

## TEACHING DEAL SKILLS IN CONTRACTS AND CONTRACT DRAFTING COURSES

Melinda Marbes<sup>1</sup>

*Lost in Translation: Using Standard  
Contract Representations to Teach  
Business Law and Lawyering Skills*

Tina Stark<sup>2\*</sup>

*Critical Transactional Skills Law  
Schools Should Teach 1Ls*

**Tina Stark**

Hello, everybody. My name is Tina Stark. It's so nice to see so many familiar faces. It is my great pleasure to work with Melinda Marbes. She was actually the first person the Center hired to teach Contract Drafting.

Even though Melinda teaches upper-level courses and I teach Contracts, we decided that her presentation would lead into mine.

*Lost in Translation: Using Standard Contract Representations to  
Teach Business Law and Lawyering Skills*

**Melinda A. Marbes**

Thank you, Tina, for the warm welcome. Thanks to everyone for coming. I appreciate your indulgence here as I serve as Tina's warmup act.

As Tina said, I will focus on Contract Drafting and how I use that vehicle to teach business law and lawyering skills. This gap in student knowledge is a challenge for their mastery of Contract Drafting. It is an important problem, but one with a narrow focus. Tina's presentation is much broader as she will discuss teaching lawyering skills across the entire curriculum—starting in the 1L Contracts class.

The connection between my presentation and Tina's is that Tina will show you how to solve part of the problems identified in my presentation—students' lack of familiarity with foundational business concepts—before the students even enroll in Contract Drafting. Tina will demonstrate how to teach some of those skills in the 1L Contracts class. I wish those skills were also taught in business law courses because I do not have time to teach them all in my Contract Drafting class.

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\* Editor's Note: Prof. Stark's presentation will be published in a subsequent edition of *Transactions: The Tennessee Journal of Business Law*.

Drafting a contract and putting any deal together is like putting together pieces of a puzzle. Those pieces for Contract Drafting are legal knowledge, business knowledge, lawyering skills, and the bridge that connects them—the skill of translating the business deal. When I do jigsaw puzzles, there are always a few pieces that are a challenge, even though I know what the puzzle looks like at the end. I have the cheat sheet, (i.e. the picture on the jigsaw puzzle box). Similarly, the client and the lawyer know what they want the end product to be or how they want it to function. But, all the pieces must be in the right place to make it happen.

Our students were taught in first-year Contracts class that a contract is a covenant or bargain to perform obligations. They may understand the flip side of those covenants, which are rights. Also, they may have learned in the first-year Contracts class about remedies. You may feel lucky if they vaguely remember that knowledge when they enter into your Contract Drafting class.

Another piece of the puzzle is to understand the form of business entities that may be parties to the contract. In my contract drafting class, I usually use Tina's book and start with the car purchase agreement. But, this year, we had the lottery that hit \$450 million on the day of the first class. I live in Florida where we have lottery fever. So, I had my students think about a situation where we all pooled our money together and bought the winning lottery ticket. They got really excited, and we didn't have to worry about any entities for our first assignment. We were all natural persons. They didn't necessarily understand how an artificial legal person affected the Contract Drafting. That was a piece of the puzzle still unclear to them in that first assignment. When that piece—understanding the various forms of business entities and how their presence can affect the Contract Drafting—is missing, the students get lost in the translation.

One of the most important business lawyering skills is “translating the business deal,” which Tina described in her article *Thinking Like a Deal Lawyer*. She made an analogy that the deal facts and the deal terms are like the litigator's facts. Then you are able to translate those into contract concepts and organize the contract correctly. That skill—translating the business deal—makes everything else with the contract flow.

So, I will break down how we can help students translate the business deal when there still are those missing puzzle pieces for the students. I will focus on some missing pieces and Tina will talk about more missing pieces. Specifically, I will focus on some standard contract provisions: the enforceability representations and warranties. Those are highly technical provisions, but if students do not understand those terms, they will encounter real problems when they practice law.

The enforceability representations and warranties included in nearly every contract include: (i) organization and good standing, (ii) power and authority, (iii) necessary action, (iv) government and other consents, and (v) enforceability of the contract.

