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Drafting in the Contracts Class

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USING CONTRACTS TO TEACH PRACTICAL SKILLS

DRAFTING IN THE CONTRACTS CLASS

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I. INTRODUCTION

When I began teaching, I perceived a dissonance between the materials in contracts casebooks and my practice experience. I had been attracted to The University of Montana School of Law because its dean, Jack Mudd, articulated a vision of legal education that would blend theory and practice.[1] The difficulty, of course, is to make that vision manifest. Mudd suggested that faculty constantly ask themselves, "What does this material look like when a lawyer encounters it?"

I came to law school teaching from a practice background in which I had worked largely as a sole practitioner in general practice. Although I had litigated many contracts cases (but rarely took them to the appellate courts), contracts more frequently crossed my desk in the planning stages. Every day I was required to read them, evaluate them, negotiate them, explain them to clients and write them.

Despite my experience, my students, employing a standard casebook, could take a six-hour contracts class and never see a contract. The fundamental difference is that in practice, contract law starts with contracts; in the classroom, contract law starts (and usually ends) with cases. I resolved to bring the perspective I had gained from practice into the classroom. This did

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1. *See* John O. Mudd, *Thinking Critically About "Thinking Like a Lawyer*," 33 J. LEGAL EDUC. 704 (1983).

not mean abandoning cases,[2] but it did mean making explicit the lessons learned from the cases. If a case involves a contract that went wrong, then the lawyer should be able to apply the learning from the case to prevent the problem from arising in the future.[3]

II. THE METHODOLOGY OF DRAFTING

I began to supplement the cases by developing drafting exercises that applied the knowledge gained from the cases. For example, in the area of parol evidence, if the issue in the case was whether parol evidence should be admitted, the class would explore how the drafter could better support the argument that the writing represented the complete understanding of the parties. Or in the area of conditions, if the issue in the case was whether the court would find an implied condition, we would explore how the drafter could have made the intention clearer through the use of express conditions.

As I proceeded down this road, I encountered some interesting developments. I found that I was increasingly interjecting comments about the role of the lawyer. For not only are contracts absent from the contracts casebook, but lawyers are absent as well. Drafting brings lawyers into the picture, and when you discuss lawyers' practices, you inevitably raise ethical issues. I found that drafting provided a natural forum to integrate discussion of ethics.[4]

I had been concerned that drafting would focus on skills that were somehow on a lesser plane than the skills of "thinking like a lawyer." As some of my critics bluntly put it, I would be teaching skills more appropriate for a vo-tech school than for a law school. I found that, in fact, drafting required the same higher-level reasoning processes as case analysis.[5] Louis M. Brown, the preventive law pioneer, insightfully notes that drafting reverses the reasoning process. In cases, the facts are a given and their legal significance is a variable. In drafting, the desired outcome is a given and the facts that will best produce it—the terms of the contract—are a variable.[6]

2. It might sometimes be more effective to write your own. *See* Scott J. Burnham, *The Hypothetical Case in the Classroom*, 37 J. LEGAL EDUC. 405 (1987).

3. One casebook, for example, states that "[o]nce the lawyer learns the pitfalls, he should have the expertise to avoid them," but gives the student no advice on how to accomplish that task. JOHN H. JACKSON & LEE C. BOLLINGER, CONTRACT LAW IN MODERN SOCIETY 1003 (2d ed. 1980).

4. *See* Scott J. Burnham, *Teaching Legal Ethics in Contracts*, 41 J. LEGAL EDUC. 105 (1991).

5. "Legal drafting is legal thinking made visible." ROBERT C. DICK, LEGAL DRAFTING 1 (2d ed. 1985).

6. LOUIS M. BROWN & EDWARD A. DAUER, PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS 270 (1978).

This focus on planning has led me to consider that Contracts does not have to be a litigation-oriented course. It can be a preventive law course, focusing on preventing the problems from arising rather than litigating them after they have arisen.[7] I constantly emphasize what I call The Three P's of Drafting:

Predict what may happen;
Provide for that contingency; and
Protect your client with a remedy.

I also found that students who are concrete learners, rather than abstract learners, benefit from the drafting exercises. In fact, most students benefit from exposure to different methods of teaching, from seeing the doctrine in context and from the active process of using the information they have gathered to solve a problem.[8]

Recently, I have detected another strength of this method. I have become concerned that students learn contracts as though it were a bunch of artificially mandated rules, like Civil Procedure. It seems to me there are essentially three kinds of rules in contract law. The first kind is the kind parties make to govern themselves. Although we pay lip service to freedom of contract, if Contracts is taught as a regulatory scheme, it is easy to lose sight of this fundamental rule. The second kind of rule is the default rules that kick in when the parties do not make the rules. The third kind of rule is the few regulatory rules that police the agreement. Drafting helps students keep these concepts straight, for as they draft contract terms, they constantly ask: What is the default rule? Am I articulating it or changing it? Is it a change that I am permitted to make?

