

CONTRACT DRAFTING: TEACHING WITH FORMS

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Kimberly Y.W. Holst

Becoming the Master of the Form

I'm Kim Holst, and I'm going to take the first 25 minutes. I'll be giving the introduction to the concept of teaching with forms. I'll walk you through a little bit of what I do in my class, and then I will turn it over to Stephen, who's going to take about 50 to 55 minutes. We are leaving time for questions at the very end. So, I'm going to try to keep myself in the 25 minutes, as best I can.

To provide a little bit of background, the class that I've been teaching, Writing for Law Practice, is a very introductory course. It covers concepts of drafting, and it's not necessarily focused on business drafting. It's drafting in all kinds of alternative contexts. As a result, my approach to it is a little less business-driven than some of the approaches that we've heard about in other sessions and that you'll likely hear about throughout the rest of the conference. I'm talking about becoming the master of the form or, at least, feeling like you can approach a form without fear and make those changes that are necessary and valuable to your client.

First, how do you become master? Many of our students come in and they're familiar with contracts. They've seen contracts. They've probably had to sign contracts, so it's not an unfamiliar concept, but the idea of drafting them is usually very unfamiliar. Most students haven't worked from beginning to end on a deal or on some other type of contract drafting. As I was thinking about this, trying to think about how to describe this (and you'll have to excuse my slightly nerdy approach to it) I began thinking of it as being similar to the wizarding skills taught in Harry Potter. They're like Harry Potter in that, as you know, he's a wizard. He has the skills. He just doesn't know what to do with the skills, and when he comes in to Hogwarts, he doesn't really believe he in his wizarding ability. He doesn't think he'll ever be like the other wizards and witches at the school. I think to a great extent, our students are like that. And, when they don't have the opportunity to engage with forms in law school, they go into practice with that same fear.

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So how do we make them a master? Again, they don't think of themselves as masters, and they want to believe that there's some kind of magic in this fully drafted contract. When they see a form or a contract, they think I shouldn't touch this because I shouldn't play with magic I don't understand. They're hesitant to make any changes, even if those changes are necessary for their clients. This results in a lack of action—they just don't want to tamper with that magic. They want to leave things as they are as much as possible.

Unfortunately, we can't, like they do in Harry Potter, give them a book of spells that tells them exactly how to perform each of these magical tasks. But, what we can do is give them exposure. We can show them lots of different contracts, lots of different forms. We can talk to them about what's good and what's bad in a particular form and help them understand how to use those good and bad templates in the future in their own practice.

Now, a little bit about forms—I think they tend to get kind of a bad rap. They're like the character Snape, who in the end everybody knows is a good guy. Sorry if you haven't made it to the last (book of Harry Potter), I should have given you a spoiler alert. But throughout the story, he kind of has a bad rap. Forms, bad rap or not, are a reality of practice. I know that my experience was very much like what Tina Stark described in the previous session—sink or swim. My experience happened on the first day at the firm where I was working as a newly admitted associate. The senior partner told me, "I need you to help me draft a ground lease for such and such business." I didn't know what the words ground and lease meant when used together in that context. I had never seen one before. I was able to find a few different ones to look at and that's where I started. Okay, so forms are out there and like me new associates are relying on them. I think a lot of what we do in practice is take a look at what has happened in other cases and other transactions and try to mimic those things. This is no different with forms and templates.

While I know they have a bad rap, I think they can be really helpful. However, I think that they're more helpful if you understand how to read them, so everybody take the materials that Tina presented and apply those concepts to get the ground level understanding of the forms being used. Beyond that, they're also helpful to develop a sense of knowing what you should take, what you should amend, and how the attorney should move forward from there.

Now, let's talk specifically about the fears of law students and newly minted associates. First, there is this fear of change. There's the worry that if I make a change and it's a wrong change, am I going to get in trouble? There's a fear of change, generally. If things have been done a certain way throughout a number of transactions, should I try to change what's happening in those transactions? Tied this general fear to the fear of failure, and it's compounded. It may result in something going bad for your client; or even if somebody catches it before it goes bad for the client, you still kind of get in trouble for that error.

Next, add in the fear of disappointment. You've changed something. It's wrong, and now they may have a lower expectation of your abilities, etc. You're upsetting others. Again, you get something wrong, you've upset people. You've done something to disappoint your clients, your partners, etc. They're upset that you didn't know the right thing or didn't do the right thing. Finally, there's the general fear of leaving your comfort zone. These are fears that are typical in numerous situations. It doesn't have to just be in relation to forms, but you can see how all of these fears kind of pile up together and really give you hesitation to change something. Especially if you believe that you don't know any better, so you believe the form is just fine because it's worked before. For example, this has been a successful lease in the past. Or, this has been a successful transaction in the past. Because of all of these fears, I'm not going to tinker with it too much. I'm going to change the names of the parties. I'm going to change the addresses in here, and then I'm just going to leave pretty much everything else the same that doesn't seem like it's relevant to my client.

How can we get rid of these fears? What should we do to dispel them? There are three things I'll talk about that can aid in dispelling these fears. They are exposure, understanding, and repetition. First, there is exposure. If you can give students more examples, they're going to have more information, and with more information, they can make better decisions and become better evaluators. The second piece is helping students to understand the information that they're getting. This step has a lot to do with understanding contractual concepts, the different pieces of contracts, and all of the different kind of theoretical pieces underlying a particular area of law. There are whole classes on those topics. And, in the previous session, Tina described how you can have a whole class just on reading a contract. Part of the challenge is getting them through these first couple of steps so that they can understand what they're reading and then repeat the process over and over again.

