

HOW TO CRITIQUE & GRADE CONTRACT DRAFTING ASSIGNMENTS

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I have to give this disclaimer. I am high grader when it comes to contract drafting. So even though my presentation is on critiquing and grading, truthfully it's more about critiquing for me. I will get into that in a minute. My name is Robin Boyle, and I teach at St. John's University School of Law. First, my background. I was an evening student at Fordham and worked in law firms during the day in both litigation and corporate practices. By the time I graduated, I worked at a large law firm, which I had summered at and then worked at during my last year of law school. I walked into the leveraged leasing practice area and then, at the height of the recession, went and clerked for a bankruptcy judge, which turned out to be a busier chamber than the corporate office that I had just left. From there, I went into a bankruptcy practice.

At St. John's, my bread and butter is first-year legal research and writing, but I also teach contract drafting to upper-level students. My course is split between contract drafting and litigation documents. I started teaching the course about a year or two before the first transactional conference in Chicago, and I teach it approximately two times a year. This year I will be teaching it three times. I teach it over a fourteen-week semester, but I also teach it in a two-week intensive course. I just concluded that two-week course in May. It's between the end of this spring and the summer. I also teach contracts to Summer Institute students, who were admitted on a conditional admission basis to our school, and I start that course on Monday. So that gives you an understanding of the contract-drafting course. It is three credits, and it is graded.

I like to start with negotiations because I like to get them going and I like their juices flowing, and I usually incorporate a problem that may have some fun aspect to it, such as a movie contract negotiation where they are negotiating the contract between a movie director and an actor. There will be a summary sheet of facts that both sides know about. There will be private facts for one side and the other. I, on purpose, put the facts far enough apart so that they need to be creative in coming up with solutions because the money just doesn't match—the director is

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tight fist, or the actor wants more money. I will put funny things in there such as the actor wants a hairstylist but is bald and so on and so forth.

So they need to be creative in what it is they are asking for, and I also give them the tips of negotiation. I get my tips from "Getting to Yes,"¹ which was the book that I used in law school and still use. So I will give them the tips, go over the idea of BATNA or the Best Alternative to Negotiated Agreement, and get them started. Within an hour, I want them back to the classroom with a negotiated agreement. They should have strategized for both sides. I also want them to have negotiated an ethical agreement because when I was a law student, I remember a lack of ethics on the other side. I remind them that they may not make sexist or racist remarks.

We come back to the classroom, and I have them go around and talk about their negotiations. At that point, I talk to them about process. How did you feel? What did you strategize about? Did you hold your best part for last? Did you use silence to your advantage and so forth. I also compliment them, because it is day one, on how it is they were creative in their approaches and talk about their similarities and differences in their results. There is no writing in that exercise. That's just day one.

On day two, we take a look at "Plain English for Lawyers"² and "Rules for Writers."³ We pull out the contract drafting book. I use George Kuney's book.⁴ We talk about how to make a contract in tabular form and how to take an archaic provision and make it readable and I have them get started on a convoluted insurance provision. I then set up an assignment drop box on TWEN. This assignment is not graded so it's low pressure. They send it in to TWEN, we will take a look at it, and I critique it. I invite the class to comment. At this point they are shy to critique because they feel as if they don't know anything. I give a fair amount of critique. Luckily I have a teacher's manual as well so I can do a sneak peek to see what it is that George Kuney had in mind, and I go forward and critique the student's work that way.

¹ WILLIAM L. URY ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1992).

² RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (5th ed. 2005).

³ DIANA HACKER, *RULES FOR WRITERS* (6th ed. 2007).

⁴ GEORGE W. KUNEY, *THE ELEMENTS OF CONTRACT DRAFTING WITH QUESTIONS AND CLAUSES FOR CONSIDERATION* (2d ed. 2006).

Then we turn around and say, “Okay, let’s use the skills that you have developed in assignments one and two for a graded assignment. What I want you to do here is to look at your book. There is a lease provision in there that is convoluted or archaic. I need you to understand what it says. I remember when I was in practice I didn’t understand what some of these contracts said. I had to understand it and then draft it so that it was better. But you are not going to just draft the provision. I want you to negotiate it, and I want you to think about the sides that you are representing and what it is you bring to the table.” These are landlord-tenant provisions, sublease provisions, etc., and we have one student represent the landlord, another represent the tenant, and I want a negotiated provision. This is for a grade, usually 10% of the grade.

They negotiate in class, and this is where the live critiquing happens. That’s part of their grade, which is why my grades are fairly high because, at this point, they are asking me questions, sometimes in front of the class, sometimes individually to me, and I walk around and I help them answer the questions. It could be as overall as “what is it I am achieving with an assignment provision and the sublet provision?” We talk about the overall goals of the provision and what happens in default provisions, but we also talk about the minutia and setting up a simple tubular form.

I also tell them that the purpose of this is that they are using a model. For some students using a model is a new concept. I don’t know why because they use models in first-year legal writing, but the corporate model is new to them. The one in the book is simply a model, and I am creating a scene where you are rushing to a meeting, there is only one model at your firm, it’s in the record room, you grab it, you use it, and—this is pivotal—invent some of your own language if you don’t like what you see. Then they start to be creative. Again, this comes in as a graded assignment. Sometimes I have them hand in a hard copy, and other times I have them email it to me in class. The assignment comes in as a pair, and the one grade counts for both students.

The reps and warranties. I give them the warning that this is the most conceptually difficult part of this course: to understand a rep and warranty, and to understand covenants and so forth, and how to draft them. I give them that warning, and I hope that they are actually going to read the chapter when they come in. I show them the PowerPoint that I have prepared, and then we work on an exercise in class. They send me their drafts, and we take a look at the exercise online on TWEN. Then I ask them to craft reps, warranties, covenants, indemnities, and releases as an essentially one-page document for a deal of their own choosing. I ask them to find a partner and invent their own deal. I give them some suggestions about past deals that students have had, and by turning the facts over to them, they start to own the deal. It also eliminates some of the problems of plagiarism and so

forth that have happened. It works nicely because they start to get excited because this is a deal that they want. I tell them again if you are buying the pizza parlor, one of you is the purchaser and one is the seller. I tell them to split up those roles, think about what the purchaser wants to represent and warrant, what the seller wants, who wants covenants, and what kinds of covenants you are going to choose. It should not be a slanted agreement. I should see a negotiated agreement.

Again, I give plenty of critique in terms of their coming to me because I let them work in class. I model this after an architectural drawing class that I took in college. In that class, my professor walked around the room and gave us lots of critique as we were drawing in class. I appreciated that, and so do my students. As questions come up in their mind, they can come to me, and I am able to be there for them. So that is the rep and warranty assignment. That is a graded assignment. This time I have them hand in a hardcopy. Again, the grade applies to both students.

