# Homework Assignments: Contract Drafting (Professor Toedt, Fall 2017)

"P/F" indicates pass-fail, meaning that students will get full credit for a good-faith effort.

INSTRUCTIONS: For each homework assignment:

1. Print out the page(s) of the homework due on the date in question and bring it to class.

2. Save this document as a new Word document entitled (for example) “Homework 1,” then in that new Word document, delete all but the page(s) of the homework that’s due.

3. Upload the new Word document, containing just the homework answer(s) due that date, to Blackboard so that your (anonymous) grade will be automatically recorded.

## 1. For Wed. Sept. 6 (5 pts, P/F): Microsoft Word basics

Q-1.1:  In Microsoft Word, how do you adjust the spacing between paragraphs? (Pro tip: **Don’t** use a blank line to separate paragraphs – adjust the spacing instead.)

Q-1.2:  In Microsoft Word, what's the proper way of creating a heading? *Hint: It involves “styles.”*

Q-1.3:  In Microsoft Word, how do you keep one paragraph with the next one? *Hint: Look up paragraph formatting.*

Q-1.4:  In Microsoft Word, how do you adjust the line spacing **within** a paragraph?

Q-1.5: In Microsoft Word, how do you create a table without borders? (Tables can sometimes be useful in contracts.)

Q-1.6:  In Microsoft Word, how do you create a table of contents? (A table of contents can be useful in a long contract.)

Q-1.7: FACTS: You want to copy and paste a short snippet from a Web page into a Microsoft Word document without messing up the formatting of the paragraph into which you’re pasting the snippet. To do this, you will use the Paste Special menu item. QUESTION: Which of the following Paste Special options would you use?
(a) Unformatted text
(b) HTML text
(c) Formatted text

## 2. For Wed. Sept. 6 (5 pts, P/F): Preamble for consulting agreement (pass-fail)

INSTRUCTIONS: See the instructions for the [Microsoft Word "basics" assignment](#WSWordBasics). **Be sure to bring a printout** of your answer so that students can exchange papers.

FACTS: Your client, Alice, wants to hire Bob as a temporary marketing consultant. Both are individuals. ASSIGNMENT: In Microsoft Word, draft (only) a title; a preamble; a background section; and signature blocks. Make up whatever information you think you need.

## 3. For Wed. Sept. 13 (10 pts, P/F): Signature blocks

INSTRUCTIONS: See the instructions for the [Microsoft Word "basics" assignment](#WSWordBasics). **Be sure to bring a printout** of your answer so that students can exchange papers.

For each of the below, explain your answer briefly.

3.1 (5 pts): As if you were representing the **seller**: Draft the signature blocks for the "selling a used computer" exercise ([§ 3.2.3](#ExSellingMac)) on the assumption that the seller is Sarah's Computer Sales, Inc., which is a Texas corporation; Sarah is the founder and CEO. *(Careful: Does a company's founder necessarily have signature authority for the company?)*

3.2 (5 pts): Same as above, except that the seller is Sarah's Computer Sales L.P., which is a limited partnership that was set up in Delaware; Sarah is a celebrity who is a limited partner in the company (i.e., an investor), and she is letting the company use her name, but she has no other role in the company.

## 4. For Wed. Sept. 20 (10 pts): UAL-CAL Effective Time definition

INSTRUCTIONS: See the instructions for the [Microsoft Word "basics" assignment](#WSWordBasics). **Be sure to bring a printout** of your answer so that students can exchange papers.

ASSIGNMENT: Rewrite the following provision from the Continental-United Airlines merger agreement —

to make the provision more readable — consider whether:

to create at least one new defined term to avoid repetition; and

to perhaps eliminate one of the existing defined terms that might not be needed; and

to get rid of the false imperative (see *[[./OnContractDrafting.html#FalseImperative][On Contract Drafting* § 4.2]]) at the beginning of the final sentence.

