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VALUE CREATION BY TRANSACTIONAL ASSOCIATES

Cathy Hwang*

How do transactional associates add value to deals? Other scholars have characterized transactional lawyers as transaction cost engineers, regulatory arbitrageurs, and enterprise architects. But those words describe partners. Although most of the deal team is made up of associates—and the vast majority of deal lawyers begin and end their careers in law firms as associates—the literature has said little about the work of associates. This Article seeks to illuminate what transactional associates do and how they add value to deals. Building on literature in contract design and transactional lawyering, it argues that associates help to mitigate some of the shortcomings of unbundled bargaining. When efficient contract design demands that contracts be unbundled into separate modules or even separate documents, associates both serve as the conduits for those modules to communicate and may, if needed, do the crucial work of reintegrating those modules into one cohesive contract.

INTRODUCTION

It was Halloween week of 2012 when Hurricane Sandy ripped across the Eastern seaboard.¹ In New York City, seven subway tunnels flooded, the New York Stock Exchange stopped trading for two days, and sweeping power outages engulfed lower Manhattan in darkness.² The law firm where I worked closed its New York office for a week. As the only person on my deal team who had reliable power, I took the reins on what we call, in polite

* Associate Professor of Law, University of Utah. This Article was prepared for the *Colloquium on Corporate Lawyers*, hosted by the *Fordham Law Review* and the Stein Center for Law and Ethics on October 11, 2019 at Fordham University School of Law. I am grateful to my fellow participants for their excellent contributions and helpful comments. For helpful comments and conversations, I am grateful to Kent Coit, Tom Haley, Thad Hartmann, Matt Jennejohn, Dmitry Karshedt, Spencer Romney, and Yaron Nili.

1. See *Hurricane Sandy Fast Facts*, CNN (Oct. 2, 2019, 5:13 PM), <https://www.cnn.com/2013/07/13/world/americas/hurricane-sandy-fast-facts/index.html> [<https://perma.cc/LE7F-YQQG>].

2. See *id.*; see also Matt Flegenheimer, *Flooded Tunnels May Keep City's Subway Network Closed for Several Days*, N.Y. TIMES (Oct. 30, 2012), <https://www.nytimes.com/2012/10/31/nyregion/subways-may-be-shut-for-several-days-after-hurricane-sandy.html> [<https://perma.cc/T9W7-E6BF>].

company, a high-yield bond offering.³ I billed 100.2 hours⁴ that week. I was a transactional associate.

In 1984, Professor Ronald Gilson wrote what has proven one of the most important articles in the transactional lawyering literature: “Value Creation by Business Lawyers: Legal Skills and Asset Pricing.”⁵ In that article, Gilson famously characterizes transactional lawyers as “transaction cost engineers”—shrewd minimizers of transaction costs who not only help their clients get a bigger piece of the deal pie but also put pie on the menu in the first place and then magically grow the pie for everyone.⁶ It is fair to say that Gilson’s work was groundbreaking. It also inspired several other scholars⁷ to take a stab at answering the same questions: What do transactional lawyers *actually do*? How do they add value, if at all?

These are questions I have often asked too, but never more often than in the early 2010s, when I was, myself, a transactional lawyer. Had I looked at the scholarly literature then (which I had not, because of aforementioned billing), I would have found few answers to my questions. And that is because the scholarly literature focuses largely on the work of *partners* in transactional practice—the folks at the top of the law firm pyramid.⁸ Others have convincingly argued that transactional *partners* are reputational intermediaries,⁹ enterprise architects,¹⁰ regulatory arbitrageurs,¹¹ and other important, fancy names that I believe partners are, and that I also know I was

3. We might also call it a “junk bond offering.” See James Chen, *Junk Bond*, INVESTOPEDIA (Apr. 22, 2019), <https://www.investopedia.com/terms/j/junkbond.asp> [https://perma.cc/C8J8-CLKE] (noting that “[j]unk bonds are also called high-yield bonds since the higher yield is needed to help offset any risk of default”).

4. I remember my hours as 100.2 and know them to have exceeded 100. In an attempt to certify that the number was, in fact, 100.2, I emailed my former office-neighbor, who is now counsel at the firm where I used to practice, and asked him to do some due diligence on my billable hours and provide comfort for the 100.2 number. He did the diligence but was unable to provide more than f-level comfort. Because I appreciate that he tried, I thanked him in the star footnote.

5. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984); see also Lisa Bernstein, *Silicon Valley Lawyer as Transaction Cost Engineer?*, 74 OR. L. REV. 239, 242–51 (1995).

6. Gilson, *supra* note 5, at 255.

7. See *infra* Part I.

8. One notable exception is Claire Hill’s excellent article which, while describing the process of contract production in a law firm, also offers an accurate description of the work of junior associates. See generally Claire A. Hill, *Why Contracts Are Written in “Legalese,”* 77 CHI.-KENT L. REV. 59 (2001).