One of the key pieces in using forms is giving students tools or guidelines for selecting and evaluating forms. In this age of Google, you can go on a computer and type in a certain type of transaction or a certain type of form and get hundreds, if not thousands, of hits, and then what do you do with all of that information? Exposure to lots of different examples is helpful, both good and bad examples are necessary. I think there's something to be said for seeing something done well, but something equally important is seeing something done very poorly. If you can give them a spectrum, that's great.

Explain to students how to evaluate the source. Where is this form coming from? Who are the likely drafters? What was the perspective or position of the drafter in this form? What was the opposing position? Does it appear that both parties had input on the form? Is it something that's very one-sided? Exposure helps student understand how to select and evaluate forms on that basis.

Another topic to focus on is spending time on actual research of forms. I have a background in librarianship, so I always think about research no matter what I'm doing. I don't think we spend a lot of time on the idea of form research, in law schools generally, when form research is a skill and there are resources that students could be using. There are data banks. There are publications (professional publication, practice guides, CLE materials, etc.) and then, of course, there are just the examples that you can find on the internet. Understanding the different authorities and the different weight we might give to each of those different kinds of documents is an important skill for students to develop. If forms aren't used in a drafting class, students aren't likely to have another opportunity to develop this skill.

Finally, give them a process. I always feel like if you have a checklist or a process to do something, it feels like you have more of a safety net. If you can walk through step-by-step and check off that you've gone through each step, you feel more confident that you're moving in the right direction. Now, we know that we can give students processes, and they can still go in the wrong direction. But a process also helps us, as teachers, because then we can see where they're going off in the wrong direction because we can walk through each step of the process. It helps them. It helps us, and it gives them something they can take from the classroom into practice. If you've got a step-by-step process that you use to evaluate forms, to revise forms in class, and it's something that they can just walk out the door and apply directly; it gives them a little more confidence when they leave the classroom, which is really important. In all of the different reports that have come out about legal education, one of the biggest complaints is that we don't always teach skills in the way that enables students to transfer the knowledge and apply it in the field. This is one method that can be provided to remedy that defect in legal education.

This is the process that I use because I like formulas. And related to that, I also don't like reinventing things that are already great. I use a process that Wayne Schiess from the University of Texas introduces in his book, *Preparing Legal Documents Nonlawyers Can Read and Understand*.¹ I don't take credit for this process, but I do use it in my teaching because I find it to be very helpful for students. It's a clear and easy step-by-step process that they can take away and use in practice. The five steps in the process are: read, list, organize, rewrite, and revise. Let's go through each one.

First, read. Read every word in the document. I think this is an important skill in transactional drafting, in particular, that students take for granted. They think they can read a provision and have a general understanding of it even if they're kind of just skimming through the different provisions. But, you have to impress upon them the importance of reading every one.

¹ Wayne Schiess, *Preparing Legal Documents Nonlawyers Can Read and Understand* 1-10 (2008).

It's helpful to remind students that, just like in their doctrinal classes, if they don't understand something in the document, they should look it up. What's really important here is that sometimes you might have to look things up not just in *Black's Law Dictionary*, and maybe not even the regular dictionary, but that you may have to look at the industry-specific language that's in the contract. It's important for students to understand that there may be a difference in how language is used in a particular industry.

Related to that is reminding students to keep in mind the client's needs while they're reading the form. It is important, at this point, to get them to think about their reading of the form as one for comprehension as opposed to one with an eye towards editing, or using the form in the future. They are focused on looking at the form to understand the substance.

The next step in the process is to create a list. I sometimes think of "list" as creating categories. What are the main points in the documents? What are the different categories or ideas that the form is trying to achieve? Going through each clause or section and saying, what purpose does this seek to achieve? Always encourage thinking about the "why" behind each piece of the form.

Then, the next step is organize. You've got these categories or lists of things. Now, let's put them into different categories or sections within the basic contract structure. First, establish the big picture structure and then determine what each of the subsections is within that structure. Think about how the pieces fit together? Does a different organization than the original form make more sense? What's most logical? Etc. At this stage it is the student is thinking about, how does this flow from beginning to end, as opposed to being tied to the original structure of the form.

The fourth piece is to rewrite. The Schiess book advocates for the use of plain language, and in the drafting course, I also advocate the use of plain language. I think that across the board—most folks are advocating in favor of plain language. Although, I do always tell my students that they should take the time to get to know what the practice is in their particular firm, in their practice area. If there are things that we would take out because they seem like legalese, but they're customary in the area of practice, and it would be looked negatively upon if they took it out; students should make sure they're aware of anything like that. But, otherwise, I do advocate plain language.

As you're rewriting, again, there should be a focus on the client's needs. What can you take out of the form that you're modifying? What might you need to add? And then, in addition to substance, what other elements of document can be rewritten? These might be things like font size, listing with bullet points, using headings—because if you look at a lot of form documents, the aesthetics are often lacking. Often a form is difficult to read, not necessarily because of the language; although, that might be part of the problem, but because it's just difficult to actually read. It may be in tiny print. It may be presented in a dense,

single block of text. Thinking about how you can make something more readable in terms of the visual aspects is important as well.