1.3 EFFECTIVE TIME. Subject to the provisions of this Agreement, As soon as practicable on the Closing Date, [UNITED] shall file with the Secretary of State of the State of Delaware the Certificate of Merger and the Restated Charter, in each case in such form as required by, and executed and acknowledged in accordance with, the relevant provisions of the Delaware Law, and, As soon as practicable on or after the Closing Date, shall make all other filings required under the Delaware Law or by the Secretary of State of the State of Delaware in connection with the Merger. The Merger shall become effective at the time that the certificate of merger relating to the Merger (the "*Certificate of Merger*") has been duly filed with the Secretary of State of the State of Delaware, or at such later time as United and Continental shall agree and specify in the Certificate of Merger (the time the Merger becomes effective being the "*Effective Time*"). the Restated Charter shall be filed with the Secretary of State of the State of Delaware immediately prior to the filing of the Certificate of Merger and shall become effective at the Effective Time.

## 5. For Wed. Sept. 27 (20 pts): Reps and warranties, etc.

INSTRUCTIONS: See the instructions for the [Microsoft Word "basics" assignment](#WSWordBasics). **Be sure to bring a printout** of your answer so that students can exchange papers.

5.1 (2 points):  As if you were representing the **seller**: Draft the signature blocks for the "selling a used computer" exercise ([§ 3.2.3](#ExSellingMac) above) on the assumption that the seller is Sarah's Computer Sales, Inc., which is a Texas corporation; Sarah is the founder and CEO. *(Careful: Does a company's founder necessarily have signature authority for the company?)*

5.2 (3 points): Returning to the "selling a used computer" exercise ([§ 3.2.3](#ExSellingMac) above): Today's date is September 20, 2017. For reasons not explained to you, the seller's principal has asked you to be sure that the date-signed fields in the signature blocks will read "September 2, 2017." The seller's principal is going through a divorce. QUESTION: Does this raise any red flags? **Explain**.

5.3 (10 points): You represent **Buyer** in the "selling a used computer" exercise ([§ 3.2.3](#ExSellingMac)above). List some reps and warranties that you would want Seller to make about the computer. *(Think about what the* remedies *should be in case a warranted fact proves untrue, and consider including those remedies in the rep-and-warranty provisions.)*

5.4 (5 points): Now you represent **Seller** in the "selling a used computer" exercise ([§ 3.2.3](#ExSellingMac)above). *(For class discussion only: Could that actually happen in real life?)* For each of the reps and warranties in the list you made when you represented Buyer, indicate whether, as Seller's counsel, you think Seller should make • a representation, or • a warranty.

## 6. For Wed. Oct. 4 (20 pts): Stanford-Tesla extension option

FACTS: (1) You have traveled back in time and are clerking at the law firm that represented Tesla Motors in negotiating a [real-estate lease agreement](http://www.sec.gov/Archives/edgar/data/1318605/000119312510017054/dex1020.htm) in which Stanford University is the landlord and Tesla is the tenant. (2) The draft lease agreement contains the following provision *(which is in the actual final agreement)*:

**4.3 Extension Option.** In the event that Landlord determines in its sole discretion[[1]](#footnote-1) that Landlord does not intend to redevelop the Premises or to use it for Landlord’s own purposes after the Termination Date, and that therefore the Premises will be available for lease, Landlord shall provide Tenant with written notice of such determination, setting forth the period of time that Landlord has determined the Premises will remain available for lease by Tenant (the “Extension Period”). Tenant shall have the option (the “Extension Option”) to extend the Term for the Extension Period by delivering written notice to Landlord within thirty (30) days after receipt of Landlord’s notice. The Extension Option shall be void if an Event of Default by Tenant exists, either at the time of exercise of the Extension Option or the time of commencement of the Extension Term.[[2]](#footnote-2) The terms of this Lease during the Extension Period shall be the same terms and conditions as during the original Term, except that the Base Rent applicable to the Extension Period shall be equal to the Prevailing Market Rent as of the commencement of the Extension Period, as determined pursuant to Exhibit D. The Extension Option is personal to Tenant and shall be inapplicable and null and void if Tenant assigns its interest under this Lease, or if either party exercises its termination right under Section 4.4. The Extension Option (if not previously exercised) shall expire as of the Termination Date.

(3) The partner for whom you are working is concerned that Stanford might forget entirely about the property and therefore might not provide Tenant with the notice mentioned in section 4.3.

