

CORPORATE FINANCE
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Writing Assignment #2 (Substantial Written Project) Guidelines

It now is time to start thinking about how to package your substantial written project.

As you already know (from the Course Syllabus and the request for proposals for this project), your substantial written project consists of two distinct components: (a) final draft financial instrument and/or agreement provision(s) tailored to a specific transaction within the scope of this course and (b) a memorandum explaining the drafting choices you made in constructing the instrument and/or agreement provision(s), including without limitation changes you made to any forms you used in your drafting. **Both components of the project should be submitted to me in typewritten form (either electronically or in hard copy format) at or before 5:00 pm on November 15, 2010.**

Late submissions will be subject to a grade penalty. Specifically, your maximum potential grade on this project (calculated without giving effect to any points you may have lost by turning in your initial proposal late) will be reduced by an amount equal to 10% of the maximum point value for the project (i.e., 4.5 points) for each day that it is late.¹ Days will be measured in 24-hour periods commencing at 5:01 pm on November 15 (e.g., a final written project turned in at 6:00 pm on November 15 is considered one day late). Accordingly, don't wait until the last possible minute to submit your project (electronic transmissions sometimes take a number of minutes, and cars can break down . . .) and **please put the date and time on any hard copy submissions left in my mailbox.** Keep in mind that one of your classmates will be awaiting receipt of a copy of your paper for review. Also, as a matter of fairness, I must remind you of your obligations under our College of Law Code of Academic Conduct.

Your grade on this project will be based on the extent to which:

- your overall project meets the requirements set forth in these guidelines (read on and see the attached checklist for details);
- the drafting component of your project successfully addresses the issues you set out to

¹ In other words, a project that is one day late will be worth a maximum of 40.5 points of your final grade in this course, rather than a maximum of 45 points. Points lost by turning in your initial proposal late will be deducted after having given effect to any 10% adjustments. Please note that any project grade reductions are permanent and will not be offset by other grade components in determining your final grade in this course.

resolve by applying legal rules, norms, and contract drafting principles to relevant facts;

- your overall project exhibits a knowledge of themes, concepts, and skills taught in this course;² and
- your overall project reflects careful, precise drafting and planning (including without limitation the degree to which ambiguous references, undefined terms, and spelling and typographical errors have been eradicated from your written work in the editing and proofreading process).

You may let your colleagues (fellow students) know what the nature of your project is, and you may discuss substantive legal issues relating to your project with your colleagues. However, you may discuss the actual drafting of the written components of your project only with me.

In my role as the senior supervising attorney on your transaction, I will make myself available as much as reasonably possible to consult with you as you begin (and continue) to draft your project provision(s) and memorandum.³ Absent special circumstances, I limit face-to-face consultations on this project to one hour per student between now and the project due date. I do not limit consultations by electronic mail. In fairness to me and to your colleagues (the other junior associates in our virtual transactional law firm), each of you should make an effort to think through your issues to the full extent you are able to do so before seeking consultation with me, whether in person or by electronic means. Please be advised that, in these consultations, I will **not** proofread or validate elements of your drafting or make drafting decisions for you. I will, however, help you to identify drafting options and understand factors and criteria that will enable you to make planning and drafting decisions on your own. Schedule any face-to-face consultations far in advance. My schedule is busy (as you know), and it may be quite impossible for me to meet with all who desire an audience during the week before the project is due.

Specific guidelines to help you prepare each written component of the project are set forth below.

² As a general matter, this knowledge most clearly is exhibited in (a) the drafting component of your project and (b) the portions of your memorandum in which you (i) identify and describe the issues raised and addressed by your draft provision(s) and (ii) apply law, norms, and contract drafting principles to facts to analyze and support your drafting choices. **It is critical that you look at and cite to relevant legal rules from statutes and case law to set up, explore, and resolve your client's issues.** The comparison/contrast and use of precedent transaction documents also will help you to spot and resolve issues. Moreover, there is a substantial body of scholarship (corporate finance, finance, etc.) that you can (and should) consult to find out how issues commonly are resolved in corporate finance practice. Cite to everything you need to support your drafting judgments.

³ I offer here a word of planning advice. The last week of October or first week of November would be a good time to schedule a consultation with me (if you need any consultation). If you wait much longer than that, you may be jammed for time at the end of the process.

