

Commercial Drafting

Colorado Law

Summer 2011

Professor Amy Bauer

E-mail: amy.bauer@colorado.edu

Office hours

Course hours

Course Description

This course will teach you the principles of contemporary commercial drafting and introduce you to documents typically used in a variety of transactions. The skills you will gain will be applicable to any transactional practice and will even be useful to litigators. On finishing the course, you will know

- the business purpose of each of the contract concepts;
- how to translate the business deal into contract concepts;
- how to draft each of a contract's parts;
- how to draft with clarity and without ambiguity;
- how to add value to a deal;
- how to work through the drafting process; and
- how to review and comment on a contract.

Homework

Our textbook is *Drafting Contracts: How and Why Lawyers Do What They Do*. It is available in the bookstore. Unless stated otherwise, all readings and drafting assignments are from this book.

The homework assignments are the focus of much of the in-class work and are critical to the learning process. I will individually review some but not all of the homework. I will, however, thoroughly review each homework assignment in class. Students who put significant effort into the homework assignments learn the most from the course and generally perform well in the course. The converse is also true.

With respect to each ungraded drafting assignment that you submit, unless told otherwise, please

- **put your name on every page in the header;**
- use a font at least as large as the font in this document (Arial, 12 point);
- use one inch margins all around;
- insert a blank line between paragraphs;
- paginate any document longer than one page;
- e-mail me a copy no later than [insert date and time] before class; and
- **print out one copy and bring it to class.**

The same rules apply with respect to graded assignments, but those assignments are not due until [insert time] the day of class. (Again, e-mail copies to both my assistant and me.)

You are responsible for all material assigned in the textbook, even if we do not specifically cover it in class.

Conferences

I will hold **mandatory**, individual student conferences mid-semester. I will provide detailed information concerning the conferences later in the semester.

Grades

Course grades will be based on the following:

- Redraft of the Car Purchase Agreement – 15%
- First draft of the Aircraft Purchase Agreement – 20%
- Second draft of the Aircraft Purchase Agreement – 20%
- National Security Exercise – 5%
- Shoeless Joe Jackson Exercise – 10%
- Carrie Richards Exercise – 15%
- Class participation – 15%

Class participation will take into account class attendance, class participation, and good faith completion of all homework.

By signing in each week on the attendance sheet, you are certifying that you are prepared for class and have completed the homework in good faith.

Students will work on several graded assignments in teams. As agreements are, in the real world, a product of a team's effort, your ability to work together to create a quality product is a realistic and fair basis on which to grade. Students may also work together on ungraded assignments in teams on many of the assignments.

Collaboration with Students and Others

I encourage you to cooperate with each other in all aspects of this course. You should feel free to share ideas with each other. You each, of course, must do your own writing, except for those instances when you work with another student as a member of a team. You may not solicit or receive the aid of anyone outside this class, such as practicing lawyers or students who previously took this course. In addition, you may not refer to any texts, precedents, forms, or other material, except if explicitly permitted. A violation of the rules in this paragraph is an honors violation.

Other Matters

Because each class of students works through the textbook at a different pace, the assignments may vary from the syllabus that follows. Exercises intended for homework may be done in class, and in-class exercises may be assigned for homework. At the end of each class, I will tell you the homework exercises for the following week and what must be submitted. **Due dates for assignments may change depending on how quickly or slowly we progress through the material.**

Please feel free to ask questions and to give me feedback throughout the course. I look forward to our semester together.

* * * * *

Class 1 - [Insert date]

Translating the Business Deal into Contract Concepts. This unit provides the framework for the course. It teaches students the analytic skill that deal lawyers use when drafting and reviews the basic contract concepts from a deal lawyer's perspective.

Reading Assignment

Chapter 1 – A Few Words.

Chapter 2 – The Building Blocks of Contracts.

Chapter 3 – Translating the Business Deal – Part 1.

Chapter 4 – Translating the Business Deal – Part 2.

Chapter 5 – A Contract's Parts.

