

**Teaching Legal Drafting in a United States Law School:
The Evolution of the Florida Program**

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1. Thinking About Writing and About Teaching Writing

I am not one who covers my office walls with quotations and clippings. But for a long time I have had on my wall two quotations that inform my thinking about writing and about teaching writing.

The first quotation I clipped from the margin of a newsletter published by the Document Design Center in Washington D.C. called "Simply Stated." It is a quotation from someone named Red Smith, who says: "There's nothing to writing. All you do is sit down at a typewriter and open a vein."

The second quotation is from S. Leonard Rubinstein. I do not know where it was published. I have it typed on an index card. He says:

The ability to write does not come from knowledge; it comes from a habit of mind. Knowing how to solve what has been solved is of great help; but the act of writing is the discovery, each time, of how to solve what has not been solved.

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I remind myself daily that the students who sit in my classes are enduring pain opening those veins. I remind myself, and them, that I would like to tell them everything first but that is impossible. There is always something else that has not yet been solved. That something else is what keeps us alive. It produces the joy that follows the pain.

2. The Evolution of the Florida Program

a. The Center Piece in a Series of Requirements

The Legal Drafting course at the University of Florida College of Law is the center piece in our three-year program of writing requirements. In the first year, the students take a course in Legal Research and Writing, which teaches library and computer research skills and writing memoranda of law. Then they take a second semester course in Appellate Advocacy, in which they write an appellate brief and present an oral argument based on it. During the third year, each student is required to write a long paper in conjunction with a seminar.

Legal Drafting is a two-credit letter-graded course for every student in the second semester of the second year. The program began in 1985 when I came to design it and hire and train four full-time instructors to teach document drafting. The instructors are lawyers with a variety of drafting experience in their law practice backgrounds. Each instructor teaches two sections each semester with approximately 20 to 25 students per section. In addition, I teach one section. The classes meet twice a week for

an hour. The textbook is my book, *Drafting Legal Documents: Materials and Problems*, which was published in 1988 by West Publishing Company, who will publish the second edition this coming spring. The new edition reflects the dramatic changes we have made over the past six years.

b. *The Original Focus on Skills Learned by Redrafting Isolated Provisions*

We began essentially with the course I had taught as an elective at Golden Gate University in San Francisco, using Reed Dickerson's text.¹ The whole community of scholars of legal drafting mourns his passing last summer. I personally owe an enormous debt to Professor Dickerson for all his writing has taught me about drafting and for the grand debates he and I used to have about how to teach the subject.

Reed's view was that the study of drafting is essentially the study of jurisprudence. He believed that the teacher should be able to teach large numbers of students at once by using only short assignments, often only one paragraph, and displaying successive redrafts on an overhead projector. The students would learn by comparing their own work with what they saw displayed. The teacher would not comment directly on the students' work.

Most law students, however, are not interested in drafting as a jurisprudential exercise. They are preparing to practice law; to represent clients; to draft pleadings, contracts, releases, wills, and a myriad of other documents. They are not content merely to redraft to improve a piece of drafting in a vacuum; they

want to draft always as someone's advocate. Neither are they content only to redraft; they want also to draft, as they put it, "from scratch." Above all, they want and need extensive commentary, both written and oral, about their own work. Ultimately, Legal Drafting needs to be a course in both clarity and strategy.

c. The Transition to Drafting Whole Documents as an Advocate

I must say that I am far more interested to accommodate students' wish to draft as advocates than I am to give them very many "drafting from scratch" assignments. Most lawyers do not draft very much from scratch. In fact, one thing we do is show students how to and not to use forms, many of which are badly drafted and most of which only partly fit the facts in any given case.

Another thing we do is bring in a collection of real documents of a given type: leases, releases, or construction contracts, for instance, and analyze them to see what is worth borrowing or adapting. A typical assignment might be to redraft a given document and to add a section on some new matter. This way, the students do get experience drafting something from scratch, but they also are not put through a pointless torture of facing a blank page that in practice they will not face.

Of course, we never lose sight of our skills agenda. We know we are using certain documents because they are useful devices for teaching certain skills. We used to have an assignment on ambiguity using just the litigated price provision from a

construction contract.² Now one of our favorite teaching devices is the whole construction contract. We still use it to teach ambiguity and a variety of what I call "micro" skills related to word choice and sentence structure. But the billing is different. The assignment is no longer billed as one on ambiguity. Instead it is on drafting a contract, with focus on such matters as recitals, stipulative definitions, *force majeure* clauses, and modifications.

Likewise we have a favorite lease³ that we use to teach the principles of organization: division, classification, and sequence, along with conceptualization and headings, in other words, the "macro" skills. The assignment is billed not as one on organization but as one on drafting a lease, with focus on drafting to protect the client (the landlord, in this case) against a defaulting party, preserving the client's interest with respect to renewal, and using a contract as both a marketing tool and a rule book.

I did not choose these assignments because I thought every lawyer should know how to draft a construction contract and a lease. I chose them instead because I found particular documents that turned out to be teaching gold mines. In addition, there is value in choosing contract drafting assignments involving relational contracts,⁴ those that govern the long-term relations between the parties.

