CONTRACT DRAFTING: SEMINAR STYLE

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The Citizen and the Coffee House

During these discussions, the students referred back frequently to the principles they had discovered from CLUG. At the end of the course, they were asked to hand in their written reactions to the game.[8] A sampling:

> "I enjoyed playing CLUG. There were times when my inability to quickly understand what was happening to me in terms of money amounts made it impossible for me to understand what was happening to the CLUG city. I imagine that much of the mess of our cities is caused by similar problems."
>
> "I grew very fond of CLUG during the weeks that I played it this Spring. * * * The game makes apparent the interdependence of the various aspects that compose a viable city and the need to carefully establish priorities in our development."
>
> "Each city we built turned out to be a place where I would not want to live. * * * There should have been a point at which we could decide what we wanted for our city without being subject to the pressure to gather assets."

All of the students considered CLUG an unusually effective teaching device, a conclusion with which I wholeheartedly agree.

CONTRACT DRAFTING: SEMINAR STYLE

JUSTIN SWEET *

For the past several years I have offered a seminar in Contract Drafting to third-year students at the University of California School of Law at Berkeley. The principle purpose of the seminar is to provide a bridge between legal education and the contract drafting aspects of law practice. To try to accomplish this objective, the seminar simulates the contract drafting activities of a law office. The students learn by doing the prescribed problems, by comparing their work with that of fellow seminar students and by having their work evaluated by practicing lawyers.

Organization Aspects

I limit enrollment to twelve third-year students. More than this number would create an intolerable time burden for me and dilute the individual treatment that can be given to the students. Usually there are more students desiring to take the seminar than can be accommodated.[1] With the exception of

[8] Anonymously or not, as they chose.

* Professor of Law, University of California (Berkeley).

[1] One year a second section taught by a practicing attorney was offered. Since much of the success of the seminar depends upon the law office "atmosphere," one obvious question relates to the desirability or possibility of such a "skills" seminar being taught by a practicing lawyer.

When a practitioner taught the drafting course at Berkeley, he relied heavily upon the format I had developed. He made some changes, notably of subject matter, to suit his own interests. Also, his absence from the law school (he taught at night) was less of a handicap, since I handled much of the administration along with my own seminar. Finally, he lived near the school and had a strong interest

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students who have already been accepted for or have already taken another law office skills type course, selection is at random. Generally the seminar consists of a group that mirrors the third year class. Usually there are a few Law Review students, a few marginal students and the balance fall into the large mass which comprises about 80% of the class.

The student is given two units of credit for the course. This means roughly thirty class hours. The classes are given in two hour sessions every Friday afternoon from 1 to 3 p. m.[2] When the course is given in the first semester, as it has been for the last several years, I conclude the seminar before the Christmas recess. There are about thirteen weeks of class work.

Originally the seminar was offered in the final semester of the third year, since at that stage of law school the student has had the maximum amount of substantive courses and is about to enter into practice.[3] While I assume that a third year student can handle any type of legal drafting problem without regard for whether he has taken any particular course in law school, the more substantive law he has had, the better. In past years drafting problems have involved the Robinson-Patman Act, the Sherman and Clayton Acts, restrictive covenants on competition, Architect Contracts, Employment Contracts, Indemnification Contracts, Secured Transactions, Bankruptcy and Mechanics Lien Laws. Also in the final semester student motivation seems to be at its lowest ebb. We hoped that a skills course in the final semester would increase student interest and motivation.

Two years ago I was asked to give the seminar in the *first* semester of the third year because we needed more seminars in that semester. For the reasons given, this time is somewhat less satisfactory. But giving it in the first semester has not materially hampered the problem selection or quality of work. No doubt some of the problems are new to the student. Generally he has had enough exposure in his two years of law school substantive law to be able to identify the legal problem and find some help.[4] All things considered, the second semester is better but the first is acceptable.

in the law school and legal education. He taught the course several times. Student comment was very favorable. Time pressures forced him to give it up.

With a carefully selected practitioner plus administrative support and counseling from a faculty member, a practitioner *can* be used. Without such a favorable arrangement, I doubt the use of a practitioner would be successful. It cannot be a job which the practitioner "tosses off" simply to supplement his income. He cannot rely solely on his experience. He must plan and consider teaching technique. Even under the best circumstances, he will need to teach the seminar 2–3 times before it can run smoothly. Unfortunately, just when things are going well, the practitioner may not have the time to devote to the seminar.

[2] The Friday class time will be explained when I describe the method of discussing student work through visting attorneys.

[3] For my view on the importance of substantive law see Sweet, *The Lawyer's Role In Contract Drafting.* This article is in manuscript form and will be published shortly.

[4] There is an incidental student benefit in having the course given in the first semester. Many job placements are made in Spring. If the student has completed the seminar by then, a positive recommendation from me can assist him in getting a job. Also, prospective employers ask for student written work as a means of evaluation. If the student has completed the seminar, he will have an impressive portfolio of his work. Of course both advantages can operate if the seminar is given in the second semester, but perhaps to a lesser degree.

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Drafting Problems

Though I have never worried about student copying, I do change the problems from year-to-year. This has its disadvantages. Problem creating is time consuming and hard work. Also, minor revisions of past problems could lead to the development of a finely honed set of drafting problems. But changing the problems expands my knowledge of substantive law and drafting practices as well as avoids the boredom which can result from repeating problems.

In the fall of 1967 Problem I [5] required each student to read carefully three Owner-Architect Form contracts published by the American Institute of Architects in 1958, 1963 and 1966. Students were put in the position of representing a client who is about to hire an architect. The students were informed that the architect had agreed to use any of the three A.I.A. forms, and the student had the duty of recommending the A.I.A. form offering the best protection for his client. The students were given the basic terms of the deal and asked to amend the form they selected, as needed, to make it conform to the basic deal previously agreed upon between the architect and client.

