

TRANSACTIONAL DRAFTING: TEACHING TIPS

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So let me just do a quick introduction of myself and how I came to this world of contract drafting. I have been at Northwestern for 29 years. For 27 of those 29 years, I taught in and then directed the first year writing course. My first exposure to teaching Contract Drafting came from Sue Payne, who is now here at Emory as a Professor in the Practice of Law and the Executive Director of the Center for Transactional Law and Practice. As Director of Communication & Legal Reasoning at Northwestern, I had hired Sue in 2005 to teach an upper level elective course in Contract Drafting and to develop and teach a contract drafting module in the first year course. Over the years that module evolved to include the first year CLR faculty in teaching basic contract drafting concepts. So as a first year teacher, I learned a little bit about contract drafting as I began teaching core contract drafting concepts to my first year students.

However, my real exposure to contract drafting concepts and pedagogy started in the summer of 2012 when I was asked by the Curriculum Dean to teach contract drafting over the summer. And so at this point in November of 2012, I have a total of eight weeks of contract drafting teaching and three sets of graded full contracts worth of experience, plus a part of the semester this fall where I'm teaching the same course again. So I am what you would call a real beginner in the teaching of Contract Drafting. If you've taught for more than two semesters, you've done more than I have, and so I wanted to caution you, at the start, that much of my talk is geared at beginners.

Ted, my co-presenter, was gracious enough to point out that what I am saying may be useful to people who are reading the transcript of this talk in the *Tennessee Journal of Business Law* and seeking to learn about teaching the course from reading the proceedings of prior conferences. I know I found those articles incredibly helpful when I was trying to learn about the substance and techniques of teaching a Contract Drafting course.

When I first started teaching legal writing at Northwestern, I had questions that were very similar to those asked by our students, such as: how many cases do you need to describe before drawing analogies and distinctions; or do you state the holding of a case before or after stating the facts; or is it better to describe the parties in the cases by names or by their legal relationship to each other. Of course the answer to all these questions is, "it depends." However, over the years, I learned a great deal of what "it" depends on so that I

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could give students answers that took account of the fact that there wasn't one right answer but that there were indeed circumstances in which one approach or the other might be better.

I am now finding I have the same types of questions about teaching Contract Drafting, and though I know that over the years I will learn answers or learn when one approach is better than another. For this talk, I have tried to identify those same types of questions with respect to Contract Drafting. I hope that what I am learning about the answers will be as helpful to other new teachers as the information has been to me.

My course right now is based on what Sue Payne created at Northwestern, and I have to say that I'm so delighted for her success in being hired as the Transaction Center's Executive Director here at Emory. But I miss her as a colleague. She hasn't been able to forget me, however, because I imposed on her busy schedule with what seems like daily questions, which she has kindly answered. The course Sue designed at Northwestern relied on Tina Stark's *Drafting Contracts: How and Why Lawyers Do What They Do*. Sue wrote her own assignments for that course and those assignments were eventually incorporated into the Aspen publication, *Basic Contract Drafting: A Narrative Approach*. Each unit in Sue's book asks the students to represent a client on a series of transactions relating to the client's business. The assignments require students to draft contracts of increasing complexity. I mention both of these books because the illustrations in this talk come from either the precepts in Tina's book or the assignments in Sue's.

The issues I am going to talk about divide into three categories. The first category questions from students where the answer is in Tina's book but where the first time I taught the course and even a few instances the second time I taught it, I simply didn't remember. Tina's book is so packed with useful information that it's hard to remember every sentence in the book, and there are chapters where you need to remember every sentence in the book.

The first point deals with definitions. As those of you using the book know, there are two verbs to use when writing a definition. Either a drafter writes a definition using the verb "means" or you write one using the phrase "includes . . . but does not include." Tina emphasizes that a drafter should not write a definition using the verbs "means . . . and includes." Then, of course, a student asked in class if he could write a definition using the phrase "includes . . . but excludes." What's the answer? Tina's book is quite prescriptive, which is one of the reasons that it is great to use in a Contract Drafting course. But as first-time teacher, I am—and perhaps many of us are—fairly literal-minded, as are our students. Perhaps that's because I came to teaching having drafted nothing more than corporate meeting minutes and spent most of my career teaching analytical writing and not drafting. It takes some experience from several years of teaching the course or from having had a transactional practice to learn how narrowly to construe Tina's advice.

