The Contract Drafting Process: Integrating Contract Drafting in a Simulated Law Practice

Charles C. Lewis
Campbell University School of Law, lewisc@campbell.edu

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THE CONTRACT DRAFTING PROCESS:
INTEGRATING CONTRACT DRAFTING IN
A SIMULATED LAW PRACTICE

Charles C. Lewis*

Teaching contract drafting in the classroom has been troublesome ever since it became a part of the law school curriculum. Drawing on the author's experience in teaching the course, as well as his experience as a former practicing lawyer, this essay proposes that contract drafting can be more effectively taught in the classroom by using a simulation model that allows the students to learn contract drafting as lawyers experience it in actual practice. In the simulation, the students experience not only traditional contract drafting, but also the interviewing, planning, and negotiating that are essential to successfully drafting a contract. In addition, the students must deal with the client and opposing counsel, as well as co-counsel and a senior partner assigned to the same project. While the students are handling legal issues in their office files, they must also face ethical and malpractice issues, and even law office management issues.

Introduction

A law school course in contract drafting is a valuable part of the curriculum. Judging from the contract drafting texts available today for classroom use, the course covers a wide range of drafting topics1

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* Professor of Law, Norman Adrian Wiggins School of Law, Campbell University. I wish to thank Professor (formerly Dean) F. Leary Davis for introducing planning courses into the law school's curriculum and Professor Richard A. Lord who first taught contract planning and handed over to me the foundation of the course that I subsequently developed and now describe in this essay. I also wish to thank Dr. J. Stanley McQuade for reading and commenting on an earlier version of the essay and Professor Dale A. Whitman, a former president of the Association of American Law Schools, who unknowingly spurred me on to write this article when I read his article, "Clinics for the Rest of Us," published in the November 2002 AALS newsletter, in which he pleads for the development of clinical and simulated clinical experiences in transactional lawyering to complement presently existing litigation-oriented clinics. Finally, I wish to thank Wallace N. Tiffany and W.N. Tiffany, Jr., whose influence over me as a young practicing lawyer is reflected in this essay and continues with me today.

1 A drafting course might include topics such as the overall drafting process, the organization of a contract, drafting style and usage, rules of contract interpretation, concerns about boilerplate and other standard provisions in contracts, a review of contract law, drafting ethics, document review, drafting by computer, as well as how to write definitions, how to avoid ambiguity, when to use vagueness, and how to use contract forms. See, e.g., Scott J. Burnham, Drafting and Analyzing Contracts (3d ed. 2003); Thomas R. Haggard, Legal Drafting: Process, Techniques, and Exercises (2003); George
and provides law students with practical information they can use in drafting legal documents, as well as a chance to practice what they learn by reviewing or drafting documents in class exercises.

When taught by the traditional classroom method, the course provides a good foundation for a law student's education in contract drafting. Although some courses in contract drafting may be limited to teaching students how to put their client's agreement effectively on paper, other courses may include some instruction on the planning that needs to precede the actual drafting of the contract. But something is nevertheless missing. Teaching contract drafting, even with a planning component, is teaching only a part of the broader process involved in producing a written contract between parties. Teaching only a part of the process does not provide the foundation students need for understanding the entire process.

Teaching contract drafting in the traditional manner, by assigned readings, classroom lectures and discussions, and even drafting exercises, is not the most effective method to use. Instead, contract drafting can be taught more effectively by integrating it into the context of a simulated law practice. In an actual practice, the contract drafting process begins with a client contacting the lawyer about drafting a contract and ends sometime later when the parties come to an agreement on the terms and sign the contract. Between the client's initial contact and the subsequent signing of the contract, far more goes on than the mere drafting and planning of a contract, and much of what goes on will profoundly influence the drafting of that contract. The core of the drafting course that I teach is the interviewing for and the planning, negotiating, and drafting of a relatively complex contract in the context of a simulated law practice. By integrating contract drafting into the context of a law practice, students learn contract drafting as lawyers experience it, and they have an opportunity to understand how it fits within the broader contract drafting process.

I took an elective course in contract drafting as a student in law school. Some thirty years later, I only remember looking at various types of contracts that were passed around in class as examples. Surely there must have been more to it than that, but that is all that I remember about the course. I do not remember using any part of the course in my law practice after I graduated. I learned what I know


2 For an example of a traditional method of teaching legal drafting, see Reed Dickerson, THE FUNDAMENTALS OF LEGAL DRAFTING 359 (2d ed. 1986).

3 It could begin earlier if the parties begin negotiating the terms of the contract before contacting the lawyers, and it could extend beyond the signing of the contract if the parties subsequently modify the contract.
about contract drafting in the same manner that I suppose most lawyers have learned it — in practice.

After practicing for a number of years, I became a law professor and was eventually assigned to teach an elective contract drafting course in the late 1980's. It was ironic that I was assigned to teach a course that did little for me in law school or practice, and I began teaching it with considerable misgiving.

I soon discovered that contract drafting had come a long way since the late sixties and early seventies when I was in law school. The drafting course as conceived by our then dean, F. Leary Davis, was broader than a mere drafting course. It was labeled “Contract Planning,” and it was designed to contain a planning component to accompany the traditional drafting component of the course. The idea, of course, was to get at the planning behind the drafting of the contract, as well as at the actual drafting itself. The casebook used in the course was a first year contracts casebook, but it included a section of cases and materials that allowed the students to examine what drafters had done wrong in drafting a contract. This section was designed to make the students think about what the drafters could have done to avoid litigation or to bring about a more favorable result in litigation.

In addition to assignments in the casebook, the students were given, as a practical exercise, a short summary of a proposed commercial transaction with directions to plan and draft a contract satisfactory to both sides of the contract. Two students were assigned to represent each side of the contract. The students were directed to make up reasonable terms for their clients and then negotiate those terms with the other side. The goal of this simulated project was to draft a contract that both sides could recommend to their clients for signing.

I taught the class by this method for several semesters before I decided to make the course more relevant to practice. My solution came partly from my experiences as a professor when I taught law school courses or judged competitions that used simulation to teach lawyering skills. In particular, I had observed how client counseling competitions included the simulation of interviewing and counseling, often with a view towards drafting a document for the client, and I began to realize how simulation of an interview might help in teaching the contract planning process.

My solution also came from my experience in teaching a law office management course that reminded me of the experiences I had as a new lawyer. At that stage of my career, I tried to work successfully with many different people, some of whom naturally represented in-

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Interests adverse to the interests of my clients. I struggled to get my work done competently and on time and to keep my files documented and up-to-date. I worried about doing something legally or ethically wrong and, as a consequence, cutting short my legal career. These memories reminded me that the contract drafting process does not take place in the serene isolation of a private office but instead in the hurly-burly of law practice.

As a result, I decided to teach contract drafting by integrating it within the setting of an ongoing law practice, where the lawyer has a client to be interviewed, consulted, advised, and kept up to date, as well as a senior partner who supervises the work, an associate with whom to work, and opposing lawyers with whom the contract must be negotiated successfully. I wanted the students to confront and learn to handle the legal, ethical, and other issues that confront practicing lawyers. In short, I wanted to teach contract drafting the same way I learned it — not by reviewing drafts or drafting them in class, but by drafting a contract in the same fashion as a lawyer in practice.

