

# SKILLS & VALUES: CONTRACTS

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# SKILLS & VALUES: CONTRACTS

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## Second Edition

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MATTHEW  BENDER

# Preface

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The materials in this book were developed to assist students and instructors in incorporating legal skills and legal ethics and professionalism issues into the study of Contracts. They challenge students to consider the substantive material from class in the context of real-life practical problems, to practice some of the skills required to use contracts in order to solve client problems, and then to self-assess their own proficiency within the wider frame of reference in which legal problems typically appear in law practice.

In attempting to expose students to the work of lawyers who use contracts, the book substantially expands the context within which most contracts students usually consider the subject. Each chapter in the text focuses generally on the professional context within which a lawyer might use contract law (e.g., negotiating a personal injury settlement agreement or creating a non-engagement letter to send to a client) and on the skills that might be implicated in that work (e.g., drafting). Pertinent contract doctrine, principles of professional responsibility, and the practicalities of law practice are explored within that larger framework.

Many of the fundamental doctrinal areas common to most first year Contracts courses are considered throughout the book in very diverse practice settings. Each Chapter includes a short introduction of the topic area and context in which it will arise followed by a series of problems and exercises that address the analytical, practical, and (often) ethical issues that a lawyer may confront when dealing with it. The goal of each Chapter is not to reiterate the applicable rules of law as described in the course materials and by the professor. Rather, the focus of the materials is to allow students to understand how lawyers use contract doctrine in complex problem solving, and to provide them with opportunities to exercise their developing practical, analytical, and professional skills in the context of the relevant substantive law.

Self-assessments that provide detailed analysis are included for all the exercises. The self-assessments are offered not as answers but primarily as guides for students to develop and use problem solving skills in the context of Contracts. The self-assessment materials are located on the LexisNexis Web Course created to use with this book. They are an integral part of it.

Many of the chapters in this text also contain additional resources that can be accessed via the Web Course. These materials include audio materials, quizzes, and links to other relevant sources. The text will prompt readers to access the online resources when they are relevant to the exercise.

The book does not “follow” either a temporal (contract formation through remedies) or theoretical (remedies first) organization based on contracts doctrine. Rather, we have organized it around the kinds of work lawyers who use contract law are called on to do (e.g., drafting rules, resolving contract impasses, performing due diligence). The earlier Chapters generally work through more foundational material (e.g., what is the thinking and drafting process involved in creating rules) progressing in the later Chapters to quite complex work (e.g., drafting an eviction complaint based on rules articulated in a public housing lease). “Teachers’ Tools” are available to instructors to locate Chapters that develop different doctrinal areas, ethics issues, the Uniform Commercial Code, drafting skills, etc.

We have long believed that students will find the law more interesting and will learn it better if they have a more sophisticated idea of the challenging settings in which they might use it. Our hope is that the contexts we have supplied in these materials will contribute to developing that sophistication so that students can better appreciate the tremendous challenges and enjoyment that using the law of contracts can offer.

WJW  
CMZ



# *To the Student*

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We have designed this book to enrich your study of Contracts by offering problems in different practice settings that you might come upon as a lawyer. By working with typical problems encountered by lawyers, you will reinforce your knowledge of the law, gain a better understanding of how your classroom work connects with client problems, and see that real life problems are not isolated by concepts of contract doctrine.

Inspiration for much of this book has come from William Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee Shulman, *EDUCATING LAWYERS* (2007), a study of legal education better known as the “Carnegie Report.” The Carnegie Report recommended exposing students to professional responsibility and, more broadly, professionalism issues as well as bringing more contextual material to the educational experience during the first year of legal education. We hope this book will assist you in understanding what lawyers actually “DO” when they practice law.

We have tried to better replicate the context for contract law’s operation in at least two ways. First, many of the Chapters put you into a transactional or counseling setting rather than into a litigation situation. Much of what lawyers do with contract law involves these activities. Moreover, because much of it involves planning rather than after-the-fact dispute resolution, the thinking is often forward looking and quite different from that involved in litigation. We think that you will improve your ability to learn the law if you understand the many contexts in which you will use it.

