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# Memorializing the Meal: An Analogical Exercise for Transactional Drafting

William E Foster, *University of Arkansas*  
Emily Grant



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# Memorializing the Meal: An Analogical Exercise for Transactional Drafting

William E. Foster<sup>\*</sup> and Emily Grant<sup>\*\*</sup>

*The legal academy is increasingly focused on producing practice-ready lawyers. For transactional practice, that notion requires that attorneys have the flexibility, creativity, and business acumen to draft documents that anticipate contingencies and accomplish clients' goals. Effective lawyers are able to structure their clients' affairs to provide a balance of flexibility for, and protection against, the predictably unexpected.*

*To further this goal, this article incorporates pedagogical theory to develop a classroom exercise that focuses on creativity and contingency planning in the transactional drafting context. It does so by introducing that process in a nonlegal context, specifically by having students plan a dinner party and memorialize the arrangements in a valid contract. By developing accessible classroom exercises that incorporate everyday contingencies, law professors can hone students' abilities to anticipate and adapt to factual and legal contingencies, and accordingly, to be effective planners and drafters as they transition to practice. Thus, this article augments the tools employed by law schools for developing this deeper concept of a practice-ready lawyer.*

## I. INTRODUCTION

The American Bar Association has recently renewed its call for the legal academy to develop practice-ready lawyers,<sup>1</sup> an evolving concept that

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<sup>\*</sup> Associate Professor, Washburn University School of Law; Visiting Assistant Professor, University of Arkansas School of Law.

<sup>\*\*</sup> Associate Professor, Washburn University School of Law. The authors wish to thank conference participants at the Institute for Law Teaching and Learning Hybrid Law Teaching Conference and the Association of Legal Writing Directors 2013 Biennial Conference for their comments and suggestions. Thank you to Charles Calleros, Carl Circo, Gerry Hess, Joe McKinney, and Judy Rosenbaum for their willingness to share their expertise with us. Additionally, thank you to Matthew Peterson and Jenna Seematter for their invaluable research assistance.

<sup>1</sup> For the past two decades, the American Bar Association has encouraged law schools to incorporate practical legal training into the curriculum. *See, e.g.*, AM. BAR ASS'N SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 3-8 (1992), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_prof](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_prof)

encompasses far more than mastery of fundamental black-letter law. To be sure, that foundational understanding is crucial to being a successful attorney. But law students must also have the opportunity to immerse themselves in the legal system, in the business world, and in the litigation arena so that they develop the common business sense and institutional knowledge to solve problems for their clients. Thus, the concept of a practice-ready lawyer is not someone who is prepared to merely perform isolated legal tasks, but one who is also able to process the client's articulated goals and to fully comprehend the client's situation.<sup>2</sup>

This article seeks to advance the methods for producing multi-faceted practice-ready lawyers by detailing a classroom exercise that builds a foundation for thinking creatively about drafting legal documents. It does so by adapting existing pedagogical approaches traditionally used to map the fundamental legal landscape and to introduce basic legal concepts (e.g., case law synthesis). But this article focuses instead on upper-level students who have some command of legal terminology, systems, and processes, and on the transactional drafting context, where the established approach tends to focus on specific task-driven learning.

The exercise described in this article requires students to walk through the details of planning a dinner party, but it focuses attention on addressing specific factual contingencies that might thwart or otherwise ruin the event. From that point, the exercise evolves so that students draft contractual provisions addressing the specific contingencies they previously identified. The culmination of the exercise is a legal document memorializing the dinner party arrangements, complete with delivery obligations, closing details, representations and warranties, covenants, and conditions for performance. This article also provides detailed materials that demonstrate the evolution of the exercise, including a sample student contract that might be created at the conclusion of the class discussion. In this way, this article supplements the conventional approach of having students actually draft transactional documents to gain subject-matter expertise with a classroom exercise designed to facilitate a more expansive view of the value an

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essional\_development\_macerate\_report).authcheckdam.pdf; AM. BAR ASS'N HOUSE OF DELEGATES, RESOLUTION 10B (Aug. 8-9, 2011), *available at* [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2011\\_hod\\_annual\\_meeting\\_daily\\_journal\\_FINAL.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2011_hod_annual_meeting_daily_journal_FINAL.authcheckdam.pdf).

<sup>2</sup> The practicing bar has become more vocal in its desire for graduating law students to have, in addition to technical skills, "general competencies," such as "problem solving, project management, teamwork, risk assessment, and emotional intelligence." See Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 BERKELEY BUS. L.J. 187, 193 (2012). "[T]he essential skills of practice-ready lawyers are dominantly those that are transferrable across multiple practice contexts—general competencies." *Id.* at 200.

attorney can bring to a drafting task. At the same time, this method highlights the function and interrelatedness of various contract provisions and yet demystifies the contingency planning task, thus diminishing the intimidation many students (and new attorneys) feel when first approaching contract drafting.<sup>3</sup>

A recent conversation illustrates a common frustration of law school graduates, legal employers, and most of all, clients. In the discussion, one of the authors' neighbors, the owner of a web hosting and IT support business, relayed his disappointment in having to fire a newly-hired employee. The employee had previously worked as a contract laborer in the construction industry. He sought a career change, attended a nearby trade school, and obtained a certificate relevant to computer repair and IT support. In this training, he learned how to perform a variety of technology-support tasks (e.g., how to replace a motherboard or reinstall an operating system). But, in the workplace, the employee's limitations in actually being able to resolve client problems quickly became apparent.

For example, when he was called to assist a client who was having trouble with her office e-mail, the employee spent several hours trying to resolve the issue to no avail. He had her reboot her computer and ran through several diagnostic sequences. Near exasperation, he called the boss for help. The boss immediately asked if the client could access the internet through her web browser and if anyone else in the office was having e-mail problems. The employee had not considered either question, and in fact, no one at the office could access their email or internet. The problem was with a third-party-run server, and no diagnostics on a single workstation could reveal the issue.

Although it is certainly fair to cut the employee some slack when confronted with a problem with nearly endless possible causes, the boss's questions were the obvious starting point for anyone who has spent substantial time in an office working on computers. The first thing people ask (yell down the hall) when their e-mail is wonky is whether others are having problems. If so, then they know it is not just their system involved, and a whole universe of problems is off the table. The IT employee had never spent much time with computers before attending trade school, so he lacked the common sense that comes with relying on institutional e-mail in a workplace. The employee could competently perform individual tasks

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<sup>3</sup> Indeed, recent graduates have identified a paucity of practical training in transactional skills as a common inadequacy in law school curricula. Joanne Martin, *The Nature of the Property Curriculum in ABA-Approved Schools and Its Place in Real Estate Practice*, 44 REAL PROP. TR. & EST. L.J. 385, 424 (2009) ("[Young practitioners] also would like to have seen an emphasis on the practical aspects of transactional practice during their law school experience.").

necessary to provide IT support, but was unable to comprehend the client's problems enough to identify the steps necessary to resolve the issue.

And so it goes with new attorneys.<sup>4</sup> Yes, graduates possess many fundamental legal skills—they know basic causes of action; they know generally how to navigate the procedure; they know what kinds of documents they may have to draft; they know the structure of the appellate system.<sup>5</sup> But they lack understanding of the basic business context in which the legal issues arise, due in part to the traditional focus of legal education.<sup>6</sup> Less attention seems to be directed at transactional matters,<sup>7</sup> and from a very practical standpoint, students do not understand the basic

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<sup>4</sup> Law schools are addressing the challenge of graduates with insufficient practical skills and are recognizing the pressing need for law students to graduate ready to engage in the practice of law. See, e.g., Barbara J. Busharis & Suzanne E. Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses*, 33 J. MARSHALL L. REV. 303, 304 (2000) (“[M]embers of the bar increasingly demand that students arrive for their first jobs with more than minimal competence in practical lawyering skills.”); Bradley T. Borden, *Using the Client-File Method to Teach Transactional Law*, 17 CHAP. L. REV. 101, 101 (2013) (advocating the client-file method, which “combines the law school case method with the business school case-study method, and provides students an opportunity to study and apply legal doctrine to a real-world problem . . . .”); Michele Mekel, *Putting Theory into Practice: Thoughts from the Trenches on Developing a Doctrinally Integrated Semester-in-Practice Program in Health Law and Policy*, 9 IND. HEALTH L. REV. 503, 507 (2012); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) (noting that law schools are moving toward theory while law firms are moving toward commerce).

<sup>5</sup> See Jonathan Todres, *Beyond the Case Method: Teaching Transactional Law Skills in the Classroom*, 37 J.L. MED. & ETHICS 375, 375-76 (2009) (“Immersed in case analysis, law students quickly grow accustomed to issue-spotting and identifying who committed a wrong and what the elements of that wrong are, but they are often far less familiar with how to approach a client’s issue when nothing has happened yet. Teaching our students to think ex ante about clients’ issues or legal matters is important to producing graduates who will excel in practice.”).

<sup>6</sup> See, e.g., Circo, *supra* note 2, at 198 (highlighting topics such as “Business acumen;” “Leadership and management;” “Financial/economic analysis;” and “Business development” that are practical skills not currently being effectively taught in law schools (citing HEATHER BOCK ET AL., NAT’L INST. FOR TRIAL ADVOCACY, *THE FUTURE OF LEGAL EDUCATION: A SKILLS CONTINUUM* 6 (2009))).

<sup>7</sup> “The scholarly and professional literature addressing why and how legal education should do a better job preparing law students for practice is more highly developed in addressing litigation and dispute resolution than business and transactional practice. This shortcoming reflects the strong advocacy bias in traditional legal education.” Circo, *supra* note 2, at 188 (citing Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS’N LEGAL WRITING DIRECTORS 118, 120-22 (2008)).

job of an attorney when it comes to the anticipatory aspects of document drafting.<sup>8</sup>

In fact, practice-ready graduates must understand the significance of a client's articulated goals in the broader context of the business deal.<sup>9</sup> It is the job of the attorney to internally translate those goals into legal terminology, externally communicate them back to the client using layman's terms to come to an understanding of the work to be accomplished, and then perform the legal task (using the necessary legal language and documents) to achieve the client's goals.<sup>10</sup> The exercise described below introduces this translation process, a necessary component of document drafting, to students, focusing specifically on anticipating contingencies that may thwart a client's goals.

At different stages, both technical and psychological barriers impede effective contract drafting. Law students are often overwhelmed by what they do not know; conversely, new attorneys are overwhelmed by what they do know. Recent graduates, having just spent three years in law school and a summer studying intricate bar exam hypotheticals, are daunted by the myriad issues implicated in each provision they draft.<sup>11</sup> As a result, they get anxious about their drafting responsibilities. Some new transactional lawyers, confronting such apprehension, have a tendency to rigidly follow a form agreement without making any modifications beyond the names of the parties.<sup>12</sup> Others attempt to tackle the multitude of issues head-on and over-

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<sup>8</sup> "[T]he legal academy has yet to identify a satisfactory means for addressing the basic gap in our students' understanding of dealmaking." Robert C. Illig, *The Oregon Method: An Alternative Model for Teaching Transactional Law*, 59 J. LEGAL EDUC. 221, 226 (2009).

<sup>9</sup> "Not only do we need to broaden and strengthen our teaching of the elements of planning, negotiation and drafting, but we need to expose students to the ways in which these fundamentals interact in practice. We need to teach students not only how to structure a merger, but how to close a deal." *Id.*

<sup>10</sup> "In practice, we solve real, not abstract problems, translating the language and methodologies of the law to our clients." Susan R. Martyn & Robert S. Salem, *The Integrated Law School Practicum: Synergizing Theory and Practice*, 68 LA. L. REV. 715, 715 (2008).

<sup>11</sup> Much of this dynamic can be attributed to the retrospective bias in the law school curriculum—that students are analyzing issues *ex post*, as compared to the prospective nature of transactional drafting. See Todres, *supra* note 5, at 375-76.

