

TEACHING CONTRACT DRAFTING BY “FLIPPING THE CLASSROOM,” USING FAMILIAR LAW SCHOOL TECHNIQUES

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INTRODUCTION

Since January 2010, I've taught a contract drafting course to upper-division students as an adjunct professor at the University of Houston Law Center. This article summarizes some of the techniques I've picked up along the way.

Following the sales and marketing principles of using social proof and setting the hook, here are some representative student comments from official course evaluations in past semesters:

“[R]eally enjoyed the approach to class and quizzes.”

“His course is different from the norm and his methods are refreshing. Professor Toedt's approach allows students to figure out the issue on their own but provides students with the tools necessary to reach an answer (which he then explains/corrects).”

“You learn piece-by-piece the process throughout the semester to be able to effectively draft/redline contracts.”

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“I liked the practical approach of the course—very effective teaching technique by using repetition and in-class exercises.”

ENHANCED SOCRATIC METHOD, WITH IN-CLASS STUDY GROUPS

I warn students that we will not necessarily “cover the material” in class. Instead, we use a supposedly new approach known as “flipping the classroom.” This approach has become popular in educational circles because it has been shown to be more effective than the traditional lecture format.¹

Flipping the classroom is what law schools have been doing for years. The flipped classroom was pioneered by Harvard physics professor Eric Mazur, who cites the law school case study method as “one of the first implementations of the flipped classroom.”²

In my classes, flipping the classroom works like this:

1. Students are randomly pre-assigned to small groups of three or four people each. (The groups are shuffled twice during the semester, so that students will get to know more of their classmates.)
2. Advanced reading assignments *and questions for discussion* are posted online for each class session.³ The discussion questions come from the assigned reading and problems that can arise in practice—sometimes drawn from real cases.
3. In class, we tackle one question at a time: The students first discuss the question in their small groups, and then we do committee-of-the-whole discussion, before moving to the next question.⁴

AN EXAMPLE PROBLEM SET

Here’s a problem set that my students work on in their small groups, after reading the materials on signature blocks in contracts.

¹ See, e.g., Cynthia J. Brame, *Flipping the Classroom*, VAND. UNIV. CENTER FOR TEACHING (2013), <https://cft.vanderbilt.edu/guides-sub-pages/flipping-the-classroom/>.

² Interview with Eric Mazur, Area Dean for Applied Physics, Harv. Univ. (Mar. 20, 2013), https://evollution.com/revenue-streams/distance_online_learning/audio-flipped-classroom-redefine-role-educators-10-years/.

³ The class plans, with reading assignments and questions for discussion, are posted at <http://www.OnContracts.com/contract-drafting>.

⁴ At the 2018 transactional law teaching conference at Emory Law, I learned that I’ve apparently taken the first steps in reinventing a wheel: see Sophie M. Sparrow & Margaret Sova McCabe, *Team-Based Learning in Law*, 18 LEGAL WRITING: J. LEGAL WRITING INST. 153 (2012) (stating the importance of law students learning to work together in groups).

FACTS:

1. Your client is Addams Investments, L.P., a “family” limited partnership of the very wealthy Addams clan in Atlanta. The sole general partner of the limited partnership is Addams Operations, Inc.
2. It is 12:00 noon EDT on June 30. The president of Addams Operations, Ms. Wednesday Addams, is on the phone. It’s a bad connection, but she wants to talk about a contract that you and she have been negotiating for Addams Investments, L.P.
3. Under the contract, Addams Investments, L.P., will buy a large quantity of widgets from Widgets, Inc., a Savannah company that recently went public. (Family patriarch Gomez Addams, a limited partner, is convinced the family will make a killing in the widget market.)
4. Wednesday Addams says that she has talked by phone with her opposite number at Widgets, Inc.; she reports that Widgets, Inc. has agreed to the last contract draft that you sent over, and that everyone is ready to sign.
5. The Widgets, Inc. people really, *really* want to get the contract signed and delivered today, June 30. They’ve told Wednesday Addams that they’re willing to make significant pricing concessions to make that happen.
6. There is a problem, though. As you learn from Wednesday Addams over the bad phone connection, she and the rest of the Addams family are at the end of a rugged backpacking vacation on a small, primitive island in Hawai‘i. The island has no Internet service and barely any cell phone service.
7. The family has just emerged from the backcountry. The plan is for everyone, smelly as they are, to take a private plane from a dirt landing strip on the island to the Honolulu airport. A shuttle bus will take them to a nearby hotel for a quick shower and change of clothes. The family will then board a United Airlines “red-eye” overnight flight that will land in Atlanta on the morning of July 1.
8. “One more thing,” she says, “in the interest of traveling as light as possible, no one in the group brought a laptop.”

