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Unique Problems and Creative Solutions to Assessing Learning Outcomes in Transactional Drafting Courses: Overcoming “The Form Book Problem”

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UNIQUE PROBLEMS AND CREATIVE SOLUTIONS TO ASSESSING LEARNING OUTCOMES IN TRANSACTIONAL DRAFTING COURSES: OVERCOMING “THE FORM BOOK PROBLEM”

*Jacob M. Carpenter**

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INTRODUCTION

Professors teaching transactional drafting courses naturally require their students to draft contracts, which the professors then grade. That seems perfectly sensible: a drafted contract would seem the most logical tool for assessing what knowledge and skills the students have acquired and how well the students execute that knowledge and skill into practice. But in reality, a drafted contract is often an insufficient means to assess whether students have developed and applied the desired learning outcomes of a transactional drafting course.

Assessment in transactional drafting courses is complicated by the

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presence and use of form books. Actually, the “form book problem” is twofold. The first aspect affects professors, and the second aspect affects students (and attorneys). First, for any transactional drafting assignment, students can quickly access hundreds of form contracts from which they can cut and paste, and fill in the blanks. When grading these contracts, professors cannot know if the students organized the contract, carefully crafted the language, and thoughtfully executed the many drafting concepts and techniques discussed in class. In fact, professors cannot be sure if the students even understood all of the provisions. Instead, the professor may essentially be assessing the quality of a commercial form rather than assessing a student’s work, knowledge, skills, development, and competence. Thus, form books create unique challenges for professors as they attempt to assess student performance.

Second, students (or attorneys) who rely on form books must be careful to avoid the dangers forms may present. Using forms to help draft contracts is not, on its own, a bad thing. In fact, form books and form files are important resources that nearly all attorneys rely on. Using forms effectively can save time and money. But, while forms are a valuable tool, they can also be detrimental. Forms can be outdated, too broad, too specific, legally inaccurate, and full of ambiguities and other drafting errors. Also, forms may include provisions that the attorney does not fully understand, yet is afraid to take out. This creates a second form book problem: attorneys who “draft” contracts by relying on such forms may fail to competently represent their clients.

This article provides solutions to both aspects of the form book problem, though it focuses primarily on overcoming the first aspect: the challenges faced by professors of drafting courses. Professors must realize the differences between their ability to assess learning outcomes in traditional legal writing courses versus in upper-level transactional drafting courses. With this understanding, professors must redesign transactional drafting assignments so that they can more effectively assess whether their students are achieving the desired learning outcomes for the course.

Part I of this article discusses the “form book problem.” Part II provides background on learning outcomes and assessment methods relevant to transactional drafting courses. Part III provides nine creative ways to design assignments to overcome the form book problem. By incorporating the suggestions in this article, professors can simultaneously increase student learning and more effectively assess whether students developed the knowledge and skills needed to effectively draft contracts themselves.

I. CHALLENGES CREATED BY THE “FORM BOOK PROBLEM”

The learning outcomes in first-year legal writing courses are different than the desired learning outcomes in an upper-level drafting course. For example, in first-year legal writing courses, common learning outcomes include the various skills students need to develop to understand and synthesize legal authorities, illustrate precedent, craft strong and thorough legal analysis, organize the written analysis logically, use mandatory and persuasive authority properly, perceive and incorporate counter-analysis, write with proper grammar and technical conventions, and cite to authorities properly.¹ To assess whether students have learned and can execute these skills, professors create careful hypotheticals that introduce new issues, require original use of precedent, and offer unique analogies, distinctions, and analysis. Assuming professors create original assignments, students will not be able to find “form” memos from which they can copy. Even if students follow sample memos, the assignments’ unique facts require original analysis, and thus original memos. Because no form memos exist which address the same hypothetical facts and which apply the same precedent authorities, students must make their own decisions and use their own words when creating, organizing, and articulating the legal analysis. Thus, a student’s written product—an office memorandum or a persuasive court brief—provides the primary assessment method² from which professors can evaluate the various desired learning outcomes in first-year legal writing courses.³

Transactional drafting assignments are different. When professors create a transactional drafting assignment, they can rarely present students with hypothetical facts for which the students could not find, literally, hundreds of relevant form contracts. By strolling through a law library, logging on to Westlaw or LexisNexis, or even searching on Google,⁴

¹ For “an excellent example of specific, focused, and clear outcomes that can be easily measured ” in first-year legal writing courses, see the table of minimum competencies that the University of New Hampshire School of Law’s (formerly the Franklin Pierce Law Center’s) legal writing program provides to its students. Susan Hanley Duncan, *The New Accreditation Standards are Coming to a Law School Near You—What you Need to Know About Learning Outcomes and Assessment*, 16 J. OF THE LEGAL WRITING INST. 605, 615, app. B (2010).

² “Assessment methods are tools and techniques used to determine the extent to which the stated learning outcomes are achieved.” Victoria L. VanZandt, *Creating Assessment Plans for Introductory Legal Research and Writing Courses*, 16 J. OF THE LEGAL WRITING INST. 313, 337 (2010) (quoting Sandy Osters & F. Simone Tiu, *Writing Measureable Learning Outcomes* 1, 5, <http://www.gavilan.edu/research/spd/Writing-Measurable-Learning-Outcomes.pdf> (last visited Sept. 13, 2012)).

³ Duncan, *supra* note 1, at 622 (stating that legal writing papers “are clear indicators of what worked and did not work in class”).

⁴ For example, on August 7, 2012, at 5:56 PM, I opened up Google and typed in the search term “form contracts.” Google returned 192,000,000 results. The second result listed was for the website OneCLE, ONECLE, <http://contracts.onecle.com/> (last visited Sept. 13, 2012). The website’s homepage listed 286 types of sample contracts. The user could click on any of the 286 types to access myriad examples of that type of contract. *Id.* For example, clicking on the “Asset Purchase Agreement” allowed the user to view 488 sample asset purchase agreements. Clicking on “Consulting Agreement” allowed

students can find myriad form contracts for any type of transaction. Even if the professor creates a unique situation for a hypothetical landlord who needs a lease drafted, countless form leases will provide students with the majority of the necessary terms.⁵ Students will be able to copy the form's organization. Students will be able to copy much of the form's language and just "fill in the blanks" or tweak certain provisions.⁶ In fact, forms are created and designed so that they can be used by attorneys and lay people in just this way.⁷ And, forms are now available in electronic formats, such as Word files, which make it even easier for students to do little more than just fill in the blanks.⁸ By downloading or copying forms, students can easily include various provisions in their contracts that sound good, but which the students do not fully understand the meaning of or purpose for.⁹

Thus, when professors review students' contracts, the professors often cannot know if the students created the contracts themselves, or if they simply found a good form, copied it, tweaked it a bit to incorporate their hypothetical client's facts, and turned it in. The written product may not reflect whether a student performed the learning outcomes for a drafting course, including whether the student understood the various terms used in contracts,¹⁰ balanced the need to protect a client while avoiding a one-sided contract,¹¹ found and applied applicable laws,¹² organized the contract

the user to view 530 sample consulting agreements. The text of every contract could be viewed and cut-and-pasted into a Word processing document free of charge.

⁵ On August 7, 2012, at 6:09 PM, I entered the "FORMS-ALL" database on Westlaw classic *Forms-All*, WESTLAW, http://web2.westlaw.com/search/default.wl?db=FORMS-ALL&rs=WLW12.07&vr=2.0&rp=%2fsearch%2fdefault.wl&sv=Split&fn=_top&mt=208 (last visited Sept. 13, 2012). When I typed "lease" into the box that stated "Enter the name of the form" and hit the "Search Westlaw" button, Westlaw retrieved 10,000 documents (10,000 is the maximum number of results Westlaw classic will retrieve). *Id.* I then clicked back to the Westlaw homepage and clicked on the button labeled "Form Finder." *Id.* Then, I selected the topic "Real Estate," the sub-topic "Leases," the jurisdiction "Illinois," and a filter of "Transactional Forms." *Id.* When I then clicked on the "Search" button, 2,806 forms were available. *Id.* Depending on their subscriptions to LexisNexis or Westlaw, practicing attorneys may be limited as to what databases they can access. But many law students, using their student LexisNexis or Westlaw passwords, are able to access them. While students may drown in the results, it is obvious that students have instant access to thousands of forms contracts, on myriad topics, at their fingertips.

⁶ SUSAN L. BRODY ET AL., *LEGAL DRAFTING 3* (1994) (noting "the myth that drafting is merely a fill-in-the-blank activity. However, the skills of legal drafting require much more than that. They are detailed and varied.").

