

Transactional Lawyering

Transactional Lawyering

An Experiential Approach to
Communication and Problem-Solving

Julie A. Ryan

ADJUNCT PROFESSOR OF LAW
GEORGETOWN LAW

ADJUNCT PROFESSOR
LOYOLA LAW SCHOOL, LOS ANGELES

PARTNER
ACCELERON LAW GROUP, LLP



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Preface

When I first began teaching lawyering skills in 2008, I had been a practicing transactional attorney at major international law firms for more than 10 years. I was immediately struck by how most courses—and the law school curriculum in general—were focused primarily on litigation, and by how little I had been aware of what I was missing when I was a law student. This was especially true of skills-based courses. Yet, almost half of law students go into transactional practice after graduation, often with little insight or exposure to what transactional practice even is.¹

In addition, I felt more emphasis was needed on preparing our students to communicate effectively in the increasingly globalized practice of law. Lawyers of today—especially transactional lawyers—frequently represent clients in transactions that span different legal systems, cultures, and languages. To succeed in this environment, they need to bring with them into practice a minimum level of cross-cultural competence.

I set about creating an upper-division transactional lawyering-skills course, called Advanced Legal Writing for International Business Lawyers, to address this perceived gap in course offerings. The course, which I was gratified to find proved to be extremely popular with both J.D. and international LL.M. students, evolved into the idea for this book.

This book is intended primarily to serve as a template and principal text for professors interested in teaching a simulation-based advanced legal writing or lawyering skills course. But it might be equally useful as supplemental reading for a business-law-oriented practicum or clinic, or any other business-law class on topics such as international business transactions, M&A, negotiations, and contract drafting as a guide to some of the practical aspects involved in business law and cross-border transactions. It can also serve as a useful reference guide for junior lawyers as they enter practice.

This book does not presume students will have taken business organizations or other prerequisites. Thus, it adapts well to teaching both J.D. and international LL.M. students. When I teach my course, I typically hold half of the spaces in the course for international LL.M. students.

What makes this book unique is its holistic approach: from the first chapter, the reader is immersed into the role of a first-year associate, exposed to realistic matters in the form and substance a junior lawyer will likely encounter in practice. It goes beyond the technical aspects of legal writing or contract drafting in the abstract to expose the

1. Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 JOURNAL OF THE ASSOCIATION OF LEGAL WRITING DIRECTORS 118, 118 (Fall 2008).

reader to writing, thinking, and problem-solving in the context of transactional lawyering as a whole. Becoming a competent transactional lawyer requires more than being able to draft a contract or a client letter (although these are of course important skills); it requires a shift in viewpoint and overall approach.

As much as it can, this book takes the student reader out of the classroom and into a simulated law-firm environment. It promotes learning through doing, practice over theory, and understanding through context. Although the book focuses primarily on a law firm context and the role of a junior associate at a law firm, the concepts and skills apply to any context.

Law school trains law students to think like—and even as—lawyers, but not necessarily as transactional lawyers. My hope is that this text fills this critical gap for law students and others interested in transactional or business law.

I could not have created the course that was the genesis for this book without what I learned from pioneers in the field of transactional lawyering and global legal skills. Sincere thanks to those who forged the path and inspired me to write this book: Tina A. Stark, Richard K. Neumann Jr., Mary-Beth Moylan, Cynthia Adams, Mark Wojcik (and the wonderful Global Lawyering Skills conference he has created), Alicia Alvarez, Paul Tremblay, Deborah McGregor, Elizabeth Fajans, Shannon Trevino, and Therese Maynard.

I would also like to thank Carolina Academic Press's anonymous reviewers for their many insightful comments; Kristen Konrad Tiscione, for sparking my interest in legal writing while I was a student in her class at Georgetown Law; my husband, Kevin, for telling me I should write a book; and Carol McGeehan, for convincing me I could.

Finally, I am grateful to the many students who have taken my classes over the years and who have taught me so much.

About This Book

The primary objectives of this textbook are to provide you with practical insight into transactional lawyering and to help you learn the skills necessary to effectively communicate in this practice setting, such that you will be able to confidently apply and adapt these skills to any situation or assignment. In completing the exercises in this textbook and other tasks assigned by your instructor, you will learn to think and act *as* a transactional lawyer. So, when the partner calls you into her office on day one, you are ready.

