Assessment Techniques in Statutory or Transactional Courses

Using Drafting as an Assessment Tool

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Syllabus Synopsis and Overview

Legislation
Spring 2014
Professor J. Lyn Entrikin

The traditional law school curriculum is infused with a litigation mindset. The Landgellian approach to legal education uses the judicial appellate opinion as the primary source from which students are taught to analyze and synthesize the law. Even courses with a strong statutory component rely primarily on judicial decisions to introduce students to statutory interpretation.

But contemporary lawmaking occurs in a wide range of settings well beyond the courtroom. Legislation, administrative rules and regulations, and court rules all play an increasingly significant role in law practice. Nearly every legal problem a new lawyer will confront in law practice will involve some form of statutory or regulatory analysis. Yet the law school curriculum remains steeped in the Langdellian model.[1]

For several years I have been experimenting with creating a "hybrid" Legislation course. My goal is to introduce law students in to the integration of substantive doctrine, process and procedure, and drafting skills, all in a legislative context.

The **substantive doctrine** of legislation includes state and federal constitutional constraints on the legislative branch, including their substantial differences. Legislative doctrine also incorporates the various jurisprudential approaches courts employ when interpreting statutes, as well as the traditional canons of statutory interpretation. The doctrine of legislation includes the fundamental judicial determination whether a legislative or regulatory text is ambiguous or unambiguous, and why that determination is critical to the judicial interpretation of texts drafted by legislative or executive branch officials.

Legislative process addresses the complex enactment process, and how that process informs the ultimate content of original and amendatory legislation. Legislative procedure relies not only on constitutional and statutory rules of procedure, but also the rules of the legislative branch itself. For example, Senate filibuster and cloture rules are a product not of constitutional or statutory constraints on the process, but rather the Senate's own procedural rules and that chamber's longstanding customs and traditions.

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[1] *See generally* Muriel Morisey, *Liberating Legal Education from the Judicial Model*, 27 Seton Hall Legis. J. 231 (2003).

Finally, the product of the legislative process is the legislation itself. **Drafting skills** are an important component of the course, and learning to draft clear statutory language teaches students to anticipate and prevent problems of ambiguity and vagueness. The related skill of amending and redrafting poorly drafted statutes to clarify legislative meaning enables students to appreciate the challenges courts undertake in interpreting general statutes to solve fact-specific legal disputes. And drafting itself is an essential skill every competent lawyer should master.

Integrating all three aspects of the course has been an ongoing challenge. But the students gain a valuable perspective in this course on an important aspect of the lawmaking function that more narrowly focused courses do not provide.

My assessment process for the course continues to evolve. I have experimented with student portfolios, exams modeled after the Multistate Performance Exam (MPT), various drafting assignments, and legislative projects. Students are generally asked to compile a contemporaneous "legislative history" on a substantial pending issue, major legislation, or a group of related bills. I consistently include a series of increasingly challenging drafting exercises on which I provide individualized feedback, and students are generally asked to revise the drafts.

The following excerpts from my current syllabus illustrate the core aspects of the course and my assessment approach.

Course Description. This two-credit course surveys statutory law, including the legislative process, principles of legislative drafting, and methods of statutory interpretation. A portion of the graded work in the class will consist of short drafting exercises and assignments.

Course Objectives: At the conclusion of this course, students who successfully complete all requirements will be able to:

- Understand the increasingly significant role of legislation in the U.S. legal system;
- Understand the theoretical and pragmatic aspects of separation of powers;
- Understand and explain the significant differences in legislative and judicial decision-making;
- Understand the legislative process, including both the lawmaking and oversight functions;
- Understand the sources of statutory law, how they compare, and which are most authentic;
- Understand the significant constitutional constraints on legislative lawmaking and the major differences between federal and state constitutional constraints on the legislative process;
- Understand the practical aspects of judicial review of statutes and regulations;
- Identify, understand, and apply statutory and regulatory interpretation techniques;
- Identify the sources and consequences of statutory ambiguity and vagueness; and
- Demonstrate effective statutory drafting skills, including techniques for avoiding ambiguity.

Required Texts:

1. Linda D. Jellum & David Charles Hricik, *Modern Statutory Interpretation: Problems, Theories, and Lawyering Strategies* (Carolina Academic Press, 2d ed. 2009).
2. Arthur J. Rynearson, *Legislative Drafting Step-by-Step* (Carolina Academic Press 2013).

3. Walter J. Oleszek, *Congressional Procedures and the Policy Process* (CQ Press, (9th ed. 2014).

Drafting Exercises. Several drafting exercises will be assigned throughout the semester to teach you the basic skills of drafting legislation. I will review your exercises and return them to you with a point score. I will allocate a varying number of points for each assignment based upon difficulty. In combination, the drafting exercises will be worth up to 50 points toward your final course grade. Extra credit may be awarded for outstanding work on drafting assignments.

Legislative Project. The legislative process is most meaningful for students who take a special interest in a legislative issue. You will be expected to identify a significant legislative issue pending either in the U.S. Congress or in the Arkansas Legislature to follow throughout the semester. The Governor's State of the State address and the President's State of the Union speech are excellent sources for ideas. You will gather relevant legislative documents to compile for your legislative project, which may include one or several different bills relating to the same issue. As the bill or bills make their way through the legislative process, you will be expected to monitor the progress, track any amendments, and keep in touch with appropriate committee or staff members to report on legislative activity.

Your compiled documents may include anything related to the legislative proposal, but must include any bills introduced, proposed amendments, legislative journals, engrossed and enrolled bills, and if applicable, veto messages. Your project may also include policy papers, bill explanations, legislative testimony, newspaper clippings, and even political cartoons on the legislative topic. The completed project should reflect a comprehensive, contemporaneous legislative history of the issue as it takes shape during the semester.

In April, each student will be asked to give a 20-minute presentation to the class on the progress and current status of your legislative issue. You should prepare a PowerPoint or other visual presentation, which may include video clips, documents, and other images to illustrate your work. The presentation will be evaluated by the class and will earn up to 50 points toward your final grade.

Your final legislative project is due no later than noon on April 28, the last day of Spring Semester. Examples of prior legislative projects will be placed on reserve.

Final Grade. Your final letter grade for the course will be determined based on the following possible points:

Drafting Exercises	50 points
Legislative Project	100 points
Class Presentations	50 points
Class Participation and Preparation	50 points
Total Points Possible:	**250 points**

A maximum of 250 points is possible in this course. Final grades will be assigned at the end of the semester consistent with the law school's grading policy.

MEMORANDUM

To: Legislation Students
From: Professor Entrikin
Re: Drafting Exercise No. 1
Date: Feb. 5, 2014

Attached is a copy of a H.R. 1308, a bill that is currently awaiting floor action in the House. The short title of the bill is the "Endangered Salmon and Fisheries Predation Prevention Act."

Congressman Tom Cotton dislikes salmon but happens to be very fond of California sea lions. He has asked us to draft a floor amendment to make several changes to the bill as reported by the Committee. Following the examples and instructions in Chapters 1 and 2 of the Rynearson textbook, please draft **perfecting floor amendments** to be offered *en bloc* to H.R. 1308 to make the following changes to the bill in its current form:

1. Change the short title to the "Preventing the Killing of Innocent Wild Sea Lions Act."
2. Omit the second congressional finding.
3. Change Section 3 to expressly prohibit the Secretary from issuing any permits for the "lethal taking" of sea lions.
4. Change the limit on the number of lethal takings for the duration of any such permit from 10 to 0.
5. Change the bill so that Section 102(2)(C) of the National Environmental Policy Act of 1969 does apply.
6. Change the definition of "eligible entity" to omit each listed state, Indian tribe, and commission. Instead, define the term "eligible entity" to include only the "State of California" and the "California Sea Lion Safety Protection Commission."
7. Define "lethal taking" for purposes of the Act to specifically mean "killing."
8. Change the Sense of Congress provision in Section 4 as follows:
    a. Delete the first subsection entirely.
    b. Change the second subsection to encourage training of permit holders in sea lion preservation (rather than "wildlife management").

c. Change the last subsection to say that the government should stop funding any measures (whether lethal or nonlethal) that would victimize sea lions.

9. Add a new section that authorizes appropriations for fiscal years 2014, 2015, and 2016 in the amount of $10,000,000 annually to fund sea lion preservation activities.
10. If you can think of anything else in the bill that could be amended to be fully consistent with Congressman Cotton's rather apparent purpose, please feel free to include it in the floor amendment. However, if you decide to include any other provisions or changes, please write a short memo to me explaining exactly what you did, as well as your reasoning. You are not required to do anything more than the changes listed in Nos. 1-9.

If you have questions about this exercise, please consult the reading assignments in the Rynearson textbook and review the Chapter 2 exercises carefully, along with the answers in the back of the textbook. Your assigned reading addresses everything you need to complete this assignment. Please do not do any outside research.

Authorized (and Unauthorized) Consultation: This assignment is for academic credit, and the Code of Academic Conduct therefore fully applies. You are encouraged to **discuss** this exercise with Professor Entrikin or with any student currently enrolled in Professor Entrikin's legislation class. You **may not discuss** the assignment with anyone else, including other students, law professors, roommates, spouses, friends, parents, or attorneys. **You may not show your written work to anyone else but me.**

Your exercise is due Wednesday, February 12, 2014, at 7:00 p.m.

U.S. GOVERNMENT INFORMATION GPO

IB

Union Calendar No. 246

113TH CONGRESS
2D SESSION

H. R. 1308

[Report No. 113–330]

To amend the Marine Mammal Protection Act of 1972 to reduce predation on endangered Columbia River salmon and other nonlisted species, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 21, 2013

Mr. HASTINGS of Washington (for himself, Mr. WALDEN, Mr. SCHRADER, Mr. SIMPSON, and Ms. HERRERA BEUTLER) introduced the following bill; which was referred to the Committee on Natural Resources

JANUARY 23 (legislative day, JANUARY 21), 2014

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

A BILL

To amend the Marine Mammal Protection Act of 1972 to reduce predation on endangered Columbia River salmon and other nonlisted species, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Endangered Salmon and Fisheries Predation Prevention Act".

