· PREFACE ·

Background

Before one can hope to draft a contract with any deftness or comfort, one must understand how to read a contract; one must understand the "language of contracts"—their provisions, their conventions, and their structure. We hope that, through this book, the reader will gain a certain facility and familiarity with contracts as found in the "real world."

We stumbled upon the idea for this book while teaching an introductory transactions course at The University of Chicago Law School. David taught contractual documents, drawing upon his fifteen years' worth of experience as a general counsel at a major corporation. Michael taught contractual provisions, as treated by U.S. courts, drawing upon his research. We decided to expand this formula in published form—to teach contracts from the married perspectives of experience and judicial treatment and to reach out to a field of expert practitioners and esteemed academics to provide additional insight and expertise. This book is one attempt to fill some of the space between traditional law school education (with its classically heavy orientation toward litigation) and transactional practice, whether in a solo-shop, corporate-legal-department, or law-firm setting.

We were encouraged by the great enthusiasm and support we discovered for the teaching of transactional matters in law school, in general, and for our idea, in particular. For one, there are the widely cited institutional positions strongly in favor of the teaching of practical courses in law school, such as the Carnegie Report's call for an emphasis on practical legal education[1] and the Association of American Law Schools' requirement that law schools offer professional skills courses.[2] In addition, throughout the process of distilling and executing the

1. William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (2007).

2. Bylaws AALS—The Association of American Law Schools, at § 6-7(c), *available at* http://www.aals.org/about_handbook_bylaws.php. The 2009-10 ABA Standards and Rules of Procedure for Approval of Law Schools also require that law school curriculum include substantial instruction in "professional skills generally regarded as necessary for effective and responsible participation in the legal profession." American Bar Association, Program of Legal Education std. 302 (2009), *available at* http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf.

idea for this book, we asked a few distinguished practitioners who sit atop the legal profession to share their thoughts with us on the topic. We also asked a few former students (of David's and/or Michael's) to share their experiences in law firms, having had benefited from some version of the instruction encapsulated in this book. Their responses follow in the order in which they were received.

Comments from Distinguished Lawyers in Practice

Whether a student will ultimately become a transactions lawyer, a regulatory lawyer or a litigator, a good grounding in all forms of corporate transactions provides a critical window into the business milieu within which he or she will practice. A study of transactions and the agreements by which they are documented also illustrates to the student how different elements of substantive law, together with accounting and tax considerations, meld together in the real world. An earlier appreciation of these considerations is something that clients, and thus law firms, are demanding of the young lawyers who serve them. While many firms provide excellent in-house training, that often comes several months after a new associate has arrived on the scene. Thus, the young lawyer who has received a grounding while still in law school may be able to hit the ground running—even in a summer program—and create the positive first impression that can be so important at the start of a career.

Thomas A. Cole, Partner
Sidley Austin LLP

Mr. Cole serves as Chair of the Firm's Executive Committee.

A casebook on transactional law has long been desired. Transactional law is a hybrid—part contracts, part securities, part antitrust, part tax, part litigation and part other areas too numerous to name. To properly advise on a transaction, it is necessary to bring all the relevant aspects into focus and craft a transaction designed to combine all into an organized transaction that accomplishes the parties' objectives.

The ability to combine multiple disciplines is critical to a transaction lawyer. Having a law school course with a well organized casebook will be greatly appreciated by students who intend to become transaction lawyers. And I'm sure will be a factor in placement with business law firms.

Martin Lipton
Founding Partner
Wachtell, Lipton, Rosen & Katz

One of the most common complaints we receive from new corporate associates is that law school has not adequately prepared them for transactional practice in a law firm and, in particular, for what that practice requires of them in their first few years. This is not a new development; I experienced similar challenges when I was a new associate a little more than 20 years ago. Although law schools have certainly made some strides in this area since that

time, introducing courses that bring more real-world situations into the classroom, a discrepancy remains between what even the finest law schools teach and what the transactional practice requires. As a result, we devote substantial resources to training our new lawyers for the tasks that they will perform as associates in the transactional practice, including drafting contracts. Our training focuses not on issues highlighted in traditional casebooks but instead on how contracts are actually drafted, how certain provisions can be varied to favor one party over another, how various provisions work together (or may be at odds with one another), and how mistakes can be made if one is not careful in drafting a contract. One can only appreciate these issues by working with—reading, analyzing and drafting—actual contracts.

