CHAPTER ONE
INTRODUCTION

Many people simplistically bifurcate the work of lawyers into two categories: (i) dispute resolution, which includes mediation, arbitration, litigation, appellate work, and regulatory hearings; and (ii) transactional practice, which involves negotiating, structuring, and documenting deals and agreements (whether involving real estate, mergers and acquisitions, finance, or securities). Movies and television have popularized the lawyers who handle controversies and have all but ignored those who handle transactions. Yet, while accurate statistics are hard to come by, some estimate that half of the work of lawyers in the United States is transactional in nature. Moreover, all lawyers engage in some transactional practice. The lawyers who specialize in tort or divorce need to be able to draft and review settlement agreements. Prosecutors and defenders need to be able to draft plea agreements. All attorneys in private practice need to be able to draft fee agreements between themselves and their clients.

Unfortunately, traditional legal education focuses on litigation. Most doctrinal courses, such as Contracts and Property, are taught using the case method, which examines the subject by looking at disputes that resulted in litigation. Even the courses that provide training in lawyering skills, such as Legal Research and Writing, Trial Advocacy, and Moot Court, typically explore the practice of law through the lens of litigation.

This book and its focus are different. They are designed to provide training and experience in the transactional practice of law. While much of the material in this book begins with and builds on contract law and contract principles, this book is more than an advanced text on contracts. Instead, this book will help you develop the skills needed to successfully engage in the transactional practice of law. Although the book contains numerous references and citations to cases, these references are merely to illustrate or support a point made in the text. The bulk of the book consists of background material leading up to exercises involving numerous types of transaction documents: leases, promissory notes, guarantees, and agreements of many kinds.

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1 While many law schools now offer one or more courses on transactional practice, either as a required or elective part of the curriculum, even at those law schools the number of such courses is still small when contrasted with the litigation offerings.
There are some topics that are important to a transactional lawyer but which are not covered in this book. For example, there is little discussion of the tax ramifications of the various ways in which transactions are structured or of how bankruptcy may upset the expectations of one of the parties to a transaction. Even though these topics have not been included, it is important to understand that each of these areas is very important when working on a transaction. Consider, for example:

- Once a lawyer and client have determined that the client will proceed with a proposed acquisition, the lawyer should consider whether there are tax advantaged (or disadvantaged) ways in which to structure the transaction.
- Once a client decides to engage in a particular transaction, the client’s lawyer should consider what might happen to the client or the transaction if the counter-party were to become a debtor in a bankruptcy case.

In each instance, these and other legal issues might be critical to how the transaction documents are drafted and even to whether the parties successfully consummate the transaction. Thus, a transactional lawyer who lacks the relevant expertise needs to confer with a tax lawyer or a bankruptcy lawyer early on in order to make sure that the client’s expectations will be met and the client’s interests properly protected.

The practice of transactional law is similar to dispute resolution in many ways. Indeed, the two types of practice might be more similar than they are dissimilar. In both settings, lawyers must have a thorough understanding of the applicable legal rules and the policies underlying them. They must be honest, fulfill promises, listen well, communicate clearly, and maintain confidences, admit error, and accept criticism and correction with grace and an open mind. It also helps to be courteous and punctual. This book may help you develop these skills, but it will focus on the other skills and abilities needed by lawyers involved in transactional practice. These other skills include:

- The ability to imagine all of the events that might later interfere with the transaction or the parties’ relationship, including,
  - the ability to perform risk analysis, and
  - the judgment needed to determine which issues to provide for in the transaction documents and which to ignore;
• The ability to produce appropriate documentation for a transaction, including,
  • knowing the distinctions among, and the appropriate use of, the different types of contract terms (e.g., covenants, conditions, representations, warranties, discretionary authority, declarations), and
  • the ability to properly draft each type of term;
• The ability to identify and eliminate ambiguity in the language of written agreements, including,
  • the ability to spot and resolve ambiguity, inconsistency, and other drafting problems in your drafting, and
  • the ability to spot the same issues in the work of others;
• Understanding the rules of contract interpretation, including,
  • how the rules might work against your client, and
  • how to turn the rules into an advantage rather than a disadvantage; and
• Understanding so-called “boilerplate” provisions, including,
  • knowing what each such provision actually means and does, and
  • appreciating how these often overlooked provisions can be vital to ensuring that an agreement meets your client’s goals.

Underscoring all of these skills is an attitudinal difference between dispute resolution and transaction practice. Most disputes involve an unwilling participant (typically, the defendant if the dispute has progressed to litigation). They also often involve what is – or at least, what appears to be – a “zero-sum scenario.” That is, one party’s gain is offset by the other party’s loss. Even this does not account for the fact that one or both of the parties will be responsible for attorney’s fees, so that resolution of the dispute might leave the parties, collectively, in a worse position than before the dispute began. Transactional practice is frequently different because the parties share a common objective and each party expects to benefit from the transaction. For example:

• A technology firm wants to use its technology to generate revenue, while still retaining ownership of the technology, and a prospective
customer wants access to the technology, so they enter into a license agreement;

- A landlord wants to lease its building and a prospective tenant wants to secure space, so they enter into a lease;

- A bank wants to lend money and a prospective borrower wants to obtain a loan, so they enter into a loan agreement; and

- A seller wants to sell a business and a prospective buyer wants to buy the business, so they enter into a purchase and sale agreement.