SEC. 2. FINDINGS.

The Congress finds the following:

(1) There are 13 groups of salmon and steelhead that are listed as threatened species or endangered species under the Endangered Species Act of 1973 that migrate through the lower Columbia River.

(2) The people of the Northwest United States are united in their desire to restore healthy salmon and steelhead runs, as they are integral to the region's culture and economy.

(3) The Columbia River treaty tribes retain important rights with respect to salmon and steelhead.

(4) Federal, State, and tribal governments have spent billions of dollars to assist the recovery of Columbia River salmon and steelhead populations.

(5) One of the factors impacting salmonid populations is increased predation by marine mammals, including California sea lions.

(6) The population of California sea lions has increased 6-fold over the last 3 decades, and is currently greater than 250,000 animals.

(7) In recent years, more than 1,000 California sea lions have been foraging in the lower 145 miles of the Columbia River up to Bonneville Dam during the peak spring salmonid run before returning to the California coast to mate.

(8) The percentage of the spring salmonid run that has been eaten or killed by California sea lions at Bonneville Dam has increased 7-fold since 2002.

(9) In recent years, California sea lions have with greater frequency congregated near Bonneville Dam and have entered the fish ladders.

(10) These California sea lions have not been responsive to extensive hazing methods employed near Bonneville Dam to discourage this behavior.

(11) The process established under the 1994 amendment to the Marine Mammal Protection Act of 1972 to address aggressive sea lion behavior is protracted and will not work in a timely enough manner to protect threatened and endangered salmonids in the near term.

(12) In the interest of protecting Columbia River threatened and endangered salmonids, a tem-

porary expedited procedure is urgently needed to allow removal of the minimum number of California sea lions as is necessary to protect the passage of threatened and endangered salmonids in the Columbia River and its tributaries.

(13) On December 21, 2010, the independent Pinniped-Fishery Interaction Task Force recommended lethally removing more of the California sea lions in 2011.

(14) On August 18, 2011, the States of Washington, Oregon, and Idaho applied to the National Marine Fisheries Service, under section 120(b)(1)(A) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1389(b)(1)(A)), for the lethal removal of sea lions that the States determined are having a "significant negative impact" on the recovery of Columbia River and Snake River salmon and steelhead.

(15) On September 12, 2011, the National Marine Fisheries Service announced it was accepting the States' application for lethal removal of sea lions and that it would reconvene the Pinniped-Fishery Interaction Task Force to consider the States' application. This Act will ensure the necessary authority

for permits under the Marine Mammal Protection Act of 1972 to be issued in a timely fashion.

(16) During a June 14, 2011, hearing, the Committee on Natural Resources of the House of Representatives received testimony from State and tribal witnesses expressing concern that significant pinniped predation of important Northwest fish resources other than salmonids is severely impacting fish stocks determined by both Federal and State fishery management agencies to be at low levels of abundance, and that this cannot be addressed by section 120 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1389), which as in effect before the enactment of this Act restricted control of predatory pinnipeds' impact only with respect to endangered salmonids.

SEC. 3. TAKING OF SEA LIONS ON THE COLUMBIA RIVER AND ITS TRIBUTARIES TO PROTECT ENDANGERED AND THREATENED SPECIES OF SALMON AND OTHER NONLISTED FISH SPECIES.

Section 120 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1389) is amended by striking subsection (f) and inserting the following:

"(f) TEMPORARY MARINE MAMMAL REMOVAL AUTHORITY ON THE WATERS OF THE COLUMBIA RIVER OR ITS TRIBUTARIES.—

"(1) REMOVAL AUTHORITY.—Notwithstanding any other provision of this Act, the Secretary may issue a permit to an eligible entity authorizing the intentional lethal taking on the waters of the Columbia River and its tributaries of sea lions that are part of a healthy population that is not listed as an endangered species or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), to protect endangered and threatened species of salmon and other nonlisted fish species.

"(2) PERMIT PROCESS.—

"(A) IN GENERAL.—An eligible entity may apply to the Secretary for a permit under this subsection.

"(B) DEADLINE FOR CONSIDERATION OF APPLICATION.—The Secretary shall approve or deny an application for a permit under this subsection by not later than 30 days after receiving the application.

"(C) DURATION OF PERMIT.—A permit under this subsection shall be effective for no

more than one year after the date it is issued, but may be renewed by the Secretary.

"(3) LIMITATIONS.—

"(A) LIMITATION ON PERMIT AUTHORITY.—Subject to subparagraph (B), a permit issued under this subsection shall not authorize the lethal taking of more than 10 sea lions during the duration of the permit.

"(B) LIMITATION ON ANNUAL TAKINGS.—The cumulative number of sea lions authorized to be taken each year under all permits in effect under this subsection shall not exceed one percent of the annual potential biological removal level.

"(4) DELEGATION OF PERMIT AUTHORITY.—Any eligible entity may delegate to any other eligible entity the authority to administer its permit authority under this subsection.

"(5) NEPA.—Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) shall not apply with respect to this subsection and the issuance of any permit under this subsection during the 5-year period beginning on the date of the enactment of this subsection.

"(6) SUSPENSION OF PERMITTING AUTHORITY.—

"If, 5 years after enactment, the Secretary, after consulting with State and tribal fishery managers, determines that lethal removal authority is no longer necessary to protect salmonid and other fish species from sea lion predation, may suspend the issuance of permits under this subsection.

"(7) ELIGIBLE ENTITY DEFINED.—In this subsection, the term 'eligible entity' means each of the State of Washington, the State of Oregon, the State of Idaho, the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Nation, and the Columbia River Inter-Tribal Fish Commission".

SEC. 4. SENSE OF CONGRESS.

It is the sense of the Congress that—

(1) preventing predation by sea lions, recovery of listed salmonid stocks, and preventing future listings of fish stocks in the Columbia River is a vital priority;

(2) permit holders exercising lethal removal authority pursuant to the amendment made by this Act should be trained in wildlife management; and

(3) the Federal Government should continue to fund lethal and nonlethal removal measures for preventing such predation.

SEC. 5. TREATY RIGHTS OF FEDERALLY RECOGNIZED INDIAN TRIBES.

Nothing in this Act or the amendment made by this Act shall be construed to affect or modify any treaty or other right of any federally recognized Indian tribe.

Drafting Exercise No. 1 – Sample Answer

AMENDMENT NO. _____ Ex. _____ Calendar No. _____

Purpose: To substitute a sea lion preservation program and to authorize funding.

IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 113th Cong. 2nd Sess.

H.R. 1308

To amend the Marine Mammal Protection Act of 1972 and reduce predation on endangered Columbia River salmon and other nonlisted species, and for other purposes.

_____

( ) Referred to Committee on _____
and ordered to be printed.
( ) Ordered to lie on the table and to be printed.

Amendments intended to be proposed by Representative Cotton

Viz:

1 On page 3, lines 4-5, strike "Endangered Salmon and Fisheries Predation Prevention Act" and insert "Preventing the Killing of Innocent Wild Sea Lions Act".
2 On page 3, strike all in lines 13-16.
3 On page 3, line 16, strike "(3)" and insert "(2)".
4 On page 3, line 19, strike "(4)" and insert "(3)".
5 On page 3, line 22, strike "(5)" and insert "(4)".
6 On page 4, line 1, strike "(6)" and insert "(5)".
7 On page 4, line 4, strike "(7)" and insert "(6)".
8 On page 4, line 9, strike "(8)" and insert "(7)".
9 On page 4, line 12, strike "(9)" and insert "(8)".
10 On page 4, line 15, strike "(10)" and insert "(9)".
11 On page 4, line 18, strike "(11)" and insert "(10)".
12 On page 4, line 24, strike "(12)" and insert "(11)".
13 On page 5, line 6, strike "(13)" and insert "12)".
14 On page 5, line 10, strike "(14)" and insert "(13)".
15 On page 5, line 19, strike "(15)" and insert "(14)".
16 On page 6, line 3, strike "(16)" and insert "(15)".
17 On page 7, line 5, insert "not" after "may"
18 On page 8, line 7, strike "10" and insert "O".

19 On page 8, line 21, strike "shall not apply" and insert "applies".
20 On page 9, line 12, strike "California, the State of Oregon, the State" and insert "California".
21 On page 9, strike all in lines 13-16.
22 On page 9, strike all in lines 17-18 and insert "and the California Sea Lion Safety Protection Commission.".
23 On page 9, after line 18, add a new subsection to read as follows:
"(8) LETHAL TAKING DEFINED. In this subsection, the term "lethal taking" means killing."
24 On page 9, strike all in lines 21-24.
25 On page 10, line 1, strike "(2)" and insert "(1)".
26 On page 10, line 3, strike "wildlife management;" and insert "sea lion preservation;".
27 On page 10, line 4, strike "(3)" and insert "(2)".
28 On page 10, lines 4-5, strike "continue to fund" and insert "discontinue funding for".
29 On page 10, lines 5-6, strike "preventing such predation." and insert "victimizing sea lions."
30 On page 10, after line 11, insert a new subsection to read as follows:
"Sec. 6. AUTHORIZATION OF APPROPRIATIONS

There is authorized to be appropriated to the Secretary $10,000,000 for each of the fiscal years 2014, 2015, and 2016 to fund sea lion preservation activities."

NOTE: In the event of adoption of the perfecting amendments proposed by Mr. Cotton, an additional amendment will need to be prepared to amend the long title, as follows:

Amend the title to read as follows: "A bill to amend the Marine Mammal Protection Act of 1972 to reduce predation of sea lions."

