

Contract Drafting Syllabus

D. C. Toedt III

§ 1 Basic information

See especially the [quiz schedule](#) and the [homework schedule](#).

§ 1.1 The course materials are available online

The class Webpage: <https://toedtclassnotes.site44.com/>

The main reading material will be the following.

- The [TANGO Terms 2019A](#), which is still very much a work in progress, but which I've locked down (in the student edition) for the semester. I intend to keep making it available at no charge. Students are encouraged to make suggestions and comments as the semester progresses; and
- a [Supplement](#), consisting of several real-world contracts that I've annotated and printed to PDF. We'll study selected portions of some of these contracts.

§ 1.2 Course objective: Exposure to the tools of the trade

Our primary course objectives and learning outcomes are to give each student *an initial, survey-type exposure* to the following tools of the contract drafter's and reviewer's trade:

1. Techniques for drafting simple, *understandable* sentences and paragraphs to cover complex topics;
2. Important legal doctrines, e.g., laws governing interest charges, indemnities, implied warranties, etc.;
3. Crucial *business* issues that are commonly addressed in contracts;
4. Practicing spotting and fixing language ambiguities that could cause problems down the road;
5. The psychology of likely future readers such as business people, judges, and jurors;
6. Finding and harvesting useful "precedents" (past contracts);

7. Recognizing when to ask the partner or the client — and getting in the habit of *documenting* that you did so.

§ 1.3 **What this course *won't* do**

First: Do NOT assume that we will "cover the material" in class, because:

- We have a total of 35 hours together in class; that's not enough nearly time to do justice to all the material you'll need to be aware of in order to be a competent contract drafter or reviewer. **Possibly more than in your other courses**, you'll need to be sure to do the reading if you want to get maximum benefit from the course.
- As discussed below, the sage-on-a-stage lecture approach has been shown to be significantly less effective when it comes to comprehension and retention, so we will focus the class time on trying to make sure you understand and retain as many crucial points as possible.

Second: This course isn't like a driver's ed class, where completing the course will make you at least minimally competent to "go out on the road" by yourself. **Becoming a competent contract drafter will take far more time and effort than can be provided in a single three-semester-hour course.** Even after you finish this course, you likely will — and *should* — worry that you don't know what you don't know.

(You could think of this course as being **akin to a surgical-tools class** in which medical students learn the basics of using scalpels, clamps, suture needles, and other surgical tools, and practice using those tools by doing a few simple procedures on an anatomical mannequin. Completing such a class, without more, should not make a student feel "comfortable" doing any kind of surgery on a live person; that's why newly graduated doctors must still spend years in residencies to learn their trade. **Much the same would be true if you were to try drafting a contract for a real client with no other training than this course.**)

§ 1.4 **Contract *revising* as well as *drafting***

In this course, we will practice good drafting skills — in part — by *revising* the work of others. This reflects what you're almost certain to see in practice: Contract drafters spend far less time *drafting* contracts than they do in *reviewing and revising* others' drafts, whether a given

existing draft was prepared by "the other side" or was used in a previous deal.

Even when you're the one who must prepare the first draft, **your supervising attorney will almost always tell you to find a previous form of agreement and modify it** (and perhaps will suggest one), instead of starting from scratch with a blank screen.

An analogy: When Princess Diana was killed in a car accident, the British government did not draw up her funeral plans from scratch; instead, the government modified an existing plan, code-named OPERATION TAY BRIDGE, which had been previously prepared and rehearsed for the eventual funeral of the Queen Mother. See <https://goo.gl/S7U8Qr> (Wikipedia.org).

§ 1.5 **Peer review of much student work**

I will of course review and provide feedback on the assigned writing projects, and I will walk around and offer real-time comments during the in-class drafting sessions. **To make it possible for you to do more practice-type exercises**, some of your drafting- and revision assignments will be "reviewed" by your colleagues in your small groups, often by comparing them with model answers that I provide.