Quick buy-sell transactions do not provide nearly the interesting drafting issues that relational contracts do. In the

latter, we have to exercise our judgment more, predict more, achieve all the flexibility we can, try to prevent trouble, and ultimately draft to prevent litigation rather than merely to prevail in litigation. In short, drafting a relational contract has a great deal in common with drafting legislation.

What we hope above all to do is provide students the transferable skills they will use even if what they draft in practice are entirely different documents from those we have used as teaching devices.

d. Additional Attention to Litigation Drafting

At the outset, my plans for our course did not include litigation drafting. I subscribed to Reed Dickerson's proposition that drafting is essentially legislative, "preventive law,"⁵ and that the principles are the same no matter whether we are drafting a contract, a will, a statute, or a set of restrictive covenants. We are describing a world, large or small, and prescribing conduct in that world.⁶

Litigation drafting, I maintained, was different. Drafting complaints, motions, and discovery documents was a matter of trial strategy far more than drafting strategy. It ought to be taught in trial practice courses and in the clinical program. Nonetheless, the Florida law school wanted me to teach pleadings. We began with just a short negligence complaint, jammed artlessly in the middle of the course.

What happened is not surprising. The students loved drafting pleadings. They wanted more of it. Moreover, the instructors

discovered they loved teaching pleadings. They wanted more of it. Pleadings were a lot more interesting than ambiguity. They moved to the front of the course. We added to the common law negligence complaint a complaint based on a statutory cause of action. Then we added an answer with affirmative defenses. Then we began working with motions. Any minute I may begin seeing visions of interrogatories dancing in my head.

Litigation drafting now comprises about one-third of our course. I have discovered that we can use the documents the students want, pleadings, to teach the skills they need to learn: finding an appropriate level of generality or specificity, using consistent terminology and parallel structure, tracking statutory language, writing with attention to both logical and chronological sequence, using tabulated structure for emphasis and readability, and avoiding negative pregnant. Every new assignment brings forth something else that has not yet been solved.

e. The Transition from Inductive to More Deductive Teaching

Perhaps the hardest lesson for me in the evolution of my teaching has been to loosen my grip on my strong preference for inductive rather than deductive teaching. It is a preference for learning by doing and for the problem method of teaching rather than either lecture or the interrogations that are often erroneously passed off as the Socratic method.

With respect to teaching drafting, the inductive method involves giving the students the badly drafted provision and saying, "Here, figure out what is wrong with this, and then figure

out how to fix it." In the beginning we fiercely resisted discussing the material to be redrafted before the students tackled it. They often grumbled that we were "hiding the ball," but our idea was that some students might find something other than a ball, who knows what, if only they were free to experiment instead of programmed to a particular result.

I do still believe in the value of inductive teaching. I do believe that if there were time enough, students would learn more valuable lessons through trial and error, through drafting with very little instruction ahead of time. I have little patience for the student who would like a drafting textbook to be reduced to a nutshell or an outline and the drafting course reduced to a Saturday morning workshop. Efficiency will never become my primary value.

On the other hand, it is important not to give students the impression they are in the middle of a deep woods with signs on every tree saying, "Do not go this way." Course materials need to include examples of good drafting, not just samples of what not to do. I acknowledge the value of the sign in the woods that says, "Go this way."

When I try to put into perspective the tug of war in my head between inductive and deductive teaching, it does perhaps come down to acknowledging the difference between teaching a required course and an elective. In the required course are students who recognize the need to learn certain skills to perform well in their chosen profession but who need to pack that learning into a tight schedule

in a world that tends to value more highly what it calls "doctrinal" studies. In the elective course are students who enjoy playing with language and structure, who enjoy intellectual puzzles, who value the journey as well as the destination.

3. The Teaching Process: Experimentation and Flexibility

a. *Ungraded Assignments*

I attribute much of the success of our program to the premium we have put on experimentation and flexibility, both for ourselves as teachers and for the students. First, we do not grade individual assignments. We do cover them with written comments, but no grades. We want the students to feel free to experiment with the understanding that they will not be penalized for an experiment that fails. The grade in the course is based on the final examination as in other courses. Our examination is a drafting project that the students work on during the last month of the semester.

b. *Outlining and Not Outlining*

We also try to acknowledge as much as possible that not everyone works naturally with the same writing process, and that therefore, it only increases the bloodletting to impose one process on all. I grew up in English classes where I learned how to outline. The rules are imbedded in my soul: no "A" without a "B"; no more than five major headings no matter how long the project; and all headings in parallel structure. The main rule, of course, was that you did not dare pen the first sentence of text until you

had outlined the whole project.

Those were the days before computers. I remember going through both undergraduate and graduate school with interminable bundles of 3 x 5 cards, from which I produced outlines, from which I produced essays. For years I taught what I had been taught.

Then I hired an excellent drafting instructor who would not outline, who finally informed me she *could* not outline. Her office was always full of piles of paper, unlike mine, where a piece of paper tends to last in the "in" basket on the average about an hour before it is whisked off to a file drawer. This instructor organizes at the computer. Without a sign of an outline she produces reasonable sequences and parallel headings. Anyone who can block and move on an IBM or cut and paste on a Macintosh can do the same.