Problem I was intended to expose students to carefully drafted form contracts and to make them compare different clauses dealing with the same subject. To select the optimum form, the student *must* review the forms thoroughly. Care is also needed to ensure that nothing in the form chosen is contradictory to the deal. (A by-product which has considerable educational value is that students see the development of a form contract. Each new A.I.A. form gradually diluted the legal responsibility of the architect while spelling out the architect's duties, compensation, and other terms in much greater detail.)

Problem II required the student to draft a few selected clauses to be included in a contract. In 1967 the students were asked to draft a clause liquidating damages and one excusing delays caused by certain events for inclusion in a form construction contract. Students were also asked to draft a very specialized type of liquidation of damages clause for a particular transaction. They also drafted a memorandum analyzing the enforceability of their clause.[6]

In Problem II, the students are *not* given the entire form construction contract. Drafting a few clauses without seeing the rest of the contract is unrealistic. However, the main purpose of Problem II is to *gradually* expose the student to drafting and to have him see the back drop of substantive law.

[5] A copy of the Problems and Drafting Exercises used in 1967–8 is given in the Appendix. When I once described this seminar to Professor Stewart Macaulay of the University of Wisconsin Law School, he stated that any article describing it would be useless without a copy of *specific* problems used. Those readers bored by the Appendix need not read it. Those readers who are *still* irritated should write Professor Macaulay.

[6] The aspects of professional responsibility relating to drafting are a recurring theme in the seminar. Should the lawyer include a clause he believes to be unenforceable? Will the answer vary depending upon whether the clause is an unreasonable covenant not to compete in a contract with a key executive as opposed to a release requested by a hospital when a patient is admitted? Students frequently ask such questions of the practicing attorneys who visit the class. Unfortunately, the Canons of Ethics are almost entirely oriented toward obtaining clients and the lawyer's role in litigation and furnish no help on this problem.

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If a student asks about the other clauses, I tell him what is in the rest of the contract form. While each student *could* be given a copy of the rest of the contract, this would increase substantially the already formidable administrative cost of this seminar.

Problem III, IV and V all required students to draft full contracts. III dealt with a purchase of some vacant lots to be used as a building site. IV dealt with employing an architect to perform architectural services. V dealt with the purchase of an expensive custom-made machine with interim payments and resulting security problems.

The subject matter for student work must be selected carefully. The instructor *must* be reasonably familiar with the subject matter of the transaction. When I have occasionally slipped up on this, the problems have been unrealistic and the student morale suffers. If the student thinks that the instructor does not know what he is doing, the course will fail. The success of this course depends upon student motivation. They will work hard if they believe that the work is real and relevant.

Topics selected have to be reasonably understandable to most students. Difficult subject matter necessitates an enormous amount of preparatory hours. It is better for the student to do more simple contracts than a few complicated contracts. Each succeeding problem is made more difficult than the preceding one.

Problems I–V required the student to draft a contract where the deal had essentially been concluded by others. In Problem VI, the students negotiated and drafted a contract. The primary purpose was to make students aware that working on an agreement *jointly* is different than drafting a contract after the deal has been concluded. The students begin to realize that much depends upon the bargaining position of the parties. Also they recognize the occasional necessity of omitting certain terms because the parties cannot agree on specific contract language or result. They also see the need in negotiation to put off certain drafting decisions by providing that the parties will agree to agree or leave the determination of unresolved questions to third parties.

In the negotiation problem it is even more vital that the students be given a subject they can understand. For the past few years I have been giving negotiation problems which have involved some aspects of the practice of law. As illustrations, I have used a contingent fee contract, the sale of a law practice and, this year, the leasing of law office space.

For the negotiations, I divide the students into two groups of six students each. One student from each group of six negotiates with another student from the other group of six. Six negotiations go on simultaneously. Each student in the group of six receives the same secret negotiation instructions and bargaining limits.

While students are working on Problem VI, two guest attorneys conduct a mock negotiation in class. There are obvious elements of unreality to the mock negotiation. Also, the demonstration and the comments of the participants do not develop negotiation "rules". Yet, the mock negotiation still has substantial pedagogical value.

The demonstration and the question and answer period show that negotiation is a highly personal art. Students see that much depends upon the clients,

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the customs within the negotiation community, the bargaining situation, the personal style of the negotiator and other subjective factors. Hard and fast negotiation "rules" are dangerous. Students do learn there is no substitute for careful preparation for a negotiation. They also learn that bargaining power itself does not necessarily determine what goes into a contract. There are times when a dominant party will make a concession to the weaker party, either because he is persuaded that the request by the weaker party is fair, or because the matter is not sufficiently important to quibble about. Finally, the mock negotiation is a welcome change of pace from the class sessions where students and their work are on the hot and often uncomfortable griddle.

Problem VII deviates from contract drafting. Here the students draft legal memoranda and opinion letters related to a hypothetical fact problem which has arisen. The opinion letter is a proposed draft which the student submits to a senior attorney for his review prior to being sent out. The memorandum contains the facts, legal authorities and analysis to back up the opinion letter. The opinion letter is supposed to be short, easily understood by the client and designed to give the client legal advice. Such advice relates to suggested action or inaction and the risks to the client of such action or inaction.

The factual setting of the memorandum and opinion letter assumes that one of the contracts which the student has drafted has gone into effect. This method of integrating the prior drafting problems with the memorandum and opinion letter problem should point out to the student some of the drafting inadequacies of his prior work. It does have the disadvantage of more or less destroying the "neutrality" of the memorandum and opinion letter. Students are usually defensive about their own drafting and are often unable to step away from their work and evaluate it honestly. However, the lack of neutrality is outweighed by the advantage of having the student work with his own draft so that he can see how it works in practice.

The hypothetical factual problems upon which the memoranda are based may go beyond the contract itself and involve ancillary questions such as bankruptcy, licensing laws, injuries, indemnification and other substantive questions.

