

ASPEN COURSEBOOK SERIES

BASIC CONTRACT DRAFTING ASSIGNMENTS

A Narrative Approach

SUE PAYNE



Wolters Kluwer
Law & Business

ASPEN COURSEBOOK SERIES

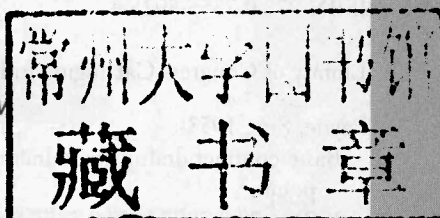
BASIC CONTRACT DRAFTING ASSIGNMENTS

A Narrative Approach

Sue Payne

Clinical Assistant Professor

Northwestern University School of Law



Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

© 2011 Aspen Publishers. All Rights Reserved.
www.AspenLaw.com

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

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

To contact Customer Care, e-mail customer.service@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.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-8925-4

Library of Congress Cataloging-in-Publication Data

Payne, Sue, 1953-

Basic contract drafting assignments : a narrative approach / Sue Payne.
p. cm.

ISBN 978-0-7355-8925-4

1. Contracts—United States. 2. Contracts—United States—Language. I. Title.

KF807.P39 2011

346.73'02—dc22

2010039047

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and workflow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional and education markets.

CCH was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and health-care reimbursement and compliance professionals.

Aspen Publishers is a leading information provider for attorneys, business professionals and law students. Written by preeminent authorities, Aspen products offer analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel and business executives around the world rely on the Kluwer Law International journals, loose-leafs, books and electronic products for authoritative information in many areas of international legal practice.

Loislaw is a premier provider of digitized legal content to small law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

For my mother, Dorothy Payne, who taught me to love a good story.

Introduction to Students

In this book, which contains contract drafting assignments grouped into four separate narrative sequences, I use storytelling to introduce you to clients, their businesses, and their needs. Through simulation, I ask you to deal with “real” characters, “real” situations, and “real” concerns.

Instead of teaching you about contract drafting concepts in the abstract, your professors can use the characters and situations in this book to bring those concepts to life. The main characters introduced in the initial client interview evolve and grow through the remaining assignments in each sequence. Narrative lends itself nicely to this progression. The characters move through life. Their businesses develop. And their needs change.

As you learn more about how to draft contracts during the course of the term, the characters enter into more complicated business deals, which require you to draft more complex contracts. The larger assignments in each sequence progress as follows:

Assignment 1	Assignment 2	Assignment 3
Level: Basic	Level: Intermediate	Level: Advanced
Purchase Contract	Services Contract	Fully Negotiated Services Contract

You will begin by learning to draft naked—that is, you will learn how to draft without relying on sample or form contracts, otherwise known as “precedent.” For the final contract in each sequence, you will be permitted to search for precedent and use what you find, as long as you carefully scrutinize it and share it with the class, if your professor asks you to do so.

Assignment 1	Assignment 2	Assignment 3
No Precedent	Precedent Supplied (“Canned Precedent”)	Open Precedent

Finally, unless your professor directs you otherwise, you will progress from drafting in a team (working with facts gleaned from a client interview), to drafting individually (working with facts contained in documents), to drafting with opposing counsel (working with facts you and your opposing counsel previously negotiated).

Assignment 1	Assignment 2	Assignment 3
Team	Self	Pair
Client Interview	Documents	Negotiated Facts

The common thread linking all of the assignments in each sequence—including the shorter assignments—is the narrative. What is happening in this client’s story?

My primary purpose for using narrative to teach basic contract drafting is to give you context—that is, to give you a realistic setting within which to apply the abstract concepts you will learn in this course. I create characters to supply you with an audience other than your professors. You meet the clients, their counsel, and some of the other people involved in each deal. If all goes as planned, when you complete each assignment, you will remember to consider these characters, as well as the judges, arbitrators, mediators, and other third parties who may have a reason to read, interpret, implement, or enforce the contracts you draft.

I want you to have fun getting to know the characters in each sequence, decoding some of the colorful jargon associated with their professions, and transforming the raw terms of their business deals into polished contracts. Through storytelling, I help you imagine your clients as people and entities with real needs. I do this because I believe it will make you a better contract drafter.

Assignment 3	Assignment 2	Assignment 1
Open the client	Present (drafted)	No Present

Acknowledgments

I begin by thanking all of the students who have taken my *Basics of Contract Drafting* seminar. Working with them helped me understand how important it was to create engaging and challenging assignments.

