

## Sample Practice Ready Exercises



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# NEGOTIATING AND DRAFTING EASEMENTS A PRACTICE READY LESSON

## STUDENT PACKET

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Adapted By [Adopting Professor, Title]

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## Assignment Overview

You are engaged in the negotiation of an easement between two adjacent property owners. At the conclusion of this assignment, you will have drafted an easement that is worthy of notarizing and filing with the County Clerk. (You will neither notarize nor file your easement.)

## Learning Objectives

Doctrine: By engaging thoughtfully in this exercise, students should be able to:

- Produce a legally enforceable express easements that meets the needs of the client and the other party.
- Differentiate appropriate fact patterns that lend themselves to right of ways that constitute lease, licenses, and easements.
- Explain the strengths and weaknesses of each party's case with respect to easements by estoppel (Irrevocable Licenses) and by adverse possession (prescriptive easements).

Skills: By engaging thoughtfully in this exercise, students should be able to:

- Compare negotiation tactics and strategies, especially win-win negotiations.
- Explain why certain negotiation techniques worked well with your partner and others did not.
- Appreciate the benefits of drafting an agreement before negotiations.
- Produce a legally enforceable contract agreement (express easement) that meets the needs of all involved parties.

Professional Responsibility: By engaging thoughtfully in this exercise, students should be able to:

- Summarize why a flat fee structure can create a tension between client interests and lawyer's interests.

## Rationale

Most law schools teach the theory of the law without ever giving you an opportunity to put the theory into practice. Indeed, putting theory into practice is a much better way to prepare you for the practice of law. Additionally, seeing theory in action helps deepen your understanding of the concepts. Negotiating and writing this easement should deepen your understanding of some of the practical implications of some of the doctrine we've covered in class, like describing the property, maintenance, and interference.

Writing documents worthy of legal commitment is one of the most common tasks a lawyer must undergo. In almost every profession of law, you will write contracts of some form, be they divorce agreements, commercial contracts, settlement agreements, or any other kind of written agreement



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between parties. An easement agreement is, at its heart, a contract concerning property. Thus, by practicing writing an easement, you will practice writing legal binding agreements between parties.

## Estimated Time for Completion

|   |               |
|---|---------------|
| Reading the Student Packet.....             | ½ - 1hour     |
| Reviewing Relevant Doctrine:.....           | 1 – 1 ½ hours |
| Brainstorming & Preparation : .....         | 1 - 2 hours   |
| Drafting Written Assignments:.....          | 2 - 3 hours   |
| Engaging in Role Play Activities:.....      | 1 – 1 ½ hours |
| Revising Written Assignments& Scripts:..... | 2 - 3 hours   |
| Engaging in Self Reflection Exercises:..... | 1 ½ - 2 hours |

## Prerequisites

To complete this assignment, you should be familiar with the rules governing easements.

## Assignment Instructions

### Introduction & Team Formation

This assignment has four phases: preparation, negotiation, drafting a legal document, and reflecting on the learning objectives. You will be on a sub team with one or two other students. You will be negotiating with one other sub team of students.

### The Preparation Phase

Please see the secret client facts.

### The negotiation phase

You will be negotiating an easement with one other sub team of students. You may conduct your negotiations in person or by email, fax, phone, text, or instant message. Please make sure that you have adequately prepared for the negotiation before you engage with the other team. You must complete your negotiations in time to allow each sub-team to draft the easement.



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## The Drafting phase

It is standard practice for attorneys to negotiate and then one attorney will agree to draft an agreement. At the conclusion of this assignment, your sub team will produce a draft agreement that you will submit to the other sub team for review, revision, and approval. However, for the purposes of this assignment, each sub-team will draft an easement *as if* the other team was not also drafting the agreement. You may not consult with the other sub team about the terms of the agreement after negotiations have concluded.

Please refer to the supplemental materials for information on how to draft an easement.

You must submit your agreement by DUE DATE and Method of Delivery.

***You do not have to have the agreement notarized and you should not attempt to register the easement. Please do not attempt to contact the owners of the property in any way.***

## The Reflection Phase

After the due date for the final draft, give your version of the final draft to the sub-team that you negotiated with. Collect their finalized version. You should also exchange your secret facts.