The last step is to revise. Of course, I also teach first-year legal writing, and I tell my 1Ls and my upper level students that they should spend as much time editing as they do writing. Again, there needs to be an emphasis on the client's needs—even in the revision process. This time focus on reading the full document that you've redrafted for clarity. Have you clearly indicated the points that you wanted to emphasize or clarify? Then, go back to your list of content, where you may have made some notes about what you needed to add or remove, and make sure you can check off that you've added or removed. Have you amended all the things that you noted? Is all of the original content you wanted to retain still there?

Those are the steps. Now, we'll walk through just a quick example of the process. Here is part of a race waiver:

I know that running/walking in a road race is a potentially hazardous activity. I should not enter and run/walk unless I am medically able and properly trained. I agree to abide by any decision of a race official relative to my ability to safely complete the run/walk. I assume all risks associated with running/walking in the RACE on May 5th 2012, including but not limited to falls, contacts with other participants, the effects of the weather including high heat and/or humidity, low temperature, traffic and conditions of the road, all risks being known and appreciated by me.

Having read this release and knowing these facts and in consideration of your accepting my entry, I, for myself and anyone entitled to act on my behalf or on behalf of my estate, waive and release RACE ORGANIZER and all sponsors of the race, any other persons assisting with the race, the officers, Board, Board members, agents, servants, employees, and their successors and assigns of each and every of the above from all claims or liabilities of any kind arising out of my participation in the run/walk even though the liability may arise out of negligence or carelessness on the part of the persons referred to in this waiver.

I also grant permission for the use of any photographs, motion pictures, recordings or any other record of my participation in this event for any legitimate purpose. I understand that if the race is canceled because of circumstances beyond the control of the race committee and sponsors, including, but not limited to unsafe weather conditions or governmental ban, my entry fee will not be refunded.

I do lots of races, and I have found that they are a great source of terrible writing across the board. For this exercise today, we're just going to look at the very first paragraph because there are enough things in that single paragraph to revise without going through the entire waiver that will take up the remainder of my time for this presentation.

Here's just the first paragraph. I'll give you an opportunity to read it either here or on the sheet of paper that was passed out, and then we'll walk through the next step. But I won't read it aloud to you.

I know that running/walking in a road race is a potentially hazardous activity. I should not enter and run/walk unless I am medically able and properly trained. I agree to abide by any decision of a race official relative to my ability to safely complete the run/walk. I assume all risks associated with running/walking in the RACE on May 5th 2012, including but not limited to falls, contacts with other participants, the effects of the weather including high heat and/or humidity, low temperature, traffic and conditions of the road, all risks being known and appreciated by me.

After reading the language of the form, the next step is to list, and because I didn't know if we'd have enough time to walk through this together, I did start pulling these pieces together beforehand. Going back to the original paragraph, these are the things I identified as the types of things the contract intended to achieve.

- Acknowledge potentially hazardous activity
- Acknowledge need to be medically able and trained
- Agree to abide by decisions of race officials regarding safety relating to ability to finish race
- Assume risks of race on date
- List of some potential hazards relating to the race

The main points seem to be acknowledging that this is a potentially hazardous activity, acknowledging the need to be medically able and trained to undertake the activity, agreeing to abide by decisions of race officials regarding safety and the ability to finish the race, assuming the risks of the race on the date, and then listing some of the potential hazards of the race. Those seemed to be the general points that first paragraph sought to achieve.

Next, I organized those points into three broader categories: acknowledgment, assumption of risk, and agreements. As part of the rewriting process, I started by taking a look at the different acknowledgements: acknowledging that running a road race is a potentially hazardous activity and then as a sub-point, what are some of the potential hazards that are listed, acknowledging and understanding that you shouldn't race unless you're

medically able to do so. Assuming the risk became a second category, and the last category was agreeing to abide by the decisions of the race officials. Here's a rough version of a rewrite:

- Acknowledgments
 - I know that running in a road race is potentially hazardous activity.
 - These hazards may include, but are not limited to the following...
 - I understand that I should not enter the race unless I am medically able and appropriately trained.
- Assumption of Risk
 - I assume the risk...
- Agreement

I agree to abide by the decision of the race official relating to...

After that, I would tweak it and add the full language; revise it to maybe look something like this. Category 1. Acknowledgements. I know that running or walking in a road race is a potentially hazardous activity. These hazards may include, but are not limited to, and then the list. And then with the list, I will note that I did make some punctuation changes adding semicolons and commas to kind of break up some of the related risks that seemed to be squished together in the original. I'm aware of these risks and appreciate the dangers they represent. I also understand that I should not enter the race unless I'm medically able and appropriately trained. I felt like these were all the original acknowledgments, the assumption of risks, and a clearer statement that I assume all the risks related to the race and then the agreement to abide by race officials relating to safety.

Acknowledgments

- I know that running or walking in a road race is a potentially hazardous activity.
- These hazards may include, but are not limited to falls; contacts with other participants; the effects of weather such as high heat, humidity, low temperature, and precipitation; and traffic or other conditions of the road.
- I am aware of these risks and appreciate the dangers they represent.
- I also understand that I should not enter the race unless I am medically able and appropriately trained.

Assumption of Risk

- I assume all the risks related to this race.

Agreement

- I agree to abide by the decision of the race official relating to my ability to safely complete the race.

Presented this way, it's clearer than the original, which was just this big block paragraph. Personally, if I participated in a race and they presented me with something like this, I might take the time to read through what I was agreeing to, as opposed to signing my name at the bottom and then paying them my money and continuing with the race.