Here I decided that since the chapter on definitions does allow the verb “excludes” by itself a definition could be written with the verbs “includes . . . but excludes.” Figuring that out, however, took combing through the definitions chapter and was not something that I could answer on the spot in class.

Then I had another question. Can you use a defined term in a definition of another defined term? I didn’t know the answer to that until later, when in grading a paper I found I had to re-read parts of the book multiple times to answer questions I asked myself in grading. And I learned that both Sue Payne and Tina recommend that drafters, in Sue’s words, should “let your defined terms work for you.” Small scale organization it is okay, to use a defined term in the definition of another defined term. However, then a related question came up. If the defined term is used before the place in the Definitions Article where it is defined, do you have to then cross reference it in the earlier definition where the defined term, the later defined term is first used? I learned that the answer to that is “no,” because the reader in the Definitions Article knows that the entire Article includes definitions, and so she can look for the definition of the term used in the definition of another further down the alphabetical list. That’s on page 81 of Tina’s book. But the point slipped right by me in the summer, when I was first teaching, and I did not revisit that page until I was again re-reading the book for my course in the fall semester. So, again, it’s part of the process of teaching being an accretion of learning and then learning something more and learning something more.

Likewise, can you create a defined term? It’s not can you *use*. Can you create a defined term in the definition of another term? And that answer is no. I learned this point when I was using the golfer’s sequence in Sue’s book, where the students are describing the building of a golf putting green in a golfer’s backyard. The golfer wants the contractor to use specific types of artificial grass. By saying something like “Bent Grass” means ½ inch high Tiger Turf manufactured by VGSI which imitates very thin blades of grass which grow densely together.” Here the student was attempting to define “Tiger Turf” in the definition of Bent Grass, where Tiger Turf should have been its own defined term. Then the definition of Bent Grass could have been, “Bent Grass” means ½ inch high Tiger Turf.” This point is subtle and not something that a first-time teacher may know.

Here is another point that is in Tina’s book but is hard to remember as a first-time teacher. It is pretty easy to remember that “shall” is an obligation imposed on a party and that to determine whether “shall” is used correctly, a drafter should make sure that a party’s name precedes the word “shall” However, as Tina points out in Chapter 13, even if a party’s name precedes “shall,” there are three exceptions when using “shall” is not correct. The exceptions when “shall” need not be preceded by a party’s name are: 1) when “shall” is used with a form of the verb “to be;” 2) when “shall” is used with a form of the verb “to have;” and 3) when there are circumstances under which an event occurs. These are important concepts, but I completely forgot them when grading my first set of contracts. I come

across these concepts in one of my many re-reads of the book and so remembered to address these concepts when I graded my second contract. However, if you are teaching this course for the first time, I would remind you to review these exceptions in Chapter 13, because these misuses of “shall” are going to come up on beginning student contracts.

Another pointer about the use of “shall” that was easy to forget when grading my first contract is that when a drafter is trying to relieve a party of an obligation, the drafter should not write “shall not.” –The term “shall not” is really to address a prohibition. On the other hand, when a drafter doesn’t necessarily want to prohibit but wants merely to relieve a part of an obligation then instead of any use of shall the drafter should write “is not obligated to” or “is not required to.” I finally absorbed that point about mid-way through teaching the summer course. For new teachers, I hope pointing that out will help you to remember it from the beginning.

Another issue when the use of “shall” is incorrect is when you have a negative subject like “neither party.” With a negative subject, then you need to use the word “may,” as in “neither party may disparage the other party.” And I can tell you that is really important because a lot of my students read that part of the book and were then trying to do may instead of shall not. They were having a lot of trouble when they’re trying to create a situation where a party is not doing something. They wanted to restrict a party from doing something, and they were writing “may.” I realized that they had not picked up] from Tina’s book that “may” was used instead of “shall” only with a negative subject. That’s on page 127, and at least in the current edition -- I know there’s another one coming out. I know when you’re reading that first set of contracts, if you know that, you’re going to do a much better job, and then it’s a lot less difficult to be able to do it on the first time than to forget about it and all of the sudden realize that it’s relevant and come back to it later. Then you’ll have the students challenge you because “you didn’t mark this up my first contract.”