Since I started teaching in 2007, I found that when I presented standard representations and warranties on enforceability, the students easily became overwhelmed. So I needed to figure out how to better teach this drafting skill—I needed a framework for skills teaching.

One way to teach a skill is to first demonstrate the skill. I will talk about skill teaching framing in a moment, but here is a sample of a standard representation and warranty from Tina's aircraft purchase agreement that often overwhelms students.

**[Tina Stark:** Which was intentionally poorly drafted.]

Right. I'm not using this as a sample to criticize the author! It is designed to not be perfect, giving students a starting point—thus starting with a level of demonstration. We ask the students to do these exercises: (i) make sure the agreement applies; (ii) make the agreement deal-specific; and (iii) make the agreement understandable to you and your client.

I probably taught my Contract Drafting class about seven times before it dawned on me that they were overwhelmed. I thought I asked the students to do some simple tasks, but it turned out it was not simple for them. I thought it obvious and that the students would be able to do this, but they were overwhelmed. They did not even know the starting point because they did not know what this provision means or why it was in the contract. In fact, the students treated them as the boilerplate, but they are not boilerplate because they have real effects. These standard representations and warranties became boilerplate to us who have practiced for a long time, but not for new students. So how do I break this down so that I can help students understand why this seemingly incomprehensible language is in the contract to begin with and how they need to break it down to make it work in their particular contract?

In our puzzle analogy, there are a couple of pieces missing. The first is business knowledge. This is less important for this particular set of representations but it is important in other representations. They did not understand the business that the client was engaged in. I was not able to teach in my Contract Drafting class the lessons I have learned in my past 20 years of practice in corporate financial restructurings, but I was able to introduce some concepts depending on the type of contract assignment with different types of issues. But, let us go back to the aircraft purchase agreement example in Tina's book. When I was in practice, I actually did aircraft financing. Another Emory alumnus teaches aviation law at my school. Last semester I had someone in the aviation law class and he taught me some knowledge about aircraft purchases which was great!

I was not able to bridge that gap of relevant industry knowledge in my Contract Drafting class, but I absolutely addressed what was a lacuna in students' legal knowledge: the concept of the separate legal person. This concept was introduced in Business Associations class, but the students did not

make the connection to what it means for Contract Drafting because we taught them about juridical persons using appellate cases but not in a business or a deal contract.

The students also probably did not know how an entity is formed. In my Business Associations class, I showed them through exercises. Sometimes I even had them form their own business entities. I told them not to pay the Secretary of State, but go all the way through the rest of the process. They certainly had never seen the organizational documents, but these documents are critical to the standard representations and warranties.

The students had little appreciation for the idea that we had a legal person that was different from a natural person and what impact that had on the contract provisions. They did not appreciate the function of the enforceability representations and warranties. So the students were lost in translation when I gave them that starting point, (i.e., the complicated representations and warranties that I wanted them to remake). They often tabulated them or took some legalese out because I had them redline all of the documents off the template, and then they turned it in. Knowing that they had some holes in their understanding, I had to go over this concept of the legal person and how the entity was formed and included in the documents. I started to realize that initially I had asked them to go too far up the staircase of learning all in one step.

This slide shows one representation of Bloom's Taxonomy and Cognitive Learning Taxonomy. It represents the stages of cognitive learning from foundational to advanced and uses action words and exercises for each stage of learning.<sup>3</sup>

The ABA requires us to articulate the learning outcomes in our syllabus, stating here is what students should be able to do when they finish the course. If you adopt Tina's book, she gives you the top-level course goals in her syllabus. One of them is to translate the business deal. What you have to do is to break that down even further for your course and each lesson. This staircase for the levels of learning in Bloom's Taxonomy is a good guide for that task.

If I ask the students to redraft that standard language and make it deal-specific, they must understand whether the language works in the deal, and then take the legalese out and use plain English to reformat. I cannot guide them through all the way to synthesis on this staircase if they do not have the knowledge to comprehend and they have not yet applied that knowledge. So I need to fill in the steps between handing them the language and expecting them to complete the task. That was what I did when I first taught the class here in 2007—asked them to jump several steps at once. It did not work out great that first time, but after realizing the gap in student knowledge it got better over time.