Instead of having students make up the facts for the project as in the previous course, I would require that they wrestle the facts out of a simulated client interview, just as practicing lawyers must do. Instead of having students draft in class a contract conforming perfectly to a client's interests, I decided to put the students through a simulated negotiation process that involved opposing lawyers (students) representing the other client's interests, a process that would result not in the perfect contract but in the best contract under the circumstances.

I also wanted the students to experience those working relationships that shape their work in the law practice. In the existing course design, they experienced working with another person in the project because I assigned two students to represent each client, but I also wanted them to experience a working relationship with a senior partner who assigns and supervises their work, discusses issues and possible solutions, and reviews and critiques contract drafts. I also wanted them to have a continuing relationship with the client and also with the lawyers (students) representing the client on the other side of the contract.

Finally, I wanted the students to use an office file to document the work that a practicing lawyer does in planning, drafting, and negotiating a contract. I wanted the file to reflect their working relationship with their senior partner, their student partner, the client, and the opposing lawyers, to show how the students handled the ethical and legal issues that inevitably arise in the drafting of a contract, and to reflect how they protected themselves from the threat of legal mal-
practice or ethical malfeasance. By all of these means, I hoped to integrate contract drafting into the broader context of the practice of law.

In this essay, I describe what I do in class to prepare my students for the simulated drafting project that forms the core of the course. I then describe the simulated project in each of its phases and explain how each phase of the project integrates contract drafting into the context of a law practice. Finally, I point out the educational benefits that are derived from each phase and describe a number of other educational benefits that appear to flow from the simulated project as a whole rather than from any individual phase of the project.

I. PREPARING FOR THE SIMULATED DRAFTING PROJECT

The course is a two hour course. Instead of teaching it two hours a week, however, I teach it three hours a week for two-thirds of the semester, leaving the last third of the semester with no classes. By concentrating the class hours during the first part of the semester, I am able to teach the students what I want them to do in the simulated project. Class hours at the end of the semester have less value since by that time the students need to know how to do the work necessary to complete the simulated project. I do, however, spend considerable time during the last third of the semester reviewing their files and advising them as they complete the project. The students' work in the project determines their course grade; no exam is given.

I begin the course by teaching an interviewing component since no drafting can take place until the lawyer interviews the client and elicits the facts needed to plan, negotiate and draft the contract. In teaching this component, I assign materials on interviewing for the students to read outside of class, and I then talk about interviewing in class.5 I next have the class apply what they have learned by interviewing me as I play the role of a client who is about to make a business loan to a relative.6 The students use the three-stage interviewing process7 that we have discussed in class and which they will use again in the simulated project. During the course of the interview, I occasionally step out of the client role to connect what they have learned in class with what is taking place at that moment in the interview.

5 I emphasize to the students that this course is not a course in interviewing, and I encourage them to take a course in interviewing and counseling, either in the law school or in a continuing legal education program.
6 I play the part of a blue-collar worker who has agreed to make a substantial loan to a nephew who will use the money to start a business that is unlikely to succeed.
When the interview is over, the students must use their interview notes to prepare a detailed summary of the facts they have learned in the interview.

The students must then analyze those facts in the planning component of the course. To prepare the students for this component, I introduce in class the classic planning questions that ask where the client wants to be, where the client is now, and what must be done to get the client where he wants to be.\(^8\) In determining the answers to the first and second questions, the students must identify the goals of the client and then assess the client's strengths and weaknesses in attaining those goals. In determining the answer to the third question, they must identify the performance terms that describe what the parties must do in carrying out their obligations under the contract. In addition, the students must predict any obstacles to carrying out those performances\(^9\) and suggest how drafting might eliminate those obstacles. They must foresee any terms needed in the agreement to protect the client in the event of a breach of a term of the contract, or to protect the client against some external risk that may threaten the contractual arrangement.\(^10\) I also ask the students to list any ethical issues that arise from the interview, any legal concerns that need to be resolved by legal research, and the advice they should give to the client based upon their planning.

After learning about the planning component in class, the students must use what they have learned by analyzing the facts they have elicited from me in the interview. They individually review the facts outside of class and identify the client's goals, the client's strengths and weaknesses, and the performance terms needed in the contract. They review the performance terms to suggest any necessary adjustments to avoid any obstacles to the parties' future performances, and they set out the terms that will protect the client in the event of breach. Finally, they list their ethical and legal concerns and their advice for their client. We discuss their planning work in class, and the students eventually recommend that the client should use a negotiable promissory note to document the proposed loan to the relative. Although we have not yet talked about drafting in class, I have each student draft a promissory note that reflects the planning we previously discussed in class.

After the students have drafted their notes, I hand out in class a note that I have drafted so that the students can compare their notes with my notes.

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\(^8\) F. Leary Davis, Strategic Planning Using a Computerized Financial Model, Part I, 8 LEGAL MGMT. 24 (1989).

\(^9\) McNeil would likely label this "performance planning." McNeil, supra note 4, at 24.

\(^10\) McNeil would likely label this "risk planning." See id. at 25.
to mine, and we discuss each provision of my note from a planning rather than a drafting perspective. For example, the client had suggested in the interview that the note should be payable at the end of the year in one lump sum. Based on the planning by the class, however, we typically decide to draft our note as an installment note with equal monthly payments spread out over a one year term. The class suggests this change in order to make it easier for the relative to repay the money, and, at the same time, to allow the client to get most of the money back before the end of the year. Also, since we have drafted the note as an installment note, we include an acceleration clause in the note to protect the client if the relative defaults on an early installment and the client wishes to sue immediately for the full amount of the note rather than waiting for each payment to become due. By first planning the note and then drafting its terms based on that planning, the students are able to understand how terms are drafted or added to a contract for particular reasons and not just because a form contract uses the term or the term appears important to the drafter.

While planning the terms of the promissory note, the students realize how much law is involved in drafting a simple promissory note. They must face the concept of negotiability, along with acceleration clauses, attorney fee clauses, waiver clauses, and prepayment clauses, and also consider the effect of usury on the promissory note. They see how the planning component and the knowledge of law affect the drafting of a contract, and they realize that they cannot draft a contract without a good working knowledge of the law involved.

The next component for the class is the negotiation component. I assign the students some materials to read on negotiation before class, and then we talk about negotiation in class. I then have the students apply what they have learned in class by requiring them to negotiate the terms of a simple commercial transaction outside of class in a one-on-one negotiation. For this practice negotiation, I give each student a fact sheet setting out the information needed for a negotiation with another student who represents the other side. Before the negotiation begins, I require the students to analyze their facts in the light of the planning component and to give the opposing student a letter setting out the performance terms for the contract. With their planning fresh in their minds, they then negotiate those terms outside of class and prepare a summary of the negotiation. Since the students have negotiated the same commercial transaction, we discuss the results of their negotiation in class. In that discussion, I connect what they have

11 As I do in the interviewing component, I emphasize to the students that this course is not a course in negotiation, and I encourage them to consider taking a course in negotiation, either in law school or in a continuing legal education program.
learned in class to what took place during their negotiations. I also point out how the use of planning prior to the negotiation, as in identifying the client’s goals, strengths and weaknesses, and performance terms, should have helped the students in preparing for negotiation and in the negotiation itself.

