



ARTICLE

Should Students Read and Apply Cases in a Contract Drafting Class?

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I've been looking for ways to teach contract drafting to my students in a way that is more like what I did in practice. Teaching students to write clearly and unambiguously is an important component of any drafting class. But students need to also learn how to apply the statutes and cases to contract clauses. When I practiced law, I contributed to the substance of the documents I drafted so I thought my students would be better prepared if I had them read and apply cases in my class.

1. Background

In my contract drafting class I had been teaching students how to draft a clear and well-organized contract from scratch using a well-regarded and established textbook in which the author provides examples of different types of contract provisions and proscribes detailed writing, rules for drafting each provision “correctly.”¹ I would review the writing rules in class, assigning the students a

¹ For example, an obligation must be drafted using the word “shall.” Using any form of the word “agree” is incorrect. But if the obligation is subject to a condition, then the word “must” is the correct word to use. Outdated words like “whereas,” “above-mentioned”

contract to draft, and grading them on how well they drafted the contract following the rules. The problem is that this exercise was very different from what I had done when I drafted contracts in practice.

In practice, I was almost always using sample contracts or “form” documents. I was not drafting from scratch. And my job was to revise the substance of the form so that they reflected the terms of each deal. I was not hired to change the sample document (e.g. to change “agrees” to “shall,” delete any legalese and write large numbers numerically). Rather, I was responsible for ensuring the document was not only clear and well organized, but that it reflected the applicable law. To do that, I sometimes had to research the enforceability of certain types of provisions and apply statutory or case law to determine the best language to use. Because I wasn’t covering any of this in my contract-drafting class. Therefore, I decided I needed to change the course to give the students a better idea of how lawyers draft contracts in the real world.

2. Implementation

One of the ways I made my class more like what I did in practice was to create an exercise that taught students to apply a case to a contract provision. To do this, I first researched the enforceability of a specific type of contract clause, looking for cases in which the court refused to enforce the clause for reasons that could be addressed by a lawyer drafting the applicable language. Once I had found the cases I wanted the students to read, I drafted a sample clause containing the types of problems that were addressed in the cases. I didn’t want the students to brief the cases. Instead, I wanted them to concentrate on the language in the clause at issue and the reasons the court refused to enforce that language. And I wanted them to think about how the issues in the case could be addressed by a lawyer editing a sample clause. To help students focus on these things, I drafted questions for the students to answer for each case they read.

For example, I found several Florida cases in which the court refused to enforce a release of future claims clause for reasons that could have been addressed by a drafter. To demonstrate how to address the issues raised in the caselaw, I created a sample release that differed from the clauses involved in the cases but was deficient for the same reasons. Additionally, I wrote the sample so that it violated some of the rules in the textbook. Here is the clause I gave the students:

and “herein” may never be used. Also, numbers must be spelled out if the number is less than ten but written numerically if the number is greater than 10.

Employer takes reasonable precautions to protect employees from injury. But accidents still happen. Accordingly, Employee hereby releases, remises and forever discharges Employer from and against any and all claims and causes of action which Employee had, has or may have against Employer for injuries suffered during the course of the construction services provided herein.

Initially, I asked the students to revise the clause based on what they learned from the textbook. They changed the sample language to delete the words “hereby” and “herein” because they are legalese. They revised “any and all” and “releases, remises and forever discharges” because those are of what the text refers to as “couplets and triplets.” And they also revised “during the course of” because, according to the text, that expression is pretentious and verbose. Here are those changes to the sample language:

Employer takes reasonable precautions to protect employees from injury. But accidents still happen. Accordingly, Employee ~~hereby~~ releases, ~~remises and forever discharges~~ Employer from ~~and against any and~~ all claims and causes of action which Employee had, has or may have against Employer for injuries suffered during ~~the course of~~ the construction services provided ~~herein~~ pursuant to this Agreement.

Next, I suggested to the students that the real problem with the provision is not with its form but with its substance. In some states, a release of future, unknown claims is unenforceable no matter how clearly it is drafted.² In other states, a release of future claims is enforceable as long as it is “clear and unequivocal.”³ I then had my students read the Florida cases I had found to see if more revisions were appropriate.

The cases I assigned were *O’Connell v. Walt Disney*,⁴ *Van Tuyn v. Zurich American*,⁵ and *Murphy v. YMCA*.⁶ For each of those cases, I posed the following questions: (1) What happened to the plaintiff? What was the accident that occurred? (2) What was the text of the exculpatory provision the plaintiff signed?