In past years I have designed individual problems for each student. This requires much work. But individual "tailoring" of the problem can focus more accurately upon drafting weaknesses. This year the first six students were given such individual problems, the next three were given a common problem and the last three were given a second common problem. This meant that I had to do only eight problems rather than the usual twelve. The same fact hypotheticals tied to different drafts done by each student can mean some of the students will have an easier time of it because their draft covers the problem better. In a sense, this can be a reward for having done a more careful job. However, this does not give them sufficient practice in legal research and writing. Perhaps the best compromise is to draft four different fact problems to be given to the twelve students.[7]

[7] The students need three to four weeks to do a decent job on Problem VII. Since the class critique of VII spans 2 to 4 weeks, depending upon whether I have one or two 2 hour sessions per day, I stagger the assignments of VII. This means

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Distribution, Deadlines and Critique of Student Work

Each student does his own work in all problems except the negotiation problem. The student is given a sketchy memorandum at the beginning of each problem which is similar to the type of drafting instructions which are often given to young lawyers. Because of this sketchiness, the student is given the opportunity to interview the client (I act as the client) to fill in the fact gaps, as well as ask the client's permission to incorporate certain "lawyer" clauses in the contract. Some students do a thorough job of preparation and interviewing. Others do not take adequate opportunity to interview the client and to raise the relevant questions. These students frequently get pressed for time and are likely to make any drafting decisions which normally would require approval by the client.

Each problem has specific page limitations. This limitation relieves me and visiting attorneys from an unreasonable amount of draft reading. Also, page limits force the students to select those provisions which are essential and free the contract from unnecessary clutter. Problems I and II are limited to 2–4 pages, while Problems III, IV, V and VI are limited to 5–6 pages. The opinion letter is limited to 3 pages, single spaced and the memorandum, 25 pages, double spaced. All the students must turn in reasonably typed work.

Problems must be turned in promptly on Monday morning. The completed problems are reproduced by my secretary in sufficient copies so that each student, myself, and any guest lecturers will have copies of each student's work. Copies should be made by Tuesday afternoon and mailed to any visitors immediately. They are distributed to the students on Wednesday. This gives the visitors and students two days to look over the material. The classes in which the material is discussed are conducted on Friday afternoon.

I divide the primary responsibility for the student work among the two visitors and myself. This means that where there are twelve contracts, as is typical, each guest attorney has primary responsibility for four and I have the primary responsibility for four. Nevertheless I must carefully review each of the twelve contracts. This is to protect me in the event a guest cannot come at the last minute or that the guest has not adequately done his homework.

There is more than enough to discuss in this two hour class period. Some students have suggested that the class period during which student work is discussed be increased to three hours. I find that approximately half the twelve papers can be discussed with reasonable completeness during the two hour period. However, I try to make some comments on each student's work. Students want their work discussed in class. Students freely participate in the discussion. We may discuss paper by paper or topic by topic.

Drafting Exercises

I make a few changes each year in the seminar, partly to try to improve the course and partly to avoid routine and repetition. This year I tried

that as soon as III is turned in, I create Problems VII's for three students based on their Problem III's. When IV is turned in, I create problems for three more students. When V is turned in, I create problems for the remaining six students. This means that some students have a bit more time than others, and that some students have a heavier work load earlier and finish their seminar work in 9–10 weeks. Neither has provided difficulty in seminar administration.

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laboratory drafting through Drafting Exercises. While students are working on contracts, there are frequently class periods which have to be filled in. Usually students get 2–3 weeks to do a problem. At certain points in the course, the students have received a problem, but have not yet turned it in.

In the past I filled these class gaps by bringing in guest lecturers to present substantive material relating to the contracts upon which the students were working. Often these lectures were not successful, because of insufficient preparation by the lecturer, because the students had not yet gotten deeply enough into the problem to appreciate the substantive matter presented, or because lectures in such a context tend to be dull.

This year I used the interim two hour class periods to give the students drafting exercises modeled on laboratory techniques used in the physical sciences. I would prepare a very simple drafting problem and distribute the drafting problem to the entire class. I would then divide the students into three groups of four each and ask them to collectively draft the clauses requested in the drafting problem. The groups were placed in separate small seminar rooms. They would work on the problem during the first hour. While they were working, I would go from room to room to answer questions, offer advice and see how they were going about their work. A copy of a drafting problem is reproduced in the Appendix.

At the end of the first hour I would collect the completed clauses, have them reproduced and distributed to the class. During the second hour we would compare the drafts. The students seem to enjoy this laboratory drafting. The more drafting students do, the better they get. The Drafting Exercises are certainly preferable to the former given lectures.

Use of Visiting Attorneys

Outside practicing attorneys are used to evaluate student work in Problems III through VII. Since this is an essential feature of the seminar, I would like to make a few comments upon the use of visiting attorneys. Attorneys often ask students if cases they have cited have been Shepardized up to date, and if statutes cited have been checked to make certain there have been no changes. Visitors berate students who cite secondary authorities when there are applicable cases. They criticize the not infrequent citation by students of opinions from other jurisdictions when the pertinent jurisdiction has a large volume of case law. Sometimes guests are critical of students who have downgraded the facts and rely too heavily upon judicial language. On the other hand they will attack broad "public policy" statements (which students are prone to make) and demand citation of authority.

As for style, attorneys attack poor spelling, bad grammar and obscure writing. Most criticize the use of legalese, although very creative and off-beat drafting (such as casting a *force majeure* clause as one dealing with disruptive events or replacing the "tried and true" hold harmless clause with one labelled allocation of risk) usually raises a few unhappy eyebrows.

In the memorandum and in the opinion letters critique, guest attorneys often criticize students who have not attempted to find a solution to a problem that will avoid litigation. Guests frequently suggest to students that they should skeptically view many of the statements made to them by their own clients. They urge students to check upon these statements without seeming

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to lack confidence in their clients' veracity. Guest attorneys frequently praise students who suggest a creative solution to a problem which has not been thought of by the parties and which can keep the parties reasonably happy.

Students often ask questions relating to fees, billing procedures, collection, law office economics, forms files and formbooks, and those aspects of professional responsibility which relate to the office lawyer.