Draft Financial Instrument and/or Agreement Provision(s)

This component of the project involves using precedent transaction documents—instrument and/or agreement provisions of the same type from other transactions of the same or a similar type⁴—and knowledge you have gained from this course to address and resolve issues relating to a particular transaction involving specific parties. Although you will have identified specific facts about the transaction and its parties in your project proposal, both the nature of the parties and the details of the transaction likely will evolve between now and the due date for the project. Do not be afraid to allow that to happen! You may want to change or add to your facts to better support the reasoning behind your drafting, for example. (Try to *enjoy* this aspect of the project. As I have mentioned to some of you, this may be the last time you have this level of control over a client and a transaction. Real, live clients generally must be accepted “as is”—although you do have the expertise and capacity to advise a client to change the nature of an envisioned transaction in response to legal rules.)

The typewritten format for this component of the project should match the format of the document for which you are drafting your provision(s). For example, the provision(s) may be labeled as, or separated into, articles or sections. You should identify each provision or set of provisions to indicate the instrument or agreement for which it is drafted. It often is appropriate to label the provision(s) as a “rider” for insertion in the overall document of which it is a part (e.g., an indenture, note purchase agreement, certificate of designation, option agreement, etc.).

The typewritten length of this component of the project should be approximately one single-spaced page. Drafting components of significantly less than a page or more than one and one-half pages should be cleared by me. The bottom line? You need to draft enough text to resolve the transactional issue(s) that you propose to resolve. I expect a very high degree of focus and precision in the drafting component of your project. **Please contact me if you have any questions about length, focus, or drafting precision (or the interaction of the three) in the context of this component of the project.**

Finally, you should ensure that any terms you use in your draft provision(s) are defined (i) within the draft provisions, (ii) in a separate definition provision incorporated by reference in the text of the draft provisions, or (iii) in an attached glossary.⁵ As you may know by now, corporate finance practitioners (like other contract drafters) virtually always capitalize defined terms used in their draft instruments and agreements, and I encourage you to do the same with respect to defined terms used in your provision(s).

⁴ Locate at least five different precedents as a first (or at least an early) step in constructing your project. Compare and contrast them. As you notice differences among the various provisions, try to determine where those differences come from and how that information may impact the drafting you are doing for your client. Consult with me as necessary or desirable. Then, choose one of the models to draft from as a principal drafting precedent and improve upon that model.

⁵ If you choose the glossary method, I ask that you please make reference to the glossary in your planning memorandum, the guidelines for which are set forth below.

Planning Memorandum

This component of the project involves drafting a memorandum to me, as the senior attorney on your project, that does **four things**:

- acts as a cover memorandum to which your draft instrument or agreement provision(s) is(are) attached, introducing the subject matter of the memorandum;
- sets forth the detailed facts of the transactional context for which your instrument or agreement provisions are drafted;
- describes the issues relating to your draft provision that are raised by your transactional context and how (in a general sense) the draft instrument or agreement provision(s) address(es) these issues; and
- analyzes specific drafting choices made by you in constructing your draft instrument and agreement provision(s) by (1) applying relevant law, related legal norms (which may be reflected in, e.g., precedent transaction documents and scholarship), and contract drafting principles to pertinent facts and (2) citing to the source of that law, those norms, and those principles.

I address each of the four components in turn below.

Optimally, you should separate your memorandum into four parts corresponding to the four component parts of the memorandum identified above. It will help you to both organize your thoughts and ensure that you have addressed all four areas.

The memorandum should be drafted in office-appropriate style. In other words, do not write anything in the memorandum that you would not write in a memorandum to someone in a senior supervisory capacity in a workplace at which you are (and desire to remain) employed.

The typewritten length of this component should be approximately five single-spaced pages. **If you believe that your memorandum will be shorter than five pages or significantly longer than six pages, please contact me as soon as possible.**

Cover Memorandum. This is the simplest part of the memorandum. In short, your memorandum to me should indicate that your draft instrument and/or agreement provision(s) are attached for my review and should orient me to any other general or introductory information that you deem relevant (including, for example, a brief introduction to the rest of the memorandum). You may want to consider captioning this part of the memorandum “General” or “Introduction.”