<sup>12</sup> "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' . . . ." SCOTT J. BURNHAM, DRAFTING AND ANALYZING CONTRACTS 216 (3d. ed. 2003); see also Todres, *supra* note 5, at 377 ("When I practiced transactional law, litigator friends would tease that 'drafting' meant merely pulling a good template from the files and changing the names of the parties and the dates. Transactional law, like all areas of law, draws upon precedents to enhance efficiency, improve quality of work, and save clients money, but a good lawyer can draft precise, effective legal language on the spot and also

lawyer a document, getting mired in the details of every possible legal and factual scenario and trying to draft over-inclusively.<sup>13</sup> Obviously, neither of these approaches effectively serves clients. The dinner party exercise developed in this article pushes students toward overcoming these barriers by developing their mastery of the technical skills of drafting in a comfortable context.

This article is unique because it does not merely promote legal analysis or drafting skills in isolation, though a more robust command of each is a fortunate by-product of the exercise. Instead, this article encourages professors to challenge upper-level students to set aside their formulaic legal mindset and their narrow vision of a drafting task and to approach drafting with something akin to common sense.<sup>14</sup> In that way, students will be better prepared to view a client's needs as individualized rather than something that can be adequately addressed by rote fill-in-the-blank drafting.

To set the context for the ideas promoted in this article, Part II discusses the existing pedagogical theory that supports using nonlegal examples to introduce students to legal concepts and explains how we have combined that paradigm with introducing students to transactional drafting tasks. Part III describes the classroom exercise that focuses on getting students comfortable with their roles and responsibilities as a contingency planner for their clients. Part IV provides other similar nonlegal analogies that may be used to promote common sense thinking in various transactional drafting contexts. Part V reiterates the utility of this exercise given the need for innovative teaching and the directive to produce practice-ready lawyers. The Appendices include documents supporting the exercise at various stages of implementation, including a sample completed contract.

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understands the law that undergirds why a provision is drafted a certain way.”).

<sup>13</sup> While thorough and thoughtful practice should certainly be encouraged, there are practical limits to what a client is willing to pay for and to what one is able to accomplish in any single document. The exercise described in this article seeks in part to demonstrate both the importance of anticipatory drafting and the inherent limitations of anyone's ability to anticipate everything. Finding a way to accomplish the client's goals without absolute certainty is a key learning point of the lesson.

<sup>14</sup> Although this type of business judgment is typically perceived to be acquired only through practice or life experience, “business acumen” has been specifically identified as one of the practical skills not effectively taught in law schools. See Circo, *supra* note 2, at 198, 201, 212-15. Professor Circo conducted a survey of law firm training and development professionals regarding entry-level transactional lawyer training. *Id.* at 213-14. Among the findings of the survey, almost seventy percent of respondents agreed or strongly agreed that law schools should devote more attention to developing “business acumen,” even at the expense of substantive law courses. *Id.* at 213.

## II. THE THEORY

One key to maximizing the effectiveness of a class exercise is creating material that is relevant to the context of the students' existing framework.<sup>15</sup> Adult learning theory, drawing on cognitive science research, recognizes that "adult learners flourish when teachers make explicit connections between students' past experiences and prior learning . . . ."<sup>16</sup> Thus, taking into account the students' world of memory, experience, and response often lightens the mental load involved in mastering a new analytical framework or developing a new skill.<sup>17</sup> Professors can better engage adult learners by drawing explicit links between the subject matter at hand and past experiences of the students.<sup>18</sup> By seeing a connection between something familiar and the new material, the students will generally be able to understand the new material more quickly and effectively.<sup>19</sup>

Students exposed to legal rules and systems for the first time are often so focused on absorbing the content and implications of the rules that they are unable to use the material to develop analytical skills or legal methods. The rules get in the way of the larger lesson.<sup>20</sup> But teachers can aid in the

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<sup>15</sup> Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941, 943 (1997) ("Adults learn new concepts, skills, and attitudes by assigning meaning to them and evaluating them in the context of their previous experience.").

<sup>16</sup> Camille Lamar Campbell, *How to Use a Tube Top and a Dress Code to Demystify the Predictive Writing Process and Build a Framework of Hope During the First Weeks of Class*, 48 DUQ. L. REV. 273, 280-81 (2010).

<sup>17</sup> See Jane M. Goddard, *Building the Cathedral: Sculpting A Part-Time Legal Education in A Double-Time World*, 8 BARRY L. REV. 117, 135 (2007); Hess, *supra* note 15, at 943.

<sup>18</sup> Campbell, *supra* note 16, at 280-81.

<sup>19</sup> This challenge is made all the more difficult given that students come to law school with diverse backgrounds and a wide variety of experiences. Illig, *supra* note 8, at 224 ("Although we sometimes like to think of law school as a uniquely novel and even transformative experience, few first-year students arrive at our doors with an entirely blank slate."). "Because law students are the products of diverse intellectual and cultural backgrounds, they bring a wide variety of schemata to the classroom at the beginning of the first semester." Charles R. Calleros, *Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 37, 39 (2001) [hereinafter Calleros, *Using*]. "Those differences include age, ethnicity, gender, life experience, sexual orientation, social and economic background, culture, learning style, disability, reasons for attending law school, and aspirations as lawyers. Legal educators must consider those differences to maximize learning for all students." Hess, *supra* note 15, at 941.

<sup>20</sup> "When an instructor introduces students to new legal rules as a means to teach analytic skills or other facets of legal method, however, the rules have a tendency to get in the way and capture an inordinate share of the students' attention and concern." Charles R.



learning process by “tying the new vocabulary, concepts, and skills to what [students] already know and to previous life experiences.”<sup>21</sup> Using familiar nonlegal contexts to teach a particular legal skill or thought process is consistent with the research about how adult students learn,<sup>22</sup> and it can “help students develop the same kinds of analytical skills they might apply to a legal problem.”<sup>23</sup>

A robust body of literature on pedagogical methods employs the use of nonlegal analogies to help law students understand basic legal analysis skills.<sup>24</sup> This work, including substantial contributions from Charles Calleros,<sup>25</sup> a forerunner in the field,<sup>26</sup> has given us some useful tools for helping students develop such skills as case synthesis, legislative drafting, and statutory interpretation.<sup>27</sup>

In one Calleros exercise, students begin to understand basic concepts of the legal method—including the ambiguous nature of the law—through a skit in which a grocery store employee must decide whether to display a newly arrived shipment of tomatoes near the apples in the store window or near the carrots that were stacked inside the store.<sup>28</sup> Students learn that the

Calleros, *Introducing Students to Legislative Process and Statutory Analysis Through Experiential Learning in a Familiar Context*, 38 GONZ. L. REV. 33, 34 (2002-2003) [hereinafter Calleros, *Introducing*].

<sup>21</sup> Timothy W. Floyd et al., *Beyond Chalk and Talk: The Law Classroom of the Future*, 38 OHIO N.U. L. REV. 257, 267 (2011).

<sup>22</sup> See Campbell, *supra* note 16, at 281.

<sup>23</sup> Calleros, *Introducing*, *supra* note 20, at 34. “[A]n occasional diversion to nonlegal cases can be justified if they teach something about the law and legal method through metaphor or analogy.” Charles Calleros, *Rules for Monica*, 9 THE L. TEACHER 11, 11 (2001), available at <http://www.lawteaching.org/lawteacher/2001fall/lawteacher2001fall.pdf> [hereinafter Calleros, *Rules*].

<sup>24</sup> “Legal writing professors commonly use non-legal examples to introduce fundamental legal writing principles. A cursory examination of the existing scholarship reveals that the analytical skills most commonly introduced with non-legal examples fall into three broad categories: curing linguistic ambiguity, demonstrating the structural intricacies of predictive writing, and explaining rule synthesis.” Campbell, *supra* note 16, at 276 (citations omitted).

<sup>25</sup> Professor of Law, Arizona State University, Sandra Day O'Connor College of Law. See *Faculty Profile, Charles Calleros*, ARIZONA STATE UNIVERSITY, SANDRA DAY O'CONNOR COLLEGE OF LAW, [http://apps.law.asu.edu/Apps/Faculty/Faculty.aspx?individual\\_id=138](http://apps.law.asu.edu/Apps/Faculty/Faculty.aspx?individual_id=138) (last visited Nov. 24, 2013).

<sup>26</sup> See Campbell, *supra* note 16, at 277.

<sup>27</sup> See, e.g., Calleros, *Using*, *supra* note 19; Calleros, *Introducing*, *supra* note 20; Charles R. Calleros, *Reading, Writing, and Rhythm: A Whimsical, Musical Way of Thinking about Teaching Legal Method and Writing*, 5 LEGAL WRITING: J. LEGAL WRITING INST. 2 (1999) [hereinafter Calleros, *Reading*].

<sup>28</sup> See Calleros, *Using*, *supra* note 19, at 42-43. Calleros adapted his skit from a simpler exercise about fruit in a basket developed by Elisabeth Keller and described in Jane Kent

grocery store owner likes to display apples in the store window to attract shoppers inside,<sup>29</sup> but that carrots are unlikely to draw anyone in and so they should be displayed in the produce section.<sup>30</sup> Students are then asked to speculate as to the reasoning behind the owner's preferences<sup>31</sup> and to apply that reasoning in deciding where to locate the tomatoes.<sup>32</sup> In so doing, students begin to understand why case law does not always present a single "right answer" and how to develop arguments for both sides of a dispute.<sup>33</sup>

In a similar manner, Professor Nancy Soonpaa<sup>34</sup> has developed a nonlegal exercise about paintings designed to expose students to the case synthesis process.<sup>35</sup> In Soonpaa's exercise, students evaluate two paintings owned by a collector, synthesize a "rule" about what kind of art the collector likes, and predict whether the collector would like to purchase a specific painting.<sup>36</sup> Students thereby become familiar with the process of synthesizing rules from several cases and applying those rules to a new set of facts.<sup>37</sup>

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Gionfriddo, *Using Fruit to Teach Analogy*, 12 THE SECOND DRAFT: BULL. OF THE LEGAL WRITING INST. 4 (1997), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1016&context=jane\\_gionfriddo](http://works.bepress.com/cgi/viewcontent.cgi?article=1016&context=jane_gionfriddo). In turn, others have developed their own variations of the Grocer's problem, adding complexities to Calleros's skit. See, e.g., Suzanne Rowe & Jessica Enciso Varn, *From Grocery Store to Courthouse: Teaching Analytical Skills to First-Year Law Students*, 14 THE SECOND DRAFT: BULL. OF THE LEGAL WRITING INST. 14 (2000), available at <http://www.lwionline.org/publications/seconddraft/may00.pdf>.

<sup>29</sup> Calleros, *Using*, *supra* note 19, at 42-43.

<sup>30</sup> *Id.* at 43.

<sup>31</sup> Most commonly, Calleros notes, students propose either that the grocery store owner was concerned with visually appealing food, like shiny red apples, in the front window to catch the eye of people outside, or that the grocer wished to have "snackable" food in the window, something like an easy-to-eat apple to remind a passerby that he is hungry and may wish to drop in for a convenient snack. *Id.* at 44-45.

<sup>32</sup> *Id.* at 43-44.

<sup>33</sup> *Id.* at 46.

<sup>34</sup> Professor of Law, Texas Tech University School of Law. See Biography of Professor Nancy Soonpaa, TEXAS TECH UNIVERSITY SCHOOL OF LAW, <http://www.law.ttu.edu/faculty/bios/soonpaa/> (last visited Nov. 30, 2013).

