

PRESENTATION: *DOES TRUMP HAVE THE BEST WORDS? USING THE DAVID DENNISON/PEGGY PETERSON CONFIDENTIALITY AGREEMENT TO TEACH THE REALITIES OF CONTRACT DRAFTING IN PRACTICE.**

Elizabeth August & Sue Payne*****

Elizabeth August:

I have taught a transactional drafting course at Syracuse University College of Law since 2006 with the goal of teaching students how to draft clear, concise contracts that accurately memorialize the intent of the parties. Unfortunately, my students search the internet for exemplars and discover some poorly drafted contracts which they then rely on for the basis for their assignments. One of my greatest frustrations was spending weeks discussing clarity of drafting, only to have my students go find an exemplar on the internet that was poorly written and then use that contract for their assignment with little editing or acknowledgement of the shortcomings of the original. The David Dennison/Peggy Peterson contract provides a good opportunity to show students how to review a contract critically and either make the necessary changes or scrap the contract and look for a different exemplar. As a result, I have developed the attached exercise to assist my students in critically analyzing the exemplars that they find.

I have only used this specific contract once, but I have used this exercise in prior semesters with different contracts that were as poorly written, or almost as poorly written, and it works well after my students

* Copies of the Confidentiality Agreement between Stormy Daniels (aka “Peggy Peterson”) and Donald Trump (aka “David Dennison”) and the Complaint filed by Stormy Daniels against Donald Trump can be found online. *Stormy Daniels Sues Trump Redacted*, TMZ, (last visited on July 20, 2018),

http://tmz.vo.llnwd.net/o28/newsdesk/tmz_documents/stormy-daniels-sues-trump-redacted.pdf.

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have had some instruction on organization and clarity through structure and word choice. I place this fairly early in the semester after we have worked through a simple contract without reliance on exemplars, such as a classroom agreement.

The focus of this exercise is organization, but it can be tweaked to change the focus. Sue Payne, who is presenting with me, has developed an excellent exercise that focuses more on the substance of the contract and is a great companion to this exercise.

For background, you should know that because I am primarily a writing teacher, I place a great deal of emphasis on clarity in teaching contract drafting. I explain to my students that it is essential that the contracts they draft be easily understood by the parties if they expect the parties to adhere to their contractual obligations. As I mentioned before, I focus primarily on organization, formatting, and word choice.

I want my students to choose organization that makes sense and is easy to follow. The most important terms should come first in the contract. Students should break provisions up into subsections where appropriate. All information on the same subject (“like things”) should be kept together. Sentences should be short, and paragraphs often should be one sentence if that is all that is needed. Furthermore, formatting should be consistent and help the reader navigate through the contract. The main headings should have the boldest formatting and formatting must be consistent throughout. Students should choose a numbering system that works for the length of the documents and then use it consistently. Finally, I instruct my students to use clear, common language and to choose their words carefully to accurately convey the intent of the parties. Of course, we also discuss tips for editing their drafts to be sure they follow my guidelines on clarity and do not have inconsistencies in their final product.

The attached exercise is self-explanatory. I have included a copy of the David Dennison/Peggy Peterson agreement that has the relevant sections highlighted to make it easier to use. Again, you are free to use this exercise as is or adapt it to focus on any of the shortcomings of this agreement. I am looking forward to using it this coming semester for multiple points, including some more substantive drafting issues.

Exercise

To: Students in Transactional Drafting

From: Prof. August

Please review the attached agreement between David Dennison and Peggy Peterson and, working with a partner, answer the following questions.

1. Look critically at the formatting of the agreement. What suggestions would you make for improving the formatting? How do the formatting errors impact the readability of the document?
 2. Next, look at the organization of provision 3.2: Transfer of Property Rights to DD. How does the organization of this provision affect its readability?
 3. What obligations does PP have under provision 3.2?
 4. How could provision 3.2 be better organized? Outline a reorganized section 3.2 below.
 5. Section 4.3 Representations & Warranties and Agreements purports to set out representations of both DD and PP. What representations does DD actually make in 4.3(a) and 4.3(b)? What other information is contained in those sections?
 6. What representations does PP make in section 4.3.2? What other information is contained in that section?
 7. How could you correct the drafting errors in section 4.3?
 8. Review the final paragraph of section 4.2 PP's Representations and Warranties Regarding Prior Disclosures of Tangible Confidential Information. What exactly does that paragraph say? How could you set out that information more clearly? Draft a revised paragraph below.
 9. What are your general thoughts about this agreement and how it is drafted? What assumptions do you make about the drafter?
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Sue Payne:

As Elizabeth points out, my workshop is a little different. I use this contract in a simulation exercise and I guess you really need the students to suspend their disbelief in order to do this exercise!

I tell the class that we are the transactional attorneys at a law firm where half of the firm's attorneys are litigators. The litigators have this incredible opportunity to represent either Donald Trump or Stormy Daniels with regard to the complaint filed about the attached confidentiality agreement. And, as it used to happen at the small firm where I worked, the litigators have come to the transactional attorneys and said, "Hey, what do you think of this confidentiality agreement?" They have asked us to review it and help them decide which party to represent in the lawsuit.

I then divide the students up into teams. I ask them to skim through the complaint and read the confidentiality agreement more closely. Normally, this is a pretty long exercise. It can take up to two hours, unless you give the students the complaint and the confidentiality agreement to read ahead of time. I give the students the attached contract analysis worksheet and ask them to prepare answers to the questions. They should return to the class ready to present their recommendations to the senior partner. Based on our analysis of the contract, does Donald Trump or Stormy Daniels have the better case?