Secondly, one finds that practice is “messy.” That means in practice, an attorney will rarely have a client who poses only one simple problem such as “is there a contract.” Instead, there will be a myriad of issues that cross doctrinal subjects. In criticizing the limitations of traditional law school education, the Carnegie Report said: “One limitation is the casual attention that most law schools give to teaching students how to use legal thinking in the complexity of actual law practice.” (Carnegie Report at 188). In our context, one finds that the problems involving contract law that come to a lawyer are seldom limited to “contracts” problems. Often there will be side issues involving torts, property law, civil procedure, or other areas of the law. Our problems, while often simpler than those from actual practice, attempt to replicate this messiness.

To begin developing your understanding of the lawyer as a *professional*, we have tried to make the problems realistic, by including issues that raise questions concerning your professional responsibility to clients. Nearly half of the Chapters directly raise these issues, in ways that are likely to appear to a practicing lawyer wrestling with a client’s problems. Professionalism issues are among the most interesting and difficult of those encountered by lawyers, and the most common. Our goal is simply to introduce you to them so that they become a part of your thinking about legal problems and your complex role in solving them from the very beginning.

The design of each Chapter will help you develop a taste for complex legal work, while at the same time simplifying it, by dividing it into “tasks.” As you work through the tasks and complete them on your own, you will begin to experience how lawyers tackle complex legal problems by approaching them in a step-by-step fashion. Once you have completed a typical lawyer “Task,” we offer feedback in the form of “self-assessments” to help you understand how well you performed it. It is important to realize that our self-assessments will not provide every possible way to solve a given task; legal problems almost always have more than one good solution. The Book is designed primarily for out-of-class work, but your Professor might decide to bring some of it into the classroom.

Consistent with recent research that suggests students learn better when presented material in a variety of media, we have augmented the book with online components in a variety of forms. The book will point you to these sources and other useful places to explore on the Web.

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## *To the Student*

### **Chapter Organization**

We have begun each Chapter with time and difficulty “meters” so that you will know how much time we think a Chapter should take you to complete. These are followed by a brief Preview that will give you an idea of what is to come. Each Chapter contains text that will provide you the substantive background needed to understand the problem you will work on. Unless specifically directed to do so, you should not need to do any research to work through the solutions to the various tasks posed.

The meat of the Chapters is in the Problems and Tasks. A fictional client or lawyer will bring you the Problem; the Tasks will direct your efforts in methodically working on the main problem. The Tasks might require you to draft a letter or a contract, write a rule to govern a particular situation, or prepare talking points for a negotiation. Each Task will be connected to a self-assessment on the Web Course that will help you evaluate what you did and to deepen your understanding of the skills and substance the Task was designed to illustrate.

While you could always “peek” at the self-assessment before doing the Task, to do so will defeat the whole point of the Chapter. We want you to feel what it is like to do a lawyer’s work, with all the uncertainty that is a part of law practice. No one will have the “answers” when you are on your own.

### **Enrichment Material**

Because lawyers never get neatly packaged “contracts” problems, most Chapters will inevitably touch other doctrinal areas of the law. In many cases, we have created Sidebars that will tell you a little about the tangentially-related area or remind you of concepts that you may have studied previously. We make no attempt to teach you the topics covered by the Sidebars; rather they are there to satisfy some of the curiosity that should be peaked as you encounter complicated legal problems.

Additionally, the Web Course chapter materials contain other related sources that are linked to the Chapters, Problems, or Tasks. You will find interviews of lawyers or others, samples of other contracts or documents, and further resources.

Contract law is an endlessly fascinating subject, exceeded only by the richness of the actual practice through which lawyers make this engaging subject operational. We have tried, through these materials, to give you a sense of that richness. We hope you will find them useful in deepening your understanding of contract law, what one does with contract law as a lawyer, and how it interacts with the actual practice of law.