Then I will say, "Okay, now we are working through the text book. We are working on different chapters as we are moving along, and we are ready for you to draft a contract from head to toe. Again, it is your deal. You may use the same facts that you used for your rep and warranty page—in that sense those provisions are rewrites—or you may decide to ditch those facts because they don't work for a full, head-to-toe contract and invent your own."

I will just give you some examples of the topics that they came up with. They do become very excited about their topic because it means something to them. So two students were negotiating the purchase and sale of the bar Cheers. It must have been a favorite show for them. They have stickler points. What were their stickler points? The specialty drinks. What about the specialty drinks? Confidentiality provisions, keeping the name, how are we going to draft these provisions? Another group wanted to do a luxury car dealership, and their stickler provisions were setting up escrow accounts because they didn't have the cash all upfront, so they needed to determine how they were going to finance this over a period of time. Somebody else came up with a publishing agreement and royalties were their stickler points.

At some point, I have the students come before the class and talk about their negotiations as they progress and what their stickler points are. The benefit of that is that the other students hear the topics, and they help the students in getting over their stickler points. So when a pair came up and said they were stuck on royalties, it turns out that they were trying to publish a book on legal writing, and the royalties were 50% that the author was going to receive. Even the rest of the students in the

class knew that sounded a little high. So then they did some research online and looked at other contracts and came back and said, “You are right.”

The one that is my all-time favorite—it sounds a little way out there. They were a wonderful team because the one student had so much patience, and the other student was out of the box in all of his thinking. They negotiated for days, and what they negotiated was a spaceship that was landing on the planet that needed repair and needed a contractor. The counsel for the alien said that we need to think about bankruptcy provisions, we need to think about currency because I can’t have it in U.S. dollars I need to have it in other dollars, and we need to think about jurisdiction because I don’t trust humans. We need to think about what’s going to happen when this goes into litigation or arbitration. The negotiations went on and it was actually creative, but what they ended up doing was hitting all of the chapters in the book in a creative way that engaged them. So those were the topics.

I asked the students at the end of this week, “What is it that you liked? What it is you didn’t like?” They said they liked everything, but I think they were just trying to be nice. One student commented that she liked the one-on-one critique, the oral critique, that I gave them because they could come to me with questions all of the time. She went on to say that this raised the negotiations to a higher level. “If you had just given me written comments, she said, “we may not have gone back and renegotiated to the extent that we did.” And they did come to the well often; they came to me often. The downside, as I said, is that the grades are high, and if any of you have graded a writing course you know that the more help you give, the higher the grades are. I do look for other ways to show that there is a range of grades in my class at the end. That usually comes from the litigation part of the course where they are working more individually and not in groups. They also like that the representation and warranty exercise preceded the full contract exercise because it got them to think about the kind of fact pattern they wanted to use but also work on the most challenging part of that contract.

Okay, so this is about grading. These are the two books. I know there are others, but these are the two that I am familiar with and that I recommend.⁵ On a macro scale of both grading and critiquing when you are looking at a contract, we start with the preamble. Now if they are starting from scratch they need to call their document something. What is it that you are calling it? Who are you? What are your names as corporations or individuals? Starting from the beginning, we explain what recitals are, and that they could explain the history of your contract. This is the

⁵ GEORGE W. KUNEY, *THE ELEMENTS OF CONTRACT DRAFTING WITH QUESTIONS AND CLAUSES FOR CONSIDERATION* (2d ed. 2006); TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2007).

simple one: “lessor has agreed to lease its factory equipment to lessee; bank has agreed to lend funds to lessee.”

Words of agreement, also known as the statement of consideration. They need to begin by using plain English: “the parties agree as follows.” My students usually put in “for due consideration, parties agree as follows.”

Definitions. This part gives students a hard time. I don’t know why, but they do. And I think for many of us it may have become second nature, but for students, crafting the definitions, defining a term, making sure that that defined term is capitalized in the body of the contract. Sometimes they may photocopy. They may have paragraphs and paragraphs that they have taken from another deal and it’s not relevant.

The substantive provisions. A lot of this gets hammered out in the back and forth. I tell them that “There is a bird on your shoulder.” Who is doing the performing? Who is the actor? This is where the active voice needs to come out. What are they performing? Where will their deliveries take place? What happens when something fails to happen? And I tell them to be ready for that hostile critical review of a judge. How will a judge interpret your contract?

The contract. The people who drafted your contract are no longer there. They have moved on to other jobs. They have successors. So successors need to read the contract. What are they reading? And we also focus on default provisions.

The reps, warranties, and covenants. Do the representations state facts? In their first drafts, the reps are not stating facts necessarily. I ask them, “Is there a fact in this statement?” What about the verbs that you are using that indicate that they are facts? Do the warranties promise that the statements are true, and are there promises in the covenants?

The boilerplate. They often get their boilerplate from other documents, perhaps in the appendix of the book or they look online. Sometimes the boilerplate is too general or not pertinent so they need to tailor the boilerplate to their deal. Are all of these provisions necessary? Have you missed anything? And of course signature lines. Are the names of the company correct? Who signed the document?

Now for the micrograding—those were macro. I handle a lot of that on the one-on-one when they come up to me and ask me questions, but I also deduct points when they hand it in at the end. Then the micro is the use of the verbs. If the contract is really very good, I would say focus on micro because you can usually

catch the small parts like verb usage. These are things like making sure that “shall” is being used for the covenants, that “may” is stating options and rights, and that “must” states a condition precedent.

Now how to convey critique? I prefer that the final contract be turned in as a hardcopy mostly because students often include attachments, and sometimes those attachments are difficult or impossible to send via email. They may attach drawings, blueprints, and so forth. I like to get a hardcopy, and in the final contract I am marking up in pencil. Also, during the contract part of the course, we’re using models from the text and also constructing exercises, such as giving good examples, for instance, of what conveys a remedy and having students try to figure out which is the better statement in terms of the conveyance of a remedy. I use these exercises as we move along.

I would be happy to answer any questions later. One thing that I would like to convey is that what I enjoy most about this course is that it teaches itself. I feel as if I walk in, I give them the building stones, and then they apply what they have learned on their own. I go over the chapter with them, practice the material, and then let them go. And then there is a buzz in the room as they are doing it themselves, and it’s a very positive buzz. It is not overly noisy. And I also let them walk around the school, and I have professors and deans come back to me and say, “We saw your students negotiating their contract in the cafeteria. They seemed so excited.” And I say, “Yes, they really are!”

I find the course easy for me to teach because they do so much of the work themselves, and it’s exciting for them to own this contract at the end. It is their project. At the end of the class I will say to them, “Did you learn something?” And they nod yes. “Did you have fun?” And they always say, “Yes!” They learn something and have fun doing it. What a perfect class. Enjoy teaching contract drafting. It can be a lot of fun.

Sue Payne*

I am going to talk more about how I grade contracts. I have been teaching a contract drafting seminar each semester for three years at Northwestern. I also teach a two-class module to all of our first-year students, and they write a contract in the two-week interim between the two classes. So I have critiqued a lot of student contracts.