<sup>35</sup> Nancy Soonpaa, *Art of Legal Analysis in the Legal Writing Classroom*, 14 THE SECOND DRAFT: BULL. OF THE LEGAL WRITING INST. 10 (2000), available at <http://www.lwionline.org/publications/seconddraft/may00.pdf>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Relatedly, Karen Gross, currently the president of Southern Vermont College, but previously a law professor at New York Law School, describes an exercise where students are asked to describe paintings as a preview for their later work comparing and contrasting cases. See Karen Gross, *Visual Imagery and Law Teaching*, 7 L. TCHR. 8 (1999), available at <http://lawteaching.org/lawteacher/1999fall/visualimagery.php>. For Ms. Gross's biography, see *Biography of President Karen Gross*, SOUTHERN VERMONT COLLEGE,

Similarly, nonlegal examples can be used to allow students to practice combining several authorities to generate an overarching statement of the legal rule.<sup>38</sup> An exercise entitled *Rules for Lina*<sup>39</sup> consists of skits, either acted out in person or shown on video,<sup>40</sup> involving a high school girl's social activity. Each short scene shows Lina, the teenage protagonist of the series, returning home after an evening with friends and eliciting some kind of response from her mother.<sup>41</sup> After each scene, students are asked to interpret the mother's statements "in an attempt to identify the parent's holding in each case and the apparent policies supporting the holding . . . ."<sup>42</sup> Thus, after four or five scenarios, the students are able to develop a synthesized rule statement from the incremental parental decision-making and the parental policies behind the rule.<sup>43</sup> This process mimics the analysis a student undertakes in working with the common law as it develops over several court decisions.<sup>44</sup> "Once they gain confidence in addressing ambiguities in the holdings of cases in a nonlegal context and understand what it means to synthesize those holdings," then "students can apply their newly formed conceptual frameworks to more complicated and unfamiliar cases dealing with elusive legal concepts such as consideration and causation."<sup>45</sup> In this way, using a familiar, nonlegal context "allows students to focus their attention entirely on the new concepts of legal method."<sup>46</sup>

Using an exercise called "Decoding the Dress Code," Professor Camille Lamar<sup>47</sup> introduces students to "fundamental legal concepts such as stare

<http://www.svc.edu/about/presidentbio.html> (last visited Nov. 30, 2013).

<sup>38</sup> Calleros, *Using*, *supra* note 19, at 49-62; *see generally* CHARLES R. CALLEROS, *LEGAL METHOD & WRITING* (6th ed. 2011).

<sup>39</sup> Lina's previous incarnation was as Monica. Calleros, *Rules*, *supra* note 23. Students seem unconcerned about what happened to Monica, though the authors still wonder.

<sup>40</sup> *See* Charles Calleros, *Rules for Lina: An Introduction to Common Law Legal Method*, ARIZONA STATE UNIVERSITY, SANDRA DAY O'CONNOR COLLEGE OF LAW, <http://www.law.asu.edu/files/faculty/RulesforLina/index.html> (last visited Nov. 30, 2013).

<sup>41</sup> "It's past 11. . . . [N]ext time, after the game, don't *hang out* at the pizza parlor. You need your sleep, and you've got plenty of homework to do." Calleros, *Using*, *supra* note 19, at 50. "No [you cannot go to the movies tonight]. You went to the school volleyball game on Tuesday night, and you went to the school musical last night, and that's enough for one week. . . . [Y]ou need to catch up on your homework." *Id.* at 52.

<sup>42</sup> *Id.* at 50.

<sup>43</sup> *See id.* at 54.

<sup>44</sup> Calleros, *Introducing*, *supra* note 20, at 35-36.

<sup>45</sup> Calleros, *Rules*, *supra* note 23, at 11.

<sup>46</sup> Calleros, *Reading*, *supra* note 27, at 8.

<sup>47</sup> Associate Professor of Law, Nova Southeastern University Shepard Broad Law Center. *See* Camille Lamar, SHEPARD BROAD LAW CENTER, NOVA SOUTHEASTERN UNIVERSITY, <http://www.nsulaw.nova.edu/faculty/profiles.cfm?pageid=190> (last visited

decisis, the common law process, and the process of predictive legal analysis . . . .”<sup>48</sup> She does so by asking the students to help Sheila, a hypothetical seventeen-year-old foreign exchange student ready to begin her first job at a local clothing store.<sup>49</sup> Sheila is uncertain about appropriate attire for the workplace, and students initially begin by offering advice based on their prior work experience.<sup>50</sup> The exercise forces students to clarify ambiguities in their advice by considering whether certain outfits, as depicted in photos, would be acceptable.<sup>51</sup> Finally, students must synthesize rules governing workplace attire after getting more information concerning the clothing store’s prior disciplinary actions for dress code violations.<sup>52</sup> This nonlegal exercise highlights for students the predictive process that lawyers must undergo in advising clients and answering legal questions.

Students can also become more comfortable with the legislative process and with statutory interpretation with various extensions and modifications of the Rules for Lina exercise.<sup>53</sup> In the legislative process version, students are asked to play the roles of parents (legislators) of a friend to “propos[e] and debat[e] rules governing the evening activities of their children in high school, rules that could codify, clarify, modify, or replace the ‘common law’ rules” developed in the original Lina exercise.<sup>54</sup> For the statutory interpretation exercise, students must resolve ambiguities that arise in the application of the rules created by the legislative process, discussing, for example, what is a “social” activity versus an “academic” one.<sup>55</sup>

Each of these exercises relies on a familiar, nonlegal situation to expose students to some aspect of legal thinking or analysis.<sup>56</sup> They allow professors to draw on the students’ existing foundation of knowledge and experience to make a particular concept or thought process more accessible

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Nov. 30, 2013).

<sup>48</sup> Campbell, *supra* note 16, at 276.

<sup>49</sup> *Id.* at 301.

<sup>50</sup> *Id.* at 301-03.

<sup>51</sup> *Id.* at 304.

<sup>52</sup> *Id.* at 305-06.

<sup>53</sup> See Calleros, *Introducing*, *supra* note 20, at 46.

<sup>54</sup> *Id.* at 47.

<sup>55</sup> *Id.* at 51.

<sup>56</sup> This approach recognizes that the learning process is a cycle of “becom[ing] acquainted with new ideas and skills[,] . . . [a]ppl[y]ing these ideas and skills in real life settings or simulations, reflect[ing] on the experience with these new skills and concepts, redefin[ing] how they might apply in other settings, and then reappl[y]ing them in other settings.” Hess, *supra* note 15, at 943. Thus, “[w]hen . . . introduc[ing] students to techniques of legal method and analysis, it pays to start with legal questions set in very familiar, concrete contexts.” Calleros, *Reading*, *supra* note 27, at 7.

and less abstract.<sup>57</sup> “If students can comfortably navigate the familiar waters of . . . nonlegal settings, . . . they may more easily survive and even thrive in the stormier seas of their legal studies.”<sup>58</sup>

In contrast to the pedagogical methods literature, which introduces students to the basic skills necessary to understand and use the law (e.g., reading and processing cases), the leading transactional drafting texts are designed to give students practice drafting real-world documents such as a promissory note, an aircraft purchase agreement, and a letter of intent.<sup>59</sup> The texts focus, appropriately, on how to create the document that the client wants—how to generate the various provisions of a contract or a will or a lease agreement. The texts teach the task,<sup>60</sup> they provide specific and thorough instruction to show students how to create a legal document.

Beyond just teaching the nuts and bolts of transactional drafting, however, much can be done to connect what happens in the classroom to what students will need to do in practice.<sup>61</sup> In the transactional drafting

<sup>57</sup> See Hess, *supra* note 15, at 942-43; Calleros, *Reading*, *supra* note 27, at 7.

<sup>58</sup> Calleros, *Using*, *supra* note 19, at 62.

<sup>59</sup> See generally TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2007); MARGARET TEMPLE-SMITH & DEBORAH E. CUPPLES, LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS (2013); CYNTHIA M. ADAMS & PETER K. CRAMER, DRAFTING CONTRACTS IN LEGAL ENGLISH: CROSS BORDER AGREEMENTS GOVERNED BY U.S. LAW (2013).

<sup>60</sup> In a similar vein, legal research and writing texts were traditionally focused on the “product” approach, see Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 250 (2012), which concentrated solely on the final written product including format, organization, clarity, and accuracy; Cheri Wryon Levin, *The Doctor is in: Prescriptions for Teaching Writing in a Live-Client In-House Clinic*, 15 CLINICAL L. REV. 157, 178 (2008). This method proved problematic as the exclusive focus of legal writing instruction. Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719, 719-20 (1997). Beginning in the mid-1980s, the discipline saw a shift to the “process” approach of teaching legal writing, focusing less on the final outcome and more on the legal analysis needed to create the final product. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 52-53 (1994); see generally Miriam E. Felsenburg & Laura P. Graham, *A Better Beginning: Why and How to Help Novice Legal Writers Build A Solid Foundation by Shifting Their Focus from Product to Process*, 24 REGENT U. L. REV. 83 (2012); Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building A Better LRW Program*, 46 SANTA CLARA L. REV. 93 (2005). The exercise described in this article continues the shift toward process-based instruction, specifically in transactional drafting classes, by isolating the analytical and problem-solving skills that students will need when they become practicing attorneys, rather than focusing solely on the final product they will need to create.

<sup>61</sup> Many law schools are doing just that by offering skills training, clinical programs, and practicum courses. Illig, *supra* note 8, at 226 (“[T]he academy has in recent years taken serious steps toward addressing the needs of transactional students by offering them an ever-expanding variety of skills courses.”); see also *id.* at 234-236 (describing the University of

context in particular, students must be exposed to the legal doctrines implicated in the document as well as the practical analytical and drafting skills that they will need to actually create the contract or deed.<sup>62</sup> The ability to solve problems that may arise in the execution of a particular legal document must be tied to the substantive area of law that the document incorporates.<sup>63</sup>

This article attempts to marry the work of the pedagogical scholars and the transactional drafting textbook authors, keeping in mind the call for law schools to develop practice-ready graduates, by giving an analogical context for some of the basic drafting tasks. This article focuses in particular on the contingency planning involved in even the most seemingly routine drafting tasks, and it does so by using a nonlegal exercise to teach students how to approach a drafting task and how to think about the contingencies involved. In this way, this article supplements the existing approaches to teaching transactional drafting and offers a way to introduce and reinforce the thought process that a lawyer must undergo while drafting a legal document.

### III. THE EXERCISE

In a transactional drafting class, students must learn how to create documents, keeping in mind the legal issues implicated in the deal. But they also need to recognize the problem-solving skills that are a key component of a lawyer's professional expertise.<sup>64</sup>

To that end, lawyers must be comfortable thinking through the legal issues—the black letter law that they learn in class. But they must also be able to anticipate contingencies that may arise in the execution of any particular business deal.<sup>65</sup> A party might not be able to give the amount of

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Oregon's Transactional Practice Labs); *see generally* Busharis & Rowe, *supra* note 4, at 305-06 (describing practicum courses taught in conjunction with doctrinal courses at Florida State University); *see generally* Christine A. Corcos et al., *Teaching a MegaCourse: Adventures in Environmental Policy, Team Teaching, and Group Grading*, 47 J. LEGAL EDUC. 224 (1997); John Sonsteng et al., *Learning by Doing: Preparing Law Students for the Practice of Law*, 21 WM. MITCHELL L. REV. 111 (1995); Elizabeth Fajans, *Learning from Experience: Adding a Practicum to a Doctrinal Course*, 12 J. OF THE LEGAL WRITING INST. 215 (2006); Martyn & Salem, *supra* note 10; Mekel, *supra* note 4.

<sup>62</sup> *See* Illig, *supra* note 8, at 226.

<sup>63</sup> Busharis & Rowe, *supra* note 4, at 303.

<sup>64</sup> "Drafting contracts is more than translating the business deal into contract concepts and writing clear, unambiguous contract provisions." STARK, *supra* note 59, at 303.

<sup>65</sup> "Rather than apply [the individual skills of planning, negotiation, and drafting] in a mechanistic fashion—as individual tasks that proceed in a linear or even more or less predictable manner—[an attorney] must creatively utilize whatever means are then at hand

money or type of services expected or might not be able to close at the anticipated time for any number of reasons—financing contingencies, shareholder problems, weather shutting down airports, or computer viruses. Effectively drafted contracts should address those contingencies so that a client's goals are not thwarted, and to do that lawyers have to understand essentially what can go wrong in any particular transaction.<sup>66</sup> Doing so requires “‘legal imagination’—the ability, based on experience and intuition, to imagine multiple possible futures and to utilize legal and other tools to direct behavior and solve client problems.”<sup>67</sup>

The following exercise helps students get comfortable using their “legal imagination” and adding contingency planning value to documents they draft for clients. It encourages them to think like lawyers and anticipate real world issues and contingencies on the front end of any given transaction.<sup>68</sup> At the same time, the exercise also hones the students' understanding of the effect of and connection among different contract provisions.

The exercise can be effectively used at any point during the semester. Early in the course, the exercise can introduce students to the general themes that will arise and can get them comfortable with the tasks involved in transactional drafting. One hundred page stock purchase agreements are intimidating; a dinner party is not. And if executed with some panache, many students will not recognize that they are developing the components of an agreement until at least midway through the exercise.<sup>69</sup> Moreover, if introduced early enough in the semester, the professor can return to the hypothetical to illustrate different learning points throughout the semester.

