

Designing a Contract Drafting Assignment

By **Diana V. Pratt**

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The first year of law school presents students with an unrealistic impression of the legal profession. Each of their courses appears distinct and unrelated to the others. In contrast, law practice requires lawyers to think across legal disciplines. Legal writing seemed an ideal forum for helping our students integrate the analysis, substantive law, skills, and procedure they learn in the first year. The obvious first step was to construct legal writing assignments around topics from other first-year courses. A tort problem, for example, can have procedural wrinkles. As a second step, a pre-litigation tort problem, first used as an office memorandum assignment, can become a complaint and answer drafting exercise. This drafting assignment and many of the memo assignments focus on the litigation side of law practice. The second semester with its argumentative brief and oral argument continues the litigation bias.

In order to continue the integration of first-year courses and present a more realistic view of law practice, the Wayne State legal writing faculty determined to include a second, transactional drafting assignment. Since we teach evening as well as day students and our evening students at Wayne take only legal writing, civil procedure, and contracts in the first year, the best option was for the students to draft a contract. This drafting assignment presented more challenges than the earlier complaint/answer drafting assignment. Our contracts faculty members do not cover the subject matter in the same order. Some begin with remedies, while others begin with offer and acceptance. Consequently, the contract drafting assignment had to be timed sufficiently late in the

second semester so that all first-year students had covered enough of the substance of contracts to make the assignment a meaningful integration. Cooperation with the contracts faculty was essential. The assignment had to be manageable. One of the contracts faculty members had tried requiring his students to draft a contract from scratch. The project overwhelmed both the students and the professor. In addition, some standard but necessary provisions never surface in the usual contracts course. It seemed unreasonable to ask students to include these provisions. Most lawyers include the standard provisions because the provisions are included in the models these lawyers consult. In reality, lawyers do not draft contracts from scratch. They begin with existing contract provisions, incorporate provisions tailored to the client's requirements, and refine the result. The process involves extensive interaction with the client and may involve negotiation with the other party to the contract.

Based on these considerations, the legal writing and contracts faculties created an assignment that simulated reality but that was reasonable in scope and time. The assignment involved a negotiation, some instruction on drafting, an earlier model contract, and a partial contract that required students to draft provisions tied to the substance covered in the contracts course.

The assignment occurs in the second semester after the students have submitted their appellate briefs and during the three weeks devoted to appellate oral arguments. A legal writing faculty member presents the assignment during a contracts class. We believed it was important for the integration to have the discussion in the contracts class. The discussion focuses on drafting techniques including references to the parties, verbs of authority, drafting style, format considerations, and ways to avoid ambiguity.

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The drafting assignment packet includes instructions, an earlier version of a similar contract, a partial current contract, and some materials on negotiation. The earlier contract serves as a model of the kinds of provisions the students could or should include. It is either an actual contract modified to disguise the parties or a contract taken from a form book. The partial contract includes standard terms the students might not include on their own. These include warranties and standards, assignability, divisibility, integration and merger, and choice of law. Six or seven provisions are left blank and marked “to be negotiated.” Although a class on negotiation would be preferable, the materials on negotiation provide an introduction.

The students are divided into two groups, each representing one party to the contract. At the close of the contract drafting discussion, each side receives a memo from the client detailing the client’s requirements for the negotiation and ultimate contract. Each student works with a partner, negotiating with two students who represent the other party. The facts are structured such that the dollar amounts overlap but do not coincide; neither side can achieve all the desired results. The students are instructed not to reveal their client’s instructions and facts except as necessary to the negotiation. The partners first meet to plan their negotiation strategy. Then they meet with opposing counsel to negotiate the deal. Each side then drafts the contract to incorporate the terms as the partners understand them. The two sides then reconvene to reconcile the two contracts into one that incorporates the understanding of all concerned. The students have two to three weeks for the entire process. The contracts are worth points toward the final legal writing grade.¹

¹ At Wayne State, legal writing is graded on an Honors, Pass, Low Pass, Fail system. The students receive quality points for the final assignment(s) each semester—the open memo in the fall and the appellate brief and oral argument in the winter. All other assignments are graded on a good faith effort basis. The theory behind the system is that students should not be graded until they have had an opportunity to try each new kind of writing and receive feedback. Every student who meets the good faith effort standard receives all the points for the assignment. The contracts are worth 50 good faith effort points.