Legislation
Professor Entrikin
Spring 2014

Student Name _____

Drafting Exercise No. 1

Perfecting Floor Amendments - House Bill

Grading Criterion	Very Good	Good	Fair	Needs Work	Comments
Change short title					
Omit second finding					
Change section 3 to prohibit permits for lethal taking					
Change limit on number of lethal takings from 10 to 0					
Amend bill so § 102(2)(C) of NEPA does not apply					
Change definition of "eligible entity" as instructed					
Define "lethal taking" as "killing"					
Change sense of Congress to delete first subsection.					
Change sense of Congress to encourage training of permit holders in sea lion preservation.					
Change sense of Congress to stop funding measures that victimize sea lions.					
Add section authorizing appropriations of $10 million annually for fiscal years 2014-16					
Uses appropriate format as shown in Rynearson textbook					
Uses appropriate punctuation as shown in Rynearson textbook					
Other					
Total Score (10 possible)					

MEMORANDUM

To: Legislation Students
From: Professor Entrikin
Re: Drafting Exercise No. 2
Date: Feb. 19, 2014

We have a client, Carl Batter, who has consulted us about an employment matter. He is a high school drama teacher at Pine Bluff High School, where he has been employed for 32 years.

Mr. Batter is worried because he was recently diagnosed with Attention-Deficit Hyperactivity Disorder (ADHD). He went to New York last fall to visit some friends who were performing in an off-Broadway theater production. While there, they suggested he consult with a specialist because one of them had been diagnosed recently with ADHD, and his friends think he has similar symptoms. The specialist diagnosed Mr. Batter with the hyperactive version of ADHD.

Mr. Batter has done some Google research and is concerned because he is afraid he may not be able to keep his job.

Refer to Rynearson Exercise 3-B as an example.

Your task is to draft an appropriate legislative vehicle to amend the relevant language of Title 42 of the United States Code, §§ 12101 *et seq.* to accomplish the following:

1. Expand the definition of "disability" so that the impairment may apply to <u>any</u> life activity (not just a "major" one).

2. Amend the definition of "disability" to provide that attention-deficit hyperactivity disorder (ADHD) qualifies as a disability as a matter of law, so long as it substantially limits <u>any</u> life activity.

3. Amend the prohibition against discrimination on the basis of disability in what is now 42 U.S.C. § 12112 so it expressly prohibits employers from discharging otherwise qualified employees just because they have been diagnosed with ADHD.

4. Make any appropriate conforming amendments necessary.

5. Select an appropriate legislative vehicle for the amendments.

If you have questions about this exercise, please consult the reading assignments in the Rynearson textbook and review the Chapter 3 exercises carefully, along with the answers in the back of the textbook. You will need to consult the relevant statutes to identify the appropriate "true" law to amend.

Authorized (and Unauthorized) Consultation: This assignment is for academic credit, and the Code of Academic Conduct therefore fully applies. You are encouraged to **discuss** this exercise with Professor Entrikin or with any student currently enrolled in Professor Entrikin's legislation class. You **may not discuss** the assignment with anyone else, including other students, law professors, roommates, spouses, friends, parents, or attorneys. **You may not show your written work to anyone else but me.**

Your drafting exercise is due Wednesday, February 26, 2014, at 7:00 p.m.

A BILL

To amend the Americans with Disabilities Act of 1990 to expand the definition of "disability" in and to prohibit the discharge of otherwise qualified employees solely based on a diagnosis of attention-deficit hyperactivity disorder.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Attention-Deficit Hyperactivity Disorder Fair Employment Act of 2014".

SEC. 2. PURPOSE.

The purpose of this Act is to protect otherwise qualified employees from discharge on the basis of a diagnosis with attention-deficit hyperactivity disorder.

SEC. 3. DISABILITY DEFINED.

(a) DEFINITION OF DISABILITY. – Section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102) is amended—
  (1) in paragraph (1)(A), after "impairment", by adding a comma and the following "including attention-deficit hyperactivity disorder";
  (2) also in paragraph (1)(A), by striking "major";
  (3) in paragraph (2), by striking "MAJOR" from the heading;
  (4) in paragraph (2)(A), by striking "major";
  (5) in paragraph (2)(B), by striking "major" where it appears before "life activity";
  (6) in paragraph (3)(A), by striking "major";
  (7) in paragraph (4)(C), by striking "major" both places it appears;
  (8) in paragraph (4)(D), by striking "major";
  (9) in paragraph (4)(E)(i), by striking "major"; and
  (10) in paragraph (4)(E)(ii), by striking "major".

SEC. 4. DISCRIMINATION ON THE BASIS OF DISABILITY.

(a) ON THE BASIS OF DISABILITY. – Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—
  (1) in subsection (b), by adding the following new paragraph after paragraph (7):
  "(8) discharging an otherwise qualified employee solely because the employee has been diagnosed with attention-deficit hyperactivity disorder.".

SEC. 5. EFFECTIVE DATE.

This Act and the amendments made by this Act take effect retroactively to February 26, 2014, to include any otherwise qualified individual who was an employee on that date.

Legislation
Professor Entrikin
Spring 2014

Student Name _____

Drafting Exercise No. 2

Statutory Amendments – Bill to Amend ADA

Grading Criterion	Very Good	Good	Fair	Needs Work	Comments
Long title					
Appropriate short title					
Enactment clause					
Refers accurately to the "true" law to amend – ADA of 1990.					
Expands definition of "disability" to include impairment of any life activity					
Defines "disability" to include ADHD as long as it impairs any life activity					
Amends what is now 42 U.S.C. § 12112 (ADA Section 102) to expressly prohibit discharging qualified employees diagnosed with ADHD.					
Makes any appropriate conforming amendments.					
Effective date.					
Appropriate legislative vehicle.					
Uses appropriate amendment format as shown in Rynearson textbook (cut-and-bite or restatement)					
Uses appropriate punctuation as shown in Rynearson examples					
Other					
Total Score (10 possible)					

MEMORANDUM

To: Legislation Students
From: Professor Entrikin
Re: Drafting Exercise No. 3
Date: March 5, 2014

Please draft a complete legislative vehicle for introduction by Congressman Steve Womack in the House of Representatives. The sponsor wants to accomplish the following policy goals, and he has instructed us to include certain other administrative provisions as well.

Devil's Den State Park, located in northwest Arkansas, includes one of the best-preserved sites in the country that once served as a Civilian Conservation Corps (CCC) camp during the Great Depression. As you may know, the CCC was an initiative of Franklin D. Roosevelt to provide jobs, training, and education for young, able-bodied men. Congressman Womack wants the federal government to ensure that what is now Devil's Den State Park is properly preserved for posterity, either as a National Park or a National Historic Site.

Please draft the legislation to accomplish his goal, including the following provisions:

- Include a long title and a short title drafted to persuade other members of Congress to consider the proposal favorably.
- Include relevant findings and a statement of legislative purpose to guide the courts in interpreting the enactment to accomplish its purposes.
- The prospective effective date should be October 1, 2014, which is the first day of the 2015 federal fiscal year (which ends on September 30, 2015).
- The transition from a state park to a National Park (or National Historic Site) will be effective October 1, 2015, the first day of the 2016 federal fiscal year.
- The boundaries of the new National Park (or National Historic Site) are to coincide with the geographic boundaries of what is now Devil's Den State Park.
- All current employees of the state park will become employees of the federal government on the effective date of the bill.

- The bill should authorize appropriations of $10 million for fiscal year 2015 (for planning and transition purposes), and $50 million for each of fiscal years 2016, 2017, and 2018, to operate the National Park (or National Historic Site).
- Make sure that the provisions of the bill are not severable in case the courts decide one or more parts are unconstitutional or otherwise invalid.
- Include a statutory interpretation provision advising the courts that the legislation should be interpreted liberally to carry out its purposes.
- Designate the appropriate federal agency that has the obligation to administer the National Park (or National Historic Site).
- Provide that the agency must file an annual report with Congress on a specified date to report on the progress of the transition.
- Add any definitions you believe are necessary.
- Make any appropriate conforming amendments necessary.

Refer to Rynearson Exercise 4-A (and the sample answer in the back of the book) as an example of how to draft the legislation. Select an appropriate legislative vehicle, and use an appropriate format. Include a long title, short title, findings, purpose, definitions (if appropriate), and all other components to ensure that the sponsor's policy goals are given effect. If you have questions about this exercise, please consult the reading assignments in the Rynearson textbook.

Authorized (and Unauthorized) Consultation: This assignment is for academic credit, and the Code of Academic Conduct therefore fully applies. You are encouraged to **discuss** this exercise with Professor Entrikin or with any student currently enrolled in Professor Entrikin's legislation class. You **may not discuss** the assignment with anyone else, including other students, law professors, roommates, spouses, friends, parents, or attorneys. **You may not show your written work to anyone else but me.**

Your drafting exercise is due Wednesday, March 12, 2014, at 7:00 p.m.

Legislation
Drafting Exercise 3

H.R. ____-- DEVIL'S DEN NATIONAL PARK ESTABLISHMENT ACT of 2014

113th CONGRESS

2nd Session

H.R. _____

To designate the Devil's Den State Park, located in West Fork, Arkansas, as a National Park.

IN THE HOUSE OF REPRESENTATIVES

Mr. Steve Womack introduced the following bill; which was read twice and referred to committee on March 7, 2014.

March 7, 2014

A BILL

To establish the Devil's Den National Park, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Preservation of President Roosevelt's Civilian Conservation Corps Camp Act".

SEC. 2. FINDINGS AND PURPOSE.

(a) Findings.-The Congress finds the following:

(1) During the Great Depression, President Franklin D. Roosevelt created the Civilian Conservation Corps to provide jobs, training, and education for young, able-bodied men.