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Why did I give up handwritten comments? First of all, I gave up handwritten comments last week because I have a big mouth, and I was writing a lot and my hand was getting extremely sore. My penmanship was deteriorating, and my hand was very sore. I actually have osteoarthritis in my thumb. This is probably familiar to some of you. My hand was just not working with all that handwriting, so I gave up doing handwritten comments.

Then I was lured in by electronic comments. All of the legal writing professors in my department had been using electronic comments, and someone showed me how to do it. I liked using the electronic comments because I could say more and the comments would be legible. Also, I could go faster by using macros. But then, both hands were sore. The electronic comments are great, and the students really like them. It would be ideal if I could grade all of the contracts with the bubbles that have lines going into the right places where I am commenting.

But my current solution is the rubric, and you have in the handouts a copy of the checklist that I used with my students. I usually hand this out during the first class. It is called "Contract Drafting Checklist," and it's very much based upon the textbook I have been using for all three years, which is Tina Stark's textbook.⁶ So I give her a nod because the book is fantastic, and she allowed me to use it as a manuscript before it became a book.

When I began my grading, I used a rubric that is created mostly from the checklist. The rubric follows the checklist in my handouts. What I am showing you is the rubric that I use to grade a midterm contract and the final contract. I can give students a lot of feedback on the rubric; there is plenty of space for it. I can focus both on detailed critique and more general critique, but I really like the way the rubric keeps me focused as a grader. I don't get all bogged down in the minutia as I did when making those little bubble comments. I can start with things that are specific to the contract. I can hop around on the rubric, but it helps me to get through the smaller, more detailed stuff and then pull back and look at the contract as a whole.

I grouped similar errors for maximum effect. If you look at the "Plain English" part of the rubric, we have a lot of the language issues there: proofreading errors, typographical errors, and punctuation issues. The contracts my students write have section numbers. I can refer to a specific section number when making a comment. I can go faster, and I can still use macros with the rubric. You do still have to type the section number of the contract though.

⁶ TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2007).

Both hands are still sore. I am now headed towards using digital recording machines. I have bought one and am hoping that I can figure out a way to do it without using my thumbs. But this is something that I learned from reading a listserv. You can even just handwrite the numbers of your comments on the document, and then open up your digital recorder and say, “comment one blah-blah, comment two blah-blah.” Then that will be an MP3 file which can either be emailed to students—I understand there are some issues with the size of those files—or they can upload it to their iPod. They have the hardcopy in front of them with the numbered comments, and then they listen to your comments. I may be moving into that or some kind of voice software that would recognize my voice. I have purchased the recording device and am learning how to use it. I anticipate relief from sore hands.⁷

Now I want to tell you some of the standard comments that I make on these rubrics. I’m sure you are going to have your own standard comments, but these are some of them.

“Definition contains a buried covenant.” Students often write definitions that contain a covenant. They might not use the word “shall” in the definition, but there is definitely a “promise” in there. I ask them not to do that.

“Let your defined term work for you.” The students will do an in-text definition of “term” with a capital “T.” Then, every time they use their in-text definition, they will say, “the Term of this Agreement.” They don’t need the words “of this Agreement.” Part of the reason for defining “Term” was to get those extra words out of there so they wouldn’t have to keep on repeating them. Let your defined term do its work.

“Say the same thing in the same way.” You will see this in the contract drafting textbooks. Students who are trained as litigators and who have done a lot of writing for litigation are used to elegant variation. They don’t want to say the same thing in the same way. When I tell them not to use elegant variation, they look confused. So instead I say, “Say it in the same way,” and then I will point to another place where they said it differently.

⁷ Since giving this presentation, Professor Payne has begun critiquing papers using voice commenting on a digital recorder. She reports that she likes the illusion that she is conversing with the student about the paper. With voice-commenting, she remembers to give more positive feedback and she does not hesitate to address complex issues that might otherwise take a very long time to address in a written comment. She also reports that she can operate the recorder without using her thumbs.

“Don’t make your heading do too much work.” Students will often name a section something, and then not repeat any of those words within the section. And they are kind of relying on you to recognize that the heading is supposed to be helping you understand what the section says. I tell them that the heading is a road sign. It’s like part of the roadmap of the contract, and I expect them to do the drafting within the section. They can’t rely just on the heading.

“Chop the snake or tabulate.” I use this when I see a sentence that is way too long. Students like that comment; they get a kick out of it. Another option, instead of making the sentence shorter, is to make a list and tabulate. Of course teaching students how to tabulate and maintain the parallel structure of the items in each list is really important.

Sometimes students are just lazy, and they don’t want to draft precisely. This goes back to the same issue of making the heading do too much work. I will say, “This is shorthand. You have to do the drafting.” Sometimes, I will put the word “do” in italics.

“Be precise. Make the rules of the game clear.” I tell my students that the contract sets forth the rules of the game for the parties. I tell them to pretend that they are one of the parties; they want to know what services they have agreed to provide. If you read the contract and can’t figure out the rules of the game, then the contract is not precise.

“Don’t raise a question you don’t answer.” Students frequently do just that. So I also tell them that the contract should set forth all of the rights and duties of the parties.

“Avoid legalese like the plague.” I advise students not to use language like “herein” and “hereinafter” in the contract. We spend a lot of time ridding the more experienced contract drafters of their bad habits. Drafting in legalese is one of them.

“Present a more polished product.” That’s my favorite comment because the students who don’t proofread carefully don’t understand why they need to. I once had a student say, “I didn’t know this was a writing class. It is drafting, not writing.” I guess they thought it was like architectural drafting or something. So I remind them that if they are turning work into a partner at a law firm, that partner will expect a polished product. I want them to treat me with the same respect.

Here are some of the more positive standard comments I use. I love creative solutions to difficult contract drafting problems. So I will comment “Creative

provision!” I will sometimes say, “Answers all of the reader’s questions about the rights and duties of the parties.” That’s usually an “A-” paper.

“Well organized on a macro and micro level.” The students don’t really understand that comment unless you explain it in class. The articles of the contract have to be organized, and then, within each article, the sections have to be organized. And, within each section, the sentences have to be organized.

This is one of my other favorite comments to make. “The Reader feels like she is in good hands.” You know, when you get that contract and you just don’t get derailed when you are reading it. You are kind of protected by how well drafted it is. All of my “A” papers get the comment “The Reader feels like she is in good in hands” or something like that.

What I have given you is a contract drafting checklist, and you can also use it for peer review of contracts. I have done that in class, where they have the checklist in hand. Sometimes I give out the actual rubric that I am going to use to grade the contract, in advance. I tell them that the last thing they should do before turning in their contract is review it against the checklist or against the rubric.