Likewise, students have an amazing amount of trouble with the word “must”, and they often want to want to use “must” instead of “shall“ to express an obligation. Tina makes it pretty clear that “must” should be reserved for expressing conditions. Although there are different ways a drafter can set up a condition, when the drafter uses the word “must,” the drafter should be intending to establish have a condition. The word “must” is not required to establish a condition. A drafter can use “if . . .then . . .” Alternatively, a drafter can use the word “must” by writing “it is a condition to such and such that the other party must have done this” or “all of the following conditions must have been satisfied or waived. A beginning teacher, though, should remember that “must” goes with conditions and should be on the alert for improper use of “must” if the student is trying to draft a covenant.

I also learned some important things to remember about drafting reps and warranties. As you all probably know, a representation a statement made as of a point in

time intended to induce reliance and a warranty is a promise that the statement is true. Because a representation is made as of a point in time, it can refer to the present or the past. A party cannot make a representation about the future, because, obviously, at this moment the party does not know what will happen in the future. So I can't represent and warrant that I will go to business school next year, but I can represent and warrant that I'm a graduate of the University of Michigan School of Law.

Another point to remember about representations and warranties is that normally a drafter uses the present tense when drafting representations and warranties. Thus the drafter writes that somebody represents and warrants that a certain fact exists and that statement is in the present tense and active voice. But as you may know, and I certainly do from having taught persuasive writing, every so often where the issue is not so much about the actor but instead is about the action, then the passive voice is appropriate. For example, in the sentence, "the solution was heated to just before the boiling point," the passive voice may be appropriate to focus attention on the heating. Even if we knew who did the heating, the identity of the person may not be nearly as important as the fact that the solution was heated.

Similarly sometimes in drafting a representation and warranty, the important point may be the action or the object and not the actor. I think Tina uses an example about a representation and warranty about how many miles a used car has been driven. If a drafter used the active voice, such as "The Seller represents and warrants that he has driven the car 30,000 miles," that active voice may not give the buyer all the relevant information. The Buyer is likely concerned about the total mileage on the car and not just what the Seller has done. Thus, for the Buyer the relevant representation and warranty would be written in the passive voice as, "The Seller represents and warrants that the car has been driven 90,000 miles."

Finally another point about representations and warranties that is difficult to remember but that a new teacher might need to know to respond to student questions is whether representations and warranties always have to be used together. The first time I taught the course I didn't realize that sometimes a party can't do a representation because the fact that needs to be stated is false. The party might decide that that's okay and that she is willing to allow the false fact. Put a different way that means that the party is willing to allow itself to be sued for damages because the party would rather have the contract but accept the risk. And those of you who do a lot of risk allocation, know that. But for a new teacher who has not come from transactional practice, it is quite possible that a student will ask either why representations and warranties go together or whether they always have to go together. After my first time teaching the course and after talking to people and re-reading Tina's book I learned that a drafter can write a contract with a warranty but without a representation if a relevant fact is actually false. Thus the party may not want to be sued for reliance damages but may be willing to accept warranty liability if the situation isn't as it has

been stated to be. Some people might write the representation and warranty and cover the possibility of a false statement by indemnification provisions. I'm not enough of an expert now to tell you the difference between using a warranty only or using indemnification. Maybe that'll be my next presentation, but at least I wanted to point out that you don't always have to have a representation and warranty together. Again, very basic for those of you, who are good at this, but a learning experience for me and perhaps for other first-time teachers.

That covers important sections of Tina's book that are hard for a first-time teacher to remember. I hope that even though I have reviewed Tina's book the information here will help first time teachers create a checklist of important information in her book that is easy to forget or to gloss over when first teaching a Contract Drafting course.