WJW  
CMZ



# *How To Use This Book*

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As described in the Preface and the note To the Student, each Chapter of this book confronts you with a complex legal task and then breaks that task into a series of component parts to make it more manageable and to give you guidance on how to digest a big legal problem. Each of the tasks in a chapter require you to *do* something—draft talking points, write down some ideas, draft a document. Once you have done that, the book will direct you to the “Web Course” on Lexis to get feedback on what you just did. The feedback, in turn, allows you to see if you understood the issues and reached a competent solution.

We have designed the book both to supplement your contracts course and to provide a first encounter in professional self-development. Professional development for a lawyer is a lifelong enterprise that is almost completely self-directed. There are no exams; the quality of your learning is “tested” by the quality of the legal representation you provide. Those who pursue their own professional development aggressively and intelligently become better lawyers and counselors than those who do not. Typically, required continuing legal education (CLE) courses are ungraded and require only attendance, not full, thoughtful attention, for compliance. As in most education and training outside of the law school setting, what you get out of it depends on what you put into it.

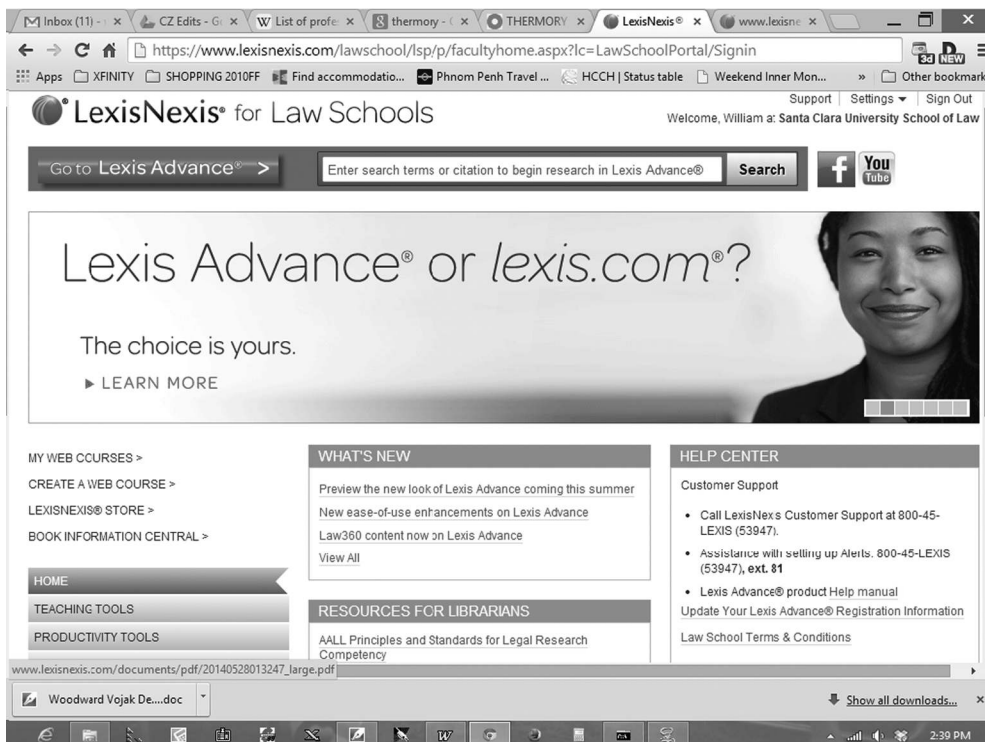
So it is with this book: getting the most professional development and learning from this book requires you to work independently and actually *do* what the tasks ask you to do *before* you consult the feedback. If you look at the feedback before doing the problem you will learn very little, if anything, from the assigned task. Remember, this is the way you likely will work when you practice law, and you will rarely have others to give you the “answers” before attempting to solve a problem when you are in practice. What follows are step-by-step directions that will show you how to get to the feedback and to the other materials on the Web Course that will reinforce the learning that comes from each Chapter.

