Designs for Courses on Drafting Contracts

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My wife, the English teacher, once said to me, "In this world, Peter, there are two forms of writing: creative (such as novels, plays, and poetry) and expository (such as treatises, letters, memorandums, and briefs)." I've tried both and prefer a third: contracts, which do not entertain, do not convey information or ideas, and do not try to persuade.

The English teacher now agrees that there are, indeed, three forms of writing. And the third, contracts, requires a distinct discipline.

Unfortunately, contract drafting has been sorely neglected by law schools, perhaps in part because teaching any form of writing is labor-intensive. Yet criticisms of this neglect are numerous, and the consequences are significant. For example:

> It should not be surprising to practicing lawyers that new associates come to work without the slightest idea about how to draft a contract. . . . [I]f you assign them a contract to draft, they will freeze like a deer in your headlights.[1]

> I have been shocked by the number of times in litigation that I have asked more senior lawyers — including some fairly good lawyers — to explain the meaning of some provision in a document they prepared and found out they had no idea what it meant.

[1] Charles C. Lewis, *Turning the Firm into a School*, 15 Bus. L. Today 25, 25 (Jan.–Feb. 2006).

> Indeed, I have just finished litigating one such case. The litigation did no one any good and would not have happened but for some sloppy drafting.[2]
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> In one study of 500 contract cases, the investigators concluded that about 25% of those cases revolved around problems of interpretation and that a good part of the difficulty was directly traceable to incomplete negotiation or poor drafting.[3]

The rest of this article suggests and discusses content that could form the body of one or more courses on drafting contracts.

What Is a Contract?

In the beginning, to write a proper contract, the student must first understand intellectually and then appreciate viscerally what a contract really is. "An agreement between or among two or more persons" provides but a bare hint. Precisely, a contract is simply a set of instructions for a transaction (the purchase of real estate), or for a relationship (a partnership), or for a combination of the two (a partnership to purchase and develop real estate). It's no different from the plans and specifications to build a bridge. And if there is a flaw in a contract's plans or specifications, problems will arise — creating a dining table for the litigators, as the letter from Mr. Jenkins and the study of contract cases demonstrate.

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[2] Letter from Stephen E. Jenkins, atty. at Ashby & Geddes, to the author (Sept. 13, 1993) (copy on file with the author).

[3] Joseph Kimble, *Answering the Critics of Plain Language*, 5 Scribes J. Legal Writing 51, 80 (1994–1995) (citing Harold Shepherd, Book Review, 1 J. Legal Educ. 151, 154 (1948)).

Laws That Bear on Forming a Contract

Any course or group of courses that treats contract drafting must include a study of the laws and principles that bear on forming a contract, for a contract is nothing if it's unenforceable. An awareness of these rules is obviously fundamental, lest the drafter sink piles into the sand. A former partner of mine — yes, a partner — closed a secured financing immersed in the erroneous belief that a UCC financing statement also constituted the security agreement required by the Code.

Presumably, students studied many of these rules and principles in first-year Contracts and in upper-level Secured Transactions. So this legal aspect of the drafting course would be in the nature of a review, a survey to establish a heightened awareness of those requirements that the contract must satisfy to ensure its enforceability. I would not require a detailed knowledge. Instead, I would try to instill a knowledge of the basics and a sensitivity to when they apply to the job at hand.

Consideration, the quid pro quo, the basic element in the universe of contracts, is the place to start. What constitutes proper consideration and, perhaps more importantly, what does not? And what contracts do not require consideration?

I would next explore the statute of frauds, beginning, perhaps, with § 2-201 and § 2A-201 of the UCC. I would then move on to other statutory provisions, like those in the New York General Obligations Law (Titles 7 and 11 of Article 5 and Title 3 of Article 15), dealing with various requirements bearing on a contract's enforceability.

Finally, I would make several other stops along the UCC: Articles 2 (Sales) and 2A (Leases), emphasizing the warranty requirements; Article 3, focusing on the requirements for negotiable

instruments; Article 9, covering the requirements for a proper security agreement; and if time allows, a brief stop at Article 5 and the ICC Uniform Customs and Practice for Documentary Credits.

In dealing with Article 9, I would emphasize the need to understand each transaction and its collateral before carefully examining the Code to determine what must be done to perfect the security interest. I would not get into the details of perfection, for Article 9 rivals the Internal Revenue Code in complexity. It's a conundrum that must be solved transaction by transaction.

