have been posed to them at the beginning of the semester, making this probably the only law school course in which students get the exam before they have taken the course. As stated above, these questions are designed to force the students to think more critically about what they have learned in the exercise about the role of lawyers and law in business transactions, and about the process of the negotiations.

### D. *Student Views on the Course*

Based on the comments of law students who have completed the negotiations seminar at AU, the course is both meeting an important need and filling a needed pedagogical gap.<sup>27</sup>

For example, citing both Buchheit,<sup>28</sup> and Stark,<sup>29</sup> one student wrote:

The Lawyer in Negotiation” briefly tells the story of a young attorney in his first bargaining session. By the end of the transaction, the lawyer has performed so ineptly that opposing counsel asks, “[s]on this isn’t your first rodeo, is it?” This story probably reflects the experiences of most attorneys in their first negotiation because, while law schools educate students to work as litigators, they fail to instruct them on the skills required of a deal lawyer. Fortunately, this class addresses that problem.

Student A.

Other students have written:

Never in a hundred years did I think I would spend so much time and energy on a

<sup>27</sup> It also appears to serve a useful purpose at the University of Dundee. Professor Janeth Warden-Fernandez, the instructor in the course at that university was the recipient of a “best teaching” award based on this course.

<sup>28</sup> Lee C. Buchheit, *The Lawyer in Negotiation*, in HOW TO NEGOTIATE EURO CURRENCY LOAN AGREEMENTS 78, 78 (1995).

<sup>29</sup> Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223, 285 (2004).



root I had never eaten, let alone heard of. Reflecting back on the negotiations, it is interesting to look at the amount accomplished by the class starting from the first day and ending on the day of the final video conference. While the simulation may not be perfectly accurate to real-life transactions, this exercise felt as real as it could within a law school setting. Throughout the simulation, the class was forced to learn and understand different areas of law related to the deal out of necessity because they were integral parts of the deal. This contrasted with the typical law school class which deals with one subject at a time, and never all at once until exams. Instead, we were forced to juggle different areas of law and business all at once and recognize when they needed to be discussed in the deal. The simulation itself gave insight gained through experience on the role of the international lawyer and the techniques and tools used in negotiation. The simulation also taught us about working as a team while representing the United States [client] against (mostly) non-American opponents.

#### Student B.

Overall, this negotiation was very interesting and complicated. At the end of the negotiation it really is staggering to look back and see all of the issues that had to be negotiated, and to see all of the various areas of law that we had to deal with. The breadth of areas covered really shows how important it is for a lawyer involved in business negotiations to be familiar with a broad spectrum of legal topics. I also think that one of the best features of this course was having the negotiation be conducted with students from outside of the United States, as it provided an invaluable look into intercultural dynamics that an intra-school negotiating seminar probably could not have provided.

#### Student C.

I have learned a lot about myself, my strengths and weaknesses in a negotiation process as an individual and as a member of a team. I have a better perception of the kind of role I can play in a given negotiation (stabilizer). I feel that I have gained some valuable skills that will help me not only in my career in a law firm but also in other situations where I could use those negotiating skills.

#### Student D.

The negotiation project was one of the better projects I undertook in my law school career. Not only did I find the class enjoyable and fun, I have already seen the result in how it will help me in my legal career. Negotiations are used on practically a day-to-day basis for many lawyers. Even if I do not engage in large, long-term, negotiations, the skills that I learned in this class will carry me through my legal career in various ways. While in this class, I learned that the negotiation process takes patience and dedication; I also know that if I am patient and dedicated to the negotiation process, the negotiations will be a success.

#### Student E.

“This is probably the best class I took in law school. Not only did I learn about negotiating, but the class either reviewed or introduced many legal concepts.” Student F.

After completing this negotiation exercise, I now feel like I have experienced what it's like to go through a true international business deal. This simulation will have me better prepared for my first “real-life” business negotiation as I will be able to



draw on my experiences to help me manage my way through the process. I have no doubt that I will still be very nervous, but at least I'll have a reference point to work from and I'll know some of what to expect.

Student G.

It should also be noted that the course has consistently received excellent course evaluations and the authors have not received any negative student comments either in the formal course evaluations or in their own discussions with students.

#### IV. STRENGTHS AND WEAKNESSES OF THE MCC-KJH SIMULATION EXERCISE

##### *A. Strengths*

The approach taken in this course offers students a number of powerful and unique learning opportunities. First, it offers students an opportunity to see a transaction unfold and how the legal and business issues interact during the course of the evolution of a transaction. The course therefore assumes that its students will either have done a number of business law courses in law school or are lawyers who have had some practical experience. Consequently, it is best suited for LLM students and JD students in their third year of law school.

Second, the course provides students with an opportunity to see how their legal skills can be used in a dynamic negotiating setting. It therefore offers them an opportunity to learn both about negotiations and about how business law principles have to be applied in, and adapted to, specific contexts.

Third, because this exercise actually involves both a cross-border negotiation and each team includes LLM and JD students from a number of different countries, it offers students an opportunity to learn about the challenges and opportunities in international and cross cultural business negotiations.

Fourth, this exercise provides students with an opportunity to explore the role a lawyer plays in a business transaction. Interestingly, in the course of the exercise, the students at different times have to play both the role of the lawyer and of the "client." This means that the exercise offers opportunities for interesting discussions about the role of lawyers in business transactions and about how they should relate to their clients. On occasion, issues arise that allow opportunities for brief discussion of the professional responsibility of lawyers to their clients.