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## How To Use This Book

### Finding the Feedback on the Web Course

1. Once you complete a task within a chapter, the book will tell you to consult the Web Course for feedback. To do that,
  - a. log in to Lexis Law Schools, <http://www.lexisnexis.com/lawschool>, and enter the ID and password you received from your school's Lexis rep. You should arrive at a page that looks like this:

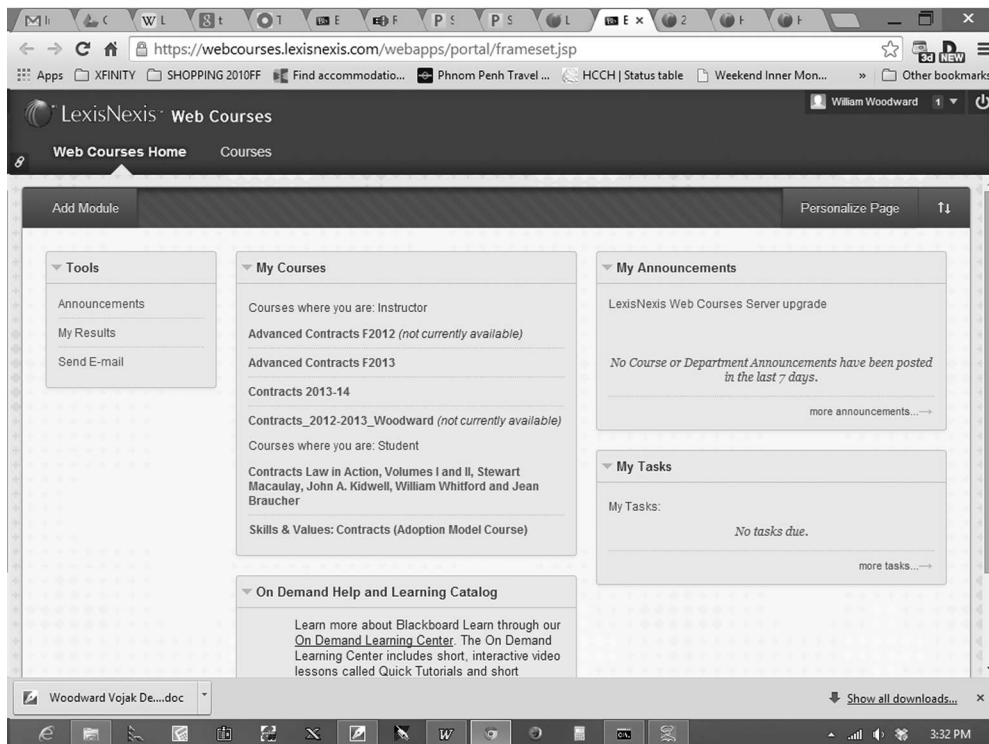


Your professor will provide you with enrollment instructions for the web course. You also may need to enter a password that permits you to access the Web Course; make sure to check your enrollment instructions to see if a password/access code is required.

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## How To Use This Book

2. Click “My Web Courses” at the left. That should bring you to a page that looks like this, but with your own courses listed.