We next move to the drafting component. The students are assigned readings from the drafting text used in the course, and they do a drafting exercise on their own to practice what they have learned. The focus of discussion in class, however, is on a contract that incorporates many of the drafting issues raised in the assigned readings. The students first review the contract on their own, identifying issues and correcting problems raised by those issues, and then we go over the contract in class. Each issue raised in the contract provides a way for me to talk about good drafting in the light of the assigned readings.

After completing the drafting component in class, the students are then ready for the entire simulated project. In my course, however, I allow the students to begin a phase of the simulated project immediately after we have covered the applicable component for that phase in class. For example, when we finish the interviewing and planning components in class, the students then start the interviewing and planning phase of the simulated project, while I go on to the negotiation component in class. When the negotiation component is completed in class, the students begin the negotiation phase of the project, while I go on to the drafting component in class. As a result, the students engage in each phase of the project when the classroom instruction on that phase is still fresh in their minds. The simulated project has four phases, and they are described below.

II. THE SIMULATED DRAFTING PROJECT

To begin the simulated project, I divide the class into teams of two. Each team is paired with another team so that each team can represent a client on opposite sides of the transaction. I limit the class to a maximum of 24 students, so I have no more than 12 teams of two students negotiating six contracts at a time. I use no more than three factual situations, so that in managing six contract negotiations, I am working with only three sets of facts. Since I use more than one simulation, students can play the role of the client in a simulation in which they are not assigned a lawyer role.

I use the CALI© lesson entitled, “Drafting a Contract – the Sale of Goods” for the exercise. This interactive lesson works well as an outside assignment since it provides its own feedback.
A. Phase One: Interviewing and Planning

Prior to beginning the interview, the students receive a memo setting out general guidelines to follow in conducting the interview. For example, the interviewed students must, within reason, answer only the questions asked and not immediately reveal all the information on the fact sheet as a result of an overly broad question. If they are asked a question that is not answered on the fact sheet, they are instructed to say, "I don’t know." The interviewing students should not ask, "What terms do you want in the contract?" or "Do you want a liquidated damage clause?" Instead, they should determine what clauses should be included based on the facts they get from the interview. Both interviewing and interviewed students must use the three stage interviewing process practiced earlier in class, but the interviewing students may also use any appropriate checklist of questions or even a form contract to ask other questions.

To begin the interview, each team is given an assignment sheet that provides a brief outline of a proposed contract. As an example, one team gets an assignment sheet explaining that their client manufactures dump trucks and is interested in obtaining a steady supply of diesel engines for their trucks from an engine company they have contacted but never dealt with before. The team on the other side gets the assignment sheet explaining that their client manufactures and sells diesel engines and has been contacted by the dump truck company about buying diesel engines to install in its trucks. Each team must then interview its client to learn the additional facts relating to the proposed contract.

I give the students playing client roles a fact sheet that contains the information necessary to fill in most of the gaps in the facts contained in the assignment sheet. The fact sheet for the dump truck manufacturer provides specific information about the client, its manufacturing facilities, its problems with its present supplier of engines, what it expects to gain in a contract with a new supplier, and some general information about the potential new supplier. The fact sheet for the manufacturer of diesel engines provides similar information for the seller. The fact sheets reflect the information that might be gained in a typical first interview and provide ample facts for the interviewing students to use in the subsequent planning component of the simulated project.

The interviewing time is limited to one hour. If the interviewing students finish the interview in forty minutes, they may schedule a follow-up interview for the remaining time to ask questions occurring to them after an initial interview. At the end of an hour, or earlier if there are no more questions, the interviewing students may ask the
I interviewed student what facts they missed. If the students are still not convinced that they have all the facts they need, they then come to see me, and I take up the role of the client to answer their questions.

I make the interview as realistic as possible, and thus I do not include in the fact sheet all the facts needed for drafting the contract. As a result, the interviewing students must experience the "I don't know" answer that occurs so frequently in actual interviews. For example, each student interviewed is an agent of a business entity referred to in the fact sheet as a "company." No information is given on the fact sheet as to what kind of business entity the company is, nor is there sufficient information for the interviewing students to conclude that the agent has authority to act for the principal. The interviewing students must then decide whether the missing facts are important enough to pursue. If they decide they need the additional facts, they must come to me for that information since I have become their client at that point. By the end of the interviewing process, they should understand that what they learn in an initial interview does not typically complete the interviewing process and that they alone have the responsibility to pursue any loose ends from an interview.

As in real life, some facts obtained in the interview appear irrelevant to the students and are frequently omitted from any documentation in the file. As the students continue in the project, they may affirm that conclusion, but, again as in real life, some facts that appear irrelevant may later turn out to be important. In one fact situation, I provide facts indicating that no bulk transfer will occur in the transaction. Since most students have never heard of a bulk transfer, or the problems it can create, the facts appear irrelevant to them. Once the issue of a bulk transfer is raised and the students do some legal research, however, those facts become relevant in determining whether the buyer should be protected in the contract by terms addressing the bulk transfer. In emphasizing the need to play it safe in these situations, I have instructed the students to be inclusive rather than exclusive in taking notes during the interview because they cannot always tell what facts may be important in the future as the transaction develops.

I allow this release of information because it is important that the students get all the information to plan the contract effectively; it also gives the interviewing students some feedback about how effectively they conducted the interview. In addition, the students representing the other side do not suffer because of poor fact gathering by the opposing side. Finally, I learn what the interviewing students missed in the interview because the interviewed student returns to me the fact sheet with the missed information highlighted.

I find that students are inclined to exclude any information that appears irrelevant for their present purposes. That inclination may come from classroom professors seeking only the key facts in a case, and from the emphasis on factual brevity in everything from
All of my fact sheets refer to a letter or memorandum indicating that the parties to the proposed contract have communicated with each other prior to any legal representation. I expect the students to see the need to have a copy of that letter or memorandum so that they will not later be blindsided by some understanding or agreement the parties made prior to representation. In class, I talk about a lawyer's need to know what the parties have said to each other prior to legal representation, and I tell the students that including the letter or memorandum in their file indicates to me that they understand this point. Some students believe they have accomplished this objective by merely receiving and filing the letter in the file; actually reading the letter may not seem important to them. As a result, I emphasize in class the necessity of reading carefully everything relating to the representation, and I include some facts only in the letter or memorandum to drive home this point.

