

## Contract Editing as Formative Assessment

Despite the challenges of grading additional assignments in a large, lecture-style family law class, I have found that integrating two to three assignments that allow for formative assessment both increases the engagement of my students and better prepares them for the exam through increasing their understanding and comfort with the material. To that end, I require the students to complete assignments designed to develop three core competencies relevant to family law practice: contract drafting, client counseling, and negotiation. For the AALS meeting, I plan to focus on my experience with the contract drafting assignment (although would happily discuss the others, as well).

The contract drafting assignment asks students to use the track changes feature on Word to make changes to a contract they might encounter in family law practice. Sometimes, the students are told they represent a potential surrogate who has been presented with a contract by the intended parents, sometimes the students represent a man who has been presented with a prenuptial agreement by his fiancé. In either case, students are instructed to read the proposed contract and think about what five changes they would make to the contract to ensure: 1) its enforceability and 2) its benefit to their client. By asking them to think about changes through both of these lenses, I encourage them to not only bring their knowledge of the substantive law to bear, but also to think about the real-world outcomes for their client and thus how to be more client-focused. I find that students really like this assignment because it gives them a taste of real practice and affords them a great deal of autonomy to decide what changes need to be made and how best to make those changes. In fact, many students report that they “can’t help themselves” and make more changes to the contract than are required by the assignment.

Because I have drafted the contract, I already have the universe of changes I expect the students to make and can grade quickly by making a few individualized remarks and then referring students to a marked up contract detailing the various changes that should/could be made, why they would be necessary or desirable, and how they might affect the client. Although every semester there are a few changes that I didn’t anticipate and for those students I can provide some quick individualized feedback on their – often quite creative – edits to the contract. Finally, I spend at least 20-30 minutes of class time reviewing the assignment, asking the students to think through their process for editing and the changes they made, and giving them (anonymized) examples of students who were particularly successful on the assignment.

## Developing Contract Editing Exercises for a Family Law Class

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### 1.) Identify the topic or topics you want to assess.

- I've used pre-nuptial agreements and surrogacy agreements in the past, but you could use an ante-nuptial agreement, a separation agreement, any type of property settlement, etc.

### 2.) Draft a short hypo introducing the parties and their respective backgrounds and goals.

- I try to keep these facts very basic but include enough information to help students get a sense of what things are likely to matter to their client.
- You can assign the whole class to one client, or split the class in half and assign each half to one client. The former is easier to grade; the latter has the benefit of helping to show how different client interests can shape what edits are desirable.

### 3.) Draft a basic contract.

- I build contracts from stock language, things I find online, bits from real cases, etc.
- I will often leave out elements of a contract that – while important to contracting generally – are less important for the material I am trying to focus on.

### 4.) Ruin the contract.

- Insert at least a dozen errors of various sizes and types.
- Introduce errors that implicate other family law topics beyond the specific topic of the contract.
- Include at least one big error of omission – just removing something critical that needs to be there.

### 5.) Develop a grading memo based on the corrected contract.

- When you are done “ruining” your contract, just do a document comparison to the original contract and you've got a built-in model answer.
- You can also go through and explain in comment bubbles the “changes” and why they are desirable.

### 6.) Ask the students to make changes using the track changes feature in Word.

- Ask them to make 3-4 changes for a quicker assignment, or all the changes they identify for a more challenging assignment.
- Importantly, you should require them not to just identify issues but to actually make changes in the document that will address those issues.
- You can just tell them to make the changes they think are most important, or you can ask them to make some changes that will increase the validity/enforceability of the contract and some changes that reflect their own client's particular interests/goals.
- You can also require students to insert a comment bubble saying why they made the change they did.

### 7.) Give individualized feedback.

- Feedback is simple because you will mostly get changes you have identified in your own corrected contract.
- All unexpected changes can be responded to quickly in comment bubbles in track changes.

### 8.) Do a full class debrief.

- Identify issues you wanted them to spot and how the language could be edited to address these issues.
- Highlight some creative student edits.
- Talk about the dual goals of making the contract legally valid and being a client-centered advocate.

## Surrogacy Assignment Directions

You represent Elizabeth Brown, a 25-year-old mother of two. Elizabeth's husband, Brandon, is a servicemember in the United States Navy, and is currently deployed overseas. Things have been tough for Elizabeth since Brandon has been gone, both financially and personally.

Elizabeth sought your services after she responded to an ad on Craigslist posted by Marcy and Jerry Taylor, seeking a gestational surrogate. Elizabeth could really use the extra money that she thinks the arrangement would provide her and loves the idea of helping another couple experience the joys of parenthood. Both of her previous pregnancies have been healthy and uneventful, and she was able to deliver both of her children vaginally and without any drugs.

The Taylors have sent her the attached contract and she wants your advice about whether she should sign it.

Using Track Changes in the attached Word Document, make the FIVE changes that you think are most important in order to make the contract fair, enforceable, and beneficial for your client. In a comment bubble attached to the change, tell me in a few sentences why you think that change was an important one.