I visited some friends recently who teach writing seminars as consultants to corporations. They showed me their materials on what they call "clustering": lots of circles and arrows, nothing linear. Some people appear to do better with flow charts, working horizontally.

c. Clients as Resources

In any event, we treat drafting as a process with several stages. We begin with attention to clients as resources. The first stage is to study the written facts we provide along with any legal materials and sample documents that form the "closed universe" of the assignment. Then the students write questions to ask the client. On purpose we often imbed in the assignments requests from

the client that run counter to the governing statutes, or contradictory requests, or requests that are not actually in the clients' best interest. There are also typically gaps in the given facts. It is up to the students to ask for what they need to draft the document and to advise the client if they find problems in the client's requests.

This is not a course in client counseling and interviewing, although I can imagine it being imaginatively taught in conjunction with such a class. At any rate, we do not typically bring in people to serve as clients or get ourselves up in some different garb to answer questions. After all, it is hardly a realistic setting for 20 or 25 lawyers to be flinging questions at a client all at once.

What we want to teach at this stage is how to ferret out what more information you need, and also how to distinguish between questions that are appropriate to ask the client and those that are not, such as legal questions or questions about drafting principles. Questions for the client are not only those seeking more facts but also those exploring the client's purposes and whether the client, and the transaction, call for a loose, flexible approach or a tight one that nails down a myriad of details.

d. Individual and Group Conferences

At this point individual conferences begin to figure in the teaching process. Again, experimentation and flexibility are the governing principles. We might have conferences with individual students, or with groups of about four students, to discuss their

plans for a drafting project. We might return each student's document at an individual conference to discuss redrafting. We might divide the class into "law firms," each to specialize in one area, meaning that one "law firm" meets with us after a certain assignment to discuss their work and prepare a presentation on it for the rest of the class.

e. *Other Small Group Exercises*

We often divide our classes into small groups for a variety of collaborative exercises. A group may exchange and discuss their completed drafting projects. A group may produce a refined version of a particularly tricky provision, which one group member then writes out on a transparency for display on the overhead projector and class discussion. Students may be divided into pairs to negotiate a given provision as adversary counsel.

A variation on this exercise is to give each student another student's document to amend as the opposing party's counsel. This process, of course, commonly happens in practice, and in my experience, not many lawyers know how to do it skillfully, that is, subtly. They know how to shoot off a blunderbuss; they do not know how to maneuver an exacto knife. When I give students others' documents, I also provide an agenda. For instance, I might say: Here is a construction contract drafted by the contractor's lawyer. You represent the owner. What you believe you negotiated was that the price cap was on the contractor's fee as well as cost, yet the contractor's lawyer has drafted the contract so as to put the cap on cost alone. Also, your client has no wish to choose

subcontractors, but absolutely does not want XYZ Tile Company involved in the project, and wants to make sure no progress payments will come due any sooner than a month after paying the downpayment.

When the students begin, they want to criticize the other student's drafting, or else politely compliment it. What I work to get them to do is interline the most unobtrusive, minimal changes to achieve what their client wants, and to leave well enough alone when the drafter has drafted inadvertently in their favor.

f. Checklists

Another regular feature of our teaching process is the extensive assignment-specific checklist. In class, on the day an assignment is due, the students go over their own work with my checklist. I invite them to edit their work according to the checklist before I mark it. This way, they can correct all sorts of mistakes and save my marking time and energy for matters requiring the exercise of expert judgment. Students tell us that checklists are second only to individual conferences as their most favored teaching method. Of course, I know that the smart students will make the checklists part of their reference library for drafting later on in practice.

g. Redrafting

Another major feature of our process is redrafting. All of the checklists, the written comments we put on students' work, and the conferences, both individual and group, are aimed at improving

the students' work through having them redraft it. In fact, it has always seemed to me that the only reason to stop redrafting is that you have run out of time. Students, of course, learn early about the concept of "billable hours." It is a companion to the concept of the client in a hurry. At the drafting seminar our Legal Drafting Department put on last month for the United States' National Conference of State Legislatures, one of the speakers was Robert Kennedy, who has been director of the Florida Senate Bill Drafting Service for nearly 20 years. He expressed the frustration we all know too well when he reported saying, probably often, "Well, Senator, do you want it right or right now."

I suppose our impossible mission, but the one that drives us daily, is to teach others to get it as close to right as possible, and as close to right now. Thus some of our assignments have imbedded in them variations on previous assignments so that we teach by an incremental process. For example, the students first draft a negligence complaint. The next thing they know, they are drafting a multi-count complaint in which one of the counts is for negligence. They draft a settlement and release to conclude the litigation. The next thing they know, they are drafting an anticipatory exculpatory clause in a lease, in other words, another form of release. In the construction contract, they draft a "no damages for delay" clause. The next thing they know, they are drafting a publishing contract for a publisher who is worried that the author will not get the manuscript done on time.

h. Use of Legislative Materials

I have referred more often here to contracts and pleadings in our assignments than to statutes. Our students are preparing to practice law, not to become professional legislative drafters. But principles of legislative drafting are pervasive in the private legislation that we do include, such as a declaration of restrictions and covenants for a subdivision or a set of corporate by-laws.