Those are the steps. It's a fairly clean process. It allows students to have a good idea of what they should be doing at each step. It allows them to go back and check what it is they should be doing and what it is they're trying to accomplish. It provides them with a way of thinking throughout the process about their client's needs as opposed to being focused on the original form, and how right or wrong the original form was. Using those steps, I definitely think your students can be on their way to becoming a master of the forms instead of being held back by their fears related to changing or using forms. Thank you.

Stephen L. Sepinuck

Drafting Through Form Annotation

I'm Steve Sepinuck. I'm at Gonzaga University School of Law, and I'm going to begin in a somewhat strange area, I think. I'm going to talk briefly about skills training, in general, and sort of lead up to where we're going about annotating forms.

At Gonzaga, we formed a commercial law center about 6 or 7 years ago, and we invited some judges and practitioners, from around the country, even some academics at other schools, to become part of a board of advisors. We tasked them with telling us what junior associates need to be able to do, not just what they need to know, but what they need to be able to do. And this list is a distillation of their collective advice. It includes some things, like ethics, that they didn't touch, but basically this is the list that we got from our board of advisors.

I won't spend a lot of time explaining what each one is, but just to give you an idea, so, communication, what they meant by that was the ability to communicate effectively with non-lawyers, including the ability to ascertain what the client's true desires are through interviews, the ability to explain legal issues to a client for types of terms, understanding the distinctions among and the appropriate use of covenants, conditions, representations, warranties, discretionary authority, declarations, all the stuff that Tina talks about in her book on contract drafting.

So we came up with this list, and then it was, okay, well that's a great list. How do we do it, and also, in what order do we cover these? And there's remarkably little literature, at any level, on the sequencing of skills training. I mean grammar school, law school -- there's very little literature on the sequencing of training and skills.

I did find one article from the mid-80s that led me to categorize them into three general groups. First, there are information skills. Do you know what you're talking about? Can you communicate that? Then, there are critical thinking skills, getting you to question what it is you're doing and thinking about it critically. Then, strategy skills require higher levels of thinking and often some creativity. And the article I read suggested you've got to cover them in this basic order. You've got to do the information skills first. Then you can move to the critical thinking skills, and then finally the strategy skills. So, for example, in my first year second semester course, which is called transactional skills and professionalism lab, we do not attempt to cover strategy skills. We save those for a future course, in contract drafting. So when I'm thinking about those, like how would you structure a transaction tool to minimize or avoid fraudulent transfer risk. They're 1L students. They haven't even finished taking contracts yet. They don't have the ability to do that kind of stuff, so we're going to save those skills for later. But we do want to help them get some information skills, and we do want to, at least, introduce them to critical thinking skills.

Now, one of the exercises that I've developed, which we're going to talk about today, is annotating a form. This is a form (promissory note). Well, as we've just talked about, one of the challenges for teaching transactional skills is showing students how to use a form properly. They're all going to use them. They get into practice. They're either going to be at law firms that have forms for particular deals, or they're going to use a form book, or they're going to start with a form that's been created by the opposing counterparty's attorney. Everybody in practice uses forms.

Most lawyers, and certainly most law students, are extremely hesitant to change them. They're holy writ. It doesn't matter that they may have been written by men in white wigs or may have been written in a century, you know, before the existing law was enacted. They were just reluctant to change the forms because they assumed the authors of these forms were more knowledgeable than they are. After all, they're law students.

So, I use this annotation exercise as a way of helping them gain confidence that they have the ability to change them. And there are two, I think, collateral benefits to this exercise. First, it emphasizes the importance of knowing the applicable law. Some students falsely have the view that their doctrinal courses and their skills courses have very unrelated focuses that they don't learn doctrine in their skills courses and they don't learn skills in their doctrinal courses. And that's just wrong, and I think this helps bridge that gap. It helps illustrate the importance of while we're working on skills, and they know they're working on skills, that they have to worry about what the law is. And it helps bridge the gap between the information skills and the critical thinking skills, so that's also why (it's here).

Okay, so what is this exercise? Well, I give them a form, and this last year, I gave them this promissory note and highlighted six clauses on it. I said for each of the highlighted clauses, identify its purpose, explain why it is or is not necessary, and explain why, if at all, it

should be revised. I made clear this was a research exercise. They were not to intuit the answer. They were to go figure out what it is. I'll get to whether that worked.

Okay, so let's just talk briefly about what these terms are. You may not be familiar with promissory notes. The first one, pay "to the order of." The note could have said "pay First National Bank." But it says pay "to the order of." I suspect almost everybody in this room understands the importance of those words under Article 3 of the Uniform Commercial Code. Those are the magic words of negotiability. Without those words, this is a nonnegotiable note. With those words, it might be a negotiable note. So for the uninitiated, you might think, oh I can get rid of those words. That's just legalese. But no, you don't want to get rid of those words if you want to have a negotiable note.

The interest is computed on "a 365/360 basis." This one you might be able to intuit. It's a method of calculating interest that divides the state of the interest rate by 360 to calculate the daily interest rate. But it actually multiplies it by 365, so you end up having an interest rate that is 1.01389 times the stated interest rate. Some courts treat the clause as creating an ambiguity because the actual interest rate is in fact not the stated interest rate. But in any event, without that language, you probably couldn't use this formula because it's increasing the interest rate. So if you wanted to use that formula, you probably have to have this language.

