

LAW-710: CONTRACT DRAFTING AND STRATEGY, SPRING 2021

Professor Andrés Cantero, Jr.

Mondays 5:30-7:20pm

SYLLABUS

Overview

This course presents the fundamentals of contract drafting, analysis and strategy in a transactional practice. The objectives of this course are for each student to develop:

- Determine how to select and use form agreements to your advantage.
- Demonstrate proficiency in evaluating, challenging, deconstructing, and revising agreements.
- Draft contracts and clauses in a precise, comprehensible, and easy-to-follow manner.
- Adapt drafting style based on the client, the parties' relationship, and the audience.
- Draft with your client's needs and concerns in mind.
- Draft effectively by asking the right questions and anticipating problems.

By the end of the class, you should have a strong understanding of the formatting of a contract and of the “miscellaneous” or “boilerplate” provisions (the generic looking clauses usually found at the end of the contract). Many of these clauses will be in every contract you draft. In order to avoid drafting pitfalls, you need to be very familiar with these clauses, why you might decide to include them in your agreement and where the negotiation lever points are.

Over the course of the semester, I suggest that you create a contract drafting kit which contains multiple versions of the contract clauses that we review and precedent to go back to for future reference. This kit will serve as a valuable tool during this class and during the practice of transactional law and will assist you in the final exam.

In addition to reviewing individual contract clauses, we will review and negotiate various types of agreements that are commonly seen in the practice of transactional law. Throughout the course I encourage you to pay attention to key clauses and issues related to each of these agreements.

This course will also cover basic issues in contract negotiation theory and ethics. In-class and out-of-class exercises will help you practice skills you learn in class. We will conduct in-class mock negotiation exercises involving a variety of contract types and situations to prepare you for negotiations you may encounter in your legal career.

Required Texts

1. **Books:** Adams, C., and Kramer, P. (2020) *A Practical Guide to Drafting Contracts: From Concept to Closure* (Second Edition) ISBN-13: 978-1543810622 ISBN-10: 1543810624
2. **Articles:** Please refer to the weekly reading table at the end of this syllabus for a complete list of articles or other readings.

Grading

Grades for this class will be based on three components:

- | | |
|-----------------------------------|--------------------|
| (1) Class Participation | 20% of final grade |
| (2) Weekly Assignments | 40% of final grade |
| (3) Final Exam – Letter of Intent | 40% of final grade |

Weekly Assignments Rubric			
Scoring	Comprehension	Clarity	Explanation
5 - 10 Points	The student does not show any understanding of the materials	The assignment is not clear and is difficult to understand	The student does not have any rationale for the choices made in the assignment
10-15 Points	The student shows some understanding of the materials, but misses a major component	The assignment is understandable to an extent but contains drafting problems	The student gives some rationale for the choices made in the assignment but they do not comport with the materials and discussions
15-20 Points	The student shows an understanding of most of the materials	The assignment is mostly understandable but contains some minor drafting issues	The student is mostly able to rationalize the choices made in the assignment and they comport with the materials and discussions
20-25 Points	The student shows an understanding of all of the materials	The assignment is fully understandable and well-drafted	The student is able to rationalize all choices made in the assignment and they comport with the materials and discussions

Letter of Intent Rubric				
Scoring	Comprehension	Clarity	Explanation of Drafting Choices	Understanding the Risks
5-10 Points	The LOI shows a lack of understanding of the deal terms	The LOI is not clear and is difficult to understand	Based on the comments to the client, the student shows no understanding of the student's drafting choices (i.e., alternatives available to the student based on the deal terms provided).	Based on the comments to the client, the student shows no understanding of the client's risk in the student's drafting choices
10-15 Points	The LOI shows an understanding of some of the deal terms	The LOI is understandable to an extent but contains drafting problems. For instance, terms of the deal are incorrectly written	Based on the comments to the client, the student shows some understanding of the student's drafting choices	Based on the comments to the client, the student shows some understanding of the client's risk in the student's drafting choices
15-20 Points	The LOI shows an understanding of most of the deal terms	The assignment is mostly understandable but contains some minor drafting issues, such as misspellings or incorrect party names	Based on the comments to the client, the student mostly shows an understanding of the student's drafting choices	Based on the comments to the client, the student mostly shows an understanding of the client's risk in the student's drafting choices
20-25 Points	The LOI shows an understanding of the deal terms	The LOI is fully understandable and well-drafted	Based on the comments to the client, the student shows full understanding of the student's drafting choices	Based on the comments to the client, the student shows full understanding of the client's risk in the student's drafting choices

You are expected to attend class, actively participate, and complete your assignments on time. You may miss one class without penalty, provided you provide advance notice (to the extent feasible). There will be assigned drafting and reading activities to consider in advance of each class. Please come to class prepared.