9. See, e.g., Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 493 (2007). The concept of reputational intermediaries is also closely related to the concept of lawyers as gatekeepers. See, e.g., Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 413–14 (2008) (describing the role of inside lawyers as gatekeepers who can disrupt misconduct by refusing to cooperate with it); Donald C. Langevoort, *Gatekeepers, Cultural Captives, or Knaves?: Corporate Lawyers Through Different Lenses*, 88 FORDHAM L. REV. 1683 (2020).

10. George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279, 299 (2009) (describing transactional lawyers as “enterprise architects” that wear a variety of hats, including that of enterprise design).

11. Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 240–42 (2010) (describing transactional lawyers as regulatory arbitrageurs and as “quarterbacks” to the deal).

not. After all, as an associate, I did not intermediate any reputations or arbitrage any regulations. I was just billing many, many hours doing . . . something.

What *do* transactional associates do? This question remains underexplored in the scholarly literature, even though most lawyers never become partners and instead spend the entirety of their law firm careers as associates. And with the rise of smart contracting, machine learning, and other technological advancements, this question also becomes existential and pedagogical: Will the work of associates survive technological change? And how can we, as law professors, better train our students so that they still have jobs even as machines become smarter?

This Article, contributed to Fordham University School of Law's 2019 *Colloquium on Corporate Lawyers*, proceeds in three parts. Part I briefly discusses some of my favorite literature on transactional lawyering and contract design. With regard to the latter, it discusses a relatively recent strand of literature on contract modularity—the idea that separating contracts into self-contained modules and then piecing them back together can have a number of efficiency advantages. Part II advances a new hypothesis about the work of law firm associates, arguing that associates help to mitigate the limitations of modularity. In previous work, I introduced the idea of unbundled bargaining: contracting where parties memorialize one deal in several interrelated contracts and agreements.¹² Although it has many efficiency-related advantages, unbundled bargaining also has some disadvantages: namely, it may be hard for separate but related agreements to speak to each other. Transactional associates can help to mitigate those shortcomings, as they serve as conduits between multiple contract modules and help to reintegrate contracts when modularity is not suitable. Part III discusses implications. In particular, if associates are conduits in unbundled bargaining, what does that mean for contract design and transactional pedagogy?

I. TRANSACTIONAL LAWYERS AS CONTRACT DESIGNERS

In the past few decades, the literature on transactional lawyering has advanced several theories of how transactional lawyering adds value: transactional lawyers are transaction cost engineers, regulatory arbitrageurs, enterprise architects, reputational intermediaries, and more.¹³ The contract theory literature that focuses on the design of contracts has added another wrinkle: it suggests that transactional lawyers, in their role as contract designers, add value by making contracts and the dealmaking process more efficient. While work in these areas has been undeniably convincing, it uniformly misses one thing: that the “transactional” work described is done almost exclusively by lawyers at the top of the pecking order.

12. See generally Cathy Hwang, *Unbundled Bargains: Multi-agreement Dealmaking in Complex Mergers & Acquisitions*, 164 U. PA. L. REV. 1403 (2016).

13. See *supra* notes 9–11 and accompanying text.

Later parts of this Article discuss how transactional associates—those who form all but the very top of the law firm staffing pyramid—create value. This Part sets the stage by providing a brief overview of the existing work. Here, I focus on only a few things that have recently influenced me, knowing that my colleagues in this field have written so much more excellent work than I can cover in this short Article. Part I.A focuses on the transactional lawyering literature. Part I.B turns to recent work on contract design. Although the contract design literature focuses on the efficient design of contracts and the connection between design and other aspects of contract theory—such as enforcement and interpretation—it does implicitly contribute to our understanding of what transactional lawyers do. After all, contract design requires contract designers and, for many corporate and commercial transactions, the contract designers are transactional attorneys.

A. Transaction Cost Engineers and Other Things That Associates Are Not

Any discussion of the literature on transactional lawyering must start at the beginning: Ron Gilson’s powerhouse article, “Value Creation by Business Lawyers: Legal Skills and Asset Pricing.”¹⁴ This article kicked off an entire line of literature. Gilson, himself a partner at a corporate law firm before he joined academia,¹⁵ argued that “business lawyers”—transactional lawyers, in the parlance of this Article—create value by engaging in “transaction cost engineering.”¹⁶

The more technical aspects of his idea rely on capital asset pricing theory, as the title of his paper suggests. Capital asset pricing theory supposes that assets are accurately priced when a number of assumptions hold, including, notably, the assumption that there are no transaction costs or information asymmetries.¹⁷ Gilson notes that the most important aspect of the theory for the work of transactional lawyers is that, “[i]n a world in which assets are valued according to any version of capital asset pricing theory, there is little role for business lawyers.”¹⁸ However, features of our legal and economic system, such as regulations, erode the effectiveness of capital asset pricing. Transactional lawyers add value, then, by undoing some of those erosive aspects through deal structures and contractual mechanisms¹⁹—in essence, “engineering” transaction costs for the benefit of their clients.

