

## DESIGNS FOR COURSES ON WRITING CONTRACTS

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### Preface.

A. My wife, the English teacher, once said to me, "In this world, Peter, there are two forms of writing: Creative, such as novels, plays and poetry; and Expository, such as treatises, letters, memoranda and briefs." I've tried both, and prefer a third: Contracts, which do not entertain or convey information or try to persuade.

The English teacher now agrees that there are, indeed, three forms of writing. And the third, Contracts, requires a distinct discipline.

B. Unfortunately, the writing of contracts has been sorely neglected by law schools, perhaps, in part, because teaching writing is a labor intensive exercise. Yet the criticisms of this neglect are numerous, and the consequences are significant. For example:

It should not be surprising to practicing lawyers that new associates come to work without the slightest idea about how to draft a contract.... if you assign them a contract to draft, they will freeze like a deer in your headlights. American Bar Association's *Business Law Today*, Volume 15, Number 3 January/February 2006, "Turning the firm into a school", by Charles C. Lewis, a law school teacher.

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...I have been shocked by the number of times in litigation that I have asked more senior lawyers - including some fairly good lawyers - to explain the meaning of some provision in a document they prepared and found out they had no idea what it meant. Indeed, I have just finished litigating one such case. The litigation did no one any good and would not have happened but for some sloppy drafting. (Letter I received from Stephen E. Jenkins, a trial lawyer in Wilmington, Delaware).

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Muddled prose can have real costs. In one of the few attempts to calculate the impact, a Harvard Law School study years ago suggested that a quarter of all contract disputes arose because of poor drafting. *The Wall Street Journal*, August 28, 1995 (p. B3).

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The balance of this article suggests and discusses content that could comprise the body of a course on contract writing. This article is an expansion of the article, "Teaching the drafting of Contracts", that appeared in the May/June 1998 edition of the *New York State Bar Journal*.

## I. What is a contract?

In the beginning, to write a proper contract, the student must first learn and then appreciate viscerally what a contract really is. "An agreement between or among two or more persons" provides but a bare hint. Precisely, a contract is simply a set of instructions for a transaction (the purchase of real estate) or relationship (a partnership) or a combination of the two (a partnership to purchase and develop real estate). It is no different from the plans and specifications to build a bridge. And if there is a flaw in those plans or specifications, problems will arise: In the case of a contract, a dining table set for the litigators as *The Wall Street Journal* article observed.

## II. Laws that bear on contract formation.

Any course or group of courses that treats contract writing must include a study of those laws and principles that bear on contract formation, for a contract is nothing if it is not enforceable. An awareness of these rules is fundamental, lest the draftsman sink piles into the sand. A former partner of mine -- yes, a partner -- closed a secured financing immersed in the erroneous belief that a UCC financing statement also constituted the security agreement required by the Code.

This legal aspect of the course would be in the nature of a survey to establish an alertness to those requirements of the law to which the contract must conform in order to assure its enforceability. I would not require a detailed knowledge of these legal considerations. Instead, I would try to instill a knowledge of the basics and a sensitivity to know when they are applicable to the job at hand.

"Consideration", the *quid pro quo*, the basic element in the universe of contracts, is the place to start: What constitutes proper consideration and, perhaps more importantly, what does not; what contracts do not require consideration.

I would next explore the "Statute of Frauds", beginning, perhaps, with §2-201 and §2A-201 of the Uniform Commercial Code, and then move on to other statutory provisions like those in the New York General Obligations Law (Titles 7 and 11 of Article 5 and Title 3 of Article 15).

Finally, I would make several stops along the Uniform Commercial Code: Articles 2 (Sales) and 2A (Leases), emphasizing the warranty requirements; Article 3, focusing on the requirements for negotiable instruments; Article 9 and the requirements for a proper security agreement; and, if time allows, I might stop briefly at Article 5 and the ICC Uniform Customs and Practice for Documentary Credits.

In dealing with Article 9, I would emphasize the need to understand each transaction and its collateral before carefully examining the Code to determine what must be done to perfect the security interest. I would not get into the details of perfection, for Article 9 of the Uniform Commercial Code rivals the Internal Revenue Code in complexity. It is a conundrum that must be solved transaction by transaction.