Assignment Formatting

1. All documents should be in Microsoft Word format.
2. Papers must be typewritten or word-processed, double-spaced, with 12 point font.
3. Make sure you keep a copy of all submitted papers.
4. Typos and spelling errors are unforgivable at this level and reflect poorly on you.
5. Include citations, references, and other appropriate weblinks.
6. All page length requirements are for double-spaced pages, with 1-inch margins, in 12-point Times New Roman font.
7. The student’s revisions to a contract shall be shown in track changes.
8. The student may put questions to the professor about a contract in a comment bubble with the comment starting with “Question for Professor –”.

Assignment Deadlines

Assignments are due no later than **11:59 p.m.** in the **Pacific Time zone** on the day that is stated in the assignment page. Late assignments receive a 5 point deduction for each day they are late, with no credit given for work submitted after 72 hours (three days) from the original due date (“**Late Assignment Policy**”).

This Late Assignment Policy may be revised at any time and for any reason during the course of the semester. If a student has questions about the policy, please contact me.

Contact Information: ACantero@law.usc.edu

Course Outline

This is my current expectation of what the course will cover, but this outline is subject to change. I will be posting class materials on Blackboard and communicating with you via email to deliver assignments and other class information.

#	Date	Topic
1	Jan.10	<ul style="list-style-type: none"> ◆ Review Syllabus ◆ Introduction to Course ◆ Introduction to Contract Drafting Principles ◆ Negotiation Ethics ◆ Tips for In-Class Assignments <p>No Assignment</p>
--	Jan. 17	No Class – MLK Day
2	Jan. 24	<p>Textbook: Chapter 2 and 3</p> <p>Online Resources:</p> <p>Writing Contracts in the Client's Interest, (Introduction and Part IV only)</p> <p>TED Talk - Let's Simplify Legal Jargon!</p>

#	Date	Topic
		Assignment: Two-page summary comparing agreements due January 22.
3	Jan.31	<p>Textbook: Chapters 4 and 5</p> <p>Online Resources:</p> <p><u>Writing Contracts in the Client's Interest, 51 S.C. L. Rev. 153 (PDF) (Fall 1999), James P. Nehf (Part II.A. only)</u></p> <p><u>Style from Beginning of Contract Form (PDF):</u> This document offers a side-by-side comparison of traditional and modern introductory provisions of a joint venture contract.</p> <p><u>27-75 California Legal Forms--Transaction Guide § 75.221 (Word):</u> This form document explains and illustrates basic elements of the beginning of a commercial contract. Note that although this example introduces recitals with the archaic term "Whereas," it is unnecessary to include "whereas" in modern contracts.</p> <p><u>Rules of Contract Interpretation and Canons of Construction: Relevant Tools for Contract Drafting (Word)</u></p> <p><u>"A Checklist for Drafting Good Contracts" (2008) by Association of Legal Writing Directors; M. H. Sam Jacobson (PDF)</u></p> <p>Assignments: Begin a contract due January 29.</p>
4	Feb. 7	<p>Textbook: Chapters 6 and 10 (10.1 – 10.4 only)</p> <p>Online Resources:</p> <p><u>Common-Sense Negotiation (PDF):</u> This article describes basic principles to bear in mind when negotiating commercial agreements.</p> <p><u>Active versus Passive Voice (PDF)</u></p> <p><u>Contract Law: The Parol Evidence Rule (video)</u></p> <p>Murray, Timothy (2019). <u>The misunderstood but critically important merger clause.</u> The Practical Guidance Journal, LexisNexis.com</p> <p>Assignments: Simplify and clarify contract language due February 5.</p>
5	Feb. 14	<p>Textbook: Chapters 7 (7.1 – 7.4, 7.7 – 7.8 only)</p> <p>Online Resources:</p> <p><u>Condition precedent: Everything you need to know. Upcounsel.</u></p> <p>Assignments: Draft performance obligation language due February 12.</p>
6	Feb. 21	<p>Textbook: Chapters 10 (10.5-10.7, 10.10 only) and 7 (7.5 – 7.6 only)</p> <p>Online Resources:</p> <p><u>Indemnification Explained for Non-Lawyers: What Is It and Why Do I Care? (PDF)</u></p> <p>Assignments: Take a position on a buy-sell agreement due February 19.</p>
7	Feb. 28	<p>Textbook: Chapters 12, 13 (13.1 – 13.2 only)</p> <p>Online Resources:</p> <p><u>Stepped Alternative Resolution Clauses Form (PDF):</u> This document contains a set of dispute resolution clauses in which the resolution of disputes begins with the least formal mechanism (good faith negotiation) and progresses to increasingly more formal mechanisms if earlier attempts to resolve the matter are unsuccessful.</p>