ASSIGNMENT: Redraft the above § 4.3 to do the following:

1. give Tesla the ability to "nudge" Stanford and get a final yes-or-no decision about Stanford's intentions for redevelopment;
2. give Tesla at least some voice in Stanford's decision about redevelopment — but don't change the "sole discretion" part *(hint: consider a*[*consultation*](http://www.commondraft.org/#ConsultationClause)*requirement)*;
3. create a "default" or "gap-filling" provision, *in Tesla's favor*, that will govern if Stanford [drops the ball](http://idioms.thefreedictionary.com/drop%2Bthe%2Bball) about giving Tesla notice concerning Stanford's redevelopment intentions; and
4. make the section more readable.

Substantively, though, don't revise the terms of the section (apart from #1 through #3 above).

## 7. For Wed. Oct. 11 (5 pts): Inspection and testing

For the "selling a used computer" exercise:

As *Buyer's* lawyer, draft a provision that allows Buyer to have a computer-savvy person inspect and test the computer before the closing.

As *Seller's* lawyer, think about what precautions might be appropriate during the inspection to reduce the risk\* of bad things happening for which Seller might want to blame Buyer.

\* Notice that this sentence doesn't say "to **ensure** that bad things won't happen," because that's not within our power.

**Explain (very briefly):** • why you included what you did, and • if you decided to leave anything out: what, and why.

## 8. For Wed. Oct. 18 (10 pts): Closing provisions

Draft a set of "closing" provisions stating exactly what is to happen at the closing; include both:

* provisions that Seller would want; and
* provisions that Buyer would want.

**Explain (very briefly):** • why you included what you did, and • if you decided to leave anything out: what, and why.

## 9. For Wed. Oct. 18 (5 pts): Payment provisions

For the "selling a used computer" exercise: As Seller's lawyer, draft a payment provision that you think will provide Seller with an acceptable risk of non-payment.

## 10. For Wed. Oct. 25 (10 pts): Preamble questions about the computer sale

1. FACTS: Billy Buyer wants the computer-sale contract to recite, not his name, but his business name, "Bravo Builders" (just that – no Inc. or LLC or anything like that).

QUESTION: Any problem with that?

2. FACTS: It turns out that Billy Buyer is 15 years old.

QUESTION: Any issues there?

3. ALTERNATE FACTS: Billy is 28 years old, a successful Internet entrepreneur who is worth $300 million. Billy wants the contract with Sarah Seller to be in the name of his new business venture, Beta-Beta Research LLC. BBR will be *renting* from Sarah (not buying) a custom-built supercomputer for one year, for an annual rent of $1 million.

QUESTION: Any *financial* issues here? How might those issues be addressed?

## 11. For Wed. Oct. 25 (5 pts): Unapproved changes

FACTS:

* Your client manually signs two originals of a contract. You mail both originals to the other side with a cover letter asking for one of the fully-executed originals to be returned to you.
* A couple of days later, you receive a fully-executed original; per the client's request, you put it in your file.
* Months later, a question comes up about the contract. You look at your file copy.
* A significant point in the contract isn't drafted the way you remember; it's different from the earlier drafts.
* You contact the other lawyer, who says he doesn't know what you're talking about.

QUESTION: How could you have prevented this from arising?

## 12.  For Wed. Nov. 1: 25 (15 pts): Termination clause

This is a provision from an actual master-services-agreement form provided by "Customer." ASSIGNMENT: As the attorney *for Provider*, redraft this to make it more workable for your client.

x.x **Termination.** Customer may terminate the Agreement or any Statement of Work, in whole or in part, for convenience (i.e., for any reason or no reason) effective as of any date by giving Provider written notice of the termination.

Except as provided in the last sentence of this Section, Customer’s failure to perform in accordance with the Agreement or otherwise comply with the terms of the Agreement will not be deemed to be grounds for termination by Provider, and Provider hereby expressly waives any such termination rights it may have.

Provider acknowledges that Customer would not be willing to enter into the Agreement without assurance that the Agreement may not be terminated by Provider and that Provider will not have the right to suspend performance of the Services, in each case except, and only to the extent, expressly provided in the following sentence.