The exercise could also be used midpoint in the semester to reinvigorate class discussion and review concepts learned thus far. Also, if introduced at the end of the course, the exercise can serve as a nice capstone to the semester. The students, now equipped with a semester's worth of

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to prepare her client for a future that does not yet exist.” Illig, *supra* note 8, at 222.

<sup>66</sup> “Sophisticated drafting requires a lawyer to understand the transaction from a client's business perspective and to add value to the deal. Looking at a contract from the client's perspective means understanding what the client wants to achieve and the risks it wants to avoid.” STARK, *supra* note 59, at 303.

<sup>67</sup> See Illig, *supra* note 8, at 223.

<sup>68</sup> “Adding value to the deal is a euphemism for finding and resolving business issues. These skills are problem-solving skills and are an integral component of a deal lawyer's professional expertise. They require an understanding not only of contracts, but of business, the client's business, and the transaction at hand.” STARK, *supra* note 59, at 303.

<sup>69</sup> Obviously, law students in a transactional drafting course will know that they are not planning a dinner party just for fun. But if they get into the party planning mode without thinking about it from the start as a contractual drafting exercise, they may be more creative (or perhaps more practical) in their suggestions or problem-solving ideas.

transactional terms and drafting techniques, can often use a prod at the end of the course to force them to apply what they have learned throughout the semester in a completely different context. It can be the elusive “ah-ha” moment for many students.

### *A. Dinner Party Dialogue*

The basic premise of the exercise is to walk the students through planning a social event—in this case, a dinner party. In the course of extracting the information necessary to prudently and thoroughly coordinate the gathering, students will naturally address a wide variety of contingencies that could threaten to ruin the experience. Students will quickly identify many of the fundamental issues to be addressed at the outset (e.g., location, date, and participants) and will move on to the finer points (e.g., arrival time, cuisine, and service particulars) in short order.

When enough details have been fleshed out to establish a coherent vision of the party, the students are instructed to turn their attention to a handout, which contains provisions of a standard form contract (in this case, a stock purchase agreement) in a tabular format.<sup>70</sup> The handout directs the students to review the typical contract provisions listed in the sample agreement and provide analogical provisions related to the dinner party scenario. For example, in the exchange section of a stock purchase transaction, the seller may agree to transfer duly executed stock certificates in transferable form. An analogous obligation of a dinner party guest may be to deliver thirty-two ounces of coleslaw.<sup>71</sup>

What follows is a series of questions designed to elicit details and decisions relevant to the event and to force students to consider possible problems that may arise. With enough time allotted for the exercise, one can allow the participants to delve into the minutiae of several individual obligations and logistical challenges,<sup>72</sup> but it is helpful to pull back occasionally and re-focus the students on the most significant “deal killer” issues, like suitability of the location for event purposes and the safety of guests. The questions are drafted to be somewhat casual and playful, which is consistent with the tone of the authors’ classrooms generally. One could easily adopt a more formal approach to soliciting the relevant information. There is nothing especially technical about the questions as drafted, but

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<sup>70</sup> See *infra* Appendix A.

<sup>71</sup> One may initially scoff at the relative triviality of a coleslaw delivery obligation, but in certain parts of the South, a barbecue sandwich is considered inedible *sans* “slaw.”

<sup>72</sup> And after all, don’t many client meetings devolve into a hand-wringing session over unlikely and irrelevant matters?



some thought has been given to ensuring that they draw out a fair amount of detail and address certain essential points of the ultimate agreement.

*"Ok, who wants to have a little get-together for dinner<sup>73</sup> this semester?"*

Here, it's helpful to get at least three volunteers to agree to be "on the spot" to host the party. These volunteers do not necessarily have to be the only attendees.

*"Whom should we invite?"*

This question narrows the field of participants and gives an idea of the scope of the affair. While it may be easier to limit the guest list to those in the room, the stakes are raised when the students plan to entertain others (friends from outside the law school, significant others, volunteers at local charitable organizations, etc.).

*"What date works for everyone?"*

This question is deceptively difficult. Law students are busy folks, socially speaking.<sup>74</sup> This item alone could take an entire class period if a more outgoing lot of participants is chosen. One item to consider here is making sure that there is enough time between the planning (i.e., execution of the agreement) and the party (i.e., the closing) in order to facilitate creating a number of pre-closing covenants later on. Two weeks should be sufficient.

*"Where should we have the dinner?"*

Consider physical space constraints, food preparation requirements, and outdoor/indoor options. One attractive option is for the professor to offer to host the party at her house. A private residence works well for this conversation because it allows the class to contemplate many odd contingencies that might be less problematic at a restaurant or banquet hall such as functioning appliances, basic cleanliness, household pets, accessibility, etc. Using the professor's residence as the defined location also works well because the professor will have a concrete idea of what is available on site and the limitations of the space (e.g., "I have double ovens, but one only goes to 235 degrees, and dining space for eight."). The previously determined date may dictate the location options in large part. For example, if the party is in Topeka, Kansas during February, outdoor space, while abundant, will be far less attractive.

*"Are we cooking or ordering in?"*

The authors push for cooking on-site because it introduces a nice variety and complexity of obligations of the participants. Other options include a

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<sup>73</sup> Substitute "supper" where geographically appropriate.

<sup>74</sup> See, e.g., Hayley Penan, *Diary of a UCI Law Student: Time Management*, THE NOTICE (Sep. 9, 2013, 11:00 AM), <http://thenoticeca.com/2013/09/09/diary-of-a-uci-law-student-time-management/>.

catered meal, takeout, or a potluck where everyone brings food prepared off-site.

*“What are we serving?”*

You can suggest a specific cuisine (e.g., Italian, Mexican, Asian, Soul food) or simply ask the hosts what they’re comfortable preparing for (and serving to) the guests (a group of perhaps twenty students or more). Within this discussion, the hosts can specify what each is contributing to the event, which will be the heart of the ultimate contract. Some may bring groceries or pantry items to use on-site; some may contribute prepackaged courses; others may only need to provide services or expertise (e.g., cleaning or event coordination) or make available their property (e.g., cookware, kitchen supplies, apartment space, vehicle for carpooling).

One way to structure this conversation is to have the students allocate responsibility among the participants by the progression of the courses to be served (e.g., appetizers, main dish, side dishes, dessert, and beverages). Time constraints may prohibit a detailed explication of each item or even developing a full menu, but having the meal sequence in everyone’s mind gives the discussion some guideposts.

*“Let’s talk a bit about money, because these dishes probably range in cost. How should we address the expenses?”*

This line of questioning allows the students to develop creative solutions to the potentially disproportionate financial burden imposed by the hosts’ various contributions. Common solutions include having everyone bear their own costs for their particular contribution, or a cost-sharing arrangement in which each person documents their own expenditures and one host is assigned to ensure an even split after the event.

This item can provoke an especially contentious discussion. It is easy to see where the host tasked with providing beverages would object to bearing alone the cost of beer, wine, and soft drinks for a large gathering. On the other hand, everyone is going to be concerned with keeping all expenses down when the group as a whole will evenly split the costs. The logistics of cost splitting can themselves get intricate. To the extent the students delve into this territory, you might have them address receipt collection and timing of reimbursement among other issues.

If students fail to raise the potential for one participant to get carried away with costs, you may ask, “what if Sally insists on using black truffle-infused olive oil to braise her grass fed chicken from the northern provinces of Canada?” Students can address these concerns effectively in a variety of ways, including agreeing to shop at a specific grocery store, developing a budget for each course or item, or inserting a flexible but overarching

reasonableness clause.<sup>75</sup> At this point it might be appropriate to briefly address potential remedies in the event one host does in fact get carried away.

*"I think we need to know some more information about the physical space."*

The direction of this conversation will vary depending upon the location chosen for the party and who has the information about the space. There are several crucial issues to be addressed with respect to the location including availability of utensils, serving dishes, and cookware; suitability of appliances; and layout of the space including accessibility, parking, and seating options. The previous decisions as to food preparation and menu will dictate what needs to be addressed. For example, depending on kitchen supplies available at the venue, hosts may need to provide extra dinnerware or a chafing dish to keep food warm, or they may need to coordinate carpooling if there is inadequate parking space. The key, however, is to have the students think through the details of what they will need in order to prepare and serve each dish and for general convenience of the guests.

*"So, we've decided to have this party at location X, what are your expectations of what the place will be like when you get there?"*

To prompt the students even further, you may ask, "Have you ever been to someone's place for a social gathering and been unpleasantly surprised? If so, what was it about the space that you didn't anticipate?" Inevitably, students quickly identify pet-related items like prevalent fur or unfriendly or intrusive animals. Many assumptions are less obvious though and it is important to draw those out of students. Beyond having a place to sit and a plate for their food, what other issues could interfere with the comfort of the guests? Will the apartment be adequately air conditioned or heated, relatively clean, and generally rodent-free?<sup>76</sup>

This is also a good point in the conversation to throw the students a curveball:

*"What if Jenny is really excited about the party and repaints her living room in anticipation of hosting the dinner that evening?"*

Although Jenny's intentions are good, the students should see that fresh paint fumes could easily rise to a noxious level and ruin the dinner. Whether Jenny should be held liable is another issue altogether. The point of this conversation is that everyone has assumptions of how an event will unfold. Part of the planning process is to articulate those assumptions to

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<sup>75</sup> This is commonly referred to as the "don't get carried away" clause in our class discussions.

<sup>76</sup> Fortunately, we have found that students are particularly adept at identifying unpleasant domestic scenarios.

ensure that all participants have compatible expectations as to core aspects of the event.

There is no possible way to identify, *ex ante*, all of the contingencies that could mar the evening. The line of questioning should usher students toward the realization that they cannot plan for every possible scenario and to begin the process of thinking through dealing with unpredictability.

*"We're serving food to a bunch of soon-to-be lawyers. Any concerns?"*

Here, we not-so-subtly direct students to some fundamental health and safety issues involved in preparing food for other people. Again, students will quickly identify the possibilities of food allergies, religious prohibitions, or other dietary restrictions of the guests. However, notions of safe food-handling, which many students may assume they share, can vary widely from person to person. Some will be appalled by the reuse of a cutting board while others wouldn't think twice about working around the spoiled parts of the meat. This question raises issues involved in both food storage prior to use as well as actual preparation. Beyond the obvious concerns like preventing someone from serving raw chicken, thoughtful students will want to ensure that all ingredients were stored at safe temperatures and in an appropriate manner at all times.<sup>77</sup>

Safety and dietary restrictions aside, students may identify items that are more accurately considered mere preferences. Perhaps someone doesn't like onions or enjoys only charred meat. Students should treat these concerns differently than the previously mentioned health and safety issues. Making that distinction is critical to helping students distinguish significant issues, i.e. the deal killers, from negotiable details.

*"What if . . . someone is sick?"*

*. . . the weather is bad?*

*. . . the president makes a surprise visit to campus that night?*

*. . . there's a gas leak in the host's apartment building?*

*. . . the store is out of salmon?"*

One of the final items to address is the possibility that something arises that interferes with the dinner party. If someone is sick or otherwise detained at the last minute, should we cancel the event or proceed as planned? Does it matter who is unable to attend—whether it be one of the hosts or a guest? If there is particularly bad weather, will the dinner be rescheduled or cancelled? Who makes these calls? How much notice should they give? What are the repercussions of cancellation? Who bears the cost of wasted food or the stockpiles of paper plate and napkins? Is a host allowed to substitute tilapia for salmon? The possibilities are endless.

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<sup>77</sup> Those who keep up with published local restaurant inspection reports will be especially helpful here.

The crux of the discussion should focus on responsibility—when is it fair to hold someone individually accountable for extra expense, delay, or inconvenience, and when is the failure to follow through excusable?

### *B. Pulling It Together*

After developing enough of the logistics through class discussion to establish a relatively comprehensive concept of the dinner party, the students can turn their attention to drafting the obligations and expectations of the parties in contract form. Appendix A of this Article gives an example of a handout that can be used to guide students through the relevant provisions of a sample contract, which can serve as a model for an agreement to host the dinner party. With sample language of the major contract provisions isolated in tabular format, students can begin to understand not only the individual components of a sophisticated agreement, but also the relationship among the various provisions. The accessibility and familiarity of the dinner party hypothetical, however, prevent the complexity of the task from overwhelming the students.