² E.g., *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 452 (Cal. 1963) (holding the release of future claims is not enforceable if the public interest is involved).

³ E.g., *Theis v. J & J Racing Promotions*, 571 So. 2d 92, 94 (Fla. Dist. Ct. App. 1990) (an exculpatory clause properly drafted can effectively bar recovery for a party’s own negligence and gross negligence).

⁴ 413 So. 2d 444 (Fla. Dist. Ct. App. 1982).

⁵ 447 So. 2d 318 (Fla. Dist. Ct. App. 1984).

⁶ 974 So. 2d 565 (Fla. Dist. Ct. App. 2008).

(3) What rule did the court apply to determine the enforceability of the provision? (4) Why did the court refuse to enforce the language? What was wrong with the way it was written? And, (5) how would you revise the sample release to reflect what you learned from reading the case?

3. Student Response

My students responded enthusiastically to the idea of including an exercise like this in class. We had a robust discussion about the law and how to apply it to the language in the release clause. I think students appreciated taking a break from writing rules. They also appreciated the substantive analysis making the course more like the other legal writing courses the students had taken, and more consistent with what they expected from a law school course.

While I did not encounter any problems with incorporating this exercise into my drafting course, I think it would have been more realistic if I had the students do the research. If I had done that, I would have also reviewed the cases they found and narrowed the list before assigning them to apply the law to the sample contract language. But even without students doing their own research, I think having students review the case law was an effective way to expose the students to the substantive aspect of drafting.

4. Conclusion

By including exercises like this in my contract drafting class, I think I make the class more like practice. In practice, substance is more important than form; and one of the things lawyers do to contribute to the substance is apply case law to the clauses they draft. To answer the question, I proposed in the title to this article, “yes, students should definitely be reading and applying cases in a drafting class.”

5. Sample Exercise

Here is the exercise I did in my drafting class. After we revised the sample release to make the language clearer, we went through the list of cases I gave them. The first case was *O’Connell v. Walt Disney*.⁷ That case involved a child who was injured by a stampede of horses while horseback riding. The child’s parents

⁷ 413 So. 2d 444 (Fla. Dist. Ct. App. 1982).

sued for negligence, claiming an employee of Walt Disney had caused the stampede.⁸ And Walt Disney defended alleging the parents had signed the following assumption of risk and waiver:

I consent to the renting of a horse from Walt Disney World Co. by Frankie, a minor, and to his/her assumption of the risks inherent in horseback riding. I agree, personally and on his/her behalf, to waive any claims or causes of action which he/she or I may now or hereafter have against Walt Disney World Co. arising out of any injuries he/she may sustain as a result of that horseback riding, and I will hold Walt Disney World Co. harmless against any and all claims resulting from such injuries.⁹

The court in *O'Connell* found that exculpatory clauses are enforceable, but "they are looked upon with disfavor" and "any attempt to limit one's liability for his own negligent act will not be inferred from an agreement unless such intention is expressed in clear and unequivocal terms."¹⁰ The clause did not specifically state that it included claims based on Walt Disney's own negligence.¹¹ Therefore, the release did not bar recovery for injuries resulting from such negligence.¹²

To apply the rule of *O'Connell*, we decided that we should revise the release to mention negligence and add assumption of risk, like the provision involved in the case. We revised the original clause as follows:

Employer takes reasonable precautions to protect employees from injury. But accidents still happen. Accordingly, Employee releases Employer from all claims and causes of action which Employee had, has or may have against Employer for injuries suffered during the construction services provided pursuant to this Agreement, including claims and causes of action based on Employer's own negligence. Employee assumes the risks inherent in the construction of single-family homes.

We then addressed the other two cases. In *Van Tuyn v. Zurich American*,¹³ a bar patron fell from mechanical bull and brought a claim against the bar for personal injuries. Prior to riding the bull, she signed the following release:

⁸ *Id.* at 446.

⁹ *Id.* at 445, n.2.

¹⁰ *Id.* at 446.

¹¹ *Id.* at 447.

¹² *Id.*

¹³ 447 So. 2d 318, 319-20 (Fla. Dist. Ct. App. 1984).