I love the next one. Each payment made, on this note, "shall be applied first to interest accrued to date of payment and then the principal." Why would you have that? Well, if interest accrued only on principal and not on unpaid interest, then you could see why the lender might want the interest to be paid first all while interest is otherwise accruing on the principal. So this would be very useful language, if, in fact, as many promissory notes provide, interest accrues only on the principal. The trouble is the note already says interest accrues on all unpaid balances, so this is probably not necessary. In other words, it already provides interest accrues on interest. So I'm not sure that this clause serves any purpose. I could go through the rest of these, but you get the idea. Some are absolutely critical. Some might have no use whatsoever, and some are maybe relevant to what the parties want a deal to be. But it could be changed if the deal were otherwise.

We'll talk about the second to the last one. "Maker hereby waives demand, presentment, protest, and notice of protest and of nonpayment." Boy that sounds like legalese. Well, those are all different things. Demand is a request for payment. If the note is a demand note, then the waiver of demand presumably doesn't obligate the need to actually request payment. If the note is payable at a specified time and not through a bank, demand is not required. So, in other words, waiving demand probably doesn't mean anything. It would have meant something perhaps prior to the amendments to Article 3 in the 1990s, but this was probably a form that was drafted decades ago, and it is not clear that language is needed anymore. Presentment is a demand for payment that allows the payee to

demand that the payor exhibit the note. This is often impractical, and, hence, it's very often waived. Waiver of presentment is also waiver of notice of dishonor under Article 3, so you don't need to have waiver of dishonor if you've waived presentment. If you research the law, you might decide, well this is an antiquated clause. I can get rid of some or all (of it). Maybe I'll choose to keep it, out of an abundance of caution, but at least you're making that decision knowingly.

How did the assignment work? It was a dismal failure. In spite of what I thought were my very clear instructions that this was a research project, and they were supposed to research the law, they all tried to intuit the answers, and of course, they didn't get them. So what I did then is I gave them my answers to the first two, and I said go back and do the other four now that you have a model of what I meant by the first two. When I do this assignment next semester, I'm going to give the students an example of one or two annotations at the beginning.

The second time around, they did a lot better. I really think my examples opened up some of their eyes.

So what we're going to do now is, I hope, open up some eyes for you because you are now going to annotate a form. You represent the bank that uses the form guarantee on the next page. It's in your materials, and I'm also going to put it up on the screen. I've given you in the materials the research, so you don't have to go to the library -- to annotate. You need to figure out the purpose and utility of each of the highlighted clauses. But I'll make it simple for you. I'm going to give you about 10 minutes. You can do it alone or with the person next to you, but I'm going to have you each only work on only one of them. So if you're in the first two rows, please work on the first blue phrase. If you're in the next two rows, please work on the second phrase. If you're in the fifth row, please work on clause 5, the third blue phrase, which is (the clause numbered form). And if you're in the last two rows, please work on #7. I'll come around and kibitz, which is what I do in class, and help you out if you get in trouble, but I'll give you 10 minutes to work on it.

Okay, well I know you may not be finished, but I want to plow through the exercises nonetheless and see what we've learned. Again, the goal here is not to teach you the law of suretyship. It's to work on the whole concept of annotating the form. So Scott, I'm going to call on you just because I know your name. So we got this phrase: "This is a guarantee of payment and not merely of collection." What's that?

Audience: Well, I certainly understand the drafter's intent was to avoid having this obligation being considered a secondary obligation, which (under the risk statement) would then require certain events to have occurred, such as an unsatisfied judgment or (insult letter and solvency proceedings).

S. Sepinuck: Okay, so --

- Audience: That's its purpose, is to try to create a primary guarantee obligation.
- S. Sepinuck: I'm going to be Socratic here. Aren't all guarantees creating a secondary obligor?
- Audience: That is true, but, at least as I'm reading the law right here, at least for a guaranteed contract, only if they are words of -- that if you call it a guarantee of collection or its collection guarantor, there are additional steps or additional events that need to occur before you can go against the guarantor.
- S. Sepinuck: Right, for all guarantees, you've got to have a nonpayment by the principal before you can collect, but if it's a guarantee of collection, then you have to do more. Under the restatement, you've either got to get an execution of the judgment that's returned unsatisfied against the principal obligor or the principal obligor has to be insolvent or in the insolvency proceeding or the principal obligor cannot be served with process or it's otherwise apparent that payment cannot be obtained against the principal obligor. So, in essence, there's a condition before you can go after the guarantor for payment. It's not just that the principal obligor hasn't paid. It's that you've tried to collect, basically, and haven't been able to do it. Whereas, if it's a guarantee of payment and not a guarantee of collection, those conditions do not apply. So all you need to show is that the principal obligor didn't pay, and you can go right after the guarantor.
- So this phrase seems a little stilted, and you might question whether it's necessary, if you don't know the law, but in fact it's quite important to the terms of the guarantee. So this would be probably a phrase that my students should not change. They should perhaps consider its wording, but they should certainly not get rid of it because it would significantly change the deal. And this is a phrase you will find in pretty much any commercial guarantee because the lender always wants it to be a guarantee of payment [inaudible].
- Audience: So if the, restatement isn't actually a statute, just a summary, but if the guarantee says nothing about primary or secondary, isn't the assumption that it's a primary obligation?
- S. Sepinuck: Not in the language of the restatement. A guarantee is -- creates an obligation of a secondary obligor.
- Audience: Okay.