Thank you to all of the teaching assistants and research assistants who have worked for me over the past five years, but especially Allison Grow, Micah Hughes, Vivian Lee, Kathryn Perry, Alice Vosmek, and Xiaoxiao Wang. Their support made it possible for me to continue creating new assignments until I had enough to fill this book.

I thank all of my colleagues in Northwestern's Communication and Legal Reasoning department. I am particularly grateful to Grace Dodier, Martha Kanter, Ellen Mulaney, Kathleen Dillon Narko, Sue Provenzano, Judy Rosenbaum, and Brian Silbernagel. They were enthusiastic about this project from the beginning and their encouragement has been a great gift.

Thank you to Helene Shapo, my legal writing professor, mentor, and friend.

Thank you also to Tina L. Stark, whose textbook, *Drafting Contracts: How and Why Lawyers Do What They Do*, has been invaluable to me. I deeply appreciate the help that Tina gave me when I first started teaching contract drafting five years ago. I am also grateful for the continued support she provides by working so hard to develop and promote transactional skills training.

I thank my development editor, Barbara Roth, and my production editor, Christie Rears. Both made working on this book a pleasure.

Thank you to my son, Nate Madden, for cherishing and sharing my creative spirit.

And, finally, thank you to my husband, Daniel Kirschenbaum, who inspires me every day.

BASIC CONTRACT DRAFTING ASSIGNMENTS

Summary of Contents

Contents	xi
Introduction to Students	xxi
Acknowledgments	xxiii

The **ARTIST** Sequence

Assignment 1	
The Paperweight Purchase Agreement	3
Assignment 2	
The Consignment Agreement	27
Assignment 3	
The Public Art Commission Agreement	61

The **GOLFER** Sequence

Assignment 1	
The Putting Green Purchase Agreement	87
Assignment 2	
The Sport Psychologist Consulting Agreement	111
Assignment 3	
The Athlete Endorsement Agreement	147

The **ROCK BAND** Sequence

Assignment 1	
The Band Logo Purchase Agreement	175
Assignment 2	
The Band Performance Agreement	199
Assignment 3	
The Band Management Services Agreement	235

The TOY AND GAME INVENTOR Sequence

Assignment 1
The Toy Purchase Agreement 261

Assignment 2
The Movie Location and Product Placement Agreement 285

Assignment 3
The Toy and Game License Agreement 339

APPENDICES

Appendix 1
Ten Tips for Interviewing a Client About a Transaction 367

Appendix 2
The Model Leaf Disposal Services Agreement 373

Appendix 3
Contract Drafting Checklist 383

Appendix 4
What Deal Lawyers Say to Each Other: A Dictionary of Contract Negotiation and Drafting Slang 389

Appendix 5
Proofreading Tips and Tricks 395

Appendix 6
Decoding the Comments on Student Contracts: Some Samples with Illustrations 399

Contents

Introduction to Students	xxi
Acknowledgments	xxiii

The ARTIST Sequence

Assignment 1	
The Paperweight Purchase Agreement	3
1A: Engagement Letter Between Attorney and Client	3
Instructions	3
1B: The Client Interview	8
Instructions	8
<i>Memorandum to Associates from Eliza Bishop,</i>	
<i>Senior Partner</i>	10
1C: Letter to Client Re Potential Ethical Question	11
Instructions	11
1D: Memorandum to Senior Partner Re Summary of Deal Terms	12
Instructions	12
1E: Assembling the Frame: Drafting the Title, Preamble, Background, Words of Agreement, Definitions, and Signature Lines	13
Instructions	13
1F: Filling in the Picture: Drafting the Contract's Operative Provisions	18
Instructions	18
1G: Putting the Picture in the Frame: Finishing the Draft Contract	21
Instructions	21
1H: Making Changes to the Draft Contract: Redlining	23
Instructions	23
<i>Memorandum to Associates from Eliza Bishop,</i>	
<i>Senior Partner</i>	24
Assignment 2	
The Consentment Agreement	27
2A: The Waiver of Conflict of Interest Agreement	27
Instructions	27