David Epstein*

I am David Epstein, and I teach at New York Law School. About 10 years ago I developed the course on contract drafting. When we started, we offered the course about once a semester. Now we are up to giving it at least 12 times a year and sometimes more. I don’t actually teach all the sections anymore. It’s a two credit course, which in the fall and spring is given over a fourteen-week period with one-hour and forty-minute classes. It is also given over the summer across seven weeks. Those classes are three-hours and twenty-minutes long.

I am going to talk about two fairly separate topics. One is a kind of critiquing exercise that probably a lot of you have done in one way or another where you have a student commenting on another student’s paper. Then, I also want to talk a little bit about creating an audio file.

I would like to start with the critiquing exercise. We have four graded exercises over the course of the semester. I start out with an exercise that only deals

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with the use of language. I give the students a contract that is fairly horrible, and their assignment is to work with it and turn it into something readable. The only drawback of the assignment is that for some reason students will take this contract that I told them was really, really bad, and when they get to the later assignments, parts of that contract show up. I am not sure why. I even give them a speech now when I give out this assignment. I tell them, "I am giving you this thing that I am telling you is terrible, but there will be two or three of you who will use some of this in later assignments even though I have told you it's really terrible. I know this because I have taught this class probably fifty times, and it's never failed." And sure enough, they don't let me down. When the time comes I'll mention it again and say, "You know, three or four of you did it again."

The second exercise is one in which the students are given kind of a broad exercise to work on. They are given the fact pattern, and they are assigned to represent one of the two parties. All the students represent the same party. Then they are told to brainstorm on their own, flesh out a contract, and put together what they think the provisions should be. They're responsible for having the content be what it should be and also having it written the way it should be. They're responsible for everything that we have already talked about. At that point though, we probably haven't gotten too much into some of the more specialized clauses, but we have gone in far enough for them to be able to put something together that works. It's a fairly traditional assignment which I critique and grade in a fairly traditional manner.

This brings us to assignment three, the assignment that I want to talk about. I have the students hand in two copies of assignment two, one of which doesn't have their name on it. I shuffle the copies that don't have names and hand them out to the class. Each student should have someone else's contract to review. When reviewing these contracts, I don't want them to approach the review in a traditional way. I don't want them to review it as a professor or partner would review the work of a student or associate. Rather I ask them to picture themselves representing the other side of the deal or the other party. They are told to take the contract and pretend that they are representing the other party. I say that "this contract is being sent to you by the attorney who represents the other party. They've drafted it, and they have given it to you." Then I tell them to do with the contract what they would do in those circumstances if you were actually practicing. I do have a class where I discuss ways to react to the other side's paper before I do this. I don't just expect them to kind of pull it out of thin air. Essentially they are told to look over the paper, remove things that they think would be damaging to their client, add things that they think would help their client, and change things that are in the contract so that it better represents the needs of their client. They are told to look for things that are vague and to look for things that are ambiguous or not easy to understand. After all, to affectively represent your client you have to make sure that everybody

can understand what the contract says. So they also spend a fair amount of time working with the language.

There are some things that I tell them not to do it. These are essentially things that one would really not do if another attorney had drafted the contract for the other side and then given it to you. These are the more mechanical types of things. For example, somebody puts something in the introduction that would be better placed in the body of the contract. Well, if another lawyer did that, you wouldn't raise it. You don't want to be condescending and essentially say, "Hey, I can draft the contract if you don't know how." So I don't want the students to do that either. In the earlier assignment that they first put together, they get comments back on things like that. Things like not having a proper recital and so forth. But for this assignment, I ask them not to do that.

It still leaves them with a lot of things to do like looking for better ways to protect their client and deleting, adding, modifying and playing around with the language. And I tell them to redline what they are doing. Part of the assignment is to make sure that whoever would look at what they have done when they send it back can very easily tell what it is that they have done. I explain to them just how upset an attorney from the other side would be if they think you have tried to sneak changes in there. You have got to make it very clear what you have added, what it is that you are taking out, and what it is that you have changed. It usually doesn't require anything terribly fancy. They are just using track changes on the word processing program. However, I generally tell them to avoid the feature where you get the bubble saying that you have taken something out because you end up with so much stuff that nobody can particularly understand exactly what it is that you have done.

As a result, I do give a higher-length limit on this particular assignment because the things that they take out physically still have to be there. They make a notation that they would remove the particular language, but they don't physically take the language out. So, if I have given them a five-page limit for the first paper, this second paper will have something like a six-page limit.

Now there are a number of ways that you can vary this. For example, I usually tell the students not to put in comments about what they did or why they did it. This is mostly because when I was practicing, I wasn't a big fan of putting comments in writing and sending them to my adversary why I did not want a certain thing a certain way. If I felt that it was necessary to explain, I would probably rely on a phone call, but I always thought that having it in writing would someday come back and bite me. But you may want the students to explain why they have made the

changes they have made, if for no other reason than you may feel that this is a good addition to the exercise.

You do want to make sure that they actually make the changes. One of the things that I have discovered when I do allow them to make comments is that they will make comments without also making the changes. I think they end up hurting themselves sometimes because they will say something critical about a particular clause, but they won't do anything with the clause. They won't show how they would have done it differently.

Another thing you can do differently is to have the students comment on the same paper. There are some drawbacks to that. The students seem to enjoy working on different papers.

I deliberately don't have the assignment count terribly much because I don't want students getting upset because they think that they have been disadvantaged based on the quality or lack of quality of the document they are reviewing. I don't want them to wonder how I can compare apples to oranges when they are all commenting on different papers. I think I have this assignment count for something like 15% of their grade, and that doesn't seem to bother anyone terribly much. However, in my experiences, it doesn't seem to matter what paper they are working with. There really isn't an advantage, for example, in working with the paper that has been very well done compared to a paper that's poorly done because you are probably just going to be concentrating on different things. You are, after all, supposedly writing it from a different perspective now. The students are representing somebody else. So even if the paper that you have been given to work on is beautifully crafted, you should not be able to just live with that paper because it should have been written from the perspective of the other side.

So you do not have to have everyone working on something different. What I have done on occasion is put together a composite, give everybody the same paper, and have them work with that. Another variation I have done is I will sometimes hand out a composite, break the class up into groups, and have them discuss in their group how they would change the document. They won't actually make the changes because it's physically kind of difficult to do at that point, and they don't have that much time. I will generally put the thing that we started out with up on a screen in addition to handing it out. Then we usually end up having a fairly healthy discussion on why certain things are worth changing or why they perhaps should not be changed.