Of course, there are other legal requirements that apply to forming contracts. These requirements arise from employment law, corporate law, tax law, real-estate law, and straight on till morning. Students must be made aware that, outside their area of expertise, they must consult with colleagues who have expertise in those fields. For example, a client called me one day, complaining about a contract it had made while represented by another attorney: "We have a problem, Peter. When we bought Fiddley Dee Company, we gave the sellers rights to buy shares in Fiddley Dee. And we also gave them the right to sell those shares back to Fiddley Dee simultaneously with their purchase. The sellers have exercised both options, but it will cripple Fiddley Dee to buy back the shares."

The fact was that Fiddley Dee had lost money for many years but was now profitable. The formula to determine the buy-back price was based on those recent earnings.

I asked whether Fiddley Dee still had an accumulated deficit. "Yes," came the reply. "Well," I said, "under applicable corporate law, the company can't buy back its shares. It's illegal. It can buy its shares only from surplus."

The lawyer for the shareholders agreed. (In the original transaction, had he known that corporate law requires that redemptions be made only from surplus, he would have insisted on a guarantee from the parent company — that is, the buyer of Fiddley Dee — or

arranged the put to the parent company rather than to Fiddley Dee.) Anyway, we renegotiated the calls and the puts to everyone's satisfaction.

Another aspect of commercial practice needs to be impressed on students: when working on a transaction in a foreign state or other foreign jurisdiction, counsel in that state or jurisdiction must be consulted.

As Dirty Harry observed in *Magnum Force*: "A man has got to know his limitations."[4]

Elements of Certain Contracts

After students are legalized (so to speak), I would introduce them to the considerations involved in certain basic contracts, such as a promissory note, a guarantee, security agreements, employment contracts, shareholder arrangements, and the sale and purchase of goods. An advanced course might treat acquisitions, leases, licenses, options, and other more sophisticated transactions.

Incidentally, I say "shareholder arrangements" rather than "shareholder agreements" because I prefer, whenever possible, to place those arrangements, such as voting and control and restrictions on share transfers, in the articles or certificate of incorporation rather than in an agreement. At any rate, my book *Commercial Agreements*, which is available online on Westlaw and supplemented annually, might serve as a good reference for this part of the course.[5]

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[4] (Warner Bros. 1981) (motion picture).

[5] Peter Siviglia, *Commercial Agreements: A Lawyer's Guide to Drafting and Negotiating* (West 1993 & Supp. 2009).

Boilerplate

I hate the term *boilerplate*, which refers to clauses commonly and variously included in most contracts. I hate the term because it carries with it a prejudice that these clauses need little or no scrutiny when added to a contract. But there's *no* clause or form that can be added to a contract without critical examination to determine whether any changes are needed — and almost always, changes are needed — to adapt the provision to fit properly into the contract. Here's a list of many of these types of clauses:

- Termination
- Assignment
- Governing law
- Arbitration
- Notice
- Execution and counterparts
- Authority to contract and to sign
- Amendment
- Waiver
- Delay in enforcing rights
- Remedies
- Integration clauses
- Expenses and interest
- Indemnities
- Severability
- Section headings
- Preamble and definitions

Drafting Exercises

Well, after all this time, we finally get to what this course is all about. After many years of reflecting on how best to organize the course, I came to the revelation, while lying in bed trying to decide whether to go fishing, that an understanding of the basics discussed above provides an essential foundation to the writing phase. So, instead of going fishing, I went to my little office in Tarrytown, New York, to write this essay.

Because a contract is no more than a set of instructions, the prime directive in drafting any contract is this: accuracy stated as simply as possible. Accuracy must be the controlling feature, for sometimes the concepts are so complex — through no fault of the lawyer, but as a result of the deal concocted by the client — that simplicity in the purest sense is not possible. Still, the lawyer should know and apply the techniques for clarifying and simplifying that this journal has promoted for many years.[6]

Because of the labor required of the teacher in the course's drafting segment, a procedure that might prove helpful and productive is for two or three students to work together on assignments, especially the longer and more complex ones. This collaboration should add perspective, which is essential to the drafting process, thereby producing a better product and, more importantly, helping to develop and improve technique and skills more quickly.