Drafting Assignment

None.

Class 2 - [Insert date]

Translating the Business Deal into Contract Concepts. Continued.

Drafting the Preamble, Recitals, Words of Agreement, and Definitions. This unit focuses on the preamble, recitals, words of agreement, and definitions. The unit covers, among other questions, stylistic variations in the preamble and words of agreement, when recitals are significant, and why contract definitions can be critical.

Legalese. Legalese annoys almost anyone who reads contracts. Through the reading and the exercises, you will learn how to write clear, contemporary contracts.

Reading Assignment

Chapter 6 – Introductory Provisions.

Chapter 18 – Legalese.

Chapter 19, § 19.4 – Numbering schemes.

Appendix A (Asset Purchase Agreement) – Read the introductory provisions.
Skim the definitions.

Appendix B (Website Development Agreement) – Read the introductory provisions. Skim the definitions.

Drafting Assignment

Exercise 5-1.

Finish Exercise 5-2.

Exercises 18-2, 18-5 and 18-6.

Create a Top Ten List of Rules for drafting a contemporary preamble.

Website Development Agreement Exercise.

Class 3 - [Insert date]

Drafting the Preamble, Recitals, Words of Agreement, and Definitions.
Continued.

Drafting the Action Sections. The action sections state the objectives each party wants from the contract (to buy property, to hire an employee, to rent space), the consideration each party will pay to gain its objectives, and how the performance of the parties will be executed. In this unit, we discuss why the action sections are “where the action is” and how to draft these sections to minimize disputes.

Reading Assignment

Chapter 7 -- Definitions and Defined Terms.

Chapter 8 – Action Sections.

Chapter 16, § 16.2.1 – Assignment and Delegation.

Chapter 19, §19.3.1 and §19.3.3.

Escrow Agreement, pages 70-71.

Appendix A (Asset Purchase Agreement) – Read Article 2.

Appendix B (Website Development Agreement) – Read Sections 2 through 5.

Appendix C (Escrow Agreements) – Read this Appendix.

Drafting Assignment

Exercises 6-2 and 6-3.

Exercises 7-1, 7-2, and 7-4.

Draft action sections for Trademark Licensing Agreement described in Exercise 5-3.

Class 4 - [Insert date]

Drafting the Action Sections. Continued.

Drafting Representations and Warranties, Covenants and Rights, Conditions, Discretionary Authority, and Declarations. In this unit, we turn to the multiple issues inherent in drafting representations and warranties, covenants, conditions, discretionary authority, and declarations.

Reading Assignment

Chapter 9 – Representations and Warranties.

Chapter 10 – Covenants and Rights.

Chapter 11 – Conditions.

Chapter 12 – Discretionary Authority and Declarations.

Chapter 13 – *Will and Shall*.

Chapter 14 – Drafting the Contract Concepts – A Summary Chart.

Chapter 27, § 27.6.2 – Using a Precedent.

Appendix B (Website Development Agreement) – Read Sections 7 through 11.

Drafting Assignment

Exercise 8-2.

Exercise 10-1.

Exercise 11-2 and 11-3.

Exercise 12-1.

Class 5 - [Insert date]

Drafting Representations and Warranties, Covenants, Conditions, Discretionary Authority, and Declarations. Continued.

Drafting the Endgame Provisions and Signatures.

Reading Assignment

Chapter 15 – Endgame Provisions.

Chapter 17 – Signatures.

Drafting Assignment

Draft Adele's representations and warranties as described in Exercise 5-2. Draft them from two perspectives: that of employee and employer.

Draft the endgame provisions described in Exercise 5-3.

Class 6 - [Insert date]

Drafting Clearly and without Ambiguity. Articulating the agreement of the parties is the goal of drafting contracts. In this unit, we explore the drafting problems that impede the realization of this goal as well as ways to cure the problems.

Reading Assignment

Chapter 19 – Clarity through Format.

Chapter 20 – Clarity through Sentence Structure.