Students learn best when they reflect upon what they learned in an exercise. To assist you in maximizing the learning from this exercise, please answer the following questions:

1. When most students receive a practice assignment like this one, they realize some area of the law that they could learn better. Were there areas of the law that you realized that you needed to understand better in order to serve the clients in this exercise? If so, what were they? What triggers made you realize you needed to deepen your understanding of the law?
2. What surprised you most about the difference between the theory that we learned in class and the practice of creating the sales contract?
3. What preparation did you do prior to the negotiation? Based on what you learned in this assignment, what additional research would you conduct in a real client situation?
4. What conflicts arose between the client's interests and your interests? How did you resolve this conflict? How might you improve the resolution of a similar conflict in the future?
5. Do you believe that your client would have won or lost if this case went to court, based on the information you had available to you **prior to** the negotiation? How did negotiating help your clients more than a trial might have? Were there any drawbacks to the negotiation?
6. Did your opinion about the strength of your case change after you saw the other side's facts? How does this new information impact your "decision" to recommend negotiation? (Pretend that the decision was your own and not predetermined for you.)

7. Look at the finalized version that the other sub-team drafted. What terms were consistent with the final draft your sub-team drafted?
8. Look at the finalized version that the other sub-team drafted. What terms were different than the final draft your sub-team drafted? How did they differ? Was the difference significant? What kind and cunning explanations do you have for the differences?
9. Focus on just the terms that are different. When terms differ in a contract, lawyers have to weigh their client's interest in changing the terms against the problems of re-opening negotiations. Which terms would be a priority to attempt to revise? Why?
10. Focus on just the terms that are different. Which terms might you forego revising? Why?
11. What is the most significant thing you learned as a result of this assignment? How do you think your new knowledge and skills will benefit you as a practicing attorney? What further learning do you realize you need to master in order to competently practice law?
12. How much time did you spend on this assignment overall? How did you spend this time?
13. Describe the preparation and participation that your teammates demonstrated in engaging in this assignment with you. If this were a real practice situation, what feedback would you provide (positive and critical) to your teammates respecting the process, results, or professionalism?
14. Do you have any suggestions about how to improve this assignment?
15. What did you like best about this assignment?

You should submit this memo by (uploading it to the X dropbox, handing it in in class, etc.)

## Confidentiality throughout

**You may not discuss your secret facts or your other sub-teams secret facts with any other team in your section, in any other section, in any other year, or in any other school.** During this negotiation, you are only allowed to discuss your secret facts with your sub team partner(s), your teaching assistants, or your professor. If you and your partner(s) agree to reveal your secret facts to the other sub-team, you may do so as part of the negotiations. You should consider what secret facts you must disclose legally and ethically in making your decisions. You must also decide when to reveal these secret facts strategically during the course of the negotiations.



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## Case Files

### Common Facts:

The owners of 820 Mt. Vernon Avenue in Charlotte, NC realized after their recent purchase that their stone-laid raised bed planter and jungle gym set overlapped the property line, infringing upon the property located at 1314 Carlton Avenue. The problem has existed since the addition was built in 2009-2010.

Your job is to negotiate an easement, including any valuable consideration.

You can see the plats at: [http://www.zillow.com/homes/820-Mt.-Vernon-avenue-charlotte-nc\\_rb/](http://www.zillow.com/homes/820-Mt.-Vernon-avenue-charlotte-nc_rb/) click on the houses to see the addresses. You can see pictures of the planter and jungle gym from the perspective of 820 Mt. Vernon here: [http://maps.google.com/maps?ll=35.211462,-80.846844&spn=0.002143,0.002409&t=h&z=18&layer=c&cbll=35.211548,-80.846809&panoid=Y\\_aGIPFf1NjhAJsFqHvtyA&cbp=12,264.67,,0,-1.41](http://maps.google.com/maps?ll=35.211462,-80.846844&spn=0.002143,0.002409&t=h&z=18&layer=c&cbll=35.211548,-80.846809&panoid=Y_aGIPFf1NjhAJsFqHvtyA&cbp=12,264.67,,0,-1.41) You can see pictures of the planter and jungle gym from the perspective of 1314 Carlton Avenue: <http://maps.google.com/maps?ll=35.211168,-80.84693&spn=0.00054,0.000602&t=h&z=20&layer=c&cbll=35.211267,-80.846907&panoid=PXLFQt10WCrEX9tSoW7MBA&cbp=12,326.57,,1,4.2>

Note: Google identifies the “approximate” address of this property as 1339, not 1314, but the pictured properties are the ones in question.



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## Confidential Grantor Client File

### *Factual Information*

Your clients have been preparing their home (1314 Carlton Avenue) for sale. In the process, your client discovered that their neighbor's planter bed and the jungle gym set were on your client's property.

