

## HOW TO CREATE CONTRACT DRAFTING EXERCISES

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To fully understand how Texas Tech's first-year Legal Practice course deals with contract drafting, it is important to understand a few basic things about the program. The present Legal Practice course was derived from combining a two-hour introductory alternative dispute resolution (ADR) course with a two-hour research and writing course.

Currently, Legal Practice is a three-hour per semester course spanning the fall and spring semesters, and students remain with the same instructor both semesters. This structure allows approximately one third of class time to be used to introduce students to ADR techniques. During the spring semester, the class devotes seven weeks to discussion and assignments related to ADR.

The class first discusses the concept of negotiation. During the first week or so of class, we discuss different types of negotiations, such as the distinction between collaborative and competitive negotiation. The instructor also introduces the class to methodologies concerning how to negotiate. Concepts such as client counseling and interviewing are covered during the fall semester and, thus, need not be covered again.

After spending time discussing negotiations, the class engages in a one-on-one sample negotiation designed to expose the students to the negotiation process. Soon after, the class participates in a more complicated negotiation, with the end result being the drafting of a negotiated contract. This process usually involves dividing the class up into teams of two, allowing for negotiations to take place between two "lawyers" on each side. As part of this process, students develop cooperation skills, as well as the ability to learn how to deal with different personalities on the other side of the table. Perhaps more importantly, they are learning for the first time what it is like to negotiate on behalf of someone else, rather than themselves. Additionally, students are introduced to the rules of conduct for lawyers in a negotiation setting.

Another important aspect that is stressed is the planning portion of the negotiation process. We emphasize planning for a negotiation because of its

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importance to the drafting process. For instance, if their client wants a covenant not to compete in an employment contract, students are responsible for researching that particular topic. Such research includes thinking about how to prepare and execute the negotiation and ultimately about how to draft the document.

As part of my introduction to the contract process, I bring three contracts from my prior practice to class. These contracts show a variety of provisions that are often included in contracts. The first contract is a divorce decree and accompanying Agreement Incident to Divorce. When I display this twenty-five page agreement to the class and compare it to the assignment the students are given, they can see the differences in the ways to approach contracts.

The second contract is a partnership dissolution contract, whereby three partners are forcing the fourth partner out. This contract has seven attachments, which are incorporated by reference into the language of the contract. These attachments include a deed of trust and a bill of sale. The third contract is an intellectual property contract that was negotiated for a client with the county so that the client could operate, develop, and program the integrated computer system at the local courthouse.

With these three contracts in mind, the class can discuss the negotiation and drafting process. For instance, a copy of one of the early IP contract drafts can be used to show comments such as “we need this, we don’t want this, or change this language.” This process gets students to think about the editing process, paying careful attention to the language that is used and how correct language makes an acceptable, effective contract.

After completing this process, the next step in the class is to set forth the seven steps of legal drafting.<sup>1</sup> Using PowerPoint, the class discusses how and what to include in the contract. This process includes the traditional who, what, when, where, and how analysis of the facts. Only after going through this process is the class presented with its first contract drafting assignment.

Although the ultimate goal of the assignment is a contract, there are some additional assignments used to help students learn related material. For instance, students are divided into teams of two to negotiate either against or with another team. Students are instructed that they will not be supervised and that they have no timeframe. However, they are required to reach an agreement. Ultimately, they have

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<sup>1</sup> SUSAN L. BRODY, *LEGAL DRAFTING* (Wolters Kluwer Law & Business 1995).

to come up with something that they can draft into a contract. Using this process, students will recognize that not all negotiations wind up in an agreement.

As part of this project, a goal sheet is included that sets out the goals for what is to be accomplished. The grading sheet corresponds with the goal sheet. This approach allows simplicity in grading and allows students to know how they will be graded.

As a culmination to this activity, students are asked to perform two tasks. First, when they finish the negotiation, they have to turn in an individual answer sheet attached to the bottom of the assignment sheet. This sheet is designed to make them think about the negotiation process—what they planned and whether or not it worked out the way they planned it. Second, each team drafts the contract they think they have agreed to. Both teams then turn the contracts in to the instructor and simultaneously exchange drafts with each other.