The exercises I developed were eventually published in a book called *Drafting Contracts*.[9] I need not repeat here all that is contained therein, but I do urge the reader to consult the *Teacher's Manual*. There I confront head-on the two questions I am always asked by instructors who are considering employing drafting exercises in the classroom: (1) "How can I fit it in and still cover the material?" and (2) "How can I do it and still have time for the rest of my life?" These are important questions, and I hope you will be encouraged to try drafting exercises after reading my answers, which claim that it is indeed possible.[10]

7. *See* Scott J. Burnham, *Critical Reading of Contracts*, 23 LEGAL STUDIES FORUM 391 (1999).

8. *See, e.g.*, Gerald F. Hess, *Seven Principles for Good Practice in Legal Education*, 49 J. LEGAL EDUC. 367 (1999).

9. SCOTT J. BURNHAM, DRAFTING CONTRACTS (2d ed. 1993).

10. SCOTT J. BURNHAM, TEACHER'S MANUAL FOR DRAFTING CONTRACTS (2d ed. 1993).

III. EXERCISE: THE *EBAY*[11] AUCTION

Instead of rehashing what I have written elsewhere, let me present a new drafting exercise that exemplifies these principles. I call it *The eBay Auction*. This exercise is intended for use on the first day of class. It would also work well in an introductory program that precedes the beginning of substantive classes, for it can serve as an icebreaker to get students to know other members of the class. As with all my materials, I would welcome comments from you on how it worked.[12]

The instructor divides the class into two groups, Buyers and Sellers, with each Buyer paired with a Seller. Each person has decided to explore *eBay*, the on-line auction. Using an overhead projector, the instructor shows students the screens that represent the steps they take to register with *eBay*, which includes entering into a "click-wrap" agreement.[13] Ask them if they would normally take the time to read the contract, and give those who would the hard copy of the agreement, which runs eight printed pages.

The instructor then shows students the screens that represent an actual auction, with the Buyer making a bid and ultimately becoming the winning bidder on the Seller's "mint condition" copy of *Air Pirates* comic book No. 1 with a bid of $80.[14]

At this point, *eBay* leaves the parties to conclude their deal. Each pair of students, a Buyer and a Seller, will now get together to work out the remaining terms of their contract. Although they are negotiating face-to-face for the sake of convenience, tell them to assume the Buyer is in a jurisdiction thousands of miles from the Seller and they are contacting each other by telephone or e-mail.[15] Having distance between the parties will compel them to confront such difficult questions as the order of performance.

Some students may be familiar with *eBay* and the assistance it offers to buyers and sellers. Tell them they are free to incorporate this knowledge into their contract, but remind them that any such procedures are not "rules" that have to be followed.

11. *See* <http://www.ebay.com>.

12. I can be reached at <sburnham@selway.umt.edu>. The materials are posted on my web site: <http://www.wcbcourses.com/wcb/schools/LEXIS/law/ln800579/3/>. Go to Learning Links and select *eBay* Auction Materials.

13. For this purpose, I captured the screen images using the Print Screen key, saved the images by pasting them into WordPerfect, and then printed them on transparencies to show to the class. Teaching drafting involves making a lot of transparencies to mark up during class discussion.

14. Preparation for this exercise did double duty for me, for I wanted this comic book as a tax-deductible show and tell to use in my copyright class. *See* Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir 1978).

15. The exercise could in fact be done via e-mail, even between students in classes at different law schools.

After they have had enough time to negotiate their agreements, initiate a class discussion by asking the students questions, such as the following:[16]

Did you read your agreement with *eBay*?
If yes, did you understand everything?
If no, what did you do about it?
If yes, did you find anything you objected to?
If yes, what did you do about it?
If no, why not?
Is it binding on you?
What if paragraph 15 said, "You agree to pay *eBay* $500 on Tuesday"?

Did you reach agreement between Buyer and Seller?
If not, is there a contract?
If yes, what are its terms?
If yes, did you memorialize the agreement in writing? How did you do that?

Who has to perform first?
Is Buyer paying before Seller ships the goods?
What happens if Seller does not ship the goods?
Is Seller shipping the goods before Buyer pays?
What happens if Buyer does not pay?
Is the exchange simultaneous?
How did you accomplish that?
What payment form is Buyer using?
Does Seller have any assurance of payment?
What shipping method is Seller using?
Does Buyer have any assurance of receipt?
What happens if the goods are lost in transit?
What happens if the goods are not as described by Seller in the auction (e.g., dog-eared and soiled)?
Who determines what "mint condition" means, anyway?
What would the terms be in the areas above if the parties did not address them in their agreement?