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<sup>3</sup> See *infra* Figure 1.

First, I identified the holes as we did today, and then figured out some processes and exercises to teach students how to fill those gaps. I needed a frame of reference and went back to basics. I revisited with students what the purpose of representations and warranties were in the contract. In Tina's book there is a great chart that tells you what all the contract concepts and the contract parts are and their function. They are also described in the chapters. So we talked about these ideas and their language in the context. Furthermore, we talked about the functions of these representations and warranties, and how they related back to remedies for enforceability of representations and warranties.

I used the five part framework from Tina's book to help the students understand the enforceability risk because it was an important missing piece of this puzzle. I taught them that an agreement might not be enforceable against a business entity unless these representations were in place. These representations were a disclosure that ensured the deal happened. The first thing was that the entity validly existed as an artificial legal person. We took it for granted in the first exercise, but I cautioned the students about it because they did not understand the standard representations and warranties. They also had to understand how the entity took action, the source of the power and authority to take action, and how the action was taken.

To teach these concepts, I came up with a framework that helped them internalize the lesson and connect it to the language in the contract. There are numerous ways to do that. For example, Karl Mackie divided the method of skills training into four phases.<sup>4</sup> The first phase is theory. The second is demonstration. The third is practice. The fourth is assessment. I used this skills training framework for this assignment. What did I do in each of these phases so that the students would have the grounding to draft? I used different techniques appropriate for each step.

The first step is theory for which I used lectures or readings on entity formation and governance. I used excerpts from my favorite resources. The students liked searching public records of companies online. If I taught this course at Emory, I would give the students an exercise with a link to the Georgia Secretary of State to explore. To deal with Emory Law School as a party, the students needed to find out: (i) is it a separate entity? (ii) is it part of Emory University? (iii) what kind of entity is it? (iv) is it validly existing? (v) is it properly formed? (vi) is its registration up to date? All of these could be found for free online. Before we came in the class, they had already found the answers to those questions.

I found that everything was okay at Emory. The registration was up to date. Unsurprisingly, Emory was a nonprofit organization which was founded

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<sup>4</sup> Karl Mackie, *LAWYERS' SKILLS: EDUCATIONAL SKILLS*, Ch. 2, at 8 (Neild Gold, Karl Mackie & William Twining eds., 1989).

in 1915. The length of the restated articles was thirty-four pages. One task for the students was to find out the business purpose of this entity that might constrain this socially responsible organization. They reviewed the online public records and looked at the organizational document.

You can pick any company. I am teaching in Orlando, so I often pick Disney. That's a lot of fun. When the students know how many Disney entities there are, they understand more about the work behind these standard representations and warranties.

Now, let us discuss readings on standard representations and warranties. I have used different sources over the years. Now I am using Charles Fox's book, an ABA published book, *What They Didn't Teach You in Law School*. That is a good book because it explains these concepts in accessible language, and it connects the enforceability representations and warranties to the organizational documents or the type of evidence you need in a due diligence search. When I was practicing, I had the document on a closing table. It is not done that way anymore, but it still matters to know how to find the information.

What I ask the students to do is like that in this presentation. To give you something that you can put it into practice in your own classroom, let us go back to that framework. I had given them the theory, and then I led the students to the next step, demonstration. We also had to practice and then assess. These steps are where the chart that has been passed out came in handy.

In the packet<sup>5</sup> there is one simple handout chart. I love charts. I'm a very visual person. This is not a completed chart, but it will give you a starting point to teach your students. We can do this exercise in different ways. If you took the first step already outlined, then you have introduced the theory. You already have the background law, either through supplemental reading or an online video or a mini lecture. I taught this class for two credit hours, so there were no mini lectures. I did not have time, so it had to be done outside of class. When you assign an acquisition agreement or credit agreement, you need some background law. You may surprisingly find out how quickly the students forget *caveat emptor* and how it impacts representations and warranties in an acquisition agreement or they are a bit fuzzy about fraud. I had some students who labeled anything they didn't like as fraud. That is not exactly what fraud is. Sometimes we have to remind them, and then they get it. That is a standard method that passively gives people information.