New neighbors just moved into the house at 820 Mt. Vernon. The previous owners are the ones who built the planter and erected the jungle gym. Your clients and the previous owners were neighbors for a long time and friends for even longer. Unfortunately, with them selling their home and now your client selling your client's home, it's all business. Your clients are most concerned with being able to sell their property. They have a couple of concerns. First, they don't want any funny business that would detract buyers or make buyers back out of a contract. Second, they don't want any funny business that will devalue their home.

Your clients approached you for advice. Your client admitted to you that when the neighbor showed plans for the addition, and then subsequent plans for the planter and jungle gym set, your clients had some question about whether the entire thing was on their property or not. However, rather than do any investigation, your clients decided it wasn't worth the damage it might cause to the relationship to even ask questions. After all, the planter was on the other side of your client's fence, they said. As such, your clients report saying nothing more than, "That just looks lovely. I can't wait to see your daffodils in bloom."

You have already investigated some options. First, you thought about offering to sell the strip of land from to neighbors. However, doing so would violate set back requirements for your client's house and would make the width of the lot smaller than the minimum required lot size. In order to perfect this sale, you would need to seek a variance from the city, which would cost a minimum of \$1,000 in governmental and court fees. You are not optimistic that the city will grant the variance. If they did, the fair market price is probably close to \$25,000 for the strip. Additionally, you estimate that it would take you between 50 and 100 hours to obtain the variance and secure the sale. Unfortunately, before you realized the scope of this problem, you agreed to take on this client as a flat-rate client for \$4,500. Your normal billing rate is \$125 per hour. Your clients need to get the house on the market and sell it quickly, and this process would take longer than their time frame.

Your clients would prefer to have the planter and jungle gym removed from their property all together, but realize that this endeavor would cost a great deal of money. One contractor quoted \$10,000.

You discussed the idea of an easement with your client and they agreed that it would be a good solution, especially if they could make a little bit extra in the process. A real estate consultant said that the decrease in fair market value would only be about \$1,000 if the easement provided for access to both the planter and the gym.



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## Confidential Grantee Client File

### *Factual Information*

Your client purchased the house at 820 Mt. Vernon using a general warrantee deed. Just after they closed on the house, the neighbors located at 1314 Carlton Avenue approached them. The neighbors said they were getting ready to put their house on the market. In the process of getting their home fit for sale, they discovered that your client's the planter bed and the jungle gym set were on their property. The neighbors indicated that they were open to talking about options, but wanted to do so in a way that would not affect the marketability of their title, discourage buyers from purchasing the property, or devalue their property.

Your clients approached you for advice. They said they were so upset that they had already called the sellers. The sellers said, "We had no idea. We didn't know where the dividing line was. We just assumed that the landscaping company would propose and build a planter and jungle gym set that didn't infringe on anyone's rights. Both were built on our side of the fence, so it seemed legit."

You have already investigated some options. First, you thought about offering to purchase the strip of land from your neighbors. However, doing so would violate set back requirements and would make the width of the lot smaller than the minimum required lot size. In order to perfect this sale, you would need to seek a variance from the city, which would cost a minimum of \$1,000 in governmental and court fees. You are not optimistic that the city will grant the variance. If they did, the fair market price is probably close to \$20,000 for the strip. Additionally, you estimate that it would take you between 50 and 100 hours to obtain the variance and secure the sale. Unfortunately, before you realized the scope of this problem, you agreed to take on this client as a flat-rate client for \$3,000. Your normal billing rate is \$125 per hour.

Your client reported that the cost of having the planter reconstructed and the jungle gym moved could run as high as \$15,000. Additionally, you let them know that it would require them to seek permission from the neighbors to use the land while removing the infringement.

You discussed the idea of an easement with your client and they agreed that it would be a good solution. You indicated that easements often cost an up-front fee, similar to a sale, but that the easement only gives possessory rights, not ownership rights. The client said they would pay as much as \$7,000 plus your fee and recording fees (which you estimate at less than \$700) to obtain the easement. They said they were willing to move the jungle gym set, if necessary, because that would only cost \$300 in labor.



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## ***Additional instructions & Assignments***

You are set to negotiate with the lawyers representing the owners of the other property at a time mutually convenient to all of you.

You know that one way to prepare for a negotiation is to draw up a draft copy of a finalized agreement before the negotiations begin. At best, the other side is unprepared and you have a major advantage to a negotiation. At worst, the other side also came prepared with a draft agreement and you are properly armed to negotiate about the wording and the clauses that will best serve the needs of your client.

