

CO-TEACHING DEAL-MAKING & DEAL-DRAFTING

OLIVIA FARRAR, HOWARD UNIVERSITY SCHOOL OF LAW
MARTHA ERTMAN, UNIVERSITY OF MARYLAND SCHOOL OF LAW

I. Negotiating the deal —

- Conference participants will be broken into groups and begin negotiating a deal.
- This negotiation is the opening stages of a real negotiation that lawyers for the deal would engage in.
- And this is the negotiation role that we have our students engage in throughout the semester.

II. Reflection —

- Reflecting on the negotiations.
- What's the ultimate goal? — As professors and in our role as master-attorneys, where do we want our students to end up? What's the final work product of such negotiations?
- How do we get there? — As lawyers who love elements and factors and principles, what conceptual components do students need to know? What pedagogical tools should students come away with after completing this course?

III.3 components for a practice-based course —

1. Reality + facts — a true-to-life hypothetical
2. Substantive law — contracts, or estate law, or legislation, or leases, or franchises, or...
3. Skills — drafting to a professional degree

IV. Sample syllabi and rubrics —

- We've included outlines for drafting courses that incorporate these three components.
- 4-credit course focusing on secured transactions and drafting — #1.
- 3-credit course focusing on contracts and drafting — #2.
- Grading rubric – Security Agreement — #3
- Grading rubric — Financing Statement — #4.
- Sample handout — Drafting principles — #5.
- Sample handout — Drafting principles — #6.
- Sample “legislative drafting” exercise — Negotiated Course Rules — #7.

V. Take it on the road —

- Brainstorming a practice-based course of your own
- Grid for building your own course — #8.

UNIVERSITY OF MARYLAND CAREY SCHOOL OF LAW

CONTRACT DRAFTING SEMINAR

PROFS. MARTHA ERTMAN & OLIVIA FARRAR

SPRING 2013

Week ~ Date	— Topic — Drafting Principles	— Topic — Contract & Secured Transaction Principles	Document DUE
1 ~ 1/15	INTRO + SCOPE of the COURSE — <ul style="list-style-type: none"> o Create a non-profit LLC that will purchase a used helicopter + generator; o Create the documents for the transaction — bill of sale; promissory note; security agr't; financing statements. 		
2 ~ 1/22	Organization	LLC law — MD	<i>[negotiate LLC Operating Agreement]</i>
3 ~ 1/29	Ambiguity; Precision.	Sale of goods + secured trans.; UCC Arts. 2 + 9; Group research — market facts.	LLC OPERATING AGREEMENT
4 ~ 2/5	RAVENS SUPERBOWL PARADE		
5 ~ 2/12	Verbs; Formatting contracts.	Law of K's for sale of goods; Warranties; disclaimers. Ending the relationship — Force majeure + damages.	<i>[negotiate Bill of Sale — identify goods, price, rep's + warranties]</i> <i>[negotiate limited damages + force majeure clauses]</i>
6 ~ 2/19	Nouns; Numbers	Interpretive provisions; DR; severability; merger.	BILL OF SALE W. WARRANTY CLAUSES <i>[negotiate DR; merger; modification; waiver; severability]</i>
7 ~ 2/26	Conditions; Exceptions	Secured financing — UCC Art. 9. Group research — UCC files.	BILL OF SALE'S BOILERPLATE CLAUSES — DAMAGES, MERGER, MODIFICATION, WAIVER, + DR CLAUSES. GUEST LECTURER — UMD MEDICAL CENTER ATTORNEY
8 ~ 3/5	Adjectives; Qualifiers.	Promissory Notes; Security Agr'ts.	<i>[negotiate Promissory Note + Security Agr't — identify collateral + obligation]</i>
<i>~ Spring Break [3/9 - 3/17] ~</i>			
9 ~ 3/19	Connectors; Punctuation.	Consequences of default in a secured transaction — default, foreclosure + commercially reasonable disposition.	PROMISSORY NOTE + SECURITY AGREEMENT W. CLAUSES IDENTIFYING PARTIES, COLLATERAL + OBLIGATION <i>[negotiate representations + events of default clauses]</i>
10~3/26	Layout; Format.	Perfecting a security interest to protect creditor's priority over other creditors.	<i>[negotiate acceleration + commercially reasonable disposition]</i>
11 ~ 4/2	Review + improving.	Choice of law; complying w. state + federal perfection req's	SECURITY AGREEMENT W. CLAUSES RE: EVENTS OF DEFAULT, ACCELERATION + COMMERCIALY REASONABLE DISPOSITION <i>[negotiate financing statements for helicopter + generator]</i>
12 ~ 4/9	Review + improving.	Legal ethics in drafting	GUEST LECTURER — ETHICS PROFESSOR
13~4/16	Creating the portfolio.		FINANCING DOCUMENTS
4/26	PORTFOLIO — MEMO TO PARALEGAL, RE: FILING; LLC OPERATING AGREEMENT; BILL OF SALE; PROMISSORY NOTE; SECURITY AGREEMENT; FINANCING DOCUMENTS.		