To use the second step in skills training, which is to demonstrate these concepts, I resort to searching the corporate records and reviewing the organization documents. That organizational document is a sample—a form of demonstration.

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<sup>5</sup> See *infra* Figure 2.

I also demonstrate how to help translate the business deal relevant to these representations and warranties by showing the students in class how I completed the first row of the chart. The chart covers information critical to understanding these provisions: (1) proposed text of the provision; (2) description of the information the party making the representation and warranty will have to disclose; (3) the business and legal risks the representation and warranty attempts to address and shift between the parties; (4) the documentation and other due diligence needed to confirm the accuracy of the representations and warranties; and (5) comments and other hints about where to find that information or how this provision functions in the deal.<sup>6</sup>

Next, I ask the students to bring all these pieces together in the third step: practice. I asked them to fill-in the remaining blanks of the chart using the same steps that I had demonstrated. So, when they looked at the standard of representation, they realized it was not just the language that had to be reviewed. The students had to understand what the language meant, why it was there, what risk it addressed, and know whether the representation was true or not.

So I prepared this chart and did it in different ways but ultimately decided upon demonstrating how to complete part of the chart and let the students do the rest. In other words, I told students “Here I have given you all the sample texts, and let us fill in the first row and you complete the rest.” What is the purpose of the organizational representation? What does the representation disclose? In our Emory example, we need to know whether it is an entity, what type of entity it is, and whether it is in good standing. What are the risks if it’s not? Probably we are not able to enforce this contract at least at law. We might need some other complicated theories when dealing with an organizational setup like Emory’s. We searched records to find out what due diligence is and what documents we needed. For example, the Secretary of State’s certificate of incorporation or restated articles in the case of Emory. In the comments column, I gave them the links to the relevant Secretary of State webpages. The students loved it when they used their computer to get information from where a lawyer actually gets the information.

Then this is the partial chart. So obviously now that is how I demonstrated this lawyering skill. I might even do this in class with them to fill in this first line before taking the next step. In the class, the students had Fox’s book or Tina’s book, and they had samples on the Secretary of State website. Then they had to fill in the rest of the chart with these standards of representations and warranties. This practice required them to know the legal background and relate it back to their drafting. They needed to complete the issue chart. When I draft the representations, I may do it with or without precedents. In Tina’s exercise, she gives precedents for every one of these—enforceability of representations that are intentionally not for the end product.

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<sup>6</sup> *Id.*

You can do it without precedents or allow the students to find the precedents. The Fox book is a good example to teach students where to find precedents. One of my colleagues, Browning Jeffries, taught me to turn to Practical Law on Westlaw. The students liked this because there were many acquisition agreements, including both short forms and long forms. They were also annotated. I did not like some drafting language, and told students that they were not the best drafts. Or they were not drafted in my style, but the students might decide whether they were effective for them.

Next is actual drafting—this is how students' learning will be assessed once their drafts are graded. But, you also can grade or at least review the chart answers before letting them loose on drafting the actual language. We have understood the background law, and completed our chart by putting the pieces together. So the students are ready to draft or redraft the language.

Once the language was drafted or redrafted, the students also needed to know whether they got it right, which is the last piece of skills training—assessment. If they got it wrong or did not understand what the risks are, they missed a piece. I assessed both their knowledge of law and drafting skills. In most classes we review the completed chart together. I might have students swap their charts, but sometimes that was a novice leading a novice and not entirely helpful. I always gave a professor's sample, and had them compare their answers first, and then with the reference chart to begin their drafting.

Often my sample was not perfect. I always had a student who thought of something that I did not. Then we did the same thing when we did the actual drafting. I found that this concept was not just with the enforceability of representations. It was with almost all parts of the contract. In fact, Tina has the chart where you are doing the end game provisions. I found that if I asked students to break this down before drafting, I got better contracts, and their grades were not so bad, which makes us all happy. It only took two bottles of wine, because the pieces had fallen in place in every single step. They finished the legal research for the theory. They had seen the work demonstrated. They had practiced filling in the chart and drafting themselves and gotten the feedback. This approach used all four steps of skills teaching laid out by Karl Mackie.