It is a good idea to remind the students that they may use their computers for word processing only. They may not use the internet for this assignment. Then, encourage them to work on each question together as a team rather than dividing the questions up amongst themselves. The idea is that two or three heads are better than one, but only if the entire team actually considers each question. The goal is to practice collaboration to complete the entire assignment, not to use divide-and-conquer to get finished before anyone else.

When we reconvene, each pair presents their recommendation to the senior partner. We also go over some of the specific questions on the worksheet. I then show them portions of the Anderson Cooper video clip in which he interviews David Schwartz (attorney/friend of Michael Cohen) and Michael Avenatti (attorney for Stormy Daniels).¹ We try to determine whether the interview sheds any light on the questions raised by the confidentiality agreement.

I recommend that you preview the Anderson Cooper video clip before showing it to the class. Select the portions of the video that deal with drafting issues. But do not miss the part where Stormy Daniels'

¹ Anderson Cooper, *Stormy and Cohen's attorneys debate contract*, CNN, YouTube, (Mar. 20, 2018), https://www.youtube.com/watch?time_continue=4&v=UNWqrAhaLhM.

attorney displays a cardboard photograph of Michael Cohen's head! It kind of balances out the antics of Michael Cohen's attorney/friend. Although you may not want to get too far off track, this opens up a great discussion about professionalism. (Is grandstanding on television unprofessional?)

Be prepared to answer this question posed by students: Does it matter that this contract is so poorly drafted? What is the practical effect of including covenants in the recitals section? What about mixing up covenants and representations and warranties by using the verbs "agrees and warrants and represents," so that the parties are sometimes making representations and warranties about things they are going to do or not do in the future?

Note that the final question on the "Ten Questions" worksheet – "What is the significance of the fact that David Dennison (also known as *Donald Trump*) did not sign the Agreement?" – is one that cannot be answered without doing some legal research. The students will try to answer it though. I have found that students do not want to say "We don't know" or "We don't have enough information to answer that question" even when that is clearly the case. It's an important lesson for a transactional attorney to learn, especially one who may spend a significant time doing due diligence work early in her career.

Contract Analysis Workshop²

Scenario: The litigators of our firm have been presented with the rare opportunity to represent either Donald J. Trump (also known as “David Dennison”) and Essential Consultants, LLC (“EC, LLC”) or Stephanie Clifford (also known as “Stormy Daniels” and “Peggy Peterson”) regarding the Complaint for Declaratory Relief filed by Stephanie Clifford against Donald J. Trump and EC, LLC. Ms. Clifford seeks an order declaring that the “Confidential Settlement Agreement and Mutual Release; Assignment of Copyright and Non-Disparagement [*sic*] Agreement” attached to her Complaint as Exhibit 1 was never formed or, in the alternative, is void, invalid, or otherwise unenforceable. Before deciding which client to take on, the litigators want to know what we, the transactional attorneys, think of Exhibit 1.

Team Exercise: Setting aside your political beliefs, please review Exhibits 1 and 2 to the Complaint. Exhibit 2 to the Complaint is entitled “Exhibit ‘A’ to the Confidential Settlement Agreement and Release; Assignment of Copyright and Non-Disparagement [*sic*] Agreement.” With your team, answer the questions in the attached table and be prepared to present a summary of your evaluation to your senior corporate partner at a group meeting. She will use the information you provide to inform her decision about what to tell the senior litigation partner.

² I am deeply grateful to Emory Law adjunct professor Les Klemperer, who encouraged me to use the Trump/Daniels Confidentiality Agreement for an in-class exercise and provided me with the Complaint, the Anderson Cooper video clip (https://www.youtube.com/watch?time_continue=4&v=UNWqrAhaLhM), and his own detailed notes. He helped me overcome my reluctance to approach this contract in class. I feared that I would be forced to discuss politics with my students, but we managed to stick to Contract Drafting – almost.

Ten Questions About Exhibit 1³	
1.	Who are the parties to the Agreement? (How can you tell?)
2.	What is the purpose of the Side Letter Agreement (Exhibit 2)?
3.	What is the main subject matter of the Agreement? (Try pretending that you have to draft what Tina Stark calls the “subject matter performance provision” of the Agreement. ⁴ What would it say?)
4.	How is the Confidential Information that is covered by the Agreement defined? Who is in possession of it?
5.	Courts generally don’t enforce operative provisions contained in recitals. ⁵ However, courts will look to recitals for evidence of the parties’ intent. ⁶ What operative provisions are contained in the recitals of the Agreement? Can you summarize what the recitals express about the parties’ intent?
6.	Examine the representations and warranties contained in the Agreement. (a) One of the representations and warranties contains a significant typographical error. Can you find it? What are the practical ramifications of this error? (b) Does the drafter demonstrate an understanding of the difference between a representation and warranty and a covenant? Does it matter?

³ If you are a professor interested in seeing a sample answer sheet for this Contract Analysis Workshop, please contact me at sue.payne@emory.edu.

⁴ TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO*, 117-19 (2d ed. 2013).

⁵ *Stark*, at 83.

⁶ *Stark*, at 81.

7.	What is the scope of the non-disclosure obligation imposed upon Peggy Peterson? (Pretend that you are her lawyer and you have to tell her what she's not allowed to say or do. You want to give her a list of very specific rules. Does the Agreement lay these out?)
8.	What is David Dennison's remedy for "each breach or threatened breach" of this Agreement? What are Peggy Peterson's remedies for breach of the Agreement?
9.	Do you notice anything unusual in any of the boilerplate (Miscellaneous) provisions?
10.	What is the significance of the fact that David Dennison (also known as "Donald Trump") did not sign the Agreement?