These groups will ultimately have to come up with one contract that all four people can sign off on and agree to, and all four students receive the same grade. This demonstrates that parties have to work through this process in order to be able to recognize what they have agreed to and that it actually works. In the end, this process exposes students to a variety of different contract-drafting skills.

In my classes, I have not had many problems with students not pulling their weight. However, I think another thing that helps is having students answer individual questions about the negotiations before they do the drafting. If someone is not doing his or her part at the negotiation level, it shows up there. I actually have had students in that report say, “please do not pair me with this particular person again, because they either are not doing their work or are unethical in the way they approach things.” So I generally know about these issues before the contract is turned in. This gives me an opportunity to do something about it at that earlier stage. Otherwise, you have to let the students police themselves.

When the students turn in their final contract, they are individually certifying to me under the Student Honor Code when they put their anonymous number on that contract that everybody in the group participated and did what they were supposed to do. So, the whole group of four people is saying that they all did their parts.

**ROSEMARY DILLON\***

Teaching in the same program and ADR class as Professor Jones, I tend to focus more on the use of forms. In particular, I want to teach students to use forms wisely. Additionally, the use of forms in this three-hour course is a way to limit the amount of research required. Texas has excellent practice guides that give students annotated forms and citations to cases. Students still need to update cases, but the use of these forms limits the amount of research.

This format is particularly effective due to the fact that the students are under many other burdens, which creates a workload issue. Furthermore, most law firms have a bank of forms that they use. As employees, these students will eventually use these forms to draft documents. In order to eliminate too much reliance on the accuracy and validity of these forms, however, students must learn to have confidence in their own skills, determining when they can change forms and when they should keep terms in a contract.

When drafting the assignments, topic selection is important. I try to think of something that has a familiar context. This leads to events students have likely experienced, such as renting an apartment, getting a job, reviewing an employment contract, or buying a car. For example, my employment contract is usually for a major league baseball player. Additionally, I include residential leases, commercial leases, and investment purchase contracts. Whatever the example, these are from experiences that students have had or are likely to encounter.

This past year a majority of my students wanted to go into real estate. As a result, the assignment concerned residential leases. Teaching residential leases has some advantages. There are a lot of forms, both good and bad. Additionally, the law is fairly concrete. Within this framework, I set up the story, involving a situation in which the students are negotiating and drafting a new lease from an existing tenant. I give them the "lease from hell" that I have drafted. This hypothetical involves a tenant that, for one reason or another, has breached the lease. The students are given negotiation terms, specific things they have to negotiate in relation to the new lease, including rent amount, duration, and allowance of pets.

The grading of the project is divided into different categories. As an example, the negotiation points count for five percent of the final grade. Additionally, if you are representing a tenant, and you are able to keep all of the pets,

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you earn points. Other categories include the amount of rent, the terms of the lease, a personal-injury clause, a security clause, etc. By including these categories into the grading rubric, these issues really begin to matter to the students.

Included with the “lease-from-hell” assignment is a long, dense, turgid document to set the basic parameters for the landlord-tenant relationship. This limits the need for independent research. I will introduce the fact that the lease was last revised a number of years ago, and subsequently instruct the students to update it. Changes will need to be made about parking and security deposits, and they are to write a very short memo explaining where the changes are and how they affect the revisions in the lease.

In addition to this exercise, I assign students to read James Nehf’s article about writing contracts.<sup>2</sup> This reading lays out the basic standards for contracts. Afterwards, we go through clauses of form contracts, discussing why something is phrased a certain way. We discuss when to use active voice and when to use passive voice. This discussion of the structure and language of the contract is all done before they actually draft the contract.

Concerning the assignment, students are given a 3,000-word limit. They are allowed to use any resource available. One suggested resource is the Texas Practice Guide. Furthermore, I inform them of other available sources, where to find them in the library, and where it is available on both Westlaw and Lexis. Additionally, I show them examples of contracts that are unrelated to their topic.

Students work in pairs. They negotiate and then hand in a draft. After I comment on their draft, they meet with the other side and complete a final draft, which is graded. As part of this grade, students must know what every provision means. If they don’t know what a provision means, it counts against them. If I feel like a student has done a particularly good job of protecting their client’s interest, I will comment on that, but I try to do it in a balanced way, because usually both sides have done a pretty good job of doing that in various places within the contract.