At the end, the students understood what the enforceability representations and warranties were in a way that my simple explanation never could. That lecture was never internalized. Also, doing it this way, students reinforced what they learned in business organizations. If I were in a class like Business Planning, I would have guided them from the beginning to the end of how to create an entity and created an exit strategy with investors in that entity because they already had the grounding. They could see how the entity choice that they made upfront played a role in numerous ways.

This lesson or exercise was a small but important piece of the Contract Drafting puzzle. You could not do this for every single piece of your drafted contract as it would take too long, but you could model this for the students



and ask them to use the chart on their own and figure out the methods that work for other contract parts. I had some students who liked mind mapping and that worked well for them. Let's go back to the Bloom's Taxonomy staircase for a minute.<sup>7</sup> What we had done was that we set a solid foundation of knowledge that facilitated comprehension and application through the practice. The students were able to analyze it and then put it back together in the drafting—taking steps up the staircase of Bloom's Taxonomy.

Now, I will not have to work that hard in Contract Drafting class if other faculty do what Tina suggests in your 1L Contracts course.

Questions? Concerns?

**Audience:** How many class sessions does it take you from step one to the final product?

**M. Marbes:** That is a great question. How many class sessions does it take me from step one to the final product? I introduce these at different times. When I first introduce representations and warranties, I use the enforceability of representations and warranties as my example, and then ask them to do research. Later, when we begin drafting in the semester, I already have some pieces. So I cannot exactly answer your question. It may take a whole class period, in 15 or 20 minute increments, but I may feel a little more spacious if I had three credit hours. I also use the TWEN platform, which is not very robust, but it is a starting point. It is easier if you have Canvas or Blackboard or other teaching online tools. They can complete the chart outside and I just review it in class. I spend almost entirely two hours on reviewing the work that they have been given. If you are asking how I fit this into the class, one thing is starting from Tina's basic syllabus and taking out some exercises in her book and put this in instead. That is where I found the time.

**Audience:** You have much more experience than I do. My limited experience tells me that in representations and warranties the enforceability is complicated. As you know, in representations and warranties, the seller says the car is red. In the midway before closing, the seller paints the car another color. The students understand the seller is a liar and a cheater who is responsible. But when the representation and warranty is there, and there is no material litigation pending, before closing material litigation is filed, they regard that as different because they do not understand the allocation of risks. That is different, and that is a simple thing without bringing in

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<sup>7</sup> See *infra* Table 1.

enforceability, but we have to look at it whether it is made in good standing. That greatly complicates it.

**M. Marbes:** That's a great point. This is complex for a Contract Drafting class from the starting point, particularly compared to something that is more within their ken. So you are absolutely right. I do not expect the students to master all of the knowledge. They are still apprentices. What I have found is when I did not address it at all, I spent so much time in class answering questions about the standards of representations and warranties. They were bothered by the standards, so at least we gave them a framework.

The other reason why I do this is because a lot of Business Organizations teachers do not expose the students to the organizational documents. If that does not happen there and that does not happen in Contract Drafting class, there are very few students who will take a business planning course that has that. Also, very few schools have a program as robust as Emory's or a similar model. At my school, Contract Drafting is just about it as far as business lawyering skills courses go. So you are right. They are not able to fully appreciate this. It is an absolutely good point.

**Audience:** Have you tried to use that chart approach? One thing I found is that the students struggled with drafting in response to a statute. It is almost like you ask elementary school kids to read stage directions.

**M. Marbes:** Right. So the question is: Have I used the chart in a statutory exercise?

**Audience:** Yeah, for that need, it is important to understand what it means and what it asks for you to do. Have you bridged that gap?

**M. Marbes:** I have not used a chart in that type of exercise. But I do know that it would help. I don't know if they are going to address it here, but I know of a presentation that might—the presentation that probably would address this is given by Lyn Entrikin and Richard Neumann who taught Contract Drafting and statutory at the same time. They might be the ones to whom you should direct your question.

