1-1-2006

Integrating Contract Drafting Skills and Doctrine

Eric Goldman
Santa Clara University School of Law, egoldman@gmail.com

INTEGRATING CONTRACT DRAFTING SKILLS AND DOCTRINE

Eric Goldman[*]

In February 2006, I participated in the Symposium, *Teaching Writing and Teaching Doctrine: A Symbiotic Relationship?*, at Brooklyn Law School. I prepared some personal and unscientific observations about the challenges of concurrently teaching legal doctrine and contract drafting. Obviously, there is a rich literature on these topics that I did not try to address; instead, my goal was simply to acknowledge my first-hand experiences wrestling with these challenges and discuss some specific solutions I have tried. This brief Essay recaps my presentation.

Despite occasional celebrations of contracts as the epitome of freedom and autonomy, in reality, contracts are heavily regulated. First, public policy prohibits some private exchange choices outright. Second, every private exchange is subject to default gap-filler provisions. Third, the parties may choose words that, due to inconsistent statutory or common law meaning, may not adequately express the parties' desired agreement.

A contract drafter cannot accurately effectuate the parties' intent without understanding this regulatory backdrop. Accordingly, contract drafting students must learn the doctrinal context applicable to their contracts. But mastery of contract doctrine, alone, is insufficient for good contract drafting. Contract drafting also requires some technical skills that apply universally regardless of the contract's substance.

In a perfect world, contract-drafting students would learn both contract doctrine and technical drafting skills concurrently. However, class time scarcity makes this ideal difficult to achieve in any one course. Simply put, teaching contract drafting is time-consuming. Teaching doctrine takes time because many contract types are subject to their own unique bodies of law and prevailing industry norms. Teaching drafting skills also takes time because it requires teaching the material with both breadth and depth. The

 Assistant Professor, Santa Clara University School of Law, and Director, High Technology Law Institute. E-mail: egoldman@gmail.com. Website: http://www.ericgoldman.org. This Essay loosely tracks my remarks at the Symposium, *Teaching Writing and Teaching Doctrine: A Symbiotic Relationship?* Brooklyn Law School, February 2006.

drafting process implicates many different skills, and teaching each skill may require exercises that specifically address those skills. Meanwhile, students improve their skills with each repetition, but reinforcing each skill through multiple exercises increases the time demands exponentially.

As educators, we cope with this time scarcity in one of two principal ways: (1) covering both contract doctrine and drafting skills in an integrated fashion (a tricky balancing act), or (2) segregating doctrine from skills-building. While sometimes doctrine/skill segregation makes sense, or is a practical necessity, integrating the pedagogy has significant benefits. Repeated exposure to doctrinal material through skills-building can provide unique insights into the rules' policy justifications, legal contours, and practical effects. In turn, when students have learned the applicable law, students engaged in skills-building exercises can better understand the importance of precise drafting and the consequences of poor drafting.

Therefore, as educators, we have a unique pedagogical opportunity to use drafting skills-building to reinforce doctrine. But how can we overcome the time scarcity in our courses? Let me offer three examples of ways that I have integrated drafting and skills training into my doctrinal courses.

I. REVIEWING AGREEMENTS

Sometimes I walk students through an actual agreement as a type of capstone review. After covering the substantive law, the agreement can illustrate how contract drafters respond to the underlying substantive law.

For example, in Intellectual Property, at the end of the trade secret module, I distribute a sample nondisclosure/"confidentiality" agreement.[1] Nondisclosure agreements are ubiquitous in corporate and intellectual property settings, but many practitioners do not realize that these agreements are, at their core, trade secret licenses. To make this point, I walk students through each word of the agreement, pointing out how the drafting reflects the substantive trade secret law we just discussed.

[1] Eric Goldman, *Eric Goldman's Website*, *Classes*, http://www.ericgoldman.org/Courses/ipsurvey/formnda--mutual.htm (posted Jan. 9, 2005).

In Software Licensing, I teach a module about the various exclusive rights of intellectual property owners.[2] Then, I review the license grant section of an actual software license agreement to explain how the language should reflect the statutory rights.

