

AALS Mid-year Conference 2005: Exploring the Boundaries of Contract Law

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Advanced Contracts

- 10 business-school style case studies, prepared with McCarthy Tetrault in Toronto, each based on real client/situation involving (redacted) actual documents
- Narratives tell the story, a variety of ‘what to do before going to an initial meeting with a potential investor’ ‘what to do in a contract renewal dispute’ initial contract negotiations, termination issues, and breach.
- Selected documents needed for review, including contract drafts, letters exchanged, etc.
- Students work in teams of 3-4, preparing a memo (2000 words maximum) to advise client on a course of action. Multiple teams for each case, advising same client, allows students to see how others dealt with same problem. Usually 8 cases per semester, each group does 4 per semester. Students who are not doing a legal memo for a given case participate as clients.
- I assign no cases; students are expected to research key legal issues and to circulate important cases they find and rely on in their memos.
- Philosophy of teaching this class is that students learn by struggling to see legal and strategic issues rather than having them pointed out by others. My experience is that if I seem to ‘anoint’ an issue they focus on that and stop thinking about others. Hence doctrinal and theoretical goals, during most of the course, take a backseat to developing students ability to identify key issues, understanding the significance of facts and uncertainty associated with

“facts” at different stages of a contracting relationship/dispute, work at understanding client’s immediate issues, prioritizing issues, developing judgment and analytical thinking, infusing ambiguous legal concepts (such as ‘good faith’ or ‘reasonable reliance’ with fact-specific and positional content) and seeing both sides of argument/strategy.

- Three class meetings (75 minutes) per case.
  - Initial class is brainstorming session, identifying legal issues, client concerns and research/analysis problems. My role fairly minimal.
  - Second class is discussion starting with one-page bullet points posted on class website by each legal team before class (allowing enough time for other students and professor to review). I usually begin with more involved questioning of students, looking to focus them on issues they’re missing and bring out the holes in their analysis or research thus far. I often start by asking them (or drawing from their notes if they’ve already said) what they see as the key issue at this stage. Students generally take over so that mid-way through the class my role is again relatively minimal. I end class with some comments on what key issues seem to be that discussion has brought out.
  - Third class is based on memos students have posted the day before on the class website (giving all students in the class the opportunity to read all memos before class starts). I often start by asking each group to briefly state their ultimate advice to the client about the situation. I become more involved in pressing analysis and arguments if other students are not.
  - Take up to half of next class discussing their analysis and giving my views. Delicate balance here—if I evaluate too much, students can shut down. But students want to know if they got it ‘right’ and it’s a long haul to help them see there’s no ‘right’ but there is stronger and

weaker analysis. I also try to relate the issues to more general problems (contracting under private information, for example.)

- I prepare up to 2 pages of typed comments on each memo, divided into three sections: some things I liked about your memo, some questions or concerns I had, some suggestions for the future. I do this by bullet point—covering matters ranging from style (good use of declarative headings, glad you put your conclusions up front, paragraph on p.2 about trade secret is unclear to me) and research (excellent identification of case on good faith, try not to rely on out of jurisdiction cases) to use of facts (you assert this is not ‘good faith’ but what are the specific facts you’re relying on? What about the letter Jones sent?), and analytical coherence (I didn’t understand why you felt the client could assert there was no reliance; what’s the significance of Clause 4.2 here?) I post these comments on the class website for all students to see but include no grade on the posting.
- Groups receive a grade out of 20 for the memo; individual students receive a grade out of 10 for their contribution. I count the best three out of four and give 10 points at the end of the semester for overall individual performance. I call individual grades ‘professionalism points’ and tell students they include quantity of participation, quality of thinking shown in discussion as well as professionalism in the sense of class attendance, meeting deadlines, carrying one’s weight in the group, remembering to turn forms in on time without reminders....There is some tension around the individual grading (I’ve done only 5 points in the past and there was less tension but I also felt less able to distinguish among students in final grades; this is a place for more experimenting.) After each memo is submitted, each team member submits privately to me a ‘self and group evaluation form’ in which they give feedback on how their group worked for that memo, how difficult they found the assignment, what they found useful or helpful, and they assign ‘points’ for their team members

work. I don't use the points in deciding my grades formally (and students need to be told this) but overall this is a way of keeping tabs on what is happening in groups, identifying problems and ultimately figuring out if someone (over the long haul) is not pulling their weight.

- In the past, I have started the course with two or three classes of readings on economic theory of contracting, to convey ideas of commitment, opportunism, private information, risk allocation, etc. Students found these materials pretty dense and then I discovered that they had so much work to do to develop their ability to think strategically and analytically that they never got to the point of being able to apply the materials.
- I have also discovered that even though most students in the course are graduating 3Ls, for most of them their recollection of basic contract law is very slim indeed. I have therefore started using the first few classes to do a review of basic contract principles. I tell them these are the most important materials for their contract analysis—not researching detailed contract doctrine but really understanding how to work with and apply central concepts of ‘you can bargain for anything you want’ (who needs a doctrine of the enforceability of obligations to negotiate in good faith?) and ‘the contractual commitment is whatever it was reasonable for the promisee to have understood the promisor to have meant’.
- I am heading in the direction of perhaps cutting back on cases or increasing course hours to be able to include more classes along the way to go back over cases and reintegrate the contract theory materials on opportunism, risk allocation, etc.

- Key focus of course is on developing students ability to identify key issues (most start the class off seeing long lists of issues and not seeing a landscape of what really matters, where the ‘jugular’ is or what the weak spot is), analytical/strategic thinking and judgment.
- Key issue going forward is student acceptance of group work and the discomfort of ambiguity and learning by doing. A significant number of students ‘get it,’ work hard and are highly enthusiastic about the course: “best course I took in law school” “the only course that teaches you how to actually be a lawyer.” But some students, particularly those who have done well in the conventional curriculum and who are attached to the idea that their job and competence is to learn a lot of legal rules and the professor’s job is to convey information, are resistant. This may be a function of the rarity of such courses.