QUESTION 1: Given that Addams Investments, L.P. is a limited partnership, and given the facts as stated, who should sign the contract on behalf of the limited partnership?

QUESTION 2: How should the contract signature block for Adams Investments, L.P. be written?

INSTRUCTIONS: Develop a consensus, then post your version on the virtual whiteboard.⁵

QUESTION 3: What could happen if Gomez Addams signed on behalf of Adams Investments, L.P. as one of its limited partners?

QUESTION 4: Why might the Widgets sales rep be so eager to get the contract signed on June 30? (*Hint*: It has to do with the fact that Widgets, Inc. is a newly-public company.)

QUESTION 5: What about just signing it on July 1 when the family gets back to Atlanta?

QUESTION 6: If Wednesday Addams is a limited partner as well as president of the general partner, does her limited partnership disqualify her from signing the contract on behalf of the limited partnership?

QUESTION 7: Is it physically possible for you to “make it happen” for the contract to be signed and delivered to Widgets, Inc. today, June 30? If so, how might you go about it?

QUESTION 8: If Wednesday Addams were to ask *you* to sign the contract as the attorney for Addams Investments, L.P., how should you respond?

LOTS OF CONTRACT *REVISING*

In my contract drafting course, students practice good drafting skills by *revising* the work of others, roughly analogous to the way that Italian Renaissance painters began learning their art by copying the works of others.⁶ Specifically:

- Each week, in small groups during class, we spend significant class time studying and *rewriting* selected “wall of words” contract provisions from publicly available contracts.⁷ I teach a systematic,

⁵ The virtual whiteboard is a Google Docs document that can be edited by any student.

⁶ See, e.g., <http://www.OnContracts.com/contract-drafting#RewriteStanfordTesla>.

⁷ Here is the actual wall-of-words provision that students rewrite in this exercise, from a real-estate lease between Stanford University and Tesla Motors, Inc.:

7.2 Real Property Taxes. Without limiting the foregoing, Additional Rent shall include, and Tenant agrees to bear, discharge and pay as the same become due, and before delinquency, all taxes, assessments, rates, charges, license fees, municipal liens, levies, excises or imposts, whether general or special, or ordinary or extraordinary, of every name, nature and kind whatsoever, including all governmental charges of every name, nature or kind that may be levied, assessed, charged or imposed

step-by-step approach to this task, as documented in my blog posting at <http://www.OnContracts.com/refactoring-a-wall-of-words/>.

- As students rewrite provisions, I walk around and look over their shoulders, making (quiet) comments and suggestions.
- For some exercises, students are asked to clean up their rewrites after class and submit them as (pass/fail) homework, which I mark up with comments and return to them (via Blackboard).⁸

or maybe or become a lien or charge upon the Premises or any part thereof; or upon the rent or income of Tenant; Or upon the use or occupancy of the Premises; or any document creating or transferring an estate or interest in the Premises; upon any of the buildings or improvements existing at any time during the Term upon the Premises; or upon the leasehold of Tenant; or upon Landlord by reason of its ownership of the Premises (but not including any franchise, transfer, inheritance, or capital stock taxes or income taxes measured by the net income of Landlord unless, due to a change in the method of taxation, any of such taxes is levied or assessed against Landlord as a substitute for, in whole or in part, any other tax that would otherwise be the responsibility of Tenant). If at any time during the Term, under any Applicable Laws, any tax is levied or assessed against Landlord directly, in substitution in whole or in part for real property taxes, Tenant covenants and agrees to pay and discharge such tax. All of the foregoing taxes, assessments and other charges which are the responsibility of Tenant are herein referred to as "Property Taxes." Notwithstanding the foregoing, Tenant shall have no obligation to pay (a) any portion of an increase in Property Taxes, if any, attributable to a reassessment for assessment year 2007-2008 as a result of Landlord's recent acquisition of the ground lease interest in the Premises; or (b) any environmental assessment, charges or liens arising in connection with the remediation of Hazardous Materials from the Premises, the causation of which arose prior to the delivery of the Premises to Tenant, or to the extent caused by Landlord or any of Landlord's agents, (c) costs or fees (other than general real property taxes) payable in connection with Landlord's right to further develop the Premises, and (d) property transfer taxes, stamp or recording taxes attributable to Landlord's transfer of ownership of the Premises or any interest of Landlord therein.

SEC, COMMERCIAL LEASE – THE BOARD OF TRUSTEES OF THE LELAND STANFORD JR. UNIVERSITY,
<https://www.sec.gov/Archives/edgar/data/1318605/000119312510017054/dex1020.htm> (last visited Sept. 1, 2018).