The tabular contract in Appendix A includes the primary sections of a typical stock purchase agreement, including the definitions, exchange/closing terms, representations and warranties, covenants, closing conditions, indemnification provisions, termination clauses, and miscellaneous terms. Depending on whether this exercise is introduced at the beginning of the course to preview the material to come, at the end of the course as a capstone tool, or somewhere in the middle, the professor may need to spend some time explaining the function of the relevant provisions.

Once students begin examining their drafting options, they initially must determine who will be a party to the agreement. Should only the hosts sign the contract or should the intended beneficiaries, i.e., the guests, also be included? In the stock purchase example, a common question is whether the corporation should be a party to the agreement, or simply the buyer and seller.<sup>78</sup>

After the parties have been identified, you may want to skip down to the exchange provisions, leaving the definitions to be fleshed out as the need arises in the other areas of the document. In the stock purchase agreement, the seller is to deliver the stock certificates in transferable form, free and clear of encumbrances, and the buyer is to deliver the cash or other consideration. This section is the heart of the transaction. In the dinner

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<sup>78</sup> See 1 ABA MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY 11 (Robert T. Harper et al. eds., 2d ed. 2010) [hereinafter ABA MODEL STOCK PURCHASE AGREEMENT].

party agreement, this exchange provision will detail who is contributing what to the dinner (grocery items, cookware, dishwashing services) and will likely describe how the costs will be accounted for and shared. As with the stock purchase agreement, the exchange section will also set forth the date and time of closing (i.e., the party) and the schedule of deliveries. Given that this exercise develops an agreement that will be executed at least a couple of weeks in advance of closing, students should be able to develop more robust pre-closing obligations of the parties.

As in practice, considerable attention should be spent refining the representations and warranties of the parties. Representations and warranties are statements of past or presently existing facts combined with a promise that they are and will be true.<sup>79</sup> They are tied to due diligence, i.e., the investigation of the company or real estate or whatever is being purchased, and can be a primary source of liability for the parties.<sup>80</sup> For example, the representations and warranties put the seller “on the hook” for its portrayal of the company in the stock purchase agreement to the extent that portrayal manifests itself in this section (e.g., the statement “The company is not presently a party to any lawsuit.”).

In the case of the dinner party, there is less historical background to navigate than would be involved in purchasing an ongoing business. But at the point of execution of the contract, the representations can ensure that everyone is on the same page with respect to certain obligations and assumptions. For example, if the students have developed a list of allergens that the hosts are prohibited from using in the preparation of the food, each party to the agreement can represent and warrant that they have received, read, and understood the list. Further, if the party will be held at someone’s apartment, then the host could represent and warrant that the space is suitable for the party or that she has maintained a pest control policy for the past three months.

Representations and warranties are critical to uncovering any surprises before closing. They are the primary sections in which the parties spell out their assumptions and expectations with respect to the form and condition of the items to be delivered and anything else that may interfere with their receipt of the bargained-for benefit.<sup>81</sup> Many representations and warranties are often untouched from deal to deal, an approach that may fail to address

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<sup>79</sup> BURNHAM, *supra* note 12 at 239.

<sup>80</sup> See, e.g., JoEllen Mitchell-Lockyear, *Common Law Misrepresentation in Sales Cases—an Argument for Code Dominance*, 19 FORUM 361, 374 (1984) (“[T]he seller’s representations are the primary source of performance obligations under the contract . . .”).

<sup>81</sup> See WILLIAM K. SJOSTROM JR., AN INTRODUCTION TO CONTRACT DRAFTING 7 (2d. ed. 2013). Cf. CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN’T TEACH YOU 51-52 (2d. ed. 2008).

crucial transaction-specific items.<sup>82</sup> One of the goals of this exercise is developing the students' acumen for anticipating unique problems in the transaction and drafting deal-specific provisions; spending ample time in the representations and warranties is one of the most effective ways of furthering that objective.

The covenants are essentially promises to do something or to refrain from doing something.<sup>83</sup> As opposed to representations, which are primarily statements of past or existing facts, covenants relate to things that have yet to happen as of the date of the contract execution.<sup>84</sup> The covenants and representations and warranties do, however, address many similar items. Well-drafted covenants can refine the parties' mutual understanding of what must happen (or not happen) in order to close the deal, as well as what needs to occur post-closing in order to protect the value of the transaction for all parties.<sup>85</sup> In the case of a stock purchase, the buyer may require the seller to agree to operate the business in the ordinary course between signing and closing, and to refrain from entering into any long-term contracts with third party vendors or customers until the deal is finalized.<sup>86</sup> In the dinner party example, the hosts could covenant to shop only at a certain store for ingredients (to keep costs predictable) and to prepare all food in accordance with "safe food handling procedures," which could be a defined term.

The covenants naturally flow into the closing conditions section. The closing conditions set forth what must happen or not happen in order for all parties to be obligated to perform.<sup>87</sup> If a closing condition is not met, the performance of some or all parties may be excused. One party's failure to abide by a covenant would likely excuse the other party's obligation to go

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<sup>82</sup> See Phillip Wm. Lear, *Representations, Warranties, Covenants, Conditions, and Indemnities: Stitching Them Together in the Purchase Agreement*, 37 ROCKY MTN. MIN. L. INST. § 3.01 (1991) ("All too often the industry resorts to stock forms containing boilerplate language without fully understanding the relationship of each provision to the other until deals unravel.").

<sup>83</sup> SJOSTROM, *supra* note 81, at 18-19.

<sup>84</sup> *Id.*

<sup>85</sup> See Alan S. Gutterman, *A Legal Due Diligence Framework for Inbound Transfers of Foreign Technology Rights*, 24 INT'L LAW 976, 1003 (1990) ("Representations, warranties, and covenants are of value in any commercial transaction . . . . Properly drafted, they can provide a basis for a common understanding between the parties as to the due diligence that has been undertaken in structuring the transaction and the ongoing expectations that have been created relating to activities following the original execution of the agreement.").

<sup>86</sup> See generally ABA Committee on Negotiated Acquisitions, *Model Stock Purchase Agreement*, WASHINGTON UNIVERSITY LAW, available at <http://law.wustl.edu/courses/lehrer/spring2010/10CourseMaterials/ModelStockPurchaseAgreement.pdf>.

<sup>87</sup> See FOX, *supra* note 81, at 20-21.

through with the deal pursuant to the closing conditions.<sup>88</sup> Closing conditions are also tied to the representations and warranties. A typical closing condition will be the continuing accuracy of all representations and warranties.<sup>89</sup> In the stock purchase scenario, a buyer's obligation to purchase stock may be conditioned upon something specific like the continued employment of several key officers of the company, or something general like the absence of any material adverse event occurring in the seller's corporation or in the seller's industry as a whole.<sup>90</sup>

The all-encompassing "material adverse effect" language is common in commercial transactions<sup>91</sup> and serves as a model for students looking to address the unlimited contingencies in nearly any legal, business, or personal situation. For the dinner party, the hosts may provide that if certain critical ingredients are unavailable at a reasonable cost (e.g., the shipment of live crawfish is lost on its way to the Midwest), then their performance is excused and the party can either be delayed, rescheduled, or cancelled. Further, if one student is hosting the meal at her apartment and covenants to have the apartment in "party ready condition" (another potential defined term), but has failed to pay her bills and had her electricity shut off the day of the party, then the closing conditions should be drafted to allow the other hosts and guests to either cancel or relocate the party.<sup>92</sup>

The host's failure to ensure proper heating or cooling then leads into the indemnification provisions. Should the responsible host be liable to the rest of the partygoers for the cost of relocating the event? If so, where do you draw the line for culpability? Surely there should be a difference between a power outage caused by an electrical storm and one resulting from a failure to pay the bills or to appropriately maintain the apartment. The

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<sup>88</sup> *Id.*

<sup>89</sup> ADAMS, *supra* note 59, at 190-91.

<sup>90</sup> See generally RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981) (defining "condition" in contract law).

<sup>91</sup> FOX, *supra* note 81, at 86-88.

<sup>92</sup> A relevant discussion at this point is whether there should be some equivalent of due diligence investigation on the part of the hosts. Initially, the hosts might want to ensure the availability of ingredients in the area ("Ground bison is \$8.00 a pound at Kroger. Check.") and the cost and accessibility of alternative locations. Keen students may also push for an inspection of the premises near the time of the event. Some will have experience purchasing real estate and be familiar with the inspection process and the potential solutions to problems identified during that process (including walk rights and price offsets). One of the most valuable provisions in a real estate purchase agreement is the closing condition of the buyer's complete satisfaction with the inspection of the property, which could be a helpful model in the dinner party example. See, e.g., HAWAII ASSOCIATION OF REALTORS, PURCHASE CONTRACT STANDARD FORM ¶J-1 (2012), available at <http://www.hawaii.realtors.com/download/rtr201-5-12%20for%20education%2022-12.pdf>.



indemnification provision should specify what acts or omissions of each party will give rise to an obligation to compensate the other parties to the agreement.<sup>93</sup>

Finally, the termination section and miscellaneous provisions may be rather similar in the stock purchase agreement and the dinner party contract. The hosts would likely want the ability to end their obligations under the agreement by mutual assent or upon a minimum number of days notice by certain parties. The dinner party may actually have more non-actionable termination options because things like inclement weather (for an outdoor event) or even minor illness (particularly of one of the hosts) could reasonably delay or cancel the dinner where they would not typically excuse a stock purchaser's obligation to close. Many of the miscellaneous provisions likewise are useful in a variety of circumstances and may require little adaptation to the dinner party. For example, the hosts could include a fairly standard provision for the modification of the agreement.<sup>94</sup>

This exercise is particularly valuable because, in addition to teaching students the function of each provision of a contract and the contingencies that come into play in drafting even a simple transaction, it demonstrates the interrelatedness of the contract provisions. Even the seemingly straightforward offer to bring food for a dinner party can implicate all of the various parts of a contract.

Initially, the obligation to prepare and bring a certain dish would be addressed in the exchange provision of the contract—that particular host has agreed to contribute ingredients and cooking services to the event. Students recognizing the dangers of cooking for potential lawyers will want to specify that the handling and preparation of the food is done in a safe manner. Because this notion of safe food handling will likely be used in several places throughout the document, drafters will want to identify a shorthand way of consistently incorporating that concept, which would logically be in the definitions section of the contract. Students will have to be resourceful in developing a workable definition. They may, for example, research the U.S. Department of Agriculture's website for guidelines on safe food handling and agree to abide by those recommended procedures.<sup>95</sup>

The notion of safe food handling touches on representations and warranties with the hosts all acknowledging that they have read and understand the defined procedures (as laid out in the definitions). The

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<sup>93</sup> See FOX, *supra* note 81, at 254-55.

<sup>94</sup> See generally W. MICHAEL GARNER, 2 FRANCH. & DISTR. LAW & PRAC. § 8:19 (2013) (discussing standard contract modification provisions).

<sup>95</sup> See Food Safety, U.S. DEP'T OF AGRIC., [http://www.usda.gov/wps/portal/usda/usda/home?navid=FOOD\\_SAFETY](http://www.usda.gov/wps/portal/usda/usda/home?navid=FOOD_SAFETY) (last visited Nov. 30, 2013).

concept implicates covenants as well, which would require that hosts abide by the safe food handling procedures at all relevant times between the date of the contract and the dinner party itself.

Compliance with the covenant to handle food in a safe manner would be a closing condition such that a failure by a host to abide by the covenant would possibly excuse the performance of other hosts. Depending on the type and timing, a breach of a covenant might, in some cases, trigger the indemnification or even the termination provisions.

Students may spend some time fleshing out the severity of breaches of covenants and representations and warranties, identifying which breaches trigger walk rights, indemnification, or other remedies. What if it comes to light, for example, that one of the hosts has stored the foie gras in her car trunk for eight hours? Is that host liable to replace it with the closest thing she can find during a last-minute run to the grocery store? Are other hosts excused from their cooking obligations? Is the breach severe enough to warrant canceling the party? And if so, is the breaching host responsible for reimbursing the other hosts for the time and money they expended? Is there a difference in relative culpability between the host who neglects the foie gras in her car and a host who serves an undercooked chicken dish? Should there be a different remedy given the danger of potential illness?