Transactional Context. This part of the memorandum details the facts that you are working with in making your drafting choices. These facts should include reasonably detailed descriptions of:

(a) the instrument **and** the instrument or agreement provision(s) that you are drafting and the authority for the instrument and provision(s) (e.g., applicable state law authority for the issuance and delivery of debt or preferred stock and the authority for including conversion provisions in the debt or preferred stock);

(b) the transaction for which the drafting is being done, including the nature and regulatory background of the transaction, the general authority for the transaction (including, e.g., any governing laws and rules under securities laws for public and private offerings of securities, any state law authorizations for mergers or dividends or repurchases, etc.), and any timing or other procedural aspects—i.e., that you are responding to a draft document or term sheet forwarded to you by another party to the transaction—that may be important to your drafting decisions;

(c) your client, including without limitation relevant background facts (e.g., state of incorporation or citizenship, capitalization or net worth, etc.) regarding, and specific needs and desires of, your client; and

(d) other key parties to the transaction (e.g., if your client is an investor, at a minimum, you would want to describe key facts relating to the issuer of the securities involved in the transaction).

Remember: the simplest details can be important. For example, in describing a corporate client or transaction party, you should (as noted above) mention the jurisdiction in which that corporation is organized and basic financial facts relevant to the transaction and the drafting issues. This information, together with other factual information (including without limitation (i) other jurisdictional and regulatory facts about your client, the other parties, and the transaction and (ii) information about the “choice of law” provisions in any applicable agreements), will enable you to ascertain the governing law of your instrument or agreement. This governing law forms the basis of your analysis and is a critical element in making your drafting choices.

For many of you, this section of the memorandum will consist of an enhanced version of the facts you provided to me in your original project proposal. As you draft, however, you almost certainly will see a need for more or different facts to support your drafting and analysis. Accordingly, I suggest that you go ahead and create or manipulate your facts in electronic form (perhaps in a segregated, word-processed file) as you go along in order to save yourself some time at the end of the process when you will need to insert those facts into your memorandum.

One last word is in order here. Please make sure that, in your factual summary, you give sufficient details about the capitalization (equity/debt structure) of the corporation that is issuing or has issued the relevant instrument or obligated itself under the relevant agreement. Ask yourself about the issuer’s outstanding indebtedness and about securities (equity and debt) the issuer has authorized, outstanding, and (as applicable) in treasury, and ensure that your

memorandum (together with your related planning and drafting) reflects these facts.

Issues. In this part of the memorandum, you should describe (but not resolve—that is done both through the drafting itself and in the analysis section of the memorandum) the key substantive issues that your drafting component addresses and indicate why, in a general sense, the drafted provision(s) address(es) the issues. These issues arise from the nature of the transaction and the transaction participants and often are identified in the process of comparing and contrasting relevant transaction precedents, as I advise that you do in footnote 4 of these Guidelines. If your client is an issuer of redeemable debt, for example, it may (justifiably) be concerned about some of the cases that we read regarding the interpretation and application of a non-refund covenant. **As you are preparing your project, every time you consider whether to do X or Y (or decide to do A instead of B or C) in drafting your provision(s), note the question and your approach for resolving it (which will involve considering legal rules, norms, and drafting principles that you have learned during the semester and applying them to your transactional facts).** These notes will help you in drafting both the “Issues” and “Analysis” parts of your memorandum.

A complete issue description consists of an explanation of the nature of the issue, the context in which the issue arises, and the general way in which drafting may address the issue. You will only be able to describe and address in detail a few key issues in the pages allotted. **The issues that you choose to describe and address should involve questions of law (statutory and decisional), as applied to your transactional facts.** Issues may also consist of norms and contract drafting principles, as applied to your transactional facts, but all other things being equal, a project that primarily or only addresses norms and contract drafting issues is not likely to receive as high a grade as those that address a rich mix of legal rules, norms, and contract drafting principles. **Please note that the authority for the instrument or the transaction is not an “issue” for purposes of this project.** Rather, these authority issues are part of the transactional context, as noted above. (I did allow this in some prior years, so do not rely on the project precedents in *Transactions* for this purpose.)

Analysis of Specific Drafting Choices. This is the heart of the memorandum. More likely than not, you will make many drafting choices—major and minor, substantive and nonsubstantive—in crafting your instrument and/or agreement provision(s). This section of the memorandum should be devoted principally to **major drafting decisions** you have made in crafting your instrument and/or agreement provision(s). In essence, the text of this section should convey three things about each major drafting choice you make: (1) the drafting alternatives available to you; (2) the drafting alternative chosen by you; and (3) your reasoning (including the applicable law, norms, contract drafting principles, and other factors or criteria used by you) in choosing that drafting alternative based on your transactional facts. Your choice of drafting alternative will be made by you based on the application of statutory and decisional law, related norms, and contract drafting principles to your client’s facts.