In terms of just the mechanics of doing this, I generally will have the students work with a physical paper. Part of that is because giving them an e-

document that they have to work with is logistically a little bit more difficult. Of course, giving them a paper to work with means that they either have to scan it or they have to keyboard it. However, as I said, it can be difficult to send them the e-document, and I do have a rationalization for not doing it that way. The rationalization is that not too many lawyers are willing, and for good reason, to give the other side an e-document that they can work with. If you know about things like metadata and meta tags and so forth, a really techno-savvy person can take this e-document and see exactly what you have done at every stage of the game and that can be a damaging thing. For example, let's say that you are preparing an employment contract on behalf of an employer. At some point you were willing to pay that person \$200,000 a year, but you've change it to a \$100,000 a year. The document itself says \$100,000. If the other side can see that, at some point, you were willing to pay \$200,000 a year, they are going to ask for more money because they know, at some point, you were at least thinking about it. So it is part of my effort to make this real and also to talk a little bit about the metainformation problems. So I very rarely will give an e-document with this assignment. They are not going to have one when they're out in practice, and I am trying to make this real.

QUESTION

How do you evaluate this for grading purposes?

DAVID EPSTEIN

I'm glad you asked that because that's something I probably should have talked about a little more. What I usually do is treat it like any other assignment. I look at what I assigned and what I asked the students to do. I asked them to make changes that would better represent their client. I asked them to work with the language if there were some problems. I asked them not to do certain things. So I will look at the assignment much like any other. I will look for those things I mentioned. Generally, I will mark it up in a very traditional way with a pen or pencil, and I arrive at the grade.

I generally do not give the paper back to the person whose paper was being revised. I generally only give it back to the person who did the revising. My experience over the years has been that the true learning goes on when the student is doing the critique by looking at a paper from a different perspective and looking at it with the kind of depth needed in order to make comments. I don't know that the person whose paper the student is working with necessarily learns all of that much, but you don't have to do it this way. If you want to give the paper back to both students so that the original drafter can see what this other student thought about their paper, that works perfectly well also. You could do this either instead of or in

addition to your own comments. There's a lot of flexibility built into this particular assignment. Any other questions about this particular exercise?

All right. Let's talk about audio files. I have found that preparing an audio file or MP3 file can be a very effective way to critique a paper. Essentially what you are doing is preparing a lecture specifically for a student based on the paper that they wrote. It's a very convenient thing to use, and very easy to get back to students, and you can just attach it to an email if you want. If you are a little less comfortable with the technology, you can even give them a CD. I think that complicates things a bit, but that's an option.

In terms of approach I find it even more important than usual to read over the paper first. One thing that's not so easy to do with an audio file is fixing things that you've screwed up. For example, if you mention that a student has missed something and you read on further and realize that it's there, you're probably going to have to go back and record the file all over again. With paper, especially if you use a pencil, that correction would be easy. But most of the recording devices I have seen do not lend themselves to going back to a particular point and replacing that particular part of the recording. So if you have done something badly enough that you can't just explain it away as part of the audio, then you end up having to do it over again.

Now let's talk about the specifics. I often use a system where I have added letters in strategic places. I have, at times, done it just by writing it on the paper. Sometimes, I find it easier to do it electronically using the Word document. In having them submit the papers and attach them to an email, I can reply with an email that contains both the paper and the MP3 file as attachments. So they've got both of those things which I think makes life a little bit easier for them. As I am reviewing, I will go to each of the different points I want to make and mark them as I am going through the paper. And I will have specific comments about the things that they have done. The audio may start with an overview depending on how I feel about the paper and whether I think I have a lot of things to say at the outset. But then I get into the specifics. I will say something like, "If you would look at point B," and I will say a little bit about what I don't like about point B. I find that easier than referring to the lettering or numbering that they have used in the paper because sometimes they have not done the lettering or numbering well enough for that to be effective.

I usually do take some brief notes on the paper as I read it so that I remember what it is that I want to say but you do, to some degree, have to be spontaneous about this, which is not really terribly difficult. There is nothing you are saying that you probably haven't said countless times before on papers or in class. If

you start writing everything out you turn this into the grading exercise from hell. This is supposed to make things easier for you as well as the students. Using recorded comments should allow you to say more in the same amount of time, not simply allow you to say more in more time. So if you write out your comments and also do extensive comment on the audio, you're making a mistake and your comments won't come out terribly well. I have found that out the hard way. When I tried it, my comments came out so badly that I did them over again. The students will be able to tell that this was not somebody lecturing to me but that it was somebody who foolishly wrote their comments down and now they are reading their comments. So that really does not work out very well.

Some people like to put in little comments just on the paper. For example, if someone has used a comma where they should have used a semicolon or if they didn't quite use the right word, they will just put the comment on the paper. That's perfectly fine.

Another variation that some people like is to put all their comments down on the paper as they normally do, and then they just record a summary. I don't particularly like that, but some people do. It's just another way of doing it. It's a classic case of doing whatever it is that works.

There are some things you have to watch out for. If you are the kind of person who sees something terrible on a student's paper and then starts talking out loud to themselves, you can't do that on the audio. So don't read the paper and say, "Oh my! This is crap." It will now be on the audio and you will have to redo it. You don't want any comments on the audio that you wouldn't normally give. You have got to be careful about a lot of things. Don't tell jokes. You don't know how it's going to come out. In the classroom that's fine. You can sort of read the situation and see how it's going to go over. You can't tell that in a recording. You cannot be sarcastic. If you're really unhappy with the student's paper, it can come out a little bit in your tone. So again, you have to be careful. Just as you would try, to some extent, in a class lecture not to let your feelings come out too much, you have to be careful about that as well on the audios.

I would not overdo the audios. I have never done more than one audio critique a semester. It doesn't mean that you can't do more than that, but I think one of the reasons the students like it is because it gives them a change of pace. For once, instead of getting back a paper with all of these comments that they hate to read, they get back a paper with comments they hate to listen to instead. But they do appreciate the difference, and there is also different depth there which they do like. But I have always had the impression that if I did too much of that it might be a mistake, and we do have to keep in mind that students learn in different ways. For

some students hearing the recording is not going to work as well as for others because they are not going to sit there and take notes or at least most of them won't. So this approach won't work for the type of student who learns by taking notes on what you have said and then goes back and reads them.

It's also got some drawbacks from your perspective. If a student wants to come in and talk about their paper, you'll have to listen to the audio file. So instead of taking a couple of minutes to just to look at the comments that you made the first time, you are going to have to sit for whatever amount of time you have spent recording and listen to it again. So you should not let these recordings be too long. Mine usually last fifteen to twenty minutes. Twenty minutes is probably tops. When you start getting into thirty minutes, it probably means that you are too in love with your own voice, and you are just doing this because the student has to sit there and listen to this thing. When you're making the recording, keep in mind that you may have to listen to it also.

When using recorded feedback, you're usually going to have to grade the paper right away. If you are the kind of person who starts with tentative grades or who makes some comments and then goes back later on to figure the final grade, this doesn't work. You won't have written comments that you can easily refer to. You will have the audio and maybe some brief, handwritten comments that a week later may not make that much sense to you anymore.

To close, there are lots of programs you can use for giving audio feedback. I usually use RecordPad. I find that it is more reliable and that odd things don't happen as often. Things don't disappear. RecordPad is not free, but it's not terribly expensive either. I think it costs something like \$40 for the year.

