

# CONTRACT DRAFTING: TEACHING CRITICAL LAWYERING SKILLS

CHARLES FOX\*

Good morning. You all are supposed to say good morning. Alright, so what I would like to talk about this morning, just briefly, are four different areas of effective lawyering that can be taught in the context of teaching people how to draft contracts: effective communication, professionalism, client management, and project management.

Communicating effectively -- this is a concept that goes well beyond teaching young folks how to do presentations and teaching them how to do oral advocacy. They need to understand that every communication they have in the workplace, whether it's written or oral, has to present a certain image, an image of professionalism and, for lack of a better term, "lawyerliness." I think this is a huge area of potential improvement for most of the young lawyers I see.

Here are a few things that you could focus on if you're doing a contract drafting class. Here's a question to ask your students: Is there anything in this agreement that would prevent the client from doing this deal? Yes, Christina?

Recording:                    There's a restriction on selling the assets, but it looks like there's an exception that would permit this.

Now what I would say to this person is "Your answer is correct, but you need to tell us what section you're looking at so that we all know where to look." This is something that they don't know, and they need to be told that we're doing this collectively. Start by saying on page 12 or in section 7.1.b. So that's a simple one.

What is ambiguous in this sentence? Yes, Christina.

Recording:                    I'm not sure this is right, but it might be . . .

Usually, I don't let the -- I teach young lawyers, mostly not students--but I don't even let that young lawyer finish that sentence. I say, "Stop right there. Do not ever start a sentence by saying this may not be right." I know it may not be right, and there's a good chance it isn't right, but that is not the way to start. You have to project confidence. This is

---

\* Mr. Fox is the founder of Fox Professional Development LLC. He has twenty-two years of experience as a lawyer in complex debt and restructuring transactions, the last fourteen as a partner at Skadden, Arps, Slate, Meagher & Flom LLP in New York. Mr. Fox is an adjunct professor at Pace Law School where he teaches "Introduction to Transactional Practice."

very important. There's so much mumbling going on. [Mumbles] No, you have to say it like you mean it, and if you're wrong, well, you take the consequences.

Last one: what's the problem for the client in this provision? Yes, Christina.

Recording: Well the sentence is like so restricted. It would be kind of like that the company would be unable to like not [people laugh and drown out the automated recording].

What do we do about this? What do we do about this? Does anybody address this issue?

Audience: I have a money jar, and I charge students after the first four basically like you know.

C. Fox: You must make an awful lot of money.

Audience: Then we donate it to the food bank.

C. Fox: Okay, yeah.

Audience: I tease them, and I say remember when you were a little kid and your mom said, "Use your words?"

C. Fox: Yeah.

Audience: Use your words. Think first, and they all laugh, and they suddenly realize that they haven't crystallized the talk yet.

C. Fox: Yeah. This drives me nuts, and my wife and I are actually in the process of trying to extirpate these words from our vocabularies, and it is hard. It's very hard, but to me there's almost nothing that looks less professional than that kind of talk.

Audience: It's almost as bad as going up in the end of a sentence like this when you're making a declarative sentence.

C. Fox: And you know there's a gender issue with that too, and it drives me nuts.

Audience: Yeah, can I say that I've actually seen that it used to be gender, and now it's --

C. Fox: Oh no, it's spreading.

Audience: ... and now it's -- yeah, it's totally like wildfire.

C. Fox: It's spreading all over the place.

Audience: It's totally like wildfire. But I also tell the students about -- this was a true story -- when I, on my first day of practice, was recording my

voicemail message, you know, the “Hello this is Erica Beal, you’ve”... -- you know “Thank you for calling,” and I found myself going, this is Erica Beal. That does not inspire confidence. So I did the downward inflection, and then I started sounding like a football player, but it was better.

C. Fox: Yeah. This kind of thing is so important, I think. The difference between an associate who talks that way, and an associate, who talks as if she were an adult and as if she was a lawyer, is night and day. And I know I pick that up as a partner, and I know the clients are going to pick that up too; although many of the young people -- their clients that they’re dealing with talk that way as well, so...

Audience: So I want to play devil’s advocate for a second and ask do you view it just as a credibility issue, in terms of persuasion, or do you view as more substantive, in terms of being able to communicate thought?