Accordingly, **in this section of the memorandum, you should address the interaction of your transactional facts with: (a) any statutory and decisional law otherwise relating to the validity or interpretation of the provision(s) drafted; and (b) any established norms or contract drafting principles relating to your drafting issues that can be gleaned from documents used in similar transactions and from corporate finance, finance, and other relevant scholarship (books and articles).** For each legal rule, norm, or contract drafting principle that you address, you must provide a citation to a source. Please see me if you have any questions about these (or any other) project requirements.

At the end of this part of the memorandum, you should briefly describe less significant drafting choices you made (e.g., decisions relating to word choice, defined term usage, formatting, and presentation). In this part of the memorandum, you likely will not discuss each of these less significant drafting choices individually. Rather, bullet points or a few sentences may be useful. Also, you may find it more effective (and easier) to select a representative sample set from among these less significant choices and/or aggregate these less significant choices in some fashion based on common characteristics.

In order to efficiently and effectively convey the material in both the third (“Issues”) part of the memorandum and this fourth and last (“Analysis”) part of your memorandum, you will want to consider creative formatting ideas. For example, side-by-side textual comparisons, or even embedded or attached charts, may be useful as means of conveying drafting alternatives. Flow charts could be useful in conveying complex reasoning or analysis. You may want to consider the use of numeric line markers in the drafting component of your project, which then can be referenced in the text of the memorandum. (I.e., “In drafting the text on lines 1-12 of Exhibit A, I considered the following legal rules, norms, and contract drafting principles:”) Of course, you always can cut and paste into your memorandum elements of text from your precedent transaction documents and your final draft provision(s) to illustrate the choices available to you and the approach chosen.

Finally, **please include both the memorandum and the drafting in one word-processed file.** If a formatting issue makes this impossible for some reason, please see me before handing in the project.

That’s it. Recognizing that this is a seven-page memorandum full of information (!), I have attached a brief checklist that outlines the key component parts of the project described in this memorandum. As the project nears completion, you can use this checklist as a means of assuring yourself that your overall project meets the basic requirements set forth in these guidelines. However, the checklist does not include all of the information in this memorandum. Accordingly, I also recommend that you come back and re-read these guidelines periodically. Some of what you read the first time may not make sense, but after working on the project for a while, it may make a lot more sense.

Please post questions on our class Web site and come to see me regarding any questions that you may have along the way. Good luck, and have fun!

Corporate Finance Substantial Written Project Checklist

Memorandum

- ___ Drafted in office-appropriate style?
- ___ Separated into **four** component parts, as set forth in the guidelines?
- ___ Includes reference to attached drafting component and introduction to project?
- ___ Includes detailed facts regarding the transactional context (i.e.: the instrument and the provisions; the transaction; the client; the other parties; the jurisdiction(s) in which any parties are resident or organized and/or the transaction takes place; any choice of law; the capitalization of the issuer; the authority for the instrument and provision(s) and the transaction)?
- ___ Identifies the key substantive issues that the drafting component of the project addresses (describing the nature of each issue, the specific context in which the issue arises, and the general way in which the drafting addresses the issue)?
- ___ Includes an analysis of the major choices made in constructing the drafting component of the project (describing for each issue addressed by the drafting component (i) the available drafting alternatives, (ii) the alternative chosen, and (iii) the reasoning used to make the choice, including without limitation statutory and decisional law, norms, contract drafting principles, and other factors or criteria used in making each choice)?
- ___ Includes a description of less significant drafting choices made in constructing the drafting component of the project (selecting from among, or aggregating, them as necessary or desirable)?
- ___ Includes citations to the sources of rules, norms, and contract drafting principles supporting the planning and drafting?

Drafting Component

- ___ Uses formatting that matches its document form (e.g., appropriate title, indentation, section references, paragraph numbers, headings, etc.)?
- ___ Uses appropriate labels for the component sections of the document, if any?
- ___ Defines all terms used in the document (or includes a glossary of defined terms)?

Overall

- ___ Have I read the *final forms* of the memorandum and drafting component in their respective entireties *at least once*?
- ___ Is the overall project free of typographical and spelling errors and other distracting language and presentation issues?
- ___ Does the overall project accurately reflect the thought, time, and care that I put into it?