(2) Devil's Den State Park, located in West Fork, Arkansas, contains one of the best-preserved Civilian Conservation Corps camps.

(b) Purpose- The purpose of this Act is to protect and preserve for posterity, the Civilian Conservation Corps camp, located in Devil's Den State Park, by establishing it as a National Park.

SEC. 3. DEFINITIONS.

In this Act:

(1) NATIONAL PARK- The term 'national park' means the Devil's Den National Park established in section 4.

(2) SECRETARY- The term 'Secretary' means the Secretary of the Interior.

(3) STATE- The term 'State' means the State of Arkansas.

SEC. 4. DEVIL'S DEN NATIONAL PARK.

(a) Establishment. - There is established as a unit of the National Park System the Devil's Den National Park in West Fork, Arkansas, in order to protect and preserve for the present and future generations the Civilian Conservation Corps camp located there.

(b) Boundaries. - The national park consists of the geographic boundaries of what is now Devil's Den State Park.

(c) Employees. - The current employees of the Devil's Den State Park shall become employees of the federal government on the effective date of this Act.

(d) Transition date. - The transition from state park to national park shall be effective October 1, 2015.

SEC.5. ADMINISTRATION.

(a) In General. - The Secretary shall administer land within the boundaries of the national park in accordance with—

(1) this section; and

(2) the laws generally applicable to units of the National Park System.

SEC. 6. REPORT.

Not later than one year after the effective date of this Act, the Secretary shall submit to Congress a report on the transition of the national park.

SEC. 7. AUTHORIZATION OF APPROPRIATIONS.

(a) There is authorized to be appropriated to the Secretary $10,000,000 for the fiscal year 2015 for the planning and transition to carry out the transition of the national park created in this Act.

(b) There is authorized to be appropriated to the Secretary $50,000,000 for each of the fiscal years 2016, 2017, and 2018 to operate the national park created in this Act.

SEC. 7. EFFECTIVE DATE.

This Act takes effect on October 1, 2014.

SEC. 8. SEVERABILITY.

If any provision of this Act, or the application of it is held invalid, the remainder of this Act and its application are not affected.

Legislation
Professor Entrikin
Spring 2014

Student Name _____

Drafting Exercise No. 3

New Enactment – House Bill

Grading Criterion	Very Good	Good	Fair	Needs Work	Comments
Long title					
Short title					
Findings					
Statement of legislative purpose					
Prospective effective date Oct. 1, 2014					
Transition from state park to national site effective Oct. 1, 2015					
Boundaries of national park to coincide with current state park boundaries					
Current employees of state park to become federal employees on the effective date of the bill					
Authorizes appropriations: $10 million for FY 2015 $50 million for FYs 2016-2018					
Includes inseverability clause					
Includes statutory interpretation provision for liberal construction to carry out bill's purposes					
Designates federal agency to administer National Park or Site					
Agency to file annual report with Congress on specified date to report on progress of transition					
Includes appropriate definitions					
Makes appropriate conforming amendments necessary.					
Uses appropriate format as shown in Rynearson textbook					
Uses appropriate punctuation as shown in Rynearson textbook					
Other					
Total Score (10 possible)					

Portfolio Assessment

References and Resources

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Redrafting Exercise

42 U.S. Code § 2000e - Definitions

For the purposes of this subchapter—

. . . .

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .

. . . .

(f) The term "employee" means an individual employed by an employer . . . .

. . . .

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S. Code § 2000e-2.

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . .

Transactional Lawyering
(Richard Neumann)

I teach Transactional Lawyering, a hybrid course that combines transactional skills with a deeper understanding of contracts concepts. I also teach our two-semester first-year course (Contracts I and II). Transactional Lawyering is essentially Contracts III. To explain Transactional Lawyering, I'll have to provide some background about first-year Contracts.

In Contracts, students learn doctrine partly by using it to solve client problems, and this is testable. Their midterm and final exams contain problem-solving questions as well as conventional doctrine-only essay and multiple-choice questions. For example, the December 2013 final exam included a question in which the student represents a company buying another company. In negotiating the sales contract, the seller's lawyer refuses to represent and warrant the accuracy of the seller's financial statements. The seller's lawyer also demands a merger clause that includes wording capable of defeating a later claim of fraud. Typical merger clauses won't do that, but this one's wording could. To do well, a student would have to figure that out and develop and explain at least two strategies for dealing with the merger clause and protecting the buyer concerning the financial statements. A typical semester's exams are about one-third problem-solving and two-thirds purely doctrinal.

In the spring, problem-solving includes drafting. For example, in class students develop language that, if it had been in the contract, would have caused Cardozo to rule the other way in *Jacob & Youngs v. Kent*, the Reading pipe case. A spring problem-solving question might require a few sentences of drafting.

Transactional Lawyering continues that progression. Here are the learning outcomes listed in the syllabus:

> By the end of the course —
>
> 1. A student should be able to do the following at or above the proficiency level of an entry-level lawyer:
>   — draft contracts
>   — analyze and structure transactions
>   — problem-solve in light of a client's objectives, anticipating consequences and assessing risks
> 2. A student should be able to do the following at an introductory level
>   (further study in an advanced course will be necessary for entry-level proficiency)
>   — counsel clients
>   — negotiate in transactional contexts
>   — work collaboratively
>   — act in professional settings in a manner that meets the standards of the legal profession

In Transactional Lawyering, students also learn at a deeper level many of the concepts introduced in the first-year Contracts course, such as conditions, interpretation, and assignment and delegation.

On the following pages are student work and assessment for Transactional Lawyering's first assignment.

The Car Contract
(Transactional Lawyering)

The first Transactional Lawyering assignment is an acquisitions contract with a closing and the need for a third-party consent and regulatory approval. Students don't have enough industry knowledge for something like the purchase of a television station, which would need FCC approval, or the purchase of an airliner, which would have to meet FAA requirements.

Instead the class watches two students negotiate the sale of a used car, and each student then writes an acquisition contract as though it were the sale of a multimillion-dollar asset. Students understand this asset, the relevant market, and each party's goals and risks. They also have experience with the regulatory agency (the Department of Motor Vehicles) and type of third party whose consent this buyer needs (an insurer). Among other things, students should account for all the duties needed to make the deal work; make wise choices between casting something as a duty and casting as a condition; construct procedures using conditions, discretionary authority, covenants, and declarations; facilitate due diligence; use representations, warranties, and closing conditions to reduce each party's risk; and do all this with clarity and precision.

This is the first time any of these students has ever drafted a contract.

After students write preliminary drafts, I make detailed written comments on their work and meet with each student individually for 30 to 60 minutes. The student then rewrites the contract and separately answers three self-assessment questions. I make detailed comments on the rewritten contact.

The preliminary draft is weighted at five of the 100 points on which the semester grade is based. The rewrite is worth 20 points because the deepest learning happens while rewriting.

On the following pages are the work of a typical student:

- the student's preliminary draft
- my comments on it (correlated to numbers I've handwritten on the contract)
- the student's self-reflective notes
- the student's rewritten contract
- my comments on the rewrite (correlated to the student's section numbers)

This student's work is about average, both in the preliminary draft and the rewrite. This student's self-reflective notes are typical in their sparseness. It's difficult to get students to self-reflect in writing. That happens more in the conversational spontaneity of the student-teacher conferences.

CAR PURCHASE AGREEMENT

CAR PURCHASE AGREEMENT (the "**Agreement**"), dated as of June 5, 2012, between Brian Wheaton (the "**Seller**") and Robert Loughman (the "**Buyer**").

Background

The Seller desires to sell the Car (as defined below) to the Buyer, and the Buyer desires to purchase the Car from the Seller.

NOW THEREFORE, the parties agree to as follows:

Article 1. Definitions

1.01 Definitions. As used in this agreement, terms defined in the preamble ~~of this Agreement~~ have the meanings set forth above, and the following terms have the meaning set forth below:

(a) "**Agreement**" means this Car Purchase Agreement ~~between the Seller and the Buyer for the Car.~~

(b) "**Best Efforts**" means a reasonable, diligent and good faith effort to achieve the stated objective and avoid possible loss.

(c) **"Car"** means the 2010 Mini Cooper Convertible with VIN numbers AB987654321CD

(d) **"Closing"** is defined in section 2.03

(e) **"Closing Date"** is defined in section 2.03(a)

(f) **"Closing Location"** is defined in section 2.03(b)

(g) **"Equipment"** refers to a list of all the items that the Car should have, substantially in the form of **Exhibit A**.

(h) **"Fair Condition"** is a list of features the Car may not be found to have, substantially in the form of **Exhibit B**.

(i) **"First Down Payment"** is defined in section 2.02(a)

(j) **"Good Condition"** is a list of features the Car must be found to have, substantially in the form of **Exhibit B**.

(k) **"Purchase Price"** means $27,750.

(l) **"Remaining Payment"** is defined in section 2.02(c)

(m) **"Second Down Payment"** is defined in section 2.02(b)

Article 2. Purchase and Sale

2.01 Purchase and Sale of the Car. At the Closing, the Seller shall sell the Car to the Buyer and the Buyer shall purchase the Car from the Seller.

2.02 Purchase Price. The Buyer shall deliver payment for the Purchase Price of the Car as follows:

(a) $2,775 as of the Signing Date, which is to be paid by bank check or certified check (**"First Down Payment"**).

(b) $5,550 upon the Car being found to be in Good Condition from the Inspection, which also must be paid by bank check or certified check (**"Second Down Payment"**).

(c) $19,425 to be paid at the Closing by bank check or certified check (**"Remaining Payment"**).

2.03 Time and Place of Closing. The consummation of the transaction that this Agreement contemplates (the "**Closing**") shall take place

(a) on June 13, 2012 at 11:00 am (the "**Closing Date**").

