

Preface to the Third Edition

From a single student signing an apartment lease to the merger of enormous corporations, almost every business relationship in the world is governed by a contract. While not every layperson needs to know how to draft a contract, every law student, lawyer, businessperson, and layperson should understand the six essential contract concepts that are the building blocks for any type of business agreement. *Drafting Contracts: How and Why Lawyers Do What They Do*, Third Edition, offers an accessible yet thorough approach to understanding these building-block concepts.

While some may hold that the skill of contract drafting can only be learned in practice, there are steps one can take before going into practice to get a running start. With the explanations, real-life scenarios, and exercises in this text, students can learn to think and draft like an attorney, and others who already have some experience in drafting can further hone their skills.

This edition would not have been possible without the strong foundation, incredible insights, and hard work of Tina L. Stark. In the Third Edition, you will find her innovative approach for understanding and drafting any type of business contract with the building-block concepts, along with detailed descriptions and examples of each part of an agreement. As in previous editions, you will continue to find a strong emphasis on teaching contract drafting in the real-world context of business transactions and developing drafting skills through practice-based examples and sample documents. Furthermore, many of the same topics continue to be relevant to current and future drafters, such as how to write clearly and avoid ambiguity, how to best organize a contract and individual provisions, and how to add value to a deal. I am honored to be following in Tina L. Stark's footsteps and to have the opportunity and responsibility to carry her work forward.

In keeping with Tina L. Stark's approach of bridging law school and practice, I have sought input from students, academics, and practitioners. As a result, the Third Edition has been updated to reflect recent developments in practice, including the initial effects of COVID-19 on drafting (such as its impact on force majeure provisions). Online materials and updates on using artificial intelligence and technology in contract drafting can be found on the Casebook Connect Resources page and on the Aspen website.

Coverage of a number of topics has been expanded, including issues relating to qualifiers, endgame mechanisms (such as limitations on liability and specific indemnity tools and provisions), and professional responsibility.

The Third Edition has been reorganized into **Parts A** through **E**.

- **Part A** introduces the six contract concepts for drafting and illustrates how to translate the business terms of a deal into these concepts.
- **Part B** explains how to draft each contract concept and how to best include them as provisions in agreements.
- **Part C** provides a thorough overview of the structure and parts of a contract, from preamble to signature lines, schedules, and exhibits.
- **Part D** focuses on Drafting Clearly and Unambiguously, mirroring Part 3 from previous editions.
- **Part E** consolidates those chapters that address skills, techniques, processes, and professional responsibility considerations when putting a contract together.

A summary chapter for study and review concludes each part, A through E, with a capsule overview of all topics covered in that section of the book.

I am excited that the Third Edition will be available on the Casebook Connect platform, where you will find more content and links. Some of the exercises, agreements, and specific explanations formerly located in Part 7 or 8 or in the Exhibit section of previous editions can now be found on the Casebook Connect Resources page and at www.aspenpublishing.com.

Students and colleagues, I look forward to receiving feedback about your experiences learning and teaching with the Third Edition. I welcome your input for my future work on the Fourth Edition.

Monica L. Llorente
December 2023

PREFACE TO THE SECOND EDITION

The following discussion occurred in 2005 between the publisher's editors and me—before I signed the contract for the First Edition:

Person 1: It's a great idea.

Person 2: But there's no market.

Persons 1 and 2 and me: If we build it, they will come.

And you came—in numbers I never thought possible. Enough of you came, you could *almost* say that Contract Drafting has become a mainstream course. Indeed, enough of you came, that the publisher said, “Write a Second Edition.” So, here it is.

HIGHLIGHTS OF THE SECOND EDITION

1. The Second Edition retains the same organizational structure and pedagogy as the First Edition, but with two additions. First, students will spend more time learning how to work with precedents. For example, the textbook includes a well-drafted House Purchase Agreement that students can use as a precedent for the Car Purchase Agreement. Second, students will learn contract analysis—how to read a contract. The Teachers' Manual includes the pedagogy and many of the textbook's exercises do double-duty, so teaching this new skill will fit easily into most syllabi.
2. Most chapters have expanded discussions of their respective content, along with new exercises.
3. The Second Edition virtually completely overhauls Chapter 15—Endgame. It now discusses in detail common contractual remedies and provides a multitude of exemplars. The exemplars come from a host of contracts, so students can see the provisions at work. Among the contracts from which the provisions have been taken are a grocery supply agreement, a construction agreement, a theater lease, and a movie distribution agreement.
4. Chapter 16—General Provisions now includes examples of well-drafted provisions, so that students have basic precedents going forward.
5. Scattered throughout the book and in Chapter 32 are multiple well-drafted exemplars for students. These exemplars are more than bare bones contracts. The Chapter 32 exemplars are populated with annotations that explain associated business and legal issues and ask questions designed to

help students problem solve the agreement's drafting. These annotations give students context for what they are reading and help avert a *mindless markup*. I call the pedagogy for using the annotations *guided reading*.

