Teaching Health Law

Beyond the Case Method: Teaching Transactional Law Skills in the Classroom

Jonathan Todres

With the publication of the Carnegie Foundation's 2007 report on legal education,[1] law schools are focused again on curriculum reform. The Carnegie report highlighted a number of important issues, one of which is the need to improve the teaching of lawyering skills. This article takes up one subset of the skills package of lawyers – transactional law skills – and suggests that health law courses provide an excellent forum for exploring and teaching such skills.

With their reliance on the case method, law schools historically have done little to introduce students to transactional thinking, practice, or skills.[2] Yet today, transactional work is a significant component of most attorneys' practices.[3] A common misperception is that transactional law only means "doing deals" while at a large law firm. In fact, transactional work encompasses everything from the securities and mergers & acquisitions deals done by large Wall Street law firms, to the small firm counseling a client opening a restaurant who needs legal advice on a lease agreement, contracts with suppliers, and other matters, to the solo practitioner who drafts wills for clients. Transactional work can also be a significant part of government and public interest lawyers' work.

Similarly, the practices of health lawyers are replete with transactional work. Such practices include providing corporate counsel to for-profit and non-profit hospitals and other health care businesses; advising health care entities on employee-related issues including benefits plans; counseling pharmaceutical companies, academic institutions, and other research entities on intellectual property matters; drafting advanced health care directives for individuals; and many other legal matters that do not require judge and jury.[4]

Despite the abundance of transactional work in practice, most law school courses are still heavily weighted toward litigation training with their reliance on the case method.[5] The analytical skills developed through traditional case law analysis are important to all areas of law, yet there are fundamental aspects of transactional practice that receive too little attention in law schools. I submit that health law courses offer wonderful opportunities for introducing law students to the thought processes and skills utilized in a transactional law practice.

Lawyering Skills for Transactional Practice

Transactional lawyers engage in a rich and varied practice, drawing upon a host of skills in practice. I want to highlight four issues that are particularly important, although not necessarily exclusive, to transactional practice: (1) thinking ex ante, (2) risk assessment and allocation, (3) drafting, and (4) negotiation. The first two issues challenge us to teach our students a particular way of thinking that is relevant for life as a transactional lawyer, while the latter two are skill sets that students need for transactional practice.

Thinking Ex Ante

Transactional practice differs from litigation at a fundamental level: While the latter typically looks back in time, reviewing what went wrong,

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and seeking accountability for past actions, the former is forward-looking and typically takes place when there is no conflict or dispute to resolve. Immersed in case analysis, law students quickly grow accustomed to issue-spotting and identifying who committed a wrong and what the elements of that wrong are, but they are often far less familiar with how to approach a client's issue when nothing has happened yet. Teaching our students to think ex ante about clients' issues or legal matters is important to producing graduates who will excel in practice.

As much of transactional work involves thinking ex ante about legal issues, the challenge for students is to develop the ability to analyze and anticipate what could happen, come up with ideas for how to account for all possible contingencies, and put all of this in writing (ideally in such a way as to enable clients to avoid litigation in the future). One can expose students to this thought process even in courses that do not appear to be typical transactional courses.

Public Health Law is not a typical transactional course, but many aspects of public health law involve drafting laws or regulations to prevent future adverse health outcomes. For example, one exercise I use in my Public Health Law course to introduce students to thinking ex ante is to put students in the position of advisors to a state or local health agency tasked with developing a plan for responding to a potential disease outbreak, or in the position of counsel to a school board developing a plan for responding to the increased incidence of obesity among students, in each instance requiring them to draft proposed regulations. In the latter case, for example, students have to grapple with defining the problem, identifying causes, and developing a proposed response that (a) can address the problem effectively, (b) will comply with relevant law (e.g., not run afoul of constitutional protections of liberty), and (c) has accounted for issues that might arise in the future (including legal challenges to their program).

Though the development of public health regulations is not typical transactional work, the manner and necessity of thinking is. Such thinking is readily transferable to other transactional work, and visa-versa. My experience as an attorney thinking about client issues in corporate matters helped me in thinking through the implications of draft legislation on children's rights issues. Both involved thinking ex ante about issues. Thus, I believe exercises in health law courses that engage students in this mode of thinking will help them gain valuable skills that can translate across numerous other areas of the law. In addition, I have found that these exercises enable certain students, who have grown disenchanted with what they see as the law's focus on arguing and disputes, to reconnect with their initial interest in studying law and thrive, as they get excited about the possibility of using the law to build something.

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Risk Assessment and Allocation

Transactional lawyers and litigators both weigh risks in counseling clients. The nature and role of the risk assessment differs, however. In transactional practice, with few exceptions (such as hostile takeovers), both parties to the transaction have the same end goal. In a securities offering, the company and the underwriters both want the deal to happen. Similarly, in a real estate transaction, the seller and buyer of a house both want the sale to be finalized. One of the central functions of counsel in these transactions is to assess and negotiate risk allocation, without the benefit of an arbiter (judge or jury) providing the final answers. In the above real estate example, the seller and the buyer both want the house to change ownership, but the lawyer has to assess what could go wrong, negotiate who will bear the responsibility (read: be liable) for the various bad outcomes if they do materialize, and describe in writing what the parties agreed.