§ 1.6 **Spaced repetition, with (some) jumping around**

Some of the short exercises and quizzes that we do will seem repetitive; they also will seem to jump around from topic to topic. **This is a feature, not a bug**, because:

- It mirrors what you'll almost certainly see in practice; and
- pedagogically it's been shown to be more effective at promoting long-term memory than lecture and repetitive reading. See generally [Spaced retrieval](https://goo.gl/4PRZTy) (Wikipedia: <https://goo.gl/4PRZTy>).

This approach will strike some students as disorganized. Over the years, though, most students seem to have come to appreciate the value of the approach, as mentioned in some of the student comments below.

§ 1.7

Social proof: Past student comments (good and bad)

Following the sales-and-marketing principles of (i) using social proof, and (ii) "setting the hook," here are some student comments from official course evaluations, from virtual-whiteboard feedback at the end of various past semesters, and from the occasional email from former students:

- "I had the opportunity to redline a software agreement for the company I intern with and the Contracts Lawyer told me I did a very fine job. ... The lawyer asked me how I was so well attuned to the various ways in which the software providers tried to undermine our company's bargaining power. ... I was amazed at how easily I could identify problematic language. ..."
- "Great job! Loved the quizzes. Very helpful class."
- "I saw what I learned in class be used at my job, so that was great to be able to use what I learned already as a student practicing."
- "One of the best classes of my time in law school. Great progressive approach to teaching. I can only hope that UH will adopt Toedt's methodology for other classes."
- "I liked the practical approach of the course – very effective teaching technique by using repetition and in class exercises."
- "You learn piece by piece the process throughout the semester to be able to effectively draft/redline contracts."
- "His course is different from the norm and his methods are refreshing. ... Professor Toedt's approach allows students to figure out the issue on their own but provides students with the tools necessary to reach an answer (which he then explains/corrects)."
- "... really enjoyed the approach to class and quizzes."
- "I like the in class exercises. Very helpful to lock in the concepts. I would recommend more of these types of exercises throughout the class. Amount of reading was reasonable."
- "Love the quizzes! They are really helpful to learn things, and the spaced repetition was excellent. Also they were a good way to test what we knew and where we were in class so we had an idea of how things were going."
- "I liked both the class and instructor and would recommend this course."
- "This was a great class, Professor Toedt's approach to teaching is clear and concise."

- “Professor Toedt is the ‘original gangster’ (hereafter ‘OG’) of contract drafting. I'm fortunate to have taken his class. He is incredible. Thanks for your public service.”
- “Professor Toedt is remarkable at contract drafting. It is a privilege to take this class with him. He does his job exceptionally well. Very respectful man.”
- “Professor Toedt is great at what he does! He really knows his stuff and makes sure you know it too. I really like the approach of having different sections of a contract due as homework every week. This helped me really learn about the different sections and helped me stay on track to writing an entire contract by the end of the semester. All in all, wonderful professor!”
- “Very insightful and practical class. The professor is very effective in conveying the information in a rememberable and engaging fashion. I truly enjoyed this course and will be using what I learned in practice next year. Thank you, Professor Toedt!”

* * *

Not everyone was so enthused; here are some less-positive comments, along with my responses.

- "I also felt that we did not have enough time to complete the quizzes." (*From a different student's review:*) "Most tests/exams we are used to taking in law school last hours, not minutes. If the timing is off on a test, then that basically destroys the effectiveness of the actual test as a way to measure how students are learning."

DCT response: **By design, each quiz has too many questions.** That way, students won't have time to look up many of the answers on-the-fly, and so those who don't need to do so will get a better score.

(This practice also has a pedagogical aspect to it: **If you don't remember an answer while taking a quiz, it's better for you to be able to look it up right then and there, instead of guessing**, because that little bit of real-time review will make you somewhat more likely to remember the correct answer *next* time.)

- "The classes felt a little haphazard on a weekly basis." (*From a different student's review:*) "[T]he course is extremely unorganized"

DCT response: The topics covered in the course are arranged in very rough order of importance (in my experience). And, as noted above, **spaced repetition can indeed feel like jumping around, but it's key to the approach of this course.**

- "I thought some of the reading assignments were a little long. It just looks daunting and I am not motivated when one section has 20-50 subsections."

