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Turning the Firm into a School: Help Your Associates Learn to Draft Contracts – The Right Way

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Turning the firm into a school

Help your associates learn to draft contracts — the right way

By Charles C. Lewis

It should not be surprising to practicing lawyers that new associates come to work without the slightest idea about how to draft a contract. They may be able to do legal research on the Internet and write a fair memo or brief, and they may even exhibit considerable advocacy skills they learned in moot court and mock trial competitions in law school. But if you assign them a contract to draft, they will freeze like a deer in your headlights.

The reason for this strange behavior may be explained by their failure to take a contract-drafting course in law school. Unfortunately, contract-drafting courses have never been wildly popular in law schools; they are perhaps considered too similar to the often unpopular course in legal writing that law students are generally forced to take during their first year. So many law students will skip a contract-drafting course without the slightest remorse in favor of courses that seem to them more exciting and relevant to the practice of law. And if

the law students hold fast to that false but commonly held belief that much of law practice today is merely filling in blanks of pre-prepared forms, it is surprising that contract drafting attracts any students at all.

But there is another problem, and it exists even when new associates have been smart enough to take a contract-drafting course in law school. The problem is that traditional law school courses in contract drafting include only a part of the drafting process. Students are typically taught drafting by assigned readings, classroom lectures and discussions, as well as by drafting exercises to practice what they have hopefully learned. But teaching students drafting skills is not teaching the broader process involved in producing a written contract.

Practicing lawyers who regularly draft contracts know that contract drafting involves more than just putting words on paper. Instead, contract drafting is a long and involved process that begins with interviewing the client and planning the transaction. It does not typically end until both parties have successfully negotiated the terms, as well as put them on paper. Mere drafting skills alone will not make a competent contract drafter.

Teaching contract drafting effectively to law students, and, indeed, even to new associates in the law office, requires that they be exposed to more

than just putting words on paper. If any law student or new associate is to be efficient and effective in drafting contracts in practice, they should be exposed to the entire drafting process and not limited to readings, lectures and drafting exercises where the drafting experience is cut off from the realities of law practice. Instead, they should experience the interviewing for and the planning and negotiating of the contract, as well as its drafting, just as practicing lawyers experience it. Only then will they be able to understand and appreciate the entire contract-drafting process.

As a classroom teacher in a law school, I teach the contract-drafting process by integrating my drafting course within the setting of a simulated law practice, where the student 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 and drafted successfully.

The students in my class must wrestle the facts for the contract out of simulated client interviews, just as practicing lawyers must do, and not from a fact sheet as is so often used in law schools. After they have gathered the facts by interviewing the client, they must then grapple with that information to plan a contract in which

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Jennifer Kalis

their clients can successfully achieve their contractual goals. The students must next go through a simulated negotiation process that involves students representing the other client's interests, just as in an actual practice.

Then and only then do the students begin to put words on paper and produce a contract that both sides will hopefully approve. And throughout this process, the students use a practicing lawyer's office file to document their work in the interview, as well as in the planning, drafting and negotiating of the contract.

Law students who go through this classroom simulation of the contract-drafting process have a good feeling for what it means to represent a client in negotiating and drafting a contract in a law firm setting. But what about new associates in the law firm who either did not take a contract-drafting course in law school or who took a course that emphasized only the drafting phase? How should those associates be trained to represent the firm's clients in negotiating and drafting a contract?

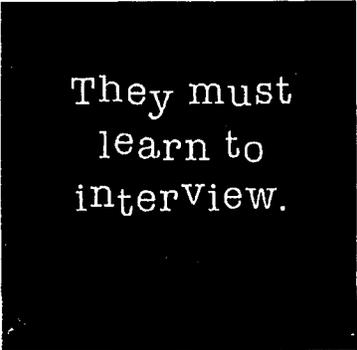
New associates should certainly not be trained by the traditional classroom method of teaching contract drafting — that is, by emphasizing only the drafting phase. That is usually what happens in law firms where the supervising lawyer is too rushed to put new associates through the entire contract-drafting process. Typically new associates are assigned the grunt work of preparing a first and maybe a second draft of the contract, while the supervising lawyer does the interview with the client, plans the transaction (to the extent that is done), and then makes the final adjustments to the contract after negotiating the terms with the lawyer for the other side.