⁸ "Blackboard is a virtual learning environment and course management system developed by Blackboard, Inc." *Blackboard Learn*, WIKIPEDIA,

- The specific provisions that students rewrite are selected to cover various substantive areas that are often encountered in contract drafting and review.

This review-and-revise approach reflects what students are almost certain to see when they start out in practice: Contract drafters spend far less time *drafting* contracts than they do in *reviewing and revising* others’ drafts. Even when the new lawyer is the one who must prepare the first draft, she will almost always be urged to find a previous form of agreement and modify it, instead of starting from scratch with a blank screen. Students take a similar approach in my course.

IN-CLASS AMBIGUITY EXERCISES⁹

Ambiguity might well be the number one source of contract disputes. For that reason, my in-class exercises include lots of practice in spotting and fixing ambiguities.

At the end of one semester, a student came up to me and said, “I hate you.” (He was smiling.) I asked why, and he responded, “Because after all the ambiguity exercises that we did, now I see ambiguities *everywhere!*” I did a fist-pump and exclaimed, “Yes!” I said that this was exactly what I had hoped: Now, in his law practice, the student would be more likely to spot ambiguities in the contracts that he drafted and reviewed.

Many of the ambiguity practice exercises are drawn from non-legal sources; I especially like humorous ones. Example: The following is adapted from my parish’s Easter Sunday service booklet of a few years ago, with the family name changed and bold-faced emphasis added:

Easter flowers and decorations are given
to the glory of God
and in memory of their grandmother Jane Doe
In honor of all Christians,
Especially those persecuted
By the Doe family

EXERCISE: Rewrite. (*Hint: How could this be fixed with just one additional character?*)

https://en.wikipedia.org/wiki/Blackboard_Learn (last modified June 21, 2018).

⁹ I’ve posted a(n evolving) set of ambiguity exercises at <http://www.OnContracts.com/ambiguity/>.

THEMES

In my course, I stress a number of real-world themes designed to help get workable contracts to signature sooner and keep clients out of trouble. Here are some of those themes:

1. Clients prize speed to signature.
2. Other things being equal, a short, simple contract *that can be reviewed and signed quickly* might serve the client's short-term and long-term desires far better than the opposite.
3. Short paragraphs are *almost* always better—avoid walls of words.
4. Single-topic paragraphs are *always* better.
5. *Contract* length is not as important as *paragraph* length.
6. D.R.Y.: Don't repeat yourself.¹⁰
7. Steer well clear of ambiguity:
 - A.T.A.R.I.: If a term is even arguably subject to multiple interpretations, Avoid The Argument: Rewrite It.
 - W.I.D.D.: When in doubt, define.
8. Make contracts understandable to future readers—such as jurors.
9. Remember that contracts will usually go back into the jury room as “real” evidence, whereas the same might not always be true for lawyer-prepared demonstrative exhibits. Take advantage of that to create your own trial exhibits:
 - Use tables where appropriate.
 - Use illustrative examples and sample calculations.
 - Consider drafting explanatory footnotes. The other side might not ask to delete them, in which case the footnotes might someday become part of a trial exhibit.
10. Other things being equal, try for “Seneca terms”—*treat your inferior as you would wish your superior to treat you*.
11. A friendly, balanced contract can signal your client's reliability as a business partner and get you to signature sooner.

¹⁰ *E.g.*, <http://www.OnContracts.com/contract-drafting#DRY> (the \$693,000 drafting error in a bank guaranty).

12. Don't leave out something that you know the other side will ask for—it's better to include a safe version that you know your client can live with. It's foolish to hope that the other side's contract reviewer won't know what to ask for; if you leave out a provision that you know she'll want, she might ask for a version that your client will hate.
13. R.O.O.F.: Root Out Opportunities for F[oul]-ups—do not assume perfect performance by either party.
 - What might fall through the cracks?
 - Personnel changes can happen—reassignments, new jobs, promotions, retirements, deaths (the Mack Truck Rule of Contract Drafting).¹¹
 - Build in sensible default values, e.g., a specific date and location for performance unless otherwise agreed.
 - Be practical, e.g., don't insist on a too-short time frame, notice period, etc.
14. Do not assume people will *want* to keep their promises (that includes your client).
15. Try to put the monkey on the other party's back, e.g., your client will do X *upon written request*.
16. Use time limits—earliest date (“sunrise”), latest date (“sunset”)—or from Neil Wertlieb: “Always address timing!”
17. Consider expressly specifying Plan-B remedies to be easily understood by business executives—and judges and jurors. For example: “If Provider fails to fix the problems on time, Customer may hire another contractor to finish the job at Provider's expense.”
18. Do not assume you must go it alone. When in doubt, A.T.P. (Ask The Partner) or A.T.C. (Ask The Client).
19. Consider making the other party *earn* what they get (or what they want to keep), e.g., tie the other side's exclusive rights to its meeting performance goals.