C. Fox: It’s not -- no -- well it’s -- it’s not substantive because you can communicate thoughts very clearly inserting the word like every twelve words. I find that they’re usually combined. There seems to be a pattern of not only of using these weasel words but also not thinking clearly and not thinking and formulating your thoughts before you actually express them. They tend to go hand-in-hand.

One of the key principles of effective communication is figuring out who your audience is and crafting your communication to his or her knowledge level and style. So I actually haven’t done this exercise because it doesn’t fit in with what I do, but think this would be a useful exercise. Give the students a complicated contract provision, and say, “Now explain it to me. I’m the partner.” You’d give them a chance to read it first, of course, but say, “Now explain it to me. I’m the partner,” and then after they do that, “Now explain it to me, I’m the client, and I don’t know very much.” And they should learn from that that there’s two completely different ways to speak about it, one to someone who understands it. You can use shorthand. You can use words that you wouldn’t use with a client, who needs to be taught.

Professionalism: This is a tough concept because to me professionalism is sort of like pornography, hard to define but you know it when you see it. And I think professionalism runs the spectrum from nit-picking to the trusted advisor aspect that we were talking about earlier this morning.

Let’s start with the nit-picking. Elizabeth already talked about being precise. In your handouts, behind the first spreadsheet, if I hand out a stock purchase agreement and say, “Take half an hour. It’s longer than this. This is just the first page. Take half an hour and mark this up, and I want you to find everything from the nit-picks to the substantive

points.” And I try to impress on them how the phrase “attention to detail” -- this is a phrase that everybody uses and I’m sure many of them have said in interviews--“one of my strong points is I’m attentive to detail”-- and I tell them, “I would be shocked if any of you really know what that means yet. Get ready, okay.”

Then I do an exercise with them, where I show several provisions from a contract, and I ask them to find the mistake here. Find the mistake that I’m going to point out on your draft and half the time they do, and half the time they don’t, and it’s -- in one case, I say “the buyer,” and in another case I just say “buyer.” And when I point this mistake out to them, they kind of roll their eyes, and I say, “That’s right. You’re thinking to yourself what’s wrong with this guy. You should be getting out more for fun. But I say that’s the way I am, and you’re working for me. And the document you’re working on is my document. I may never even look at it. It’s my document, and I guarantee you I’m going to find that. And I don’t expect you to find the tricky substantive issues because you don’t know enough yet. But I do expect you to find this stuff. So whether or not you like it, you’ve got to pay attention to these nit-picks.”

Then I hand out this exercise, and I say find all the mistakes. I’m going to ask you all to just take two minutes. I’m going to give a prize for the person who finds the nit-pickiest mistake here.

Okay, you’ve had long enough. Someone -- show of hands. Yeah.

- Audience: Well Section 2 is titled “Reps and Warranties”, and then it just says “Seller represents.”
- C. Fox: Okay, that’s actually not -- I wouldn’t even call that a nit-pick. That’s fairly substantive, yeah.
- Audience: And then --
- C. Fox: No, no, just one per customer. Yeah.
- Audience: Section One, the period’s underlined for “purchase and sell.”
- C. Fox: How many got that? You’re definitely in the front running. The period is underlined, and when I point that out to them, they’re like what do you mean. That’s -- and I tell them, that is what you got to pay attention to. What else? Kent?
- Audience: The comma in the preamble, (Idaho Corporation)’s in the wrong place.
- C. Fox: And query whether you even need it.
- Audience: Well if you need it all, it goes after.
- C. Fox: It goes after, right. A couple of more?

Audience: Well there are a bunch of quotations that are wrong all over the place, but I also say among is the wrong word. It should be between because there're only two.

C. Fox: Good. One more.

Audience: Well the title's wrong.

Yeah, the title is wrong. Okay, so this exercise just starts to focus them in on how much -- how carefully they need to look at this. By the way, you win the prize, but it's a notional prize or another way of saying it, it's a deemed prize, and I tell them, "When lawyer's use the word notional or deemed, it means we're making it up," but that level of attention to detail is something that's -- as Liz was saying, it's really hard to get them to really get down to that level.

Which brings us to another issue; I tell them, "I'm going to make all of these nit-picky comments on the draft that you give me because you work for me, and it's my document." What am I going to do when I'm looking at a draft and it comes from another law firm? Am I going to give it the same work over? And I tell them that I am not. Why not? If there's a clear mistake, I'm going to fix it. If it's a typo, I'm going to fix it. But if it's a stylistic change, I'm not going to make that comment. Why? Number one, I want to retain good relations with that lawyer over on the other side. Number two, if it doesn't have a substantive effect, it's not worth the trouble. It's not worth spending the client's money on that, so you have to sort of find the right balance between nit-picking and then just letting things go sometimes.