I have not had a situation where one side just says to the other, “let’s just get this done on whatever terms you want.” I did have a colleague who did deal with this, though, and as a result, the team turned in the shortest of all the contracts. They eliminated all of the difficult negotiation points from it, and it came up as 10 pages instead of 20. That is hard to grade, because it is kind of creative.

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<sup>2</sup> James Nehf, *Writing Contracts in the Client’s Interest*, 51 S.C. L. Rev. 153 (1999).

Occasionally I have had a problem with one student in a pair not pulling his or her weight. I am not a big fan of group assignments, but this is a program-wide thing that we have to do as a group assignment. I explain to the students that they are beginning to develop a reputation, and that reputation will carry through their career. I explain that they do not want to be known as the slacker. I have always had at least one complaint each semester about the negotiation, but it seems to work. I know there are slackers out there, especially when four people are being graded on a final contract. I simply have not found a good way of dealing with it. Perhaps it would be best to grade the contracts as a team. Students are less likely to slack in groups of two instead of groups of four.

I also grade negotiation points. By making it a very small percentage of the grade, it gives them more of a life-like experience, while at the same time, in the long run, it does not make a big difference in their grade. A good contract or a bad contract, however, will make a difference. The one thing I do say upfront is that you could end up with two very different grades on the same contract. If one side agrees to something that was not within their authority, they lose a lot of points. So one side could have an “A” contract and the other side, because they agreed to something that was not in their authority, could have a “D.”

As far as grading, I grade each side, but the contract is graded as one. It becomes complicated, but there is the form, the content, the terms, the language, and the negotiation points. I usually catch it if someone goes outside his or her authority in the drafting of the contract. If the students do not correct it, they will end up getting a failing grade.

#### **LISA PENLAND\***

In teaching contract drafting and deciding how I am going to teach students through exercises and assignments, one of my primary objectives is to provide students context to understand the exercise we are going to work within. Clearly, I want to teach the students the skill of contract drafting, but I also want to provide them with legal context to understand the exercise or assignment. In particular, because students often do not have a foundation in the law, we need to find a shared context for the exercises so that we can work through the subject matter together. We cannot get to the skill involved unless we first all have a common understanding of the legal objective and background for the exercise or assignment.

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For instance, one of the questions I had last week from a student was, “why is there a purchase agreement for real estate when you have already an offer and acceptance?” I appreciated that question, and the reason the students do not understand the difference between and significance of the two documents is because they have never bought a piece of real estate. So, primarily, I try to keep in mind what I can share with my students that will provide context in order that they can understand the substance and then work on skills.

My classes are basic drafting classes that work on developing skills. In addition to creating legal context for my students in exercises and assignments, I want the students to be engaged. To do this I try to make the exercises interesting in some way or another. Additionally, I am also looking at what the objective of my assignment is. Are we just working on a preamble? If so, then I probably do not want to make an exercise with a three-page hypothetical. I think about what my assignment objectives are as I am creating my exercises, assignments, or even my final assignment. Sources for these assignments come from things that I have come across in practice or in legal situations I have encountered in my own life. As a result, the students will get to share in some aspects of my prior practice and my life.

My class is an interim course that runs for two weeks for three hours a day, and I consider it a technical drafting course. We are talking about drafting generally. We also discuss legal concepts to the extent that the concepts relate to drafting. For example, we discuss the legal implications of indemnification clauses because how the clause is drafted will impact its legal effect. Thus, while my course is a general drafting course, it necessarily includes legal concepts related to contracts. Being that the class is only a two-credit class, I do not have time to talk much about negotiations.

As part of the course work, I generally have the class do one of two things: in-class exercises followed by some discussion of how we are going to draft the document, or an assignment to be performed entirely outside of class. Under either choice, we go over the exercise or assignment in detail. We discuss what it is that our client wants and how we will translate that into a contract provision; we discuss the particular components of the contract on which we are focusing. For example, if the assignment is about representations and warranties, then we will discuss that aspect of the law.