In that situation, new associates will never develop as competent contract drafters. While they may learn something about drafting if the supervising lawyer goes over the contracts drafts with them, they will never realize the importance that interviewing, planning and negotiating have in the contract-drafting process. As in the traditional law school drafting course, the associ-

ates will see only a part of the broader contract-drafting process.

A law firm's training program should instead be developed along the lines of the model that I use in the classroom to give law students the same experience that practicing lawyers have in negotiating and drafting a contract. That model will work as well in a law office setting as it does in the simulated law practice of the classroom.

New associates should be involved in the contract-drafting process from the very beginning. They should take part in the initial interview of the client



They must
learn to
interview.

and not just be given a summary of facts that comes from the supervising lawyer's interview of the client. Associates should not be expected to know much about the interviewing process or understand how critical it is to the drafting process, but they should be expected to spend some time reading the legal literature about interviewing and perhaps attend a CLE on interviewing, if one is offered.

The supervising lawyer must take the time to be a good mentor for associates by sitting through interviews with associates and passing on to them any wisdom gained from the supervising lawyer's years of experience in interviewing.

The experience that associates will gain from conducting interviews with the clients is far more instructive than merely handing the associates a summary of facts prepared by someone else who actually did the interview and expecting the associates to rough out a

draft from those facts. Associates will quickly understand that interviewing is a complex process that takes time and effort to master.

They will 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. 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.

At the same time, associates will 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 phase of the process is likely to be unattainable.

Associates must also be involved in the planning phase of the drafting process. This phase is probably the hardest of the phases of the drafting process because it is the thinking part. It requires that the associates analyze the facts from the interview along with applicable law to propose contract terms that will achieve the client's goals as closely as possible. For example, if applicable law as applied to the contract will bring about a result that is unsatisfactory for the client, the associates should learn to question whether they can by drafting change that unsatisfactory result to a result more in favor of the client.

The planning phase of the contract probably comes naturally to practicing lawyers who have been drafting many contracts over the years, but new associates need close supervision to plan the contract in a systematic manner. Each term of the contract should be drafted not only with care but also with an understanding of what that term is to accomplish.

In order to get associates to under-

stand more thoroughly this phase, they should be introduced to 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 or she wants to be. In determining the answers to the first and second planning questions, the associates 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, the associates must identify the performance terms that describe what the parties must do in carrying out their obligations under the contract.

In addition, they must predict any obstacles to carrying out those performances and figure out 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.

If the associates can master this difficult phase of the contract-drafting process, they should see how the planning component and the knowledge of law affect the drafting of a contract. They should realize that they cannot draft a contract without a good working knowledge of the law involved. In addition, when associates get to the planning phase of the contract and learn how to analyze the facts to turn them into a contract for the client, they should realize for the first time that the gathering of facts in the interview is the foundation on which rests the success of the entire task of drafting a contract.

Without the complete and accurate facts, they cannot do the planning necessary for negotiating and drafting the contract, and they cannot get those facts unless they have a good understanding of the interviewing phase of contract drafting. In short, interviewing skills and planning skills go hand in hand and should be taught together and experienced by the associates before they begin to negotiate or draft the contract.

Associates should also be involved in the negotiation phase of the drafting process. As in interviewing, associates should not be expected to know much about negotiations, although it is likely that they may have taken a negotiation course in law school. Nevertheless, they should be expected to read the legal literature on negotiation and attend a CLE on negotiation, if one is offered. And again, the supervising lawyer must take the time to be a good mentor for the associates by sitting through negotiations with the associates and passing on to them any wisdom gained from the supervising lawyer's years of experience in negotiation.

When associates are involved in negotiating the contract terms, they will realize how important the prior planning phase of drafting is for a successful negotiation of the contract terms. For example, by identifying the client's goals, strengths and weaknesses, and performance terms, and by predicting future events for which their clients may need protection, the associates have gone a long way in preparing themselves for the give-and-take of negotiations.