As a result, law schools would perform a valuable service if they offered "hands-on" courses that focused on the contracts themselves rather than on cases involving those contracts. Of course, case study will always be important in teaching law students key legal principles and, more importantly, how to "think like a lawyer." However, I am confident that law firms would be pleased to welcome new associates who were better prepared for the demands of corporate practice and better able to make a more immediate contribution upon their arrival at the firm.

Stephen L. Ritchie, Partner
Kirkland & Ellis LLP

Mr. Ritchie serves on the Firm's global Management Committee, is Chairman of the Firm's Nonshare Partner and Associate Compensation Committee, and serves on the Firm's Administrative Committee.

I've been asked, as someone who has had a general corporate law practice for 54 years, and chaired Mayer Brown LLP from 1984-98, whether it is important for a law school graduate to have a basic knowledge of how the legal, business and public policy aspects of common and somewhat complex business transactions are reduced to writing, and the related question of whether it is important for the leading law schools to provide the education that leads to that knowledge. My answer to both questions is an unequivocal "yes!" There are some obvious but limited exceptions: if a student "knows" that he or she will have a specialized practice totally unrelated to business, e.g., criminal law of the non-white collar variety or public international law, a transactional law knowledge base would be ornamental but not essential. (However, no one can foresee the future with certainty.) For the rest, whether pointing toward a law firm, a law department, a legal aid program, the government or a career in business, this book meets an important and unmet need.

It is my belief in this practical aspect of legal education that led me to encourage Dean David Zarfes and Professor Michael Bloom's plan to undertake the preparation of this book.

My experience as a lecturer at the University of Chicago Law School has sharpened my ideas about legal education at the leading law schools, which justifiably think of themselves institutionally as being involved primarily in providing an intellectual foundation in the U.S. legal system for their students. Often, but not always, this leads to a certain disdain for problem-solving and clinical courses—"we are not a trade school" is the refrain. I believe that attitude is mistaken: an intellectual foundation is not valuable, except for certain scholars, unless the law school experience connects it to the solving of problems—that is what lawyers

are called upon to do. And this book, born of lawyers' experience, with its suggested forms and commentary, will help students (and I daresay many practioners) learn to do just that. Intellectual understanding and its application to the world of law practice are not, and should not be, mutually exclusive.

(A relevant personal experience: My first-year contracts class at Northwestern was taught by Dean Harold Havighurst, a stimulating teacher and a scholar. I enjoyed it immensely and learned a lot, but we were all surprised and dismayed when, after a full year course, the principal final exam topic described a "real world" business transaction and told us to draft and annotate, as appropriate, an agreement to reflect the apparent meeting of the minds. Except for extracts from contracts in the judicial opinions in Dean Havighurst's casebook, I had never read, let alone drafted, a business contract. Well, under the pressure of an unanticipated exam question, I learned; but I also learned the importance of connecting an understanding of doctrine to practice. This book makes that connection, and that is why it is important.)

Robert A. Helman, Partner
Mayer Brown LLP

Mr. Helman was Chairman of the Firm's Management Committee from 1984 to 1998.

Sophisticated contractual drafting reflects a mathematical elegance. All possible events in a commercial relationship—default in payment on a loan, failure of performance by an employee, impossibility of delivery of goods, decline in stock value, increase in stock value, no change in stock value—are usually intended to be addressed within the agreement, with specified consequences for all events. The darkest hours in a transactional lawyer's life are those spent looking through last year's documents for the provisions that address this year's circumstance that no one anticipated.