- S. Sepinuck: So it's secondary in the sense that you only go after the guarantor if the principal obligor has default.
- Audience: Yes, I understand that, but if you make no reference to the idea that it's a collection guarantee, you don't have to hit these other steps. You know, the obligee is not required to establish insolvency or non-satisfaction of judgment, etc, if it's silent.
- S. Sepinuck: Yeah, great question. If it's silent, do you have a guarantee of collection or do you have a guarantee of payment? I think in most jurisdictions, but not all, you will have a guarantee of collection, so it will be problematic, hence, why you need this language in there. Okay.
- Audience: Don't you see from time to time though a process in the guarantee that kind of explains the -- you know in the event of a default by the principal obligor, then they'll call on the guarantee. And I'm just kind of curious in that situation because you have, obviously -- I guess what I'm getting at is without that language in the guarantee, if you have an actual process here that talks about we're going to call on you when you have the default. We're going to go through that. Does that kind of take care of it also?
- S. Sepinuck: It might.
- Audience: You know what I'm saying?
- S. Sepinuck: Yeah, you could describe the process in which liability accrues. Unlike to the order of, which are magic words, which you don't want to change at all, you could phrase this another way. The courts will find various phrasings to lead you to a guarantee of payment rather than a collection, absolutely.
- Okay, the nature of the guarantee. And we have these wonderful words here: continuing, absolute, conditional, and irrevocable.
- Audience: I am not completely sure, but just looking through here, it terminates upon death, and as far as the secondary liability, you have to agree to that. It seems that there would be more language if the intent was actually (to continue).
- S. Sepinuck: Oh, so you think continuing is about surviving the death of the guarantor.
- Audience: Well possibly.

I think it means that they extend additional credit, that your liability continues on to that further -- an extension.

S. Sepinuck: Right, a continuing guarantee is what covers future obligations of the principal obligor. So to the person, who's unaware of the law here, you might think these are all kind of saying the same thing. In fact, they're saying quite -- or at least three very different things. "Continuing" is about the future obligations of the borrower, the principal obligor, so you're guaranteeing not just this car loan but future loans you make to the -- the creditor makes to the borrower.

Alright, what about "absolute"?

Audience: It doesn't require any notice.

S. Sepinuck: Notice of what?

Audience: I don't know. It doesn't require -- notification is not essential to acceptance of an offer (but advancing) money on credit.

S. Sepinuck: So you don't have to notify the guarantor of acceptance of the guarantee. So basically, it's binding even if the lender hasn't notified the guarantor, yep I'm accepting this guarantee. So it's kind of a technicality designed to get around what might be the law in some jurisdictions. What about "irrevocable"? Alright, we'll let's skip that for a moment. What about "unconditional"? Unconditional appears to be synonymous with "absolute." I can't find anything in the law or restatement that suggests that word somehow has a meaning other than "absolute." "Absolute," I think, is you can't take it back. We really mean it. "Irrevocable" is a little different. A continuing guarantee, one that's going to continue -- cover future loans -- is revocable to the future loans. It's not revocable, as to the loans already made. But it is revocable as to the future loans unless you say it's irrevocable. So if you want a continuing guarantee, you probably also want it to be irrevocable.

So you get through all this. You realize, well I definitely, as a lender, want "continuing" to be there. If I want "continuing" to be there, I definitely need "irrevocable" to be there. "Absolute," obviate the need for notification. "Unconditional," that may not be needed -- maybe I can get rid of that. It doesn't mean anything, or maybe I keep it because somebody in a powdered wig put it in the form, but at least I know what I'm talking about.

Okay, let's do one more here, or let's do two more.

- Audience: By the way, the only answer of an irrevocable continuing here [inaudible] obligation. You know what I mean?
- S. Sepinuck: Well, you can cap it a certain amount, but yeah it is. But when you think about when they're typically used, the lender is loaning money to a small business and it's getting a guarantee from the principal owners.
- Audience: Sure.
- S. Sepinuck: So it's -- basically we set up this LLC or this corporation to limit liability, but that's to limit the tort liability. It's not to limit the credit liability because the creditor won't let you limit it.
- Audience: Right.
- Audience: Are you saying that a better way to draft this would be -- like for the continuing statement to have a definition that says what "continuing" is or include something here that says what that means?
- S. Sepinuck: No, I am suggesting something far less significant. I'm suggesting before my students can begin to think about whether or not to change the form, they need to know what the words mean.
- S. Sepinuck: Yeah, I do understand that.
- Audience: And me, with my experience with guarantees and drafting, I would -- this is very standard language. You'll find this in forms used by major firms and in small deals. I don't think these terms are typically defined or explained in guarantees.
- Audience: So part of your goal here is not making the form more understandable to the guarantor?
- S. Sepinuck: Oh no. No, no, no. I teach secured transactions and you know those security agreements are not written to be understood by the debtor. They're written to be understandable to the creditor. They're not written to be negotiated. I certainly wouldn't have objection to making them more understandable, and there are going to be other terms we're going to get to in a moment that I think should be changed, but -- and in other types of contracts, that indeed would be involved. I am contemplating using, as a basis for our final project next semester -- we have a local vendor, who has a winery. And I've met with him and reviewed some of his contracts. And he has great purchase contracts that are kind of interesting. He also leases vines. I had no idea that some vendors leased vines. So he

gets about half his grapes from leasing certain vines that certain growers maintain. And those are really interesting deals, and I was just thinking of having him to come in, but that's an agreement that I would want easily understood by both parties as a way of helping to avoid litigation later.