Gilson is clearly right. But his article’s most enduring contribution is not so much its technical “rightness” but the fact that Gilson—to the relief of generations of transactional lawyers—characterized transactional lawyers as

14. Gilson, *supra* note 5.

15. Gilson calls his article “my dissertation from practice,” noting that when he began practicing, “[t]he firm’s way of training people was to hand them a deal. I did my first acquisition six weeks after I showed up at the firm.” See William J. Carney, Ronald J. Gilson & George W. Dent, Jr., Keynote Discussion, *Just Exactly What Does a Transactional Lawyer Do?*, 12 *TRANSACTIONS* 175, 176 (2011).

16. Gilson, *supra* note 5, at 253–56.

17. *Id.*

18. *Id.* at 251.

19. *Id.* at 254–56.

adding value to deals at all. As Gilson himself notes, there had been a long-held and “often quite uncharitable” view of the work of transactional lawyers.²⁰ At best, lawyers are scribes: businesspeople make deals and then turn to lawyers to write them down. At worst, lawyers muck up deals by introducing so many complications that the deals “collapse under their own weight.”²¹

Gilson argues, instead, that transactional lawyers *make deals happen*.²² What happens when two parties cannot decide on a purchase price because the buyer does not believe the asset is as good as the seller says? In comes the transactional lawyer, with a contractual device called the post-closing purchase price adjustment, to solve that problem. What happens when there are skeletons in the target company’s closet that the target knows about but which would cost the buyer enormously to discover and evaluate? In comes the transactional lawyer, with the contractual devices of representations and warranties, indemnification, and earn-outs. These devices create a relatively lost-cost system to incentivize disclosure of said skeletons. In Gilson’s world, then, transactional lawyers are not deal breakers—they are dealmakers.

In the years following Gilson’s paper, several others have taken a stab at articulating what deal lawyers do. Lisa Bernstein, for instance, noted that in Silicon Valley deals—venture financing deals in particular—lawyers play a strikingly similar transaction cost engineer role to the one Gilson says they play in merger and acquisition transactions.²³ George Dent described deal lawyers as “enterprise architects”—folks who wear many hats, including that of Gilson’s transaction cost engineer, but also of doers of due diligence, gatherers and verifiers of information, and negotiators and drafters of agreements.²⁴

A favorite paper of mine in this literature is Vic Fleischer’s 2010 paper, “Regulatory Arbitrage.”²⁵ Fleischer describes two ideas for what transactional lawyers do. The first is revealed in the paper’s title: transactional lawyers are “regulatory arbitrageurs.” The basic premise is that there are “three parties at the table” in any negotiation: the two deal parties and the government.²⁶ Regulatory arbitrage is “a perfectly legal planning technique used to avoid taxes, accounting rules, securities disclosure, and other regulatory costs . . . [by] exploit[ing] the gap between the economic

20. *Id.* at 241.

21. *Id.* at 242. And while it would be nice if the uncharitable descriptions had ended with Gilson’s paper in the mid-1980s, I am afraid to report that such characterizations are still rampant. A partner I worked with once told me that businesspeople called lawyers “the Department of No.”

22. *Id.* at 254 (describing how lawyers can “reduce real-world deviations from the capital asset pricing theory’s central assumptions,” thereby reducing market failure).

23. Bernstein, *supra* note 5, at 241–42.

24. Dent, *supra* note 10, at 309–18; *see also* Carney, Gilson & Dent, *supra* note 15, at 180–81.

25. Fleischer, *supra* note 11.

26. *Id.* at 238.

substance of a transaction and its legal or regulatory treatment.”²⁷ In short, lawyers try to cut the government out of the deal as much as possible so that their clients can have more of the deal pie. Fleischer also describes transactional lawyers as “[q]uarterbacking the [d]eal.”²⁸ Like a football quarterback, transactional lawyers manage the deal, flipping nimbly between their roles as regulatory arbitrageurs and as transaction cost engineers.²⁹

Most recently, Elisabeth de Fontenay proposed a new idea in her article “Law Firm Selection and the Value of Transactional Lawyering”: in major corporate transactions, elite law firms add value by giving their clients private information about market deal terms.³⁰ In this way, elite lawyers bring something special to the dealmaking table: their expertise, drawn from doing many deals and the ability to transform that private information into pricing information.³¹

In light of these and many other compelling hypotheses about what transactional lawyers do, several years ago, Steven Schwarcz surveyed in-house and law firm lawyers to try to figure out what law firm lawyers think they do and what their clients think they do.³² His findings strongly support the notion that transactional lawyers primarily add value—or at least they and their clients *think* they primarily add value—by reducing regulatory costs.³³ His findings also provide weak support or mixed results for other proposed hypotheses: that transactional lawyers add value by reducing transaction costs;³⁴ by acting as reputational intermediaries;³⁵ by providing client privilege and confidentiality;³⁶ and through economies of scope.³⁷