Another issue is how one-sided do we make the first draft. Obviously you can, when you're doing the first draft, you can choose which direction to go. Do you make it totally one-sided in favor of your client? Do you make it middle of the road? And this really raises a number of issues.

Number one, they need to understand that when they're doing a first draft, every decision they make, whether to write it this way or write it that way, is potentially an opening position in a negotiation. When they think of that negotiation opening position, they're thinking about a seller saying how much they want. But they need to understand that negotiations occur down to the level of words in a deal, and that when they're deciding whether to put the word reasonably in or not, in a first draft, they're creating negotiating positions, number one.

Number two, they need to understand that it's important to choose their battles, that you can't fight over everything, and that you have to distinguish between the important things and the unimportant things. So, in my opinion, there are plenty of cases where you say I'm just not going to fight that battle.

And number three, and perhaps most importantly, is it's very important, as a transactional lawyer, not to get to be known as a jerk. And I'm not sure that that is as important if you're a litigator. But it's certainly important if you're a deal lawyer. And if somebody sends me a draft asking my client to make a rep that says there's not threatened or pending litigation, and they don't say "no pending or to my client's knowledge threatened litigation," I'm going to think to myself, "Come on, what are you doing?" because they know I'm going to raise that point. And when I do, they're going to have no reasonable basis for not giving it to me. So what I would tell associates that work for me is to never put something in a first draft that when it's raised by the other side you're just going to go, "Oh you're right" and just change it, because to me that's almost acting in bad faith. If you can't justify it, you're wasting everybody's time.

Audience:                    You should talk to every tenant in America, every national tenant in America, who submits a lease [inaudible].

Well, I'll be glad to do that assignment.

Now this is where we get into the trusted advisor side of the spectrum. Here's a scenario. Your client, Fun Inc., is trying to sell its board games business by selling 100% of the outstanding stock of its subsidiary Fun Board Games Inc. for \$50 million, and this actually involves due diligence; I think learning how to read a contract and interpret it is just as important as learning how to write it. So here you discover that the client is a licensee under a trademark license agreement that says "Fun Inc. shall not sell assets with a value exceeding \$30 million." So what do you tell your client? Well first of all, you see that there's an issue here. That's the first thing we lawyers do is we identify -- in this kind of situation, is we see if there's an issue. But then if we're good lawyers, we try to help the client solve the problem, and there is a solution here. There is a potential solution. Anybody see it? Can we structure this as an asset sale? Can we have the subsidiary sell the assets? And the answer is yes because the contract provision says Fun Inc. shall not sell assets.

So the learning point here is if you want to bind an entity and its subsidiaries, you need to say so. This is a very important point because they don't understand this business about parents and subsidiaries. I tell them as a legal matter, you can say to your client you can structure this as an asset sale assuming that you have no other reason for not wanting to do it that way without violating this provision. So that's good legal counsel. But then I say to them, you can go one step further and provide good, common sense advice that isn't strictly legal. And some of the best advice I've seen great lawyers give to clients is not legal. It's business advice. It's common sense advice. And my common sense advice to the client on this one would be I think there's a good chance that the licensor thought that they were restricting this. They thought they were restricting the subsidiaries, so you're basically taking advantage of what I think was a drafting error in this agreement. And you're going to make the other side very, very upset and you're in a business relationship with them. So you just

need to consider that. That's not legal advice. That's just common sense advice, and I try to help them understand that there's an entire spectrum of things that go into looking at a situation like this.

Client management, this is a big part of being a lawyer. And when I was a first-year lawyer, the head of my department, at my first law firm, one day put his arm around my shoulder -- back in those days you could do that -- put his arm around my shoulder and he said -- he was a very colorful -- we called him grandpa because he was like grandpa from the Munsters, really very similar, except he didn't wear the Transylvania garb. But he put his hand around my shoulder and said, "Charlie, I'm going to give you the single best piece of advice I could ever give you, as a lawyer." He says, "You're going to remember this your whole life." So far that's true. He said, "You're going to be doing deals. You're going to be fighting with the lawyers on the other side. You're going to be negotiating with them, and things are going to get hot. And you're going to think that those lawyers are your enemy. Never think that. It's not true. Those lawyers are not your enemy. Your client is the enemy. Never forget it. Never forget it. Your client is the enemy." I thought he was nuts. But after a while, I realized he wasn't so nuts that -- my point here -- it's a funny story, but my point is young lawyers need to learn that there is always a certain adversarial element to the lawyer-client relationship, and one of those comes up in the context of business issues versus legal issues, which is a terminology I think is -- I don't believe in this distinction.