⁷ Forms "are written to cover every conceivable person and circumstance." *Id.* at 4.

⁸ Many of these forms available to download on Lexis and Westlaw are now available as Word files.

⁹ BRODY ET AL., *supra* note 6, at 18 ("[L]egal forms compile many ingredients, or ideas, with which [students] may be unfamiliar. [Students] may understand the overall function of the final product, but [students] may not understand the effect of each provision.").

¹⁰ As examples, by reading a contract the student may have copied, the professor cannot assess whether the student actually knew the difference between a warranty compared to a representation. The professor cannot assess whether the student knew the purpose behind an included "time is of the essence" clause.

¹¹ *See* BRODY ET AL., *supra* note 6, at 9 (stating that the skill of advocacy is necessary for effective legal drafting so the drafter can represent her client's best interests, while the skill of objectivity is necessary to understand the other party's positions and compromise when appropriate to achieve a contract both parties will sign).

logically (small-scale and large-scale),¹³ and crafted language that is complete, concise, clear, and precise. Even if the contract accomplishes the above goals, professors cannot be confident that the students’ knowledge and skills—rather than the forms they found—accomplished the goals.¹⁴

A solution may seem simple: ban the students from using forms. If students cannot use forms, they would be forced to apply all the knowledge and skills they have learned throughout the class to draft contracts from scratch. Based on the written contracts, professors could assess whether the students achieved the desired learning outcomes. Unfortunately, this solution is both unrealistic and undesirable. First, the volume of available form contracts makes this restriction impossible to police. For example, if a professor assigned a lease for the students to draft, the professor could never compare each student’s lease with the thousands of form leases available to students. Second, in practice, attorneys do use forms to help them draft contracts they have not drafted before.¹⁵ As all attorneys know, attorneys rarely draft contracts from scratch without using forms as guidance.¹⁶

[a]lmost all drafting done today begins with a precedent for two reasons. First, it is efficient. Precedents save time and money. Rather than reinventing the wheel for each new deal, a lawyer gets a head start. Second, if the precedent is a good one, using it will reduce errors and improve a contract’s quality.¹⁷

Forms can save time and money while reducing errors. Forms also can benefit a drafter by helping the drafter consider various provisions the drafter may not have thought of, by helping provide a logical organizational structure, and by providing examples of ways to word tricky, complex, or novel provisions.

Despite these benefits, forms often have many shortcomings.¹⁸

¹² *Id.* at 9–10.

¹³ *Id.* 10–11.

¹⁴ Duncan, *supra* note 1, at 621. In a recent article about the incorporation of learning outcomes and assessment into the new accreditation standards coming to law schools, Professor Susan Duncan urges that “legal writing [professors] should . . . take the opportunity to reflect on the design of their own courses and evaluate to what extent their current framework helps or hinders students in meeting the identified learning outcomes.” *Id.* The “form book problem” in drafting courses hinders a professor’s ability to assess learning outcomes. More importantly, drafting students who copy or improperly rely on form books are less likely to meet important learning outcomes of the course.

¹⁵ BRODY ET AL., *supra* note 6, at 18; ELIZABETH FAJANS ET AL., *WRITING FOR LAW PRACTICE* 12 (2004).

¹⁶ SCOTT J. BURNHAM, *DRAFTING AND ANALYZING CONTRACTS* 5–6 (LexisNexis, 3d. ed. 2003) (stating attorneys “rarely start to draft on a blank slate. More often, [attorneys] start with an existing contract or form.”).

¹⁷ TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* 335 (2007).

¹⁸ MARY B. RAY & BARBARA J. COX, *BEYOND THE BASICS: A TEXT FOR ADVANCED LEGAL WRITING* 92 (2d ed. 2003) (“Form provisions are . . . of limited usefulness because they were not written with your parties in mind.”).

Forms are typically drafted either on behalf of one party or in a way that either party could use the form.¹⁹ This means many forms may be overly one-sided or may not protect a particular client enough. Many forms are overly general,²⁰ while others may be too specific. Many forms are based on general legal concepts (like the rules from Restatements), not the specific laws of the jurisdiction a client is in.²¹ Many forms are outdated and do not follow recent amendments or developments in the law. Forms may be awkwardly organized.²² Many forms are replete with legalese and other nuts-and-bolts drafting errors.²³

Students need to learn both the benefits and pitfalls of using forms. Students also need to practice using forms properly: as an aid in the drafting process, not as a replacement of the drafting:

A practitioner who, as a law student, never saw a form may tend to clutch it as a drowning person grabs whatever flotsam comes within reach. The form may represent the ‘answer’ that has been hidden by a devious instructor. A form is neither a taboo object, never to be touched, nor an object of veneration, to be respectfully copied. It is a guide, perhaps a checklist The form must be subjected to the same critical thinking involved in all legal analysis.²⁴

Indeed, there are pedagogical advantages in allowing students to use forms as an aid when they draft contracts.²⁵ Prohibiting students from using forms ignores the reality that students will use forms when they practice. Students who are not allowed to use forms as an aid when drafting contracts are less likely to learn and appreciate the benefits and dangers that forms provide. They are more likely to use forms improperly, and thus draft contracts less competently, after they graduate. Allowing students to use forms more accurately replicates what students will do when they practice. It gives students the opportunity to practice identifying the shortcomings of forms they find. It best prepares students for effectively drafting contracts in the real world.

So therein lies the problem. On one hand, students need to practice evaluating and using forms when they draft contracts. Only by doing so can

¹⁹ BRODY ET AL., *supra* note 6, at 18 (stating that “[n]o one form has been prepared for your specific client in her precise situation”)

²⁰ *Id.* at 18.

²¹ RAY & COX, *supra* note 18, at 92 (stating forms “can contain provisions that are incomplete, unedited, or drawn from litigated cases. When drawn from opinions, they did not do what they were intended to do, which was to keep the parties out of court.”).

²² BRODY ET AL., *supra* note 6, at 18.

²³ *Id.*

²⁴ BURNHAM, *supra* note 16, at 216–17.

²⁵ See BRODY ET AL., *supra* note 6, at 18 (stating that, while students should learn “original drafting,” forms, practitioner’s guides, and checklists are “an integral part of the research necessary to draft a document”).

students learn to overcome one aspect of the form book problem: over-reliance on forms and failing to identify forms’ shortcomings. On the other hand, when students use forms, the other aspect of the form book problem arises: professors cannot assess whether students just copied forms or whether they crafted the contract carefully based on their own knowledge and skills. How can a professor overcome both aspects of the form book problem simultaneously?

Fortunately, there are solutions. To overcome the form book problem, professors need to first identify the specific learning outcomes for their drafting courses. Professors then need to consider the various forms of assessment. With a grasp of the desired learning outcomes and forms of assessment, professors can creatively design drafting assignments to overcome both aspects of the form book problem. The next section of this article provides background on learning outcomes and assessment methods. Part III then provides nine concrete solutions.

II. UNDERSTANDING LEARNING OUTCOMES AND ASSESSMENT

Professors teaching transactional drafting deploy assignments not only to provide students with opportunities to practice and demonstrate the skills covered during the course, but also to give professors a way to assess the students’ strengths and knowledge. Before deploying an assignment, professors should carefully consider what skills and knowledge they want the students to learn and develop.²⁶ Then, professors must take care to ensure that the assignments serve the purposes of providing practice for the students and providing a valid assessment tool for the professor. This section offers learning outcomes specific to transactional drafting courses, then discusses the various types of assessment a professor may consider in a transactional drafting course.

A. *Learning outcomes in transactional drafting courses*

While all professors have, at a minimum, a basic idea of what they are attempting to accomplish with each assignment, professors should pinpoint, both for themselves and for their students,²⁷ the precise learning outcomes that they will assess.²⁸

²⁶ Duncan, *supra* note 1, at 613 (citing MARY J. ALLEN, ASSESSING ACADEMIC PROGRAMS IN HIGHER EDUCATION 33 (2004)) (“[L]earning objectives can be developed by considering what a successful lawyer needs to know and be able to perform.”).

²⁷ Duncan, *supra* note 1, at 614. (Legal writing and drafting courses “add great value to legal education when learning outcomes are clearly stated and explained, which greatly assist students in focusing their effort in the course.”).