I even include an agreement review exercise in Contracts. At the semester's end, I distribute a sample agreement[3] and narrate it paragraph by paragraph. For example, we discuss the force majeure clause—a provision that lawyers typically gloss over mindlessly. However, because the students have just reviewed some force majeure cases,[4] the force majeure clause suddenly has real-life meaning, and it becomes immediately clear how students can draft the contract to deal with unwanted default rules.

II. DRAFTING LECTURE MODULES

In some situations, I give brief drafting lectures to explain contract drafting issues. These modules integrate doctrine and skills by demonstrating how to use the doctrinal material in real-life situations.

For example, online "privacy policies" are ubiquitous on the Internet and a mainstay of a cyberlawyer's practice. In Cyberlaw, after we study online privacy law, I teach a brief module about "best practices" (both substantive and procedural) for drafting online privacy policies.[5] This module reinforces some substantive points about online privacy while providing students with specific actionable drafting recommendations.

In Copyrights, I typically spend a class covering some counter-intuitive rules that dramatically affect contract drafting, such as a

[2] *Id.* at http://www.ericgoldman.org/Courses/contracts/iplicensegrants.htm. For example, a copyright owner has the exclusive right to "reproduce," "distribute," "prepare derivative works of," "publicly perform," "publicly display," and "digitally perform" a copyrighted work. *See* 17 U.S.C. § 106 (2000).

[3] Eric Goldman, *Eric Goldman's Website, Classes, Contract Law,* http://www.ericgoldman.org/Courses/contracts/mktgservicesagmt.pdf (posted May 28, 2006).

[4] *E.g. Krell v. Henry* [1903] 2 K.B. 740 (A.C.) (facility rental to watch coronation procession mooted when procession cancelled due to illness); *Taylor v. Caldwell* [1863] 122 Eng. Rep. 309 (K.B.) (fire burns down event venue between contract formation and event date); *Paradine v. Jane* [1647] 82 Eng. Rep. 897 (K.B.) (during English Civil War, an invading army ejected tenant from rented land).

[5] I affectionately call it "Grandma Goldstein's 16-Step Recipe for Deploying Online Privacy Policies." *See* Eric Goldman, *Grandma Goldstein's 16 Step Recipe for Deploying Online Privacy Policies,* http://eric_goldman.tripod.com/resources/privacyrecipe.htm (last modified Oct. 17, 2002).

stringent statute of frauds[6] and a non-waivable right to terminate ownership assignments or license grants thirty-five to forty years after the transfer was made.[7] Any lawyer drafting a copyright license or assignment needs to know these rules and to contemplate them in the contract. The drafting lecture module allows me to explain the practical consequences of these rules and highlights the critical importance of knowing a contract's regulatory context.

III. DRAFTING EXERCISES

Finally, I occasionally incorporate drafting assignments into doctrinal courses. There is no substitute for "doing" drafting, but drafting exercises are time-consuming. Here is how I try to balance the competing demands for time.

Contracts (for me) is a one-semester four-unit course, so it is undeniably time-squeezed. Nevertheless, I add a three-step contract drafting exercise[8] without sacrificing doctrinal coverage. The exercise involves a hypothetical sports endorsement contract. In Exercise A,[9] the students enumerate the major issues that the contract should address. The students do not actually draft contract terms; this is just an issue-spotting exercise. I ask students to issue-spot from both sides to highlight the importance (and limitations) of perspective. In Exercise B,[10] each student adopts a side (licensor or licensee) and drafts a clause addressing the endorser's objectionable conduct (sometimes called a "morals" clause). Students do not draft the entire contract; that would be too hard and time-consuming. In Exercise C,[11] students negotiate a morals clause with another student. The negotiation provides a capstone experience because students realize the limits of their drafting in Exercise B. In Exercise B, most students use extremely client-favorable language, not considering if an opposing party would ever agree to such language. In Exercise C, students learn first-hand what happens to such language when an opposing advocate pushes back. The negotiation exercise gives students a valuable

[6] The statute of frauds applies to ownership assignments and exclusive licenses. *See* 17 U.S.C. § 204(a) (2000).