So business issues versus legal issues, to me there's a false distinction because, as lawyers, we should never be fighting over any issue that doesn't have some potential business impact on our client, period, right? You can call the legal issues, legal issues. That's usually used by clients, who don't want to pay attention to something. So let's do a little exercise here, and Kent I already told you I was going to call on you. So here is a provision in an acquisition agreement. It's a representation and warranty, that the target is not a party to any litigation that could have a material adverse effect on its financial condition. This rep gets made at signing, and the rep also gets made at a closing as a condition to closing. The issue here is the word "could." What we worry about is that even though the target is free from litigation at the date that the contract is signed, what happens if somebody sues them for a billion dollars between signing and closing? The way this is written, that would give the buyer the right to walk, because a billion dollar claim *could* have a material adverse effect.

So what do we want to do? We want to change that and put in something like "could reasonably be expected to have a material adverse effect." So Kent is dealing with that, and he is a smart lawyer because in a way this is a legal issue. It's a legal issue in the sense that he's going to try to talk to the lawyer on the other side and resolve this problem without involving his client, which he tries to do. The lawyer on the other side is refusing to make the change. So what is Kent's only recourse here? Kent's only recourse is to try to get his client in on this discussion.

So Kent is going to be the lawyer, and I'm going to be the client. And he's going to explain to me what the issue is and what he thinks we should do about it.

Kent: So the issue is you need to change could to would. That's one issue. And the reason you need to do that is because if something comes in, in the interim, between signing and closing --

C. Fox: Kent, wait a second. Hold on. What are you talking about? I don't care about that stuff. I got to get this deal closed.

Kent: Yes, you do because it affects the party's obligation to close -- the buyer's obligation to close, and that's why you care about it because it goes to deal risk. And if you want the deal to close, you need to change that, for that reason.

Okay. We didn't rehearse this, but that was good.

Clients -- the last thing a business person wants to do is talk about this stuff because, first of all, they don't understand it. And secondly, it's tedious, so we have to sometimes grab them by the scruff of the neck and rub their nose in it. But do it in a -- Kent did it in a forceful way and made it very clear to me—"I care about this because if we don't fix this, the other side might not have to close."

Alright, I'm going to stop here because my time is up. Thank you very much.

I guess we'll take questions.

D. Levene: Yes, this is Doug Levene, at Peking University. Charlie I have a question, when you were talking about marking up the opposing counsel's draft, and you said you let stylistic points go. What do you tell students about to graduate and go off into the world to do? What do you tell him to give the partner?

C. Fox: I tell him to -- if the associate is marking up another firm's draft?

D. Levene: Yes.

C. Fox: No one's asked me that question. That's a very good question. I would say, "I want you to show the partner that you know where all the mistakes are, and then the partner can make that call is what I would tell them." But the risk if they don't do that is the partner is probably not going to realize that the associate's thinking as sophisticated as she is and think that they're just not picking up the stylistic mistakes.

Audience: Charles, your exercise concerning taking a complex provision and having students explain that to a client and then a partner and the

differences there brought an interesting question to me, which is that, most of the transactional work that we do tends to be written, and that isolates out the importance of oral communications. And I've seen some of the literature on success in profession that indicates that might be one of the central factors of success. Is there more that we should be waiting, in terms of oral communications around transactional law, and are there other exercises that any of you are doing that isolates out different dimensions of oral communication around transactional law?

C. Fox: My short answer to that, because I don't have any suggestion, but my short answer to that is you can't do enough of this.

Audience: Cannot?

C. Fox: Cannot do enough. I don't know any of the evidence that you're talking about, but just from my own personal experience, I have one associate who mumbles and can't explain things clearly to me and concisely, and another one who can. Obviously the one who can is going to be the one that I bring on to my next deal. That is just so important and so basic, so I think the more time that can spent on this, the better.