²⁸ Linda Suskie, *Fair Assessment Practices: Giving Students Equitable Opportunities to Demonstrate Learning*, AAHE Bulletin 52(9), 7–9 (May 2000), available at http://uncw.edu/cas/documents/fairassessmentpractices_suskie.pdf; Linda Suskie, *Fair Assessment Practices: Giving Students Equitable Opportunities to Demonstrate Learning*, *Adventures in*

The first step to fairly assess learning outcomes is to clearly state what the learning outcomes for the course are.²⁹ The term “learning outcomes” can be generally defined as “the stated abilities, knowledge base, skills, personal attributes, and perspectives on the role of law and lawyers in society that the [professor] desires the students to exhibit on . . . [completing the course].”³⁰ When creating and articulating the learning outcomes for their courses, professors should not be general, but rather very specific:

Most legal writing professors would have no difficulty identifying legal analysis, writing, and citation as essential skills students must be proficient in after taking a legal writing course. These might be very worthwhile overarching program goals but not particularly effective learning outcomes. What some legal writing and non-legal writing professors might do better is supplement these with more detailed and specific outcomes the students will be able to know, think or do by the end of the course to show competence.³¹

Having clearly stated, specific, detailed learning outcomes helps both the professor’s focus and the students’ focus.³² By having clearly stated learning outcomes, professors can tailor individual lectures to accomplish very specific goals. Further, if professors share with their students what the specific learning outcomes for a course are, the students know what to expect,³³ what is important, and what to focus on while reading for class, attending class, and completing assignments.³⁴

Assessment, vol. 14, 5–10 (Spring 2012), available at <http://www.sabes.org/resources/publications/adventures/vol14/vol14.pdf> (The Suskie article as printed at The AAHE Bulletin was not originally accessible online, but the Adventures in Assessment newsletter was. At the time of editing this article, both were available and, therefore, included. Because it is more easily accessible, the pages referenced in the remaining cites to this Suskie article will be to the Adventures in Assessment newsletter); see also Duncan, *supra* note 1, at 616. Professor Duncan states that, while most professors “implicitly expect” certain outcomes and develop assignments to help students meet those outcomes, professors do not always “explicitly share” the outcomes with their students. *Id.* Telling the students what the learning outcomes are at the beginning of the semester “helps [students] focus on what’s most important and get the most out of their learning experience.” *Id.* (quoting LINDA SUSKIE, ASSESSING STUDENT LEARNING 4 (2004)).

²⁹ Suskie, *supra* note 28, at 6.

³⁰ Gregory S. Munro, *How Do We Know If We Are Achieving Our Goals?: Strategies for Assessing the Outcome of Curricular Innovation*, 1 J. ASS’N LEGAL WRITING DIRECTORS 229, 232 (2002).

³¹ Duncan, *supra* note 1, at 615.

³² *Id.* at 616 (stating that specific learning outcomes, rather than general goals, more effectively communicates to students the competencies they will learn).

³³ Suskie, *supra* note 28, at 6 (“Have clearly stated learning outcomes and share them with your students, so they know what you expect from them. Help them understand what your important goals are. Give them a list of concepts and skills to be covered on the midterm and the rubric you will use to assess their research project.”) (emphasis omitted).

³⁴ See Melissa J. Shafer, *Effective Assessment: Detailed Criteria, Check-Grading, and Student Samples*, 14 THE SECOND DRAFT: BULLETIN OF THE LEGAL WRITING INST. 6 (1999), available at <http://www.lwionline.org/publications/seconddraft/nov99.pdf> (discussing the value of providing students with detailed assessment criteria for each written assignment). First, students understand what composes

When creating learning outcomes for a transactional drafting course, professors should attempt to create learning outcomes that:

- are measurable³⁵ (capable of assessment);
- are clear and straightforward;³⁶
- are reasonable in light of students’ abilities;³⁷
- are neither too broad nor too specific;³⁸
- use action words that describe what students should be able to do;³⁹
- define fuzzy terms;⁴⁰
- focus on the end rather than the means;⁴¹
- focus on the most important goals;⁴² and
- reflect the knowledge, skills, and attitudes employers will expect from the students following graduation.⁴³

Below is a useful table of learning outcomes for transactional drafting courses.⁴⁴ Professors should provide students with a similar table at the beginning of each semester so students can see in detail what they can expect to learn during the semester. By receiving a detailed table of

their grade, which diminishes claims that grading is arbitrary. *Id.* Second, students can critique themselves against the criteria while they work on their assignment, which can increase their knowledge and their understanding of the critical elements of the written product. *Id.* Third, when students receive their grade with scores next to each of the detailed assessment criteria, students can troubleshoot the areas in which they performed weakly. *Id.* Providing the students with detailed learning outcomes throughout the semester and with each assignment provides the same benefits for the students.

³⁵ ABA SEC. LEG. EDUC. & ADMIS. TO B., REPORT OF THE OUTCOME MEASURES COMMITTEE 10 (2008) [hereinafter OUTCOMES MEASURES REPORT] (citing ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 49–50 (2007)).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Duncan, *supra* note 1, at 614 (citing LINDA SUSKIE, ASSESSING STUDENT LEARNING, 78 (2004)).

³⁹ *Id.* (citing LINDA SUSKIE, ASSESSING STUDENT LEARNING 78–79 (2004)).

⁴⁰ *Id.* at 615 (citing LINDA SUSKIE, ASSESSING STUDENT LEARNING 79 (2004)).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* (citing LINDA SUSKIE, ASSESSING STUDENT LEARNING 88 (2004)). Additionally, professors should avoid learning outcomes that conflict with their school’s mission and that conflict with the learning outcomes for other writing courses within the law school. VanZandt, *supra* note 2, at 331.

⁴⁴ Individual professors may want to add to or otherwise tweak the table for their own course purposes. But the learning outcomes provided in the table apply to nearly all transactional drafting courses.

learning outcomes, students will view the course from its very beginning as a productive course in which they will learn, practice, and develop important, concrete, and identifiable knowledge and skills. Also, such a table will help the students understand what will be expected of them. Further, it helps the professor focus on what exactly he or she will be assessing when grading assignments.

LEARNING OUTCOMES FOR TRANSACTIONAL DRAFTING

By the end of the course, students should be able to do the following:

Document Design

- Use headings and subheadings effectively
- Use white space effectively
- Use outline format and techniques effectively
- Use margins, tabs, and hanging indents effectively

Research

- Spot and research questionable terms desired by client
- Understand requirements for making contract binding
 - Proper signature? Witness needed? Notary needed? Etc.
- Learn appropriate resources
 - Statutes, cases, and forms

Using Formbooks and Prior Documents

- Understand effective use of forms
 - For drafting assistance (at beginning and end of writing process)
 - For research assistance
- Understand pitfalls and dangers of using forms
- Evaluate stronger versus weaker forms
- Creating personal form files
- Using checklists

Substantive Knowledge

- Understand an attorney's role in transactions
- Understand the steps in a typical transaction
- Understand common ethical concerns attorneys face when representing clients in transactions
- Understand every part of a contract

- Six parts to all contracts
- Additional common parts
- Understand common types of legal consequences drafted into contracts (i.e., duties, rights, privileges, conditions, warranties, representations, covenants, indemnities, guaranties, defaults, remedies)
- Understand common boilerplate provisions
- Understand various types of alternative dispute resolutions (ADR)

Writing Skills

- Learn a step-by-step process for drafting any contract
 - Conduct necessary research prior to and during drafting
 - Gather necessary facts relevant to the contract
 - Organize and outline a contract logically
 - Draft carefully
 - Test for consequences
 - Edit and revise with client and opposing party in mind
- Draft contracts in clear, concise, simple, and precise language
 - Avoid long strings of information
 - Break paragraphs down into chunks
 - Use lists, enumerations, and bullet points
 - Use short sentences
 - Use Actor-Action-Object sentence structure
 - Use simple words when appropriate
 - Avoid “ee” and “or” endings, when possible
 - Avoid legalese
 - Avoid use of “said,” “such,” and “same”
 - Use consistent terminology – avoid variation
 - Avoid ambiguity when using “and” and “or”
 - Avoid unnecessary words, phrases, and sentences
 - Write in the present tense
 - Draft positively, rather than negatively, when possible
 - Avoid gender specific pronouns and terms, when possible
 - Use “shall,” “will,” “must,” and “may” consistently and not interchangeably
 - Draft consequences using proper language (i.e., duties, rights, privileges, conditions, warranties, representations, covenants, indemnities, guaranties, defaults, remedies)
 - Draft dates precisely

- Choose when to use definitions, where to place them, and how to draft them
- Using forms effectively to assist in drafting process
- Amending existing contracts
- Draft effective letters
- Understand various types of letters attorneys draft (cover letters, demand letters, opinion letters, advice letters, third party letters)

B. Considerations for effective assessment

Once professors have pinpointed and articulated various learning outcomes for their courses, they must be able to accurately assess whether their students are achieving those learning outcomes.⁴⁵ When assessing student learning, professors must conduct both “formative assessment” and “summative assessment.” Formative assessment “focus[es] on improving a student’s learning or improving a professor’s teaching.”⁴⁶ Summative assessment focuses on giving students grades.⁴⁷ This article provides professors with techniques that will both increase student learning (formative assessment) and lead to grades that more accurately reflect whether students achieved the desired learning outcomes for the course (summative assessment).