I even purposefully allow misinformation to get into the fact sheets, since that is an unfortunate reality of the practice of law. As a result, an interviewed student unknowingly gives some incorrect information that I have included on the fact sheet, and the interviewing students must discover and correct this information as the project proceeds. For example, the fact sheet for the buyers may indicate that the sellers have excess inventory in the amount of 1.5 million units for immediate sale, but in reality the seller, as reflected by the seller's fact sheet, has 7.5 million units for sale. The interviewed student, playing the role of the buyer, unknowingly gives the incorrect lower figure, but the interviewed student also mentions in the interview that the sellers have communicated their offer to the buyer by letter. If the students playing the lawyer role ask for a copy of the letter, the interviewed student does not have it. After the initial interview is over and I have assumed the role of the interviewed student, I will give a copy of the letter to the students playing the lawyer role if they ask me for it when they come to me seeking information omitted from the interview. If they read the letter, they will discover the higher figure and realize they need to go further in ascertaining the correct figure and what amount the buyer really wants to buy.

At the point in class when this misinformation should have been discovered, I talk about the problem of miscommunication and the deleterious effect that the resulting misinformation can have on a transaction. I warn the students that miscommunication will creep into the planning and negotiation of any contract. As in real life,
some students do not discover the misinformation until after the planning is done and the negotiations have started. Although I do not allow a failure to discover misinformation to jeopardize the success of the students’ project, they nevertheless learn quickly the importance of working not only with complete facts, but also with accurate facts.

After the students have completed the interview, they prepare a summary of the facts and place it in their office file, along with the notes taken during the interview. They then analyze the facts in light of the planning component and document that planning in a memorandum placed in the file. Finally, they draft and place in the file a letter setting out for the other side their proposed performance terms for the contract.

At this point, the students turn in their office files, and I, in the role of senior partner, critique them and return them to the students. The students must then review my comments in the file and respond to my critique by taking any corrective action. My critique might challenge the accuracy or completeness of the facts or address the shallowness or lack of detail in the planning process. I might ask the students to provide missing documentation or to revise inadequate documentation. I invite the students to meet with me if they have any questions or concerns about my comments.

B. Phase Two: Negotiation

The negotiation phase of the project begins as each side sends the other side the letter setting out the performance terms they want in the contract. After both sides have reviewed the proposed terms, they should have a good idea of what the other party wants and how far apart they are on the terms of the contract. The two sides must then come together for the first of two negotiations of the contract terms.

The facts from the interview provide the two sides plenty of terms to negotiate. The students representing the buyers will know the type and quantity of goods required by the buyer and a price range that the buyer will be willing to pay for the goods. The students representing the seller will know the price range acceptable to the seller for the sale of goods and the type of goods available, as well as the production capacity of the seller’s manufacturing facility. The students must negotiate not only those terms, but also other terms relating to the performance of the parties, such as when the goods must be delivered and in what quantities, how and where the goods will be transported to the buyer and who will pay for the transportation, and how and when the buyer will pay for the goods. The duration of the contract will be negotiated and, depending on the facts from the interview, perhaps an option to renew or an early termination clause also may be
negotiated.

I allow the students only an hour and a half to negotiate the terms, even if they cannot completely finish negotiating the terms during that time. Each side then orally summarizes for the other the progress they believe they have made. In order to document their work for this phase, the students must include in their office files their negotiation notes and a summary of the negotiation. The summary must record the agreements and disagreements of the parties on the performance terms, and it must also include an evaluation of the negotiation itself. In the evaluation, the students assess whether the goals identified in the planning component were achieved, and if not, whether the failure to achieve the goals was a result of a weakness identified in the planning component or perhaps a strength that was not properly utilized.

C. Phase Three: Drafting

After completing the first negotiation, the students are ready to begin drafting the first of four drafts of the contract. Since the goal of the first negotiation was to agree on the performance terms of the contract, the students’ goal in the first draft is to put those terms down on paper. The two sides, working independently of each other, must draft a contract from scratch or use a form contract that helps them put the negotiated terms in the first draft of the contract.

I allow the students to use contract forms in the drafting phase. The use of forms is a reality of law practice, and we have previously discussed in class the benefits and dangers of using forms. When students use forms in this phase, it allows me an opportunity to emphasize again the dangers of forms when, for example, they incorporate provisions obviously detrimental to their client’s interest or include two merger clauses using different words to say the same thing. In addition, many forms do not follow the drafting rules I teach in class, so the students learn to modify the forms using the rules they have learned in class. I also include in the facts of each project the need for some unusual provisions that make it difficult for the students to rely entirely on any contract form. As a result, the students’ drafts are usually a combination of some drafting from scratch and some drafting from a form.

After the first draft is completed, the students prepare a letter to their client setting out their progress in the negotiation. In the letter, the students must list the client’s original goals from the planning component, indicate to what extent they have reached those goals in the first draft, and, if they did not meet their goals, assess why they did
not.\textsuperscript{15} The letter also encloses a copy of the first draft of the contract for the client's review and comment. Finally, the students prepare a proposed transmittal letter that will accompany the draft of the contract when it is subsequently sent to the students on the other side.

All of these documents are placed in the office file and reviewed by the senior partner. I have forewarned the students that I will read their contract as a hostile reader, much as a lawyer for the other side might do in search of a basis for litigation. I also review the letters to the client and to the opposing students, marking them up as necessary. I then send the office file back to the students with specific instructions to review each of my comments and make appropriate corrections or changes.\textsuperscript{16}

\textbf{D. Phase Four: More Drafting and Negotiating Leading to Final Agreement}

After receiving their office files from me, the students begin working on a second draft of the contract in response to my comments. Since the first draft incorporates only the performance terms, the students must now concentrate on adding to the second draft additional terms to protect the client in the event of breach or from some other external risk.

As part of the planning component of the course, we have talked previously in class about specific clauses that might be added to any contract to protect a client from these risks, and I ask the students to consider adding these clauses, if they are applicable, to the contract they are drafting in the simulated project. The facts elicited in the interview provide opportunities for the students to put many of these clauses in the contract. For example, the goods sold under the contract may be transported hundreds of miles to the buyer, and that fact raises the issue of risk of loss to both parties if the goods should be destroyed in transit. The students on both sides should realize that a risk of loss clause ought to be included in the contract and draft an appropriate clause to protect their client.

In addition, I send the students letters or memoranda from their clients that raise issues of risk and ask how it should be handled in the

\textsuperscript{15} I hope that a comparison of the goals from the planning component with the goals achieved in the first draft will force the students to see the connection between setting goals in the planning component and actually achieving those goals in the drafting of the contract.

\textsuperscript{16} I do, however, allow the students to challenge any of my comments if they believe that what they have done is correct or appropriate under the circumstances. For example, they may use a vague term in the contract when I think that they should have used a more specific term. However, if they realized that the term was vague but they had a good reason for using a vague rather than a specific term, then I will not require the change.
contract. The seller may write its lawyers about its warranty liability to the buyer for the goods and inquire if there is some way to limit that liability in the contract. The buyer may write its lawyers about its commitment to supply the goods to third parties and ask what happens if the seller does not deliver sufficient goods to satisfy those commitments. The students must then face the issues of warranty disclaimers and limitations of damages, and draft appropriate clauses to protect their clients.