There is a second category of tips that relate to matters that either were not in Tina's book or that were in the book but that I didn't understand even after reading it. This was my biggest problem over the summer. For example, one student asked me what's the difference in the Preamble between writing "This contract dated March 3, 2012" and "This contract dated *as of* March 3, 2012." I was completely stymied by this question. I read everything I could, and discovered that Ken Adams has a different approach than Tina. Sue Payne wasn't quite sure, though she was in the middle of moving when I asked her. And over the summer, I didn't have Tina's email, which I got later, but when I wrote Tina, she said is the answer required a phone conversation and she walked me through it over the phone.

For those of you who have problems with the difference between the Preamble saying that a contract is dated this day and saying that it is dated *as of* this day, the difference is that "*as of*" is always looking backwards. The example Tina gave me is that you've got a situation where you've got a key employee, maybe a CEO, who quits, and you've got to get someone else into place right away to do the work that the employee who quit was doing. You may quickly promote someone to replace the person who left before you are able to nail down the provisions of the employment contract until several months later. Well, that contract, when it finally gets written, has to look backwards because the person has already been in the job for several months and certainly is going to get paid for the period after she started to work and before the contract is signed. In that situation, or something similar when you are writing the contract after a task or obligation has already been performed, you write the date in the Preamble using the language "*as of*" the date performance began to insure that all the performance before the contract was actually signed is recognized as part of the contract. Tina's explanation was incredibly helpful to me, and I hope it is to you as well.

The issue of how to use dates in a contract is not limited to the way the date is referenced in the preamble. Often, and this situation is fairly common, a contract may be

drafted and signed before the work is to begin. Building contracts are a good example of that because the contractor has to get the permits before construction can begin but can't start to get the permits until the contract is signed. Or perhaps, construction cannot begin until the weather is right, an issue that came up in the golf contract, where the students were instructed that the parties would sign the contract in February, but the work could not actually begin until March or April, when the ground was soft enough to dig into. The remedy here was to write the contract with an effective date, which means that even though the contract is signed first, the contractor was under no obligation to start construction until the weather conditions were right.

Another issue that confused me was dates and signature lines, and I'm still not sure I've got this right. A student asked me if whether he wrote the date at the beginning in the preamble meant he also had to date it at the end of the signature lines. Now, what happens where the contract is dated on one day, maybe the closing date, and maybe the contract is effective then, but the parties don't sign it right away? If they sign it later and add the date of signing then the contract has different dates in the Preamble and on the signature page.

I think what I have learned from that is that if the contract has an effective date, then the effective date is going to control over the date on the signature page, so it is better not to include a date on the signature page to avoid confusion. On the other hand, if the contract is being signed in counterparts, then dates on the signature page are helpful, especially if you've got a provision saying that the effective date is when the last party signs the agreement, because dating the signatures actually clarifies the definition of effective date. Again, maybe I got this wrong, but this is what I think I figured out, and it seems to be helpful to me in answering questions from students.

I also came across a situation that I put out to the listserv, because I was embarrassed about asking Tina and Sue yet another question. But this one generated a lot of interest on the legal writing listserv. I knew that people write in contracts, as a definition for agreement, that "'Agreement' means this agreement, as it may be amended from time to time." But I was totally floored when a student drafted a definition for services and said "'Services' has the meaning assigned in Section 4 as changed from time to time." I was confused. I didn't know if that definition was right or wrong or if it was legalese. Not only did it make no sense to me, but I also got as many responses to my query going one way as the other way, so I think it may be as confusing to others. Some say they see it all the time. Some think it's legalese. Some had never seen that before in a contract.

Tina finally gave me an answer that reconciles the various responses. She said because, in effect, parties can make changes to the contract all the time, even oral changes, if the definition of Services changes, the parties have allowed for that change. So she thought that this was not a problem, in the way that some people thought it was a problem.

Here was a problem I had this fall. I have an Asian student. As those of you who teach foreign lawyers know sometimes students from other countries particularly those in Asia, don't use articles, definite or indefinite, the way we do. So this student was diligently following –instructions in Tina's book, and she created a defined term of access, and she put a "the" in front of it. Well those of us, who are native English speakers, know that we don't write "the access." So we would write a covenant to permit someone access to a location as "Name of Party shall grant access to someone"; we would not write "Name of Party shall grant the access to someone."