DCT response: Noted — I've redone the reading assignments to indicate more what must be read closely, versus what can be merely looked over or skimmed (so that you'll likely remember that it's there and can look it up if you ever need it in the future).

- "I felt like we spent a ton of time revising contracts and simplifying them, but I'm still not sure that I have a great grasp of all the sections of a contract." (*From a different student's review:*) "I liked that the class stressed practical knowledge and what to look out for when reviewing contracts but I do not feel like that this has translated into me feeling confident (or even semiconfident) writing or reviewing a contract in real life."

DCT response: **It's normal not to feel confident** until you've had a fair amount of real-world experience that didn't blow up on you. Think back to when you first drove a car by yourself.

- "To me, I think the stress of a contract for a law student is the idea of, if you're assigned to write up a contract from scratch, your thought is, where do I even begin?"

DCT response: Noted; I'm thinking about how to remedy this with some kind of step-by-step procedure — although as pointed out above, contract drafters almost never start with a clean sheet of paper or blank computer screen.

- "[W]hile I found it helpful that we started the pass-fail assignments in class and could discuss with fellow students and the instructor I would have liked more personal comments back on the finished product." (*From a different student's review:*) "Overall, I thoroughly enjoyed this class and learned a significant amount. The only change that I would be recommend [*sic*] is for the instructor to if at all possible [*sic*] decrease the amount of peer review of homework and substitute it with his own review."

DCT response: As discussed above, **peer review provides each student with more opportunities** to do short drafting assignments and get feedback; if we only did instructor feedback, we'd necessarily have fewer of these opportunities, and consequently less practice in drafting. That said, I've reworked the schedule of homework assignments and plan to do more review and commenting myself.

- "I do think you could go without any reference that might offend students. For example, I think there is a "safe sex" reference that is unnecessary"

DCT response: "Safe sex" is a metaphor that I use as Rule 3 of my [Three Rules for Protecting Trade Secrets](#). To make the underlying principle more memorable, I've been using the safe-sex metaphor for probably 20-plus years, in dozens of presentations to CLE audiences, business managers, entrepreneurs, law students, and business students — during that time, only this student and one business manager several years ago have ever complained the metaphor was offensive. (I also refer to "d[**]kish documents" in the [Battle of the Forms discussion](#).) These metaphors seem to help convey the underlying concepts to adult audiences, so I anticipate that I will continue to use them.

§ 2 **Administrative details**

§ 2.1 **Computer use; email addresses**

- Computer use in class is not just encouraged but required; you will need in-class Web access for many of the in-class exercises. If this will be a problem, be sure to contact me well in advance.

(You might, however, want to rethink the extent to which you use laptops in your other classes; see, e.g., [this article](#) by a professor at the University of Michigan about how classroom laptop users not only do worse than those who take notes by hand, they also interfere with the learning of non-laptop users around them.)

- On the first day of class I will be asking for your email addresses so that I can include it in a class Google Group. Please provide an email address that you check regularly.

§ 2.2 **Extra class time each day (to avoid needing a Friday-night makeup class)**

I'm a practicing attorney and arbitrator; I normally don't have to miss class, but it has been known to happen, e.g., when I've had out-of-town commitments. There have also been times when class has been canceled due to weather. (And on the evening of Game 7 of the 2017 World Series, we canceled the evening class.)

The ABA requires 700 minutes of instruction for each credit hour; that means we need 2,100 minutes of instruction for our three-hour course. *We will achieve the needed minutes of instruction by:*

1. meeting for 80 minutes per class for 26 class meetings, vice the normal 27 scheduled class meetings, to get 2,060 instruction minutes;
2. making up the remaining 40 instruction minutes via “online” instruction in the form of emails and other discussions, as permitted by ABA rules;
3. using the resulting “spare” class #27 as a makeup day if necessary, otherwise ending the course at #26;
4. as a last resort, meeting on one of our scheduled Friday-evening makeup days (not the situation of choice).