2B: Memorandum to Senior Partner Re Summary of Deal Terms	29
Instructions	29
Fact Pattern for Consignment Agreement	30
<i>Memorandum to Emory Dickinson from Arthur Cole Lector (Client)</i>	32
2C: E-Mail to Client Re Potential Ethical Question	38
Instructions	38
2D: Assembling the Frame: Drafting the Title, Preamble, Background, Words, of Agreement, Definitions, and Signature Lines	40
Instructions	40
2E: Filling in the Picture: Drafting the Contract's Operative Provisions	46
Instructions	46
2F: Putting the Picture in the Frame: Finishing the Draft Contract	50
Instructions	50
2G: Considering the Boilerplate Provisions	52
Instructions	52
2H: Side Letter Re Special Exhibition	54
Instructions	54
<i>Letter from the Artist to the Gallery Owner</i>	56
<i>E-Mail String Between Arthur Cole Lector and Emory Dickinson</i>	57
Assignment 3	
The Public Art Commission Agreement	61
3A: Non-Disclosure Agreement: Drafting the Definitions of Confidential Information	61
Instructions	61
General Information for Both Parties	63
3B: Non-Disclosure Agreement: Drafting the Operative Provisions	64
Instructions	64
<i>Memorandum from Willa C. Williams, Junior Attorney, Re Notes of Meeting Between the Artist and the City of Chicago</i>	67
3C: Preparation for the Negotiation of the Public Art Commission Agreement	69
Part I: Finding, Evaluating, and Using the Relevant Precedent	69
Instructions	69
3D: Continued Preparation for the Negotiation of the Public Art Commission Agreement	75
Part II: Researching the Legal Issues	75
Instructions	75
3E: Negotiation of the Public Art Commission Agreement: Letter of Intent and Term Sheet	76
Instructions	76
<i>Drafting the Letter of Intent</i>	79

3F: Preparation of Talking Points for Meeting with the City's General Counsel Re Potential Ethical Question	80
Instructions	80
3G: Drafting the Public Art Commission Agreement	81
The Frame and the Picture	81
Instructions	81

The **GOLFER** Sequence

Assignment 1

The Putting Green Purchase Agreement	87
1A: Engagement Letter Between Attorney and Client	87
Instructions	87
1B: The Client Interview	92
Instructions	92
<i>Memorandum to Associates from Sue Payne, Senior Partner</i>	94
1C: Letter to Client Re Potential Ethical Question	95
Instructions	95
1D: Memorandum to Senior Partner Re Summary of Deal Terms	96
Instructions	96
1E: Assembling the Frame: Drafting the Title, Preamble, Background, Words of Agreement, Definitions, and Signature Lines	97
Instructions	97
1F: Filling in the Picture: Drafting the Contract's Operative Provisions	102
Instructions	102
1G: Putting the Picture in the Frame: Finishing the Draft Contract	105
Instructions	105
1H: Making Changes to the Draft Contract: Redlining	107
Instructions	107
<i>Memorandum to Associates from Sue Payne, Senior Partner</i>	109

Assignment 2

The Sport Psychologist Consulting Agreement	111
2A: The Waiver of Conflict of Interest Agreement	111
Instructions	111
2B: Memorandum to Senior Partner Re Summary of Deal Terms	113
Instructions	113
<i>Memorandum to Associates from Sue Payne, Senior Partner</i>	114
<i>Letter from Betsy Bennett to Sue Payne</i>	115
<i>Draft Contract from Dr. Hope Bowker</i>	122
2C: E-mail to Client Re Answer to Potential Ethical Question	124
Instructions	124

2D: Assembling the Frame: Drafting the Title, Preamble, Background, Words of Agreement, Definitions, and Signature Lines	126
Instructions	126
2E: Filling in the Picture: Drafting the Contract's Operative Provisions	132
Instructions	132
2F: Putting the Picture in the Frame: Finishing the Draft Contract	136
Instructions	136
2G: In-Class Workshop: Boilerplate Provisions	138
Instructions	138
<i>Exercise I: Assignment and Delegation</i>	139
<i>Exercise II: Governing Law</i>	139
<i>Exercise III: Notice</i>	140
<i>Exercise IV: Severability</i>	140
<i>Exercise V: Merger/Integration Clause</i>	141
<i>Exercise VI: Waiver of Jury Trial</i>	142
2H: Side Letter Re Special Golf Lessons for Dr. Bowker	142
Instructions	142
<i>E-Mail String Between Betsy Bennett and Dr. Hope Bowker</i>	144
Assignment 3	
The Athlete Endorsement Agreement	147
3A: Non-Disclosure Agreement—Drafting the Definitions of Confidential Information	147
Instructions	147
General Information for Both Parties	149
3B: Non-Disclosure Agreement: Drafting the Operative Provisions	152
Instructions	152
<i>Memorandum from Audra Hepburn, Junior Associate, Re Notes of Meeting Between Grace Under Pressure, Inc. and Betsy Bennett</i>	155
3C: Preparation for the Negotiation of the Athlete Endorsement Agreement	158
Part I: Finding, Evaluating, and Using the Relevant Precedent	158
Instructions	158
3D: Continued Preparation for the Negotiation of the Athlete Endorsement Agreement	163
Part II: Researching the Legal Issues	163
Instructions	163
3E: Negotiation of the Athlete Endorsement Agreement: Letter of Intent and Term Sheet	164
Instructions	164
3F: Preparation of Talking Points for Meeting with Senior Partner Re Potential Ethical Question	168
Instructions	168