After discussion, I give the students time to write alone or in groups. After the students are given some time to write, I ask for someone to give me an example of his or her writing. After they give it to me we put it up on the screen and, as a class, we take ownership of it; the purpose of this is to prevent students from feeling singled out when the class comments on the written product, whether it is good or

bad. We continue this cycle of discussing, then writing, then discussing, and then writing, and it is positive because it is both interactive and fun.

One particular exercise I use is called the “Big Boards Consulting Agreement.” This is an exercise I created primarily to look at the “action section” of the contract, which contains the main performance, the consideration, and those sorts of things. After drafting the preamble several times, with different types of agreements, and after drafting definitions, I set the students up with this hypothetical.

This hypothetical is about a guy who coaches skateboarding champions and a skateboarding company that wants him to sign on as a consultant. The company asks that he provide some insight as to how well its skateboards work. He will get a bonus if he signs any of his super skateboarding clients. This contract includes three separate types of consideration, because we are focusing on that part of the contract in class.

Another hypothetical I use is a septic addendum to a real estate purchase agreement. The problem examines what happens when a septic system fails 10 days before a closing. I have the students look at the provision in a standard real estate sales agreement that does not adequately cover what happens when a septic system fails just before closing. We go through the provision in the agreement and talk about what was attempted by the provision, whether it created the types of legal concepts that the writers wanted it to create, and what could have been done better.

I next introduce the fact that the septic system failed just before closing, and that the seller has agreed to pay \$6,500 of an estimated \$10,000 for a new system. The buyers agreed to pay the remaining \$3,500, and both parties agreed to split up to \$1,100 if damage is more than the estimate. Students are then asked to draft the septic addendum that includes all these provisions in it. An interesting aspect of this particular addendum is that there is no agreement between the parties as to what to do if it repairs run over \$11,100. Students always come up with all kinds of interesting ways to deal with this.

As for providing feedback to students, I do not meet individually with the students until they begin work on their final contract. However, because we review all of their assignments in class, the students receive a tremendous amount of feedback. Before their final project, we will have conferences to go over their drafts. This contract is due after the course is over. I can do this because it is an interim session. If they want additional conferring time, they get the opportunity to make an appointment with me. I will confer with a student as much as he or she wants without writing the contract for them.



**SUE PAYNE\***

I teach a 13-week seminar for second- and third-year students on the basics of contract drafting. We meet once a week for two hours and 50 minutes, and I get the chance to create assignments that require the students to draft complete contracts. My class is a seminar, and I have devoted almost all of it to what I consider drafting. We mostly do exercises in class together. The assignments, however, have a lot of lead time. When creating contract-drafting assignments, I not only want to engage the students in what I am doing, but I want to be engaged, as well. So, I have designed something I call “The Narrative Semester.”

How do you create assignments for The Narrative Semester? First, you have to be passionate about your topic. If you have a particular area of expertise, you may find your topic there. Once you find a topic that you are really excited about, you may need to do a little bit of research on it, especially if it’s not something that you have a great amount of expertise in. I don’t believe there are any particular topics that are off limits. Instead, my concern is that I have to keep on creating new assignments, so if I find a subject that has a nice progression of difficulty level that also interests me enough to keep writing the story, I will use it.

You will want to find out what contracts are commonly used in that topic area and decide on a progression of contracts. You will start with an easy contract and progress to the more difficult contract. You then create a narrative for the semester. In this narrative, characters can live, they can evolve, and they can have different types of deals and create different needs for different types of contracts.

Concerning the use of templates and forms, I make a distinction between “sample” contracts (most templates and forms the students find) and “model” contracts (contracts worthy of imitation). Most templates and forms are samples but not models. I give my students a model of a good contract. As an example, I wrote an agreement called the “Leaf Disposal Services Agreement” that I gave the students. You will want to provide at least one good model in another subject area; that way the students are not going to just copy it. Teach your students how to critique templates and forms, using a canned assignment in which you give them some templates along with the hypothetical.

In differentiating between templates and forms and models, a model is a good contract that I want the students to imitate. Templates and forms are an

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unknown, because students can easily grab them from the Internet. Additionally, students do not even use the forms books that much anymore. When using a canned assignment, you provide students templates that you have pulled from the Internet. Students are required to cite any language that they adopt or adapt from these forms. For the final assignment, I let students use any materials they want, so long as they don't have to purchase them or get them from another practicing attorney. Finally, they are to make everything that they want to use for the final contract available to the entire class. I post these things on the Blackboard website, even if I have to scan them myself.