Moreover, we use statutes extensively in our teaching materials. I mentioned earlier that we always base a pleading assignment on a statutory cause of action. The students need to discover the elements and determine what to allege to establish those elements. We work on the difference between quoting from a statute as authority and weaving its language into a factual allegation without waving a red flag over it.

We also use statutes as the legal foundation for documents that not only must comply with them but should take advantage of them. For example, in Florida we have a Residential Landlord and Tenant Act.⁷ When our students draft a lease, they have to decide what to do because their client, the landlord, wants to prohibit waterbeds but the Act does not allow prohibiting them unless they would violate an applicable building code.⁸ The statute does authorize requiring the tenant to carry sufficient insurance to protect the landlord. It is truly amazing to see the variety of ways a group of 25 students can translate that statute into a provision in a lease.

Here is another example from the same assignment. The old lease form that the client landlord has been using requires the landlord to give four hours' notice to the tenant before entering the tenant's dwelling unit. The Florida statute says that "the tenant shall not unreasonably withhold"⁹ access. The students discover the need to redraft to take full advantage of the statute that is much kinder to their client than the client's old lease.

Finally, even though most of our students will not become professional legislative drafters, many in private practice will have occasion to become involved in drafting, or redrafting, local ordinances. I have in my textbook assignments using two of my favorite teaching gold mines, a local ordinance on false alarms¹⁰ and one on barriers around swimming pools.¹¹ I turn to these ordinances for lessons on what section headings and definitions reveal about conceptual and organizational problems.

The false alarm ordinance turns out to be full of procedures for registering alarm systems in residences and business establishments, not exclusively about false alarms at all. The definition of "false alarm" tells us, among other things: "Alarm systems which activate from simply shaking of doors or rattling of windows are not properly installed or maintained and are deemed to be emitting a 'false alarm.'"

The swimming pool ordinance goes painstakingly through definitions of "swimming pool (private)" and "swimming pool (public)" and then, in Section 15, announces that it applies exclusively to private swimming pools.

4. Looking Ahead

The Curriculum Committee at our law school is conducting a two-year comprehensive study of the entire curriculum with a view towards long-range planning. As part of the study, questionnaires were sent to our graduates. One of the questions was what they would like to see given more attention in the curriculum. More than anything else, they mentioned drafting.

We continue to design new experiments. One of the drafting teachers team-taught an assignment this semester with a Corporations teacher. Another is working with an Estates and Trusts teacher. I have taught a drafting exercise in a first-year Contracts class. Some Civil Procedure teachers have had their students draft pleadings. In short, we are exploring the possibilities for introducing drafting principles briefly in first-year doctrinal courses; teaching the fundamentals of drafting, as we do now, in the second year; and then weaving more complex drafting problems into advanced courses.

I would like to see the day come when the third-year advanced writing requirement may be fulfilled through a drafting project as an alternative to a seminar paper. I know that day is not tomorrow or next week. But clear messages come to United States law schools from the American Bar Association.¹² We are in an era of greater and greater demand for skills training and certainly for training in drafting as one of the most pervasively needed skills. It is a myth that new lawyers learn these skills on the job; at least it is a myth that *many* of them learn these skills *well* there.

The law schools need to teach drafting. More and more are doing so. I am pleased that Florida's program has become a widely followed model, for it puts me at the heart of this important mission in my own writing and teaching, and in speaking to others about it, as I do here today. I am grateful to Don Revell for inviting me and to you all for the exchange of ideas and perspectives in which we share.

¹Materials on Legal Drafting (1981).

²See *Lewis v. Carnaggio*, 257 S.C. 54, 183 S.E.2d 899 (1971). The entire contract appears in an appendix, at 183 S.E.2d 903-05. For our original drafting assignment based on the price provision, see B. Child, *Drafting Legal Documents: Materials and Problems* 194 (1988). A drafting assignment involving the entire contract will appear in the second edition.

³B. Child, above note 2, at 142.

⁴See Macneil, *The Many Futures of Contracts*, 47 S. Cal. L. Rev. 691 (1974); *Restatement (Second) of Contracts and Presentiation*, 60 Va. L. Rev. 589 (1974).

⁵The Fundamentals of Legal Drafting 6 (2d ed. 1986).

⁶See *id.* at 3-6.

⁷Fla. Stat. § 83.40 *et seq.* (1989).

⁸Fla. Stat. § 83.535 (1989).

⁹Fla. Stat. § 83.53(1) (1989).

¹⁰B. Child, above note 2, at 155.

¹¹*Id.* at 152.

¹²See, e.g., ABA, Section of Legal Educ. & Admissions to the Bar, Long Range Planning Committee, *Long-Range Planning for Legal Education in the United States* 24 (1987).

Construction Contract Assignment

A. Objectives

The major objectives of this assignment are as follows:

1. Draft a contract to prevent problems anticipated by the client and to protect the client's interests.
2. Make certain the contract is free from inadvertent semantic, syntactic, and contextual ambiguities.
3. Use general, specific, vague, and precise language purposefully and strategically.