Risk allocation can be explored in numerous health law contexts. As described above, in my Public Health Law course, I ask students to advise a state or local health department on developing a plan for responding to a potential disease outbreak. As many of us who have worked on these very projects know, risk is very present in this context. The exercise enables students to grapple with risk-related questions: Should immunity be given to physicians in a public health emergency? Should pharmaceutical companies have immunity for vaccines produced in an emergency? What remedies should be in place if an individual is improperly quarantined? As part of this exercise, with each risk, students have to analyze the impact of their initial answers. So, in the context of developing a new public health regulation, when students decide whether health care professionals should have full immunity for their actions, they must explore the potential ramifications of their decision, both initially in terms of the likelihood of getting the regulation adopted and subsequently when an emergency actually occurs. What students learn is that for the indi-

vidual or entity they represent, some issues are deal-breakers, others matter little if at all, and still others fall somewhere in between. Also, certain outcomes create greater legal risks. Students need to learn to assess the varying levels of risk associated with different outcomes in order to advise their client effectively.

While this exercise is still developing and existing public health law may answer some of the above questions, my aim is to get students to project into the future, think about potential risks and which party should bear the burden, and examine the potential implications of those risk-related decisions. In that respect, the exercise has served its purpose. Other health law areas (e.g., medical malpractice, human subjects research, intellectual property, etc.) present many scenarios for students to explore risk allocation in settings where there are two existing parties seeking to enter into a transaction or agreement.

Drafting

Drafting is an essential skill in the transactional world (and also needed in settlement negotiations and other aspects of a litigation practice). Although drafting courses are on the rise, most law schools currently offer students relatively few opportunities to draft legal documents.[6] Historically, legal writing courses have called for students to write a legal brief or memo for a litigation setting. Transactional drafting exercises are often left to a small-section "Deals" course that is offered as an elective. Drafting, as all practicing attorneys know, demands great precision. Incorporating drafting exercises into more of the curriculum would help further several important goals.

First, drafting exercises enable students to improve their writing skills. Second, drafting exercises convey to students the complexities involved in taking an idea and translating it to a written document. For example, if a student thinks quarantine should be an option in certain public emergencies, requiring the student to describe it in writing makes the student grapple with who decides when quarantine is appropriate, under what circumstances, and what due process rights should be available to those subject to quarantine, among other issues.

Finally, I have found that drafting exercises seem to get students more comfortable with, and better at, statutory interpretation. The regulatory state has expanded exponentially since the development of the case-method approach to teaching law, yet law schools are in the early stages still of developing courses that teach about the regulatory world. Getting students to draft contracts, regulations, or legislation can help. When students review their own draft legislation or that of a peer, they begin to see holes in the language they have chosen and also start to read such language more closely. This learning can be reinforced with contracts cases in which indeterminate words caused significant litigation. Given the extent to which so many aspects of health law (and other areas of practice) are shaped by the regulatory state, developing young lawyers who are better versed in statutory interpretation will be valued.

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When I practiced transactional law, litigator friends would tease that "drafting" meant merely pulling a good template from the files and changing the names of the parties and the dates. Transactional law, like all areas of law, draws upon precedents to enhance efficiency, improve quality of work, and save clients money, but a good lawyer can draft precise, effective legal language on the spot and also understands the law that undergirds why a provision is drafted a certain way. Frequently, in negotiations, transactional lawyers must be prepared to provide a legal or business rationale for a particular provision or re-draft it to reflect a compromise position, all with their clients at their side and opposing counsel across the table. Equally important, like litigation, every transactional matter is unique, and each one requires lawyers to draft new language that both is precise and does not expose their clients to liability or excessive risk.

Health law courses offer many potential opportunities for providing students the opportunity to develop drafting skills while learning about the law. In my Public Health Law course, the exercises used to engage students in thinking ex ante also offer students the chance to draft legal language. Typically I ask students to bring extra copies of their draft public health emergency response legislation or school board obesity prevention program proposal to class, so that they can exchange drafts with classmates and have the opportunity to engage in peer critique.

The critique stage is crucial, and here I draw upon my experience teaching in the Lawyering Program at New York University School of Law, where we had students regularly engage in critique of each others' work. There are numerous potential benefits of the critique stage (including the ability to analyze and draft contracts, regulations, legislation more precisely), but let me highlight one that I believe often goes unnoticed. As I tell students, life in practice can get rather hectic, leaving regrettably little time for senior lawyers to sit down to mentor junior lawyers. Thus, devel-

oping the ability to critique one's own work is essential, and a good starting point is critiquing others at the same stage. I tell students that with every issue or problem they identify in their partner's work, they should look back at their own draft to see if they made similar mistakes. Ask their partner why he or she drafted a provision a particular way and how that addresses law relevant to the situation. Mentoring from senior lawyers is still needed, of course, but developing students' ability to critique their own work will help them to produce better work in practice, and I believe that skill can be fostered by engaging in peer critique.