When the students finish the second draft of the contract, they place it in the file and send a copy of the draft to the other side, along with a letter of transmittal that specifically mentions the addition of any terms that the parties have not yet negotiated. After each side has compared their second draft of the contract with the second draft from the other side, the students are ready for the second and final negotiation.

In this negotiation, the students must agree on the terms that both sides can recommend to their clients. That agreement entails ironing out any differences in the performance terms appearing in the drafts and in the performance terms they orally agreed to in the first negotiation. Even if the substance of those terms is essentially the same in each version of the proposed contract, the wording in each contract will likely be different, and the students will not only have to agree on the terms but also on the exact words to be used. In addition, the students must negotiate the additional terms added in the second drafts and agree on which terms should be included and the exact wording to be used for each.

In playing the various roles of client or senior partner, I can help broker an agreement when both sides refuse to budge on either the terms or the exact wording of the contract. As the senior partner, I may advise one side that the legal risks they fear are minimal and that they should accept the demands of the other side, and I advise the other side to stand firm on their demand. As a client, I may tell one side to accept the demands of the other side because the client is willing to concede that issue in order to have a contract, and I tell the other side that the issue is a deal breaker for the client and ask the students not to budge.

After both sides reach agreement, they must then jointly prepare a third draft of the contract. In jointly preparing a third draft, the students may adopt one side’s draft as the beginning point for a third draft or they may use parts of both second drafts to construct the third draft. In either case, the students must agree on all the terms, prepare a third draft to reflect their agreement, and place the third draft in their files. The students must also place in their files their negotiation
notes from the final negotiation and a summary of that negotiation, along with a letter to the client that explains the progress made in the negotiation and includes a copy of the third draft. This letter to the client must also explain the benefits and disadvantages of the contract and invite the client to go over the terms with his lawyers.

Each side turns in their office files at this point, and I, as senior partner, review the files for the third time. I check the second draft to be sure that the students have revised the contract consistent with my comments and that they have appropriately added the additional terms to provide for remedies and protect against other risks to their client. I read the third draft of the contract more critically than I do the second draft since the third draft is the joint work of both sides and represents the agreement of the parties.

After I return the files to the students, they must respond to each comment on the third draft by revising the contract in a final draft. I do not make them negotiate this fourth draft with the other side because time is usually running out as the semester nears its end, but I review it to see that the students have made the changes to reflect my comments on the third draft. They may, however, refuse to make a particular revision as a result of my comments if they put in the file a memorandum justifying why no change should be made. This fourth phase completes the simulated drafting course as I presently teach it.

If there is a negative to teaching the course by simulation, it is the time and effort involved for the professor. Except for the assigned drafting textbook and other assigned readings, the professor must develop the materials for the class and continually revise them over time. The students' files must be promptly reviewed, critiqued and returned to the students so that they can complete their work in the project before the semester ends. At the same time, the professor's classroom responsibility in the course continues for much of the semester while the professor and students are working on the project, and there are countless conferences with the students to answer questions or counsel them about the project.

The time and effort devoted to teaching the simulated course, however, is lessened somewhat by basing the students' grades for the course only on their work in the project and not on an exam given at the end of the course. The time and effort are also lessened by limiting class size, using technology to communicate with the students outside of class, constantly reviewing and revising the course goals in light of the course requirements, and thinking about ways to increase the efficiency and effectiveness of both managing and teaching the course. To the extent a simulated course still requires much time and effort from the professor, the course nevertheless provides the stu-
udents with many benefits that they would not otherwise receive in a traditional drafting course.

III. Benefits of An Integrated Approach To Contract Drafting

An integrated approach to contract drafting has many benefits. It would be easier for me to give a fact sheet directly to the students, rather than putting them through the extra step of the interview, but that would not reflect the reality of law practice. The experience gained from conducting a simulated interview to gather the facts with which to draft the contract is far more instructive than merely handing the students a fact sheet. If nothing else, the students realize that the facts in the real world come from the client and not from a law professor in the form of a fact sheet. They also realize that it is their responsibility in the interview to elicit the correct facts and the complete facts, and if they do not pursue those facts, no one else will do it for them. At the same time, they realize that if they do not have the interviewing skills they need to elicit the facts effectively from the client or a sufficient knowledge of applicable law, they will not be successful in gathering the necessary facts. If they do not get the facts they need, their goal of helping the client in the planning component is likely to be unattainable.

The students learn that the interview can be a complex process that takes time and effort to master. They experience for themselves how hard it can be to get the facts from a person who does not know what to tell the lawyer, does not have all the information the lawyer needs, and may be misinformed. They also experience the real-world feeling of discomfort that arises from wondering if they really have all the facts from the client, particularly when they know that I purposefully leave out some important information.

Finally, when the students get to the planning component of the project and begin to analyze the facts they have gathered from the interview, they realize that the gathering of facts in the interview is the foundation upon which rests the success of the entire task. Without the facts, they cannot do the planning necessary for negotiating and drafting the contract, and they cannot get the facts unless they have a good understanding of the interviewing component.

As valuable as it is for a student to experience interviewing another person, it is also a valuable experience for a student to be the person interviewed, and the simulated project provides the opportu-

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17 These facts can come from sources other than the client, as in the situation where one lawyer in the firm conducts the interview and another lawyer drafts the contract.
nity for some students to be interviewed as the client. I encourage the students who are interviewed to reflect on how effective the interviewing process has been in getting information from them and to use any insight they gain to make themselves better interviewers. For example, if the students interviewing them are rude, impatient or arrogant, they will quickly learn how not to act in an interview. I instruct the students who are interviewed to provide the interviewing students who request feedback with their insights about the effectiveness of the interview.

Contract drafting by itself could be taught by having the class review and revise poorly drafted contracts or by drafting from scratch various types of clauses or entire contracts. Contract planning, however, cannot be taught unless the students are provided with enough facts to analyze so that they can come up with a plan for their client. When the students know about their client’s wants and needs, as well as strengths and weaknesses, in contracting with another party, they will have the facts to use in planning a contractual arrangement. In doing so, they will be able to practice using those facts, together with their knowledge of the applicable law, to negotiate and draft a contract to achieve favorable results for their client. The interviewing component of the project provides the students with an array of facts to analyze in the planning component of the project, and the project’s four phases guarantee that the planning component precedes, as it should, the actual negotiation and drafting of the contract.

Of course, the planning component could be taught and practiced with a fact sheet handed directly to the students, and the interview component skipped entirely, perhaps saving more time for additional planning and drafting exercises. Nevertheless, the students benefit from understanding the connection between the interviewing and the planning components. After practicing the planning component in class, the students better understand the type of information they need from a client in order to plan a contract. When students are familiar with the information they will need in the planning component, they can ask the questions in an interview that will produce the information they need for planning the contract. In short, the better the planner, the better the interviewer, and the better the interviewer, the better the planning can be. Interviewing skills and planning skills go hand in hand; they should be taught together and experienced by the students before they begin to negotiate or draft the contract.