Audience: What do you make of Section 48 in this waiver that suggests that -- the point about not saying that the duty is absolute or insufficient or ordinarily not sufficient?

S. Sepinuck: There a whole lot of suretyship defenses. Things like, oh you didn't perfect your security interest in the collateral, or you released the principal obligor when you shouldn't have released the principal obligor. So when you go through the suretyship defenses, there are a lot of them, and let me just stop for a moment. If any of you have ever worked with guarantees, you know that there is not a guarantor in the world that has ever voluntarily ponied up money when you've called. They don't do that. So the debtor is often insolvent, doesn't put up a fight. The guarantors put up a fight. They always put up a fight. And guarantors have a lot of defenses available to them, which can be waived but "unconditional" is not adequate waiver. So if you wish to waive suretyship defenses, you've got to use other language to do that, and I'm glad you asked that because that would be a point to really bring home to the students: wow, there are all these other defenses that are really important. You know as the lender, you want the guarantor to waive but making the guaranty "unconditional continuing, absolute, and irrevocable" will not suffice.

Okay, so this is revival and reinstatement. So this is a clause that reports to revive a surety's obligation. If the payment is an avoidable preference or a fraudulent transfer, then the creditor is required to return the payment. So in other words, the creditor got paid presumably by that principal (owner), which would normally discharge the guarantee. Then, the debtor goes into bankruptcy, for example and it's determined that the payment that the debtor already made is an avoidable preference. The creditor has to regurgitate it, and the idea of this clause is to say, okay, therefore the guarantee is revived. If we have to disgorge the payment, as the creditor, the guarantee comes back.

But that probably is the law. There are a bunch of cases out there that say that's the law. The restatement says that's the law, so this clause, while certainly being cautious, you might want to have it in there, but that might not be necessary. That said, what the restatement says is that if the creditor returns the payment pursuant to a legal duty to do so, then the surety's, the guarantor's obligation automatically revives. So what if you return it

not pursuant to a legal duty, in other words, not to a court judgment? What if the trustee in bankruptcy sues you for a preference or calls you and says I'm going to bring a preference action, and you look over the facts and go, oh yeah, alright, you've got a pretty good one. And you just repay. It's not clear then if the language of the restatement, which you know, it's not a statute. It's a restatement of the law, but it's not clear then if that will kick in. So you really probably do want a clause to make it clear that if you settle a claim, saying that the payment was avoidable then revise the guarantee. But this language may not do that. So oddly enough, this is written in such a way that it may not do the one thing you need it to do, which is go beyond what the law provides. And so, you know, that would be another good object lesson for the students.

Let's just go to the last one.

Audience: [Inaudible].

S. Sepinuck: Sure.

Audience: This may be splitting hairs about a subject I know very little about, but isn't there a difference between avoid and avoidable? So the fact that it would be avoidable doesn't mean that it is, in fact, [inaudible] dead, and so therefore that was my issue with it. Is it the fact that it's avoidable mean that they've actually been required yet to repay or restore? I had a problem with characterizing it as an avoidable transfer in the first place. I would have said it was subsequently declared to be void, and then I would have used a defined term that played on the void, as opposed to avoidable, which doesn't state that they have in fact been required to refund.

S. Sepinuck: A couple of things about that. First of all, in bankruptcy, they're called avoidable transfers, so it's avoidable not voidable, so it's not void. And the transfer is avoided, in bankruptcy. So I would be very reluctant to refer to the payment as void. There's probably no reason why the debtor's payment was improper or ineffective when made, so I would be very reluctant to say that.

Now if we look at what it says as a whole, for any reason it's declared to be void or voidable, under state or federal law, and if creditor is required to repay or restore such voidable transfer, then as to that amount, the guarantee revives. So I think it's saying, hey you have to repay it. But the problem is we've got this "declared to be" language. It doesn't say who's doing the declaration. Is it the guarantor? No, it's probably a court, which is a problem if repayment is voluntary.

- Audience: Well, in that case, would the other part be -- you know I was picking on the voidable part -- you know the bankruptcy language. Then would the void part be kind of useless and superfluous there?
- S. Sepinuck: It might be. It's probably there as an abundance of caution just in case, for example, it was a payment by a corporation that didn't have authority to make a payment. It was [inaudible]. I can't imagine why [inaudible]. Eric, do you have a reason why our payment might be void?
- Audience: It was an impermissible transfer from corporate [inaudible] corporation [inaudible] distribution is impermissible [inaudible].
- S. Sepinuck: That's about all I could think of. I think that's an example where you might leave it in under an abundance of caution.
- By the way, I took this clause, unlike the rest of it, which I got off the web -- I took this clause from my law firm's standard guarantee. And when I looked at it, I was like oh s**t. And I went back and I talked to the partner, with whom I work with, and he said, you know we should rewrite this a little bit. And he's one of the best lawyers I've ever met, and I think I caused him not to sleep for several nights.
- So, waiver of a right to a jury. What's the problem, right? People do this all the time. What's the problem for someone who worked on it?
- Audience: Well, you've got to know what state you're in.
- S. Sepinuck: We're governed by California law.
- Audience: [Inaudible] because there's a statute in California that [inaudible], and it's the case that interprets the statute.
- S. Sepinuck: That says what?
- Audience: You got to have a pending case in order to waive jury trial.
- S. Sepinuck: You cannot have a pre-dispute jury waiver in California. A case called *Grafton*, and I don't remember the year but it's like 2005 I think. Pre-dispute jury waivers are invalid in California, and businesses have tried to get the legislature to change it. They haven't changed it yet. They're probably not going to change it. That's just the way it is in California. So this clause is meaningless given that our guarantee expressly says it's governed by California law, which then gets to a really great question. Is it ethical for the attorney to

put this clause in knowing that it's ineffective? And then I can have a great discussion with my class about that. Well, maybe the law will change, in which case maybe it'll become retroactively effective. Or, you know, well what if your real objective is you're hoping that the guarantor won't know it's ineffective and will lose his rights or her rights. Is that an ethical approach, and they're a couple of opinions of this. There's a state bar opinion that contrasts and almost contradicts an ABA opinion with very different views about whether it's ethical for the attorney to knowingly put a clause in that is unenforceable. So that's one of the things I like to talk about. And this is, by the way, the exercise I'm going to be using next coming semester.