16. I said I would not answer in this article the question, "How can I do it (have students draft contracts) and still have time for the rest of my life?" I cannot, however, help but point out that even though students will be drafting contract terms, you will not individually assess their drafts. Your feedback will consist of gathering contributions from them and commenting on their contributions. Just as when you have students brief cases, you do not generally collect their briefs and comment on them individually. You have a class discussion that arises from those briefs, which they can then self-evaluate based on the discussion. So it is with drafting.

What law governs this agreement?

Are those rules mandatory or facilitative?

Is it practical to bring a lawsuit against the other party?

Are there any alternatives to bringing a lawsuit?

What is the role of an attorney here?

Would one of the parties have considered using an attorney to draft the contract?

IV. GOALS AND OBJECTIVES

What are the goals of this exercise? It is, of course, introductory, and intended only to demonstrate some of the themes that will run through the course. Questions, not answers, will suffice at this point. But there are also habits of thinking that I wish to inculcate at the beginning of the course. These themes and habits include the following:

- to provide a framework for organizing the course.
- to appreciate the concept of freedom of contract.
- to recognize the concept of default rules.
- to become familiar with sources of contract law.
- to distinguish between regulatory rules and facilitative rules.
- to compare and contrast contracts of adhesion and negotiated contracts.
- to talk back to the contract by predicting what may happen in the future.
- to ask what the remedy is if promises are not kept.
- to appreciate the role of transaction costs.
- to interject lawyers in the process.
- to appreciate possibilities for alternative dispute resolution.
- to detect possibilities for preventive law.

These are, of course, goals and objectives for the whole course.[17] The emphasis here is on introducing the students to these themes. Let me elaborate on how those goals and objectives are realized in this lesson:

1. *Organizing the course.* The issues in the *eBay* contract include: (1) Is there a contract? (2) What must each party do to perform it? (3) What happens if a party doesn't do what it is obligated to do? These three topics—formation, performance and remedies—provide a rough outline for the course.

2. *Freedom of contract.* Contracts are largely a matter of freedom of contract, with the parties free to negotiate the terms. I fear that students quickly begin to think of contracts in terms of the rule for this or that

17. I often share my goals and objectives with the students, so they know what they were supposed to take away from a particular lesson.

situation. In order to emphasize this fundamental principle, I choose to start with it.

3. *Default rules.* One of the jobs of contract law is to provide a rule that kicks in when the parties do not expressly put the relevant provisions in their contract. You might indicate to students some of the default rules in our scenario. For example, if the parties do not provide for the time when performance begins, is there still a contract? What might the rule be?

4. *Sources of law.* Where do these default rules come from? Explain briefly the common law and the U.C.C. You might even begin to introduce them to the notion that particular statutes apply to particular transactions. Here, for example, because the transaction involves the sale of goods, the U.C.C. applies, and you cannot begin too early to emphasize that the U.C.C. applies even if the parties are not merchants![18]

5. *Regulation and facilitation.* Most of the rules that apply to this transaction are not regulatory. That is, within reason, the parties are free to come to whatever terms they desire. Contract law facilitates the making of their agreement. Another issue is determining when the terms are not within reason, so that the state might exercise its police power.

6. *Contracts of adhesion and negotiated contracts.* The contract between each party and *eBay* is, of course, a contract of adhesion, while the contract between Buyer and Seller is a negotiated contract. Students should contrast these agreements and begin to see why the law sometimes treats them differently. For example, why would we more likely tolerate a term such as "You agree to pay me $500 on Tuesday" in a negotiated agreement, and how can we justify its non-enforcement in a contract of adhesion?

7. *Prediction.* Contract law is an experience in time travel. The contract drafter must always ask what might happen in the future and provide for it in the present. Some call this concept presentation; I call it "What-iffing" the contract.

8. *Remedies.* After predicting what might happen in the future, how can a party provide protection in the contract should the event occur? On stating that one party has an obligation, such as to ship or to pay, the student should get into the habit of asking, what happens if they do not do what they promised to do? Is it possible for the other party to obtain any leverage in that event? Examine some of the solutions students came up with in drafting their contracts.

9. *Transaction costs.* Even if a party has a claim, what is its value? What is the cost of achieving it? Is it worth pursuing?

18. *See* Scott J. Burnham, *Why Do Law Students Insist That Article 2 of the Uniform Commercial Code Applies Only to Merchants and What Can We Do About It?* 63 BROOK. L. REV. 1271 (1997).

10. *The role of lawyers.* In dealing with this contract matter, would the parties have considered consulting a lawyer for assistance? Why not? Would it have made a difference if this agreement was for $80,000 instead of $80?

11. *Alternative dispute resolution.* Are there methods of dispute resolution other than recourse to the courts? What are the advantages and disadvantages of them? Students who have actually traded on *eBay* may have some insights.