Perhaps the most important point the students learn from the simulated negotiation is that what they as lawyers want in the contract will not necessarily be what they get. Although they may plan carefully and draft perfectly to obtain certain provisions for their client,
they soon realize that they may not in the end be able to keep every-
thing they want in the final version of the contract because of the give-
and-take of the negotiations.

Without having to conduct a negotiation, the students in a draft-
ing class could easily conclude that the contract that they draft in class
will be the end result and will achieve a complete victory for the cli-
et's interest. The negotiation process and the conflicting interests of
the opposing client quickly teach them otherwise. In the project, they
prepare the second draft exactly as they and their client want it, but
after the final negotiation, they must prepare a third draft that accom-
modates the concerns and interests of both sides.

The simulated project also shows the students the importance of
their negotiation skills in getting the terms they want in the contract.
Telling students in class about the importance of their negotiation
skills in drafting a contract will do them little good; they will merely
nod their heads in agreement and smile pleasantly. The experience of
actually negotiating the terms of the contract, however, with the re-
sulting feelings of exhilaration or disappointment, depending on the
outcome of the negotiation, drives the point home. The process helps
them understand the importance of negotiating skills in achieving the
terms desired by the client.

The negotiation process also rids the students of the common
misconception that one contract fits all situations. Since the fact
sheets used in the interviews provide for conflicting interests between
the parties and since each side advocates in the negotiation for the
interests of its client, the students are able to see how contracts can be
drafted to favor one side or the other. For example, students repre-
senting a buyer may want a clause keeping risk of loss on the seller
until a late point in the transaction, while the students representing
the seller may push a provision to shift risk of loss to the buyer at an
early point in the transaction. One side may try to obtain a force
majeure clause to protect its client in the event of a particular occur-
rence, while the other side may reject that clause and insist instead
on a provision requiring absolute performance in the event of that
occurrence. Since the negotiation, rather than the boilerplate terms of
some "standard contract," will determine what clauses are included in
the contract, the students begin to realize that they have considerable
latitude in proposing and negotiating the provisions of a contract to
suit their client, and they should not limit their efforts to the terms
included in a formbook.

The students are also able to understand the subtle difference be-

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18 A force majeure clause lists the circumstances that excuse a party's nonperformance. BURNHAM, supra note 1, at 129.
tween negotiating the terms of a contract and negotiating the wording of the terms of a contract. In the project's first negotiation, the parties merely agree orally on the proposed performance terms but not on the precise wording of those terms. In the final negotiation, however, the parties must not only agree on the terms in the third draft but also negotiate the precise wording of those terms.

At the stage when students exchange different versions of the same contract, students are able to see for themselves that they have more control over the language of the contract if their draft is used as the basis for the joint draft. If the students instead compromise and take provisions from both drafts, not only do they find themselves less in control of the language, but they also experience the problem of keeping the language of the final draft internally consistent.

In preparing four drafts of the same contract, the students get used to drafting and redrafting the language of a contract, a key element in good drafting that is frequently avoided by impatient students and lawyers alike. In reviewing and perhaps even disagreeing with the senior partner's criticism, as well as receiving criticism from their working partner and the team on the other side of the contract, the students get used to criticism of their work and hopefully learn to take it in stride and to profit from it.

The negotiation and drafting phases of the simulated project also allow the students to make practical use of the work they have done in the planning component. It is, of course, the planning component that gives direction and purpose to both negotiation and drafting. While many students may intellectually accept the need for some type of planning before negotiation and drafting, in the simulated project they can experience the advantage of having a plan to guide them through the give-and-take involved in both negotiating and drafting the terms of the contract.

In addition to allowing the students to practice the skills involved in the contract drafting process, the integrated approach to contract drafting also places the students in a simulated law practice where they must complete their project under the same conditions that practicing lawyers must work in serving their clients. This approach then exposes the students not only to interviewing, planning, negotiation, and drafting but also to professional ethics, file keeping (both as a means of protecting the lawyer from malpractice claims and as an organizational tool), law office management, and the importance of different professional relationships.

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19 This is the draft that each side prepares independently of the other side, and the teams must consider both versions of the second draft to prepare the third draft that both sides must later approve.
Any contract drafting course should include an ethical component, and the simulated project allows many opportunities for the students to apply ethical rules to facts arising out of the representation of the client. Although the students may know the ethical rules, they sometimes have a hard time seeing an ethical issue when it actually confronts them. The simulated project gives them the experience of confronting ethical issues in context and handling them as a practicing lawyer might.

In class, we talk about ethics and work through a number of the rules as they apply to contract drafting. I later provide the class an ethical checklist setting out briefly the rules that might possibly come into play in a contract drafting situation. The students must place this checklist in the file for the simulated project and note on the checklist whenever an ethical rule might be implicated. Throughout the project, I then introduce the facts, either in the fact sheet or through memoranda or letters to the students, that bring into play many of the ethical rules and force the students to handle ethical issues.

As an example, before a lawyer starts any work, the lawyer must consider whether a conflict of interest could prevent representation of the client. In class, we talk about what a lawyer does in a conflict of interest check to comply with the rules of professional responsibility. A client information sheet, filled in partially by the interviewed student, requires that a conflict of interest check must be made, and the students must record on that sheet exactly what they did in the conflicts check, what they found, and what they concluded, and they must promise to evaluate any situations that develop that may involve a potential conflict. After the project begins, the students receive a memorandum from the senior partner that his son is working in the law firm representing the other side and that the representation of the client must stop immediately. The students must then resolve this ethical issue before continuing their representation, stating the correct rule and their resolution of the issue in a memorandum placed in the file.

In another situation, the senior partner asks his associates to include a certain clause in the client engagement letter that attempts to limit prospectively the firm's malpractice liability. When the students spot the issue and refuse to include the clause, the senior partner tells them that they will be fired if they do not include the clause. He suggests that they can protect themselves by putting a note in the file that they disagreed with the senior partner and included the clause only because the senior partner demanded it. Now the students must

20 MODEL RULES OF PROFESSIONAL CONDUCT R. 1.8 (2003).
worry about their responsibilities as subordinate lawyers and whether they must report their senior partner's conduct. The students must then resolve these ethical issues and document their decision in a memorandum placed in the file.

In a traditional drafting course, many ethical rules would probably never be considered since the facts are simply not present to raise the issues. When contract drafting is taught by integrating it into the law practice, the interview produces abundant facts that raise ethical issues that relate directly to drafting a contract, as well as issues that relate to client representation more broadly. For example, the students must provide in the client engagement letter for an hourly fee, a retainer, and a provision that if monthly payments are not paid when billed, then the lawyer may withdraw from the representation. The ABA Model Rules of Professional Conduct deal with each of these provisions, and the students are expected to see the potential issues and comment on them under the appropriate rules on the ethical checklist, even when the facts show no actual violation of the rule, and even if the ethical rules do not relate directly to drafting a contract.