Thus, one member of your sub-team should bring a draft easement to the negotiation. Everyone on your sub-team should review the easement prior to the negotiation. The pre-negotiation draft should be clearly labeled as such. The team member who took the lead on drafting the agreement should submit the draft *without modification* on the assignment due date.

After the negotiations are concluded, the other member(s) of your sub-team will revise the agreement based on the outcome of the negotiation. You may discuss the results of the negotiation with your sub-team members only, not the sub-team representing the other side and not anyone else. The post-negotiation draft should be clearly labeled as such. The team member who took the lead revising the agreement should submit the final draft on the assignment due date.

Thus, if you are part of a two person sub-team, one person will turn in a draft easement (used for the negotiations). The other person will turn in the finalized version. All versions are due by the due date of the assignment.

Note: The other team will also be preparing, at minimum, a post-negotiation draft.



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# Supplemental Legal and Non-Legal Materials

## Introductory Materials on Drafting Easements

You can find guidelines for writing easements here: <http://www.realestatelawyers.com/resources/real-estate/land-use-and-zoning/property-easement.htm> A sample easement for Mecklenburg County is here: <http://www.colonialtitle.net/JohnsDocsPDF/Encroche%20Ease%202.pdf> Note that the sample does not follow all of the advice from the guidelines, so part of your job is to revise the sample both to fit your client's situation and to create a written easement that does comport with all of the guidelines. (You can omit the property diagram.)

Under normal circumstances, you would do much more research on creating an easement, including reviewing more detailed guidelines, researching and reviewing applicable statutes, reviewing official survey plats, etc. However, for the purposes of this exercise, you can skip those additional steps.

## Introductory Negotiation Materials

Negotiation is part of several upper level courses that you will have the option to take before graduating. It is impossible to teach you negotiation skills here. The purpose of this exercise is to get you to reflect upon your own natural negotiation strategies and expose you to other students' natural negotiation strategies. That said, there are some fundamental principles that we can introduce you to here. As you approach your upper level courses and practical training, you will only deepen your understanding of these tenements.

In their book, *Getting to Yes: Negotiating Agreement without Giving In*, Professors Ury and Fisher recommend seven initial principles in preparing for and engaging in a negotiation. While we highly recommend that you read the book at some point before you graduate, for the purposes of this exercise, a summary is sufficient to encourage you to begin to think about some of these principles. "[The Negotiation Experts](#)" provide a summary of the pioneer book on their website. Please read this summary on their website.

## Grading Criteria

This assignment is worth a total of 100 points.

Each portion of this assignment is full/no credit. However, I reserve the right to reduce points for students whose work product does not reflect the minimum standard of graduate level work.

If you wrote the pre-negotiation draft agreement, you will receive 50 points for turning in the draft agreement. You should not turn in the post-negotiation draft.



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If you wrote the post-negotiation draft, you will receive 50 points for turning in the post-negotiation draft agreement. You should not turn in the pre-negotiation draft.

Everyone should turn in an individualized reflection paper. You will receive 50 points for submitting your reflection paper by the due date.

## **Attributions**

Thanks to InfiLaw for the vision to see how important it is for students to practice law in a low-stakes environment.

Thanks to Professors Ury and Fisher for their book, "Getting to Yes: Negotiating Agreement without Giving In."

Thanks to "the Negotiation Experts" for their summary of "Getting to Yes."  
<http://www.negotiations.com/book-reviews/getting-to-yes/>



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## Future Interest Conveyance

### Objectives:

- Spot legal issues when clients provide you with tangential and off-topic stories told to you in laymen's terms.
- Translate laymen's requests to legal language that lawyers and the courts understand.
- Create a basic legal conveyance using the possessory and future interests that we have studied.
- Identify the interests that each party has based on the conveyance that effectuated the client's wishes.

### Instructions:

You have a client who wanted to convey their first house to their children and came to you for help. Here is a transcript from a client that you interviewed last week. Read through the transcript to become familiar with what the client is asking. Then, write the conveyance from your client to the client's children, according to the client's wishes. After the conveyance, write what each party has at the time of the conveyance. Identify any questions you would have wanted to ask the client, why, and how the answers might have impacted your conveyance.

### Interview Transcript:

You: Welcome, Mr. O'Toole. I'm glad you are here. I understand that you would like to convey some of your property to friends and relatives and you'd like me to help. Why don't we start with you telling me a little about your situation?

Client: Well, I'm 63 and I've had a heart attack. My wife is in good health, but neither of her parents lived that long, though you can't count her dad's death against her expected life span because he committed suicide. Her mom died shortly after that, but we all think it was from grief, so we think that my wife will probably outlive us all.

