Drafting Construction and Design Contracts and Settlement Agreements

Carl Circo

**Basic Information**

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| class meeting details  [e.g., in-person meeting times, remote schedule information] | Class Structure:    Experiential, simulation course |
| Instructor Contact: | Office Hours: |

**Other General Information**

This syllabus provides information about course requirements, policies, grading, and the main topics covered. All reading assignments will be available either on Blackboard or through databases available to you.

Learning Objectives. Through a series of lessons and writing exercises, including a major project due around the end of the term, you will refine your understanding of legal drafting as applied to construction industry contracts and settlement agreements. When you have completed this course, you should be able to advise and assist clients in: (1) selecting and preparing standard design and construction contracts; (2) adapting standard design and construction contracts to a client’s specific circumstances; and (3) drafting contracts to implement agreements settling construction industry disputes. While the exercises for this course involve legal relationships in the construction industry, the contract drafting skills you will develop are broadly transferable to other areas of law practice.

**Assigned readings and related resources**

Assigned readings. As noted above, you will access the main reading assignments via Blackboard and databases available to you. We will frequently refer to contract forms promulgated by industry groups, such as those published by the American Institute of Architects (AIA), the Engineers Joint Contracts Drafting Committee (EJCDC), ConsensusDocs, and other industry organizations.

**Grading**

Grading will be based on (1) performance on contract drafting assignments that I designate for grading (approximately 50% of the final grade), (2) participation in-class discussions of contract drafting issues and exercises (approximately 20% of the final grade) and (3) a major drafting assignment toward the end of the term (approximately 30% of the final grade). The grading process will include written feedback on assignments. In keeping with the accreditation standards and law school policies for upper-level writing courses, you must submit the first version of the major drafting assignment to me for my comments, must meet individually with me for a conference to discuss my comments, and must submit a final version that adequately responds to my comments.

*Artificial Intelligence:* Artificial intelligence may not be used to generate content for any graded assignments (unless otherwise specified). Any use for those purposes will be treated as serious violations of professional ethics and the student code of conduct. During the term, we may take some time to discuss how artificial intelligence might be useful in preparing documents in the practice of law.

**Blackboard**

For general course management purposes, I will use Blackboard, and you should consult Blackboard regularly throughout the term for important course information and announcements. This will include, among other things, a copy of this syllabus and supplemental information about assignments.

**Outside Preparation**

In accordance with ABA requirements and law school policy, the structure of this course anticipates that for every hour of recorded lecture time you should spend an average of at least two additional hours reading, reviewing, preparing for or conducting assigned exercises, studying, or otherwise engaging with course materials. You must also devote substantial time outside of our class sessions to completing the drafting assignments.

**Contacting Me Outside of Class**

You may contact me by email to schedule an appointment, or you may ask questions via email. Please allow adequate time for me to respond to your messages. Questions sent via email can be especially helpful because they allow me to consider whether the topic raised is something that I should address in class.

**[Add relevant institutional information, such as regarding disability accommodations, student services, and other procedural or policy matters]**

**Lessons**

Each Lesson consists of one or more readings assignments, one or more in-class discussion topics for participation credit, and one or more drafting exercises (individually graded).

Lesson 1 Basic Contract Drafting Principles

Reading assignments: Tina L. Stark, Contract Drafting Basics: Translating the Business Deal into Contract Concepts, 20150930A NYCBAR 27 (2015 WL 6394812); Carl J. Circo, The Evolving Role of Relational Contract in Construction Law, 32 Construction Lawyer 16 (Fall, 2012)

In-class discussion: [conventional structures and layouts of transactional contracts, including construction industry form contracts; drafting recitals; drafting representations and warranties]

Graded exercise: [using plain English and the active voice revise a sample provision]

Lesson 2 Working with construction industry form contracts

Reading assignments: [selected sections of] Bruner & O’Connor Construction Law, Chapter 5 (Standard Construction Contract Forms: Analysis of the AIA General Conditions); Neale T. Johnson & Kristen Rectenwald Wang, Anticipating and Allocating Risks in the 2017 AIA Owner-Contractor Agreement, 39 Construction Lawyer 35 (Fall 2019); selected alternative owner-contractor forms