Hypotheses about the work of transactional lawyers share two things in common. First, they all describe at least *part* of what transactional lawyers do. For example, in support of de Fontenay’s argument, the work of a transactional lawyer frequently involves digging up recent deal terms and contracts, figuring out what provisions previous deals included, and advising one’s client on which of those precedent provisions should be included in the contract at hand. To find support for Fleischer’s theory, one need only look at recent tax inversion transactions. In tax inversions, U.S.-based corporations reincorporate in tax-advantageous jurisdictions while keeping all of their operations the same as before the inversion.³⁸ These corporations

27. *Id.* at 229.

28. *Id.* at 241.

29. *Id.* at 241–42.

30. Elisabeth de Fontenay, *Law Firm Selection and the Value of Transactional Lawyering*, 41 J. CORP. L. 393, 396 (2015).

31. *Id.* at 425–27.

32. Schwarcz, *supra* note 9, at 488–91.

33. *Id.* at 500.

34. *Id.* at 498.

35. *Id.* at 502.

36. *Id.* at 504.

37. *Id.* at 506.

38. Cathy Hwang, *The New Corporate Migration: Tax Diversion Through Inversion*, 80 BROOK. L. REV. 807, 810 (2015) (discussing how parties to tax inversion merger and acquisition (M&A) deals derive value from the favorable tax treatment of the combined company post-closing).

seek different regulatory treatment for what is substantively the same company and operations, just as Fleischer describes.³⁹

Second, none of these descriptions capture what transactional *associates* do. Transactional attorneys begin their careers as associates; at elite law firms, the vast majority never become partners. Claire Hill's article, "Why Contracts Are Written in 'Legalese,'"⁴⁰ offers a glimpse into the work of transactional associates. In describing how attorneys produce contracts, she argues that associates often use forms and precedent as a baseline when they work on new deals.⁴¹ They also use forms as a shield: should the deal go awry, an associate's act of drafting from precedent creates a rebuttable presumption that she drafted reasonably.⁴²

B. Contract Design and Other Things Partners Do

Although not directly about the work of transactional lawyers, the literature on contract design also sheds some light on what transactional lawyers do.

Since the latter part of the Cretaceous Period,⁴³ the vast majority of contract law scholarship has been concerned with the back end of a contract's life: breach, enforcement, and damages. In recent years, however, a new line of scholarship has emerged, focusing on the front end of a contract's life: the design of contracts.⁴⁴

One major contribution of the contract design literature is the recognition that contract design and enforcement are interconnected and that attention paid to design can reduce overall contracting costs.⁴⁵ For example, Bob Scott, Albert Choi, and George Triantis have written a series of compelling papers that show how early investment in negotiating specific contract provisions makes little economic sense if those provisions are unlikely to be litigated.⁴⁶

39. Fleischer, *supra* note 11, at 230.

40. Hill, *supra* note 8.

41. *Id.* at 66–69.

42. *Id.* at 67–68.

43. This is a joke; dinosaurs did not contract, let alone write about contracts.

44. Contract design is different from contract formation—offer, acceptance, and consideration—which is part of the first-year law school curriculum. Rather than being about when a contract is formed, contract design theory is largely concerned with how to design contracts, substantively and structurally, in order to make the deal more efficient.

45. See Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1583 (2005) (defining the cost of a contract as the sum of ex ante negotiating and drafting costs, the probability of litigation multiplied by the sum of the parties' litigation costs, the judiciary's litigation costs, and judicial error costs).

46. See, e.g., Albert H. Choi & George G. Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848 (2010) (arguing that parties can use vague contract provisions efficiently—for example, material adverse change clauses in acquisition agreements may remain vague because they are rarely litigated); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006) [hereinafter Scott & Triantis, *Anticipating Litigation*] (examining the efficiency of investment in the design and enforcement phases of the contracting process and arguing that parties can lower overall contracting costs by using vague contract terms ex ante and shifting investment

Another strand of contract design is concerned with the design of contract structure.⁴⁷ In previous work, I, too, have explored contract structure—specifically, the role of modular contract design.⁴⁸ Contracts can be more modular (with many relatively self-contained parts working together by communicating through standard interfaces) or more integrated (with interconnected parts that rely on each other to work).⁴⁹ In one paper, for example, I introduced the concept of “unbundled bargaining”: breaking one deal into multiple related contracts and agreements can make the dealmaking process more efficient.⁵⁰ When deals are unbundled, complex technical parts—such as the tax-related aspects of the deal—can be allocated to specialists.⁵¹ Simpler parts that require more rote work can be done by junior associates, whose work is billed at a lower rate.⁵² In another paper, my coauthor Matt Jennejohn and I noted that when individual contract provisions are insufficiently modular, contract interpretation also becomes much more complicated than the literature anticipates.⁵³

While contract design is largely concerned with the efficient design of contracts, its accidental contribution to the literature on transactional lawyering is also significant. The clear subtext of statements like “the vast majority of contract law scholarship has been concerned with the back end of a contract’s life” is that most contract law scholarship is about *litigators*. The literature on contract design elevates the work of transactional lawyers to work that is worth studying, and what it tells us is that transactional attorneys make contracts more efficient by, for example, reducing litigation probabilities and making contracts easier to read, use, and perform.