Students seem to enjoy the visits and comments of practicing attorneys. In the drafting area they are more impressed with the "attorneys out in the real world" than they are with remarks made by an "academic" lawyer.

The range of comments and suggestions by ten to fifteen practicing attorneys show students that there are great differences of opinion among attorneys as to how counselling and drafting matters should be handled. Also, such exposure to the "bar" gives students, for better or worse, a good picture of the way practicing lawyers look at law and how they regard their profession.

There are public relations advantages to the use of visitors. Usually Alumni feel a sense of re-identification with their law schools. Attorneys generally get a chance to see what *is* happening in legal education instead of assuming it is the same as when they were in law schools. If asked, attorneys make an honest effort to come. They enjoy a student audience. They pontificate, at times to an embarrassing degree, on law generally and legal education especially. But most make a positive effort to bring "the real world" to the classroom.

For my purposes, the use of visiting attorneys has other advantages. It gives me an opportunity to discuss problems of practice with those who are in the midst of practice. It is helpful in teaching to get the views *and* attitudes of the practitioners. Also, it gives me a chance to sell some of my own ideas and crusades.

Using guest attorneys has undeniable drawbacks. It takes time to line up visitors. Last minute crises develop and substitutes have to be obtained. Explanatory, reminder and thank you letters keep your secretary busy. You must insure that the guests have adequate directions to the law school and a place to park their cars. Student work must reach visitors on time: this means that student deadlines must be firm and you pray that reproducing machines do not break down. Occasionally a guest attorney is badly prepared, incredibly windy, or not very perceptive. However, over the years I have built up a capable and dependable staff of guests. Despite the hazards and burdens, I find the use of guest attorneys adds a needed dimension and interest to the seminar.

Course Conference

The course concludes with a thirty minute conference with each student. Prior to the conference, I review the work of each student. This includes his written work and my evaluation of other aspects of the course, such as interviewing technique and poise in responding to questions. Sometimes these interviews can be very painful. Students do not take kindly to candid criticism of their work. However, they do want to have their work evaluated.

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Conclusion

The high demand for enrollment in the course, and the student comments that I have received, demonstrate that students like the seminar. While it is true that much of what they get can be obtained in a good law office, not all students will practice in good law offices, and not all practicing attorneys, even if competent, are willing to give the kind of individual treatment that students get in the seminar. The course, in effect, is a law school-controlled de facto apprenticeship. Any mistakes that are made in the seminar do not harm clients or damage the profession. More important, there is enormous improvement in the students' work in the course of the semester.

This course, and other lawyer skills courses like it at Berkeley, have had a beneficial effect on student morale in the third year. Even though there still is the general problem of third year boredom, I have found that third year students will work hard when they are convinced that what they are doing is meaningful, serious and carefully planned.

Problem I

Our office represents Martin Grover who is the president and sole shareholder in Highrise, Inc. He is about to hire an architect to perform professional services in connection with a small office building his corporation will construct in Oakland. The architect that he proposes to retain is Harper Evans, a partner in the architectural firm of Evans and Green.

Grover and Evans have discussed the matter informally and have reached certain basic conclusions relating to the employment. Evans will perform normal architectural services for a fee of 5½% of the construction cost. Grover has informed Evans that he does not wish to build the project if the construction costs will run over $500,000. The Building is to be a five-story building with a total usable square footage of approximately 50,000 square feet. Grover has informed us that we will have to obtain a zoning variance and also obtain financing at least to the extent of 90% of the construction cost if he is to proceed with the project. Evans has assured him that he will furnish reasonable assistance in both of these matters. Highrise owns the land upon which the building is to be constructed.

Evans sent to Grover the three attached form contracts.* He has indicated that any of the contracts will be acceptable to him. Please review the contracts and determine which form contract is most desirable from Grover's standpoint. To support your conclusion, please divide your memo into the key aspects of the contract such as services, what the fee covers, progress payments, contingencies (and any others you determine). Compare the clauses of the different forms if they are different.

If you see any clauses in the form which you think desirable that which are *totally* unacceptable or need revision if the form is used, please prepare any necessary amendments or note any clauses which you think should be deleted. Make certain that the contract is consistent with the terms I have set forth in this memo.

* Not reproduced but attached to Problem I were:
A.I.A. Document B 131, Sept. 1966.
A.I.A. Document B 131, 1961.
A.I.A. Document B 121, 1958.

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As for the bargaining situation, Evans is a fairly established architect and for that reason you should take into account that there is a fairly even balance of bargaining power. Grover has informed us that he thinks it will be easier to obtain financing and ultimately tenants if Evans is the architect. For that reason, any recommended changes should be adequately explained in your memo so that Evans or his attorney can be shown a good reason for the change.

Your memorandum should not exceed five typewritten pages, double spaced.

Time Table

September 12, 1:00 p. m., Distribution of Problem.

September 15, 1:00 to 3:00 p. m., I will be available to answer any questions in Room 343.

September 19, 9:00 a. m., completed memorandum turned in to Room 355.

September 21, 9:00 a. m., reproduced student completed problems to be picked up in Room 355, 9:00 a. m. (All problems are to be read prior to class discussion).

September 22, Class discussion of completed Problem I.

Problem II

This office represents a number of corporations who routinely engage in erecting commercial buildings. We are trying to develop certain clauses which can be inserted in *all* of these construction contracts, (except in unusual contracts.) We have gone over the contracts that have been used for these clients in the past and have determined that the clauses which deal with delay problems are rather badly drafted. You are to draft clauses which can be inserted in these form construction contracts which deal with delay.

As you undoubtedly know, delay in construction projects is not uncommon. The contractor usually bears the risk of delay in construction. However, if delay occurs because of circumstances over which he had no reasonable control, he should be given an extension of time to perform. As to delays for which he is responsible, we want some method of liquidating the damages which are caused by these delays. A per diem liquidated damages figure is usually used in construction contracts and we would want such a provision in our contracts as well. Go through various forms and determine what other provisions should be included relating to the question of delay. Do not deal with delay in making progress payments by the owner. We are only interested in delayed construction on the part of the contractor.