By completing the handout with details from the dinner party planning session—Appendix B offers some suggestions for dinner party provisions that may fit into each section of the contract—students will see the interrelatedness of the various contract provisions. This relationship among the provisions demonstrates the importance of treating any one item thoroughly and consistently throughout the document.

One common pitfall of new attorneys is the careless, mechanical overreliance on form documents in creating a contract. Illustrating for students the interrelatedness of contract provisions highlights the dangers of this practice. Instead, students should realize that, even if borrowing provisions from separate agreements, they must be cautious to ensure that the provisions make sense when combined into a single document. For example, a seller's obligation to deliver stock certificates unencumbered may be addressed in one stock purchase agreement in the exchange provision ("seller shall deliver unencumbered stock certificates . . ."). Another agreement may address that obligation differently in the covenants ("seller shall refrain from encumbering . . .") or the representations and warranties ("stock certificates are free from encumbrances . . ."). Another may use the definition section to specify that "stock certificates" means unencumbered certificates. Creating a piecemeal contract by cutting and pasting paragraphs from separate documents can be an efficient way to customize a contract for a client, but it runs the risk that the provisions will

not cover all necessary information, or worse, that they will directly contradict each other. Without careful drafting, a contract that incorporates provisions from each different agreement may be repetitive, inconsistent, or incomplete. Thus, lawyers must take care to be consistent and thorough throughout the document, particularly if borrowing provisions from other forms.

This exercise, then, gets students more comfortable not only with the standard layout of the document and the effect of each clause, but also with the interrelationship of the provisions. Grasping this drafting concept, as well as the need to write specifically for each client's goals, emphasizes the importance of careful and accurate drafting.

### *C. Possible Work Products*

The dinner party exercise can be used in a number of different ways to produce various outcomes. The sequence contemplated in this article involves talking through the exercise in class with little or no preparation on the part of the students, and then inserting basic skeletal concepts or language into a worksheet keyed to an analogous stock purchase agreement. The students could simply take notes on the form and complete it themselves. The intermediary product could be something similar to Appendix B, which is a sample of a completed tabular contract that includes a number of items that would be addressed in both agreements.

To promote a deeper understanding of the function and interrelationship of the contractual provisions, the assignment could incorporate drafting an actual contract with each relevant provision articulated in final form that would be legally enforceable and effective at accomplishing the client's goals. The students could either be individually assigned separate provisions, which could later be assembled into a master class document, or they could work in teams to produce several versions of the agreement. Either approach works well, particularly if shared with the entire class so that students can see how others resolved tricky language and structural issues involved in the drafting. A sample student-drafted contract is included in Appendix C. The example is by no means exhaustive or flawless, but merely demonstrates some of the ways a particular student chose to solve the drafting challenges presented in the exercise.

Requiring the students to draft the contract language also fosters their resourcefulness. They will need to contemplate what kind of legal language to use for the various dinner party provisions and perhaps even seek out other sources to find sample wording. They might, as noted above, refer to the USDA website for food handling procedures, or perhaps turn to

habitability language from a lease agreement to help define “party ready condition.”

This kind of resourcefulness is a skill that often separates successful new attorneys (those who thrive on solving challenging tasks in a creative manner) from those who can only perform limited or isolated tasks. Much like the construction-worker-turned-computer-technician who was unable to apply industry common sense to solve a client’s problem,<sup>96</sup> attorneys who fail to appreciate the larger business or legal context and lack ingenuity or creativity will often fail to effectively serve their clients. By promoting creative problem-solving and drafting flexibility in the transaction setting through these and similar exercises, law schools can better equip students to practice in a way that adds significant value to their clients’ deals from day one.

Finally, the dinner party hypothetical can serve as a handy reference point throughout the semester in a transactional drafting course. If introduced early, the instructor can refer back to the numerous variables, contingencies, planning paths, and alternative solutions presented by the party scenario in a consistent and accessible manner.<sup>97</sup> For instance, when discussing the benefits and downsides to incorporating an alternative dispute resolution mechanism, the students can recall hosts who might be suddenly adverse to each other after one of them flakes on the meal and the others are left with forty pounds of fresh-caught Atlantic salmon. This tangible and manageable example can be used to frame many, if not most, of the substantive discussions throughout the semester.<sup>98</sup>

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<sup>96</sup> See *supra* Part I.

<sup>97</sup> In Professor William Foster’s Mergers & Acquisitions class, he walks the students through the purchase of a local restaurant in the first class meeting. The students initially identify what it is they actually want to purchase (e.g., the equipment, location, name, recipes, or employee contracts, if any), and then think through the relative benefits and costs of stock purchases and assets acquisitions. The hypothetical continues to develop throughout the semester as the details of the restaurant’s (surprisingly complex) corporate structure and intricate contractual obligations with vendors and major customers unfold.

<sup>98</sup> It might be helpful, however, at the conclusion of the exercise to remind students of the pedagogical purposes underlying it. Many students tend to alienate their friends or family during law school by bringing legal lingo and sensibilities to social occasions that ought to be kept simple. See, e.g., Tanina Rostain et al., *Thinking Like a Lawyer, Designing Like an Architect: Preparing Students for the 21st Century Practice*, 88 CHI.-KENT L. REV. 743, 752 (2013) (noting that law students’ family and friends sometimes complain about the students’ tendency to “lapse into legal jargon”). For example, we do not want them lunching at someone’s home and asking “Are you warranting that this food is fresh and has been prepared in a hygienic fashion?” Instead, the exercise is designed to develop ways of thinking and negotiating that students can later apply to legal problems; we certainly are not suggesting that every dinner party must be reduced to a set of carefully negotiated written obligations. In real life, sometimes “I’ll bring a salad and dessert to add to your main dish,”

## IV. OTHER POSSIBILITIES

Beyond the stock purchase agreement and dinner party conversation, there are nearly endless possibilities for developing similar exercises. One option is to use a partnership agreement format to set out the obligations and expectations of roommates sharing an apartment for the first time. In addition to being a particularly familiar circumstance for most students, the roommate/partnership example is a great option because it highlights the uniqueness of individual business partners' various contributions and concerns.<sup>99</sup> In this sense, variations on the roommate hypothetical advance the attorney's understanding of his role as a dynamic problem-solver and also encourage the view of the client as someone with dynamic needs.

There is a tendency among practitioners to draft partnership and LLC agreements in a one-size-fits-all manner, which can miss more obvious and straightforward approaches to things like valuation of contributions, liquidating distributions, cash flow allocations, and so forth.<sup>100</sup> A roommate agreement would consist of more than merely detailing how the bills get paid. Similarly, a partnership agreement must also include things beyond the obvious contributions of money, property, and services. Just like a roommate who shows up with a dog, a saxophone, and a heavy metal music collection, a client's potential partner brings to the table his own individual personalities, strengths, and weaknesses. Thus, the roommate scenario highlights for students the multiple variables of the arrangement, variables that might not be that obvious to new lawyers in an analogous legal situation where, at first blush, it seems that the only significant terms are the financial details.

Consider also the parallels between a contingent scholarship grant and an earn-out agreement.<sup>101</sup> Many students are familiar with contingent

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really is all that is needed or appropriate.

<sup>99</sup> It is, after all, occasionally ok to anthropomorphize your clients.

<sup>100</sup> "[E]very transactional matter is unique, and each one requires lawyers to draft new language that both is precise and does not expose their clients to liability or excessive risk." Todres, *supra* note 5, at 377. As a result, "attorneys who 'draft' contracts by relying on [form books] may fail to competently represent their clients." Jacob M. Carpenter, *Unique Problems and Creative Solutions to Assessing Learning Outcomes in Transactional Drafting Courses: Overcoming the "Form Book Problem"*, 38 U. DAYTON L. REV. 195, 196 (2012). Drafting problems arising from reliance on forms extend to the format and style of the document as well. "[T]oo often lawyers and law students use forms to replace [the organization, sentence structure, and grammar] 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." SUSAN L. BRODY ET AL., *LEGAL DRAFTING* 10 (1994).

<sup>101</sup> See DALE A. OESTERLE, *THE LAW OF MERGERS AND ACQUISITIONS*, 24 (4th ed. 2012)

scholarships, where the monetary award varies based on the earned GPA in a given year. In a similar way, contingent compensation in the acquisition of a business is sometimes represented in an earn-out agreement, which specifies a schedule of payments to be made upon the selling company hitting certain, typically financial, milestones.

Although most schools tie contingent scholarships solely to GPA, students tasked with structuring the arrangement may find themselves advocating for more creative measures of contribution to the school. Students may, for example, recommend that the scholarship award consider things beyond just GPA, including participating in moot court competitions, serving as a student bar association representative, or volunteering for certain community-oriented externships. Similarly, the attorney advocating for a seller of a business might want to look for more innovative measures of performance to trigger a higher payout from the buyer. A seller's attorney might advocate for the company's performance potential to be evaluated on things beyond just the financial bottom line, including the receipt of new patent rights, recognition from a community organization for the company's contribution to hiring minority workers, or an award for outstanding safety performance in the industry.

Again, this analogy encourages students to be creative and dynamic in their representation of clients, and it gets them comfortable drafting language from scratch to solve specific client goals. In the context of a company acquisition, this approach adds value to both sides of the transaction and to the industry and community at large.

Other course-oriented drafting tasks include a will (particularly one that establishes a testamentary trust that ties distributions to certain events related to age or education), an advanced directive, a healthcare power of attorney, a real estate purchase agreement, a promissory note, a mortgage, or even a patent license. The nonlegal settings could involve a family wedding, a storyline from television show,<sup>102</sup> the logistics of traveling abroad with a group, or a shared labor project where someone exchanges legal services for yard work and home maintenance. Bearing in mind the students' experiences and frames of reference, a nonlegal analogy to a drafting task can challenge the students to think about the task in a nontraditional way.

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("In an earnout, the purchaser pays part of the purchase price (in additional cash or purchaser securities) as a percentage of post-closing profits earned periodically by the newly purchased operations."); *Richmond v. Peters*, No. 97-3647, 1999 WL 96736 (6th Cir., Feb. 3, 1999) (demonstrating a real-world example of an earn-out agreement).

<sup>102</sup> Jerry and Elaine's intricate agreement to rekindle aspects of their friendship in *Seinfeld: The Deal* (NBC television broadcast May 2, 1991), is a particularly saucy example.

## V. CONCLUSION

The dinner party scenario uses a common event in the lives of students to show them that they have the ability to plan for contingencies. We ask specific questions—What if there's bad weather? What if someone is sick? What if an ingredient is more expensive than we thought?—and then ask them to work through how to achieve the desired outcome. The handout closes the loop by giving the contingencies names and a place in an actual contract. So in addition to being more comfortable anticipating problems, students learn some substance of the drafting task, namely what kinds of terms belong in various parts of a contract.

In using an exercise that draws on students' everyday experiences and then connecting them specifically to tasks they will face as attorneys, we can communicate to students that they have the ability to think critically and anticipate problems—people problems, logistical problems, business problems, and not just legal ones. Although it may seem like using a nonlegal discussion represents a step backward from practice-readiness, the exercise addresses a deficit in the problem solving skills of new attorneys.<sup>103</sup> The nonlegal context allows professors to illustrate the need for a multi-faceted view of an attorney's role as issue spotter and anticipator. By using a familiar nonlegal context, the exercise focuses students' attention solely on the challenges of anticipating contingencies and addressing them with creative solutions. If students started out with a drafting assignment only in a legal context, they might devote so much attention to technical facets of that field or industry that they would forget to see the bigger picture. Thus, the exercise encourages students to be thorough but non-mechanical in their drafting tasks, and it gives them confidence as they approach a drafting situation, rather than starting with a mindset of worry or dread.