So I got in touch with Tina about that, and she actually didn't know the answer and found a foreign student, who also happened to be Korean, like mine, and asked him how to explain why the word "the" is not used in front of access to non-native English speaking student. As a native speaker this isn't right, but what's the reason for that. And the student said what he had figured out was whether the word "my" could be put in front of it. So you don't say my access.

Then I got lucky in a meeting, with some people in our Legal English program, both of whom have degrees in linguistics. Some nouns are called "count" nouns. A count noun can be used with a number in front of it, like one chair or two pencils. In contrast there are also "uncount" nouns. These are nouns that cannot be used with a number in front of them, such as "information" or, in my case, "access." The linguistics rule is that typically a writer uses articles with "count" nouns and does not use articles with "uncount" nouns. It is actually a bit more complicated because articles are not used with "uncount" nouns if the writer means the thing in general, but can be used with "uncount" nouns if the thing is used to refer to something specific, but the nuances are beyond the scope of the issue I encountered.

Okay, here's the other one -- yes?

Audience: because I think it also depends on if there is like a particular access that you're contemplating. [inaudible].

J. Rosenbaum: Right. That's the nuance regarding "uncount" nouns.

Audience: It's a simple particular access that you're talking about, then the access would make sense.

J. Rosenbaum: Right.

Audience: It's context. It's all about -- you can't answer the question from what you've got there. It's context and how you're using access that is relevant

Right, right, and I understand that. Unfortunately, in the context in which that student was using it, the student was correcting errors in some examples I had provided, and

the problem was that the definition was circular. But instead of catching the real problem of the circular definition, what the student caught was that there wasn't a "the" in front of the noun and since I know the student was not a native speaker, I was trying to figure out how, after we tell non-native speakers to use articles in front of nouns, I could rationally explain why with this particular noun in the context in which it was used, the article would not be correct.

But again, I think this is a helpful conversation because in teaching sometimes absolute rules don't work. So it is better if we don't tell our students to use articles in front of nouns, but rather that we explain when articles are used in front of nouns and when it might be proper not to use an article.

Back to the talk, another issue that came up when I was grading papers is that headings are not actionable. Headings are crucial for organization and road-mapping purposes but they are a substantive part of the contract. So in drafting, the operative terms must be placed in the actual contract language and not in the headings. Unlike definitions where it is a good idea to use them once you have defined terms and not to rewrite the definition of the term later in the contract when the term itself is all that is needed, the substantive term should be in the contract and not in the heading. This issue came up in one of the golfer sequence contracts. A professional was supposed to come to the golfer's home to teach her on the putting green that the golfer had had installed in the prior contract. The language the student wrote in the contract was "Every Friday the Professional shall assist the Golfer at her home. The Golfer and the Professional were both females, so the drafting had created an ambiguity about whether the instruction was at the Golfer's home or the Professional's home. The student had included "Instruction at Golfer's Home" in the heading so the student thought that the drafting was clear. However, because the heading cannot be used substantively, the operative language in the provision should have made clear that the instruction was to take place at the Golfer's home, or on the Golfer's Putting Green." –If there were an issue, which granted, was unlikely with this provision, a party would not sue on the heading; a party would need to sue on the substance.

Okay, a couple of more, and then I'm done. One is principal place of business. Sue in her book, and in her model agreement uses principal place of business in addition to the name of a jurisdiction in which a business is incorporated or does business. So when a corporation is a party a drafter would write the contract to say:

Putting Green Purchase Agreement (the "Agreement") made this 1st day of February 2012, between The Village Green Society, Inc., a Delaware corporation with its principal place of business located at 4323 West 182nd Street, Bolingbrook, Illinois 29480 ("VGSI"), and Betsy Bennett, an individual who resides at 2005 Eagle Lane, Longbourn, Illinois 65432 ("Bennett").

This approach made perfect sense to me until my students, using both Sue's book and Tina's book pointed out to me that Tina doesn't have a include language about a principal place of business. Since I use both books, I didn't want to have to say that one author was right and the other wrong, so I sought to reconcile the different approaches. When I contacted Tina, she said she would prefer to keep the Preamble short. Thus, she leaves the principal place of business out of the Preamble and if the principal place of business was relevant, then it could be mentioned in a representation and warranty. A party would represent and warrant that its principal place of business is at a certain address.