This does not mean that there will be no controversies about how to consummate the transaction; it means merely that most of the controversies will be about the deal terms, not about whether the parties will or should do a deal with each other.

In short, the goal of a litigator is to help the client win (and the other side to lose) in the resolution of a controversy, whereas the goal of a transactional lawyer is to facilitate the transaction while protecting the client’s interests. In some instances, the transactional lawyer’s best advice will be for the client to walk away from the transaction. But clients rarely appreciate that advice, even when it is in their best interests.²

A second principal difference between dispute resolution and transactional practice is that the facts concerning a dispute most often occurred in the past³ while in a transaction the facts have not yet occurred. Thus, lawyers handling a controversy often must comb through the available evidence to identify the facts that support their client’s position.⁴ They investigate. Transactional lawyers, on the other hand, focus upon the object of the deal, especially from the client’s

² It is therefore a major reputational problem for a transactional lawyer to be known as “a deal killer.”

³ Occasionally, a party might seek prospective relief for a wrong that has not yet occurred. For example, a wife might seek a temporary restraining order against further contact from a violent husband or the owner of a trademark might seek an injunction against future infringement. Even in those cases, however, granting the requested relief will typically depend on whether predicate facts justify it.

⁴ Recall the old saw:
   If the law is not on your side, argue the facts,
   If the facts are not on your side, argue the law, and
   If the facts and law are not on your side, pound the table.
The import of that quip is that a lawyer handling a controversy often tries to fit the existing facts or the law into a narrative that suits the client’s interests.
perspective, and consider what might go wrong. They imagine. Consider the following Exercise, the first of many you will be asked to tackle in this book.

**Exercise 1-A**

Four law school classmates have decided that they would like to rent a house together as way of reducing their living expenses. The class will be split into four groups, each representing one of four proposed roommates. The proposed roommates are all third-year law students who attend the same school. Here are their names and some minor biographical information:

Andrea – Her home is in New Jersey; her family is very well off; she is an only child; she is quiet and is the smartest of the group; she is the one who needs to study the least but does study the most; she is near the top of the class; she drives a late-model American car.

Jim – His home is in Wisconsin; his family is working class; he receives a small scholarship; he is one of three siblings; he is gregarious and well-liked by most people; he is very athletic, having played varsity baseball in college; he drives a 17-year-old Toyota; he is ranked in the middle of his class.

Paul – His home is in New Hampshire; his family is working class; he is one of four siblings; he studies all the time; he is on law review; he drives an old Chevrolet; he is highly ambitious.

Stacy – Her home is in California; her family is well off; she is an only child; she is an extrovert; she drives a late-model Porsche; she is a chain smoker; she has not been a serious student.

The house that the classmates plan to rent has the following characteristics:

- It is furnished;
- It has a kitchen with a breakfast area and a living room with a fireplace, sofa, two arm chairs, and one television;
- It has one master bedroom with an attached bathroom, two standard bedrooms with a communal bathroom; and a makeshift bedroom in the basement;

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• It needs to be heated in the winter and air conditioned in the warm weather months;
• It has a two car garage;
• Free parking is available on the street, but it is restricted on specified days to facilitate street cleaning and trash collection;
• It is approximately 1.5 miles from the law school; public transportation is available, but it is not particularly practical given the route to the law school;
• The lease will have a one-year term, from August 1 until July 31, and rent will be $4,000 per month; and
• A security deposit equal to one month’s rent is required at the time the parties execute the lease.

Identify the issues and contingencies that the proposed roommates should discuss and which of these an agreement among them should address. Do not attempt to resolve the issues or contingencies; merely identify them.

Lastly, after a transactional lawyer has identified the risks inherent in a transaction, the lawyer must assess each risk and, if possible, fashion a solution for it. Identifying legal issues and potential future problems is a necessary component of practicing transactional law, but the client will want to complete the proposed deal and, thus needs to know how significant each risk is. Sometimes, this implicates ethical issues (i.e., even if a risk associated with some action by the client is small, the lawyer should never counsel the client to commit a criminal act), but most often it calls for judgment and an ability to separate the “wheat from the chaff.”

Not all risks are equal. A transactional lawyer needs to be able to weigh each risk against the objective of the client – whether essential, important, or desirable -- that the risk jeopardizes. The lawyer should then explore whether there are creative solutions that can either eliminate or minimize the risks. The lawyer is unlikely to be able to eliminate all risk. Accordingly, a lawyer should work with the

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6 See Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223, 229 (2004) (“most lawyers . . . have been taught issue spotting. But if that is all that a lawyer does, she will justly earn a reputation as a deal killer. To be effective, she must assess the probability that a risk will occur and, if it is significant, find a way to limit it.”).

client to identify and manage the most salient risks. In doing this, it is not that the lawyer needs to stop thinking like a lawyer, but that the lawyer must also think like a client.

If no amount of creativity can satisfactorily mitigate the risks, then the lawyer needs to provide advice and judgment to the client as to whether the identified legal issues significantly jeopardize one or more of the client’s essential objectives. To be clear, assessing and weighing risks is not the same as making the decision. The client will expect the lawyer to identify and explain the risks – especially the legal risks – associated with a transaction. The decision whether to accept a risk is the client’s.

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8 Remember, however, that a risk with a 0.01% probability of creating a $5 billion problem is not a $500,000 issue. It is still a $5 billion issue. Think of the Exxon Valdez, the BP oil spill, etc.