Please prepare these clauses for review prior to their incorporation in our construction contract forms. The clauses dealing with delay should not exceed one typewritten page, double spaced. (You will not be given the full form contract. If you have questions relating to the full form, see me).

The second part of Problem II also relates to the question of delay but involves a somewhat unusual situation. One of our clients is Acme Meat Packers, Inc. They have entered into negotiations with Hardy Builders, a construction company. Hardy has agreed to complete a meat packing plant by December 30, 1968. The contract price for such a project will be $10 mil-

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lion. It is very important for this project to be completed by Dec. 30 because of the seasonal nature of the meat packing business. Despite assurances, our client would like some club to hold over the head of the contractor to make certain that performance is completed by the designated time.

The house counsel for Acme has suggested this approach to the problem. He wants a completion date in the contract to be stated in January 31, 1969. Also, the contract price will be specified in the contract at $9,000,000. If the contractor completes the project by Dec. 30, 1968, he will receive a bonus of $1,000,000. For each day delay after January 31, 1968, there will be a per diem liquidated damages figure of $5,000.

Please prepare a liquidated damages provision which will accomplish this purpose. Also, accompany the clause with a brief memorandum which states your opinion as to the validity of such a clause. The clause itself should not exceed one typewritten page, double spaced. The memorandum accompanying the clause should not exceed two typewritten pages, double spaced.

Time Table

September 19, Problem distributed to students at 9:00 a. m. in Room 355.

September 25, Students turn in completed problem to Room 355 by 9:00 a. m.

September 27, Students will pick up reproduced Problem II by 9:00 a. m. (students will read all student work for class discussion).

September 29, Class discussion of Problem II.

Problem III

Our office represents Wilbur Horn, a land developer in Oakland. Mr. Horn is the president and sole shareholder of Ventures, Inc. Horn would like to purchase three lots in Oakland owned by Preston Fox. These lots are adjacent to one another and are located at 1601, 1603, and 1605 Beagle Street. The lot at 1601 is on the corner of 16th Street and Beagle. Each lot has a frontage of 60 feet and is 150 feet in depth. The lots at 1601 and 1603 are presently used as a parking lot which is run by Harold Olson. The lot at 1605 has a frame building which presently has a small art studio.

Horn wants to purchase these three lots and demolish the structure at 1605 with a view toward erecting a large office building.

Horn would like us to draw up an offer to purchase this land for acceptance by Fox. Most of the details have been worked out orally and Horn expects that Fox will accept the proposal.

The total purchase price for the three lots is to be $100,000. $10,000 as a down payment will be tendered by cashier's check along with the offer. If Fox accepts, Horn will pay an additional $15,000 into escrow within 30 days of the acceptance. The balance of $75,000 will be paid into escrow within 90 days after time proposal is accepted.

Horn does not want to have to go through with his purchase unless he is able to obtain financing which is adequate. He expects to borrow $75,000 and give a first deed of trust to the lender. Fox needs the money and will not help finance the purchase. Horn does not want to have to purchase unless he can obtain a zoning variance. At present, the area is zoned com-

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mercial A and commercial A does not permit buildings over three stories in height. Horn wants to construct a building which will be anywhere from five to eight stories in height. Horn will try to get a variance or a rezoning.

If for any reason, Horn should decide to change his mind, he wants to make certain that his exposure is limited to the $10,000 down payment.

Horn thinks that at $100,000 he has an exceptionally good deal. (He could be wrong and that's why he wants his exposure limited to $10,000.) He believes that the property could be sold for $150,000 right now. He would like you to make sure that if for *any* reason Fox does not go through with the deal after he accepts, Horn can recover the difference between contract price and market price which Horn thinks is at least $50,000.

Title is to be taken in Ventures, Inc., which is the corporation owned by Horn. Fox has ten days in which to accept the offer and then it is to lapse. The property was shown to Horn by the Hart Realty Co. However, Fox informed Horn that Hart did not have any listing on the property and was not entitled to any commission for showing this property. Fox assured Horn that he never signed any written listing agreement with Hart and that Hart will not be entitled to any commission. However, Horn wants an indemnification from Fox that if Horn gets stuck for paying any commission to Hart, that Fox will indemnify Horn.

Horn wants to make sure that the frame structure located at 1605 Beagle is demolished by March 1, 1968. If everything goes right, Horn will commence construction by March 1–15, 1968. Horn wants the demolition work to be done by Blast Demolition Co., since Charles Blast is Horn's brother-in-law.

Fox would like to have some office space in the building if it is constructed. Horn and Fox have agreed that Fox is to have an option of taking a five-year lease on 500 to 1,000 square feet of office space on the ground floor, (the precise space to be determined by Fox) for 90% of the going square footage rental for the building. If Fox exercises this option, he is to get a five-year lease for the rented space. The lease will be on the best terms given to any other ground floor tenants.

Please draw up the contract which is to accompany the $10,000 down payment. If you think anything should be covered which is not covered in this memorandum, please incorporate a provision which is relatively standard and reasonably fair to both parties. As mentioned, Horn thinks he has a very good deal and he does not want to insert anything unfair which is likely to cause Fox to reject his proposal.

The proposal should include a space for Fox's acceptance. The proposal should not exceed four, double spaced, typewritten pages.

Time Table

September 25, Problem III passed out at 9:00 in Room 355.

September 29, 4:00 to 6:00 p. m., I will be available for interviews in Room 343.

October 9, Problem turned in to Room 355.

October 11, Students to collect completed Problem III after 9:00 a. m.

October 13, Class discussion of Problem III.

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Problem IV

Our office represents a wealthy San Francisco industrialist named Roscoe Semple. Semple owns seven and a half acres in Walnut Creek. He wants to build a luxurious residence on this land. The address will be 1000 Diablo Road. He has contacted a firm of architects called Prose and Conz with offices in San Francisco. The man with whom he has discussed the matter is Alex Prose. Semple thinks Prose is a magnificent architect. While Semple is willing to make the contract with the partnership, he wants it clearly understood that Prose will do all of the architectural work. If for *any* reason Prose is unable to do so, Semple does not want to deal with anyone else.