Sophisticated contractual drafting requires careful, sometimes artful, use of words. Real world outcomes vary, and dollars change hands, based upon the drafter's use of "or" versus "and" or "before" versus "before and during."

Sophisticated contractual drafting follows custom and practice. Counsel for multinational corporations expect banking documents to follow the format and terminology used by banks globally. Sales warranties resemble each other, except to the extent the parties choose quite noticeably to vary them. That consistency simplifies commerce and allows high confidence in the meaning of many words and clauses, through repeated judicial interpretation and broad commercial understanding.

These hallmarks of sophisticated contractual drafting cannot be learned from reviewing cases, which usually address one flawed phrase in a contract. They are learned by reading the contracts themselves, and writing them yourself, and having your contracts edited by more experienced lawyers, and negotiating those contracts with opposing counsel, and disagreeing with opposing counsel a year later on the meaning of your own words. Nothing in law school can provide all of that—that's what careers are made of—but this course book is a great start.

Keith C. Wetmore, Chair
Morrison & Foerster LLP

There are few skills that are more important for a young lawyer to possess than a familiarity with the law, logic and sense of contracts and the transactions they represent.

So much of what lawyers do centers around the relationships in which their clients are involved. Those relationships, and the transactions that arise from them, typically involve contracts. A level of comfort and facility with contracts is, therefore, critical to a solid foundation as a practicing lawyer.

Evan R. Chesler
Presiding Partner
Cravath, Swaine & Moore LLP

Comments from Former Students

Law school courses, especially those taught in the first year, are unquestionably geared toward litigation. But for those considering a career in transactional law, there are few opportunities to understand what might lie ahead. As one of Dean Zarfes's former students, I benefited tremendously from a hands-on learning experience, and gained confidence critiquing and improving upon real-world corporate contracts. It's an experience I would recommend for all students with an open mind as to where their careers will take them.

This book offers some of the same concrete examples, along with many others, which will prepare students to hit the ground running when they graduate. Just as first-year classes teach students to grapple with the foreign language of legal vocabulary and the peculiarities of judicial opinions, these materials will introduce those students interested in transactional law to a similarly eye-opening experience.

Bradley P. Humphreys
The University of Chicago, J.D. 2009

Dry as desert sand and every bit as apparently identical as one grain from the other. That is, until the contract lands on your desk and you have to either get out of it or make it stick. All of a sudden every italicization, word, comma, semi-colon outside the quotation mark or inside the quotation mark is going to mean the difference between indemnity or not, liability or not, insurance coverage or not. You simply cannot appreciate this until you've held that contract in your hands, heard the counter-argument and applied the words on the page in front of you in the service of your client's position.

Cases are helpful. Has the Eleventh Circuit already decided that an insurance clause identically worded to the one now in front of you means what your opponent wants it to mean? Has the Supreme Court defined the term of art you're now staring cross-eyed at? These are benchmarks; you cannot ignore them. But re-read your contract. There's a comma in your paragraph A.4(d) that isn't in the contract they interpreted. In a separate provision, your contract defines a word left undefined in the contract on which those cases were decided. Every contract is different. You learn this from considering each one individually. And, it takes practice to spot those differences. More, to know which ones really matter, which ones you can exploit. A contracts textbook that confines you to the learning of case law ignores this principle. It will teach you the basics, but it won't make you fluent. To get there you need to handle the documents, read them, defend them, enforce them, argue them. Having the real

documents to consider from the first day of your first contracts class will ensure you get there well before your opponent.

Cadence A. Mertz, Associate
Williams & Connolly LLP
The University of Chicago, J.D. 2008

For those law students hoping to enter the world of corporate law, it's sometimes difficult to imagine how traditional law school classes fit into a future role as an advocate in a negotiation. It's only following graduation and well into your practice as a new lawyer that you begin to fully - comprehend how the law contributes to and in many instances shapes commercial decisions in a contract negotiation.

