

ASPEN PUBLISHERS

DRAFTING CONTRACTS

**How and Why Lawyers
Do What They Do**

Tina L. Stark



Wolters Kluwer
Law & Business

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Tina L. Stark

**Professor in the Practice of Law
Emory University School of Law**



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Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

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Aspen Publishers
Attn: Permissions Department
76 Ninth Avenue, 7th Floor
New York, NY 10011-5201

To contact Customer Care, e-mail customer.care@aspenpublishers.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Aspen Publishers
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

890

ISBN 978-0-7355-6339-1

Library of Congress Cataloging-in-Publication Data

Stark, Tina L., 1953-

Drafting contracts : how and why lawyers do what they do / Tina L. Stark.

p. cm.

Includes index.

ISBN 978-0-7355-6339-1

1. Contracts—United States. 2. Contracts—United States—Language. 3. Legal composition. I. Title.

KF807.S73 2007

346.7302—dc22

2007016511

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For Bobby and Mort Weisenfeld, my mother- and father-in-law, who
have always treated me as if I were their daughter

For their son Dave, my best friend and beloved husband

and

For their grandson Andy, my wondrous treasure

Preface

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

Acknowledgments

I began this book in 1993 when I first began teaching at Fordham Law School. Unfortunately, the text was only in my head. It took another ten years before I began to put the words on a page. This lengthy gestation has led to a long list of people to thank.

I begin by thanking my students. They were the first to encourage me to write this book. Through the years, their comments and insights challenged me to rethink and clarify my ideas.

While writing this book, I had the help of the following practitioners and professors: Helen Bender, Robin Boyle, Ruthie Buck, Sandra Cohen, Carl Felsenfeld, John Forry, Eric Goldman, Morton Grosz, Carol Hansell, Charles Hoppin, Vickie Kobak, Terry Lloyd, Lisa Penland, Nancy Persechino, and Sally Weaver. Their input and that of Aspen Publishers's anonymous reviewers greatly improved this book's quality.

I thank my colleague Alan Shaw for his intellectual generosity and careful review of the manuscript. In addition, I am grateful to Peter Clapp, someone whom I have never met, but who gave me line-by-line comments on almost every chapter.

Richard Green at Thelen Reid Brown Raysman & Steiner LLP was most helpful. He not only reviewed chapters, but also graciously arranged for his firm's word processing wonders to turn my typed pages into a manuscript.

While working on this book, I had the enthusiastic and dedicated support of my student research assistants: Hannah Amoah, Stephen Costa, Sarah Elkaim, and Noel Paladin-Tripp. I thank Fordham Law School for its generous support of this book.

I also thank Rick Garbarini for his good work and friendship.

Richard Neumann of Hofstra Law School played a pivotal role in this book's publication by introducing me to Richard Mixter at Aspen Publishers. I thank them and Carol McGeehan at Aspen for having had the imagination to envisage a contract drafting textbook market, even when one barely existed.

Others at Aspen also played important roles. Barbara Roth expertly shepherded me through the writing and design process, and Sarah Hains and Meri Keithley artfully designed the book's pages to showcase the contract provision examples. In addition, Kaesmene Harrison Banks skillfully guided the book through production on a tight timeframe, and Lauren Arnest meticulously copy-edited the manuscript.

Finally, I thank my husband Dave and son Andy. Their unwavering love, support, and encouragement make everything I do possible. They also make me laugh—at myself.

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