(b) at Hofstra Law School, 121 Hofstra University, Hempstead, New York (the "**Closing Location**").

2.04 Closing Deliveries and Further Assurances

(a) **Seller's Deliveries.** At the Closing, the Seller shall deliver to the Buyer the following

a. the Car in Good Condition,

b. all keys to the Car,

c. a New York State Department of Motor Vehicles certificate of Title, Form MV-999 stating the Seller's name, address and signature,

d. any other instrument necessary to vest the Buyer with good title in the Car.

(b) **Buyer's Deliveries.** At the Closing, the Buyer shall deliver to the Seller the following

a. The Remaining Payment by bank check or certified check made out to Seller.

Article 3. Seller's Representations and Warranties

The Seller represents and Warrants to the Buyer the following:

3.01 Ownership of the Car. The Seller has been the sole owner of the Car since he purchased it new in May 2010.

3.02 The Car. The car is a 2010 Mini Cooper convertible.

3.03 Color. The color of the Car is yellow with black racing stripes.

3.04 Past Maintenance. The Car has been maintained by Hassel Mini dealership in accordance with the schedule in the owner's manual.

3.05 Warranty. The Car is still under the drivetrain 4 years or 50,000 miles manufacturer's warranty.

3.06 Mileage. The Car has been driven no more than 25,000 miles.

3.07 Collisions. The Car has never been in a collision.

3.08 Equipment. The Car includes all the Equipment.

Article 4. Buyer's Representations and Warranties

The Buyer represents and warrants to the Seller the following:

4.01 Financing. The Buyer expects to receive a $15,000 bonus, which will be used towards the purchase of the Car.

4.02 Past Bonuses Received. The Buyer has received a $15,000 bonus for the past three years on June 11.

Article 5. Seller's Covenants

The Seller promises to do the following before the Closing Date.

5.01 Condition of the Car. When the Car is delivered to the Buyer it shall be in the same condition it was in when inspected or when repaired to pass inspection.

5.02 Inspection of Car. The Seller shall let the Buyer drive the Car to Hofstra Mechanic Shop, Hempstead NY for the Inspection on June 4 after both parties execute the Agreement and after the Buyer pays the First Down Payment.

5.03 Documents to be Delivered. At the Closing the Seller shall deliver to the Buyer any documents necessary for the Buyer to acquire insurance and get title to the Car.

Article 6. Buyer's Covenants

The Buyer promises to do the following before the Closing Date.

6.01 Bonus. The Buyer shall use his Best Efforts to secure a Bonus in an amount sufficient to pay the Remaining Payment.

6.02 Purchase Price. The Buyer shall pay the full Purchase Price of the Car, unless

(a) If the Car, through inspection, is found to be in less than Good Condition than the Purchase Price must be reduced by the amount of repairs necessary for the vehicle to be in Good Condition.

Article 7. Inspection

7.01 Inspector Selection. The Buyer shall select who inspects the vehicle and has chosen Hofstra Mechanic Shop, Hempstead NY.

7.02 Inspection Criteria. Pending the results of the inspection the Car will have been found to

(a) Pass inspection if it is in Good Condition, or

(b) Fail inspection if it is in Fair Condition.

7.03 Yacht Delivery to Inspector. The buyer shall drive the Car to the inspectors shop.

7.04 Inspection Payment. Buyer shall pay the mechanic for performing the inspection.

7.05 Damages to Car. The Buyer shall pay for any damages the Car receives before it is returned from the inspection.

Article 8. Conditions to Seller's Obligation

The Seller is obligated to close the transaction that this Agreement contemplates if each of the following conditions have been satisfied or waived on or before the Closing Date.

8.01 Performance of Buyer's Covenants. The Buyer must have complied with all of the covenants to be performed by him on or before the Closing Date.

8.02 Accuracy of Buyer's Representations and Warranties. The Buyer's representations and warranties must be true on the Closing Date as well as on the date they were made.

8.03 Payment of Second Down Payment. If the Car, through inspection, is found to be in better than Fair Condition than the Buyer must make a Second Down Payment.

Article 9. Conditions to Buyer's Obligation

The Buyer is obligated to close the transaction that this Agreement contemplates if each of the following conditions have been satisfied or waived on or before the Closing Date.

9.01 Performance of Seller's Covenants. The Seller must have complied with all of the covenants to be performed on or before the Closing Date.

9.02 Accuracy of Seller's Representations and Warranties. The Seller's representations and warranties must be true on the Closing Date as well as on the date they were made.

9.03 Reduction of Purchase Price. If the Car, through inspection, has been found to be in less than Good Condition but better than Fair Condition the Seller must subtract the cost of the necessary repairs from the Purchase Price of the Car.

what if the car is in an accident on the way to the closing?
what if the inspection determine that the car is in less than Fair condition?

[student's name deleted]

Car Contract
comments on the student's
PRELIMINARY draft

Your contract is attached.

This draft earned three of the five points available. Please remember that contract drafting is hard to learn. That's why this first assignment is worth only five points — so you can use lessons learned from mistakes here on later assignments that have much greater weight. (The rewrite is worth 20 points.)

Your rewrite is due by 11:00 pm seven days after your conference. For example, if your conference is at noon on a Tuesday, your rewrite will be due by 11:00 pm the following Tuesday. Submit it as a pdf or in Word or WordPerfect.

Together with your rewrite, submit as a separate document a note that responds to these three questions:

1. *What aspects of the rewrite were most difficult?*

2. *What are your strengths as a drafter?*

3. *What drafting skills do you most want to improve?*

Be specific in answering these questions. Title this document "Rewrite Notes." Make sure your name is on it.

Paragraphs **A** through **N** below appear on every student's comment pages (not just yours), and they might or might not be germane to your contract.

Comments specific to your contract are numbered and begin after paragraph **N** below. You'll see circled numbers on your contract. Those circled numbers correspond to the numbered comments below. For example, to see what the circled number 2 on your contract is all about, read comment number 2 below.

If a problem occurred more than once in your contract, I did not mark it every time. You might see these abbreviations:

DA = discretionary authority
WDTM? = What does this mean?
R/W = represent and warrant
PP = purchase price

A. Before starting on your rewrite, go back over the notes on what the parties agreed. Check to be sure that everything on which they agreed is in your contract.

B. What factual assumptions is each party making? For example, what if the VIN turns out to be phony? Or the title turns out to have liens on it? (What buyer would ask, "Is your car's VIN genuine?" or "Are there liens on your car's title?"?) What protection would the buyer need? How can you provide it? What other factual assumptions are being made by one party or the other?

C. At the closing, the buyer will need to receive an executed bill of sale from the seller to prove how the buyer acquired the car. The contract doesn't prove that. It only proves a promise to buy it. (The buyer could have signed the contract and then stolen the car before the closing.) Many insurance companies will require a bill of sale to insure the car. What should this bill of sale look like? There are two solutions. One is to draft one, get the other lawyer to agree to it, attach it to the contract as an exhibit, and cross-ref to it in article 2. The other is to give the buyer veto power ("in a form reasonably satisfactory to the Buyer"); do that in the closing deliveries. The bill of sale needs to be executed: the seller has to sign it.

D. Both parties have covenants concerning the mechanic's inspection. And there might be declarations and discretionary authority as well. That's why it needs its own article. If you were to scatter these provisions into several places in the contract, the reader would have a hard time figuring out how the inspection is supposed to work. Even if you were to put the covenants in covenants articles, where would the declarations and discretionary authority go? The only things that *can't* go into an inspections article are adjustments to the PP and payments of it (which must go in the purchase and sale article); closing conditions (which must go in a closing conditions article); and termination powers (which must go into a terminations article).

E. The inspection won't happen just because the contract says it will. To make it happen, does either party (or both) need covenants or discretionary authority? How will the car get to the mechanic? If you assign that duty to the seller, it should be conditioned on the buyer's exercise of discretionary authority to have the car inspected. Don't obligate the buyer to have it inspected. The buyer might decide not to. Covenants are for actions that benefit the other party or both parties. DA is for actions that benefit the party who can take action. Will the mechanic do anything just because somebody hands him the keys? Unless the parties have agreed otherwise, the party who wants an expert to evaluate the asset (due diligence) would normally instruct the expert. What if the parties decide to reschedule the inspection? Have you drafted to allow for that possibility?

F. When periods of time are relevant, be sure to specify them exactly. For example, if a seller R/W's that the car has been serviced according to the schedule in the owner's manual, when did that period of time start? Without precision in things like this, a contract will have gaps, sometimes called loopholes ("oh, that didn't mean the whole time the seller owned the car," says the seller's lawyer later when a dispute begins, "it means only recently").

G. For the rewrite (which will include a terminations article): Where a party gets a walk-away right if a certain thing goes wrong, that party needs both a closing condition and a

termination power. What is a ground for closing occurs before the closing? The terminating party might want to terminate immediately rather than wait until the closing. Or what if the party discovers at the moment the closing is to begin that it's gone wrong? Without a closing condition, there's a risk that the party could be liable for breach for not closing. That party needs a termination power (as well as a closing condition) because not having to close isn't enough to get the party out of the deal. An unterminated contract continues to bind the parties.

H. More for the rewrite's terminations article: How is a party to terminate? What's the procedure? In writing? How delivered? To whom? Is following this procedure a duty or a condition of the notice of termination being effective? When is termination effective?

I. When something occurring (or not) pursuant to or provided for in one part of the contract creates grounds for something elsewhere, cross-ref for clarity. For example, where the buyer gets a termination power if the car flunks inspection, the section creating that terminations power should cross-ref to the section or sections that provide for passing or flunking the inspection. Otherwise, you'd be making the reader hunt for the pass/flunk section.