Negotiation

Negotiation is a core part of any transactional law practice.[7] When I started teaching in the NYU Lawyering Program, prior to coming to Georgia State University, the program was seeking to add a transactional exercise to its experiential curriculum. I had the opportunity to serve on the small committee that undertook this task. We developed an exercise that would meet the needs of the goals of the Negotiation segment of the course while introducing transactional skills, through a hypothetical negotiation between a medical school and a pharmaceutical company over a licensing agreement for a new drug.

The exercise requires students to engage transactional practice on a number of fronts. First, students have to develop an understanding of their client's business and its industry, including industry norms. Understanding the client's business and industry standards is a threshold step transactional lawyers typically undertake early in representing any client.[8] Accomplishing this task means research for students, including understanding financial issues. (As an aside, this helps debunk two myths that circulate often on law school campuses: "if you don't like research, just become a corporate lawyer, because they never do research" and "going to law school, instead of business school, will allow you to avoid ever dealing with numbers again.") Second, students learn about a new area of substantive law (in our case, intellectual property law). Third, students have an opportunity to counsel their client and then negotiate with opposing counsel. Finally, students then have the opportunity to draft select provisions of the contract based on the outcome of the negotiations.

Providing students the opportunity to negotiate in a transactional context enables them to engage in ex ante thinking, grapple with risk allocation (determining which issues or matters are most important to the client, which are less important, and how much flexibility the client has on each issue), and develop their drafting skills. These exercises also present many opportunities to explore ethical and professional responsibility issues that arise in negotiation and client representation. And, of course, students gain experience in negotiation and exposure to various theories of negotiation.

Challenges

There are several challenges I have encountered individually and would anticipate that we will encounter collectively as teachers.

First, developing drafting or interactive lawyering exercises, as with any new curriculum, takes time. As important, it requires time in the classroom. In many cases, substantive law learning can be incorporated into the drafting exercises. Tough choices might have to be made, however, especially for those teaching the omnibus Health Law survey course which already has an overflow of substantive areas to cover. I believe that there is room for incorporating skills and would argue that it is worth doing even if it means briefer coverage of certain issues. Developing students' skills will equip them with a methodology they can utilize when practicing in areas of health law that your course did not get to cover.

Second, in order to maximize the value of such skills exercises, there needs to be buy-in among students. Most law school courses still assign no work other than reading until the final exam or final paper. Introducing several additional projects during the semester might seem burdensome to students, at least until these courses are no longer the outliers. Having these exercises count toward final grades is one way to incentivize buy-in, but the criteria for assessing student performance must be carefully considered. Whatever approach is taken vis-à-vis grading skills exercises, my experience has been that taking a few minutes early in the semester and before each exercise to be transparent about what you are asking of students and what they can hope to gain from the exercises really makes a difference in student commitment. Ensuring full engagement is particularly important with interactive exercises, as their value is enhanced when all students (who are playing counsel to someone who is acting as a client) treat them as real as possible.

Related to this, I think it is important to be transparent about what part of each exercise is not real. Those of us who use skills exercises in the classroom have to balance the desire for a real-world feel with pedagogical goals. One obvious place this arises is with time and teaching students the value of time in transactional exercises. A law school semester does not allow for real-world merger negotiations that might stretch over several months time. So, shortcuts are necessary. However, time value is a key concept in transactional practice. At certain points in negotiations, a client may see more value in getting the deal done than in fighting over the remaining open items in the contract and risking poor market timing, and that context should be introduced.

Similarly it is hard to convey the value of repeat business and good business relations in a single negotiation. A student who employs a win-at-all-costs strategy in negotiations might gain a few extra minor concessions, but only at the risk of the other party not wanting to engage in further transactions with his or her client. Simulating the importance of goodwill and continued business relationships is challenging, but at

the very least this discussion should be part of the debriefing after the negotiation.

Third, there is a human resources issue with respect to transactional skills teaching. Most law school faculty did little or no transactional work when they practiced. While many of us have had the experience of teaching a law school course we did not take as students (some of us now teach courses that were not even offered when we were students), teaching the skills necessary for a type of practice that one has never engaged in is a greater challenge. Certainly, many skills of litigators and transactional lawyers overlap, but there are significant differences. One way to address this might be to engage in team-teaching of certain skills components of courses. There are other potential solutions. The key is that this issue must be considered as we develop transactional law courses and also as we hire the next generation of law professors.

Conclusion

Whatever our motivation – e.g., the Carnegie report and the current wave of law school curriculum reform, practicing attorneys' demands for better trained law school graduates, or students' desires to learn about transactional law – it is clear that we can and should do more to equip our students with, or at least introduce them to, the mindset and skill set of transactional practice. Health law's tremendous breadth of practice offers an ideal platform for teaching transactional skills.

References

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