§ 2.3 **Recording my lectures: Go ahead if you want**

I don't make audio recordings of my lectures, but I have no objection to students doing so and sharing the recordings with other UHLC students.

§ 2.4 **Last-day agenda: Reviews, Jeopardy, pizza**

The last day of class will generally include:

- Pizza for the section (4:00 p.m. or 6:00 p.m.) that has the highest average total score, including the class attendance, homework, and quizzes;
- An overview of the final exam plan;
- A collaborative review of key concepts, using the virtual whiteboards to create a master outline for each group — the virtual whiteboard ([4:00 p.m. section](#) | [6:00 p.m. section](#));
- A group discussion of what would make the course and/or the materials more useful to next semester's students, and what *didn't* work so well, again using the virtual whiteboard;
- Course evaluations, using the UH online system; and
- As one last review: [a Jeopardy! game](#).

§ 3 General information

My contact information: I can be reached at dc@toedt.com or (713) 364-6545 (which forwards to my cell); see also [my About page](#).

I respond pretty quickly to email questions. If I think that a question might be of interest to other students, I'm likely to copy and paste it (possibly edited, and with identifying information redacted) into an email to one or both sections.

My office hours: As an adjunct professor, I generally don't physically come to the school except to teach class. I'm happy to meet with students as follows:

HOW	WHEN	APPT. NEEDED?
In person	M or W 3:30 p.m.	Yes
In person	M or W 5:25 p.m. or 7:25 p.m.	No
Skype or Zoom video; phone	TTHF 3:00 p.m.	Yes

I strongly encourage each student to make at least one appointment during the semester to discuss any questions that they or I might have.

§ 4 Counseling available

Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (<http://www.uh.edu/caps>) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the "Let's Talk" program, a drop-in consultation service at convenient locations and hours around campus. Go to http://www.uh.edu/caps/outreach/lets_talk.html for more information.

§ 5 Grading: Quizzes, final exam, etc.

The school's required average: 3.0 to 3.4: As required by [law school policy](#) for a writing class, raw grades will be adjusted proportionally to the extent necessary to make the average of the final class grades fall within the range specified in the heading of this section. (My usual practice — but not a guaranteed one — is to “move the curve” up or down as necessary so that the average is as close as practicable to the *high* end of the required range.)

Your final grade is based on 950 total possible points: Your course grade will be based on how many points you earn out of 950 total possible points, as explained below.

§ 5.1 Attendance “signing bonus”: 100 points — *with a claw-back*

Every student starts out with the above “freebie” points for class attendance, **but can lose points for missing class**, as follows:

TOTAL CLASSES MISSED	TOTAL POINTS LOST
1	0
2	10
3	30
4	60
5 or more	all 100

This means, of course, that students who miss more than one class will have to do that much better on the final, the quizzes, and homework in order to keep up with their classmates on the school-required average.

Some absences won't lose points, however:

- I don't count absences for “official” law school travel, e.g., for moot-court competitions, etc., as long as I'm informed in advance.
- I also don't count up to two absences for illness (yours or someone for whom you need to care, e.g., a child). **If you're ill, please don't come to class and infect the rest of us.** Please email me if you'll be absent for illness; I'll take your word for it without a doctor's note.

Other absences, e.g., for job interviews, office visits, work trips, etc., **will be counted as missed classes** and will lose points as set forth above; please schedule accordingly.

On any given day, if I see that one or more students are missing, I will circulate an attendance sign-in sheet. If I see that everyone is present, I normally won't bother doing so.

For regular "classroom" sessions, I no longer let students attend remotely, because experience has shown that realistically, remote attenders don't participate in the small-group discussion.

Why attendance is especially important: The class attendance policy arises from the fact that we will be doing:

- a significant amount of in-class *discussion*; and
- a significant number of in-class *exercises*, in two- to four-person teams.*

Consequently, it's important for all students to attend each class, not just for their own benefit, but so that their teams won't be shorthanded.