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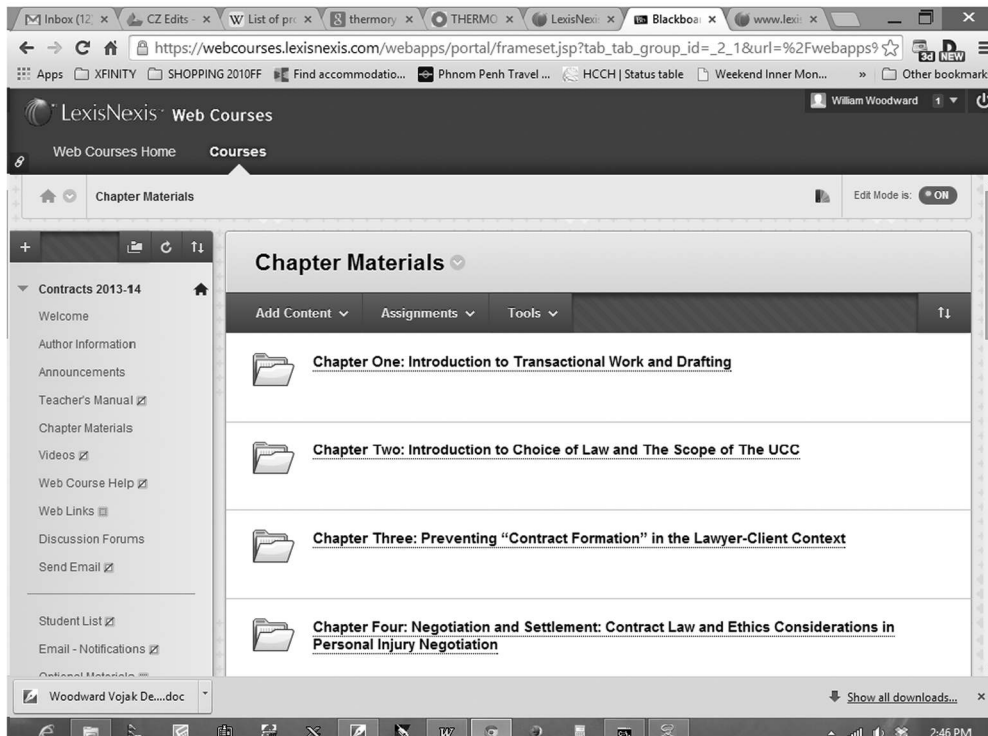
## How To Use This Book

3. Click on your own Contracts course in the second column. That should bring up a page like this:

The screenshot shows a web browser window displaying the LexisNexis Web Courses portal. The browser's address bar shows the URL: [https://webcourses.lexisnexis.com/webapps/portal/frameset.jsp?tab\\_tab\\_group\\_id=\\_2\\_1&url=%2Fwebapps%2F](https://webcourses.lexisnexis.com/webapps/portal/frameset.jsp?tab_tab_group_id=_2_1&url=%2Fwebapps%2F). The page has a dark header with the LexisNexis logo and 'Web Courses' text. Below the header, there's a navigation bar with 'Web Courses Home' and 'Courses'. The main content area is titled 'Welcome to Skills & Values: Contracts'. On the left, there's a sidebar menu for 'Contracts 2013-14' with links like 'Welcome', 'Author Information', 'Announcements', 'Teacher's Manual', 'Chapter Materials', 'Videos', 'Web Course Help', 'Web Links', 'Discussion Forums', 'Send Email', 'Student List', and 'Email - Notifications'. The main content area features a large banner with the text 'SKILLS & VALUES' and 'Welcome to Skills & Values: Contracts'. Below the banner, there are tabs for 'Add Content', 'Assignments', and 'Tools'. The 'Add Content' tab is active, showing a message about purchasing the 'Skills & Values: Contracts' book. The message includes a link to the product detail page: <http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&core=&parent=cat80002&catId=cat80154&prcdId=prod14160520>. It also states: 'You can purchase either as an eBook or in print.' At the bottom of the main content area, there's a section titled 'News, Updates and Announcements'. The browser's taskbar at the bottom shows various open applications and the system clock indicating 2:43 PM.