I hereby voluntarily assume any and all risk, including injury to my person and property which may be caused as a result of my riding or attempting to ride this Bucking Brama Bull. In consideration for CLUB DALLAS permitting me to ride such amusement device, I hereby voluntarily release, waive, and discharge CLUB DALLAS, Marr Investments, Inc., their lessors, heirs, successors and/or assigns from any and all claims, demands, damages and causes of action of any nature whatsoever which I, my heirs, my assigns, or my successors may have against any of them for, on account of, or by reason of my riding or attempting to ride this Bucking Brama Bull.¹⁴

Like the court in *O'Connell*, the court stated that for an exculpatory clause to be effective, "it must clearly state that it releases the party from liability for its own negligence."¹⁵ In addition, the court added that, to prove assumption of risk, the defendant had to show that "the particular risk was known or should have been known and appreciated by the person injured."¹⁶

Like the waiver in *O'Connell*, the release in *Van Tuyn* failed to state that it covered the defendant's own negligence.¹⁷ Also, the defendant failed to demonstrate that "the plaintiff fully understood the risks and dangers involved in riding the mechanical bucking bull in question."¹⁸ Therefore, the release did not bar the plaintiff's claims.¹⁹

Based on the *Van Tuyn* case, the students agreed they should further revise the lease to not only mention negligence but also disclose the risks and dangers involved in the applicable activity, so it would be apparent that the signer understands what she is relinquishing. Thus, we added some additional language to the end of the clause:

Employer takes reasonable precautions to protect employees from injury. But accidents still happen. Accordingly, Employee releases Employer from all claims and causes of action which Employee had, has or may have against Employer for injuries suffered during the construction services provided pursuant to this Agreement, including claims and causes of action based on Employer's own negligence. Employee assumes the risks inherent in the construction of

¹⁴ *Id.* at 320.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 320.

¹⁸ *Id.* at 321.

¹⁹ *Id.*

single-family homes, including the risks and dangers associated with use of electric saws, nail guns and other power tools and equipment by Employee and others, the unfinished condition of the property, any holes on the property, protruding utilities, and any unfinished structures and uninstalled appliances.

Finally, in *Murphy v. YMCA*,²⁰ a member of a recreation facility was injured using facility's exercise equipment. She sued the YMCA for damages, and YMCA defended based on her signing the following release:

I understand that even when every reasonable precaution is taken, accidents can sometimes still happen. Therefore, in exchange for the YMCA allowing me to participate in YMCA activities, I understand and expressly acknowledge that I release the Lake Wales Family YMCA and its staff members from all liability for any injury, loss or damage connected in any way whatsoever to my (or my children's) participation in YMCA activities, whether on or off the YMCA's premises. I understand that this release includes any claims based on negligence, action or inaction of the Lake Wales Family YMCA, its staff, directors, members and guests.²¹

The court found that the language in this release was confusing because it "suggests that the YMCA will take "every reasonable precaution" against accidents" but then absolves the YMCA from liability for "any claims based on negligence."²² According to the court "a reasonable reader might be led to believe that the waiver of liability extends only to claims for injuries that were unavoidable "even when every reasonable precaution" had been taken by the YMCA."²³ Because of that potential confusion, the release did not operate to bar the plaintiff's claims.²⁴

Based on *Murphy* the students wanted to delete the first two sentences of the revised release. Explaining that accidents happen even with the Employer taking reasonable precautions may seem like an appropriate justification for the release, but it confuses the issues since the signer is releasing the Employer whether reasonable precautions are taken or not. Thus, the final version of the release the class drafted omitted the first two sentences.

²⁰ 974 So. 2d 565, 566 (Fla. Dist. Ct. App. 2008).

²¹ *Id.*

²² *Id.* at 568.

²³ *Id.*

²⁴ *Id.* at 568-69.

~~Employer takes reasonable precautions to protect employees from injury. But accidents still happen. Accordingly, Accordingly,~~ Employee releases Employer from all claims and causes of action which Employee had, has or may have against Employer for injuries suffered during the construction services provided pursuant to this Agreement, including claims and causes of action based on Employer's own negligence. Employee assumes the risks inherent in the construction of single-family homes, including the risks and dangers associated with use of electric saws, nail guns and other power tools and equipment by Employee and others, the unfinished condition of the property, any holes on the property, protruding utilities, and any unfinished structures and uninstalled appliances.

After applying those five cases to the drafting of the sample release clause, I concluded this exercise by going back to the original language that we had revised for clarity and asked if it was enforceable. The class unanimously agreed the clause would not have been enforceable the way it was originally written. Although the black letter law is that the release must be "clear and unequivocal," Florida case law requires more than that. The drafter needs to spell out what types of claims are being waived and what types of risks are being assumed. So, reading and applying Florida cases to the sample clause we were working with turned out to be a critically important part of drafting that clause.