Professor Zarfes' teaching method has always combined the Socratic method and traditional law school techniques with a refreshing and helpful combination of real-world negotiating exercises. Consistent with this method, this new textbook will undoubtedly serve to bridge the divide between theory and practice for an aspiring corporate attorney. Furthermore, this textbook will provide a much needed supplement to the traditional legal curriculum and a helpful introduction into the art of negotiating commercial agreements.

Jaime E. Ramirez, Associate
Sullivan & Cromwell LLP
The University of Chicago, J.D. 2007

Based upon my study of transactional law with attorneys (they are as much lawyers as professors) David Zarfes and Michael Bloom at The University of Chicago Law School, I can assure you that their combination of real world experience and academic depth is unparalleled in most of legal academia. Their students not only learn about the law, but more importantly they learn how to be lawyers. I benefited greatly from their method, and so will you.

Like most law students, I entered law school with little idea about what lawyers really do. At best, many of us had sentimental notions drawn from courtroom dramas, novels extolling the honest attorney, and history books describing landmark litigation. While the traditional law school curriculum, through civil procedure and intensive case law analysis, does give lawyers to-be some exposure to a litigator's tools, most students remain ignorant about transactional practice. As a result, many young transactional lawyers face a steep learning curve and, relative to their peers in litigation, have far more catching up to do before they can be effective. Long overdue, this book will serve to remedy these shortfalls and minimize the lag time before young lawyers can deliver real value to their clients.

Many law students graduate without ever having analyzed, much less drafted, complex contracts. Even in most contracts classes, students only read cases about contracts and do not review the agreements themselves. This is a mistake. Every young transactional lawyer has seen or heard the same story: he or she is pulled into a partner's office, given a basic overview of the deal, handed a document to use "as precedent" (often a contract between parties not involved in the current deal), and told to turn a draft of some agreement they have never heard of. The terror felt by these lawyers, and the ensuing frustration of the partners, is real, and so too is the bill footed by the client.

However, if during law school a student can get exposure to a range of transactional matters, gain familiarity with a variety of agreements, practice drafting in a deal context, and start developing their negotiating skills, the situation is reversed. A young lawyer with this legal education is ready to hit the ground running. He or she can understand a partner's instructions and ask appropriate, insightful questions regarding the assignment. The partner is freed to focus on strategy and client-specific concerns while skipping rudimentary instruction. Perhaps the clients receive the greatest benefit, for they no longer must subsidize on-the-clock basic transactional education.

Additionally, the transactional perspective presented in this book emphasizes client needs. Law is a service industry, and no lawyer can survive without the appropriate attention to client service. Unfortunately, reading cases, while necessary, will not itself expose students to the client side of practice. Working with contracts, on the other hand, forces students to ask several important questions. What is a client's specific objective in this transaction? How does this relate to its broader business plan? What is the relationship between the client and the counterparty? What is the industry standard? Over time, students who have studied from a transactional perspective can develop an intuition regarding client concerns. Young lawyers who develop this client-centered attitude will be far ahead of their peers who continue analyzing legal problems in the theoretical, Socratic vacuum they encountered in the law school classroom.

In the end, transactional lawyers must eventually learn these skills somewhere. They might as well learn them in law school where students can make mistakes in an environment which, relative to actual practice, is low pressure and consequence free. What's more, transactional lawyers will be learning the basics on their own dime, instead of the client's. After studying this book and putting forth required effort to develop their transactional skills in law school, young lawyers will be ahead of their peers and will enter the practice of law ready to benefit themselves, their firms, and their clients. Everybody wins.

Ian N. Bushner, Associate
Jenner & Block LLP
The University of Chicago, J.D. 2009

The moment any law student enters the real world, they will quickly realize that their 1L "Contracts" class was a bit of a misnomer—rarely, if ever, will they have actually examined a real contract or learned how a contract affects the parties to a transaction—this book aims to fill that gap.