HOWARD UNIVERSITY SCHOOL OF LAW

LEGAL DRAFTING – SUMMER 2013

PROF. OLIVIA FARRAR

WEEK ~ DATE	– TOPIC – DRAFTING PRINCIPLES	– TOPIC – CONTRACT COMPONENTS	DOCUMENT DUE
Wk. 1 5/25/2013	Organization; Precision + Concision.	Formatting a Contract; Drafting “facts”.	
Wk. 2 6/1/2013	Precision; Verbs.	Most-favored customer + Confidentiality + Interpretive clauses.	CONTRACT [10%]
Wk. 3 6/8/2013	Nouns + definitions; Numbers + Money.	Dispute resolution + Force majeure + Indemnification.	MOST-FAVORED CUSTOMER CLAUSE + CONFIDENTIALITY CLAUSE + 4 INTERPRETIVE CLAUSES [10%]
Wk. 4 6/15/2013	Adjectives + Adverbs; Conditions + Exceptions.	Amending a contract. REVIEW — Organization + format; “Facts”; Endings for a contract.	DISPUTE RESOLUTION CLAUSE + FORCE MAJEURE CLAUSE + INDEMNIFICATION CLAUSE [10%]
Wk. 5 6/22/2013	And + or; Punctuation; Layout + Typography.	Settlement agreements. LLC Operating agreements.	AMENDED CONTRACT [10%] COLLECTIVE DOCUMENT — HUSL STUDENT AFFAIRS GUIDE [10%]
Wk. 6 6/29/2013		Non-compete agreements; Issues in online consumer K’s – Plain language; Formatting; DR; privacy.	SETTLEMENT AGREEMENT [10%] LLC OPERATING AGREEMENT [10%]
Wk. 7 7/6/2013		Cognition issues in drafting. Legal ethics for drafting. Negotiation theory + practice.	NON-COMPETE AGREEMENT [10%] ONLINE CONSUMER CONTRACT [10%] COLLECTIVE DOCUMENT — HRG PROCEDURES [10%]

RUBRIC — Elements of a Security Agreement

Title

Preamble (Parties' names)

Recitals [if you include them, they'd go after the preamble, BUT they're not mandatory].

IF you include them, make sure that they don't conflict with the rep's/warranties or any other substantive provision.

Definitions [this section can go at the very beginning of the document, or after the rep's/warranties, or at the beginning of the Interpretive clauses].

Action Sections

Create SI:

- Grant language; Collateral identified & Obligation identified
- Focus strongly on the identification of the collateral and make sure that this description matches what you have in the rep's/warranties and events of default.
- Cross-reference the other relevant documents in the deal, or incorporate them by reference.

Covenants

- pay principal indebtedness,
- notify Secured Party if "incident," "accident," etc.

Representations and warranties

i.e., where collateral kept

Make sure that the rep's/warranties correspond to the events of default in a relevant way.

Organize the rep's/warranties by party.

Remedial Provisions

- Define events of default
- Specify consequences of default (i.e., acceleration, D collect collateral for SP)
- Define commercially reasonable sale of collateral
- indemnification,
- Attorneys fees

Filing Authorization (authorize Secured Party to file Financing Statement & other documents)

Miscellaneous [can crib from Bill of Sale for final portfolio]

- notices,
- NOM,
- merger,
- anti-waiver,
- choice of law, etc.