ABA accreditation rules and school policy require attendance at 80% of the class meetings for each course. We will meet a total of 26 times; rounding to the nearest whole number of classes, a student therefore must attend at least 21 class periods to comply with the 80% rule.

§ 5.2 **Homework: 200 points**

Homework consists of short drafting assignments, mostly pass-fail; see [that section](#) for instructions and the specific assignments.

WARNING: In one past semester, a student failed the course — even though the student had a (very-low) passing grade on the final exam — *and therefore didn't graduate that semester* as the student had planned, because the student had turned in almost none of the homework assignments.

§ 5.3 **Mid-term quizzes: 150 points**

On four different Wednesdays (generally every third one), at the beginning of class, we will have an in-class, mid-term quiz.

The mid-term quizzes will include progressively-more review material and accordingly will count for an increasing number of points, as follows:

Quiz 1	Wed. Sept. 11	20 points
Quiz 2	Wed. Oct. 2	30 points
Quiz 3	Wed. Oct. 23	40 points
Quiz 4	Wed. Nov. 13	60 points

Each quiz will:

1. be administered either on-line via Blackboard or in hard copy;
2. be timed for *approximately* TEN MINUTES each (people with accommodations can get extra time — ask Dean Tennessee’s office to let me know if you’re one of those people);
3. sometimes be open-everything (book notes, Internet), but NO communicating with other students;
4. some quizzes might be closed book (I’ll announced that well in advance)
5. **very likely include more questions than almost anyone could answer in the allotted time** — that’s a corollary of having the quizzes be open-everything (people who spend time looking up answers won’t score as well);
6. include a mix of true-false, multiple-choice, fill-in-the-blank, and/or “micro-essay” (short answer) questions;
7. cover only the following:
 - the readings assigned up through *and including* the quiz date, whether or not we discuss any particular topic in class;
 - any review questions relating to the reading;

- anything in the in-class and homework exercises that we have done to date — the quizzes themselves will thus serve as a reinforcing review that takes advantage of the [testing effect](#);
8. be graded partly anonymously — the Blackboard software shows me students' names; I can't do anything about that, but:
- Blackboard automatically grades the true-false, multiple-choice, and fill-in-the-blank (“FITB”) questions.
 - I review any “incorrect” fill-in-the-blank answers so that I can give credit for simple misspellings, which Blackboard can't always pick up. (I program the quizzes on Blackboard to accept as many misspellings as I can think of, but you'd be surprised how ... creative students can be).
 - If a quiz includes any micro-essays, they will not be anonymous at all.

In past quizzes, a few students have gotten the right answer to every question on every quiz. In response, one student suggested that I should “[d]esign quizzes to have a wider score distribution.” I'm less interested in that than in helping *all* students to understand and retain the material.

§ 5.4 **Final exam: 400 points**

The final exam will: • be one hour in length; • consist in large part of what amounts to a mid-term quiz on steroids; • take place in the to-be-designated final-exam room; and • be open-book, open-notes, open-browser (but no communication with anyone else, whether by text, email, IM, or anything else).

What's fair game for the final exam? Anything: • in the reading materials, including the flashcards; • in the homework, quizzes, and in-class exercises.

The honor code will of course apply.

Copying and pasting from the course materials won't cut it.

§ 5.5 **Take-home, open-book review (“Quiz 5”) 100 points**

This is an optional online review that you can do for extra points. NOTE: Keep in mind that your final grade will still necessarily be tied to the class average required by school policy. But still, you'll improve your chances of placing higher on the grade-distribution curve by earning more points.

§ 5.6 **Class participation bump**

As permitted by law-school policy, I reserve the right:

- to award *discretionary* increases in student grades by one-third of a grade level for excellent class participation, e.g., from a B to a B-plus, assuming that this doesn't cause the class average to exceed the maximum permitted; and
- to reduce grades for sub-standard class participation. (I've almost never done that, except for a couple of students for whom it was like pulling teeth to get them to participate even minimally.)