But, like their comrades who write about transactional lawyering, scholars of contract design, too, seem to focus on the work of *partners*.⁵⁴ In my own work, for example, I say a few words about associates, who contribute to unbundled bargains by working on simple modules, thereby lowering contracting costs for clients.⁵⁵ But who decides to unbundle bargains in the

to the ex post enforcement phase); Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187 (2005) [hereinafter Scott & Triantis, *Incomplete Contracts*] (considering the role of litigation in motivating contract design).

47. See, e.g., George G. Triantis, *Improving Contract Quality: Modularity, Technology, and Innovation in Contract Design*, 18 STAN. J.L. BUS. & FIN. 177, 204–06 (2013) (describing how modular contracts improve collaboration in creating standardized contract provisions); see also Margaret Jane Radin, Commentary, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1224 (2006); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1176 (2006) (discussing modularity within individual contracts).

48. See generally Hwang, *supra* note 12; Cathy Hwang & Matthew Jennejohn, *Deal Structure*, 113 NW. U. L. REV. 279 (2018).

49. See *infra* note 61 and accompanying text (providing a more detailed description of modularity and integration).

50. Hwang, *supra* note 12, at 1417–18.

51. *Id.*

52. *Id.* at 1424.

53. See generally Hwang & Jennejohn, *supra* note 48.

54. See *supra* Part I.A.

55. See Hwang, *supra* note 12, at 1423–26.

first place, and to allocate simple modules to junior associates? In the end, that is the work of a partner. What, then, do transactional *associates* do?

II. TRANSACTIONAL ASSOCIATES AS CONDUITS IN UNBUNDLED BARGAINING

Part II presents a new idea: transactional associates are conduits in unbundled bargains, and they help to reintegrate modular deals when modularity has reached its limits. Part II.A begins with a discussion of the functions of transactional associates. It focuses largely on the work of associates in large, elite coastal firms that staff deals with large teams of transactional associates, although I suspect that those who practice in other environments will also recognize their work in the description here. Part II.B then argues that this work—which sounds simple, functional, and rote when described—actually serves a critical purpose when deals are unbundled.

A. *The Everyday Life of a Transactional Associate*

Transactional associates do many things. Often, what a transactional associate does depends on their seniority⁵⁶: it takes an associate many years to be promoted to partner, so the “associate” moniker refers to both first-year associates and experienced eighth years. At the senior level, the work of a transactional associate begins to resemble that of a partner: they take on more of the work of directly designing the deal, drafting parts of the contract, advising clients, and negotiating with counterparties.⁵⁷

For all but the most senior associates, however, the work of a transactional associate looks more mundane. For example, when a deal begins, associates often immediately create two documents: a working group list (a Word document that lists every person from every department working on the deal, along with contact information) and a checklist (the core organizational document of any major corporate transaction).⁵⁸ This checklist is a technicolor to-do list that makes the most obsessive bullet journaler⁵⁹ look disorganized and lists every task that the deal team needs to accomplish for the deal to sign or close, who is responsible for the task, whether the task is complete, and, often, where the relevant documents associated with that task are stored on each firm’s internal document system. The checklist may need to be updated multiple times a day as documents are added, completed, and updated—and it is the work of an associate to update the list and make sure that updated lists are distributed to the group.

56. Associates might also do different work depending on their practice area. This Article focuses on M&A associates. Much of the transactional lawyering literature is based on M&A.

57. For more on how deals are staffed at large firms, see Hill, *supra* note 8, at 70–71.

58. Hwang, *supra* note 12, at 1413 (describing deal checklists).

59. Anna Russell, *Can Bullet Journaling Save You?*, NEW YORKER (Sept. 7, 2019), <https://www.newyorker.com/culture/culture-desk/can-bullet-journaling-save-you> [<https://perma.cc/JE7C-59XF>] (describing bullet journaling as “a cultish notebook-organization system tagged in more than eight million posts on Instagram”).

Throughout the deal, transactional associates also take on many other tasks that generally all require organizational skills and attention to detail. A good way to sum up this type of work is that it needs to be done with an “I’ll take care of it” attitude. For example, many transactional associates will prepare, near the end of the deal, a physical or digital closing room where every piece of paper relevant to the transaction is stored. This allows more senior attorneys to walk through the room and see what still needs attention. In many transactions—not just merger and acquisition (M&A) transactions—transactional associates will also be among the final readers of the documents. They will read with an eye toward ensuring boring-seeming things, like consistent use of defined terms, consistent use of verb tense, and accurate cross-referencing.