Dean Zarfes is the rare law school professor who knows both the classroom and the boardroom, and in this book, as in his classes, he bridges the significant divide between the two using interesting, understandable, and, most importantly, relevant examples that illustrate the transactional practice students will be facing before they know it.

Zarfes and Bloom's students—both those who learn from this book or have either of them in class—will be uniquely prepared to handle real-world work the minute they walk in the door of a law firm or business, and these lessons will stay with them throughout their careers. Today, more than ever, that type of preparation is an asset that could mean the difference between success and failure.

Garrett Ordower, Editor-in-Chief
The University of Chicago Law Review
The University of Chicago, J.D. 2010

Simply put, there is much more to the practice of law, and, thus, to legal education, than litigation and the traditional case method of law school. Not only does the historical method—when used exclusively—fail young litigators, but it leaves the myriad law students who go into transactional fields completely unprepared.

Although I enjoyed most every aspect of law school and reveled in extrapolating complicated legal principles from seminal case law, I was surprised to finish the first year and select transactional-based classes, only to find that such courses were taught in the same way as the core classes: by analyzing fact-specific litigations.

I was always left wanting to combine the intellectual pursuit of the case method with the practical means of examining and drafting actual contracts; it seemed obvious that applying the legal principles—gleaned from the cases—to actual contracts, would more fully concrete one's knowledge of the concepts.

It was not until David Zarfes and Michael Bloom's courses on contract interpretation and negotiation and complex business transactions that I found the practical (yet still academic) teaching style that I had been looking for. After taking these courses and reading early versions of this book, the advantage that I had over my (highly qualified) colleagues in my summer associate program was obvious, and, throughout the summer, I received strong praise from partners for my understanding of the interplay between complicated contractual terms.

Zarfes and Bloom's book—and their teaching methodology—should be mandatory for any law student going into a transactional area of the law. The casebook makes complex concepts easy to understand and will leave students asking themselves something that law professors and practitioners take for granted due to their years of experience: How can students learn the language of contracts necessary to understand business relationships in the real world?

The answer lies in this book.

Sean Z. Kramer, Associate
Kirkland & Ellis LLP
The University of Chicago, J.D. 2010

What This Book Is, What It Is Not, and How to Use It

We took great stock of the above comments, as they came from people well positioned to speak to what many in the legal profession value in young lawyers as well as to what young lawyers have found to be valuable in their legal careers. We also realized we cannot be all things to all people and that, while the comments above call for a plethora of fantastic things, we had to pick a focus for this book. This book's mission is simple: to familiarize the reader with the basic "language of contracts," with some of the basic and common provisions found in "real-world" contracts, and with how those provisions act and interact to serve

a party's position and interest. We will consider it no minor victory if the readers of this book no longer view contracts as strange, foreign creatures written in a strange, foreign language.

Accordingly, this book is intended to be "of this world," which means, for instance, that the contracts used in this book were contracts used by real-life parties in real-life transactions. These contracts are drawn from the Security and Exchange Commission's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system, which is a database of documents that public companies have filed with the SEC. This also means that these agreements have their flaws. We do not hold this book's agreements out as model documents. On the contrary, we see these documents as teaching tools and as exemplars of the type and quality of documents a lawyer is likely to encounter in practice—as a precedent document used to draft a contract for a new transaction, as a document first drafted by opposing counsel, as a document reviewed at the behest of a client, etc. We consciously decided not to break up the agreements in this book because we think a great part of our mission is to "force" the reader to read whole contracts—much as other courses instill in students the skillful habit of reading cases and statutes.

We also note that, in this book, we do not consciously adhere to or adopt any particular style or school of drafting; for instance, the "plain language" school of drafting may have its admirable tenets, but we do not hold this book or (certainly) its agreements out to be in compliance with the "plain language" school's scriptures. Indeed, this book is not a "contract drafting" manual or guide, at all. We see this book as serving a very different purpose. To reiterate, the focus of this book is to introduce the reader to contractual documents and their parts, in the context of actual contracts and transactions. Along the way, we offer some drafting notes here and there, but this book is not intended to be a comprehensive guide to contract drafting, grammar, style, or clarity.