§ 6 **Homework fact pattern**

§ 6.1 **Facts to start (based on an actual client project)**

1. The two clients in this project are:
 - a. "Gigunda Energy," a (hypothetical) global oil-and-gas company headquartered in California but with a significant campus in Houston; and
 - b. (the equally-hypothetical) "Math-Whiz LLC" in Houston. Math-Whiz is headed by Mary, who is an expert in analyzing seismic data to predict where oil or natural gas deposits might be. Mary "came up" in the industry working for major oil companies, then started her own company. Her business has grown; she now employs several junior analysts, and also selectively subcontracts work to others (usually, longtime friends or colleagues of hers) to do specialized tasks.
2. Gigunda Energy expects to collect seismic data, over a period of about a year, from a potential oil field in Outer Mongolia. Gigunda wants to hire Math-Whiz to analyze the seismic data.
3. Gigunda and Math-Whiz have discussed the likely amount of work that will be involved. They have agreed that Gigunda will pay Math-Whiz a flat monthly fee of \$20K for up to 200 staff hours of work per month, with additional work being billed at \$150 per hour.
4. A partner in your law firm has asked you to prepare a draft contract and to help the parties negotiate it.

For each homework assignment:

A) Draft a version that you think would be workable — feel free to “soften” (or leave out entirely) one or more provisions that you might otherwise include, e.g., in the interest of getting to signature sooner.

B) Indicate what if any changes you think each party might want, and why.

§ 6.2 Week-by-week drafting assignments

See the fact pattern on the previous page.

First drafts of each of these drafting assignments is due **in hard copy** on a Wednesday at the beginning of class — be sure to read the general instructions below.

For each drafting assignment, be sure to read the associated provisions and commentary in the TANGO Terms. (But do not just copy and paste the TANGO Terms provisions.)

Week	First Draft: Wednesday (a)	Provision (P/F?)	Points
02	Aug. 28	Title and signature blocks for the agreement (P/F)	5
03	Sept. 4	Preamble and recitals (P/F)	5
04	Sept. 11	Payment terms; interest clause	10
05	Sept. 18	Math-Whiz reps and warranties (b)	10
06	Sept. 25	Rep- and warranty disclaimers	10

Week	First Draft: Wednesday (a)	Provision (P/F?)	Points
07	Oct. 2	Each party's indemnity obligations	20
08	Oct. 9	Assignment consent	20
09	Oct. 16	Amendments, waivers, entire agreement	20
10	Oct. 23	Recordkeeping; audit rights; background checks	20
11	Oct. 30	Termination rights	20
12	Nov. 6	Insurance	20
13	Nov. 13	IP rights; notices	20
14	Nov. 20	Governing law; forum selection	20
		TOTAL:	200

NOTES:

(a) Final drafts due no later than Sunday 12:00 noon; late submissions will have points deducted.

(b) Don't do disclaimers that will come later.

§ 6.3**General instructions for the drafting homework**

1. Many drafting-assignment homework assignments will be pass-fail; any that are not pass-fail will be "flagged" as such in advance.

2. If you want to include information that isn't given in the facts, either leave a placeholder note or make something up.
3. Feel free to compare notes with your classmates — it's *encouraged* — but **each student is to do his- or her own work.**
4. Feel free to *briefly* explain any decisions or recommendations you make, in the same way that you might if you were sending the draft to a partner or to the client. BUT: I don't want any long essays or extensive annotations!
5. **Drafting homework is to be printed out with your name on it and brought to class.**
6. At the beginning of class on the due date, you'll exchange papers within your group; look over what your colleagues did; and make any comments.
7. At the end of class on the due date, turn in your homework.
OPTION: If you want to revise your own homework based on comments from your colleague(s), you can keep your printed-out copy and instead email me a revision.
8. I expect to provide a model answer that you should study.
9. I'll normally return marked-up homework papers the following Monday. **Don't necessarily expect a lot of individualized comments** — instead, you should study the model answer and email me with any questions you have.