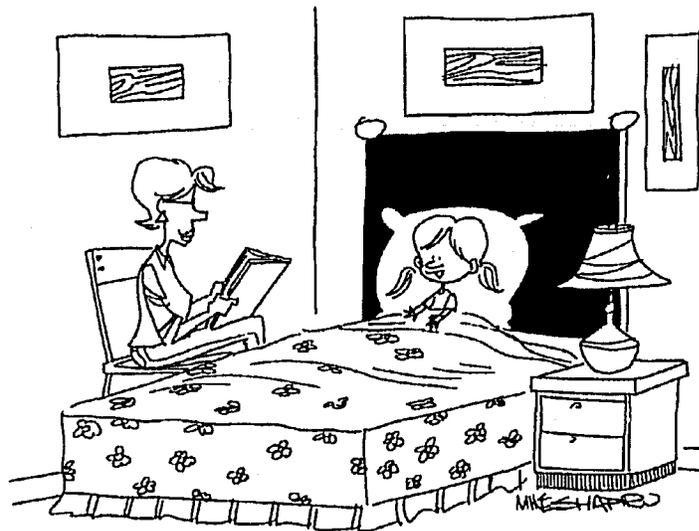
Allowing the associates to negotiate

for their clients, with the resulting feelings of exhilaration or disappointment — depending on the outcome of the negotiation — will make the associates appreciate the importance of their negotiation skills in achieving the terms needed by the client.

Perhaps the most important point the associates should learn from the negotiations is that what they as lawyers want in the contract will not necessarily be what they get in the end. 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 everything they want in the final version of the contract because of the give-and-take of the negotiations.

Without having to experience a negotiation, the associates could easily conclude that the contract they draft for the supervising lawyer will be the end result and will achieve a complete victory for the client's interest. The negotiation process and the conflicting interests of the opposing client — as advocated by the opposing client's lawyers — will quickly teach them otherwise.

And finally there is drafting, the fourth phase of the contract-drafting



'Tell me the story about the girl who was editor of the law review and went on to become partner at a prestigious firm.'

process. Before this phase begins, the supervising lawyer should emphasize to the associates that without good interviewing, planning and negotiating by the associates, there will be no firm foundation for drafting a contract. If the interviewing, planning and negotiation is done well and successfully, then the proper groundwork for drafting has been laid, and the associates can proceed with confidence to this last phase.

Unless the associates have taken a drafting course in law school, the associates should, of course, not be expected to know much about drafting. Nevertheless, just as in interviewing and negotiation, the associates should be expected to spend some time reading the legal literature about drafting, perhaps attending a CLE on drafting, if one is offered, and perhaps even practicing drafting in drafting exercises suggested by law school primers on drafting.

Certainly, there is no substitute for the supervising lawyer who must be a

good mentor for the associates by taking the time to review draft after draft of the contract until it completely and clearly sets out the agreement of the parties. Requiring associates to complete more than one draft is certainly a key element in good drafting that is frequently avoided by impatient law students and lawyers alike.

In supervising the drafting of the contract, the supervising lawyer must not just be concerned with the drafting style of the associates but also with the content of the contract. For example, the supervising lawyer must follow through on the planning phase by making certain that work done by the associates in the planning stage of the drafting is appropriately reflected in the terms of the contract.

It is, after all, in the drafting phase that the associates are able to make practical use of the work they did in the planning phase. Associates should find that the planning phase gives direction and purpose to drafting, and they should experience the advantage of hav-

ing some plan to guide them through drafting the terms of the contract.

While it requires much time and effort from the supervising lawyer, a law firm training program that involves new associates in the four phases of the contract-drafting process is necessary to equip them with the skills and knowledge that they will need to become effective and efficient contract drafters. Cutting corners by involving new associates in only the traditional drafting phase may save time and ease the conscience of a busy supervising lawyer, but it is, in the long run, a mistake, just as it is in teaching law students.

Involving associates only in the drafting phase does not provide the foundation on which drafting competency may be attained and leaves the associates without any understanding of how interviewing, planning, negotiating and drafting fit into the broader contract-drafting process and how each is an essential part of that process. **DL**

PLANNING PUBLIC SERVICE

Making Service Part of the Workplace Is Good for the Profession and the Public

By Michael S. Greco

President, American Bar Association

Most lawyers feel a responsibility to the public, but lawyers today are facing the more rigorous demands of modern practice, which deplete time and energy for pro bono and public service work. Lawyers are frustrated, while the public's need for legal services remains severe.

I have appointed the Commission on the Renaissance of Idealism in the Legal Profession to develop policies and practices that would enable lawyers to do more pro bono and public service. It already has created the *Pro Bono and Public Service Best Practices Resource Guide*, an online clearinghouse of pro bono and public service programs that lets lawyers learn from others' experiences and submit their own for others' benefit.

As ABA president, I have asked lawyers to do more pro bono and public service, but I am not asking lawyers to do it alone. I urge you to visit www.abanet.org/renaissance, use the best practices, and share your own.