Of course, there are other legal requirements that apply to contract formation such as employment law, corporate law, tax considerations, real estate law, ... and straight on 'til morning. Students must be made aware that, outside their area of expertise, they must consult with colleagues who have expertise in those fields. For example, a client called me one day and said, "We have a problem, Peter: When we bought Fiddley Dee Company [at that time represented by another attorney], we gave the sellers rights to buy shares in Fiddley Dee and simultaneously to sell those shares back to Fiddley Dee. The sellers have exercised both options, but it will cripple Fiddley Dee to pay them."

The fact was that Fiddley Dee had lost money for many years, but was now profitable. The formula to determine the buy-back price was based on those recent earnings. I asked whether Fiddley still had an accumulated deficit. "Yes", came the reply.

"Well", I said, "the company can't buy back its shares. It's illegal. It can only buy those shares from surplus."

The lawyer for the shareholders agreed (in the original transaction, he should have insisted on a guarantee from the parent company, that is, the buyer, or arranged the put to the parent company rather than to Fiddley Dee). Anyway, we renegotiated the calls and the puts to everyone's satisfaction.

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Another facet of commercial practice of which students must be made aware is that when working on a transaction in a foreign state or other foreign jurisdiction, counsel in that state or other jurisdiction must be consulted.

As Dirty Harry observed in *Magnum Force*: "A man's got to know his limitations."

### III. Elements of Basic Contracts.

Following legalization of the students, I would introduce them to the considerations involved in certain basic contracts such as a promissory note, a guarantee, security agreements, employment contracts, shareholder arrangements, the sale and purchase of goods, acquisitions, leases, licenses and options.

I say "shareholder arrangements" rather than "shareholder agreements" because I prefer, whenever possible, to place those arrangements, such as voting and control and restrictions on share transfers, in the articles or certificate of incorporation rather than in an agreement. See Chapter 8 of *Commercial Agreements: A Lawyer's guide to Drafting an Negotiating* (West Group). In fact, that book, which is available on line on Westlaw, is a good reference for this part of the course.

### IV. Boilerplate.

I hate the term "boilerplate", which refers to clauses commonly and variously included in most contracts. The reason I hate the term is that it carries with it a prejudice that these clauses need little or no scrutiny when added to a contract. However, there is not a clause or a form that exists that can be added to a contract without critical examination to determine whether any changes are needed -- and virtually always, changes are needed -- to adapt the provision to fit properly into the contract. Below is a list of many of these types of clauses, and a discussion of them can be found in *Exercises in Commercial Transactions* (Carolina Academic Press)

1. Termination
2. Assignment
3. Governing Law
4. Arbitration
5. Notice
6. Execution and Counterparts
7. Authority to Contract and to Sign
8. Amendment
9. Waiver
10. Delay in Enforcing Rights
11. Remedies
12. Integration Clauses
13. Expenses and Interest
14. Indemnities

15. Severability
16. Section Headings
17. Definitions and Preamble

#### V. Drafting Exercises

Well, after all this time, we finally get to what this course is all about. After many years of reflecting on how best to organize the course, I came to the revelation, while lying in bed trying to decide whether to go fishing, that an understanding of the basics discussed above provides an essential foundation to the writing phase. So, instead of going fishing today, I came to my little office in Tarrytown, New York, to write this essay.

Because a contract is no more than a set of instructions, the prime direction in writing any contract is "*accuracy stated as simply as possible*". Accuracy, though, must be the controlling feature, for sometimes the concepts are so complex -- not due to the lawyer, but due to the deal concocted by the client -- that simplicity in the purest sense is not possible.