QUESTION

Do any of you have the students number every line so you can just refer to the lines when you are making your comments?

ROBIN BOYLE

I do not for simplicity reasons. Just to keep it simple. I didn't want my students to have to worry about how to get that done. But what is important is the tabular form. What's very important is how they number a provision and a heading and so forth. But I don't have them enumerate each line.

SUE PAYNE

I don't do it either. I use section names or usually the numbers of the sections. If I am critiquing a definition it usually has a letter or some way to refer to it, and I make sure that my students format their documents a certain way so that it makes it possible for me to comment that way.

DAVID EPSTEIN

I generally don't do it, partly because it can make a student feel that it is easier to find things than it actually is, so the student may not spend as much attention to numbering headings and subheadings in an effective way so that they are easy to refer to. I have also noticed there are fewer lawyers using the line numbering than there used to be. I don't know if there is a reason for that because it's easy enough to do with word processing, but I have noticed less of it than was once the case.

QUESTION

How do you put some teeth into grades when there is a lot of subjective critiquing being offered? How do you differentiate one student from another in terms of grades and still be able to have a curve at the end of the course where not everyone gets an A? What are your final grades comprised of?

ROBIN BOYLE

We do plenty of ungraded exercises. For the graded ones we start off with a provision that counts for 10% of the final grade. It's usually an insurance provision that's written in an archaic way, and they revise the provision in plain English. Those grades end up being on a scale of one to five. The average grade is somewhere around a three. This means that I am giving some four's, a lot of three's, and some two's.

The next graded assignment is to revise a more complex provision. Often I take a real estate lease because a lot of people are familiar with landlord-tenant issues and leases and have read one before. Those scores end up being on about the same range on a scale of one to five. I find the median is about a three. If it's a scale of one to ten, the median would be somewhere between a seven and an eight.

Then we get to the contract. That is when I focus on a lot of those macro issues in the give and take so what gets deducted sometimes is the micro issues

which I don't really pick up on when we are doing the live critiquing because I don't see the printed form of their contract until the very end. Micro tends to take over in terms of grading for me. Sometimes they will even miss some of the macro things we have talked about. In the finished product, they may forget to insert a remedy provision for a default. Sometimes the verbal critique doesn't resonant the way I think it should. That's where some of the macro points come out. The full contract is worth 20%.

Participation in my class ranges from 10% to 20%. The nice thing about using TWEN and the assignment drop box is that I can go back and check to see who sent in documents into the assignment drop box. Students who don't bring laptops to class have the option of reading their draft out loud—not the full contract, but when we work on non-graded assignments. I tell them that participation counts. I expect them to be sending documents into the assignment drop box. I check TWEN to see who has, and that does count towards participation. If they don't bring a laptop to class, they can use someone else's laptop or they can read their contract out loud. On the score sheet, I keep track of who is participating in that regard.

Now if I were to cut off the other half of my course, I would make some revisions. If I were to focus just on contract drafting, I would probably have them hand in a draft contract at that midpoint. Instead, I give oral feedback to the class and they do an oral presentation on their contract. I would also have them hand in a draft, and I would count part of their grade on the draft towards their grade on the final product. That's one way in which you get a variation of grades because the final contract is usually in really good shape when they have received so much feedback prior to that point.

SUE PAYNE

I teach a thirteen-week seminar. My grades are all based on contract drafting. Class participation counts for 25% of their grade. Class participation includes a student presentation, a group presentation, an ungraded contract, and numerous in-class exercises. I also say that attendance is mandatory, which makes me really popular. Usually everybody misses at least one class, but I include attendance in that 25%. I like a lively, active class, and that's why I make participation such a big part of the final grade. The mid-term contract is written individually and graded individually. That accounts for 25% of their grade. The final contract is a negotiated contract they write in pairs. Each pair gets the same grade, and that counts for 50% of their final grade. I can do it all different ways, but that's how I did it this semester, and it seemed to work okay.

QUESTION

We go over so many drafting techniques and provisions that it takes the entire semester to cover them all. Your grading rubric is excellent, but when you are looking over something that they have written in the middle of the semester do you try to mark everything that they have done incorrectly or do you just let them know that you are grading them relative to each other based on what you have already covered in the course?

SUE PAYNE

I should have given you a sample rubric with my comments filled in. That might have helped. I actually do try to point out every single thing that's wrong, which might be why my hands are sore. I also tend to read the paper all the way through before I make any marks on it. I know that's time consuming, but I like to have a sense of the whole. I only have twelve to fifteen students in my class so it's not that difficult to do. It would be very difficult if there were more students in the class. But I read the paper once through, make some comments, and then I go into the rubric. If we haven't covered boilerplate yet, I don't use that part of the rubric for that assignment, and I don't count off for mistakes in that area. So I do tailor it to what we have covered so far in the class.

ROBIN BOYLE

I just wanted to add one point. I'm not sure I told you how many students I have in my class. For the pre-summer course, which is the ten-day intensive class, I usually have anywhere from sixteen to twenty-one students. Then in the fall/spring course, I have anywhere from seventeen to twenty-one. This coming year, I will be teaching about sixty students in the seminar, covering fall, spring, and pre-summer semesters.

DAVID EPSTEIN

I just have one quick comment about this problem of having a broad contract that has some things in it that you really haven't talked about yet. That happens a lot with the papers that I assign. I don't tell them to do everything. In fact, sometimes I tell them not to do certain things, but they don't always listen particularly well. So I will get, for example, a paper that has a force majeure clause in it even though we haven't covered force majeure clauses. I don't count that towards their grade unless there is some obvious drafting mistake that just happens to do with language. But as far as a technical error, if we didn't cover it yet I wouldn't count it on the grade, and I will generally not comment on it. I will make sure they

understand that I have not commented on that section. For example, I will write that “we have not covered force majeure clauses yet so I did not comment on that on your paper and have not considered that for your grade.” On the other hand, I remind them not to assume that the force majeure clause was okay. That’s the reason I didn’t comment on it.

QUESTION

Is there a risk to not pointing out every error if you are grading relatively?

SUE PAYNE

I think there is a risk to pointing out every error. Isn’t there a pedagogy that says you shouldn’t do that? I do it, but you probably shouldn’t do it. I can’t help myself sometimes, and I try to pull back so that the student doesn’t get this rubric that’s so full of stuff that it’s overwhelming to them. As far as this being a risk when I am grading them relatively, I haven’t seen a risk doing that.

QUESTION

Well, I am saying that if you do not document every mistake, but you are grading them relative to each other, isn’t there a risk in that?

SUE PAYNE

No, I don’t think so.

QUESTION

When you are making comments on the papers, do you tell them what’s wrong and possibly how to fix it or do you do just write questions such as, “Is this the best wording to use here?”

SUE PAYNE

I do both. If I feel like I have been writing too many questions, I switch to the other method.