B. Facts

Your client is Martha Isley, a Gainesville contractor, doing business as Waccamaw Construction Company, a sole proprietorship. Waccamaw's address is 215 S.E. Boulevard, Gainesville, FL 32601.

Isley was in the construction business for three years in Attica, South Carolina, before moving to Gainesville. When she moved to Gainesville, she continued using a form contract drafted for her by a lawyer in Attica. She used the form without significant problems until a year ago, when she undertook to build an office for Dr. Carl Mulliner. In the past, all of her construction projects had been houses. Dr. Mulliner hired her because her bid was substantially lower than that submitted by any other contractor in Alachua County.

The cost of constructing the office was \$240,800. According to her understanding of the contract, Isley claimed that Mulliner owed her a total of \$258,580. In a lawsuit in which she attempted to establish and enforce a lien for the balance due on the contract, the trial court construed it as entitling her to only \$234,500. The court found that \$234,500 was a reasonable estimated price and that additional costs incurred in making changes in the project were part of the "actual cost" of construction. Moreover, the court awarded Mulliner damages of \$13,950 for construction delays. Isley completed construction March 15, 1991, nearly nine months later than estimated.

Isley has fired her trial lawyer and hired you to represent her on appeal (not part of your assignment). She also wants you to redraft her contract so as to avoid similar results in the future.

What happened with Mulliner was essentially as follows.

Their agreed estimated date of completion was July 1, 1990. However, Isley encountered an initial two-month delay in obtaining a building permit, which set back the whole project. Then early

in the construction process, rain storms prevented the work from going forward on schedule.

Mulliner was livid at the delay, and on October 1, he ordered her to accelerate construction. However, he subsequently began asking her to make various alterations, invariably after the work had already been completed. He was constantly turning up at the construction site with suggestions and complaints.

A central feature of the office was the "lab." The specifications called for a system of built-in cabinets. After these had been installed, Mulliner called them "shoddy" and announced that he wanted them ripped out and replaced with a certain substantially more expensive brand. After waiting several weeks for the replacement cabinets to come in, Isley finally called the manufacturer and learned that the line of cabinets she had ordered had been discontinued. When she called Mulliner to discuss the problem, he was on vacation and unavailable for three weeks. Under orders to accelerate construction, she decided to consult the interior designer who had been advising Mulliner. The designer recommended that she order similar cabinets manufactured by another company. They cost more, but Isley ordered and installed them.

Mulliner refused to pay the additional cost and berated her for making the decision without consulting him. Although the new cabinets were similar in appearance to the ones he had selected, there were only three drawers in each cabinet instead of four. According to Mulliner, efficient operation of the lab depended upon having four. In the end, Isley had to tear the cabinets out, absorb the additional cost, and order a new set, dissimilar in appearance to the discontinued line but of comparable price. The replacement cabinets plus the additional labor cost an additional \$3,000. Isley and Mulliner executed a supplemental agreement covering the cost of labor and materials for the replacement cabinets.

Mulliner also demanded that Isley replace "hollow-core" doors with "hard-core" doors, increasing the cost by a total of \$900. There was no written agreement covering the doors; in fact, Mulliner made all arrangements with one of the subcontractors and Isley didn't learn of the change until the work was already completed.

After the consulting rooms and reception area were substantially complete, Mulliner decided that the intercom system was not adequate and required Isley to replace it with a more expensive system. The parties executed a supplemental contract covering the cost of installing the system, which was \$1,000. They neglected to mention in this contract the \$1,000 increase in the cost of materials.

While one of the subcontracting firms was in the process of painting the interior, Isley discovered that one of her employees had inadvertently ordered the wrong brand and color of paint. Additional labor and materials to correct the mistake cost Isley \$400. She absorbed the cost of correcting her employee's mistake.

Isley was also plagued by labor problems and vandalism. She became involved in disputes with the subcontracting firms she had engaged to install the plumbing and lay the asphalt for the parking lots. Although these disputes were ultimately resolved, they caused substantial delay. The day after the sinks were installed, vandals came onto the construction site during the night and tore them out. Vandals also smashed several windows. Isley's insurance paid for the damage.

Long before construction was complete, Mulliner was threatening to sue Isley for breach of contract. In the end, he refused to pay her more than what he claimed was the contract price of \$234,500. However, when she sued him for the balance, he counterclaimed for damages due to delay. Because he could not get into the new building, he had to continue paying \$1000 a month for his downtown office and an additional \$50 a month for parking. He also had to pay an additional receptionist he had hired in anticipation of an expanded practice and \$500 a month to store new furniture and equipment he had ordered for his new office.

C. Drafting Assignment

Isley has asked you to redraft her form contract to adapt it to her next construction job. Her particular goals for the new contract are:

1. to give her as much protection as possible against liability for damages due to construction delays;
2. to avoid any ambiguities respecting the contract price; and
3. to try to prevent interference by the property owners in the construction process, either through late payments to the subcontractors or unauthorized changes.

The new contract is to be based on the following facts:

1. The property owners are Michael Kuzak and Victor Sifuentes, two lawyers who want her to build an office for them.
2. Isley and the lawyers reached their agreement on October 27, 1991. They have an appointment to sign the contract on November 8, 1991.