[7] 17 U.S.C. § 203 (2000).

[8] *See* Eric Goldman, *Eric Goldman's Website, Classes, Contract Law* 5–6, http://www.ericgoldman.org/Courses/contracts/2005contractssyllabus.pdf (posted Aug. 14, 2005).

[9] *Id.*

[10] *Id.* at http://www.ericgoldman.org/Courses/contracts/draftingexercise2.pdf.

[11] *Id.* at http://www.ericgoldman.org/Courses/contracts/draftingexercise3.pdf.

perspective on the entire course. In many cases we study, the litigated contract provision (or lack thereof) does not make sense, encouraging students (and me) to disparage the litigants for their drafting failures. After the exercise, students realize that previously unfathomable contract language may result from negotiated compromise.

To save class time for doctrinal coverage, the entire process takes place outside of class. Students draft and negotiate on their own time. After each step, I hold an optional review session (about half of the students come). In the review sessions, we discuss both process and substance. Typically, I pose some questions to the students[12] and then lead a guided discussion. This discussion usually reveals that students use different techniques and approaches to deal with the exercises, allowing their peers to consider the efficacy of those alternatives.

Students get some feedback from these sessions as they benchmark their choices against their peers'. Students also get feedback from (1) my written comments on their drafts, (2) a sample answer I draft,[13] and (3) a compilation of student submissions so that they can see what their peers actually produced. Usually, after seeing their peers' work, students realize that they were not alone in finding the problem difficult.

In Software Licensing, I give students a statute governing the effects of bankruptcy on a software license.[14] Section 365(n) of Title 11 of the United States Code is very confusing due, in part, to poor statutory drafting. I also give students a real-life contract in which the parties make elections under Section 365(n).[15] I ask the students to figure out what the parties wanted to accomplish. Then, I ask students to redraft the provision to accomplish this goal in fewer words. I offer a prize to the student with the shortest redraft.[16] The prize (though trivial in value) encourages students to evaluate every word carefully and to eliminate unnecessary words.

When I taught the course in Spring 2005, I got responses ranging from about 35 words to more than 150. One student took

[12] For examples of the questions I use to prompt the discussion, see *id.* at http://www.ericgoldman.org/Courses/contracts/draftingexercise3debrief.pdf.

[13] *See id.* at http://www.ericgoldman.org/Courses/contracts/draftingexercise1writeup.pdf; *id.* at http://www.ericgoldman.org/Courses/contracts/draftingexercise2writeup.pdf.

[14] 11 U.S.C. § 365(n) (2000).

[15] Eric Goldman, *Eric Goldman's Website, Classes, Contract Law,* http://www.ericgoldman.org/Courses/contracts/bankruptcydraftingexercise.pdf (posted May 28, 2006).

[16] I love Slinkies. Therefore, I maintain a supply of cheap Slinkies to give away in these types of situations. The winner of the redraft effort chooses a Slinky from my stash.

the position that no contract clause was needed at all (thus, she submitted a clause with zero words). This offered a wonderful opportunity to explore how and when contracts can rely on default statutory provisions. As usual, I commented on each student's answer, wrote up my own answer, and shared all submissions so students could see their peers' drafting. Because the drafting and feedback principally took place outside of class, the students explored a complex doctrinal area and had an integrated skills experience without consuming much class time.

IV. CONCLUSION

As professors, we face scarce class time—too much to teach, not enough time to cover it all—and this scarcity pressures us to sacrifice skills training in our doctrinal courses (and doctrinal material in our skills courses). Yet, integrated coverage provides unique pedagogical opportunities to show students the real-life importance of legal doctrine and to build student skills contextually. As this brief essay has explored, there may be ways to overcome the time squeeze, so I hope this will encourage creative thinking about ways to balance teaching doctrine and skills. The pedagogical payoffs are worth it!