#	Date	Topic
		<p><u>Agreement to Mediate with Single Mediator Form (PDF)</u>: This form is a basic agreement between two parties to designate a single mediator to assist them in negotiations to resolve certain disputes to be described in the agreement.</p> <p><u>My Version of the AAA Standard Arbitration Clause by Ken Adams</u>: A well-known instructor of contract drafting states his ideas for clarifying and improving on a standard arbitration clause promoted by the American Arbitration Association.</p> <p>Assignments: Draft dispute Resolution and Governing Law due February 26.</p>
8	Mar. 7	<p>Textbook: Chapters 12 (13.3-13.11 only) and 14</p> <p>Online Resources:</p> <p><u>Boilerplate Provisions (Word)</u>: This is an excerpt from a sample contract that contains what are often considered to be “boilerplate” or “miscellaneous” provisions. Each provision is annotated with comments that explain the background for the provision.</p> <p><u>A Short History of Boilerplate (PDF)</u>, 5 Scribes J. Legal Writing 155</p> <p>No Assignment</p>
--	Mar. 14	No Class – Spring Break
9	Mar. 21	<p>Textbook: Chapter 9</p> <p>Online Resources:</p> <p><u>Sample Letter of Intent (LOI) (Word)</u>: This sample document is provided to give you ideas for drafting a term sheet in this week’s assignment.</p> <p><u>Contractual Foreplay: Letters of Intent vs. Term Sheets (PDF)</u>: This article explains some of the legal principles, psychology, and strategy involved in the negotiation, drafting, and execution of letters of intent and term sheets.</p> <p>Stephanie Evans, <u>Know Your Limits: Understanding Your Term Sheet’s Exclusivity Provision</u>, WilmerHale Launch (April 13, 2017): This article explains the meaning and use of exclusive dealing provisions in term sheets and letters of intent.</p> <p>Philip Richter, <u>Negotiation in Good Faith—SIGA v. PharmAthene</u>, Harvard Law School Forum on Corporate Governance and Financial Regulation (Jan. 27, 2016): This article explains how a commitment to negotiate in good faith can have significant legal consequences that the parties themselves may not have anticipated.</p> <p>Assignments: Revise Letter of Intent due March 19.</p>
10	Mar.28	<p>Textbook: Chapter 8</p> <p>Online Resources:</p> <p><u>Week 9 Discussion Artifact (Word)</u>: This document may be used by the instructor as the basis for discussion during the Week 9 live session.</p> <p><u>Week 9 Lease Form (PDF)</u>: This form is provided to illustrate a lease of office space that Ellis-Elan Jewelry Design, LLC might enter into with a commercial landlord.</p> <p><u>Industrial Lease Form (PDF)</u>: This form is provided to illustrate a lease space in a mixed-use industrial park.</p> <p><u>Residential Lease Form (PDF)</u>: This form is provided to illustrate a lease for use in leasing a residence, such as an apartment or a single-family home.</p> <p>Assignments: Draft a Lease due March 26.</p>
11	Apr. 4	Textbook: Chapter 10 (10.8 and 10.9 only)