You may complete this assignment alone or with a partner.

Agreement is made this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ by and between Elizabeth Brown (hereinafter referred to as "Surrogate"), Marcy Taylor and Jerry Taylor, (hereinafter referred to as Intended Parents).

NOW THEREFORE, in consideration of the mutual promises contained herein and with the intention of being legally bound hereby, the Parties agree as follows:

### SECTION I: PURPOSE AND INTENT

The sole purpose and intent of this Agreement is to enable the Intended Parents to have a child by means of transfer and implantation of embryo(s) into Surrogate, who agrees to carry the embryo(s) to term and relinquish custody of the Child born pursuant to this Agreement to the Intended Parents.

It is the Parties' intention to try up to three (3) embryo transfer attempts. Further, it is the Parties' intention to transfer a maximum of three (3) embryos per attempt. If the contemplated pregnancy has not occurred after the third transfer attempt, this Agreement may be terminated by any party giving written notice to all Parties.

At birth, the Surrogate will relinquish the Child to the Intended Parents, and the Intended Parents will assume all parental rights and responsibilities for the Child from that time forward. Surrogate will comply with all legal actions necessary to have the Intended Parent's names placed on the birth certificate.

The Surrogate represents that they believe a Child conceived pursuant to this Agreement is morally and contractually that of the Intended Parents and should be raised by the Intended Parents without any interference by the Surrogate and without any retention or assertion of any parental rights. Subsequent to the birth of the Child, all Parties agree to voluntarily participate in any blood testing necessary to conclusively determine the genetic parentage of the Child.

### SECTION II: DUTIES OF SURROGATE

#### Physical & Psychological Examinations

The Surrogate shall undergo psychological testing prior to the transfer and implantation of said embryo(s) to the Surrogate, and during the duration of this agreement by request of the Intended Parents.

The Surrogate shall have a medical examination, blood and other tests as determined by the Intended Parents. The surrogate further agrees to undergo any medical testing that a designated physician deems necessary while this Agreement is in effect.

**Commented [MB1]:** It is a good idea to include your client's husband as a party to the contract, both because you want to ensure he is aware of the arrangement and supportive but also because the operation of the marital presumption will make him the legal parent of any child born into the marriage and, absent his consent to the contract, might complicate parentage.

**Commented [MB2]:** These are likely a worthless clause because its mainly aspirational language. Further, you want to ensure that your client can decide not to go forward with additional attempts without incurring a penalty.

**Commented [MB3]:** This is way too many embryos, and your client should insist that, considering there is no indication that she will not be able to become pregnant, a single embryo is transferred at least originally. A multiple pregnancy places your client at increased risk and should be avoided.

**Commented [MB4]:** You want to ensure that your client will be compensated for her time/effort even in this eventuality.

**Commented [MB5]:** This is another place where you would want to bind your client's husband, as well.

**Commented [MB6]:** This is likely meaningless.

**Commented [MB7]:** This might be okay, but the contract should spell out what happens if the blood testing reveals something unexpected.

**Commented [MB8]:** First, you want to limit the amount of testing your client consents to in some way other than "by request" of the IPs. If they request it daily, that will clearly be incredibly burdensome and disruptive. Second, you should also insist that the IPs undergo similar testing to make sure they are prepared for the psychological effect of the surrogacy and parenthood, as well.

**Commented [MB9]:** The decision whether to undergo medical examinations should not be left to the unfettered discretion of the IPs. Further, the parties should agree how a medical professional will be decided on and what information/role that person is expected to play here.

The Surrogate expressly waives the privilege of confidentiality and permits the release of information obtained as a result of said examinations to Intended Parents. The Intended Parents shall have full access to the results of testing conducted under this Agreement.

**Commented [MB10]:** I would walk back this provision to the information relevant to the pregnancy, as determined by the identified medical provider.

### Lifestyle

Surrogate agrees and promises that she will not have sexual intercourse with anyone from the first day of her menstrual cycle before the embryo transfer until the birth of the Child. Surrogate further agrees that she will not engage in any activity in which there exists a possibility that semen could be introduced into her body during this time period.

**Commented [MB11]:** This is ridiculous and unnecessary. After the pregnancy is confirmed, there is no need to avoid sexual intercourse unless there is a specific medical indication that it would be detrimental.

The Surrogate agrees to comply with all medical instructions given to her by any medical professional, including instructions as to medication and vitamins. The Surrogate agrees not to participate in dangerous sports or hazardous activities, and not to allow herself to be exposed to radiation, toxic chemicals, or communicable diseases. The Surrogate agrees not to smoke any type of cigarettes, drink alcoholic beverages or caffeinated beverages, or to use any illegal drugs, prescription or non-prescription drugs without the written consent of her physician.

**Commented [MB12]:** This is incredibly vague and almost impossible for your client to completely control. This language should be nixed or made into sometime more definite.

The Surrogate agrees not to travel outside of the United States of America during the pregnancy.