3. The lawyers will bring to the appointment a copy of the legal description of the property. The street address is 555 Los Personas Court, Gainesville, Florida, 32601.
4. The estimated date of completion is January 15, 1992.
5. The estimated cost of construction is \$134,500.
6. The lawyers agree to pay a downpayment of \$13,000 at the time they sign the contract.

Isley says that you can regard as applicable to the new contract any information in the Mulliner contract that is consistent with the information in items 1-6 immediately above.

D. Optional Background Reading

If you want to do background reading on construction contracts, several copies of the following chapters of Steven M. Siegfried's *Introduction to Construction Law* (1987) are on reserve:

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|-------------|-------------------------------------------------------|
| Chapter 2, | "Selected Construction Contract Provisions" |
| Chapter 10, | "Risk of Loss, Construction Insurance, and Indemnity" |
| Chapter 12, | "Time, Scheduling, Delay and Its Consequences" |

CONSTRUCTION AGREEMENT

This agreement, made and entered into This 8th Day of March, 1990, by and between Carl Mulliner, hereinafter called the Owner, and Waccamaw Construction Company by Martha Isley, hereinafter called the Contractor.

Witnesseth:

Whereas, the said Carl Mulliner is the Owner of property described as:

and

Whereas it is the desire of the parties to this agreement to enter into an arrangement under which the Contractor will build for the Owner an office on said property in accordance with certain plans and specifications attached to this agreement, incorporated herein by reference, said office to be paid for by the Owner in accordance with the terms of this agreement. Both the agreement and plans must be read together and not as separate agreements.

The purpose of this paragraph is merely to set forth the intent of both parties and purpose of the contract; the following numbered paragraphs are the mutual promises between the parties. The courts look to the intent as well as the specific terms agreed upon therefore, if an important part of the agreement is omitted in the numbered paragraphs but mentioned above in the paragraph entitled "whereas" it would be sufficient to bind the parties to the agreement.

Now, therefore, in consideration of the mutual promises of the parties as set forth hereinbelow and in consideration of the agreement of the Contractor to build an office aforesaid together with the promise of the Owner to pay for same in accordance with the terms of this agreement, it is mutually agreed as follows.

1. Contractor agrees to build an office as described in the plans and specifications attached hereto and made a part hereof on the property belonging to the Owner hereinabove described in accordance with the said plans and specifications, and further, the contractor agrees to provide all of the labor and materials and to perform, or to cause to be performed, all work necessary for the proper construction and completion of the said office in conformity with the said plans and specifications, including all conditions thereof and also in conformity with the building and zoning laws and regulations of the City of Gainesville, State of Florida. It is mutually agreed that all subcontractors work and materials, except as otherwise hereafter agreed in writing between these parties, shall be purchased and handled through the office of the contractor and shall be performed under the direction and supervision of the contractor, subject to the approval of the

Building Inspector of the City of Gainesville, Fla. The contractor shall furnish all tools and equipment necessary for the purpose of the performance of the work at his own expense. It is agreed that the selection of any subcontractor shall not create an agency relationship between the Owners and said subcontractors, and that the Owner shall have no control over the selection of said subcontractors.

2. It is further agreed that all work in connection with the erection of the residence shall be carried on with all possible speed consistent with reasonable cost, good workmanship and safety of construction, and it is further agreed that the erection of the said building shall progress continuously except for strikes, lockouts, delay in delivery of materials, acts of God or other delays beyond control of the contractor. The contractor agrees to commence the Performance of the work immediately, and to be completed by approximately July 1, 1990.

3. In consideration of the performance by the said contractor of all of the covenants and conditions contained in this agreement and contained in the plans and specifications the owner agrees to pay to the contractor an amount equal to the amount of all material furnished by the contractor and the labor furnished by the contractor together with payroll taxes and Insurance, also together with the sum total of the net amount due the subcontractors performing work or furnishing work for said construction. The Owner also agrees to pay to the contractor, in addition to the amount specified hereinabove, a fee equal to 10% of the actual cost of the said residence, said fee to be paid after completion of said residence and acceptance thereof by the Owner. It is specifically agreed by and between the parties that notwithstanding the agreement hereinabove by the owner shall not be required, under the terms of this agreement, to pay to the contractor any amount in excess of the sum of Two Hundred Thirty-Four Thousand, Five Hundred Dollars (\$234,500.00) which is the estimated cost of construction, plus the fee provided for herein.

4. It is further agreed by and between the parties that the payment constituting the satisfaction of the Owner's obligation under the terms of this agreement shall be made in the following manner:

a. That the owner shall pay to the contractor at the time of the signing of this agreement the sum of \$23,000.00.

b. That from time to time, and not more frequently than once each month, except in the case of an emergency, the contractor shall submit to the owner proper invoices or delivery tickets covering labor, material or subcontract work performed in the construction of the improvements on the property.

c. That upon receipt of the invoices or bills hereinabove referred to, the owner will cause same to be paid into the hands of the persons furnishing labor, materials or subcontracting

services; that the owner shall not pay any invoice or bill for labor, materials or subcontracting services without the approval of the contractor.