If Customer fails to pay Provider when due any amount owed Provider hereunder, Provider will notify Customer of such default in writing, and if Customer has not cured such default within sixty (60) days after Customer’s receipt of such notice, then Provider may terminate the affected Statement of Work in whole upon at least ninety (90) days prior written notice to Customer.

## 13.  For Wed. Nov. 8 (5 pts): Equitable relief clause

This is a provision from an actual contract form provided by Customer. ASSIGNMENT: As the attorney *for Provider*, redraft this:

* to make it more acceptable to Provider while still trying to make Customer happy; and
* to make any necessary stylistic changes, e.g., for enhanced client readability and/or to R.O.O.F.

x.x **Equitable Relief.** Provider acknowledges and agrees that there can be no adequate remedy at law for any breach of Provider’s obligations or covenants under Sections *[omitted]*, and that any such breach will result in irreparable harm to Customer. Provider agrees that upon any such breach or any threat thereof, Customer will be entitled to appropriate equitable relief in addition to whatever remedies it might have at law (without being required to post a bond or other security).

## 14. For Wed. Nov. 8 (10 pts): Most-favored-customer pricing

FACTS: Your client, Seller, has asked you to review a purchase order from Buyer. The PO includes two pricing clauses that appear to have been copied essentially verbatim from a Honeywell contract form:

12. Price: Most Favored Customer and Meet or Release. Supplier warrants that the prices charged for the Goods delivered under this Purchase Order are the lowest prices charged by Supplier for similar goods. If Supplier charges a lower price for similar goods, Supplier must notify Honeywell and apply that price to all Goods ordered under this Purchase Order by immediately paying Honeywell the price difference and applying the lower price to all Purchase Orders. If at any time before full performance of this Purchase Order Honeywell notifies Supplier in writing that Honeywell has received a written offer from another supplier for similar goods at a price lower than the price set forth in this Purchase Order, Supplier must immediately meet the lower price for any undelivered Goods. If Supplier fails to meet the lower price, in addition to other rights or remedies, Honeywell, at its option, may immediately terminate the balance of the Purchase Order without liability. As directed by Honeywell, Supplier will provide the Goods at the prices listed on the face of this Purchase Order, subject to these terms and conditions, to other Honeywell divisions and affiliates and any third-party Honeywell sub-supplier or designee.

ASSIGNMENT: Redraft this along the same lines as the two bullet points in the instructions for #13 above.

## 15. For Wed. Nov. 15 (15 pts): Audit clause

This is a provision from an actual contract form provided by "Customer." ASSIGNMENT: As the attorney *for Provider*, redraft this to address:

* substantive issues of concern to Provider; and
* "necessary" stylistic changes, e.g., for enhanced client readability and/or to R.O.O.F.

x.x **Audits**. Upon request, Provider and Provider Agents will provide Customer and internal and external auditors, inspectors, governmental authorities and other representatives that Customer may designate (collectively, “Customer Auditors”), with timely and unrestricted access to the Project Staff, the locations at which the Services are performed at or from, systems, records documenting the performance of the Services and the invoicing of the fees hereunder, and other pertinent data and information for the purpose of inspecting, examining and auditing the Services and the operations of Customer relating to the Services, including to verify (a) the fees invoiced and paid hereunder, (b) performance of the Services, (c) compliance with the Agreement, (d) the use of Customer property and (e) the integrity of those elements of Customer’s corporate control processes that are performed by Provider. If any such audit reveals an overcharge to Customer, then within thirty (30) days following the completion date of such audit, Provider will pay to Customer the amount of such overcharge, plus interest at JPMorgan Chase & Co.’s then current prime commercial lending rate, calculated from the date of receipt by Provider of the overcharged amount until the date of payment to Customer. In addition, if any such audit reveals an overcharge to Customer by an amount greater than five percent (5%) of the audited invoices, then Provider will reimburse Customer for the costs and expenses of such audit.

1. Comment: In the Common Draft materials, look up the definitions of sole discretion and discretion and read the annotations. QUESTION: In this provision, just what determination(s) are within Landlord’s “sole discretion”? [↑](#footnote-ref-1)
2. Question: What is the Extension Term — where did that come from? Is it a “thing,” or is it a drafting error? [↑](#footnote-ref-2)