Chapter 21 – Ambiguity.

Drafting Assignment

Exercise 19-1.

Exercise 31-1. (Redraft of the Car Purchase Agreement, along with accompanying memo to the client.)

Class 7 - [Insert date]

Drafting Clearly and without Ambiguity. Continued.

Reading Assignment

None.

Drafting Assignment

Exercises 19-4, 21-5, and 21-10.

Class 8 - [Insert date]

Deconstructing Complex Provisions; Organizing a Contract and its Provisions; The Drafting Process: In this class, you will learn a methodology for deconstructing and reconstructing complex provisions. In addition, we consider the drafting process from the initial consultation with the client to the drafting of the final agreement. Then, using in class exercises, you will learn how to organize an agreement for which there is no precedent.

Reading Assignment

Chapter 24 – Deconstructing Complex Provisions.

Chapter 26 – Organizing a Contract and its Provisions.

Chapter 27 – The Drafting Process.

Drafting Assignment

Exercise 21-4 and any Chapter 21 exercises not yet reviewed or completed in class.

Exercise 27-2.

National Security Exercise.

Class 9 - [Insert date]

Drafting Numbers and Financial Provisions; A Potpourri of Other Drafting Considerations. Drafting financial concepts is critical to memorializing a deal accurately. This unit focuses on how to draft mathematical formulae, including those that rely on accounting concepts.

In this class, you will also learn technical drafting points not covered in earlier classes.

Reading Assignment

Chapter 22 – Numbers and Financial Provisions.

Chapter 23 – A Potpourri of Other Drafting Considerations.

Drafting Assignment

Exercise 22-1.

Exercise 23-2.

Shoeless Joe Jackson Exercise.

Class 10 - [Insert date]

Adding Value to the Deal. This class focuses on the lawyer's role as business counselor. You will learn

- how to look at a deal from the client's business perspective; and
- how to add value to a transaction by identifying business issues that are buried in the principals' deal.

Reading Assignment

Chapter 25 – Adding Value to the Deal.

Drafting Assignment

Exercise 31-2 (Aircraft Purchase Agreement, along with accompanying memo to the client.).

Class 11 - [Insert date]

Reviewing and Commenting on a Contract. You will not always be the drafter of a deal's contract. Therefore, to protect and advance your client's interests, you must

know how to analyze and comment on the other side's drafts. This class will teach you techniques that you can use so that you can do this.

Reading Assignment

Chapter 28 – How to Review and Comment on a Contract.

Drafting Assignment

Exercise 28-1.

Complete Steps 1 through 3.

Class 12 - [Insert date]

Reviewing and Commenting on a Contract. Continued.

Reading Assignment

None.

Drafting Assignment

Exercise 28-1 – Mark-up the contract from your client's perspective. Draft an accompanying memo to the other side.

Class 13 - [Insert date]

Drafting the General Provisions, Amendments, Consents, and Waivers.

The general provisions include the following clauses: choice of law, anti-assignment, severability, waiver of jury trial, no oral amendments, merger, and notices. Drafters often give short shrift to these provisions because they are at the end of a contract and thought of as “boilerplate.” They are, however, more than mere housekeeping rules. Through class discussion and exercises, you will learn the business terms and legal issues that a drafter must address and analyze when drafting each of these provisions. You will also learn how to draft the documents that change or amplify a deal's original terms.

Reading Assignment

Chapter 16 – General Provisions.

Chapter 29 – Amendments, Consents, and Waivers.

Drafting Assignment

Exercise 28-1. Contract negotiated with the other side, along with each lawyer's memo to his or her client.

Exercises 16-2, 16-5, 16-6, 16-8, and 16-10.

Class 14 - [Insert date]

Drafting Ethically. In this class, we will work through a series of exercises that raise ethical issues that can arise when negotiating and drafting contracts.

Reading Assignment

Chapter 30 – Ethical Issues in Drafting.

Drafting Assignment

Revised Aircraft Purchase Agreement, along with memo to the client.