At a minimum, their contracts must include the terms provided and those left open for negotiation. The students are free, however, to revise the terms provided and to negotiate and include additional terms. They are also free to organize the provisions for better understanding and use their discretion on the format. We urge them to be creative.

The legal writing faculty comments on and scores the contracts. Because a competition is involved for the best contract for each contracts section, we do not score the contracts drafted by our own students. At the end of the semester, the students who wrote the best contract for each section receive Best Contract certificates. The awards are presented with great fanfare in the final contracts classes. At the Honors Convocation, the recipients of the best overall contract receive small financial rewards. A former student donated the award money.

The work involved in designing each assignment with its earlier contract, the partial current contract, and the two sets of facts and instructions is considerable. Consequently, the project is limited to three basic scenarios that are used on a revolving basis. Each year the names and a few details are changed from the earlier version.

One project involves a landscaping contract. Counsel for both parties receive a diagram of the property with the detailed landscaping plan. The hypothetical homeowner had a landscaper work on his property some years earlier, the earlier contract, and now wants to go upscale with a gazebo, an underground sprinkling system, numerous shrubs, and some optional details. He has a firm deadline for completion of the work. His counsel receive facts including his absolute requirements, his timing, the things he would like but is willing to forego, and the price he would like to pay as well as the absolute maximum beyond which he is unwilling to go. The landscaper’s counsel receive the price list for each of the items included in the plan and some options. A plastic underground watering system, for example, costs less than a metal system. The gazebo can be topped with a cupola or a weather vane or neither. They receive information on the hourly wage for permanent employees and for seasonal workers.

The landscaper would like to use both types of employees in the project according to their expertise, but seasonal workers will not be available until close to the deadline. The landscaper wants to make a 10 percent profit on the project but is willing to take less in view of the advertising potential of the project. She wants to post a tasteful sign in the front yard for 30 days. All these factual details are up for negotiation.²

The students must include a description of the work to be performed, the timing of performance, what constitutes a breach of the contract, the timing and amount of payment, the remedies available to each party in the event of a breach, and other terms. They must also include a liquidated damage clause should the project not be completed on time.

From the students' perspective, this collaborative effort, first between the partners and then within the foursome, works well. After some scheduling and work allocation issues in the first year of the project, we modified the procedure in three ways. First, we assign the students with partners and opponents within their legal writing section, using a random system. To avoid creating the same pairings and foursomes for the fall and winter drafting assignments, we use a different system of random allocation in the fall and winter semesters; if the chemistry between the students does not work well one semester, they will not be forced to work with the same partner in the second semester. Second, although the students are free to meet with their partner and opponents at any mutually agreeable time, the legal writing slot is the default position. As the class does not meet during those three weeks, every student is available at that time to work on the contract. Third, the students are instructed that they must reach an agreement; impasse is not an option. The collaborative success of the assignment, however, is attributable to the students. Beginning during Orientation, they tend to bond with their colleagues in friendships that endure well after law

school. The group dynamic seems to encourage the cooperative effort. In addition, and probably less importantly, the students have been working collaboratively on legal writing in-class assignments since Orientation. The only frictions that the students report concern timing, when a "let's get started right away" type is paired with a procrastinator. Because the assignment is limited in scope, the schedule is imposed by the faculty, and four people are necessary to the ultimate contract, the students deal with the minor frictions.

How much the students actually learn from the project is difficult to measure. Given a sample contract or two involving similar parties and issues, most of the students could create a credible draft contract. They would anticipate the obvious contingencies, but not necessarily the less obvious ones. Most of them do not yet possess the linguistic awareness and precision necessary to skillful contract drafting. While we, the legal writing and contracts faculty members, would like to see the students engage in a searching debate involving contracts principles and precise language, the reality reflects the students' pragmatic desire to create an acceptable contract.

The contract drafting project has been successful in achieving its rather limited goals. The students enjoy the face-to-face negotiation. The bargains reached are reasonable and reflect a middle position that satisfies the important concerns of both parties. All of the contracts demonstrate basic competence. Some of the contracts include thoughtful additional provisions, careful drafting, and the attention to detail that is the mark of good transactional lawyers. The assignment, however, does not purport to substitute for a serious contract drafting or negotiation course.³

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² The other two projects involve a commercial lease agreement and an at-will employment contract.

³ For more information, feel free to contact me, Diana Pratt, Wayne State University Law School, 471 West Palmer, Detroit, MI 48202, (313) 577-4824 or d.v.pratt@wayne.edu.