6. The textbook has revised the *Aircraft Purchase Agreement* exercise. By omitting some provisions and redrafting others, the APA more directly addresses the significant issues. The memos giving instructions are also more targeted. In addition, Chapter 32 includes exemplars of action sections and endgame sections in acquisition agreements so that students gain practice working with precedents. This move reduces the textbook's narrative discussions on acquisitions—a topic not all professor want to teach.
7. The poorly drafted, much-maligned *Asset Purchase Agreement* appears no longer in the textbook's appendices. But it's on the website for anyone who grew attached to it.
8. The website will include significant new material:
 - (a) Multiple exercises not included in the textbook
 - (b) Standard comments that you can use when grading some of the more significant exercises. They are in a Word document, listed in order by section number. All you need to do is copy and paste the comment into a Word Comment bubble—and then tailor as necessary. These standard comments work because students regularly make the same mistakes because provisions target a specific pedagogic issues. So, when a student errs in her drafting, the error probably resembles the same error of previous students. I update these comments regularly, so please check the website right before you use the comments.
 - (c) Proposed grading suggestions. The grading document allocates to each drafting, business or legal issue a number of points reflective of the issue's difficulty; for example, fewer points for the preamble and more points for the action sections. The website provides detailed information on how to use the grading documents.

Tina L. Stark
November 2013

PREFACE TO THE FIRST EDITION

Drafting Contracts brings a new approach to the teaching of contract drafting. It emphasizes the nexus between the business deal and the contract, both in the material taught and in the exercises students work on. In addition, it teaches students to think critically about the law and the transaction they are memorializing.

To draft a contract well, a drafter must know the rules of good writing—and more. Among other things, a drafter must

- understand the business deal;
- know how to use the contract concepts to reflect the parties' deal accurately; and
- be able to draft and recognize nuances in language that change the deal.

In addition, a good drafter knows how to add value to a deal by discerning and resolving business issues.

Drafting Contracts reflects a real world approach to contract drafting, bringing together years of real world contract drafting experience and law school teaching.

Although new to the market, the materials in *Drafting Contracts* have been used in law school classrooms for more than 13 years, including use of the manuscript at more than ten schools.

Drafting Contracts teaches students through narration and drafting exercises. The exercises are numerous, permitting a professor to choose the ones most appropriate for his or her class. As designed, the exercises in later chapters incorporate material from earlier chapters, so that students practice what they have already learned while integrating new skills. Professors need not, however, teach the materials in *Drafting Contracts* in the order set out. The book is sufficiently flexible that professors can reorder the chapters to suit any curriculum.

This book's organization reflects its pedagogy. Part 1 teaches the material that is the course's foundation. Its chapters introduce students to the building blocks of contracts: representations and warranties, covenants, rights, conditions, discretionary authority, and declarations. These chapters do more, however, than define the terms. They show how and why a drafter chooses a specific contract concept by teaching the analytic skill of *translating the business deal into contract concepts*.

In Part 2, *Drafting Contracts* sets out the framework of an agreement and works through it from the preamble to the signature lines, in each instance discussing the business, legal, and drafting issues that occur in each part of a contract. After these chapters, in Part 3, *Drafting Contracts* turns to the rules for good drafting and to techniques to enhance clarity and to avoid ambiguity. Although the chapters in this Part concentrate on more traditional drafting issues, they nonetheless remain sensitive to how the business deal affects drafting in subtle ways.

In Part 4, students learn how to look at a deal from the client's business perspective and how to add value to a transaction by identifying business issues using the five-prong framework of money, risk, control, standards, and endgame.

In Part 5, students learn the drafting process, from organizing the initial contract to amending the signed agreement. Students also learn how to analyze and comment on a contract that another lawyer has drafted.

Drafting Contracts directly addresses ethical issues unique to contract drafting, both through textual material and exercises in Part 6. The book's final part, Part 7, provides supplementary exercises.

Drafting Contracts is designed for use in an upper-level drafting course but can be integrated into a variety of other courses, including a first-year writing or contracts course, a mergers and acquisitions course, a transactional simulation course, a transactional clinic, and an upper-level writing survey course. The Teachers Manual suggests appropriate chapters and exercises for each of these uses.

The Teachers Manual is detailed. For exercises that require the redrafting of a provision, the TM includes the original provision, a mark-up showing the changes, the final version, and Notes explaining the answer. For exercises that require free drafting, the TM includes an example of a good answer along with Notes explaining the answer. In addition, the TM provides answers to commonly asked questions and tips on how to present material.

The *Drafting Contracts* website will also be a resource available to professors and students. First, professors will have access to an electronic version of the TM, so anything in it can be copied and incorporated into class notes. Second, professors will be able to download PowerPoint slides and additional exercises. Third, the website will include Word and WordPerfect versions of each provision in a large, readable font. These provisions can be projected on a screen in the same way that a PowerPoint slide can be projected. Once projected, the professor and students can

work through the revision together. The website will also have additional exercises to give professors even more choices for assignments. Finally, to minimize the word processing that students do, the website will include electronic versions of the longer exercises.

Drafting Contracts teaches contract drafting in a new way. It teaches students how to think like deal lawyers and how to reflect that thinking in the contracts they draft.

Tina L. Stark
May 2007