ROBIN BOYLE

I do both also, but I tend to make more affirmative statements. I think the other approach where you are asking them questions is more diplomatic or polite. It comes off a little bit sweeter. Based on what I do, particularly when grading first-year papers, sometimes I think my comments tend to be brash. But this is after teaching legal research and writing to first-year students for fourteen years. I do like the question approach because it gets them to think for themselves rather than for you to tell them what is missing.

DAVID EPSTEIN

I use both and it partly depends on whether I think asking the question will do any good. If I think it's a student who can think through the question in a thoughtful way that will be useful to them, then I do like the question approach. If it's the kind of thing where it really seems like this student will have to be hit over the head with a bat to get the idea, then the question format may not work as well. Even though you are trying to get them to do a certain thing, it doesn't always seem to do the trick.

SUE PAYNE

With my LL.M. students, if I write a question on the contract they come to see me about every single question because they want to answer the question. That is hard on them and on me. So I tend to make more affirmative statements for them.

APPENDIX A**SUE PAYNE**

CONTRACT DRAFTING CHECKLIST & GRADING RUBRIC**I. General**

- ☐ Accurately embodies negotiated terms
- ☐ Covers all relevant facts
- ☐ Parts of the Agreement are well coordinated—they all work together
- ☐ Defined terms prove their value and are consistently, appropriately used
- ☐ Cross-references are easy to follow and not too abundant
- ☐ Reads like good prose; clear, concise, smooth, well-organized
- ☐ Reader ends up knowing all of the rights and duties of the parties
- ☐ Reader ends up with all significant questions answered
- ☐ Reader can understand the terms of the deal even though Reader is a third party

II. Format

- ☐ Font is Tahoma or comparable
- ☐ Font size is 12 point
- ☐ Article names use Roman Numerals; centered; boldface
- ☐ Section names are regular numerals with decimals; numerals are keyed to Article names (e.g., Section 3.01 is the first section in Article III); boldfaced
- ☐ Heading of Section is indented after Section number; boldfaced
- ☐ Headings – initial caps of key words
- ☐ Pages are numbered at the bottom center
- ☐ Signature lines do not appear on a page without any text

III. Essential Parts

- ☐ Title
- ☐ Preamble
- ☐ Background
- ☐ Statement of Consideration
- ☐ Definitions
- ☐ Action Sections

- ☐ Other Substantive Provisions
- ☐ Endgame
- ☐ Boilerplate
- ☐ Signature Lines

IV. Review of Each Part

Title

- ☐ Appropriate for subject matter
- ☐ Not too general or too specific
- ☐ Not too long
- ☐ Initial caps of key words
- ☐ Centered; boldfaced

Preamble

- ☐ Nicknames for parties are at same level of generality
- ☐ Nicknames are placed in appropriate place in sentence
- ☐ Full names of parties are correct
- ☐ State of incorporation or residence included
- ☐ If address included for one party, then address included for other party

Background

- ☐ Information not confidential or embarrassing to other party
- ☐ No covenants or other substantive provisions
- ☐ Puts Agreement in context but does not say too much

Statement of Consideration

- ☐ No archaic language
- ☐ Short and sweet—"Accordingly, the parties agree as follows:"
- ☐ Appears at the end of the Background section; not set apart in separate section

Definitions

- ☐ Not circular; usually doesn't use the word itself to define the word
- ☐ No covenants; each definition is a declaration only
- ☐ More than just the dictionary definition of a word

- Makes sense; doesn't define word in way so different from ordinary meaning that Reader gets confused
- Terms that need to be defined are defined, especially if need to clarify that parties agree to a particular meaning
- Nice balance between definitions in Definitions section and cross-references to in-text definitions
- Eliminates need to repeat a long group of words each time

Action Sections

- Term of the contract is described (with references to possible early terminations and extensions, if applicable)
- Closing Date is identified; time and place as well
- Closing Deliveries are specified, if any
- Subject matter performance provision (parties covenant to perform the main subject matter of the contract)

Other Substantive Provisions

- Organized by topic, usually in order of importance (most to least)
- Utilizes contract concepts within each topic (NOTE: Do not use contract concepts as headings. Use topic headings, with appropriate sub-topics.)
- Within each topic, translate business terms into contract concepts:
 - Covenants
 - Representations and Warranties
 - Conditions Precedent
 - Discretionary Authority
 - Uses correct verbs to indicate type of provision
 - Not every contract concept appears under every topic

Endgame

- Section contains or references every endgame provision in Agreement – a snapshot of the Endgame
- Spells out all of the if/thens – good consequences; bad consequences
- Incorporates right to cure, if so agreed by the parties
- Spells out procedure for carrying out endgame
- Spells out what happens to the money if contract terminates early
- May include dispute resolution procedure

Boilerplate

- ☐ Shows good judgment about choices made
- ☐ Appropriately adapts precedent used
- ☐ Appropriately cites precedent used
- ☐ Consistently utilizes defined terms from THIS Agreement

Signature Lines

- ☐ Uses correct full names of parties
- ☐ Does not abbreviate names
- ☐ Does not use nicknames
- ☐ Formatted properly
- ☐ Contains prefatory language (“To evidence their agreement to the terms . . .” or “AGREED:”)

IV. Plain English

- ☐ Agreement is written in plain English.

AVOID THE FOLLOWING LANGUAGE ISSUES.

- Archaic/elevated language
- Legalese
- Wordiness
- Choppy prose
 - Passive voice
 - Awkward phrases or sentences
 - Inconsistency
 - Vagueness
 - Ambiguity
 - Omission of articles (“a,” “an,” and “the”)
 - Wrong Verb tenses
 - Use of nominalizations instead of strong verbs
 - Double negatives
 - Dangling modifiers
 - Covenant language needed/not needed
 - Discretionary authority language needed/not needed
 - Condition precedent language needed/not needed
 - Dual verbs (pick one)
 - Dual adjectives (pick one)

- Wrong preposition choice
- Sentence fragments
- Run-on
- Faulty parallel structure
- Inappropriate tone

AVOID PROOFREADING ERRORS AND TYPOGRAPHICAL ERRORS.

- Missing words
- Extra words
- Missing word endings
- Spell Check errors
- Failure to conform boilerplate to terms used in contract

AVOID PUNCTUATION ISSUES.