12. *Preventive law.* Most importantly, the emphasis is on preventive law. The drafter is trying to anticipate what might happen and deal with it at the time the contract is drafted, rather than, as in the cases, after the transaction has blown up.

V. DISCUSSION GUIDE

Did you read your agreement with *eBay*?

If yes, did you understand everything?

If no, what did you do about it?

If yes, did you find anything you objected to?

If yes, what did you do about it?

If no, why not?

Is it binding on you?

What if paragraph 15 said, "You agree to pay *eBay* $500 on Tuesday"?

These questions introduce the student to contracts of adhesion. My guess is that the students, like most of us, agreed to the terms without attempting to read or understand them. One reason for this behavior is that, because there was no opportunity to object to the terms, it would have been inefficient to spend time on them. As to what prevents the drafter from slipping in an onerous term, you might introduce them to the concept of reasonably expected terms or unconscionable terms, or better yet, leave the question hanging.

Did you reach agreement between Buyer and Seller?

If not, is there a contract?

If yes, what are its terms?

If yes, did you memorialize the agreement in writing? How did you do that?

These questions introduce the student to negotiated contracts, which can be readily contrasted with the contract of adhesion. The initial focus is on formation issues. The contract with *eBay* was entered into by clicking, but what indicates agreement between Buyer and Seller? Is it enough that Buyer submitted the high bid, or do the parties have to agree on all the terms? If the former, where do the terms come from? How much formality is required for a contract? If it has to be put in a signed writing, do you have a signed writing when you exchange e-mail in cyberspace?

Who has to perform first?

Is Buyer paying before Seller ships the goods?

What happens if Seller does not ship the goods?

Is Seller shipping the goods before Buyer pays?

What happens if Buyer doesn't pay?

Is the exchange simultaneous?

How did you accomplish that?

What payment form is Buyer using?

Does Seller have any assurance of payment?

What shipping method is Seller using?

Does Buyer have any assurance of receipt?

What happens if the goods are lost in transit?

These are the kinds of questions that ask the students to use their predictive powers. They must visualize what will happen in the future and then try to make a rule in the present to govern that event. The predictive powers should extend to what happens if a party does not do what they promised to do. Many of these problems will revolve around credit. For example, if the Seller ships the goods first, she is extending credit to the Buyer. How can a party reduce the risk when extending credit? Some parties may be aware of some creative ways to solve these problems, such as using an escrow agent as an intermediary or paying to a credit card where the payment can be later disputed.

What happens if the goods are not as described by Seller in the auction (e.g., dog-eared and soiled)?

Who determines what "mint condition" means, anyway?

What would the terms be in the areas above if the parties did not address them in their agreement?

Continuing the discussion of problems that may arise in the future, there are the issues of what condition the buyer can expect the goods to be in, and if the promises are spelled out (as in the phrase "mint condition"), what the language means. The role of custom and trade practice can be invoked here to supplement the contract terms. Once it is clear that the buyer did not get what she expected, what can she do about it? How do you calculate damages?

What law governs this agreement?

Are those rules mandatory or facilitative?

These questions provide an opportunity to reiterate the law that applies—the rules the parties have agreed to, the default rules that apply where they have not agreed, and the mandatory rules that they must follow. You might mention the source of these rules in the common law and the legislative enactments.

Is it practical to bring a lawsuit against the other party?

Are there any alternatives to bringing a lawsuit?

What is the role of an attorney here?

Would one of the parties have considered using an attorney to draft the contract?

First-year students quickly get into the habit of thinking in terms of lawsuits. Here, a lawsuit is probably not practical because the transaction costs would exceed any recovery. You might introduce the "American Rule" regarding attorney's fees. Are there less expensive ways of obtaining remedies? Some students may be aware that *eBay* participants can check comments posted about experiences with particular buyers and sellers. While it would have been helpful to have checked the comments earlier in this case, the possibility of posting a comment now can operate as a deterrent to behavior. There are limitations to what can be accomplished through a contract; therefore, who you are dealing with remains important. If the transaction costs are a deterrent to bringing a lawsuit, is it possible to use a less costly dispute resolution mechanism, such as mediation or arbitration?

Most of us would not consider using an attorney for an $80 transaction because it would not be cost effective. Would it make any difference if you added a few zeros to the numbers? People might still consider themselves competent to enter the transaction, employing an attorney only after it goes bad. Is it possible to reorient contract law to emphasize preventive law?

VI. CONCLUSION

Reading about this exercise—and I am hopeful, your actually using it—will make clear to you why I supplement the contracts course with drafting exercises. In sum:

- Drafting exemplifies the principles of contract law.
- It does so in a planning context.
- It develops lawyering skills.
- It appeals to different learning styles.
- And most importantly, it's fun!