The house is to be a rambling, two-story, English Tudor house. It will be luxuriously fitted and about all that is set so far is that it will be at least 8 bedrooms, 8 baths, a large formal dining room and a 40 by 60 living room. In addition, there will be horse stables, a large swimming pool, cabanas, an observatory and small putting green.

The fee will be based upon the total construction cost. If the construction cost is kept below $200,000, the fee is to be 12%. From $200 to $225 thousand, the fee is to be 10%. From $225 to $250 thousand, it is to be 8%. If the costs go over $250,000 the fee is to drop to 4%. Semple is trying to set up the decreasing percentage to make certain that the costs are kept in line.

Prose has assured Semple that if at any stage of the design work by Prose, Semple is not satisfied, then Semple can cancel the contract and it will not cost Semple anything.

Prose has also agreed that he will give intense supervisory work to this building. It is to be a show place and its completion will be a feather in Prose's cap. (Prose wants to be able to show prospective clients around at reasonable times.) Prose has assured Semple that the contractor selected for the construction will perform up to the standards set forth in the plans and specifications.

The basic fee will *include* travel expense of the architects.

All consultants' fees are included in the basic fee except that of a landscape architect. Semple wants Horace Hedge, a prominent landscape architect, to handle the landscape design features. Prose will pay Hedge for landscape architectural services and this will be reimbursed to Prose by Semple with 5% added for overhead cost.

Semple wants it clearly expressed in the contract that under no circumstances will this house ever be duplicated. He wants Prose's promise not to do any house resembling this and also to copyright the plans and specifications.

Please draft a contract which will express the understanding that has been given in this memorandum and also any other clauses which you think should be included in such a contract. As for the bargaining position, Semple wants very much to use Prose as his architect. However, make certain there is nothing in the contract which is unfair to Semple.

The written contract should not exceed six typewritten, double spaced pages.

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Time Table

October 9, Problem distributed to class.

October 13, 4:00 to 6:00 p. m. interviews as necessary.

October 23, Turn in completed contract by 9:00 a. m.

October 25, Pick up reproduced completed contracts.

October 27, Class discussion.

Problem V

Our firm represents Amalgamated Aluminum. Amalgamated is based in Oakland but has a number of large plants throughout the country. Amalgamated has entered into negotiations with Majestic Tool, Inc., a small and somewhat under capitalized machine tool plant which has its office and only manufacturing unit in Lima, Ohio. Amalgamated wants Majestic to build an eight stand roll press. (You will not have to get into the technical description of the machine because the contract will contain an appendix and a set of plans and specifications which will describe the machine and also give certain performance specifications. You need only identify the machine as a Majestic Model 771 rolling press.)

The price for the machine will be $1 million f. o. b. manufacturer's plant in Lima, Ohio. The machine will be delivered either to the buyer's plant in Brokenpot, West Virginia, or Gardena, California. The buyer will reimburse seller for transportation costs. Seller will have the risk of loss during transit.

The Seller will furnish 10 working days of technical assistance when the machine is ready for installation at the buyer's plant. Any assistance requested by the buyer which takes up over 10 working days will be at the buyer's expense. For assistance over 10 days, the engineer who performs this technical assistance will be paid $150 a day and his subsistence while residing away from Lima, Ohio.

The buyer will make a $100,000 advance payment to the Seller. The balance of the purchase price will be paid by monthly progress payments. These payments will be based upon a certificate to be issued by the chief engineer for Amalgamated Aluminum. The request for payment, along with a necessary data as desired by Buyer, will be submitted by Seller no later than the 15th of each month. The certificate will be issued on the 25th of each month. The certificate will state the percentage of completion of the machine as of the 15th of the month. Payment will be by the last day of the month. Payment will be 90% of the percentage of completion X the contract price. The $100,000 advance payment will be applied to the progress payments due and owing and when the $100,000 is used up, then payments will be made by the buyer based upon the 90% formula. This means that when the machine is completed, the buyer will have paid 90% of the contract price as adjusted. (The adjustment aspect will be explained later in this memo).

One half of the final 10% which has been withheld will be paid *six months* after delivery and the balance *one year* after delivery. The buyer will have the right to make change orders in the plans and specifications for the machine. If the change orders constitute an increase in the contract price, the

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Seller will receive that increased cost plus 15% in lieu of profit and overhead. If there is a deletion in the contract price by virtue of the change, the contract price will drop accordingly.

Include an arbitration clause to handle any disputes which may arise during performance.

The performance will commence at the time the contract is executed and will be completed no longer than 180 days from the commencement date. For every day of unexcused delay, the Seller will be charged a liquidated damages figure of $1,000 a day. For every day in advance of the 180 days that the Seller performs, he will be entitled to a bonus of $500 a day.

The buyer will be making preparations at his plant for receipt of this machine. If the machine is not delivered on time, or does not function properly, this can have a serious impact on the buyer's production in that plant. However, the Seller does not want to take the risk of lost profits resulting from delayed or deficient performance. He is willing to pay the $1,000 a day delay. However, he does not wish to be responsible for any other damages caused by improper performance of the machine. He will make all repairs necessary at his entire expense. However, there should be a clause which limits his liability for breach of warranty to replacement of defective parts, including the labor necessary to replace these parts.

Keep in mind that Majestic Tool is a small company and this contract will require that a large amount of its resources be devoted to the making of this machine. Do all that is necessary to insure that if Majestic gets into financial difficulty, Amalgamated can recover its advance payments either in kind or by taking the uncompleted machine. Amalgamated wants a security interest in the machine to insure itself that it does not become an ordinary unsecured creditor if Majestic runs into difficulty. Attached to the contract should be a memorandum which states what is necessary to perfect a security interest if this can be done. Also, include in the contract any provisions which may be of any assistance in protecting Amalgamated from this risk.