“Running changes” is another common mundane task of transactional associates. Often, when contracts and other documents are renegotiated or redrafted, senior attorneys make changes to the document by hand. That handwritten document is then given to a more junior attorney to type into an electronic document, and afterwards they will send back both the clean, revised document and a “blackline” document that shows the changes made.

The norm of handwriting changes seems to be partly based in antiquity: one need not spend more than two-tenths of an hour at an after-work event to hear a partner’s war stories of how they began practicing before computers were invented. But some of the handwriting norm is also driven by practicality. Consider an acquisition agreement, for example. As described in previous work, acquisition agreements are usually broken up into modules to be worked by different specialist teams.⁶⁰ Tax attorneys might mark up the tax provisions, for instance, while antitrust attorneys craft the antitrust provisions. When multiple hands need to work on the same document, it can be more straightforward for one person—an M&A associate—to have primary responsibility for changing the electronic document and for all others to send their handwritten contributions to the M&A associate.

Transactional associates are also often deputized to liaise with specialists who are air-dropping in for only part of the transaction. For example, advice from antitrust attorneys is an important part of nearly every deal done by an elite law firm: antitrust attorneys help draft antitrust provisions and also file for antitrust preclearance from the relevant government authorities. But to do their job well, antitrust attorneys need not be involved in every other part of the deal—they only need to understand the parts of the deal that relate to antitrust, and to mark up the parts of the contract that might impact their work. It is the job of the transactional associate, then, to convey the relevant information to the antitrust attorney on the deal and to make sure that they are apprised of any relevant changes.

Transactional associates do similar liaison work with every other practice group that touches the deal. Depending on the deal, those groups might

60. Hwang, *supra* note 12, at 1418–19 (describing how acquisition agreements are separated into “complex modules” so that specialists can work on them more efficiently).

include tax, financing, litigation, and many other departments who need to be apprised of just a sliver of the deal.

B. Transactional Associates as Conduits

The role of the transactional associate, although it sounds rote, straightforward, and even boring, is an incredibly important part of any deal. To understand why, it helps to start with a little secret: although I and others have spent the better part of the last half-decade touting the wonders of modularity in contract design, modularity, like all things, has its limits.

Modularity, a concept borrowed from design and engineering, is a way to design contracts by separating parts into relatively self-contained modules, which are then plugged back together through a standard interface.⁶¹ Legos are an example: no matter the Lego block's shape, it can be refitted with other Lego blocks through its standard interface.

For complex projects like major corporate transactions, modularity has many benefits. In "Unbundled Bargains: Multi-Agreement Dealmaking in Complex Mergers & Acquisitions," I discussed many of the efficiency benefits of modularizing one deal into many separate contracts: essentially, it allows the deal team to divide and conquer a complex project.⁶² In other work, I have joined a small chorus (more like a decent-sized a cappella group) of scholars who have spread the good news of modular contract design for the same efficiency-driven, divide-and-conquer reasons.⁶³

But modularity has clear shortcomings. An obvious one is that modularity relies on standard interfacing—without it, the pieces of the system that have been broken apart simply cannot be put back together. In the world of corporate contracting, this means that it may be efficient to break a deal or a contract into many pieces, but that efficiency is worthless unless the deal can later be put back into a cohesive, sensible whole through the work of some standard conduit.

Transactional associates are the standard conduit. Consider the process of running changes. A busy tax associate who is staffed on many deals might be called upon to mark up a tax-related representation and warranty for Deal A. In the process, she might insert defined terms that she is using in Deal B or Deal C into the Deal A document. Left unchanged, Deal A would then contain tax-related defined terms from Deals A, B, and C. A transactional associate's job is, during the running of the tax associate's changes into the master document, to conform all the defined terms so that Deal A's documents stay consistent no matter how many specialists mark up the document.

In addition to being conduits, transactional associates also help put deals back together when they need to be. Even the keeping of the checklist

61. Hwang & Jennejohn, *supra* note 48, at 299–305 (describing modular contracting in detail).

62. *See generally* Hwang, *supra* note 12.

63. *See supra* note 47.

ensures that a deal broken into many modules can eventually be put back into a cohesive whole. For example, many M&A deals require financing—the buyer must borrow money from a bank in order to pay the seller.⁶⁴ The main acquisition agreement and the necessary financing documents are unbundled and worked on by different teams—the former by an M&A team aided by specialists and the latter by a financing team. Even though these documents are unbundled, they rely on each other and need to work together to make the deal happen. In particular, the buyer obtaining financing may be a condition to the buyer's obligation to close the M&A deal, lenders may wish to do their own diligence on the company being purchased, and both documents may need to consider government approvals—such as antitrust or national security preclearance—that must take place before the deal can close. Through a checklist, a transactional associate makes sure not only that all of the relevant interconnected documents and action items for these two parts of the deal are completed on time but also that, when the documents need to refer to each other, they do. Like a Lego enthusiast, a transactional associate takes the two parts of the deal that have been built by separate people and makes sure they fit back together.