## How To Use This Book

- Click “Chapter Materials” at the left. That will bring you to the pages with the Web Course materials in them. Like this:



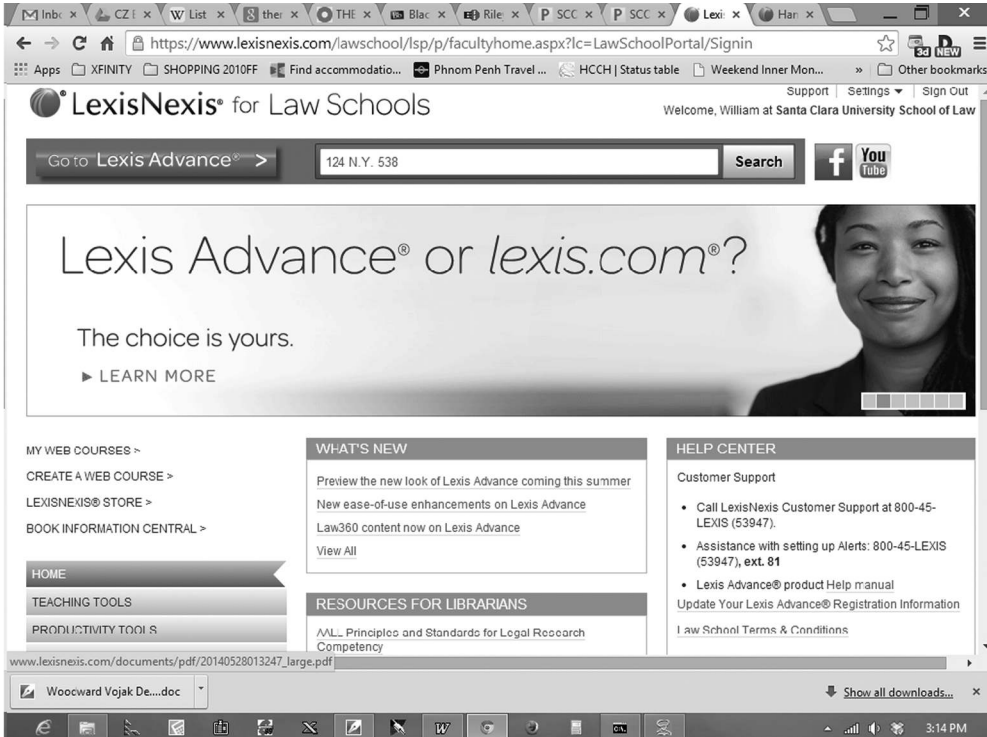
- From there, it's simply a matter of clicking the appropriate Chapter's folder and getting the feedback and other materials contained in that folder. Your professor may “hide” some or all of the feedback until after you have finished the task. When that happens, you will be told when the feedback will be available on the Web Course for you to review and compare it to the work you have completed.

## How To Use This Book

### Finding Cases on Lexis Advance

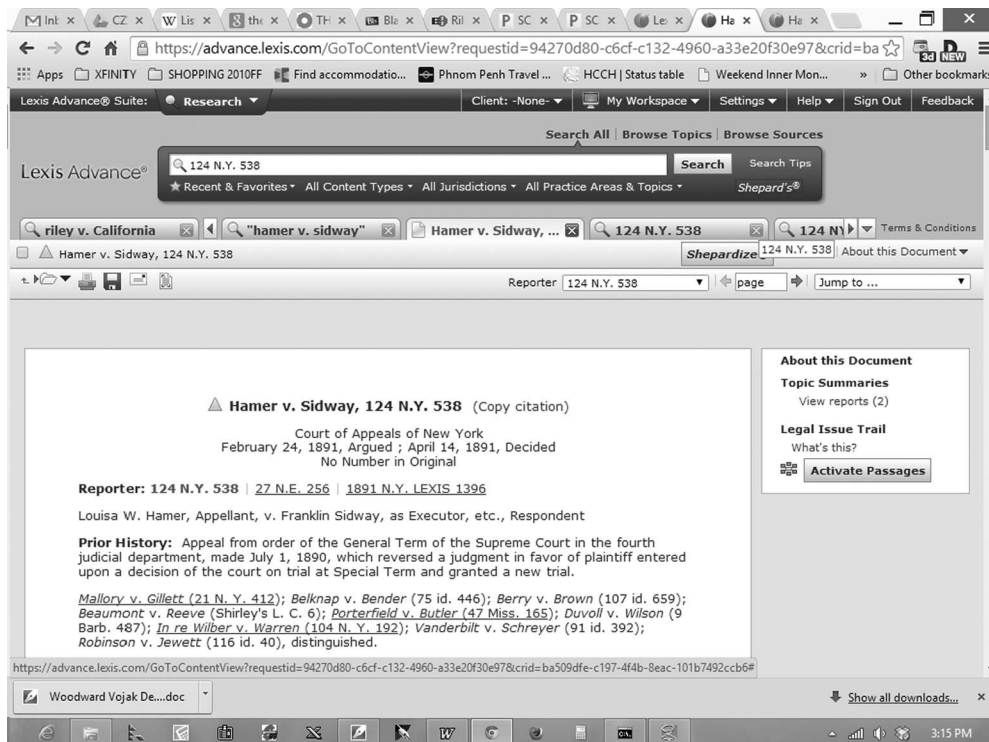
Occasionally, either the book or the Web Course will ask you to perform a search on Lexis Advance. While the instructions are designed to be clear, in the early going you may encounter frustration with this. Becoming facile on Lexis can help you tremendously by giving you fast access to materials that are more difficult to find by using other methods. Try a very simple Lexis search for a case that you likely will read in your Contracts course, *Hamer v. Sidway*, 124 N.Y. 538 (1891).