There should also be included in the contract any other clauses which you think necessary to protect Amalgamated's interests. For a bargaining standpoint, Amalgamated is in the driver's seat and can probably dictate any terms which you think necessary.

The contract should not exceed six, double spaced, typewritten pages.

Time Table

October 23, Problem distributed to class.

October 27, 4:00 to 6:00 p. m., I will be available for client interviews.

November 6, Problem V turned in.

November 8, Collect completed Problem V.

November 10, Class discussion.

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Problem VI

NEGOTIATION PROBLEM

Instruction for negotiation for students 1 through 6: (tenants)

You are a sole practitioner attorney who needs new office space because your present quarters are inadequate and you desire to have a better location. Also your business has been good and you're considering another attorney as an associate. You have investigated an office building in downtown Oakland located at 14th Street and Broadway. The office building is called the Center Building of Oakland. The building has eight stories and at present there are two office suites which will become available when you need to vacate your present quarters. They will become available on January 1, 1968. One suite is located on the eighth floor with an impressive view. This suite consists of Room numbers 801, 803, 805, and 807. The eighth floor suite has a reasonably spacious outer office, a small file room and three lawyer's offices. The client would enter in Room 801 but there would be doors from 803, 805, and 807 which open onto the corridor.

The second suite is located on the second floor and consists of rooms 201, 203, 205 and a small file room. The outer office Room 201 is somewhat smaller than 801 and there are only two lawyer's offices in this suite. The office building has a small, but for your purposes inadequate, library which is available for the use of attorney tenants. Your work is rather specialized and requires substantial number of legal texts and reports which are not found presently in the library. There is space in the library for these books.

You have looked at a number of comparable offices in the same geographical area. From what you have seen, the second floor suite is probably worth about $250 a month and the eighth floor suite about $350 a month (each unfurnished).

You could rent the suite of offices totally unfurnished, furnished with the basic furniture, such as desks and chairs, or totally furnished. Totally furnished would mean that there would be filing cabinets, paintings on the walls, drapes on the windows, carpeting, and couches in each attorney's office. You are willing to go up to $300 a month for the unfurnished suite on the second floor, up to $350 a month for a basically furnished suite and up to $400 a month for a totally furnished suite. As for the eighth floor suite, you would be willing to go $100 more in each category ($400, $450, and $500).

You are willing to sign a lease for up to 20 years provided you can buy your way out of the lease for no more than one year rental payments. The better the lease deal, as far as rent is concerned, the longer the lease you would like to have.

You would also like to have a provision in the lease which would give you an option to rent additional space at the going market rate if you so desire.

The lesser important negotiable items are furnishings, option for additional space, and some provisions which would make the building library more suit-

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able for your needs. You will enter into negotiations with a designated student who will represent the landlord. Try to get the best deal you can and as to other items which have not been mentioned in the negotiation, you should use your own discretion.

Students 7 through 12 (landlord):

You have two office suites in your office building—the Oakland Center Building at 14th and Broadway which will be available on January 1, 1968. One suite is on the eighth floor and consists of rooms 801, 803, 805 and 807. This suite would consist of a spacious outer office and a small file room, and three smaller attorney offices. Each of the latter offices has a door which opens onto the corridor. The office suite on the eighth floor commands a very good view of the Bay Bridge and parts of the city of Oakland.

You will also have a suite available on the second floor which consists of rooms 201, 203, 205 and a small file room. Room 201 is slightly smaller than 801. The lawyer's offices are about the same size.

In your office building you have a library available for the tenants which is on the seventh floor. You have additional space in this office for more books if necessary.

You rent offices either unfurnished, furnished with basic furniture, or totally furnished. The basically furnished office contains desks and chairs only. The totally furnished office consists in addition of carpeting, drapes, paintings, couches in the lawyer's offices, as well as a reasonable number of metal filing cabinets.

As for term, you like to get long-term leases if the rent is favorable. Taking into account all the cost factors involved in renting space, you cannot go below $200 a month for the second-floor suite unfurnished, $250 a month for the second-floor suite basically furnished or $300 a month for the suite totally furnished. As for the eighth-floor suite, your bottom limits are $300 a month, $350 a month, and $400 a month, respectively.

You would consider redecorating the office of suites if you can get a favorable rental for a substantially long period of time. Sometimes tenants will take long leases only if they have a provision to buy out the balance of the lease for a designated sum of money. It has been your practice to permit provisions such as these if the buy-out provision at least consists of six months of rent. Sometimes you give an option to a tenant to buy additional space as necessary. You should enter into negotiations with a designated student who will be the lawyer who is interested in renting the space. When you come to an agreement, you should draft the agreement representing the oral agreement in which you have negotiated.

Time Table

November 6, Problem distributed in class.

November 17, Mock negotiation in class conducted by two attorneys using the same basic problem.

November 27, Problem to be turned in.

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November 29, Completed contracts picked up by class.
December 1, Class discussion.

Negotiation		Opponents
1	v.	7
2	v.	8
3	v.	9
4	v.	10
5	v.	11
6	v.	12

Problem VII

(Based upon Problem III)

Some problems have arisen which relate to the deposit receipt that you drafted for the purchase and sale of the Beagle Street lots in Oakland.

On Oct. 16, Horn mailed the deposit receipt signed by him along with a cashier's check to Fox. Evidently Fox received the deposit receipt on Oct. 17. On Oct. 19, he signed the deposit receipt and mailed it back to Horn on that date. A completed deposit receipt was received by Horn on Oct. 20. On Oct. 23, Horn retained an architect, Roger Corson, to start work on the schematic designs for the proposed building. He also entered into negotiations on that same date with a saving and loan association for a construction loan and also for a loan with which to pay the balance of the purchase price. He started preparing necessary documents for Fox's signature as owner to procure a zoning variance.