J. In a contract, don't divide the world up into A (such as passing the inspection) and B (such as failing the inspection). What if there's something you forgot about that doesn't fit into A or B. Divide into A (such as pass inspection) and not-A (such as does not pass inspection). You think that there are only two alternatives here, but life will surprise you with possibilities you haven't thought of that don't fit into A or B. You will never have that problem if you divide into A and not-A.

K. When expressing a covenant, express it precisely so the party with a duty knows exactly what to and when to do it. Imagine that you're the party with the duty, and that you want to do everything expected of you. Read each of your covenants in that frame of mind, asking yourself things like "What exactly do I have to do to avoid being in breach?" If the covenant you have written does not answer that question, you need to redraft it. (With many covenants, maybe most of them, specify time, place, manner of performance, or some combination of these. What would be breach? When would breach occur?) *Create a duty precisely enough so that the party who performs it knows exactly what to do and the other party knows where breach begins.*

L. (The word "condition" can have two meanings here, so read this note carefully.) In what condition (in the quality sense) did the parties agree the car is to be on the closing date? What happens if it isn't in that condition? That depends on what you provide. If you make it a closing condition (in the contract sense), the consequence would be that the buyer wouldn't have to close. If you make it part of a closing delivery ("at the Closing the Seller shall deliver ... the Car in the same condition as when it passed inspection pursuant to section X"), the consequence would be damages for breach of a covenant. Which of these two possibilities would a buyer want? The answer is both. The buyer would want to walk away from the deal—and sue for damages (if there are any).

M. Ask yourself whether an unqualified R/W is a trap for one of the parties. For example, the seller might have told the buyer that the car has never been in a collision. But is the seller really in a position to know that it has *never* been in an accident? Did the seller buy the car at the factory the moment it left the assembly line? Could the car have been in a slow-speed parking lot collision when owned by the manufacturer, the distributor, or the dealer — with damage that was repaired before it was sold to the seller but not disclosed to the seller? What qualification could you add to the R/W about collisions that would protect the seller from inadvertent misrepresentation and breach of warranty — while still reasonably protecting the buyer from what the buyer is anxious about?

N. The parties have agreed to a reduction in the PP if the inspection produces a certain result. If you define the PP as a number of dollars without accounting for the possibility of reduction, you have not accurately defined the PP. Use a formula *only* when there's an unknow at the time you draft. That's true here. This is what the parties agreed to:

> The PP is $X. But if the inspection shows the car needs repairs to satisfied a standard the parties have specified, the PP is reduced by the cost of those repairs.

Even though the parties said the PP is $X, for contract-drafting purposes it isn't that. Instead, it's $X minus a number (which might turn out to be zero). You need to construct a formula. If the PP is reduced, the buyer's closing delivery will also be reduced. How can you draft to provide for that?

Comments specific to your contract:

1. "Above" and "below" don't work in contracts. Cross-ref to specific sections.

2. Keep it simple where possible.

3. Lay out the page so the reader can tell where one article ends and another begins. Among other things, skip an extra line above the article title so the division between articles can easily be seen by a reader scanning the document. See document design in the supplement.

4. Without allowing for future amendments ("as it may be amended from time to time"), you've frozen the definition so that when the defined term is used later in the contract it can refer only to the original, unamended contract.

5. If you are satisfied with the law's definition of this term, don't define it yourself. A court will assume that to the extent your definition differs from the law's, the parties have rejected the law's definition. Do you know that you want that result?

6. "has the meaning set out in" is more contract-like, but what you've done is ok

7. These verbs have to contain the concept of definition or meaning.

8. You don't need these exhibits, which are used when something can't fit into the contract body. All of these will fit into the contact.

9. Your defined terms for the three payments can easily be confused with each other. Find terms that are easily distinguished from each other, such as "Execution Deposit" and "Inspection Deposit." What about a new name for the third payment?

10. A better way to set this up is to indent the first line, like a paragraph, and flush the rest of the section to the left margin.

11. Capitalizing says this is a defined term. It isn't defined and should not be — you use it only once. A more precise concept is execution. Lots of things are signed. To execute is to adopt (maybe by signing) with legal effect.

12. "Upon" is usually ambiguous. Does it mean at the same time ("contemporaneously")? Or immediately after? (If so, exectly when? An hour? On the same day?)

13. Who must pay it? Create a duty clearly.

14. The closing has a duty to take place?

15. Without the words "or another date on which the parties agree", the parties would have to amend the contract just to reschedule the closing. We define closing date because it may be a movable date, and using a defined term allows you to refer to it throughout the contract without locking in to one date.

16. How many times do you use this defined term? Is it really worth defining?

17. Subdivision letters and numbers have parens on both sides — (a) etc. In addition, the first level of subsection is (a), (b), etc. The second level is (i), (ii), etc.

18. This will not transfer ownership to the buyer. Is it enough for the seller simply to write this on the title and hand it to the buyer? The buyer has to execute to convey title. That's the goal here.

19. If this is all the seller does, DMV will not allow the buyer to title and register the car in his own name. You have to get this deal through a regulatory agency — just as you would get a radio station sale through the FCC or an airliner sale through the FAA.

20. Is the seller assuming anything else about the buyer and his money?

21. The car has a duty? If you're trying to create a seller's duty, it goes in article 2 as part of his closing deliveries. The buyer might also want a closing condition.

22. See note D.

23. Closing delivery duties belong in article 2.

24. No (a) without a (b).

25. Changes in the PP must go in the purchase and sale article.

26. See note N.

27. Why impose a duty ("shall")?

28. These words mean that the buyer must pay for damage that occurs at any time between execution of the contract (which is when the buyer becomes bound) and return of the car to the seller. Is that what you meant?

29. "each ... have"?

30. First, the words in the conditions chapter are more precise than yours. Second, the R/W condition always comes first — because the parties are dealing with each other only because they have received reps and warranties.

31. It looks like you're creating a duty to pay ("must make"), not a closing condition.

32. If this really is a closing condition, it's covered by 8.01.

33. First, this looks like a covenant and not a condition. Second, A party can't change the price. If the price will be adjusted automatically, use a declaration in article 2 (just as you used a declaration to create the price in the first place). And if it changes, at least one covenant to pay also has to be drafted so that it also adjusts. Do you see why?

Transactional Lawyering
Rewrite Notes

1. What aspects of the rewrite were most difficult?

I found the most difficult part to be filling in the blanks that were not given to through the negotiation notes. It was clear to me while writing, and from looking at the text and the supplement, that extra sections were necessary but I had a lot of difficulty choosing the necessary from the unnecessary. I found this particularly difficult while drafting the terminations section where the text mentioned numerous examples of when a termination clause might be necessary but then our negotiation notes and the supplement only spoke about termination clauses very briefly.

2. What are your strengths as a drafter?

I think my biggest strength is being able to be concise and to the point. I never thought of myself as a very eloquent writer so when I was in the process of drafting sections not being overly wordy or using big words came pretty naturally to me.(at least I think I did a good job of that)

3. What drafting skills do you most want to improve?

I'm guessing it comes with experience, but to go along with what I found most difficult, I'd like to improve on my ability to fill in the gaps when drafting if something is not provided for by the facts.

CAR PURCHASE AGREEMENT

CAR PURCHASE AGREEMENT (the "**Agreement**"), dated as of June 5, 2012, between Brian Wheaton (the "**Seller**") and Robert Loughman (the "**Buyer**").

Background

The Seller desires to sell the Car (as defined in section 1.01(c)) to the Buyer, and the Buyer desires to purchase the Car from the Seller.

Accordingly, the parties agree to as follows:

Article 1. Definitions

1.01 Definitions. As used in this agreement, the following terms have the meaning set forth in this article:

(a) **"Agreement"** means this Car Purchase Agreement which may be amended from time to time.

(b) **"Car"** means the 2010 Mini Cooper Convertible with VIN numbers AB987654321CD

(c) **"Closing"** has the meaning set out in section 2.03

(d) **"Closing Date"** has the meaning set out in section 2.03(a)

(e) **"Fair Condition"** has the meaning set out in section 7.02(b)

(f) **"Execution Deposit"** has the meaning set out in section 2.02(a)

(g) **"Good Condition"** has the meaning set out in section 7.02(a)

(h) **"Purchase Price"** means $27,750.

(i) **"Final Payment"** is defined in section 2.02(c)

(j) **"Inspection Deposit"** is defined in section 2.02(b)

Article 2. Purchase and Sale

2.01 Purchase and Sale of the Car. At the Closing, the Seller shall sell the Car to the Buyer and the Buyer shall purchase the Car from the Seller.

2.02 Purchase Price. The Buyer shall deliver payment for the Purchase Price of the Car as follows:

(a) $2,775 at this Agreement's execution, which must be paid, from Buyer to Seller, by bank check or certified check (**"Execution Deposit"**).

(b) $5,550 if the Car passes the inspection, which must be paid, from Buyer to Seller, by bank check or certified check (" **Inspection Deposit"**).

(c) $19,425 must be paid at the Closing by bank check or certified check, from Buyer to Seller, unless if the Car's inspection has the result which is defined in Section 7.06(b), if that happens the cost of repairs must be deducted from $19,425 and the remainder, if any, paid from Buyer to Seller. (**"Final Payment"**).

2.03 Time and Place of Closing. The consummation of the transaction that this Agreement contemplates (the **"Closing"**) will take place

(a) on June 13, 2012 at 11:00 am or another date on which the Seller and the Buyer agree to (the **"Closing Date"**).

(b) at Hofstra Law School, 121 Hofstra University, Hempstead, New York.

2.04 Closing Deliveries and Further Assurances

(a) **Seller's Deliveries.** At the Closing, the Seller shall deliver to the Buyer the following

(i) the Car in Good Condition,

(ii) all keys to the Car,

(iii) a New York State Department of Motor Vehicles certificate of Title, Form MV-999 stating the Seller's name, address and signature,

(iv) New York State Department of Taxation and Finance Sale or Gift of a Motor Vehicle, Form DTF-80,

(v) an itemized bill of sale

(vi) copies of all documents so that Buyer may provide them to insurance company, and

(vii) any other instrument necessary to vest the Buyer with good title in the Car.