Because of the labor required of the teacher in the writing segment of the course, a procedure that might prove helpful and productive is for two or three students to work together on assignments, especially the longer and more complex ones. This collaboration should add perspective, which is essential to the drafting process, thereby producing a better product and, more importantly, helping to develop and improve technique and skills more quickly. A variation on this approach is to have the teams prepare different assignments which would be presented at different times during the course. Copies of completed assignments would be distributed to the other students for comment during class sessions. The object of this critique is not to attack and defend, but to determine whether the agreements adequately and comfortably house the transaction and whether the construction work (*i.e.*, the drafting) is sound, and then to decide how best to correct any deficiencies. Guidance by the teacher in these discussions will be essential to focus attention on critical issues and to avoid digressions into minutia. My wife uses a similar technique with success in her creative writing classes. She has observed that meaningful comments from peers often carry greater weight with students than those from teachers.

Materials for this aspect of the course can be found in *Writing Contracts, a Distinct Discipline* (Carolina Academic Press) and *Exercises in Commercial Transactions* (Carolina Academic Press).

Of course, a good grasp of grammar and a good dictionary will also help. And I don't mean a "Law Dictionary", for in my lexicon the word "legalese":

the conventional language of legal forms, documents, *etc.*, involving special vocabulary and formulations; often thought of as abstruse and incomprehensible to the layman (*Webster's New World Dictionary*, Third College Edition),

does not exist.

## VI. Ethical Considerations.

Yes, even the discipline of contract preparation engenders ethical considerations.

One of these is the mandate that the draftsman prepare a fair agreement. The reasons are simple:

- a one sided contract will invariably be negotiated back to the middle;
- an even handed contract will result in minimal, non-confrontational negotiation and a quick conclusion of the deal;
- an even handed contract, raising few issues, will result in less cost to the client in terms of legal fees.

That's right, lower legal costs. And yes, that's good; and it's also right. The lawyer is a fiduciary and, as a fiduciary, the lawyer owes a duty to the client to keep those legal fees on a diet. Those lawyers with high IQs ("I" for Integrity and "Q" for Quality of Performance) will not have to panhandle for lunch. The Clint Eastwood character in the movie, *In the Line of Fire*, a secret service agent assigned to protect the President, teaches us this lesson: The client comes first.

A second ethical principle is that "there is no shame in helping the other guy". Commercial transactions should not be adversarial proceedings. The goal is not to win; the goal is to do a deal that conforms to the intent of the parties. Thus, while the attorney must at all times represent the interests of the client, the attorney must not seek to gain an advantage contrary to the terms of the deal from a mistake by the other lawyer. An obvious example -- and surely one that begs correction -- is the inadvertent omission of a word: "The Company will pay the following expenses..." vs. "The Company will not pay the following expenses...". Do unto the other lawyer as you would have that lawyer do unto you.

In the context of a commercial transaction, I doubt there is a better application of the Golden Rule than to the principle: correct drafting errors of the other attorney. In fact, because the object of a contract is to reflect accurately the intent of all parties, this principle is the ethical equivalent of the "given in geometry". Allowing errors that one detects to remain uncorrected serves but two demons: a perverse desire to gain an improper advantage; litigation that should never be spawned. The client is ill represented by this type of practice.

## VII. Conclusion.

I have little more to say, and that little more is this: As Ezra Pound observed, the English language is the best language in which to write. I have done deals all over the world, and all of the contracts have been in English. I once did a deal in Morocco, where the principal language is French. The contract was written in English, but, after the text was agreed, the other party, an agency of the Moroccan government, asked that the parties also sign a version in French. This request was fine with me because, although I could not add a supremacy clause as to the English version, the contract provided for arbitration in London. So I asked our Moroccan attorney, who was fluent in both languages, to do the translation. A day or so after he began the work, he said to me: "Peter, the French language cannot express some of these concepts with the precision of English."

"Fine," I said, "just do the best you can."

Though, we, here, may have the best verbal means of communication on the planet, that facility is of little benefit unless we writers have the ability to apply it properly. Between expository writing, like this article, and a contract, the objective is the same: "accuracy stated as simply as possible". To achieve that objective, the writer must have a command of the language. The responsibility for engendering that command is not the job of the law school: it is the responsibility of the primary and secondary schools and, to a lesser extent, the responsibility of the colleges. To the extent those formative institutions fail, law schools and the other institutions of "higher learning" must succeed.