Signatures

Name correct + Agency identified

Exhibits

Contract Drafting

Spring 2013

Profs. Ertman & Farrar

Rubric for FAA & UCC-1 Financing Statements

April 21, 2013

Student: _____

Prof.: _____

FAA Aircraft Security Agreement

Name & address of Debtor

Name & address of Secured Party

Date

Description of collateral (FAA Reg #, mfgr, model, and serial #)

Description of Debt Secured

Debtor's Signature

Debtor's name correct & Agency identified

UCC-1 Financing Statement

Name, Address, type of Organization & Organization number of Debtor

[Debtor's name must be correct]

Name & Address of Secured Party

Description of collateral

AMBIGUITY — SOURCES + SOLUTIONS

MODIFYING CLAUSES —

WHY they're ambiguous — it's not clear what they attach to

HOW to solve → **CUT or ATTACH** — insert commas or divide into separate sentences [CUT apart]; add “attaching words” [ATTACH explicitly]; move the modifier [ATTACH by proximity]

Tenant shall not make modifications or repairs in excess of \$5000.

If Acme rejects any Asset within 10 days the Seller shall reimburse Acme the deposit on that Asset.

“OR” + “AND” —

WHY they're ambiguous — “or” might mean “and”; can have a distributive or a cumulative effect

HOW to solve → add **clarifying terminology**, e.g. “either”; “but not both”; “or both”; “all”; “any” *etc.*

I give \$100,000 to be divided equally between my children and my grandchildren.

A will giving: “the residue of my estate to my niece, Diane Hall and/or grandniece, Carly Hall.”

PUNCTUATION [ESP. COMMAS] —

WHY they're ambiguous — our punctuation rules are flexible, and frequently not followed

HOW to solve → use a serial comma [where appropriate]; divide into separate sentences; enumerate.

I give my stocks equally to my sister Jane, my brother John and my cousin Ophelia.

This agreement shall continue in force for a period of five years from the date it is made, and thereafter for successive five-year terms, unless and until terminated by one year prior notice.

PASSIVE VOICE —

WHY it's ambiguous — because it only specifies a **RESULT**, not **WHO** must perform the action

HOW to solve → if it's important **WHO** must act → **name the actor**

The husband's car collection shall be sold and the net proceeds divided equally between the spouses.

The concrete admixture shall be in compliance with all municipal regulations.

UNDER-SPECIFICITY —

WHY it's ambiguous — *whether it's ambiguous depends on the context*

HOW to solve → **define** carefully in the Definitions section; use a **more specific term**

If I have not recovered within 3 months, I want all medical procedures terminated.

I give \$12million to Jim Brown for taking care of my dog, Fifi.

OVER-SPECIFICITY —

WHY it's ambiguous — it's unclear whether the specified terms are **exemplary or exclusive**

HOW to solve — if the terms are **exemplary** → find an all-inclusive term; if they're **exclusive** → say so

It is a felony for any drunk person to drive a car, truck, trailer or tractor on the highway.

My trustee has full authority over my stocks, bonds, and bank accounts.

VERBS

- Core-action verbs — these verbs establish what **type of action** is being done + they are rarely problematic
- Modal verbs — these auxiliary verbs establish the **level of obligation**
 - these are the “mini-verbs” in front of the core-action verbs [e.g. “will”, “could”, “may”, “shall” etc.]
 - despite their small size and subsidiary location in the sentence, modal verbs are the **most powerful** but also the **most problematic** words in the entire document

— *create a LEXICON* —

If you mean ...	→ then say ...
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DUTY

- someone **MUST** do something
- will a penalty or liability follow from **NOT** doing it?

MUST

WILL

SHALL

MAY NOT [meaning duty to NOT]

RIGHTS

- someone can **CHOOSE** to do or not do something
- will a penalty or liability follow from **NOT** doing it?