For assessment to be effective, the assessment should be: (1) valid, (2) reliable, and (3) fair.⁴⁸ An assessment is valid if it “accomplish[es] that for which it was designed or intended.”⁴⁹ An assessment is reliable if “the test or measuring procedure will yield the same results on repeated trials.”⁵⁰ An assessment is fair if it:

- is based on clearly stated learning outcomes;

⁴⁵ Generally, assessment is broken down into two broad categories. The first category is institutional assessment. VanZandt, *supra* note 2. Institutional assessment focuses on whether the institution at large (e.g., the law school) is achieving its goals and missions. Duncan, *supra* note 1, at 622–23. While a law school will have goals related to student learning, schools have other objectives as well, such as producing scholarship, bridging into the community, establishing various specialty institutes, etc. Institutional assessment would include assessing the school’s success and progress in those various areas that extend beyond just student learning. See VanZandt, *supra* note 2, at 320. The second category is assessment of student learning. Duncan, *supra* note 1, at 622–23. Professors should assess student learning by focusing more narrowly and assessing whether their students have achieved the professor’s desired learning outcomes for the particular course the professor is teaching. See VanZandt, *supra* note 2, at 321. This article addresses the more narrow focus: professors assessing student learning in their transactional drafting courses.

⁴⁶ Duncan, *supra* note 1, at 622 (quoting MICHAEL HUNTER SCHWARTZ ET AL., TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM 137 (2009)).

⁴⁷ *Id.* at 622–23 (citing MICHAEL HUNTER SCHWARTZ ET AL., TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM 137 (2009)).

⁴⁸ Munro, *supra* note 30, at 237.

⁴⁹ *Id.*

⁵⁰ *Id.* (emphasis omitted).

- focuses on what the professor taught;
- uses different kinds of measures;
- helps students learn how to do the assessment task;
- engages and encourages students; and
- interprets assessment results appropriately.⁵¹

Further, over the length of a course, professors should engage in various methods of assessing the students’ learning: “A valid, reliable, and fair picture of the student’s ability is much more likely to exist if the measures are done several times using different modes of evaluation.”⁵²

When contemplating different methods from which to assess student learning in a valid, reliable, and fair manner, professors may consider the following definitions for various assessment methods. Assessment measures can be “direct” (requiring students to demonstrate their achievement through, as examples, examinations or written assignments⁵³) or “indirect” (considering the students’ opinions, such as whether students believe they are learning and developing skills).⁵⁴ “Authentic” assessment involves the use of real-world activities and situations that lawyers would encounter.⁵⁵ The data professors generate from assessing learning outcomes can be “quantitative” (such as numerical scores related to how much a student learned) or “qualitative” (such as a professor’s opinions, descriptions, or comments to a student).⁵⁶ Assessments can also be based on either “value-added judgments” (such as a professor determining that a student has improved) or “absolute judgments” (such as a professor determining that a student has properly used contract terms).⁵⁷ “‘Developmental assessment’ refers to the tracking of an individual student’s development.”⁵⁸ Assessment can also be “criterion-referenced” (evaluating student performance compared with pre-established criteria) or “norm-referenced” (evaluating student performance compared to the

⁵¹ *Id.* at 6–7.

⁵² *Id.* at 238.

⁵³ VanZandt, *supra* note 2, at 337–38 (citing Barbara D. Wright, *More Art Than Science: The Postsecondary Assessment Movement Today* 4, <http://www.apsnet.org/imgtest/MoreArtThanScience.doc> (last visited Sept. 20, 2009)).

⁵⁴ *Id.* at 338 (citing MARY J. ALLEN, ASSESSING ACADEMIC PROGRAMS IN HIGHER EDUCATION 7 (2004)).

⁵⁵ *Id.* at 339.

⁵⁶ *Id.* (citing GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 111–15 (2000)).

⁵⁷ *Id.* (citing MARY J. ALLEN, ASSESSING ACADEMIC PROGRAMS IN HIGHER EDUCATION 8 (2004)).

⁵⁸ *Id.* at 340 (citing MARY J. ALLEN, ASSESSING ACADEMIC PROGRAMS IN HIGHER EDUCATION 9 (2004)).

performance of the other students in the class (such as grading on a curve)).⁵⁹ Professors should use various methods to assess student learning.⁶⁰ And, professors may use many of the above methods simultaneously.

| TYPES OF ASSESSMENT | |
|---|---|
| Formative: focuses on student learning | vs. Summative: focuses on student grades |
| Direct: requires students to demonstrate through exams and assignments | vs. Indirect: considers students' opinions, such as whether they believe they are learning |
| Quantitative: uses numerical scores | vs. Qualitative: includes professor's opinions, descriptions, and comments to a student |
| Criterion-referenced: evaluates performance compared to pre-established criteria | vs. Norm-referenced: evaluates performance compared to performance of others (curves) |
| Value-added: professor's judgment about student improvement | vs. Absolute: professor's judgment about whether student's performance was "right" |
| Authentic: involves use of real-world activities and situations | |
| Developmental: tracks individual student's development | |

⁵⁹ *Id.* (citing GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 119 (2000)). Munro argues that norm-referenced assessment can be detrimental to sound assessment, but norm-referenced assessment (such as grading on a curve) is a long-standing practice in law schools. *Id.* at 341 n.129.

⁶⁰ Munro, *supra* note 30, at 237.

III. NINE TECHNIQUES TO EFFECTIVELY ASSESS LEARNING OUTCOMES

To best assess how well students have attained the learning outcomes for a course, professors need to use multiple measures.⁶¹ Below are nine approaches that will assist professors in assessing whether their students have achieved the learning outcomes for their courses. In turn, each approach will also help students learn how to use forms properly, avoiding the pitfalls forms may present. Many of the approaches allow for multiple forms of assessment. The first solution involves teaching students how to properly use forms. The remaining solutions provide ways to craft assignments that allow professors to assess whether students have gone beyond copying a form and actually applied their own knowledge and skills when completing assignments.

A. *Teach the pros and cons of using forms*

An important part of solving the “form book problem” is to acknowledge it and address it head-on with the students. Professors are teaching students how to be attorneys. Thus, professors should neither ignore nor hide the fact that form books are potentially helpful resources for attorneys to use.⁶² Professors should spend significant time in class discussing with students the benefits, and the very real pitfalls, of using forms when drafting their contracts.

Students need to be introduced to forms so that they learn to appreciate the hidden dangers forms⁶³ present:

Forms may give you the impression that you have been handed a well-organized, clearly written, syntactically and grammatically correct, completed document that is satisfactory—or even perfect—for a particular situation. That impression, however, is erroneous. In fact, the organization and language used in forms can never replace clear, organized, original work. The structure and words used in forms are intended to be general and abstract, not specific and concrete. Because a form is meant to encompass so many possibilities, its organization and words

⁶¹ Duncan, *supra* note 1, at 626.

⁶² BRODY ET AL., *supra* note 6, at 18.

⁶³ Even if an attorney uses an exemplar (an existing contract from a prior, similar transaction), rather than a form (a more generic, sample contract to be used by future attorneys and parties), many of these dangers lurk. See GEORGE W. KUNEY, *THE ELEMENTS OF CONTRACT DRAFTING* 34 (2nd ed., Thomson West 2006). “[A]n exemplar from a prior transaction was, at best, right for that transaction, not the current one. It represents a negotiated compromise of issues that were in play in that prior deal. Said another way, it represents an allocation of risk and reward, benefit and burden, between those parties at that time. This being the case, it is best to view the exemplar with a critical, not an accepting, eye and “reset” the provisions to a neutral position or one that favors your client before proposing the document to the other side.” *Id.*

can never accurately satisfy any particular set of facts without significant revision.