3G: Drafting the Athlete Endorsement Agreement	169
The Frame and the Picture	169
Instructions	169

The **ROCK BAND** Sequence

Assignment 1

The Band Logo Purchase Agreement	175
1A: Engagement Letter Between Attorney and Client	175
Instructions	175
1B: The Client Interview	180
Instructions	180
<i>Memorandum to Associates from Edwin Poe, Senior Partner</i>	182
1C: Letter to Client Re Potential Ethical Question	183
Instructions	183
1D: Memorandum from Associates to Edwin Poe, Re Summary of Deal Terms	184
Instructions	184
1E: Assembling the Frame: Drafting the Title, Preamble, Background, Words of Agreement, Definitions, and Signature Lines	185
Instructions	185
1F: Filling in the Picture: Drafting the Contract's Operative Provisions	190
Instructions	190
1G: Putting the Picture in the Frame: Finishing the Draft Contract	193
Instructions	193
1H: Making Changes to the Draft Contract: Redlining	195
Instructions	195
<i>Memorandum to Associates from Edwin Poe, Senior Partner</i>	196

Assignment 2

The Band Performance Agreement	199
2A: The Waiver of Conflict of Interest Agreement	199
Instructions	199
2B: Memorandum from Associates to Hermione Melville, Senior Partner, Re Summary of Deal Terms	201
Instructions	201
<i>Letter from Sylvia P. Hughes (Client) to Hermione Melville</i>	203
<i>Memorandum from Sylvia P. Hughes (Client) to Hermione Melville</i>	204
2C: E-mail from Associate to Senior Partner Re Answer to Potential Ethical Question	211
Instructions	211

2D: Assembling the Frame: Drafting the Title, Preamble, Background, Words of Agreement, Definitions, and Signature Lines	212
Instructions	212
2E: Filling in the Picture: Drafting the Contract's Operative Provisions	218
Instructions	218
2F: Putting the Picture in the Frame: Finishing the Draft Contract	221
Instructions	221
2G: In-Class Workshop: Boilerplate Provisions	224
Instructions	224
<i>Exercise I: Assignment and Delegation</i>	224
<i>Exercise II: Governing Law</i>	225
<i>Exercise III: Notice</i>	225
<i>Exercise IV: Severability</i>	226
<i>Exercise V: Merger/Integration</i>	226
2H: Side Letter Re Special Benefit Performance of Band	227
Instructions	227
<i>Letter from Sylvia P. Hughes to One Art Partnership</i>	229
<i>E-Mail String Between Sylvia P. Hughes and Hermione Melville</i>	230
Assignment 3	
The Band Management Services Agreement	235
3A: Non-Disclosure Agreement: Drafting the Definitions of Confidential Information	235
Instructions	235
<i>General Information for Both Parties</i>	237
3B: Non-Disclosure Agreement: Drafting the Operative Provisions	238
Instructions	238
<i>Memorandum from Roberto Frost, Junior Associate, Re Notes of Meeting Between the Band and the Management Company</i>	241
3C: Preparation for the Negotiation of the Band Management Services Agreement	243
Part I: Finding, Evaluating, and Using the Relevant Precedent	243
Instructions	243
3D: Continued Preparation for the Negotiation of the Band Management Services Agreement	249
Part II: Researching the Legal Issues	249
Instructions	249
3E: Negotiation of the Band Management Services Agreement: Letter of Intent and Term Sheet	250
Instructions	250