1. Log on to Lexis Advance. You will see the initial startup screen.



## How To Use This Book

2. In the search box, type the citation to the case listed above; no need to include the year. You can see it typed in the screen shot above. Click Search and the result should be a screen like this:







# *Acknowledgements*

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The authors are indebted to many colleagues, friends, and attorneys who provided them assistance as they worked on this project; their help has made this a much better book than we could have produced by ourselves. We both wish to thank and acknowledge our educational institutions, Temple University Beasley School of Law, Santa Clara University, and Stetson University College of Law, and their respective deans, Dean JoAnne Epps, Dean Lisa Kloppenberg, Dean Darby Dickerson, and Dean Chris Pietruszkiewicz, for their generous support of this project.

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# Chapter Summaries

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## Chapter 1                      Introduction to Transactional Work and Drafting

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*Most of the work where lawyers use contracts involves planning, advising, drafting, and creating transactions; the thinking and skills involved in doing this work differ substantially from those involved in trial work. This simple Chapter introduces and explores a methodology for drafting rules of the kind that make up contract provisions, organizational bylaws, work rules, regulations, legislation, and constitutions while introducing the kinds of conflict of interest problems that lawyers encounter every day.*

---

## Chapter 2                      Introduction to Choice of Law and the Scope of the UCC

---

*There are many legal sources for rules governing contracts. These rules come from agencies, courts, legislatures of multiple jurisdictions, and even treaties among different countries, each of which may or may not apply to any given task. This Chapter looks at the threshold problem of identifying the many different rules that might apply to issues and then finding the applicable principles that will govern the contract to be drafted or the dispute to be resolved.*

---

## Chapter 3                      Preventing “Contract Formation” in the Lawyer-Client Context

---

*A person’s encounter with a lawyer can ripen into a lawyer-client relationship without the lawyer even knowing it. Even casual advice by a lawyer may lead to a claim of legal malpractice in certain situations. This Chapter introduces the contract, professional responsibility, and liability issues raised by one such case together with the strategies lawyers can employ to prevent such misunderstandings.*

---

## Chapter 4                      Negotiation and Settlement: Contract Law and Ethics Considerations in Personal Injury Negotiation

---

*A common task for lawyers is negotiating contracts that settle disputes. Contract law, ethics, and professional responsibility rules place limits on an attorney’s conduct in those types of negotiations. This Chapter surveys those issues in the context of personal injury litigation.*

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## Chapter 5                      Drafting a Contract from a Form