**Commented [MB13]:** Consider changing to make your client only responsible for "best efforts" and only as to the medical professional charged with the care of her pregnancy. Otherwise, this clause could contractually obligate her to take a supplement suggested to her by a random doctor she meets on the street.

## SECTION III: BIRTH & ABORTION

### Birth

The Surrogate shall give birth at Northport Medical Center in Northport, Alabama. Unless directed by a physician, the Surrogate will not utilize any epidural anesthesia during the birth.

**Commented [MB14]:** The first part of this clause is ill-defined, the second is not really within your client's control. The world is full of radiation, toxic chemicals, and communicable diseases (including the common cold!).

**Commented [MB15]:** While the prohibition on cigarettes and alcohol might be reasonable, the prohibition on caffeine is probably not necessary and there are lots of OTC drugs which are safe during pregnancy and you don't want your client to need a doctor's note to take a cough drop.

### Abortion

The Surrogate will not seek or undergo an abortion procedure unless a medical doctor states that such action is necessary to avoid death.

**Commented [MB16]:** Consider adding exceptions for emergencies, or travel to certain countries (including wherever her husband is stationed if its relatively safe).

The Surrogate waives any rights she may have to abort the pregnancy. If the fetus has been determined by any designated physician to be physically or psychologically abnormal, the decision to abort the pregnancy or not to abort the pregnancy shall be the sole decision of the Intended Parents.

**Commented [MB17]:** This is a bad idea for your client – she needs the ability to go to a facility that medically and personally makes sense for her and there is no reason to prohibit her from utilizing pain medication during the birth.

## SECTION IV: PAYMENT OF CERTAIN ACTUAL AND REASONABLE EXPENSES

The Intended Parents shall pay for certain Living Expenses of the Surrogate subsequent to the confirmation of pregnancy and before the birth of the Child and for no more than four

**Commented [MB18]:** This is likely wholly unenforceable because the decision whether or not to abort, as we learned at the beginning of the semester, remains with the pregnant woman herself.

(4) weeks after the birth of the Child. Examples include, but are not limited to, housing, automobile, related insurances, real estate taxes and maternity clothing.

First payment is due five (5) days following confirmation of pregnancy. Subsequent payments are due on the monthly anniversary thereafter as long as the fetus remains viable.

All medical expenses incurred during, or resulting from, complications arising from embryo transfer, pregnancy or birth that are not payable under Surrogate's health insurance policy shall be paid by the Intended Parents.

### SECTION V: INSURANCE

At the time the Surrogate executes this Agreement, Surrogate represents that she has in force a valid health insurance policy. The policy is expected to pay a significant portion of all medical bills relating to pregnancy, pregnancy-related complications, labor and delivery, and hospitalization.

The Intended Parents shall be responsible for all of Surrogate's medical expenses that are related to the embryo transfer procedure and/or pregnancy that are uninsured.

### SECTION VI: EARLY TERMINATION OF AGREEMENT

Before the Surrogate becomes pregnant, this Agreement may be terminated under the following conditions:

1. By the Intended Parents, for any reason.
2. By the Surrogate if a medical professional determines she is not a good candidate for surrogacy.

### SECTION VIII: BREACH

If the Surrogate breaches this Agreement or fails to fulfill her obligation:

1. She relinquishes her entitlement to the payment of expenses, and if she has received the benefit of any portion or all of the payment of such expenses, she must immediately refund it to the Intended Parents.
2. She will be responsible for all monetary expenses incurred by the Intended Parents, including, but not limited to, medical expenses, psychological expenses, travel expenses, and all legal expenses.

If the Intended Parents breach this Agreement, then they agree to be obligated as follows:

1. To pay all actual expenses of the Surrogate incurred to the date of breach.

**Commented [MB19]:** You need a lot more specific information about what will be paid for, the method for determining that amount, and the mechanism for payment.

**Commented [MB20]:** The amount owed to your client shouldn't be solely tied to the viability of the fetus, but to the work she performs as a result of the contract itself.

**Commented [MB21]:** As we discussed in class, many health insurance companies attempt to avoid payment in surrogate situations. You need to have an honest conversation with your surrogate about the risks/benefits of submitting these charges through her own insurance.

**Commented [MB22]:** Termination provisions should be more equal and your client should receive some compensation for the time she spends even if she does not successfully become pregnant.

**Commented [MB23]:** This is too harsh and could subject your client to financial ruin. Consider tying the termination of compensation to the date of the breach without repayment of actual expenses.

**Commented [MB24]:** This should be cut out entirely.

**Commented [MB25]:** This is tricky because if the IPs breach by failing to take custody of the child – say because it has severe disabilities – then your client will be financially responsible for the costs associated with future care of the child with no ability to seek contribution from the IPs.

**SECTION IX: GOVERNING LAW**

This Agreement shall be governed by the laws of the State of Alabama.

We have read this page and the foregoing pages of this Agreement, and it is our intention, by subscribing our signatures below, to enter into a binding legal obligation.

_____	_____
Name, Surrogate	Date
_____	_____
Name, Intended Father	Date
_____	_____
Name, Intended Mother	Date