In actual practice, lawyers who draft contracts must be careful not only to protect the interests of the client, but also to protect themselves against the threat of malpractice. The drafting lawyer's responsibility extends throughout the contract drafting process and even beyond the signing of the contract. If the performance of the parties under the contract ends successfully, the lawyer's responsibility then ends, but if some breach stops the performance prematurely, and litigation is threatened or initiated, the drafting lawyer may later be called to task for a glitch in the drafting and possibly face a malpractice suit that lingers long after the contract was signed and the fee for the work received. If drafting lawyers do not protect themselves during the drafting process, their work may return to haunt them long after the drafting process is over. The students, therefore, need to confront the reality that in drafting a contract they may incur liability for malpractice, and they should have some idea about how to protect themselves.

Using the file to document the legal work performed is one important way for a lawyer to protect against malpractice claims, and the integration of contract drafting in the context of an actual law practice

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21 Id. R. 5.2, 8.3.
22 Id. R. 1.5, 1.15, 1.16(b)(5).
23 Although liability for malpractice claims may be mentioned in some doctrinal courses, I suspect most law students have only a vague idea about malpractice and little knowledge about how to avoid it. A law office management course may include risk management as a topic, but that course is probably not taught in all law schools.
provides an excellent way to teach students good file keeping habits.\textsuperscript{24} In addition to introducing the students to the obvious need to document the interview and the negotiation, I try to get the students in the habit of using the file to document every aspect of the contract drafting process. If the students talk with the senior partner, I require the students to prepare a memorandum that documents that conversation. If they have further conversations with the client, perhaps to ask more questions after a negotiation session, they write a memorandum about that conversation. If they have a conversation with the lawyers on the other side that is not included in a negotiation summary, they must also document that conversation. I want the students to realize that the documentation will help explain what the lawyers did and why they did it, and what the client wanted or did not want and why, all of which may help the drafting lawyer in a subsequent malpractice claim.

I emphasize the connection between file documentation and malpractice in a drafting exercise in class. In that exercise, the students advise the client to put a certain clause in the contract. The client refuses the advice on some semi-rational basis, and the clause is accordingly not included in the contract. As the performance of the contract unfolds, it later becomes clear that the clause should have been added, and the client accuses the students of omitting the clause and leaving the client's interests unprotected. When the students remind the client that he had rejected their advice to include the clause in the contract, the client denies receiving this advice, thus placing them squarely in that common and frustrating situation of a "yes, I did...; no, you didn't..." debate.

This exercise teaches the lesson that documenting the process of client decision making in writing provides some proof that the discussion transpired as the lawyer remembers it and also serves as a reminder to the lawyer of what transpired. When students tell me they can easily remember what they said and did, and perhaps even why, I explain that the client's claim of malpractice may, subject to the statute of limitations, come up some years later, long after the drafting lawyer has forgotten these events. While they as students can probably remember what happened in one case spread over a period of two or three months, the practicing lawyer with many cases spread over a far longer time does not have that same advantage.

Students learn from this exercise that lawyers may find more protection from malpractice claims in the documentation contained in their files than they will find in the terms of the drafted contract. Only

\textsuperscript{24} Documentation is an important tool for lawyers, but I suspect that it is one rarely, if ever, mentioned in law school. I was taught in the law office, not the law school, to document all phases of any representation of a client.
then do they understand the importance of including in the file a memorandum setting out their advice to include the clause and explaining the client's decision to delete the clause. I ask the students to apply this lesson to each phase of the simulated project, and I back up that request by carefully checking the documentation in the file whenever I review it.25

Although it would be easier simply to warn the students in class about the dangers of malpractice in contract drafting and the need to document the file for their own protection, they would not understand the importance of the message without the experience of the simulated project. Even with the lessons of the simulated project, it is very difficult to get the students in the habit of carefully and fully documenting their files. When students do document their files, they frequently tell only half the story. If they state they advised the client to do something in a certain situation, they frequently fail to state why they gave the advice and whether the client accepted or rejected the advice, and if the client rejected the advice, why the client did so. By the end of the project, their documentation of the file has improved, but only with much prodding by me.

I also require the students to evaluate in writing the documents they receive during the project. For example, those students who discover that they represent a corporation eventually determine, after prodding by the senior partner, that they need to obtain a corporate resolution authorizing an appropriate officer to sign the contract. After obtaining a copy of the resolution from the client, most students will put the resolution in the file, without considering whether the language of the corporate resolution is appropriate to authorize the signing of the contract. When they are finally required to read the resolution and apply it to the facts of their project, they realize that the resolution is not drawn broadly enough to cover the contract, and they redraft the resolution and send it back to the corporate directors for approval. At the conclusion of this exercise, the file should include a copy of the original corporate resolution, a memorandum explaining why the resolution was inadequate and what they did about it, and a copy of the redrafted resolution.

During the course of the project, I bring up several legal issues that require some simple legal research. For example, the students may have to decide if they can liquidate damages or limit consequential damages. As they undertake the research to answer these ques-

25 Documenting the file also provides proof that the lawyer has complied with Rule 1.4(b) of the ABA Model Rules of Professional Conduct which requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
tions, I warn them that many lawyers in a busy practice make the mistake of researching a legal issue and finding the answer but never documenting the research in the file. If the issue becomes important later in the representation, the lawyer has nothing in the file to show that the issue was considered or how it was resolved. In the simulated project, I require the students to document their research in a memorandum that provides a statement of the facts, the rule and its citation, the application of the rule to the facts, and the conclusion.

In the traditional drafting course, little consideration is given to the reality that a contract must be negotiated and drafted within the context of a working law firm, even though it is through that business entity that the lawyer delivers legal services to the client. The simulated project, however, provides an opportunity to introduce the students to some elements of law office management that affect the broader drafting process. As a result, the students gain some sense of the need to practice effectively and efficiently to better serve the public, and to benefit themselves as well as the legal profession.

As an example, I require my students to use a "to-do" list throughout the simulated project. On this list, the students are supposed to describe each task to be completed, state which partner is to do the job (or client, if client needs to do something), the deadline for completing it, and the date it is actually completed. This list serves as a simple but functional tickler system for the file, and I use it not only to make sure that tasks get done on time, but also to convey to the students the idea that their complex professional lives will require an effective tickler system in their law practice.

When students fail to complete the work that the senior partner has specifically assigned, it is often because the “to-do” list is either incomplete or has been ignored. As a result, one of my more frequent questions in class or in office consultations after assigning a specific task is, “How are you going to make sure you do it?” When I first ask the question, I usually get blank stares. As the semester winds down, the students answer, “Put it on the ‘to-do’ list.”

The students keep time sheets indicating the work done, the date it was done, the person who did the work, and the time it took to do it. Keeping time sheets gives the students a sense of the relationship between tasks to be performed and the time it takes to do them, and it

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26 I graduated from law school in the early 1970’s without the slightest inkling of what was involved in the delivery of legal services to the public.

27 Students are surprised to learn that malpractice insurers ordinarily require that law offices maintain an effective tickler system.