5. It is further mutually agreed by and between the parties that neither party will make any change or deviation from the plans and specifications set forth as Exhibit "A" attached hereto; it is further agreed that should both parties agree to a change in the plans and specifications, then there shall be executed an agreement supplemental to this agreement setting forth the change to be made and the amount of addition to or subtraction from the contract price; it is further mutually agreed that should some change be agreed upon orally and be incorporated into the work called for under the terms of this agreement, that such oral agreement shall not constitute a waiver of the provisions of this paragraph by either or both parties and notwithstanding such oral agreement, no additional cost resulting from the performance of the work shall be added to the contract price nor shall any savings resulting from the performance of said change be deducted from the contract price.

6. It is further agreed that the contractor will carry adequate Workmen's Compensation and Unemployment Compensation Insurance for all the employees to be employed upon the job and the contractor shall also carry public liability and property damage Insurance. The contractor shall also carry Builder's Risk Insurance in an amount at least equal to the estimated price as set forth in paragraph 4 hereinabove. In case of loss, it is agreed that the proceeds of all such risk insurance shall be used to restore and replace any property damaged or destroyed, and it is especially agreed that the contractor shall not be held responsible for or liable for any loss, damage or delay caused by fire, cyclone, strikes, lockouts, civil commotion, nor shall any loss or damage be charged as a part of the work called for under the terms of this agreement.

This Agreement shall be binding on the parties hereto, their assigns, successors, representatives or administrators.

Three (3) Exhibits.

WACCAMAW CONST. CO.

By: MARTHA ISLEY
Contractor

CARL MULLINER
Owner

Checklist for Construction Contract

Instructions:

1. Check your construction contract against this list. To the extent possible, make corrections between the lines or in the margins. Treat longer corrections or additions as numbered endnotes, and put them on additional sheets of paper.

2. Only when you are satisfied that you have fully attended to an item, either in your original draft or in revision, check it off in the blank at the right margin on this checklist.

3. If you have purposely handled something differently from the way this list indicates is appropriate, annotate in a numbered endnote to explain your rationale.

4. Turn this checklist in with your contract.

I. Exordium

- A. Do you accurately identify the parties: either Waccamaw Construction Company or Martha Isley d.b.a. Waccamaw Construction Company, Contractor, and Michael Kuzak and Victor Sifuentes, Owners? All names spelled correctly? _____
- B. Do you establish short forms for reference to the parties throughout, probably "Contractor" and "Owners"? _____
- C. Do you refer to the contract as a construction contract rather than relying on title for that? _____
- D. Do you refrain from typing in a contract date, which may well turn out to be different from what the parties presently expect? _____
- E. Do you express mutual agreement of C & O to all of the terms in the remainder of the contract? _____
- F. Do you eliminate obsolete legalese including "Witnesseth" and redundant expressions such as "made and entered into"? _____

II. Definitions

- A. Do you either have no Definitions section or else have one that consists exclusively of definitions of terms used in more than one section of the agreement? _____

- B. Do you either have no Definitions section or else have one that consists exclusively of definitions rather than substantive provisions? _____
- C. If definitions appear anywhere in your contract, do you use "means" to introduce full definitions and "includes" or "does not include" to introduce partial definitions? _____
- D. Do you avoid strained definitions and strained labels (terms that you create to serve as shorthand for unwieldy collections of items)? _____

III. Recitals

- A. Do you avoid "Whereas" as introductory signal? _____
- B. Do you recite that Owners own the specifically identified property? _____
- C. Do you leave space for legal description or reference to plat book where it can be found? _____
- D. Do you give accurate street address? _____
- E. Do you recite that Owners acknowledge accuracy & completeness of plans & specs? _____
- F. Do you refer to them as attached & incorp. by ref? _____
- G. Are your recitals in numbered and headed sec.? _____
- H. Does the heading signal appropriately whether recitals are specific & intended to be binding or general (nonbinding) expressions of background info on intent & purpose of contract? _____

IV. Contractor's Obligations

- A. Do you express Contractor's promises:
 - 1. To build according to plans & specs? _____
 - 2. To build on property that you clearly ID? _____
 - 3. To provide labor, materials, tools, equip.? _____
 - 4. To select & supervise subcontractors? _____
 - 5. To build on time except for excused delay? _____
- B. Do you say expressly who gets & pays for licenses & permits? _____
- C. Do you recognize that "performing work" by convention includes causing it to be performed, & so eliminate the redundant expression: "to perform, or to cause to be performed"? _____

- D. Do you recognize that "laws" is a generic term that includes regulations, & so eliminate the redundant reference to "building and zoning laws and regulations"? _____
- E. Do you eliminate all the wordy, negative double-talk about subcontractors, & substitute concise, positive statement about who will do what? In particular, do you say that C exclusively will select and supervise subs? _____

V. Delay

- A. Do you express completion date of 1-15-92 flexibly and refer to "best efforts" or some other standard of reasonableness for C's progress? _____
- B. Do you expressly cover delay caused by Owners, acts of God, labor problems, slow granting of permits, & slow delivery of materials? _____
- C. Do you include some general language about other causes beyond Contractor's control? _____
- D. Do you exclude from delay section everything not related to delay? _____
- E. Do you provide for Owners to be liable to Contractor for delay they cause? _____
- F. Do you provide for waiver of Owners' claims by acceptance of completed office? _____
- G. If you provide for liquidated damages, do you provide for a sum certain? (It is not certain if you say: "not exceeding X." When does C or O pay something but less than X? How much less? It is also not certain if you say: "X per week." How much for part of a week? Prorated? Nothing? Same as for another whole week?) _____