MAY

[HAS THE RIGHT TO]

[IS ENTITLED TO]

[IS NOT REQUIRED TO]

DECLARATION of legal status quo

- a mandatory, ongoing legal situation or relationship
- use for **GENERAL** interpretive issues that relate to entire document
 - do **NOT** use if the duty falls on particular party
- use for definitions

IS

present indicative of core-verb

MEANS [used for definitions]

→ **AVOID** —

Passive voice — it's ambiguous **WHO** has the duty or choice

“Should” — it's ambiguous **WHAT DUTY** is being imposed because it has 3 core meanings:

1. morally desirable [“People should tell the truth.”]
2. must [“All copies should be submitted to the Clerk of the Court.”]
3. if [“Should you need assistance, please call the operator.”]

— EXAMPLES —

DUTIES V. RIGHTS V. STATUS QUO

Smoking *shall only be allowed* in designated areas.

This agreement *shall be governed by and interpreted* according to the laws of Vermont.

The concrete admixture *shall be* in compliance with all municipal regulations.

Managing partners *shall have authority* to bind the partners in the following situations.

"Demised premises" *shall mean* the property leased to the tenant, including all fixtures and appliances.

The Corporation *shall issue* shares under such terms and at such times as it *shall deem reasonable*.

Confidential information *shall be marked* in a manner to put a reasonable person on notice as to its confidentiality.

PASSIVE

If the Web Designer discloses any of the Law Firm's Confidential Information, the Law Firm is entitled to indemnification, injunctive relief and attorney's fees.

BEWARE "MISSING-ACTIONS" — is there a missing precursor action?

Appeals *shall be filed* within 30 days of a final order.

The patient's primary physician *shall approve* the patient's request for terminal medication.

Both parties *shall agree to modify* this Agreement.

At the end of the 12-month Servicing Agreement, the parties *shall enter* a new Servicing Agreement.

SmartPhones *will pay* \$5000 for the domain name www.smartphones.com .

MacPro will submit the Final Draft of the Website for written approval no later than May 15, 2014, and the Website will be made available for public access no later than May 22, 2014.

A "force majeure event" is an event that makes it impossible for a party to perform, *despite having taken* all reasonable precautions.

A "force majeure event" is an event that the non-performing party is *unable to avoid through the exercise* of due diligence.

SUPPLEMENTAL AGREEMENT

This Supplemental Agreement is dated March 12, 2013, and is between Olivia Farrar, a resident of the District of Columbia (“Professor”) and Anna Bruton, a resident of Maryland, Bianca Manns, a resident of New York, Brandon Burrell, a resident of California, Roselle Oberstein, a resident of Maryland, Grace Brooks, a resident of the District of Columbia, Pamela Okafor, a resident of the District of Columbia, Hannah Newkirk, a resident of District of Columbia, and Vanessa Tabler, a resident of Maryland (“Students” if plural, and “Student” if singular).

The parties therefore agree as follows:

1. Pre-existing agreement.

- a. Professor and Students are parties to an existing agreement, namely the Syllabus for Legal Drafting, being taught during the Spring 2013 semester at the Howard University School of Law (“Syllabus”).
- b. The provisions of this Supplemental Agreement supersede any contrary provision in the Syllabus. All other terms in the Syllabus remain in full force and effect.

2. Discretionary Assignments

- a. Each Student must submit via email, no later than 11:59 PM EST on March 17, 2013, any two of the following three assignments:
 1. the LLC Operating Agreement;
 2. the Non-Compete Agreement; or
 3. the Electronic Consumer Contract.
- b. Professor shall not provide any additional grade points to any Student who completes all three of the documents listed in Section 2a.

3. Attendance

Students are deemed on time for class as long as they arrive no later than 30 minutes after the start of class.

The parties signed and delivered this Supplemental Agreement on March 12, 2013.

Date: _____

Olivia Farrar

Date: _____

Anna Bruton

Date: _____

Brandon Burrell

Date: _____

Vanessa Tabler

Date: _____

Roselle Oberstein

Date: _____

Hannah Newkirk

Date: _____

Grace Brooks

Date: _____

Pamela Okafor

Date: _____

Bianca Manns

XYZ SCHOOL OF LAW

ABC DRAFTING –

WEEK	– TOPIC – Skill	– TOPIC – Substantive law + Document Element	DOCUMENT DUE
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			