- Commas in the wrong place
- Semicolons used incorrectly
- Colons used incorrectly
- Periods missing
- Tabulations punctuated improperly

<u>GRADING RUBRIC</u>	Name: Grade:
<u>I. Issues Specific to this Contract</u> <ul style="list-style-type: none"> ✓ Accurately identifies the parties; chooses appropriate shorthand names ✓ Helps the Reader by defining any jargon specific to the industry ✓ Correctly defines the term of the Agreement, taking into account the possibility of early termination and extension ✓ Clearly describes the services ✓ Clearly describes the fee structure – who gets what? when? how? ✓ Covers all logistical matters ✓ Gives appropriate party artistic control ✓ Describes the promotional activities and the minimum spend on those activities ✓ Asks “What-If?” and answers the questions in the Endgame provisions ✓ Follows the money if event is cancelled ✓ Appropriately tailors boilerplate to the business issues ✓ Contains signature lines for the correct parties and identifies the individuals signing 	
<u>II. General</u> <ul style="list-style-type: none"> ✓ Accurately embodies negotiated terms ✓ Covers all relevant facts ✓ Uses headings to create clear roadmap ✓ Is well organized; easy to follow ✓ Contains all essential parts ✓ Makes all parts work well together; accurate cross-references ✓ Defines terms appropriately ✓ Allows defined terms to do their work ✓ Reads like good prose; clear, concise, smooth ✓ Tells the Reader about all of the rights and duties of the parties ✓ Translates the terms of the deal into appropriate contract concepts, using appropriate verbs ✓ Devises creative solutions to problems posed by the assignment ✓ Demonstrates thoughtful drafting; precise, unambiguous ✓ Is presented as a polished product (no grammatical, mechanical, typographical errors) 	

<u>III. Format</u> <ul style="list-style-type: none"> ✓ Follows Paperweight Purchase Agreement or Leaf Disposal Services Agreement ✓ Gives every article, section, and subsection an appropriate heading ✓ Uses Tahoma or other readable typeface ✓ Uses 12-point font size ✓ Numbers pages at bottom center (not including the first page) ✓ Does not put signature lines on a page without any text 	
<u>IV. Essential Parts</u> <ul style="list-style-type: none"> ✓ Title ✓ Preamble ✓ Recitals/Background ✓ Words of Agreement ✓ Definitions ✓ Action Sections (including SMPP) ✓ Other Substantive Provisions ✓ Endgame ✓ Boilerplate (General Provisions) ✓ Signature Lines 	
<u>Title</u> <ul style="list-style-type: none"> ✓ Appropriate for subject matter ✓ Not too general or too specific ✓ Not too long ✓ Initial caps of key words ✓ Centered; boldfaced 	
<u>Preamble</u> <ul style="list-style-type: none"> ✓ Nicknames for parties are same level of generality ✓ Nicknames are placed in appropriate place in sentence ✓ Full names of agreement and parties are correct ✓ State of incorporation or residence included ✓ If address included for one party, then address included for other party 	
<u>Recitals/Background</u> <ul style="list-style-type: none"> ✓ No covenants or other substantive provisions ✓ Puts Agreement in context; doesn't say too much 	

<p><u>Words of Agreement</u></p> <ul style="list-style-type: none"> ✓ No archaic language ✓ Short and sweet—"Accordingly, the parties agree as follows:" ✓ Appears at the end of the Recitals/Background section; not set apart in separate section 	
<p><u>Definitions</u></p> <ul style="list-style-type: none"> ✓ Includes appropriate prefatory language, referencing definitions contained in preamble and background section, if any ✓ Not circular; generally doesn't use the word itself to define the word ✓ No covenants; each definition is a declaration only ✓ More than just the dictionary definition of a word ✓ Makes sense; doesn't define word in way so different from ordinary meaning that Reader gets confused ✓ Terms that need to be defined are defined, especially if need to clarify that parties agree to a particular meaning ✓ Nice balance between definitions in Definitions section and cross-references to in-text definitions ✓ Eliminates need to repeat a long group of words each time ✓ Verb is "means" or "includes...but does not include..." 	
<p><u>Action Sections</u></p> <ul style="list-style-type: none"> ✓ Subject Matter Performance Provision contains main covenants and appropriate cross-references ✓ Term has start and end dates and mentions possible extension or early termination, if appropriate; also contains cross-references to appropriate sections ✓ Monetary Provisions (Who pays what to whom? When? How?) 	
<p><u>Other Substantive Provisions</u></p> <ul style="list-style-type: none"> ✓ Organized chronologically, or by subject matter in decreasing order of importance (could be a mixture of both), or is organized in some other logical way ✓ Uses correct verbs to indicate covenants, reps and warranties, conditions precedent, discretionary authority ✓ Appropriately translates terms of deal into contract concepts ✓ Demonstrates clear understanding of each contract concept 	
<p><u>Endgame</u></p> <ul style="list-style-type: none"> ✓ Section contains or references every endgame provision in 	

<p>Agreement – a snapshot of the Endgame</p> <ul style="list-style-type: none"> ✓ Spells out the if/thens – good consequences; bad consequences ✓ Automatic termination? ✓ Termination for Material Breach? Termination for Non-Material Breach? ✓ Notice? ✓ Right to cure? ✓ Spells out procedure for carrying out endgame ✓ Spells out what happens if contract terminates (follows the money) ✓ May include dispute resolution procedure 	
<p><u>Boilerplate</u></p> <ul style="list-style-type: none"> ✓ Shows good judgment about choices made ✓ Appropriately adapts standard boilerplate to terms of this deal ✓ Contains at least the following provisions (you decide the appropriate order – see textbook for guidance): <ul style="list-style-type: none"> ○ Merger/integration ○ Severability ○ Force majeure (if not handled in Termination Section) ○ Notice ○ Choice of Law ○ Assignment and Delegation ○ Amendment/Modification ○ Any other boilerplate you feel is necessary to protect your client 	
<p><u>Signature Lines</u></p> <ul style="list-style-type: none"> ✓ Uses correct full names of parties ✓ Formatted properly ✓ Contains prefatory language (“AGREED”) 	
<p><u>V. Plain English</u></p> <ul style="list-style-type: none"> ✓ Drafter writes in Plain English <p><u>AVOID LANGUAGE ISSUES.</u></p> <ul style="list-style-type: none"> • Archaic/elevated language • Legalese • Wordiness 	

<ul style="list-style-type: none"> • Choppy prose • Passive voice • Awkward phrases or sentences • Inconsistency • Vagueness • Ambiguity • Omission of articles (“a,” “an,” and “the”) • Wrong Verb tenses • Use of nominalizations instead of strong verbs • Double negatives • Dangling modifiers • Covenant language needed/not needed • Discretionary authority language needed/not needed • Condition precedent language needed/not needed • Dual verbs (pick one) • Dual adjectives (pick one) • Wrong preposition choice • Sentence fragments • Run-on • Faulty parallel structure • Inappropriate tone 	
<p><u>AVOID PROOFREADING ERRORS AND TYPOGRAPHICAL ERRORS.</u></p> <ul style="list-style-type: none"> • Missing words • Extra words • Missing word endings • Spell Check errors • Failure to conform boilerplate to terms used in contract 	
<p><u>AVOID PUNCTUATION ISSUES.</u></p> <ul style="list-style-type: none"> • Commas in the wrong place • Semicolons used incorrectly • Colons used incorrectly • Periods missing • Tabulations punctuated improperly 	