In Narrative Semester I, the character Anna Claire Glass is an artist. She has created her first glass paperweight. She has met a collector named Arthur Cole Lector. For the first agreement, the students write together in a small team. It is a simple paperweight purchase agreement in which Anna is selling her paperweight to Arthur. The Paperweight Purchase Agreement is critiqued but not graded.

The midterm contract for Narrative Semester I, a graded assignment, evolves from Anna's continuing relationship with Arthur, who has opened an art gallery and wants to help her market and sell her work. Each student writes a consignment agreement. We spend three or four class periods working with the facts of the mid-term deal and reviewing how to translate those facts into contract concepts.

The final graded contract involves a negotiation between two parties. In pairs, with half the class representing the City of Chicago, and half the class representing Anna, the students negotiate a commission agreement between the City and Anna. The City commissions Anna to create a glass sculpture commemorating the Chicago Fire—a sculpture to be placed in Millennium Park. Each pair of students turns in one contract and both students receive the same grade.

Narrative Semester II is about a rock band. The band's name is One Art, and the lead singer is Melissa Treadwell. In this narrative sequence, the first contract is a band logo purchase agreement. The band purchases the logo, which they need for the cover of their demo CD and the side of their van, from the artist Vincent Van Logo.

The mid-term contract for Narrative Semester II is a performance contract between The Bell Jar Bar (owned by Sylvia P. Hughes) and One Art. One Art agrees to play experimental rock music at the Bar for 20 consecutive Saturday nights. The Bar agrees to pay the Band a base fee plus a percentage of the tickets sold for each performance. By this time, Treadwell had developed a relationship with Vincent Van Logo, who has joined the Band.

The final contract in Narrative Semester II is a management agreement. Van Logo has become unhappy because Treadwell, his significant other, is spending so much of her time managing One Art. One half of the class represents the Band and the other half of the class represents We Brake for Musicians, Inc., a management company. Van Logo and Treadwell want the management company to promote the Band and help them achieve their primary goal of obtaining a record deal.

In Narrative Semester III, the students meet an up-and-coming LPGA golfer named Betsy Bennett. Betsy hires a contractor to put a putting green in her backyard and the students (in teams) write a putting green purchase agreement. Betsy next engages a sport psychologist to help her with her mental game and the students write a consulting agreement. Finally, after working very hard with her sport psychologist, Betsy becomes one of the top five LPGA golfers in the United States, and she gets an endorsement deal with a company called Grace Under Pressure, Inc. (known as “Guppy”). Half of the class represents Betsy and the other half represents Guppy.

It is important to change the assignments from year-to-year. This is the problem with contract-drafting assignments, and probably with legal-writing assignments, as well. It takes so much time to create them, yet you must keep on adding to your repertoire. I cannot use the golfer hypothetical again for a couple of years for fear that a student will get a hold of a previous student’s contract and use it. Obviously, to re-use an assignment, you have to change the facts, the dates, how much money the golfer made, when the tournaments are, etc. The details have to be changed. This is quite time consuming, but not as time consuming as coming up with something brand new.

During each Narrative Semester, the initial contract is team-written and ungraded. On the contract, I write lots of comments in hopes that the students will be able to learn from them. The mid-term contract is written individually and is graded. Again, I give the students a lot of comments, hoping that they will absorb them before beginning their final contract. For the final contract, I do not grade the negotiation process. I consider whether the students have devised creative solutions to difficult problems that the negotiation raised. I do give points for creativity in resolving those kinds of issues. I suggest to the students that they try to draft the contract as if they are actually working as transactional attorneys. One person sometimes takes on the first draft, and sometimes that can work well. When one student drafts first, then the other can redline it as if they were actually drafting the contract.

With respect to a student not pulling his or her weight, I did have a bad slacker one semester. This student left the weekend before the final paper was due, and he didn’t make himself available to his partner. I gave that team the grade they

deserved on the final product, but I boosted the working partner's grade in class participation. Twenty-five percent of the grade is class participation, and this fosters a really active class.