(b) **Buyer's Deliveries.** At the Closing, the Buyer shall deliver to the Seller the following

(i) The Remaining Payment by bank check or certified check made out to Seller.

further assurance

Article 3. Seller's Representations and Warranties

The Seller represents and warrants to the Buyer the following:

3.01 Ownership of the Car. The Seller has been the sole owner of the Car since he purchased it new in May 2010.

3.02 The Car. The car is a 2010 Mini Cooper convertible.

3.03 Color. The color of the Car is yellow with black racing stripes.

3.04 Past Maintenance. The Car has been maintained by Hassel Mini dealership in accordance with the schedule in the owner's manual.

3.05 Warranty. The Car is still under the drivetrain 4 years or 50,000 miles manufacturer's warranty.

3.06 Mileage. The Car has been driven no more than 25,000 miles.

3.07 Collisions. The Car has never been in a collision while owned by Seller.

3.08 Car Options. The Car has all of the following options such as a (1)turbo 4-Cylinder 1.6 liter engine, (2) 6 –speed manual transmission, (3) forward wheel drive, (4) rollover protection, (5) the cold weather, sport and premium accessory packages, (6) sport and performance suspension, (7) traction and dynamic control, (8) 4-wheel ABS, (9) power steering, (10) keyless entry and start, (11) air conditioning, (12) power windows, (13) power door locks, (14) cruise control, (15) dual and side air bags, (16) leather heated dual power seats, (17) power soft top roof, (18) HID headlamps, (19) premium wheels, (20) tilt wheel, (21) AM/FM stereo, (22) multi disc MP3, (23) Harman kardon sound, (24) sirius satellite radio, (25) bluetooth wireless system, and (26) an exterior Aero Kit .

3.09 Liens. Title to the Car is free of liens.

3.10 Vin Number. The Car's VIN number is AB987654321CD.

Article 4. Buyer's Representations and Warranties

The Buyer represents and warrants to the Seller the following:

4.01 Financing. The Buyer expects to receive a $15,000 bonus, which will be used towards the purchase of the Car.

4.02 Past Bonuses Received. The Buyer has received a $15,000 bonus for the past three years on June 11.

4.03 Bonus. The Buyer will receive a $15,000 bonus on June 11, 2012.

Article 5. Seller's Covenants

The Seller promises to do the following before the Closing Date.

5.01 Condition of the Car. At Closing the Seller shall deliver the Car to the Buyer in the same condition it was in when inspected or when repaired to pass inspection.

5.02 Documents to be Delivered. The Seller shall deliver to the Buyer all items listed in Section 2.04(a).

5.03 Adjustments of Final Payment. The Seller shall comply with the adjustments to the Final Payment as they are defined in Section 2.02(c).

Article 6. Buyer's Covenants

The Buyer promises to do the following before the Closing Date.

6.01 Bonus. The Buyer shall use his best efforts to secure a Bonus in an amount sufficient to pay the Remaining Payment.

6.02 Payments. The Buyer shall deliver these payments to the Seller:

(a) Execution Deposit from Buyer to Seller.

(b) Inspection Deposit from Buyer to Seller provided the Car passes inspection as defined in section 7.02(a).

(c) Final Payment at the Closing from Buyer to Seller.

Article 7. Inspection

7.01 Inspection of Car. If the Buyer chooses to have the Car inspected the Seller shall let the Buyer drive the Car to the inspector.

7.02 Date of Inspection. The inspection will be done June 4 after both parties execute the Agreement and after the Buyer pays the First Down Payment. Buyer and Seller may change the inspection date if both agree to new date.

7.03 Inspector Selection. The Buyer may select who will inspect the Car and has chosen Hofstra Mechanic Shop, Hempstead NY.

7.04 Car Delivery to Inspector. The buyer may drive the Car to the inspectors shop.

7.05 Inspection Criteria. If Buyer chooses to have car inspected he will instruct the inspector that the Car is to be inspected based on the two standards set forth in sections (a) and (b) directly below.

(a) The Car ~~can be found to be~~ in **"Good Condition"** and if it meets the following criteria:

(i) The Car can have some repairable cosmetic defects, minor rust, and is free of major mechanical problems, and

(ii) the Car can be in need of some servicing and the engine compartment can have no more damage than minor leaks, and

(iii) the paint and bodywork can require minor touch-ups, and

(iv) the body of the Car can have, at most, minor scratches or dings and the interior can have no more than minor blemishes characteristic of normal wear, and

(v) all the tires match and have at least 50% of their tread remaining, and the wheels have, at most, minor repairable scratches or scrapes, and

(vi) the Car can be in need of some reconditioning, but it has a clean title history and will pass a safety and smog inspection and some of its service records are available.

(b) The Car can be found to be in "**Fair Condition**" if it meets the following criteria:

(i) The Car can have some cosmetic defects that require repairing and/or replacing and can require some mechanical repairs,

(ii) the paint and bodywork of the Car can require refinishing and body repair, and some repairable rust damage, and

(iii) the engine compartment has leaks and can require repairs, and

(iv) the body can have dents, chips, and/or scratches, and the interior can have substantial wear, and can have small tears, and

(v) the wheels are warped or bent, have major scratches, scrapes, or pitting and require replacement, and the tires do not match and need replacing, and

(vi) only a few service records are available.

7.06 Results of Inspection. Whether or not the Car passes or fails the inspection will be based on the opinion of the inspector by applying the two standards listed in section 7.02 (a) & (b)

(a) The Car will pass the inspection if it is found to be in Good Condition or better.

(b) If the Car is in less than Good condition but not less than Fair Condition the Buyer may have the Car repaired so that it will be found to be in Good Condition and pass inspection.

(c) The Car will fail the inspection if it is found to be in less than Fair Condition.

7.07 Inspection Payment. Buyer shall pay the mechanic for performing the inspection.

7.08 Damages to Car. The Buyer shall pay for any damage the Car receives after the Buyer picks up the Car to drive it to the inspection and before it is returned from the inspection to the Seller.

Article 8. Conditions to Seller's Obligation

The Seller's obligation to perform is subject to the fulfillment of each of the following conditions:

8.01 Accuracy of Buyer's Representations and Warranties. The Buyer's representations and warranties must be true on the Closing Date as well as on the date they were made.

8.02 Performance of Buyer's Covenants. The Buyer must have complied with all of the covenants to be performed by him on or before the Closing Date.

Article 9. Conditions to Buyer's Obligation

The Buyer's obligation to perform is subject to the fulfillment of each of the following conditions:

9.01 Accuracy of Seller's Representations and Warranties. The Seller's representations and warranties must be true on the Closing Date as well as on the date they were made.

9.02 Performance of Seller's Covenants. The Seller must have complied with all of the covenants to be performed on or before the Closing Date.

Article 10. Termination

This Agreement terminates before the Closing Date as follows:

10.01 Grounds for Automatic Termination. Provided effective notice as defined in Section 10.05 a party may terminate before Closing in ~~the event of these scenarios~~:

(a) Buyer and Seller mutually agree to terminate the Agreement

(b) Buyer or Seller has made a misrepresentation or breached a warranty.

(c) Buyer or Seller has failed to perform their respective covenants.

(d) Buyer or Seller has failed to satisfy a condition.

(e) A force majeure event

(f) Death of either Seller or Buyer

10.02 Seller's Termination Power. Seller may terminate if Buyer fails to make Final Payment on the Closing Date.

10.03 Buyer's Termination Powers. Buyer may terminate if

(a) The Car fails the inspection.

(b) The Seller does not deliver what is required from section 2.04(a).

10.04 Remedies

(a) **Seller's Remedies.** If Buyer does make Final Payment at Closing then Seller may keep the Execution Deposit and Inspection Deposit.

(b) **Buyer's Remedies.**

(i) If Seller fails to deliver the items defined in Section 2.04(a) then Buyer is entitled to the return of his Execution Deposit and Inspection Deposit.

(ii) If the Car fails the inspection as defined in Section 7.06(c) then Buyer is entitled to the return of his Execution Deposit and Inspection Deposit.

10.05 Notice. Effective termination requires the terminating party to deliver written notice, by priority mail, to the non-terminating party of its intention to terminate.

(a) If Seller, as terminating party, fails to deliver effective notice to Buyer then Buyer's option to buy the Car remains in full effect.

(b) If Buyer, as terminating party, fails to deliver effective notice to Seller then Seller may keep the Execution Deposit and Inspection Deposit.

To evidence the parties' agreement to this Agreement, they have executed and delivered it on the date stated in the preamble.

Seller: _____
Brian Wheaton

Buyer: _____
Robert Loughman

[student's name deleted]

Car Contract
comments on the student's
FINAL draft

This draft earned 16 of the 20 available points.

If a problem occurred more than once, I did not mark it every time. Where I wrote a number and circled it on your contract, see the corresponding number below.

DA = discretionary authority
WDTM? = What does this mean?
PP = purchase price
R/W = represent and warrant

My comments are organized differently from the comments on your first draft. Here, my comments refer to the section numbers in your contract. So that you can receive feedback quickly, I'm sending you my comments without a marked-up copy of your contract. You can follow them by referring to section numbers in your copy of the contract.

My comments on your contract are ***after the horizontal line*** a few pages after this page. The comments below (***before*** the horizontal line) are general and might or might not apply to your contract.

Where my comments on your contract are directive — for example, "change the wording to X" — you are ***not*** being required to rewrite and resubmit your contract. I'm only showing you how to solve a problem.