So we do this and they learn -- what do they learn? I need to know the law before I can begin to modify or even frankly understand a form. So I have to do research. Once they have that, they gain confidence in their ability, their judgment, and their knowledge to make changes. And then the next step is we do that. So the third step in the project today, which of course you didn't do, is revise it, so that's what my students work on next is, okay let's revise the clauses that need to be revised. And if you take nothing away from this exercise, like oh I don't want to do this exercise, don't do that -- that's crazy, take away this one little piece. You don't have to have students work on whole contracts (at a time). You can have them work on one clause at a time. You know, if you teach contracts, and you don't want to have a whole contracts drafting exercise, have them draft a merger clause. There are lots of ways to draft a merger clause; some ways better than others depending on the nature of the deal. If you want to have an exercise on some little clause, have an exercise on (some little clause).

Audience: [Inaudible] know the law and knowing this document, knowing what your client's trying to accomplish because you run into this provision and you go oh we can't do what they wanted to do, with this approach. What if they put an arbitration clause --

S. Sepinuck: Yeah, great. We can have an arbitration clause, and that will effectively waive jury and that is enforceable in California.

Audience: Sure.

S. Sepinuck: Absolutely. You don't like the law?

- Audience: No, I'm dying to know the difference between the state and ABA. Which one went which way?
- S. Sepinuck: If you give me your card, I'll send you copies of it. They're hard to find actually because the Maryland -- you know I've got like a PDF of it somehow. I don't remember how I got it because it's old. It's from like the 80s and the ABA one is also that time period.
- Audience: Do you have discussions with the students about who's going to pay for them to do this research? I mean if they go to a big firm and they're working out a big transaction, who's going to have time to do this and how do you address that?
- S. Sepinuck: So the short answer to your question is no. I don't, in part because my students aren't going to go work for big firms. I'm lucky if they're employed. Frankly, I'm lucky if I'm employed. I guess my answer to that, and I know it's not really responsive, is I don't want them to care about that. I want them to know that they have to know the law. It's not an option. If they have to eat the cost themselves, then they eat the cost themselves. But this is an essential aspect of doing the job, of drafting the agreement, and it's not something that can be avoided.
- Audience: We've had that come up, and my answer to that is we have a mix of small firms [inaudible]. You're competing, now, not with other lawyers. You're competing with Legal Zoom. And so that understanding [inaudible] is how you kind of get the client not the drafting necessarily. So who's going to pay you to do this, nobody initially, but long-term, this is what's going to provide you value, in the small firm market.
- S. Sepinuck: Yeah, when your client gets screwed because of some other document -- excuse me, not your client. Your client's adversary gets screwed because of some document, boy you're the lawyer that person's going to come to then.
- Audience: I have a [inaudible] to that in a little different way. I'm two worlds, too. I'm adjunct and I practice, so I teach how to do the wonderful contract blah, blah, blah, nice architecture, nice tight wording, low passive voice, which makes the contract four times [inaudible] lots of white space and sculptured. You give it to the client and they go I like the old one better. It's shorter. But I go it's also less (thick), but that's not relevant. This is digestible. But what's your argument? [Inaudible] crossed that bridge and said listen this is good. Here's

the drawback. Why don't we justify it to the client because the client's obviously, put it all on one page. You know it doesn't matter what it is. Put it on one page.

S. Sepinuck: Because the client wants to be able to understand it.

Audience: Well (Titanic contract) was on one page but [inaudible] know based on [inaudible].

S. Sepinuck: I don't know. Let me throw that out. I've never had a student ask me that.

Audience: I used to have a response to my clients, when I was practicing and I would say okay which ones of your rights do you want me to leave out. I mean --

S. Sepinuck: Which one of your children do you want me to sacrifice?

Audience: Which one of these concepts do you want to leave out because that's the only way I can get it on one page cause that's --

Audience: [Inaudible] to students is try to put the deal points up in the first few pages because the client who tries to read through may get to page 5. It's not likely they're going to get all the way through, but if they see that the deal has been properly memorialized, they'll be okay.

And the point about Legal Zoom, my wife does estate planning (and elder law). And her shtick with her clients is look, the forms are free. The documents are free. What you're paying for is my expertise and guidance and planning that helps you. And I use that with my students all the time. You're going to get a lot of clients who went to Legal Zoom and got in trouble because they didn't understand what they were doing. [Inaudible].

S. Sepinuck: And, you know, this one of the clauses, on this exercise, I would rewrite. I think when I rewrite it, it would be shorter, kind of broader. I would broaden the scope of this clause, but I would probably do it in fewer words, so that's another thing you can tell your students. You can make it better. That doesn't mean you have to make it longer.