Perhaps the dullest part of a transactional associate's job is also the most important. The reality is that, for the kind of highly bespoke contract that governs complex corporate transactions, there is no good way to fit many interrelated contracts back together without a detail-oriented human being at the helm.⁶⁵ Consider, for example, a proxy statement issued in conjunction with a public-company M&A deal. A proxy statement is a long document that often spans hundreds of pages and that is worked on by a team of lawyers from various practice groups and law firms, in-house counsel, accountants,

64. See generally Sheng Huang et al., Bank Dependence and Bank Financing in Corporate M&A (June 7, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010410 [<https://perma.cc/4NV6-92S8>].

65. I consider the Cooley law firm's Cooley GO product to be one of the most interesting automated-lawyering products on the market. Cooley GO allows individuals to use its website to generate articles of incorporation, bylaws, and other simple governance documents for a variety of business entity types. See *Index of Cooley GO Docs Document Generators*, COOLEY GO, <https://www.cooleygo.com/documents/index-document-generators/> [<https://perma.cc/45BS-PEMR>] (last visited Mar. 17, 2020). Along the way, individuals follow links to learn—for example, about the difference between LLCs and C corporations—and are, of course, directed to contact Cooley if they need more assistance than Cooley GO can provide. See *Comparison of C Corp, S Corp, and LLC Entity Types*, COOLEY GO, <https://www.cooleygo.com/compare-business-entities-chart/> [<https://perma.cc/CST6-2WMA>] (last visited Mar. 17, 2020). The mechanism used to generate these products, at least from the user's side, is highly reminiscent of TurboTax—the user fills in the blanks with information like the preferred entity name and Cooley GO autopopulates several documents with the relevant information. See, e.g., *Incorporation Package (Delaware)*, COOLEY GO, <https://www.cooleygo.com/compare-business-entities-chart/> [<https://perma.cc/N7UK-ACUF>] (last visited Mar. 17, 2020). In my view, Cooley GO works well because the documents it spits out are simple—articles of incorporation and bylaws are relatively boilerplate. The documents also need very little reintegration to work together as a set; they are quite modular and can stay that way forever. As a result, Cooley GO can offer a product—for free, no less—that requires little human oversight. More complex documents, or sets of more integrated documents, would be much harder to create without human oversight.

and bankers. The document will also repeatedly cross-reference itself—for example, “for more information, see page twelve.” It is common, during the process of putting together a draft of a proxy statement, to leave all those cross-references blank.⁶⁶ Before the document is finalized, an associate reads the entire document, inserting cross-references, conforming style throughout the document, and cleaning up things like defined terms, descriptions, and numbers.

While this “final check” task seems mundane, it is both necessary and important. Modularizing the document is necessary to getting the document done; in the interest of expediency, all of the different parties who need to work on the document must work on it in parallel, rather than taking turns.⁶⁷ But when there are so many cooks in the kitchen, the document inevitably becomes messy. And that messiness is more than aesthetic: it introduces potential liability to the deal. For example, imagine that during an early draft of the proxy statement, the client had represented to its lawyers that it owned fifty toy stores throughout the country. That number—fifty—was inserted throughout the proxy statement. Later, due diligence revealed that the client actually owned forty toy stores in the United States and seven toy stores in Canada, for a total of forty-seven toy stores in North America. That new information was inserted into a later section of the proxy statement but not into the “summary” section in the first few pages. A shareholder who reads only the summary section might then believe that the client owns fifty toy stores in the United States when, in fact, it owns forty-seven in North America. It is the job of a detail-oriented transactional associate to catch those inconsistencies (or, even better, to ensure that those kinds of inconsistencies are not introduced into the document in the first place), so as to limit liability.

In short, the dull organizational work of a transactional associate is the crucial “putting back together” that modularity demands. Without a detail-oriented human being to reassemble the modularized parts, it would be impossible to capture modularity’s benefits.

III. WHAT’S NEXT?: TRAINING LAWYERS FOR THE FUTURE

When I was a first-year associate at a New York firm, a friend who was leaving the firm to take a teaching job sent me, through interoffice mail, the camping cot he had kept in his office for overnight stays.

“You’ll need it,” he said.⁶⁸

66. In fact, even the preliminary version of the proxy statement, submitted to the Securities and Exchange Commission for comments and posted publicly, will leave those cross-references blank.

67. This time sensitivity is driven by both everyone’s desire to speed things along and securities laws. Securities laws require that shareholders be given at least twenty to thirty business days to consider a transaction after they receive a definitive disclosure document—usually a proxy or prospectus—about the transaction. This means that the sooner a proxy is filed, the sooner shareholders can vote and the sooner the deal can close.