When parties agree that one of them has to do something, that does not mean that you should automatically create a covenant. Sometimes what they've agreed to is really a condition. The big lesson is that you need to figure out *why* parties have agreed that one of them has to do something. If the consequence of not doing it should be damages, create a covenant ("shall"). If the consequences should be that something else in the contract is activated, create a condition ("if" or in a closing condition "must have" or "must be").

When you mention something that is provided for elsewhere in the contract, refer to that other provision. For example, if the buyer doesn't have to close if the car fails to pass inspection, the reader needs to know, in the buyer's closing conditions article, what inspection you're talking about ("the Mechanic must have determined, pursuant to section X, that the Car ..."). Same with a termination power based on the inspection. Your contract might include other instances where a cross-ref will clarify what you're doing.

Among the most complicated parts of this contract are the seller's closing deliveries, the purchase price, the buyer's closing delivery (which is affected by the PP), and the terminations article. Each of them could be handled effectively in several different ways.

A. The seller's closing deliveries: You had to construct a set of closing deliveries that would (1) transfer ownership to and possession of this asset to the buyer, (2) satisfy a regulatory agency so the buyer could do what he wants with the asset (drive it on public streets), and (3) allow the buyer to insure the asset. Based on a simple investigation of agency procedures, here is what a seller's closing delivery provision would look like:

> (a) **Seller's Closing Deliveries.** At the closing, the Seller shall deliver to the Buyer
>
> (i) the Seller's New York State Department of Motor Vehicles Certificate of Title, MV-999, free of liens and executed by the Seller to convey the Vehicle's title to the Buyer;
>
> (ii) a bill of sale in a form reasonably satisfactory to the Buyer, executed by the Seller, and stating accurately, among other things, the Vehicle's make, model, model year, description, mileage, and VIN, as well as the Purchase Price and date of delivery to the Buyer;
>
> (iii) the Vehicle, in the same condition as it was when inspected by the Mechanic, together with its keys, owner's manual, manufacturer's warranty, and other manufacturer's documents obtained by the Seller when he purchased the Vehicle; and
>
> (iv) any other documents that might be needed to transfer the Vehicle's title to the Buyer, enable him to register and insure it in his own name, and prove his purchase of the Vehicle from the Seller.

A buyer receiving these would go out into the world a happy owner and possessor of an asset that a regulatory agency and an insurance company would be pleased to bless.

It's not enough for the seller to "execute" the title certificate. The seller should have to deliver it "executed to transfer title to the buyer." That's what the buyer is buying. You don't want the seller to execute it to transfer title to his cousin and then deliver it to the buyer. And you don't want him to execute it but spell the buyer's name incorrectly. In other situations, name-misspelling is just a nuisance. But here nobody will recognize the transfer as valid if, for example, the buyer's last name is "Jane Smythe" but the seller executes it to "Jane Smith." Those look like different people.

The seller should be required to produce a title certificate that's free of liens. The relevant regulatory agency has procedures for dealing with titles with liens, and the buyer won't like those procedures. Think about why the agency cares. It regulates this type of transaction for several reasons. Who would the government be trying to protect?

The last item — "any other documents" — is just a boilerplate precaution. You'd include it in an asset sale just in case you've misunderstood something or the agency changes its rules or the insurance market changes before the closing.

B. The purchase price: The parties did *not* agree that the PP is $27,750. They haggled until they reached that number. But they also agreed that if the mechanic determines that the car is in Fair but not Good condition, the PP is reduced by the cost of bringing the car up to Good. (If the mechanic determined that the car's condition is less than Fair, the buyer can walk away.) Because you can't know that cost when you draft, you must construct a formula. Here's an example (others might work, too):

> **2.2. Purchase Price.** The purchase price is $27,750 minus the cost, if any, of repairs determined by the Mechanic to be necessary to put the Car in Good Condition pursuant to section 5.3 (the "Purchase Price").

If the car is already in Good condition, that cost is zero and the PP would be $27,750 minus zero. You would need to create a defined term for this PP (as in the example above) because you need to use that term for the buyer's closing delivery (see below).

Provide for the adjustment to the PP *only* in the purchase and sale article. PP provisions must be there (it's the purchase and sale article). Don't duplicate the adjustment in the inspection article or anywhere else in the contract. Don't provide the same thing twice. It creates risk of inconsistency, which could produce ambiguity. Do it once and completely. If you need to bring the matter up twice, make one of those instances a cross-reference to the other.

C. The buyer's closing delivery: The parties agreed on two deposits that, added together, equal $8,325. You *cannot* provide for a closing delivery of $19,425, even though that's what's left after you subtract $8,325 from $27,750. Because there's an unknown number (the cost of repairs), you must again construct a formula. Here's one way to do it (others might work, too):

> **(a) Buyer's Closing Delivery.** At the closing, the Buyer shall deliver to the Seller a bank or cashier's check, payable to the Seller, for an amount equal to the Purchase Price minus $8,325.

D. The terminations article: A terminations article must resolve *all* of the following questions:

On what grounds may a party terminate? A ground is a condition to the party's discretionary authority to terminate. It's possible to have an unconditional power to terminate, but the buyer and seller did not agree to any unconditioned powers. It's also possible to have an automatic termination — the contract self-destructs on a pre-agreed date or if a specified condition is satisfied — but the parties didn't agree to that either.

Sometimes parties negotiate some of the grounds specifically, and they did here. They agreed, for example, that the buyer can walk away if the mechanic determines that the car is in less than Fair condition. Others can be inferred for drafting by the lawyers from the nature of the deal. For example, if a party fails to close even though that party's closing conditions have

been satisfied, the other party should be able to terminate to get out of the deal. And some are natural to all deals. An obvious example is that if a party has misrepresented, the other party should be able to terminate. A litigation remedy for misrepresentation is rescission, but a termination power can provide immediate relief without a lawsuit.

Closing conditions and termination powers are related but are not the same thing. For example, a party whose closing conditions have not been satisfied might want to wait a bit before terminating and, while waiting, try to renegotiate to get a better deal, using the power to terminate as negotiating leverage ("if you don't give me X, I'll terminate").

What is the procedure for terminating? In writing? How delivered? Lawyers supply this because the parties rarely negotiate it. A party who wants to terminate should be able to find out, in the contract, how to do it. (A procedure is essential for discretionary terminations but irrelevant for automatic ones.)

Be careful how you express the procedure. If you express it as a covenant, breach could lead only to damages, of which there might be none. If you express the procedure as a condition to effectiveness ("notice of termination is effective only if the party giving notice ...."), you get better results. We covered this in class.

When is termination effective? The usual provision puts effectiveness at the moment the nonterminating party receives notice from the terminating party. (This doesn't matter for automatic terminations because they happen without a procedure.)

What are the consequences of termination? Often parties don't negotiate this completely. To the extent they haven't, lawyers figure it out from the logic of the termination grounds. For example, if the seller terminates because the buyer fails to close even though the buyer's closing conditions have been satisfied, the seller will normally get to keep any deposits the buyer has paid. The parties are free to agree otherwise, but if they haven't, the lawyers will settle on the logical consequences.

If the consequences involve duties, spell them out precisely. For example, if the seller must pay money to the buyer, specify how the money is to be paid and set a deadline.

If the consequences involve discretionary authority, express it that way. If the seller gets to keep deposits, don't create a duty ("shall retain"). Give the seller the power ("may") to do that. You might be able to get the same results through a declaration ("the Buyer forfeits"). A duty, however, might persuade the seller that he's obligated to keep the money, even if he wants to be generous and give some or all of it back to the buyer. Although a buyer can waive the duty, why create an issue? Precision reduces issues.

The left column below refers to sections in your contract. My comments are in the right column.

generally	Indent the first line of a section, like a paragraph
1.1	These must be in alphabetical order.
2.02	You're mixing a declaration of the PP with obligations to pay parts of it. Declare the PP (which here requires a formula) in 2.02. Then separately in a section immediately following obligate the buyer to pay the deposits. See note B.
2.02(c)	Merge this into 2.04(b). See note C.
2.03	Merge (a) and (b) so there are no subsections. None needed here.
2.04(a)(i)	They agreed that it could be delivered in Fair condition if the price is reduced. Also suppose it were in Excellent condition. As you've worded this, the seller would be in breach. What wording would fix that?
2.04(a)(iii)	See note A.
2.04(a)(vi)	All of what documents?
2.04(b)	No (i) without a (ii). Can't have only one subsection.
2.04(b)(i)	What is the Remaining Payment? Where's the definition?
2.04	Where are the further assurances?
4.01(a)	First, you can't rep the future. Second, this isn't a warranty either. It's a promise to do something (a covenant), and it's unnecessary. All the seller wants is money, and the seller doesn't care where it comes from. If the buyer doesn't pay, he'll breach covenants that are already in article 2.
4.03	Can't rep the future. And the buyer didn't warrant that he'd get the bonus, only the present fact that he expects to get it. That is both a rep and a warranty.
article 5	These are all already in article 2. Don't provide twice. It creates a risk of ambiguity if there's any difference between the two provisions.

6.02	Same problem.
7.05	1st line: see the will/shall chapter. In (a) and (b), delete "can be found to be" and insert "is". These are simple declarations.
7.06(b)	They didn't agree on this. They agreed that the price is reduced. They agreed on nothing else.
7.06(c)	"will fail": If it's a declaration, it should be in the present tense. See page 144.
article 9	What if the mechanic determines that the car is in poor condition? What if it's in a accident just before the closing?
10.01	So either party can terminate if either breaches? The seller can breach and then terminate because he breached? Same for the buyer?
10.02	Even if the buyer's closing conditions weren't satisafied?
10.04(a)	WDTM?
10.05	Why priority mail exclusively? If the sender wants to pay more for better service (overnight delivery), that wouldn't be good enough?
10.05(a)	WDTM?