28 I point out to the students that the “to-do” list is one device that should help them comply with the diligence requirement of Rule 1.3 of the ABA Model Rules of Professional Conduct.
introduces them to the reality of keeping track of time in the practice of law.

To give the students a sense of how time relates to money, I require the students to prepare a fee statement after they finish the third draft. If they have kept a detailed time sheet, they will have an easy time preparing the fee statement by transferring the information on the time sheet to the fee statement, without having to go through the file to reconstruct what was done and when. In preparing the fee statement, the students also have to confront the issue of whether they can fairly charge the client for all the work they have done. The fees reflected in these statements typically add up to several thousand dollars, a fact that excites some students but shocks others who consider the effect on the client.

I emphasize the need for file organization by requiring that all files be organized in a particular way so that the students can locate their documents quickly and efficiently when they meet with me in my office. In the beginning, they often neglect to bring the file to the meeting at all or, if they do bring it, they fail to organize it, resulting in some very unproductive meetings. As in the case of learning to document the file, the students eventually realize the value of an organized file, and occasionally former students who are now practicing law have asked me to refresh their memory about file organization.

The simulated project also teaches students about the importance of professional relationships – with clients, associate lawyers, supervising lawyers, and opposing lawyers. Although a traditional drafting course may suggest otherwise, lawyers do not work in isolation from one another. Instead, a lawyer must work well with all types of people. A lawyer’s representation of a client may fail miserably if the lawyer cannot work with people or adjust to those who may differ in personality, race, gender, religion, political belief, or legal interests.

Good working relationships probably cannot be taught in class, but they can be experienced in a simulation. In the simulated project, the students cannot finish the project without having to work closely with the senior partner and the client, as well as a student partner and students acting as the lawyers for the other side. When students enjoy good personal working relationships with those involved in the project, they can usually complete the project fairly successfully. On the other hand, if they have poor personal working relationships, serious problems quickly arise and sometimes require my intervention.

Although the professor and students with whom a student must work in the simulated project will not reflect the range of people a lawyer will have to work with in practice, the simulation gives the students at least a flavor of what they might experience in an actual prac-
tice. In the simulated project, both the student’s working partner and the students working as lawyers for the other side are selected by a random method rather than by student choice. The students therefore cannot team up with an already known, compatible partner or opposing team, and must experience these relationships as they develop.

The most important working relationship for any lawyer is that between lawyer and client, and even in the artificial context of the simulation the students develop a sense of responsibility toward their clients. Because the simulation is ongoing, the students experience what it is like to represent a client in a continuing relationship over a period of time. That relationship begins with the interview and the planning of the contract, extends through the negotiation and drafting phases, and ends with the preparation of the final draft. During that time, the students must stay in contact with the client, advise the client, keep the client informed, and follow the client’s instructions. The lawyer’s relationship with the client is an integral part of the contract drafting process, and counseling the client about the contract and its effect on the interests of the client is essential to any representation of the client. In a non-simulated context, a student might believe that a contract is drafted without any need to communicate with the client.

In the simulated context, the students in the planning component must set out the advice that the client should be given at the beginning of the representation. That advice can be as simple and practical as advising the client to investigate the reputation of the other side as a contractual partner, or as complex as advising the client about the benefits and risks of a requirements contract or the need for some type of security. As the project continues into the negotiation and drafting phases, the students should be able to offer additional advice on specific terms of the contract, including advising the client on certain terms offered or demanded by the other side during the negotiation. Finally, as the project closes and the students send the client the final draft of the contract, they must in the letter accompanying the draft assess the contract in light of the client’s goals and resources and invite the client to go over the contract “line-by-line.” If any terms in the draft are still unsatisfactory in the opinion of the students, they must warn the client in the letter about the possible adverse effect of the objectionable terms.

The simulated project also introduces the students to the contractual relationship between the client and lawyer. Students are somewhat surprised to find that drafting a contract for a client involves not one contract, but two contracts: the contract between the client and the other party and the contract between the client and the drafting lawyer. To help the students understand the contractual relationship,
I require that they draft a client engagement letter in the first phase of the project. In that letter, the students describe the scope of their work and cover other matters such as an hourly fee for their work, an estimated fee for their work, a retainer, reimbursements for costs advanced, and monthly billings, as well as contingencies for non-payment of a monthly fee statement or a breakdown in the negotiation before the contract is signed. At the end of the project, the students must follow through on the client engagement letter by drafting a fee statement setting out the services performed and the costs advanced and giving credit for the retainer.

Another working relationship that is important for success in contract drafting is the relationship with opposing counsel. Although both sides have a common interest in the successful drafting of the contract, the two sides must work with the differing interests of their respective clients. If the two sides cannot work well with each other in negotiating and drafting the contract, the success of the representation for either side is doubtful. Since both sides must agree on all of the terms of the contract to complete the project successfully, they experience the need to work together for the benefit of both clients, an experience that is completely missing in a non-simulated context.

Finally, the simulated project introduces the students to the relationship between a new lawyer and a mentor, who may be a senior lawyer or a supervising partner. The most important teacher after law school is the mentor who guides the new lawyer toward effective lawyering. In the simulated project, I play the role of the senior partner who advises, critiques, prods, reassures, and sometimes compliments the students as they represent their client in the drafting of the contract. I am constantly available to the students and encourage them to see me when questions or problems arise. I am surprised that students will often do some questionable things without asking for my advice in my role as senior partner or classroom professor. Their behavior suggests to me that they are perhaps unfamiliar with the benefits of a mentoring relationship. By using simulation, I hope to give students some idea of how valuable a good mentoring relationship can be in their professional lives, and I believe that some of the most effective teaching I have ever done in law school has been in my office with students who seek additional information or advice about their projects.

Conclusion

Contract drafting involves more than just putting words on paper. It is a long and involved process that begins with interviewing the client and planning the transaction, and it does not typically end until
both parties have successfully negotiated the terms, as well as put them on paper. To teach contract drafting effectively in law school, students should be exposed to the entire process and not just to the actual drafting of words on paper.

A simulation of the drafting process that takes the student through interviewing, planning, negotiation, and drafting allows the students to practice the skills required in each component of the drafting process. Instead of having parts of the process taught in separate law school courses on interviewing and counseling, negotiation, and drafting, the students in the simulation are able to see the entire picture at one time. The simulation helps the students understand how the components fit into the entire process and how each is an essential part of that process.

Putting the simulation in the context of a law practice adds a measure of reality that stimulates student interest, but it also demonstrates that the drafting process does not take place in a vacuum. When the students are involved in the drafting process, they must deal with a client, a senior partner, a law office partner, and lawyers representing the client on the other side. And, at the same time, the students must grapple not only with the legal issues underlying the contract, but also with ethical and law office management issues, and they must plan to avoid malpractice.

Integrating contract drafting into a simulated law practice provides an effective method of teaching the entire drafting process and also provides students with experience in areas that many law students often are not exposed to in law school. Students will not be transformed into instant drafting experts by the simulation, but it will give them a solid and realistic framework on which they can continue to build when they begin practice.