¹¹ See, e.g., D. C. Toedt III, *Getting a Workable Contract to Signature Sooner: Field Notes*, ON CONTRACTS (NOV. 15, 2018 9:35 AM), <https://www.oncontracts.com/docs/IACCM-Ask-The-Expert-Contract-Signature-Sooner-May-20154.pdf#page=15>.

20. Be sure the other side has the financial and other wherewithal to perform—consider:
 - Due diligence;
 - Asking for the other side to agree to financial covenants; and
 - Asking the other side to arrange for backup funding sources, e.g., insurance, guaranties, standby letters of credit, escrow.
21. You get what you *inspect*, not what you *expect* (a saying from the nuclear Navy). So:
 - Insist on the client’s getting the information it needs/wants.
 - [Perform] due diligence, including getting third parties involved (e.g., a mechanic to inspect a used car).
 - Confirm your understanding and assumptions with representations and warranties.
 - Audit provisions.
22. Humans can be funny—see behavioural economics. Some examples follow.
23. Incentives matter.¹²
24. Many people care most about their own careers.
25. Buyer’s remorse can be a problem, especially if a better offer comes along—and competitors might do that intentionally to try to steal a deal away.
26. People are *great* at rationalizing doing what they want to do.
27. People don’t like to be told what they can and can’t do.
28. Memories can be plastic.
29. People might cut costs to meet their KPIs, resulting in dangers or disasters.¹³

¹² Cf. *The Power of Incentives: Inside the Hidden Forces That Shape Behavior*, FARNAM STREET, <https://fs.blog/2017/10/bias-incentives-reinforcement/> (quoting Charlie Munger, Berkshire Hathaway Inc. Vice-Chairman, *The Psychology of Human Misjudgment* (1995)).

¹³ See, e.g., *San Bruno pipeline explosion*, WIKIPEDIA, https://en.wikipedia.org/wiki/San_Bruno_pipeline_explosion (last modified May 15, 2018) (stating, “PG&E had illegally diverted over \$100 million from a fund used for safety

30. People tend to point fingers to shift blame, and lawyers can be a favorite target.
31. But don't forget Hanlon's Razor: never attribute to malice that which can be adequately explained by stupidity—but do not rule out malice.¹⁴
32. "Absent reasonable objection, we can do X" might be better than "Mother May I?"
33. Plan for transition after termination. For example, consider:
 - a phase-out period, or
 - a transition of a customer's business to another vendor.
34. When you can't just say no in a contract negotiation, use creative compromises such as:
 - Non-discrimination language,
 - An advance warning or advance consultation requirement,
 - At transparency requirement,
 - A cap the financial exposure for the onerous provision, or
 - Package the onerous provision as part of a premium offering.
35. Negotiate limitations of liability risk-by-risk, not one-size-fits-all.

MINOR POINTS

In the news: I watch the advance sheets and news reports, looking for lessons to apply in contract drafting. Students seem to enjoy discussing a problem that they have read about or seen on TV—for example, the Stormy Daniels contract was the gift that kept on giving, in terms of opportunities to improve on bad drafting.

Attendance "starting bonus": Another adjunct professor once complained to me that he had a hard time getting his students to come to class. In my course, every student starts out with 50 "freebie" points for class attendance, which is ten percent of the final course grade—but students

operations, and instead used it for executive compensation and bonuses.”).

¹⁴ See *Hanlon's Razor*, WIKIPEDIA, https://en.wikipedia.org/wiki/Hanlon%27s_razor (last modified Aug. 9, 2018).

also *lose* points for missing class,¹⁵ which takes advantage of the well-known “loss aversion” effect.¹⁶

Flashcards: I’ve posted a fairly extensive set of online flashcards, which students seem to have found helpful, at <http://www.OnContracts.com/flashcards>. The in-class quizzes and the non-essay portions of the final exam are drawn very largely from these flashcard questions.

Name tents: I’ve found it helpful to make name tents from sheets of letter-sized paper, folded in thirds to make a prism-like shape resembling a Toblerone candy bar. I’ve posted a template Word document for typing in students’ names at <https://goo.gl/4mH6CG>.

Jeopardy! game: Each semester, the last class session includes a Jeopardy!-style game as a course review. The game is available, for free, online at <https://jeopardylabs.com/63157>.

¹⁵ For more details about how attendance points can be lost, see <http://toedtdclassnotes.site44.com/index.html#Attendance>.

¹⁶ See generally *Loss aversion*, WIKIPEDIA, https://en.wikipedia.org/wiki/Loss_aversion (last modified June 25, 2018).