The utility of this exercise extends to students all across the performance spectrum. Even top performing students are often paralyzed by the overwhelming number of legal issues that may be implicated in a given

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<sup>103</sup> See Neil J. Dilloff, *Law School Training: Bridging the Gap Between Legal Education and the Practice of Law*, 24 STAN. L. & POL'Y REV. 425, 438 (2013) (stating that "good lawyers trained in creative thinking can devise solutions that are within both legal and ethical bounds"); David Segal, *After Law School, Associates Learn to Be Lawyers*, N.Y. TIMES (Nov. 19, 2011), [http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&_r=0) ("What [students] did not get, for all that time and money, was much practical training. Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions . . . ."); *supra* Part I (discussing the lack of real-world problem solving skills in new attorneys).

document. Actually, it is often the better students that are aware of the potential implications of the document that they are drafting. The tendency is for those students to either “over-lawyer” each provision (e.g., write too specifically to include each possible variation on each contingency, etc.), or to stick with the standard form document and make no alterations besides the names of the parties.<sup>104</sup> Neither approach effectively serves the client.

We can help students find a more positive and eager approach to their drafting tasks by demonstrating that creating transactional documents is easier and more effective with a flexible mindset. The exercise described above illustrates that there is nothing mystical about many of the contingencies attorneys deal with; they can be anticipated and handled as easily as those issues students address without hesitation in their everyday lives.

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<sup>104</sup> See BRODY, *supra* note 100, at 10; Lear, *supra* note 82, at § 3.01.



## APPENDIX A: STUDENT HANDOUT

*Agreement for**1. Defined Terms*

The Defined Terms section provides agreed-upon definitions of terms that are either frequently used in the document or the explanation of which elsewhere in the document would detract from the readability of the contract.

*Example:*<sup>105</sup>

For purposes of this Agreement, the term "Business Day" shall mean any day other than (a) Saturday or Sunday or (b) any other day on which national banks in the State of Kansas are generally permitted or required to be closed.<sup>106</sup>

*Dinner Party:**2. Exchange/Transaction/Closing*

The Exchange section explains the form and economic terms of the transaction, including the details (time/date/location) of the closing of the transaction and the parties' respective deliveries due at closing.

<sup>105</sup> All examples are adapted from the ABA's Model stock Purchase Agreement. See 1 ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 78.

<sup>106</sup> *Id.* at 15.

*Examples:*

Subject to the terms and conditions of this Agreement, at the Closing, Buyer shall purchase the Shares from Seller, and Seller shall sell and transfer the Shares to Buyer, free and clear of any Encumbrance.<sup>107</sup>

At the Closing, Buyer shall deliver to Seller \$100,000.00, which shall be paid by wire transfer to Seller.

At the Closing, Seller shall deliver to Buyer certificates representing the Shares, endorsed in blank and otherwise in proper form for transfer.<sup>108</sup>

*Dinner Party:**3. Representations and Warranties*

Representations are statements as to past or present facts, made as of a moment in time to induce a party to act. Warranties are promises that existing or future facts are or will be true. Among other things, these provisions describe what is being sold and give assurances as to the authority of the parties to enter into the transaction.<sup>109</sup>

*Examples:*

Seller represents and warrants to Buyer that the Company is duly organized, validly existing, and in good standing under the laws of its jurisdiction of organization.<sup>110</sup>

Since January 1, 2013, the Company has not suffered any Material Adverse Change and no event has occurred, and no circumstance exists, that can reasonably be expected to result in a Material Adverse Change.<sup>111</sup>

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<sup>107</sup> *Id.* at 45.

<sup>108</sup> *Id.* at 58-59.

<sup>109</sup> *Id.* at 77.

<sup>110</sup> *See id.* at 82.

<sup>111</sup> *Id.* at 124.

*Dinner Party:*

#### 4. Covenants

Covenants are commitments by each of the parties to the contract to perform (or to refrain from performing) certain obligations prior to closing and after closing.<sup>112</sup>

*Examples:*

Prior to Closing, Seller will provide Buyer with full and free access, during regular business hours, to the Company's personnel, assets, contracts, records, and furnish Buyer with such contracts and records as Buyer may reasonably request.<sup>113</sup>

After Closing, Seller shall take no action, either directly or indirectly, that could diminish the value of the Company or interfere with the business of the Company.<sup>114</sup>

*Dinner Party:*

#### 5. Conditions

Conditions specify what must happen (or not happen) prior to closing in order for the parties to be obligated to close. If a condition is not satisfied, the other party may refuse to close without being liable for damages.<sup>115</sup>

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<sup>112</sup> See *id.* at 197.

<sup>113</sup> *Id.* at 198.

<sup>114</sup> *Id.* at 243.

<sup>115</sup> See *id.* at 245.

*Examples:*

Buyer’s obligation to purchase the Shares is subject to Buyer’s receipt, at or prior to Closing, of each of the Consents identified here in a form and substance satisfactory to Buyer.<sup>116</sup>

Seller’s obligation to sell the Shares is subject to Buyer’s representations and warranties being accurate in all material respects as of the date of this Agreement and of Closing.<sup>117</sup>

*Dinner Party:*

6. Termination

The Termination provision specifies which events will terminate the parties’ obligations under the agreement and upon which terms each of the parties may terminate the contract (either with or without liability).<sup>118</sup>

*Examples:*

This Agreement may be terminated as follows:  
by mutual consent of Buyer and Seller;  
by Buyer upon a material Breach of any provision of this Agreement by Seller; or  
by Seller upon a material Breach by Buyer.<sup>119</sup>  
A termination will not relieve any party from any liability for any Breach of this Agreement occurring prior to termination.<sup>120</sup>

*Dinner Party:*

<sup>116</sup> See *id.* at 255.  
<sup>117</sup> See *id.* at 270.  
<sup>118</sup> See *id.* at 275.  
<sup>119</sup> *Id.* at 276.  
<sup>120</sup> *Id.* at 280.

### 7. Indemnification/Remedies

The Indemnification provision backs up the representations and warranties and other agreements contained in the contract by providing that the breaching party will pay for damages caused by its breach. This section may provide for equitable remedies or set termination fees as well as money damages.<sup>121</sup>

*Examples:*

Seller shall indemnify and hold harmless Buyer from any loss that Buyer may suffer, sustain, or become subject to, as a result of any Breach of any representation or warranty made by Seller in this Agreement.<sup>122</sup>

Buyer shall indemnify and hold harmless Seller from any loss that Seller may suffer as a result of any Breach of any representation or warranty made by Buyer.<sup>123</sup>

*Dinner Party:*

### 8. Miscellaneous

The Miscellaneous provisions are the standard boilerplate, which are common in most contracts and which specify how expenses will be shared and which state's laws govern, and where notices should go, among other things.<sup>124</sup>

*Example:*

This Agreement may only be amended, supplemented, or otherwise modified by a writing executed by the Buyer and the Seller.<sup>125</sup>

<sup>121</sup> See *id.* at 285-86.

<sup>122</sup> See *id.* at 305.

<sup>123</sup> See *id.* at 323.

<sup>124</sup> See *id.* at 351.

<sup>125</sup> *Id.* at 361.

*Dinner Party:*

## APPENDIX B: COMPLETED EXERCISE

*Agreement to Host a Dinner Party**Recitals: identify the parties to and purposes of the transaction/event**1. Defined Terms*

The Defined Terms section provides agreed-upon definitions of terms that are either frequently used in the document or the explanation of which elsewhere in the document would detract from the readability of the contract.

*Example:*<sup>126</sup>

For purposes of this Agreement, the term "Business Day" shall mean any day other than (a) Saturday or Sunday or (b) any other day on which national banks in the State of Kansas are generally permitted or required to be closed.

*Dinner Party:*

"Protein/Starch"

"Side Dish"

"Dessert" (includes cheese? Fruit?)

"Identified Allergens?"

"Safe Food Handling Procedures"

"Party Ready Condition"

*2. Exchange/Transaction/Closing*

The Exchange section explains the form and economic terms of the transaction, including the details (time/date/location) of the closing of the transaction and the parties' respective deliveries due at closing.

<sup>126</sup> All examples are adapted from the ABA's Model Stock Purchase Agreement. See *supra* notes 105-125.

*Examples:*

Subject to the terms and conditions of this Agreement, at the Closing, Buyer shall purchase the Shares from Seller, and Seller shall sell and transfer the Shares to Buyer, free and clear of any Encumbrance.

At the Closing, Buyer shall deliver to Seller \$100,000.00, which shall be paid by wire transfer to Seller.

At the Closing, Seller shall deliver to Buyer certificates representing the Shares, endorsed in blank and otherwise in proper form for transfer.

*Dinner Party:*

On June 15, between 6:00 and 6:30 PM, Steve will bring X, and Megan will bring Y to the apartment at \_\_\_\_\_.

X will be delivered hot/cold or ready to eat/ready to be cooked, etc.

Z will tally all receipts submitted by June 17 and allocated the costs evenly among the Hosts.

Hosts with a deficit will deliver a check or cash in the amount of the deficit to Z on or before June 24 at 5:00 PM

W will provide disposable dishware, utensils and napkins by \_\_\_\_.

Q will make available the Apartment from 5:00 until midnight on the night of the event in Party-Ready Condition.

*3. Representations and Warranties*

Representations are statements as to past or present facts, made as of a moment in time to induce a party to act. Warranties are promises that existing or future facts are or will be true. Among other things, these provisions describe what is being sold and give assurances as to the authority of the parties to enter into the transaction.

*Examples:*

Seller represents and warrants to Buyer that the Company is duly organized, validly existing, and in good standing under the laws of its jurisdiction of organization.



Since January 1, 2013, the Company has not suffered any Material Adverse Change and no event has occurred, and no circumstance exists, that can reasonably be expected to result in a Material Adverse Change.

*Dinner Party:*

X, Y, and Z represent and warrant they have read and understand the list of Identified Allergens set forth in Exhibit \_\_\_\_.

Q represents and warrants that the Apartment is suitable for purposes of hosting the Party.

#### 4. Covenants

Covenants are commitments by each of the parties to the contract to perform (or to refrain from performing) certain obligations prior to closing and after closing.

*Examples:*

Prior to Closing, Seller will provide Buyer with full and free access, during regular business hours, to the Company's personnel, assets, contracts, records, and furnish Buyer with such contracts and records as Buyer may reasonably request.

After Closing, Seller shall take no action, either directly or indirectly, that could diminish the value of the Company or interfere with the business of the Company.

*Dinner Party:*

All Hosts will obtain and distribute to Z by June 17th copies of receipts for all expenses incurred with respect to the Party.

Hosts will use reasonable best efforts to keep costs reasonable by shopping for ingredients only at Walmart.

At all times from the execution of this Agreement to the Party, Q will maintain a policy for regular pest control for the Apartment.

Hosts will acquire, store, transport, handle, and prepare all ingredients in accordance with Safe Food Handling Procedures.

Each of the Hosts will take reasonable/ordinary care to ensure the safety of themselves and others (no running with knives or sloshing hot oil around), and to maintain the kitchen in reasonably good and serviceable condition at all times (including cleaning spills on floors, in the oven, or on the countertops) in a timely manner and storing all equipment in a safe manner (no baking sheets on the floor).

5. Conditions

<p>Conditions specify what must happen (or not happen) prior to closing in order for the parties to be obligated to close. If a condition is not satisfied, the other party may refuse to close without being liable for damages.</p>
<p><i>Examples:</i></p> <p>Buyer’s obligation to purchase the Shares is subject to Buyer’s receipt, at or prior to Closing, of each of the Consents identified here in a form and substance satisfactory to Buyer.</p> <p>Seller’s obligation to sell the Shares is subject to Buyer’s representations and warranties being accurate in all material respects as of the date of this Agreement and of Closing.</p>
<p><i>Dinner Party:</i></p> <p>The Hosts’ obligations to perform (including showing up, bringing ingredients/dishes, and sharing costs) are subject to the satisfaction of Q’s covenant to keep the Apartment in Party Ready Condition.</p> <p>The Hosts’ obligations to reimburse (under paragraph __) are subject to the performance of the receipt/accounting procedures (under paragraph __).</p> <p>All Hosts’ obligations to perform are excused if Shawnee County is subject to a tornado warning issued by the National Weather Service at any time between 5:00 PM and 6:00 PM on the night of the Dinner.</p>

### 6. Termination

The Termination provision specifies which events will terminate the parties' obligations under the agreement and upon which terms each of the parties may terminate the contract (either with or without liability).