In-class discussion: [compare and contrast selected risk allocation provisions in designated alternative industry forms, such as termination clauses, and claims procedures]

Graded exercise: [draft selected supplemental conditions for a standard industry form contract for a hypothetical client and project]

Lesson 3 Design services agreements for construction projects

Reading assignments: Shiva S. Hamidinia, The Misadventures of Shared Design Risk in the New Design-Build World: Managing Design Risk and Responsibility on Federal Design-Build Projects, 38 Construction Lawyer 7 (Spring 2018); Joel D. Heusinger, Ambiguity Breeds Conflict: The Importance of Defining “Design-Assist” in the Construction Industry, 11 No.1 J. of Amer. Coll. of Construction Lawyers (Winter 2017)

In-class discussion: [sample intellectual property provision]

Graded exercise: [draft provisions allocating shared design risks]

Lesson 4 Contracts for alternative project delivery systems

Reading assignments: Justin L. Weisberg & Raymond M. Krauze, Opening Communication Lines: Evolving Project Delivery Methods to Promote Collaboration, 38 Construction Lawyer 14 (Spring 2018); Jean M Terry, E. Mitchell Swann & Carmela Mastrianni, Managing Integrated Project Delivery, 42 Construction Lawyer 5 (Summer 2022); Patricia D. Galloway, The Art of Allocating Risk in an EPC Contract to Minimize Disputes, 38 Construction Lawyer 26 (Fall 2018)

In-class discussion: [defining reimbursable costs for a GPM contract]

Graded exercise: [draft selected provisions for an EPC contract]

Lesson 5 Contracts with subcontractors and suppliers

Reading assignments: Danielle Meyer, Rowan Mason, & Bryan Van Lenten, Ways to Address Cost Escalation and Supply Chain Issues, 17 No. 1 J. of Amer. Coll. of Construction Lawyers (Winter 2023); Anthony J. LaPlaca, On the Effective Use of Liquidating Agreements, 39 Construction Lawyer 20 (Summer 2019)

In-class discussion: [cost escalation clauses]

Graded exercise: [revise selected provisions of sample liquidating agreement for a hypothetical project]

Lesson 6 Construction loan agreements

Reading assignment: Dianne s. Coscarelli, The Construction Loan Agreement: Six Provisions Important to Lender's Counsel, Prob. & Prop., Jan/Feb 2001, at 30; Sample Construction Loan Agreement

In-class discussion: [conditions precedent to initial and periodic disbursements of loan proceeds]

Graded exercise: [revise sample default provisions of loan agreement for a hypothetical project and client]

Lesson 7 Joint venture agreements

Reading assignment: John I. Spangler & Deborah Cazan, Construction Joint Ventures—Essential Terms, Representation Issues and Potential Claims, 42 Construction Lawyer 5 (Fall 2022)

In-class discussion: [scope, capital contributions, and profit and loss sharing provisions for a joint venture agreement]

Graded exercise: [draft provision for management of a hypothetical joint venture]

Lesson 8 Public-Private Partnership agreements

Reading assignment: Ross J. Altman, Public-Private Partnerships in Construction, SU010 ALI-CLE 571; Sample P3 Agreement

In-class discussion: [review selected provisions of a sample design-build-operate-manage agreement for a P3 project]

Graded exercise: [draft selected provisions of a concession agreement for a hypothetical P3 project]

Lesson 9 Settlement agreements

Reading assignments: W. Alexander Moseley, Drafting the Arbitration Clause to Avoid Common Complaints, 8 No. 1 J. of Amer. Coll. of Construction Lawyers (Febr. 2014); Charles Sink, Drafting Disputes and Damages Clauses to Avoid Both, 15 No. 1 J. of Amer. Coll. of Construction Lawyers (Winter 2021)

In-class discussion: [review claims and disputes provisions of alternative standard industry forms]

Graded exercise: [draft an agreement implementing a proposed settlement of a hypothetical dispute]

[Add information on major project, such as drafting a complete contract for a hypothetical client and project, along with a related memorandum to the client explaining key aspects of the contract.]