Fifth, since the exercise involves written communications, it offers students useful drafting opportunities. Particularly in the early classes, they get to see the risks of miscommunication that can arise in cross-border and cross-cultural contexts and the importance of precision in drafting communications. They may also see how, unless they are careful, the terms of early communications can limit (or enhance) their options in later rounds of the negotiations.

Sixth, since the exercise involves a number of different means of communications used by lawyers – written messages, teleconferences and video-conference – it offers students an opportunity to learn about the benefits and costs of each of these media. While many of the students, no doubt, would enjoy the

opportunity to travel to a face-to-face meeting with their counterparts, the exercise helps them see both the opportunities and constraints inherent in working with people whom one has not met face-to-face.

### B. Weaknesses

Since the exercise is driven by the dynamics of the negotiation rather than the professors, it gives rise to risks that might be seen by some as weaknesses. First, there is a risk that the challenges that arise in the course of the negotiations can overwhelm the class time, thereby reducing the opportunities for exploring the substantive issues that arise from this exercise. Emotions can run high, particularly if the opposing team is evasive, abrasive or non-responsive, and class time must be devoted to analyzing the tone as well as the substance of communications. Thus, the pressure of preparing weekly responses to the other party and dealing with the “emotional” component in the exercise can limit the time available for the professors to highlight legal issues that arise in the class discussions or to raise related issues that the students could consider addressing in the exercise. However, this is an acceptable risk in a course that is designed as a capstone course for LLM students who are already qualified as lawyers and for JD students who have already done a number of business law courses. In addition, there is an opportunity to revisit substantive issues that arose in the course of the exercise in the last two classes of the semester.

A second risk in the course is that the professors cannot control the dynamics of the course and cannot easily prepare for each class. As in actual transactional practice, the subject of each class (*i.e.* each round of negotiation) is determined by the communications received from the other party, the drafts prepared by the lead negotiators, and the other student responses to these drafts. This means that the matters discussed in each class are unpredictable and arise from the real time collaboration between the professors and the students in producing the next communication. Since the students take the lead in preparing these communications, the professors are limited to facilitating discussions, providing guidance and substantive input where appropriate, avoiding pitfalls and seizing instructional moments whenever possible. Depending on the dynamics of each class, this can mean that some potentially rich teaching opportunities are less than fully exploited by the professors. Consequently, it is critical to retain notes on issues that need to be addressed in the review sessions at the end of the semester. However, this cost is offset by the benefits to be gained from the rich discussion and broad range of issues raised in the exercise.

The professors in this course are fully aware of the risks associated with this course and over time have made changes to the exercise to both mitigate these risks and enhance the learning opportunities that the course offers. For example, each year the simulation model is both updated and slightly modified to assess the effects of new facts on the negotiation. This year a new series of facts were added to provide that the waste product derived from the refinement of the agricultural raw material for use in the drug is saleable as animal feed or fertilizer. As a result, there were more issues to consider and costs and benefits to allocate between the



parties, resulting in a more varied negotiation. Interestingly, the AU class used this new issue to support a very high ownership allocation (90/10) in favor of the U.S. company. In return they offered the African company a reverse split (10/90) of the profits from the sale of the by-product. The Dundee class virtually ignored this gesture and fought for a higher control over the joint venture generally (which ended at 80/20), only to react adversely when the AU class withdrew the previously proffered split on the by-product (which ended at 20/80). In the final joint class analysis, the Dundee students indicated that they had valued the revenue stream from the by-product as their most potentially valuable profit component from the joint venture, even though they had engaged in minimal discussion of the matter.

### *C. Some Unexploited Opportunities and Adaptations in the Exercise*

The authors believe that there are opportunities for developing and expanding this course that they have not yet exploited. For example, the seminar could be taught either in two sections at the same law school or as simultaneous classes at two separate U.S. law schools in close proximity.<sup>30</sup> The former opportunity would make for easier communication and, at least at AU, with its large international student body, would not lead to a loss in the cross-cultural learning opportunities that the exercise currently offers. It would, however, most likely result in a reduction in the number of means of communication used in the exercise, as face-to-face negotiations would replace video- and tele-conferencing. The latter opportunity would lead to a greater variety in means of communication as face-to-face negotiations are added to video-conferencing and teleconferencing for the negotiations. In addition, with classes at the same law school or in close proximity, there would be the opportunity for more extensive joint debriefings after each round of negotiations.

Another potential variation would be to continue the seminar over two semesters. This would allow the negotiation over the letter of intent to be followed by a second set of negotiations, in which the students focus on converting the letter of intent into the definitive agreement required to document the transaction.

A final interesting possibility would be to have a business school class participate in the exercise. This option would create some interesting multi-disciplinary learning opportunities.

## V. CONCLUSION

Law schools are beginning to address the demonstrated need to be more attentive to the non-litigation, transactional side of legal practice. Momentum is growing to develop classroom techniques that provide law students with sufficient background to function capably in a transactional practice. The simulation exercise described in this article is a successful example of a creative way to train

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<sup>30</sup> Either modification would require two professors to teach the two separate seminars as it would not be practical for one professor to teach both sides and remain the confidante of both classes, particularly in the face-to-face negotiations.



transaction lawyers. It is to our hope that this article will inspire other law professors to experiment with innovative teaching methods and to share these methods with each other. Through these efforts, we hope that law schools will become more effective in training transaction lawyers – who are increasingly needed both in commercial and public interest law practices.



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