Integrated Approach: Communication, Knowledge, and Problem-Solving

Being a transactional lawyer requires more than knowing the substantive law or having theoretical or actual knowledge of business. It involves several integrated components—a cocktail consisting of one part communication, one part substantive knowledge, and one part problem-solving. The accomplished transactional lawyer blends each of these attributes into every interaction, whether with a partner or senior associate, the client, or opposing counsel.

A transactional lawyer who is an expert in a substantive area of law will not be able to provide her client with the best advice if she is unable to effectively communicate what the law is and how it applies to the client. Similarly, a naturally proficient writer will not be much help to his client if he does not have a firm understanding of the underlying law or legal issue. And the best legal knowledge and communication skills are of little value if the lawyer cannot appreciate the practical consequences of any given legal advice.

In our increasingly globalized world, one additional ingredient to the recipe for being an effective transactional lawyer exists that is often overlooked: cross-cultural competency. Lawyers of today, especially transactional lawyers, frequently represent clients in transactions that span different legal systems, cultures, and languages. Junior lawyers must be prepared to adapt their communication skills to any context, whether helping a client in Texas negotiate a transaction with a New York company, representing a California manufacturer in the acquisition of a factory in Malaysia, or assisting an Irish software company conduct its initial public offering in the United States.

Experiential Approach: Learning through Simulation

This book uses simulations to replicate the experience of a first-year associate in transactional practice at a law firm, exposing you to the types of transactions, demands, and

forms of communications you will likely encounter as a new lawyer, whether you are part of a big law firm, in-house counsel team, boutique firm, or other setting.

In addition to building concrete drafting and other skills, the simulations your instructor will guide you through are designed to help you learn what questions to ask and have the confidence to approach any assignment.

Although we will touch on contract drafting concepts, this text focuses on written and oral communication skills in the broader sense. You will learn how to translate and comment on contracts, but also how to draft emails, office memoranda (formal and informal), client letters, comment letters, and bullet point lists, and to engage in discussions and meetings with partners, clients, and opposing counsel.

Holistic Approach: Learning in Context

From the first chapter, you will be immersed in the role of a first-year associate, exposed to realistic matters in the form and substance you will likely encounter in practice. This text goes beyond the technical aspects of legal writing or contract drafting in the abstract to expose you to writing, thinking, and problem-solving in the context of transactional lawyering as a whole—to being a “practice-ready” first-year lawyer.

Emphasis on Transactional Law

The emphasis of this book is on transactional lawyering. Chapter 1 examines in more detail what we mean by transactional lawyering, and how it differs from other types of law practice. Many of the skills focused on in this text are important for any kind of lawyer. But we examine each of these skills through the lens of a transactional lawyer.

Focus on Law Firm Setting

The general premise of this book asks you to assume you are an associate at a law firm. I recognize that many of you may choose alternate career paths. However, using a law firm setting facilitates exploring a wide range of transactional lawyering activity and provides valuable exposure and insight, whatever your ultimate path. References to junior *associates* can in most cases be substituted equally with junior *lawyers*.

How to Get the Most Out of This Book

If you are reading this textbook as part of a law school course, I recommend completing the assigned reading for each week prior to that week’s class, as this will help you more easily follow the in-class discussion.

As you come across terms or concepts with which you are not familiar, refer to the Practice Notes located at the end of each chapter. You may also want to refer to the Glossary, for definitions of key terms, or Appendix A, which contains Practice Area Overviews that provide summaries of selected practice areas, for a deeper understanding of the materials and additional practical insight and explanation.

Try to complete as many of the In-class Exercises as possible and consider each of the Questions for Discussion as you go through each chapter (unless otherwise directed by your instructor), as these are designed to illustrate and clarify the theoretical discussion.

At the end of each chapter, you will find either a Simulation Exercise or Writing/Negotiation Project. The Simulation Exercises are designed to reinforce the materials covered in that chapter. The Writing and Negotiation Projects ask you to delve deeper into the subject matter and are designed to be completed over several weeks using materials that will be provided to you by your instructor.