This book is also not a practitioner's guide, and it is not a fifty-state survey. That is, in the United States, most of contract law is state law, and states may vary in their treatment of certain provisions or issues that arise in contracts. Of course, this book cannot comprehensively survey how every state addresses every issue. Necessarily, we have to speak at a certain level of generality, in terms of "majority" and "minority" rules, and, where we have not been able to discern a particular trend, we can only say that certain courts have taken a certain approach and others, another. This operates to flag some of the issues for the reader, but, of course, one cannot practice directly from this book, and one must research the law that will govern a particular contract. In addition, this book takes as its core focus U.S. domestic law but also attempts to include global perspectives to enrich this focus and broaden the scope of discussion.

A thematic lesson running throughout this book is the importance of understanding the intended purpose and the likely effect of a contract. One must understand and appreciate a contract's target audience—there may be several—in understanding the purpose of a contract. Inasmuch as a contract is

intended to be enforceable in court (or arbitration), one should draft with an appreciation for how a future court (or arbitrator) might read and enforce the contract. Cases provide a source of information for how courts have treated contracts and some evidence for how they might treat them going forward.

This can be highly instructive for the contract drafter or reviewer, but the inquiry should not end there. Contracts may be enforced in ways that do not involve formal dispute resolution, including by the threat or in the shadow of litigation (the so-called "in terrorem" effect of contracts) and through a concern for business reputation. What is the dynamic between the contracting parties? Is this a "once-off" contract or is this a "repeat-game" scenario where the parties expect or hope to do business together going forward? Process may also be important; as an illustration, in a particular negotiation, a party may wish to keep contentiousness to a minimum and to draft accordingly, perhaps avoiding harsh-sounding language or picking and choosing which changes to suggest to the other party's offered draft. Contractual parties may understand a contract as a code of conduct or as a manual that documents their expected behavior throughout the course of a relationship or undertaking. These parties may conform their behavior to their written bargain without a consideration for overt enforcement mechanisms (again, perhaps with a concern for business reputation and perhaps even due to a more basic normative instinct to behave as promised). The reader is encouraged to reconsider these concerns on a consistent basis throughout this book. As you read, ask yourself: What is the drafter trying to accomplish here, and is the drafter going about this in the best way?

This book operates as follows. The first four chapters explore basic commercial agreements—non-disclosure agreements, employment agreements, services agreements, and sale-of-goods agreements—with the overarching objective of teaching provisions and concepts common to most all contracts. These basic commercial agreements serve as vehicles for teaching more generalizable lessons, while also familiarizing the reader with several types of "real-life" agreements and transactions. Chapters 5 and 6, then, ask the reader to apply the lessons learned in those earlier chapters to the more complex agreements found in these later chapters. In Chapters 5 and 6, we present lending and mergers-and-acquisitions ("M&A") agreements that are relatively simple and straightforward (at least as compared to those generally found in lending and M&A practice) and offer practitioner pieces to highlight and explain the more nuanced aspects of these types of agreements and practice areas. As we do in the earlier chapters, we walk through the agreements in these later chapters and explore their provisions and their interaction. It is our hope that, by these chapters, the reader will find many of the devices and provisions used in these more complex agreements to be familiar.

The premise of this book is that the reader will acquire a meaningful set of skills and a certain level of facility through reading contracts, through slogging through their seemingly foreign text, and through wrestling with their meaning,

purpose, and effect. Before (or at least in addition to) learning how to write contracts through acquiring finely tuned grammatical and stylistic tools for drafting an unambiguous sentence, students should learn how to understand whole agreements, to understand their basic provisions and their interaction, to understand what parties might want to accomplish through contracts, and to understand how contracts can (and cannot) go about accomplishing these objectives.

David Zarfes
Michael L. Boom

Chicago, IL
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