---

*A resource that a new lawyer will discover early in practice is a “form book” or its online equivalent, but simply using a form as a template may lead to unwanted and unintended results. Learning how to modify the form to be useful for a client’s particular problem is a skill that must be learned. In this Chapter, a form from the Lexis Transactional Advisor is the starting point for drafting a simple sales contract that conforms to the client’s wishes.*

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## Chapter Summaries

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### Chapter 6                      Performance and Breach I: Helping a Client with a Troubled Contract

---

*Contracting parties regularly encounter performance problems. Lawyers may be called in to help put things back on track before the contract is irretrievably broken. This is the first of two Chapters that looks at this kind of work where the focus is on how to keep the contract going. It also offers some experience in interviewing and fact finding.*

---

### Chapter 7                      Performance and Breach II: Resolving a Contract Impasse

---

*How do attorneys resolve contractual impasses when the parties no longer trust one another? This Chapter examines one solution often used to resolve an impasse in contractual performance — an escrow provision — and offers some experience in drafting one.*

---

### Chapter 8                      No-Compete Contracts and the Ethics of Drafting

---

*A lawyer's job is to respond to and work for her clients. But a client's demands sometimes exceed the permissible limits of the rules that govern lawyers. This Chapter introduces those rules and the difficult choices a lawyer may face when a client's demands conflict with those rules.*

---

### Chapter 9                      Controlling Risk in Purchases and Acquisitions I: Real Estate Purchase

---

*Core functions of many contracts are controlling and allocating risk. This Chapter uses a residential real estate contract to explore contract provisions an attorney might consider in controlling or limiting a buyer's risk in a simple asset purchase.*

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### Chapter 10                     Controlling Risk in Purchases and Acquisitions II: Lawyer Due Diligence

---

*In large transactions where complicated assets are exchanged, large teams of professionals that include lawyers will collaborate in performing "due diligence" work. This work is vital in bringing clarity to the nature and value of the assets being exchanged; this Chapter introduces this kind of work in the context of a relatively simple purchase of a hardware store business.*

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### Chapter 11                     Determining Contract Terms with UCC § 2-207

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*This Chapter explores the in's and out's of Uniform Commercial Code § 2-207 through a "battle of the forms" problem that illustrates the complexity of the task.*

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### Chapter 12                     Inter-Client Conflicts of Interest

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*Lawyers must be able to recognize and resolve conflicts of interests with clients or potential clients; the problems are subtle and difficult in transactional settings. This Chapter introduces some of the problems in the context of a contract negotiation in the corporate setting.*

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## Chapter Summaries

### **Chapter 13                      Helping a Client Cope with Insecurity About Contract Performance**

---

*Long-term contracts sometimes veer off course in a way that requires lawyers to help their clients work through the problems. This Chapter explores some of the mechanisms available to work through contract performance troubles in these kinds of contracts.*

### **Chapter 14                      Analyzing and Interpreting Prenuptial Agreement**

---

*Contract law and family law merge when parties create a prenuptial agreement. This Chapter focuses on a prenuptial contract and on the issues that might arise when one spouse becomes seriously ill and the parties and family disagree about whether the prenuptial agreement requires the other spouse to pay medical expenses.*

### **Chapter 15                      Drafting a Public Housing Eviction Complaint Based on Breach of a Lease**

---

*Contract disputes often require that lawyers draft formal documents such as demand letters, complaints, or petitions. This complex job may require determining which rules dictate the form of the official papers, reviewing contract provisions, and identifying the relevant facts from the records in a file. This Chapter focuses on those skills in the representation of a client who manages public housing in a dispute centered on a complex residential lease.*

### **Chapter 16                      Reading a Lease Contract and Drafting an Arbitration Memorandum**

---

*Representing a client in an adversarial proceeding requires attention to detail and an ability to construct a sympathetic story from relevant facts. This Chapter focuses on an adversarial dispute between a tenant in public housing and the Housing Authority and requires the drafting of an arbitration memorandum for each side of the dispute concerning a tenant's eviction from public housing.*



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