68. The author is grateful for the helpful camping cot of Benjamin P. Edwards, who is now a law professor at the University of Nevada, Las Vegas.

And, indeed, I did.

There was the month I billed 340 hours, flanked on either side by two other high-billing months. There was the time I was stupid enough not to take a vacation day on the Fourth of July and it seemed that everyone else in my year did, so I was left covering for everyone else's deals. There was the time two other associates and I were assigned to "emergency weekend diligence" that was so emergent that I could not shake loose for thirty minutes to go to my friend's annual barbeque, which was about a five-minute walk away.

I was busy.

But what was I busy doing? This existential question plagued me as an associate and I think, to some extent, it plagues a lot of young associates working in "Big Law."

When I was a fellow, I read Ron Gilson's paper⁶⁹ about transactional lawyering and George Triantis's papers⁷⁰ about contract design and was, as a fellow at their institution, fortunate enough to spend time musing about these topics with them both. Those early academic influences and conversations shaped my thoughts on transactional lawyering, contract law and theory, and, of course, the existential questions that had bothered me as a young associate practicing in M&A.

Now, as a law professor, I also have some thoughts about how the work of transactional associates can and should impact the way we teach law students. Many doctrinal law classes, including my own business organizations course, are taught using cases. Litigation is still at the core of our curriculum, and we still primarily train students for litigation practice.

As a former transactional lawyer, however, I have found it both easy and fun to integrate transaction-based training into my courses. For example, so much of being a transactional lawyer is about communicating effectively to complete team-based projects. In all of my courses, students work on team-based projects and we discuss, explicitly, how to write emails that are clear and useful for all members of the team. In my M&A class, students learn a bit about the main practices that influence M&A—especially tax, antitrust, securities, and litigation—so that they know how to spot issues and communicate with specialist attorneys. We also spend some time researching, closely reading, analyzing, drafting, and marking up deal documents, so that students enter practice with the skills they need to succeed as associates. Finally, of course, we cover all the theoretical and doctrinal principles, read all those old chestnut cases, and work on issue spotters and hypotheticals.

I am obsessed with sprinkling transactional skills into doctrinal classes because of two stubborn little ideas I have about the practice of law. First, the law is a learning profession: junior associates learn from mid-level associates, mid-level associates learn from senior associates, and so on. I

69. See generally Gilson, *supra* note 5.

70. See generally Choi & Triantis, *supra* note 46; Scott & Triantis, *Anticipating Litigation*, *supra* note 46; Scott & Triantis, *Incomplete Contracts*, *supra* note 46; Triantis, *supra* note 47.

think this is a fairly uncontroversial idea. In fact, I have often heard partners say that junior associates are asked to do tasks for “training purposes” and not because junior associates are particularly well-equipped to do them. A seasoned legal assistant, for instance, could probably do a better job of running changes and reintegrating a document than a green junior associate—but in doing those tasks, the junior associate gets to familiarize herself with the contracts that she will work on next year.

But I have a second idea: it is really not the client’s job to pay for junior associate training. Sure, much of the substance of the job really must be learned on the job, and there is no way around the client shouldering some of the cost for that learning. There is no point, for example, in cracking into the thick Romeo and Dye treatise on section 16 filings until one is actually assigned to work on those filings for a real IPO. But for *basic* skills, like taking a first look at how multiple agreements fit together or practicing the detail-oriented proofreading and contract straightening-up that distinguishes a terrific junior associate from a merely good one, the classroom is a good place to learn. In fact, I think that the classroom is the *best* place to learn those skills because students can make mistakes in the classroom without causing dire real-world consequences.⁷¹

Despite the perennial fears that automation will leave our students unemployed, there is still much work to be done by organized, detail-oriented attorneys. So far, machines cannot effectively replicate even the basic reintegration of modules that associates do. But more importantly, effective reintegration of modules requires legal training. A good transactional associate must have subject-matter expertise across diverse and complex areas of the law, and must also be able to issue spot, know when to engage with specialists, be able to communicate pertinent information to specialists, and bring many specialists’ ideas together into a cohesive, legally viable whole.

In other words, there is still much work to be done, many promises to keep, and at least 3000 hours a transactional associate must bill before she sleeps.⁷²

CONCLUSION

Existing legal scholarship fails to adequately explore the crucial question of what transactional associates do. However, building on literature in contract design and transactional lawyering, this Article argues that transactional associates facilitate efficient modularity in contract and deal design and step in when modularity has reached the boundaries of its usefulness by reintegrating many parts to make a cohesive whole.

71. I could tell you some scary stories but, this being a family law review, let’s not get into the gory details. Instead, just trust me when I say that it can get bad. Really, really bad.

72. See ROBERT FROST, *Stopping by Woods on a Snowy Evening*, in THE POETRY OF ROBERT FROST 224, 224–25 (Edward Connery Lathem ed., 1979).