...[T]oo often lawyers and law students use forms to replace that part of the process of legal drafting, blindly copying forms or combining several of them, without thinking about their language or structure. Often, the results can be disastrous.⁶⁴

Professors should work with students to understand and spot the deficiencies in forms so that students learn to use forms to help them begin the thinking process that goes into the drafting process, not to take the place of the drafting process.⁶⁵ If the professor does not devote significant attention to the proper and improper use of forms, inexperienced students lacking in confidence are likely to copy and over-rely on forms to a detrimental extent.

B. Have students annotate a form

After discussing with students the pros and cons forms present, an excellent assignment is to provide students with a form and require students to annotate it. By annotating it, students should note each aspect of the form that is either particularly well drafted or poorly drafted. The professor can direct students to comment on the strengths or weakness of specific things (such as the large-scale organization, smaller scale organization with certain sections, overall document design, length of provisions, ambiguities, legalese, use of terms like “shall,” etc.). Or, the professor can leave it up to the students to note any drafting concerns they find or revisions they think would be beneficial. Professors should not ask students to simply identify strengths and weaknesses, but also to explain *why* the strength is a strength, or *why* the weakness is a weakness.

If the professor provides a photocopied form from a form book, students can comment with hand-written margin comments and end comments. Or, if the professor provides students with a form in an electronic format, such as a Word file, students can use the “comment” function in Word to type detailed comments in the margins.

Professors can assign this as an ungraded exercise early in a semester, before professors ask students to draft complete contracts. This assignment can work well as an in-class exercise or as a take-home exercise. Professors can ask students to annotate the form individually, or to do so in small groups. With whichever approach the professor chooses, after the

⁶⁴ BRODY ET AL., *supra* note 6, at 10.

⁶⁵ *Id.* at 18 (stating that while using forms may be an integral part of drafting a document, forms “never should replace your own thinking or writing”).

students annotate the form the professor and students should discuss the form’s strengths and weaknesses in class. This gives the students an opportunity to see if they (1) spotted all of the various strengths and weaknesses and (2) understood *why* the weaknesses were harmful. It also gives students an opportunity to ask questions about forms, their strengths, their weaknesses, or about contracts in general. If time permits, the professor and students can further work to correct some of the shortcomings of the form (such as to reorganize it, or redraft poorly worded provisions, etc.).

For this exercise, professors can use any form they choose. Thus, professors can use forms that have specific shortcomings that the professor may want to highlight. Devoting time to this exercise helps students see that, while forms may be helpful, they often have many weaknesses. Thus, when students find forms for future drafting assignments, they are more likely to critically assess the forms and use the forms as guides, not as an end product.

C. Have students rewrite a “real world” contract early in the semester

Another technique to help avoid the form book problem is to require students early in the semester to rewrite an existing, executed, real-world contract.⁶⁶ For this assignment, the professor should provide students with a fully-executed contract that suffers from various drafting errors, such as poor organization, insufficient headings, awkward formatting, distracting legalese, potential ambiguities, inconsistent terms, and excessive grammatical errors.⁶⁷ Early in a semester, the professor can cover the nuts-and-bolts of proper drafting, and thus students can quickly begin attacking and revising a poorly drafted contract.⁶⁸

From the viewpoint of assessing learning outcomes, the assignment serves two important functions. First, the assignment emphasizes to

⁶⁶ This assignment offers numerous forms of assessment. It offers formative assessment (student learning) because it provides students the opportunity to practice and learn plain language drafting skills. It also offers summative assessment if the professor assigns a grade. It offers direct assessment because students are required to demonstrate their plain language drafting knowledge and skill on a written assignment. It offers authentic assessment because students are working on a real-world contract. The feedback to the student may be quantitative (numerical score) and qualitative (professor’s comments). The professor will likely use criterion-referenced evaluation (evaluate compared to pre-established criteria) but may choose to ultimately score the student papers on a norm-referenced basis (grades based on a curve). When grading, the professor will be making absolute judgments (whether the student correctly revised the contract). Because the assignment is the first assignment of the semester, the professor will not yet be able to assess student improvement or development. But this assignment may provide a good baseline from which to compare student’s use of plain language on future assignments.

⁶⁷ Professors can find ample examples of poorly drafted contracts that real parties signed by browsing many of the sample contracts found on the OneCLE website. ONECLE, *supra* note 4.

⁶⁸ For a thorough list of considerations and tips in drafting clear and unambiguous provisions, see Chapters 18 (Legalese), 19 (Clarity Through Format), 20 (Clarity Through Sentence Structure), 21 (Ambiguity), 22 (Numbers and Financial Provisions), 23 (A Potpourri of Other Drafting Considerations), and 24 (Deconstructing Complex Provisions) of STARK, *supra* note 17, at 199–299.

students the reality that existing contracts and forms, even though drafted by licensed attorneys, may be poorly written. Not surprisingly, “law students and newly licensed lawyers imitate the writing of more experienced lawyers and thus perpetuate poor writing.”⁶⁹ This exercise opens students’ eyes to the reality that such practice often leads to poorly drafted contracts and helps students accept that simply finding a form and copying it may be insufficient and dangerous. Instead, students will begin to understand that they should view existing documents and forms only as a resource for initial ideas about how to draft a particular type of contract—they should never assume that existing contracts and forms are solid examples to be thoughtlessly followed. As a result, when students draft contracts later in the semester, they are more likely to use forms properly—to assist in the drafting process, not to replace it. Thus, subsequent assignments are more likely to reflect students’ own drafting, rather than copying, of particular contracts.

Second, from this assignment professors can assess the students’ ability to apply plain language techniques for contract drafting. By grading the revisions, the professor can assess various skills, including whether students used contract language properly,⁷⁰ applied a logical organization and outline structure, created helpful headings, used white space well, and caught ambiguities, all of which are some of the important skills for students to learn in a transactional drafting course. This assignment forces students to consider the language carefully, requires students to correct and replace poor drafting choices in the original, and provides much practice that will improve the students’ drafting skills on subsequent assignments.

When used as an assignment early in the semester, the timing and limited focus of the assignment are beneficial. Most students can focus on correcting drafting mistakes in a given contract without feeling overwhelmed. On the other hand, if the professor requires students to draft a contract from scratch, early in a semester, the students are more likely to feel lost, ill-equipped, and desperate, which could drive students to seek out and copy forms. Because students will have worked through an entire contract and carefully worked with a contract’s language, students are more likely to approach future assignments, in which they do have to draft a contract from scratch, with more confidence. If they find forms, they will be more likely to view forms as guidance only, not as a final product.

⁶⁹ BRODY ET AL., *supra* note 6, at 4.

⁷⁰ As one of many possible examples, the terms “will,” “shall,” and “may” should each be used carefully and consistently, and should never be used interchangeably. *See* STARK, *supra* note 17, at 147–52. If the sample contract used the terms improperly, professors grading the students’ revisions can assess whether students understand the different and appropriate uses of each term.

D. Require students to document each step of the process

Drafting a contract is not a one-step endeavor. Rather, drafting a contract involves preplanning and working through multiple steps, which may include: (1) listing known facts, (2) learning applicable law, (3) grouping facts into sections, (4) outlining the contract, (5) drafting each provision, (6) testing for consequences, and (7) editing.⁷¹

Students who copy a form are unlikely to work through these steps: “too often lawyers and law students use forms to replace . . . part[s] of the process of legal drafting.”⁷² Instead, students may even jump to the final step—editing—and tweak the forms as needed. Of course, if that student is later faced with a situation in which the student has to draft a unique document from scratch,⁷³ the student will be at a loss even how to begin. Also, students who fail to work through all of the steps are less likely to “own” and fully understand the contracts that they “produced.” To help avoid these outcomes, professors should require students to document their work at each step in the drafting process. Rather than turning in only their finished contracts, students should turn in: (1) their list of raw facts, (2) documentation of the sources they relied on to learn the applicable law,⁷⁴ (3) the facts grouped together into potential sections, (4) their preliminary outline for the contract, (5) the first draft of the contract, (6) an explanation of revisions the students made when they tested the first draft for consequences, and (7) the final, polished version of the contract.

Professors may choose to grade only the final version of the contract. But, by forcing students to document that they did work through each step of the process, professors can assess where students may have

⁷¹ Professor Brody explains that the drafting process is a recursive process involving the following seven steps: “(1) understand the audiences; (2) gather the facts; (3) know the law; (4) classify, organize, and outline; (5) write carefully; (6) test for consequences; [and] (7) edit and rewrite.” BRODY ET AL., *supra* note 6, at 23–58. Others explain the process in other, similar ways. For example, the authors of the book BEYOND THE BASICS: A TEXT FOR ADVANCED LEGAL WRITING provide the following steps for drafting a contract: (1) research to parties’ relationship and the law; (2) think through the contract; (3) write a draft or outline; (4) rewrite, concentrating on organization of major elements; (5) rewrite, concentrating on thoroughness and consistency; (6) obtain editing from another person; and (7) polish for clarity. RAY & COX, *supra* note 18, at 93.