A variation on this approach is to have the teams prepare different assignments that would be presented at different times during the course. Copies of completed assignments would be distributed to the other students for comment during class sessions. The object

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[6] *See, e.g.*, Howard Darmstadter, *Sentences That Do Too Much* and *Promissory Notes*, 10 Scribes J. Legal Writing 129, 145 (2005–2006); Joseph Kimble, *A Crack at Federal Drafting*, 10 Scribes J. Legal Writing 67 (2005–2006); Duke McDonald, *The Ten Worst Faults in Drafting Contracts*, 11 Scribes J. Legal Writing 25 (2007).

of the critique would not be to attack and defend, but to determine whether the agreements adequately and comfortably house the transaction and whether the construction work (the drafting) is sound. The class would then decide how best to correct any deficiencies. The teacher's guidance in these discussions will be essential to focus attention on critical issues and to avoid digressions into minutiae. My wife uses a similar technique in her creative-writing classes. She has observed that meaningful comments from peers often carry greater weight with students than those from teachers.

Materials for this part of the course can be found in several books, including two of my own.[7]

Ultimately, for me there is either good writing or bad writing. And if the writer properly executes the prime directive — accuracy stated as simply as possible — the writing will be good. But if the writer fails to execute the prime directive, he or she will be designing a playground for litigators.

Ethical Considerations

Yes, even the discipline of contract drafting engenders ethical considerations, which need to be integrated into the drafting instruction.

One principle is that the drafter must prepare a fair agreement. The reasons are simple:

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[7] Scott J. Burnham, *Drafting and Analyzing Contracts* (3d ed., LexisNexis 2003); George W. Kuney, *The Elements of Contract Drafting* (2d ed., West 2006); Peter Siviglia, *Writing Contracts: A Distinct Discipline* (Carolina Academic Press 1996); Peter Siviglia, *Exercises in Commercial Transactions* (Carolina Academic Press 1995); Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (Aspen Publishers 2007).

- A one-sided contract will invariably be negotiated back to the middle.

- An evenhanded contract will result in minimal, non-confrontational negotiation and a quick conclusion of the deal.

- An evenhanded contract, raising few issues, will cost the client less in legal fees.

That's right, lower legal costs. And yes, that's good — and also right. The lawyer is a fiduciary, and as a fiduciary, the lawyer owes a duty to the client to keep those legal fees on a diet. Those lawyers with high IQs ("I" for Integrity and "Q" for Quality of performance) will not have to panhandle for lunch.

A second ethical principle: there's no shame in helping the other guy. Commercial transactions should not be adversarial proceedings. The goal is not to win; the goal is to do a deal that conforms to the parties' intent. Thus, while the attorney must at all times represent the client's interests, the attorney must not seek to gain an advantage contrary to the terms of the deal from a mistake by the other lawyer. An obvious example — and surely one that begs correction — is the inadvertent omission of a word: "The Company will pay the following expenses" versus "The Company will <u>not</u> pay the following expenses." Do unto the other lawyer as you would have that lawyer do unto you.

In the context of a commercial transaction, I doubt there's a better application of the Golden Rule than to that principle: correct the other attorney's drafting errors. In fact, because the object of a contract is to accurately reflect the intent of all parties, the principle is the ethical equivalent of the "given" in geometry. Allowing errors that you detect to remain uncorrected serves but two demons: a perverse desire to gain an improper advantage and litigation that should never be spawned. The client is ill-represented by this type of practice.

A Final Thought

I have done deals all over the world, and all the contracts have been in English. I once did a deal in Morocco, where the main language is French. The contract was written in English, but after the text was agreed on, the other party, an agency of the Moroccan government, asked that the parties also sign a version in French. This request was fine with me because, although I could not add a supremacy clause favoring the English version, the contract provided for arbitration in London. So I asked our Moroccan attorney, who was fluent in both languages, to make the translation. A day or so after he began the work, he said to me: "Peter, the French language cannot express some of these concepts with the precision of English." "Fine," I said, "just do the best you can."

Though we, here, may have the best verbal means of communication on the planet, that facility is of little benefit unless we writers can apply it properly. For expository writing (like this article) and a contract, the goal is the same: accuracy stated as simply as possible. To achieve that goal, the writer must have a command of the language. The main responsibility for engendering that command does not rest on the law school; it's the responsibility of the primary and secondary schools and, to a lesser extent, the colleges. But insofar as those formative institutions fail, law schools and the other institutions of higher learning must do their best to succeed.