#	Date	Topic
		<p>Online Resources:</p> <p><u>Confidentiality Agreements—What Every Business Lawyer Should Know (PDF)</u>, 52 Orange County Lawyer 10 (October 2010)</p> <p><u>Examples of Some Clauses Commonly Found in Employment Agreements (Word)</u></p> <p>No Assignment</p>
12	Apr. 11	<p>Textbook: Chapter 11</p> <p>Online Resources:</p> <p><u>Distribution Contract Form (PDF)</u>: This is a somewhat more detailed, ten-page sample distribution agreement.</p> <p>The following two articles explain some of the most important clauses to include in distribution agreements as well as traps to avoid:</p> <ul style="list-style-type: none"> ○ <u>10 Golden Tips for Distribution Agreements</u> ○ <u>Avoiding the Top 10 Mistakes with Distributor Agreements</u> <p>The article in Footnote 7 of Chapter 6 of the textbook: <u>73 U. Chi. L. Rev. 705 (2006). Putting the "Best" in Best Efforts (PDF)</u> by Rob Park</p> <p>Assignments: Draft a Termination Provision due April 9.</p>
13	Apr. 18	<p>Online Resources:</p> <p><u>Important Contract Terms for Service Agreements</u></p> <p><u>Gotcha! Common Traps to Avoid in Vendor Agreements, New York State Bar Journal (Jan/Feb 2019) (PDF)</u></p> <p><u>Mutual Confidential Nondisclosure Agreement Form (PDF)</u></p> <p><u>Vendor Nondisclosure Agreement Form (PDF)</u></p> <p><u>Protecting Confidential Information: Using NDAs with Your Vendors</u></p> <p><u>Unilateral vs. Mutual NDAs</u></p> <p>Assignments: Mark up NDA due April 16.</p>
14	Apr. 25	<p>Online Resources:</p> <p><u>Rules of Engagement in the Conflict between Businesses and Consumers in Online Contracts (PDF)</u></p> <p><u>Online Contract Formation, Journal of Internet Law, (October 2018) (PDF)</u></p> <p><u>Those Wordy Contracts We All So Quickly Accept</u></p> <p><u>Why All the New Terms of Service?</u></p> <p><u>Terms of Use Excerpts (Word)</u>: This document is a compendium of online terms of use employed by major companies including Twitter, Google, Disney, and Pinterest. These terms are provided to illustrate the kinds of contracts that are agreed to (knowingly or otherwise) by millions of users on a daily basis.</p> <p>No Assignment</p>
--	Apr. 26	<p>The final exam will be issued by the registrar's office on April 26th and due May 9th at 12 pm noon.</p>

Statement on Academic Conduct and Support Systems

Academic Conduct:

Plagiarism – presenting someone else’s ideas as your own, either verbatim or recast in your own words – is a serious academic offense with serious consequences. Please familiarize yourself with the discussion of plagiarism in SCampus in Part B, Section 11, “Behavior Violating University Standards,” <https://policy.usc.edu/files/2020/07/SCampus-Part-B-2.pdf>. Other forms of academic dishonesty are equally unacceptable.

Support Systems:

Student Counseling Services (SCS) – (213) 740-7711 – 24/7 on call - Free and confidential mental health treatment for students, including short-term psychotherapy, group counseling, stress fitness workshops, and crisis intervention. <https://studenthealth.usc.edu/counseling/>.

See also this guide for Gould students to facilitate access to mental health resources on campus: <https://gould.usc.edu/assets/docs/directory/Mental-Health-Services-at-USC.pdf>

National Suicide Prevention Lifeline – 1 (800) 273-8255 - Provides free and confidential emotional support to people in suicidal crisis or emotional distress 24 hours a day, 7 days a week. www.suicidepreventionlifeline.org

Relationship and Sexual Violence Prevention Services (RSVP) – (213) 740-4900 – 24/7 on call - Free and confidential therapy services, workshops, and training for situations related to gender-based harm. <https://studenthealth.usc.edu/sexual-assault/>

Sexual Assault Resource Center - For more information about how to get help or help a survivor, rights, reporting options, and additional resources, visit the website: <https://eotix.usc.edu/>

Office of Equity and Diversity (OED)/Title IX Compliance – (213) 740-5086 - Works with faculty, staff, visitors, applicants, and students around issues of protected class. <https://eotix.usc.edu/>

Bias Assessment Response and Support - Incidents of bias, hate crimes, and microaggressions need to be reported allowing for appropriate investigation and response. <https://eotix.usc.edu/>

The Office of Disability Services and Programs - Provides certification for students with disabilities and helps arrange relevant accommodations. <https://dsp.usc.edu/>

Student Support and Advocacy

Campus Support and Information is where members of the Trojan Family go to seek support for themselves, for others, and for the community. It is a one-stop-shop for care and support, troubleshooting and advocacy. <https://cwci.usc.edu/campus-support-and-intervention/>

If you are concerned about a fellow Trojan challenged with personal difficulties, you can file a report through Trojans Care for Trojans. The form can be found at: <https://campussupport.usc.edu/trojans-care-4-trojans/>.

Diversity at USC

Information on events, programs and training, the Diversity Task Force (including representatives for each school), chronology, participation, and various resources for students. <https://diversity.usc.edu/>

Gould-specific information can be found at <https://gould.usc.edu/about/race-equity/> (Law, Race and Equity page) and <https://gould.usc.edu/students/diversity/>. Students can submit anonymous EDI-related comments/complaints through the law portal: <https://mylaw2.usc.edu/about/contact/anonymous-comments>

USC Emergency Information

Provides safety and other updates, including ways in which instruction will be continued if an officially declared emergency makes travel to campus infeasible. <https://emergency.usc.edu/>

USC Department of Public Safety – UPC: (213) 740-4321 – HSC: (323) 442-1000 – 24-hour emergency or to report a crime. Provides overall safety to USC community. <https://dps.usc.edu/>