Thank you for your attention and the questions.

Figure 1

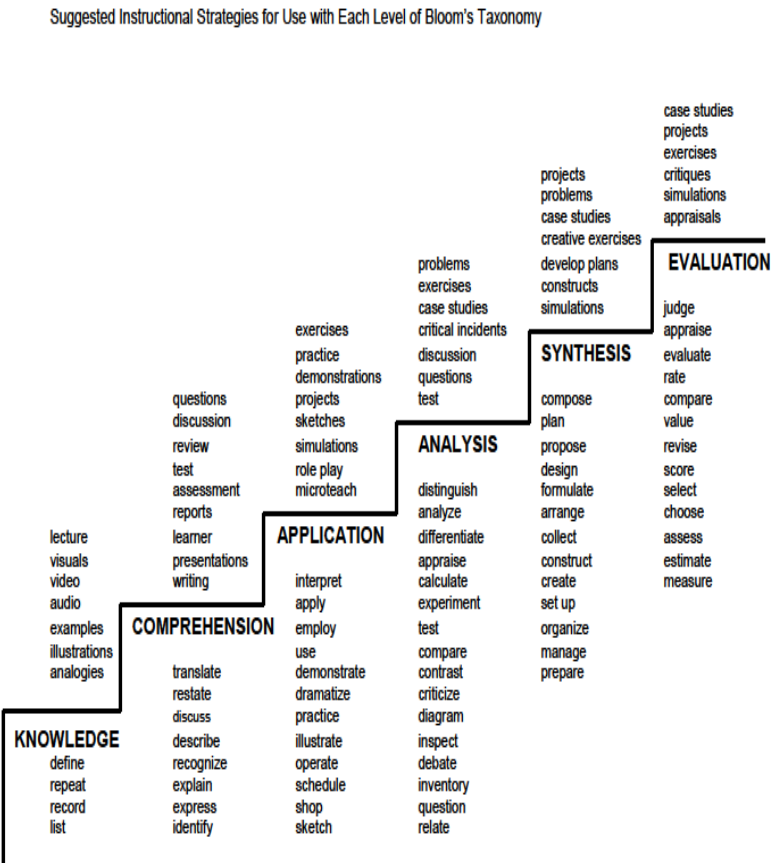


Figure 1.

Suggested Instructional Strategies for Use with Each Level of Bloom's Taxonomy (available at [http://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/nrcs143\\_023989.pdf](http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_023989.pdf)).

Figure 2

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MELINDA A. MARBES

**UNDERSTANDING THE BUSINESS PURPOSES OF  
STANDARD REPRESENTATIONS AND WARRANTIES IN COMMERCIAL AGREEMENTS**

Type	Sample Text	Disclosures	Risks	Due Diligence	Comments
Organization	The Company is a [corporation limited liability company, limited partnership] duly organized, validly existing, and in good standing under the laws of the State of _____, [and no reports, registrations, license fees, or other fees are due or pending to any federal, state, regional, or local governmental agency].	What is the form of business entity of any person that is a party?  What is the entity's state of incorporation or organization?  What, if any, reports, fees, registrations, or other filings are outstanding?	If the party is an entity that is not properly organized and validly existing, then the party does not have the legal capacity to contract and the agreement may be unenforceable against the party.	Certified copies of Certificate of Incorporation [or analogous organizational documents if party is a limited liability company, or any type of limited partnership or limited liability partnership] and Good Standing Certificate from Secretary of State in jurisdiction where party was incorporated or organized.	The Secretary of State of most jurisdictions permits online access to organizational documents, as well as annual reports.  See, e.g., <a href="http://www.sunbiz.org">www.sunbiz.org</a> or <a href="https://scorp.sos.ga.gov/">https://scorp.sos.ga.gov/</a> .
Good Standing					
Power and Authority					
Necessary Action					
Governmental and Other Consents					
No Conflict or Non-Contravention					
Enforceability					

Figure 2.

Chart for Skills Training to Help Students Understand the Business Purpose of Standard Representations and Warranties in Commercial Contracts by Melinda A. Marbes (Copyright © 2016) (Used with author's express permission).