⁷² See BRODY ET AL., *supra* note 6, at 10.

⁷³ Though attorneys rarely have to draft contracts completely from scratch without using a form as guidance, such situations can come up. For example, before pet trusts were common, I once had to draft a pet trust for a client before she underwent major surgery. I only had two hours to complete the trust as my client waited in a conference room, and I did not have access to any sample pet trusts to use as guidance. Thus, I had to draft the document essentially from scratch, including researching relevant law, brainstorming what the important facts and provisions would be, organizing it, and wording each provision. While such situations are uncommon, they can occur, and attorneys need to have the knowledge and skill to draft contracts themselves when forms are not available for guidance. Only being able to copy forms is not competent lawyering.

⁷⁴ This list could be an annotated list of secondary sources and helpful forms the student used (with appropriate citation to the source of the forms), or an annotated list of statutes, ordinances, regulations, or case law relied upon. It could also be a memorandum to an assigning attorney in which the student explains the results of any necessary research.

erred on their way to producing the final document.⁷⁵ More importantly, though, documenting each step helps students conceptualize the entire drafting process. This exercise helps wean students from feeling the need to rely on forms. Students will learn that, by following a process, they can draft documents from scratch. Also, because students are forced to document each step of the process, the students who find and use forms are more likely to use forms properly: as guidance only. Even if a student finds a useful form, the student is more likely to use the form as a tool to consider its organizational scheme, to consider its use of headings and white space, and to consider its provisions and wording. Using forms this way is appropriate.

By requiring students to document each step of the drafting process, professors force students to use forms as guidance only. By requiring students to document their work through each step of the drafting process, professors force students to learn, develop, and execute all of the skills involved in properly drafting complete contracts. Thus, this exercise helps students develop desired learning outcomes and allows professors to assess the students' work through each step of the drafting process. If the professor requires students to turn in the final product only (the polished contract), the professor is left to guess as to how the student reached that point.

E. Provide semi-helpful forms

If professors have addressed the strengths, weaknesses, and proper use of forms with students, then professors can provide forms for their students to use when drafting a particular assignment.⁷⁶ If the professor provides one or two forms, the professor can choose which forms to provide. Thus, the professor can select (or create) forms that are strong in certain areas and weak in other areas. The professor can manipulate the form to create whatever strengths and weaknesses the professor wants. For example, the professor can provide a poorly organized form so that the students will have to reorganize it (to score well). Professors can provide forms that include ambiguities or improper use of terms, such as "shall."⁷⁷ Also, professors can provide forms that include provisions that would be irrelevant for the contract the student is drafting. Conversely, professors can choose forms that lack some of the provisions the student will need to

⁷⁵ This assignment allows for all of the following forms of assessment: formative (student learning), summative (grades), direct (written assignment), authentic (real world activity), quantitative (numerical scores), qualitative (professor's comments), and absolute judgments (correct or incorrect). Professors may compare the students' drafting to their drafting on the first assignment to make value-added judgments and to track development. As with all assignments, the professor's evaluation of student performance should be criteria-referenced but the ultimate grades may be norm-referenced.

⁷⁶ An example of this type of assignment can be found at RAY & COX, *supra* note 18, at 110–15.

⁷⁷ See STARK, *supra* note 17, at 147–52 (addressing the proper use of "shall.").

include.

By providing a form, professors are not duplicating the assignments noted earlier, in which the students annotate a form or revise an existing contract.⁷⁸ Instead, now the students are required to produce an original contract for their own hypothetical client and that client’s unique circumstances. By providing forms, professors are simulating a common drafting experience in which an attorney drafts a document from scratch, using forms to assist in the process.⁷⁹

Providing carefully tailored forms has many benefits.⁸⁰ First, by providing the forms, the professor minimizes the students’ desire to search for external forms to help guide them. Because students have forms in their hands, students are more likely to spend their time and efforts drafting their contracts rather than searching for forms.⁸¹

More importantly, providing tailored forms allows professors to target particular learning outcomes the professors want to focus on for that assignment. By targeting particular learning outcomes, professors can assess how well the students performed in those areas. For example, if professors provided poorly organized forms, the professors will know to pay particular attention to the organization of the students’ contracts. If the students borrowed the poor organization scheme from the form, the professor can discuss with the student why this was a poor choice (and how the form could have been better used). On the other hand, if the students’ contracts are well-organized, the likelihood is higher that the students considered the organizational shortcomings of the provided forms and created a better-organized contract themselves. Thus, in attempting to assess the students’ abilities to think through the organization of a contract, the professors will have decreased the odds that the students simply copied the organizational structure or format that they found in a form.

Similarly, if professors intentionally leave out particular provisions

⁷⁸ See discussion *supra* Part.III.D.

⁷⁹ In real life, an attorney drafting a contract may obtain similar sample contracts from a partner, or from a file, or from a form database the firm maintains. “Lawyers often use forms to assist them in drafting legal documents. But, forms should be used . . . properly—never in lieu of your own thinking.” BRODY ET AL., *supra* note 6, at 18.

⁸⁰ This assignment allows for all of the following forms of assessment: formative (student learning), summative (grades), direct (written assignment), authentic (real world activity), quantitative (numerical scores), qualitative (professor’s comments), and absolute judgments (correct or incorrect). Assuming this is not the first assignment, professors may compare the students’ drafting to their drafting on earlier assignments to make value-added judgments and to track development. Again, the professor’s evaluation of student performance should be criteria-referenced but the ultimate grades for the assignment may be norm-referenced.

⁸¹ Second, students may feel that the professor has been doing them a favor by giving them some forms for guidance. Generating goodwill may be a beneficial byproduct: students who feel that their professor provides helpful guidance may feel that the professor is fair and concerned. The professor should, of course, explain that the forms are decent, but not great, and that they are being provided to help the students begin thinking about how they may want to draft the contract.

on the forms, they can more reasonably expect that the language the students use in drafting those provisions is the students' own language. Thus, the professor can assess the students' language choices. Additionally, this provides another opportunity for students to learn that copying forms often leads to a poor contract, but using forms properly can be a helpful drafting tool. Using forms properly can be an important learning outcome for a drafting course.

F. Integrate research into assignments

For many lawyering tasks, solid legal research is a critical skill. When representing clients in a transaction and when drafting a contract, this is no different. Professors would be shortsighted if they focused only on the actual drafting and ignored the role research plays in drafting contracts. Conducting research is part of the drafting process.⁸² Thus, important learning outcomes in a transactional drafting course are for students to continue to develop their legal research skills, to conduct legal research outside of the focus of a predictive memorandum or a persuasive brief, and to draft contract provisions based on their research results. Regardless of whether students use forms to help them draft a contract, a well-planned assignment will allow professors to assess the students' ability to research the applicable laws.

Professors can craft assignments in a transactional drafting course so that a student must conduct legal research to be able to draft appropriate provisions. As a simple example, a hypothetical client may request a number of provisions in a contract, some of which the jurisdiction's laws allow and some of which the jurisdiction's laws prohibit. To succeed on the assignment, the student will need to identify potentially problematic client requests (such as a client seeking a security deposit equal to three months' rent). The student will then need to conduct research to determine if such requests can be written into the contract. The student will then need to draft various provisions in ways that comply with the governing laws.

By incorporating research into assignments, professors can assess the learning outcomes related to a student's ability to identify potentially problematic terms, to research within the context of transactional drafting, and to translate research results into appropriate contract provisions.⁸³ Even if students find forms to rely on, the students will not be able to copy it thoughtlessly. If the hypothetical client asks for a security deposit equal to three months' rent, students may be tempted to just replace the wording in a

⁸² BRODY ET AL., *supra* note 6, at 9–10; RAY & COX, *supra* note 18, at 94–96.