VI. Price and Payment

- A. Do you make clear what "cost" covers? _____
- B. Do you make clear that the cap of \$134,500 is on payment for cost, not on cost itself? _____
- C. When you mention "\$134,500," do you say where it came from (that it is estimated cost)? _____
- D. Do you use a different term from cost, such as "fee" to refer to C's profit? _____

- E. Do you make clear that the fee is 10% of actual rather than estimated cost? _____
- F. Do you make clear that the cap of \$134,500 is on payment for cost, not also on the fee? _____
- G. Do you avoid contextual ambiguity (or statements that turn out not to be true), by mentioning the cap up front rather than as a surprise tacked-on provision? _____
- H. Do you have a consistent system that either separates what Owners pay from when they pay it, or that incorporates time with amount throughout price section? In particular, do you make sure not to bury the time of paying fee in the price section? _____
- I. Do you make clear that the \$13,000 paid at time of signing is downpayment on cost, not some additional amount owed? _____
- J. Do you acknowledge receipt of the \$13,000 rather than having Owners promise to pay it? (This is because document speaks as of time of execution.) _____
- K. Do you convert so that Owners pay Contractor & Contractor in turn pays subs rather than Owners paying subs? _____
- L. Do you clarify when Owners' progress payments are due rather than merely saying when they get invoices? (Depending on your system, you may need to use blanks for dates, keeping in mind that payment dates may depend on when O & C actually sign the contract)? _____

VII. Insurance

- A. Do you make clear that O's obligation is to reimburse C for ins. payments attributable to this job? _____
- B. Do you convert obsolete reference to "Workmen's Compensation" to current "Workers' Compensation"? _____
- C. If you have a section headed "Insurance," do you exclude from it material on any other subject? _____
- D. Do you specify that Contractor will carry at least \$134,500 worth of Builder's Risk Ins. (rather than forcing reader to cross-ref. for amount)? _____

- E. Do you avoid ambiguity in referring to which ins. will be used to restore or replace property? _____
- F. Since insurance is part of the ordinary business of the contract, does your coverage of insurance precede all housekeeping provisions? _____

VIII. Modification

- A. Do you treat modifications of plans & specs as modifications of the contract, as you should once you have incorporated plans & specs by ref.? _____
- B. Do you avoid making it first seem that all modifications are impossible even though they turn out to be possible with limitations? _____
- C. Do you avoid making it first seem that oral modifications are impossible even though they turn out to be possible with limitations? _____
- D. Are your modification and price sections consistent with respect to modifications that change price? In other words, is it clear that the parties can modify all they want orally, but that to result in a price change, a modification must be written and signed by both? _____

IX. Conceptualization and Organization

- A. Is your contract easy to use as a reference document because sections are informatively headed? _____
- B. Do you use headings that identify the topics of sections without trying to give shorthand version of content? (E.g., "Delay" is better heading than "No Damages for Delay.") _____
- C. Are your headings stylistically consistent? (E.g., do you avoid the tag "Provision" on some headings?) _____

X. Format

- A. Are heads and subheads easily distinguishable from each other and from text? _____
- B. Are attachments referred to as "Exhibit A," etc., & expressly incorporated by reference? Do you eliminate the mysterious reference to 3 exhibits at the end of the agreement? _____

- C. Do you provide blanks rather than typed dates for dates of signatures & any other dates that may change depending on when parties sign? _____
- D. Do you provide a separate signature line for each individual who is a party? _____
- E. Do you provide a separate date line for each signature? _____
- F. Do you have some text on the same page as the signatures? _____
- G. Do you show the total number of pages on each page (e.g., "1 of 4")? _____

XI. "Across the Board" Checks for Consistency

- A. Do you refer to the parties throughout by the short forms you established in the exordium, including consistent use of caps or no caps and "the" or no "the"? _____
- B. When you have occasion to use pronouns to refer to the parties, do you use "they" for Owners and "she" or "it" for Contractor, depending on whether you named the party as Isley or Waccamaw Construction Company? _____
- C. Do you avoid beginning sentence after sentence with the wordy introductory phrases, "The parties agree to ...," "The contractor agrees to ...," & "The owners agree to ...," & simply say instead, "Contractor will ..." & "Owners will ..."? _____
- D. Do you express the parties' promises of future action with the contemporary simple future "will," which is the contractual future (the language of agreement), rather than "shall," the regulatory future (the language of statutes & other orders)? _____
- E. Do you use present tense to refer to the time of execution (thus not "agreement was made" or "Owners will pay downpayment)? _____
- F. Do you use present tense for policy statements as distinct from promised actions? (E.g., "Contractor is not liable for delays outside her control"; "actual cost includes.") _____
- G. Do you write about what the parties will or won't do instead of about abstractions (thus not "Work will be performed in compliance with" or "Subs' work & materials will be purchased & handled")? _____