Finally, over the summer when I was less familiar with the nuances between the two books, one student asked why Sue puts her signature lines horizontally and Tina puts them vertically. I really didn't know why they used different approaches and I didn't see a difference between the two. I told my students they could follow one or the other, but, again, students look at these things and they want reasons for the differences, and I'm a big proponent of being able to answer student's questions. I also would not want to see people not using Sue's book because there's slight discrepancies between Tina's book because Sue's assignments and exercises are so good. And they allow for a school to do what I think -- at least I heard from my students this summer -- they really want, which is that they'd like to have a basic course and then an advanced course.

Audience: But you're acting like these things are the freaking Bible. I mean they're books. They're people's opinions.

J. Rosenbaum: Okay. Well that's what I thought some people were going to say about my presentation --

Audience: There're two ways of doing things, but there're a billion other ways to do it.

J. Rosenbaum: Well okay, but I'm a teacher, who's beginning this. I haven't practiced in this area, and I've been teaching for 28 years, and I don't know. And I knew that some people were going to --have issues with the fact that my presentation was aimed at new teachers and not so much at people who have taught a while and resolved these issues or people who have had an extensive transactional practice and intuitively knew what was important and what was not. In fact, I was joking to people before the presentation that we're going to be going from the ridiculous to the sublime.

But to be honest with you, I don't know that everybody who's got that experience doesn't have the same attitude that you have, but when you're talking about a brand new teacher, you know these are the things that a new teacher wants to know and that I, as a new teacher want to know as well. A new teacher, like me still needs to

learn how literally to take the drafting philosophies in both books. After all, many lawyers would write a covenant with the word “must,” but that would really be contrary to one of the main points in Tina’s book. I do think many, perhaps most new teachers at first want to know things like how much do I have to follow prescriptions in the book and how much can I disregard them, and what am I doing to my students, if I don’t know these answers? So I realize that you -- I saw you in another presentation and know you’ve been doing this for years-- you understand what aspects of teaching from Tina’s book can be considered treated flexibly and what should be followed “like the Bible,” but this past summer was my first time teaching the course, and I was getting questions from students, where I didn’t have answers. And to me, it was important that I bring myself up to speed, as quickly as possible, and that’s the audience that this presentation of mine was aimed at. Ted’s you will find is a little bit different and a little more sophisticated. But mine really is, as I said at the beginning, aimed at a new teacher, who doesn’t really know the nuances and who’s starting out, and who gets these questions from students and wants to give the students principled answers.

Audience: But it’s a legitimate answer to say it’s stylistic because a lot of what you’re talking about is stylistic. And it’s not an unreasonable answer, as a teacher, to say these are just stylistic choices that lawyers make.

J. Rosenbaum: Well and I’m okay with that, when I understand that. Like with the signature lines.

Audience: Yeah, that’s a great example.

J. Rosenbaum: But I’m not okay with that if I know that there’s some reason somebody wrote this in the book and I want to at least understand why they wrote that, like the --“as of” language in the Preamble.

Audience: I can give one answer to that. In different states, your attestations are different. So in Georgia, we do the attestation next to the signature. In many states, they do it at the end of the signature. So, in Georgia, you’ll primarily see Tina’s version. Tina happened to have taught here.

J. Rosenbaum: Right.

Audience: You’ll primarily see Tina’s version because you’ll generally see a witness and an attestation or a notary seal to the left of it because

that's how it's done in this state. In other states, you'll often see it the other way because you'll generally then see jurates after the signature.

And Sue practiced in Illinois and maybe that's how it's done in Illinois, but again, the question is do you have to be a practitioner to be able to teach this. And maybe you do. I mean maybe that's the reason for having adjuncts, but I was in a situation where I've been a teacher for many years, but when I was in practice my assignment was to write corporate meeting minutes for closely held corporations, which I'm convinced you don't even have to be a lawyer to do, and which is one reason I got out of practice. So with that, I'm going to turn it over to Ted, who will now edify you on something far more significant than my presentation was about. However, as this talk will also be transcribed for print in the *Tennessee Journal of Business Law*, for readers who will read the journal version of this talk, I hope you find this helpful.