⁸³ While this assignment allows for multiple forms of assessment (formative, summative, direct, authentic, quantitative, qualitative, value-added, absolute, criterion-referenced, and norm-referenced), by adding a research component, it increases the opportunity for formative (student learning) and authentic (real-world exercise) assessments.

form that requires a security deposit “equal to one month’s rent” with the wording “equal to three months’ rent.” However, if the jurisdiction’s laws cap security deposits at an amount equal to one-and-a-half month’s rent, then the student’s provision will fail.⁸⁴ The professor can easily assess the students’ successes or failures in conducting and applying research within the context of drafting a contract. Based on how students draft such provisions, professors have a better idea of whether the student just copied and tweaked a form, or whether the student properly used a form to assist, but not replace, the complete drafting process. Also, forcing students to work through this process of applying research results to a drafted contract demonstrates to the students, concretely, why they cannot carelessly copy forms they may find. Rather, every contract must be considered carefully for every unique client. This realization, itself, is an important learning outcome for a transactional drafting course.

G. Require client letters to accompany contracts

A daily part of an attorney’s practice includes drafting correspondence. This correspondence can take the form of transmittal letters, demand letters, opinion letters, letters to third parties, e-mails, etc. While the consequences of well-written or poorly-written correspondence is easily overlooked, attorneys can help themselves, or hurt themselves, through their correspondence.⁸⁵ Attorneys should be careful to establish the desired tone with the recipient.⁸⁶ Attorneys can damage their credibility through sloppy correspondence.⁸⁷ Transactional drafting courses offer a great opportunity to teach effective letter writing in the context of working with clients and opposing counsel. Being able to create effective correspondence should be a desired learning outcome in a drafting course.

With that in mind, professors should include in their assignments the requirement that students draft letters to the client. Doing so helps put the exercise of drafting a contract into context (who is the contract drafted for and what happens after the contract is drafted). Also, while students may be able to find sample correspondence, the samples will be entirely different, substantively, than the letters the students would have to write. It

⁸⁴ For example, students would need to draft a security deposit provision carefully if drafting a lease set in Kansas. Kansas law states that “[a] landlord may not demand or receive a security deposit for an unfurnished dwelling unit in an amount or value in excess of one month’s periodic rent. If the rental agreement provides for the tenant to use furniture owned by the landlord, the landlord may demand and receive a security deposit not to exceed 1 1/2 months’ rent, and if the rental agreement permits the tenant to keep or maintain pets in the dwelling unit, the landlord may demand and receive an additional security deposit not to exceed 1/2 of one month’s rent.” KAN. STAT. ANN. § 58-2550 (West 2012).

⁸⁵ BRODY ET AL., *supra* note 6, at 9–10.

⁸⁶ CHRISTINE COUGHLIN ET AL., *A LAWYER WRITES* 274 (2008) (“Your tone may convey as much information as the substance of the [correspondence], so always think about the tone you would like to convey and the tone the [correspondence] is actually sending.”).

⁸⁷ *Id.* at 269 (stating that “[a]s an attorney, your credibility will be constantly evaluated with every piece of work you complete—whether that work is a complex memorandum or a three-line e-mail”).

is unlikely that students would be able to copy any sample letter they may find. Thus, the letter requirement provides one more opportunity for professors to assess students' writing.⁸⁸ Professors can assess students' ability to create a desired and consistent tone,⁸⁹ to organize and format properly, to use appropriate paragraph breaks, to apply transitions and create a smooth flow, and to follow grammar rules.

Further, letters provide an avenue for students to explain the research results they learned when researching in the midst of drafting the contract. For example, students can explain to the client why they were not able to include some of the provisions the client requested. Students can explain why they drafted a provision a particular way as a compromise between what the client desired and what the law allowed. Students can explain what additional information they would need from the client to complete the contract before it is signed. The letter provides professors with another tool from which they can assess how completely and accurately the students conducted necessary research within the context of a transaction.

Whenever an attorney drafts a document, the attorney typically sends the client a letter enclosing the document for the client to review. Thus, it makes sense to require students to do the same. More importantly, doing so provides another opportunity for professors to assess the desired learning outcomes in a way that the professor can confidently assume is not just the students' cut-and-pasted version of a form.

H. Assign an in-class, graded exercise

Professors should consider assigning an in-class, graded drafting assignment near the end of the semester. In this assignment, students will need to work independently and draft a complete contract from scratch. Professors should prohibit students from accessing the internet, and the professor should not provide any forms. Instead, at the beginning of the class period the professor should provide only the "facts" the students need to draft the terms of a contract. The students will then have the entire class period to draft the contract.

Because the students have no forms available, students are forced to work through the steps of drafting a contract rather than just skipping ahead to the final steps of writing and editing. Without the aid of forms, students

⁸⁸ The letter component of an assignment should be in addition to a contract the student drafts. Thus, all of the assessment forms noted with the prior assignments apply here as well. But, with the letter, professors have more ability to assess the students' own, independent performance—no form letter exists for students to simply copy, and the letter allows students to explain the choices they made when drafting their contracts.

⁸⁹ COUGHLIN, *supra* note 86, at 274 ("Tone is most often conveyed through word choice and sentence construction. Make deliberate choices about the words you choose and about how you phrase your sentences. Your goal is to convey the substance politely and professionally.").

will have to decide what sections to include; create their own organizational scheme; apply their own headings and sub-headings; and choose how to word each provision in a way that is consistent, avoids ambiguities, uses action terms properly, and is precise and concise.⁹⁰

Professors should place this assignment near the end of the semester. And, professors should refer to this “upcoming” assignment throughout the semester. Professors can warn students that their success on this assignment will largely depend on how much independent work they put into the earlier assignments. Those students who chose to find and copy forms for prior assignments may sink when attempting to complete this assignment. Conversely, those students who used forms properly and who worked hard to draft their own documents throughout the semester will likely rise to the top when completing this assignment.⁹¹ Such warnings throughout the semester may help motivate students to follow through all the drafting steps in each assignment, which will certainly help them achieve all of the learning outcomes for the class.

This is the only assignment in which a professor can know that the students’ work product is 100% their own work and not adapted versions of forms they found. Thus, this assignment provides a crucial tool for professors to confidently assess the students’ development in many of the desired learning outcomes for the course. This assignment serves as a valuable assessment tool at the end of the course.

I. Assign an end-of-the-course exam

While drafting courses focus on teaching students the skills needed to draft contracts, drafting courses must also teach students some substantive knowledge related to contracts and transactions. Thus, learning substantive aspects of the laws related to contracts is a desired learning outcome.⁹² Assessing the knowledge learned by students may not always be

⁹⁰ Professors should avoid research for this assignment for two reasons: (1) to allow students to have enough time to draft a complete document in one class setting, and (2) to keep students off of the internet (on which they could find forms). This assignment allows professors to assess many other learning outcomes, aside from research. If a professor feels compelled to include research, the professor may consider giving the students whatever authorities they will need, such as relevant statutes, ordinances, or regulations. Because this assignment is to be completed in-class, students will be challenged to simply organize, think through, and draft the contract. Research, if integrated, should be minimal in this assignment.

⁹¹ While this assignment allows for numerous forms of assessment, because the assignment: (1) precludes students from using forms, (2) can only be the student’s own independent work product, and (3) occurs late in the semester, this assignment provides an especially good opportunity for value-added and developmental assessment. It also provides an opportunity for students to assess (and ideally to see) how far they have come since the beginning of the semester when they likely would have had no idea how to draft a contract from start.

⁹² Students may have been exposed to some of the substantive contract principles in prior classes, such as contracts, sales, UCC, etc. But drafting professors should take advantage of the opportunity to integrate substance into practice. Thus, drafting courses are ideal courses to review and apply various substantive aspects of contract law.

accomplished by reviewing the contracts the students drafted. This is especially true if students find and rely heavily on forms.

For example, drafting professors will likely teach their students the substantive differences between a warranty and a representation.⁹³ Because of the differences between the two, professors instruct students to include each by drafting provisions that “represent and warrant” various facts. However, students may mechanically follow that advice and include the “represents and warrants” language in a contract while failing to actually grasp, or remember, the differences between the two terms. Just by seeing the “represents and warrants” language in a contract, the professor cannot assess whether the student retained the substantive knowledge and understanding behind the terms. The professor cannot know if the student has actually learned what consequences attach to a false representation compared to a breached warranty.⁹⁴

Because of this, a useful tool to assess the knowledge and substance that students learn and retain is an end-of-the-semester exam.⁹⁵ While uncommon to drafting courses, professors should consider adding one to their course.⁹⁶ First, it provides the assessment tool⁹⁷ for professors to assess not just the skills, but the knowledge, learned.⁹⁸ Second, professors

⁹³ STARK, *supra* note 17, 114–19. A representation is a promise about a currently existing fact (like “the item is free of defects and it functions properly”). A warranty is a promise about the future (like “the item will remain free of defect and function properly for two years from the date of the contract”). A cause of action for a false representation requires different proof than for a breach of warranty, and the remedies available for a false representation differ from the remedies available for a breach of warranty. Thus, it is important that a student, and a lawyer, using these terms in a contract understand the substantive differences.