You: I'm sorry to hear about your wife's parents. Please, continue.

Client: We are looking to distribute our property to our children.

You: What property do you have?



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Client: We have a first house that we raised our kids in. We love the house, but we've recently acquired a beach home. Since we are retiring, we'd like to move into the beach home full time. However, given how bad the economy is, we don't particularly want to sell our first house. We can't imagine renting it to strangers, however, but we would like to use the house to give our kids some financial stability. For example, my second son was unemployed for a spat and I think he's not doing well financially. It might be nice if he could use the property for five or ten years, just long enough to get back on his feet financially.

You: Would you like to give your second son the rights to use the property for five or ten years?

Client: Well, not so much for a period of time, but just until he can repay his retirement account loan. But, he still owes me a ton of money, so I don't want him moving into the property, living mortgage and rent free while he splurges on other expenses and never repays his retirement loan.

You: It is possible for us to make it a condition that your son pay a minimum amount on his retirement account loan and if he doesn't, then he loses rights to the property.

Client: Well, that would be ok, but if he loses his job again, I wouldn't want this minimum loan payment hanging over his head.

You: So if he is unemployed, he can stay in the house or if he is employed and making minimum loan payments, he can stay in the house. Do I understand you correctly?

Client: Yes, and I will add that no matter what, he has to leave the house in five years, so my daughter has a place to live. I'm hoping that by then she is married and maybe having kids. But, even if she isn't, she'll need a house. She's in graduate school right now. She'll need a permanent home when she graduates and my wife and I don't want her living with us, permanently, that is. We love it when she comes to visit, but the last time she asked if she could crash for the weekend, she didn't leave for 3 months and took our car with her when she left. We don't want a repeat. I think giving her the first house will give her a permanent place to live and then when she comes to visit, we'll know that she has somewhere to go home to when she leaves. We are really worried that she will never marry, so we want her to have the house for life.

You: Let's get to your daughter in a minute. Does your second son need to live in the house during the five years?

Client: Yes.

You: So, after your son is in the house for up to five years, you want the house to pass to your daughter. What do you want her to be able to do with the house?

Client: Well, I want her to live there. But, even if she doesn't, I want her to own it for her lifetime.



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You: Do you have any children other than your second son and your daughter?

Client: Yes, I have my first son. However, he married a woman we can't stand. We have been very generous with our other children, but we have never given our first son a dime because we don't want that woman he married to have one red cent of our money.

You: Would you want your first son to be able to share the property with your other two children if your daughter decides not to live there any more?

Client: Well, no, not as long as he is married to that dreadful woman. However, we don't want money to be a factor in why he would stay married to her. So, if he divorces her, we'd like him to be able to have the house.

You: By have the house, do you mean that he can live in it or sell it as he sees fit?

Client: Yes, if he needs the money to get rid of that dreadful woman, I'm OK with him selling it.

You: Let's walk through some scenarios. What do you want to happen if your first son divorces his wife while your daughter is still living?

Client: Hmm. That's a good question. As much as I want him to get divorced, I don't want to rip the roof out from over my daughter's head. Actually, on second thought, I would rather him take the house away from my daughter than remain married to that dreadful woman!

You: What do you want to happen if your first son divorces his wife while your second son is still living in the house?

Client: That's a tougher question. My second son is really hard up right now and so I really want to support him. I would hate for him to be hurt just because my first son finally came to his senses. Sorry, but my first son has to wait until my second son is done with the house. If my first son really needs the money, my first son can sell his share of the house to my second son and daughter to support him through his divorce.

You: So, your second son gets to keep the house for the full five years, provided that he is either employed and making minimum retirement loan repayments or he is unemployed? And that is true even if your first son divorces his wife, correct?

Client: Yes. If my first son divorces before my second son is done with the house, my first son will just have to wait to get the house until my second son has had the house for five years.

You: But your first son can take the house away from your daughter if your first son divorces, correct?

Client: Yes.



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You: Let's walk through one more scenario: what if the five years pass with your second son's estate, then your daughter passes and your first son is still married to his current wife. Who should get the house then?

Client: My second son should get to sell the house or do whatever he wants with it.

You: What are your children's names?

Client: My first son is Adam; my second son is Barry, and my daughter is Catherine.

You: What is your first son's wife's name?

Client: Willow.

You: What is the address of the house you'd like to convey?

Client: 123 Main Street in Smallville, NC



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