*Examples:*

This Agreement may be terminated as follows:

- by mutual consent of Buyer and Seller;
- by Buyer upon a material Breach of any provision of this Agreement by Seller; or
- by Seller upon a material Breach by Buyer.

A termination will not relieve any party from any liability for any Breach of this Agreement occurring prior to termination.

*Dinner Party:*

The Party can be cancelled by the Guests (as communicated by Guest representative \_\_\_\_\_). If cancelled within 5 days of the Party, all Host obligations will be terminated.

### 7. Indemnification/Remedies

The Indemnification provision backs up the representations and warranties and other agreements contained in the contract by providing that the breaching party will pay for damages caused by its breach. This section may provide for equitable remedies or set termination fees as well as money damages.

*Examples:*

Seller shall indemnify and hold harmless Buyer from any loss that Buyer may suffer, sustain, or become subject to, as a result of any Breach of any representation or warranty made by Seller in this Agreement.

Buyer shall indemnify and hold harmless Seller from any loss that Seller may suffer as a result of any Breach of any representation or warranty made by Buyer.

*Dinner Party:*

A Host who breaches a covenant or representation and warranty regarding Safe Food Handling or Identified Allergens must indemnify \_\_\_\_ for any damage or injury or loss suffered as a result of such breach.

A Host who goes over budget is liable for the excess expenditure.

*8. Miscellaneous*

The Miscellaneous provisions are the standard boilerplate, which are common in most contracts and which specify how expenses will be shared and which state’s laws govern, and where notices should go, among other things.

*Example:*

This Agreement may only be amended, supplemented, or otherwise modified by a writing executed by the Buyer and the Seller.

*Dinner Party:*

Can modify the date/time/food, by majority vote of Hosts.

## APPENDIX C: SAMPLE COMPLETED CONTRACT

## DINNER PARTY AGREEMENT

This DINNER PARTY AGREEMENT (the "Agreement") is entered into effective as of February 1, 2013, by and among Abigail, an individual ("A"), Benjamin, an individual ("B"), and Charles, an individual ("C," and collectively with A and B, the "Hosts," or individually, a "Host").

## BACKGROUND

- (a) The Hosts are students enrolled in Professor Grant's Spring 2013 Transactional Drafting class (the "Class").
- (b) The Hosts desire to host a dinner party (the "Dinner Party") for all students currently enrolled in the Class (the "Guests").
- (c) This Agreement sets forth the Hosts' obligations and rights with respect to the Dinner Party.

Accordingly, the Hosts agree as follows:

1. *Definitions.* Terms defined in the preamble have their assigned meanings and each of the following terms has the meaning assigned to it:
  - (a) "*Allergen*" means any food allergen identified by any of the Guests by written notice to the Hosts no later than ten (10) days prior to the Table Date.
  - (b) "*Appetizer*" means Caesar salad to be prepared substantially in compliance with the recipe attached as Exhibit A.
  - (c) "*Beverages*" means water, coffee, Coke, Diet Coke, and red wine.
  - (d) "*Dessert*" means tiramisu and vanilla ice cream to be prepared substantially in compliance with the recipe attached as Exhibit E.

- (e) “*Main Course*” means chicken parmesan served on spaghetti noodles with marinara sauce to be prepared substantially in compliance with the recipes attached as Exhibit B.
- (f) “*Meal*” means the combination of the following: Appetizer, Beverages, Dessert, and Main Course to be served successively on the Table Date.
- (g) “*Party Ready Condition*” means accessible, habitable, air conditioned, properly lighted, and reasonably clean such that the premises are suitable for food preparation by the Hosts and occupancy by the Guests.
- (h) “*Proper Cooking Temperature*” means the correct temperature at which particular food items should be cooked as set forth by the U.S. Food and Drug Administration on the following webpage:  
<http://www.fda.gov/Food/FoodborneIllnessContaminants/PeopleAtRisk/ucm083057.htm>.
- (i) “*Protein*” means chicken parmesan served on spaghetti noodles with red sauce, prepared at the Proper Cooking Temperature.
- (j) “*Safe Food Handling Procedures*” means compliance with the four steps to food safety, as further defined by the U.S. Food and Drug Administration: Clean, Separate, Cook, and Chill, as set forth on the following webpage: <http://www.fda.gov/Food/ResourcesForYou/HealthEducators/ucm083000.htm>.
- (k) “*Servingware*” means plates, napkins, forks, knives, spoons, and glasses.
- (l) “*Side Dishes*” means corn prepared substantially in compliance with the recipe attached as Exhibit C, and garlic bread to be prepared substantially in compliance with the recipe attached as Exhibit D.
- (m) “*Table Date*” means February 22, 2013, between the hours of 6:00 PM and 10:00 PM.

- (n) "*Venue*" means A's residence, located at 555 N. Main Street, Topeka, Kansas.
  - (o) "*Weather Cancellation*" means a cancellation of the Dinner Party, which will occur if Washburn University School of Law has cancelled its afternoon classes due to inclement weather on the Table Date.
2. *Hosting the Dinner Party.* By signing this Agreement, the Hosts agree to combine their efforts to prepare a Meal and host a Dinner Party for the Guests, pursuant to the following:
- (a) A shall by 5:00 PM on the Table Date:
    - (1) make available the Venue in Party Ready Condition;
    - (2) make available Servingware for all Hosts and Guests; and
    - (3) provide Beverages for all Hosts and Guests.
  - (b) B shall provide:
    - (1) Protein for all Hosts and Guests by 6:30 PM on the Table Date; and
    - (2) Dessert for all Hosts and Guests by 8:30 PM on the Table Date.
  - (c) C shall provide:
    - (1) Appetizer for all Hosts and Guests by 6:00 PM on the Table Date; and
    - (2) Side Dishes for all Hosts and Guests by 6:30 PM.
  - (d) *Reasonable Care.* Each Host individually shall take reasonable care to ensure the safety of themselves and others, and to maintain the Venue in good and serviceable conditions at all times during the Dinner Party. The Hosts collectively shall ensure that all floors, countertops, and appliances will be cleaned in a timely manner, and shall ensure that all cooking equipment, utensils, and cutlery will used and stored in a safe manner.
  - (e) *Expenses.* Each Host shall pay a proportionate share of the reasonable expenses incurred in the Dinner Party, subject to the terms and conditions outlined in section 3 below.

3. *Cost and Payment.*

- (a) *Estimated Cost and Cap.* The Hosts estimate that the cost of preparing and hosting the Dinner Party will be Five Hundred Dollars (\$500).
  - (b) *Receipts.* Each Host shall provide A with all receipts of items purchased in preparation of hosting the Dinner Party. Each Host shall deliver a copy of his or her receipts to A by 5:00 PM three (3) days following the Dinner Party.
  - (c) *Reasonableness of Expenses.* Each Host shall use care to keep costs reasonable in preparation for the Dinner Party. If, after reviewing the receipts, A believes an expenditure is unreasonable, A shall bring it to the attention of the Hosts, who will decide by a majority vote what portion of the particular expense is unreasonable. Each Host shall be responsible for paying any portion of his or her incurred expenses that are determined unreasonable.
  - (d) *Allocation of Costs.* Excluding any portion of any expense deemed unreasonable in part 3(c) above, A shall divide the total costs among the Hosts and will calculate who needs to pay whom in order to equalize the expenditures. A shall promptly notify the Hosts of the amounts due to each other.
  - (e) *Form and Timing of Payment.* Each Host shall pay his or her proportionate share of the total cost by check or cash no later than seven days after notification by A pursuant to part 3(d) above.
4. *Representations and Warranties of A.* A represents and warrants to B and C as follows:
- (a) *Meal Preparation.* A has read and understands the Safe Food Handling Procedures.
  - (b) *Proper Cooking Temperature.* A has read and understands the requirements for Proper Cooking Temperature.



- (c) *The Venue.* The appliances in the Venue are currently in working condition, and the Venue can accommodate the Hosts and the Guests.
- 5. *Representations and Warranties of B.* B represents and warrants to A and C as follows:
  - (a) *Meal Preparation.* B has read and understands the Safe Food Handling Procedures.
  - (b) *Proper Cooking Temperature.* B has read and understands the requirements for Proper Cooking Temperature.
  - (c) *Recipes.* B has read and understands the recipes attached to this Agreement for the Protein and Dessert and is or will be competent to prepare both dishes on the Table Date.
- 6. *Representations and Warranties of C.* C represents and warrants to A and B as follows:
  - (a) *Meal Preparation.* C has read and understands the Safe Food Handling Procedures.
  - (b) *Proper Cooking Temperature.* C has read and understands the requirements for Proper Cooking Temperature.
  - (c) *Recipes.* C has read and understands the recipes attached to this Agreement for the Appetizer and Side Dishes and is or will be competent to prepare both dishes on the Table Date.
- 7. *Covenants.*
  - (a) *Meal Preparation.* The Hosts individually will abide by Safe Food Handling Procedures and Proper Cooking Temperature requirements. The Hosts individually will refrain from using any identified Allergen in the preparation of the food.
  - (b) *The Venue.* Between the date of this Agreement and the Table Date, A will notify the Hosts of anything that could impact the Venue's Party Ready Condition on the Table Date.

8. *Termination of the Parties' Obligations and Rights.*

- (a) The Dinner Party may be cancelled by a two-thirds (2/3rds) majority vote of all the students of the Class, so long as the Dinner Party is cancelled at least five (5) days prior to the Table Date. A two-thirds (2/3rds) majority vote to cancel the Dinner Party shall terminate the parties' rights and obligations under this Agreement.
- (b) All parties' rights and obligations to perform shall terminate in the event of a Weather Cancellation.
- (c) If the Venue is not in Party Ready Condition by 5:00 PM on the Table Date, two-thirds (2/3rds) of the Hosts may elect to cancel the Dinner Party or to relocate it to an alternate location, capable of accommodating The Guests and furnished with all necessary appliances and equipment.

9. *Indemnification.*

- (a) *Indemnification by A.* A shall indemnify and hold B and C harmless from and against any liability, claim, damage, obligation, cost, or expense incurred by or asserted against B or C by reason of the breach by A of any representation, warranty or covenant of A contained in this Agreement.
- (b) *Indemnification by B.* B shall indemnify and hold A and C harmless from and against any liability, claim, damage, obligation, cost, or expense incurred by or asserted against A or C by reason of the breach by B of any representation, warranty or covenant of B contained in this Agreement.
- (c) *Indemnification by C.* C shall indemnify and hold A and B harmless from and against any liability, claim, damage, obligation, cost, or expense incurred by or asserted against A or B by reason of the breach by C of any representation, warranty or covenant of C contained in this Agreement.

10. *General Provisions.*

- (a) *Assignment.* Neither this Agreement, nor any of the rights, obligations, and duties hereunder, may be assigned or

otherwise transferred by any party without the prior written consent of all other parties to the Agreement.

- (b) *Amendment.* This Agreement shall not be modified or amended except pursuant to the written consent of two-thirds (2/3rds) the Hosts.
- (c) *Governing Law.* This Agreement shall be governed by the laws of the States of Kansas.
- (d) *Survival.* The covenants, agreements, representations, warranties, and obligations of the parties hereto shall survive the Table Date.
- (e) *Entire Agreement.* This Agreement is the full agreement among the parties.
- (f) *Binding Effect and Benefit.* This Agreement shall be binding upon and inure to the benefit of the parties hereto. Otherwise, this Agreement is not intended to create any rights for the benefit of any third party.
- (g) *Notice.* All notices, requests, and other communications required or permitted hereunder shall be in writing and sent by e-mail as follows:
  - (1) If to A, e-mailed to Abigail@hotmail.com, with copy to B at Benjamin@gmail.com and C at Charles@yahoo.com.
  - (2) If to B, e-mailed to Benjamin@gmail.com, with copy to A at Abigail@hotmail.com and C at Charles@yahoo.com.
  - (3) If to C, e-mailed to Charles@yahoo.com, with copy to A at Abigail@hotmail.com and B at Benjamin@gmail.com.
  - (4) Any party may designate an alternate address with notice to the other parties.
  - (5) Any notice, if properly made, shall be deemed to have been made at the time actually sent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the day and year aforesaid.

The Hosts

\_\_\_\_\_  
Abigail

\_\_\_\_\_  
Benjamin

\_\_\_\_\_  
Charles