⁹⁴ This example demonstrates why examinations can be useful in drafting courses. Examinations allow professors to “evaluate knowledge of principles that are important, but that [professors] were unable to incorporate into the large-scale writing project that semester, or that [professors] find difficult to evaluate independently when grading the large-scale project.” Douglas Miller, *Using Examinations in First-Year Legal Research, Writing, and Reasoning Courses*, THREE LEGAL WRITING: J. LEGAL WRITING INST. 217, 237 (1997).

⁹⁵ *See id.* at 219 (noting that, while not all skills can be tested in an in-class exam, many skills can). “The education theorists who conclude that not every skill can be tested in three hours do not advocate the abolition of examinations: rather, they suggest that in-class examinations be used with other kinds of projects.” *Id.* This article, too, suggests that an exam should not replace drafting assignments. Rather, an exam supplements the drafting assignments that professors should also assign throughout a course.

⁹⁶ Creating an exam for a transactional drafting course is not difficult. An easy approach to doing so is for the professor to review his lecture notes from each class and make notes of the materials covered that would make for strong exam questions and that you think are most important for the students to remember. If you are interested in creating an exam and would like a sample for guidance, please contact me and I will gladly provide you with the exam that I use in my transactional drafting courses. Once I verify that you teach, I will gladly mail to your law school mailing address or law school email address the full exam that I use in my course.

⁹⁷ An exam focuses primarily on direct, summative, and quantitative assessment. The value of the exam is that it allows professors to assess substantive knowledge more easily and more accurately than may be possible with written contracts. And, providing various measures of assessment increases the “fairness” of a professor’s overall assessment of his or her students. Suskie, *supra* note 28, at 6.

⁹⁸ Miller, *supra* note 94, at 218. In his article advocating the use of exams in first-year legal writing courses, Professor Miller states that examinations provide a means of judging whether students have attained a bare mastery of the course-content, a partial mastery of the course-content, or a complete mastery of the course-content, and that “this holds true regardless of whether the content of the course is

can use the exam looming ahead to reinforce to students that just copying forms is not competent lawyering—rather, knowing what terms to include and the purpose behind various terms is essential to drafting solid contracts. Third, beyond just asking substantive questions, professors can include in the exam a section that requires students to rewrite poorly drafted provisions⁹⁹ or to draft particular provisions from scratch.¹⁰⁰ This provides another opportunity for professors to assess the students’ ability to use contract language appropriately, precisely, and concisely.¹⁰¹ Thus, exams in drafting courses can test both skills and substance.¹⁰² Also, knowing that an exam looms ahead may motivate students, as they are working on earlier assignments, to carefully think about the provisions and write the provisions themselves rather than simply copy language they find in a form.¹⁰³

One criticism of using examinations in a writing course is that examinations shift the students’ time, energy, and focus away from the more traditional writing projects.¹⁰⁴ Further, “[i]n expecting students to finish [a] large writing project, then turn around and prepare for all their other examinations, as well as preparing for an examination in [their] writing course[], [professors] are expecting a great deal.”¹⁰⁵ However, this perceived negative of using an examination in a writing course can be avoided.

First, the examination in a drafting course would be only one of many graded exercises: the examination should only supplement a heavy

best described as a set of skills, a set of principles, or a body of knowledge.” *Id.* When offered in a drafting course, the exam can test both skills and knowledge.

⁹⁹ *Id.* at 231 (noting that if questions asking students to rewrite a piece of poor writing are written with care, “they will operate to measure most of what we are looking for in large writing projects.”).

¹⁰⁰ *Id.* A benefit of using an examination in a writing course is that it allows the professor to “evaluate knowledge and skills without much fear that students are collaborating improperly or cheating in some other way.” *Id.* at 238. Like an in-class drafting assignment, an in-class examination eliminates a student’s ability to copy language the student finds in a form. Thus, by having students draft provisions from scratch as part of an exam, the professor can evaluate whether students have achieved that skill.

¹⁰¹ See Miller, *supra* note 94, at 200 (“[The] mastery of skills in [writing] courses might be tested by means other than traditional writing assignments.”). Miller notes that professors can identify discreet skills to test in timed examinations, and that the range of skills that can be tested during a timed examination is very broad, while the range of skills that cannot be tested during timed examinations is very narrow. *Id.* at 221.

¹⁰² *Id.* at 235. Professor Miller notes that exams allow professors to do “a post-exam statistical analysis of each question to determine the degree of correlation between the group of students who performed well overall on the exam and the group of students who performed well on each particular question” to determine which questions “worked” and were well constructed. *Id.* More importantly, such a statistical analysis would allow professors to identify particular skills or areas of substance that large numbers of students succeeded or failed in. *Id.* Thus, the analysis would help the professor self-assess what topics she may want to focus more on, or alter the instruction of, when teaching the course in the future. *Id.*

¹⁰³ A benefit of using an examination in a writing course is that professors “can increase incentives for [their] students to work hard on assignments that do not themselves *directly* affect the course grade, but which are more obviously related to the course exam than they are to the large writing project[s].” *Id.* at 238.

¹⁰⁴ *Id.* at 236.

¹⁰⁵ *Id.*

dose of drafting assignments. Thus, the bulk of the students' work throughout the semester will be focused on completing "traditional" drafting projects.

Second, the professor should carefully arrange the syllabus so that no drafting assignment is due less than one week before or after the students take the examination. Thus, students do not have to balance their time and energy between completing a drafting assignment and preparing for the examination.

Third, professors should carefully draft the exam so that it piggybacks on the knowledge and skills the students should be using when completing their drafting assignments. Thus, the students are, in essence, preparing for the examination by putting in time and effort completing their drafting assignments. The examination should be created so that it rewards the student who practiced the drafting skills taught throughout the semester and took efforts to learn the substantive aspects covered, while presenting a challenge for the student who exerted minimal effort on drafting assignments by over-relying on forms without applying the drafting skills and substantive knowledge discussed during lectures.

Fourth, professors may give the examination on the last day of the class, rather than during the final examination period when the students are taking their examinations in their other courses.

Fifth, an element of fair assessment is to "use many different measures and many different kinds of measures."¹⁰⁶ When assessing learning outcomes, "it's important to give students a variety of ways to demonstrate what they've learned."¹⁰⁷ "Effective assessment exhibits qualities of validity, reliability, and fairness. . . . A valid, reliable, and fair picture of the student's ability is much more likely to exist if the measures are done several times using different modes of evaluation."¹⁰⁸ Administering an examination helps provide variety for students and a different mode of evaluation for the professor.

Below are a few sample exam questions that would allow a professor to assess whether the student has retained some of the substantive concepts discussed during the course.¹⁰⁹

- If a condition within the contract is not met, has the contract

¹⁰⁶ Suskie, *supra* note 28, at 6.

¹⁰⁷ *Id.*

¹⁰⁸ Munro, *supra* note 30, at 237–38.

¹⁰⁹ The samples are just intended to give professors a flavor of the type of questions an exam allows professors to ask, thus allowing professors to assess the substantive knowledge students may have gained from the course. If any professor is interested in reviewing an entire exam, please contact me directly. After verifying that you teach, I will gladly mail to your law school mailing address or law school email address the full exam that I use in my course.

been breached? If so, why? If not, why not?

- What is a covenant in a contract, and how does it differ from a warranty?
- In five or fewer sentences, explain the differences between arbitration and mediation.
- State what drafting error is found in the following sentence, then redraft the sentence properly: “If the seller fails to deliver the item, then the contract shall terminate.”

CONCLUSION

The prevalence of legal forms creates unique challenges for transactional drafting professors attempting to assess how well students have achieved the learning outcomes for their courses. If professors require their students to draft various contracts alone, the professors cannot know how much of the work product was based on the knowledge and skills their students possess versus how much of the work product is a copied version of a form. But, this “form book problem” can be overcome with adding thoughtful and creative requirements to their assignments. By requiring students to produce more than just a finished contract, professors can fully assess how well the students have achieved all of the desired learning outcomes for the course, even if students use form books for guidance. And, by using the techniques discussed in this article, professors can stop worrying about students copying forms and can instead teach the beneficial, practical approach to using forms effectively—a skill students will need as practicing lawyers.