On Oct. 31, buyer and seller disagreed on the question of who was to pay for the cost of demolition of the frame building and the cost of removing the paving which are presently on the two lots being used as a parking lot. The buyer insisted that the seller was to deliver the three lots ready for construction while the seller maintained that he was not obligated to do so. Buyer claims that this was discussed and agreed to by the seller in the preliminary negotiations, but seller denies that this conversation took place. Fox says he will not perform unless Horn pays for the work in dispute.

Horn has consulted us regarding this dispute. He wants to know who must pay the cost of removing the paving and the structure. Also, he wants to know the steps which are necessary to perfect any claim he may have against Fox. What remedy can he get if Fox does not go through with the deal? Can he get his $10,000 back? Can he recover damages for Fox's refusal to convey? Can he get a court order giving him the land? (We think that Fox is looking for an "out" as he has a better offer, or so we have been told.)

Another matter has arisen which ties into this question. On Oct. 30, 1967, Horn received a letter from Mrs. Preston Fox stating that the property in question was her separate property and that Fox had no authorization to sell property which belongs to her. She claims the property was left to her by an aunt about three years ago. The record title shows that Mr. Fox owns the land. The Fox's are separated although there has been no interlocutory decree of divorce. Fox insists that he owns the land because of an oral agree-

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ment made between himself and Mrs. Fox before their separation in which it was agreed that this particular property would belong to Mr. Fox.

A third matter relates to a claim by Blast Construction Company that he should recover his loss of profits from Fox's refusal to convey. We think that Fox is going to demolish the structure and sell the land to another purchaser for more than $100,000. Fox does not intend to use Blast to knock down the frame building. If you will recall the antecedent negotiations which led up to this transaction consisted in part of an oral agreement by Fox and Horn that Blast would get this demolition job. For some unexplained reasons the provision was not included in the deposit receipt which you drew up.

Please determine whether Blast has any legitimate claim against Fox with regard to the demolition.

Please prepare a memorandum and opinion letter which deals with these legal questions. If you need any further information, please see me. A legal opinion should be couched in terms which are understandable to both Blast and to Horn. It should not exceed three typewritten pages single spaced or six typewritten pages double spaced. The memorandum should have all the legal back up which will enable me to determine whether the opinion letter should be sent out as drafted. It should cite relevant legal authorities as well as give me arguments both ways on these legal questions. The memorandum should not exceed 25 typewritten double spaced pages.

Time Schedule

December 4—9 a. m.—problem turned in to Room 355.

December 8—From 1 to 3 p. m.—problem to be discussed in class with visiting attorneys.

Problem VII (Based on Problem IV)

We have been requested to give a legal opinion to Roscoe Semple which relates to matters that transpired after the contract between Semple and Prose and Conse was executed.

Both parties signed the contract on November 1, 1967. Prose commenced on the design aspect of the project. After some work on November 21, 1967 Prose informed Semple that it appeared that the project would cost somewhere between $250,000 and $300,000 if it included all the items set forth in the contract. Prose suggested that certain changes be made which would in his opinion bring the cost down to around $225,000. The changes he suggested were to eliminate the putting green and observatory. He stated that $10,000 could be saved by elimination of those two items. He also suggested that certain materials could be used which would have the same appearance and effectiveness but would cost substantially less. He stated that a saving of approximately $25,000 could be effected in this manner. He also suggested that the living room be scaled down from 40 x 60 to 30 x 50, and that this could save another $5,000. On November 24, 1967 Semple objected to these changes, stating that he expected to have the house designed as specified in the contract. Prose stated that under contracts of this type he should have some authority to cut back on some of the space and materials, as this was customary. Semple was adamant. As a result, on December 1, 1967 Prose

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sent a letter to Semple in which he stated that he would proceed along the original dimensions but that he was doing so "without waiving any rights he would have either by contract or by law."

The construction documents were completed on December 28, 1967. They included the observatory and the putting green, and the 40 x 60 living room, as well as the materials desired by Semple rather than those suggested by Prose. On January 5, 1968 Semple requested bids from three contractors. These contractors were Atlas Construction, Hercules Building Co., and Ajax, Inc. On Jan. 25, 1968, Atlas bid $292,000, Hercules bid $276,000 and Ajax bid $224,000. Each bidder accompanied his bid with a certified check for 5% of his bid. Both Prose and Semple were overjoyed at the bid submitted by Ajax. On January 26, 1968 they informed Ajax that he would be awarded the contract, that he should come down to Semple's attorney's office to sign the contract on the next day. On the evening of January 26, Ajax called Semple and informed him that he had made an error in the bid. He had unintentionally omitted an item of $47,000 for certain work. He asked to be relieved from his bid and asked that the deposit that he made with the bid be returned to him. On February 2, Semple conferred with me regarding the alleged mistake. After a certain amount of research, we informed Semple on February 6, that very likely Ajax could be relieved if he went to court and rather than take the legal expense and time to try to get the contract enforced, we should let Ajax off the hook.

Ajax was relieved from his bid and the check returned to him on February 10, 1968. Semple awarded the contract to Hercules for $276,000 on February 15, 1968.

Prose did not know about this and on February 17 he informed Semple that Semple should permit Goliath Construction to bid on the job. Prose claimed that Goliath would submit a bid for $248,000.

This turned out to be true. However, Semple stated that he did not like the work Goliath did and he felt that he was morally obligated to award the contract to Hercules.

Hercules commenced construction around March 1, 1968 and the project was completed on November 14, 1968. The ultimate amount paid to Hercules was $296,000. The increase was due to changes which were made during the course of construction, authorized by Semple. This accounted for approximately $10,000. The other $10,000 increase in ultimate costs resulted from subsurface conditions which were different than anticipated by Hercules. He demonstrated that he would incur about $20,000 more of costs because of the subsurface being different and not represented by the soils engineer hired by Semple. Semple and Hercules compromised this and Semple paid an additional $10,000.

During the course of the architects design performance, Semple had paid progress payments of $7,000. He refused to make the $7,000 for payment upon completion of working documents because he felt that he could hold this amount to apply to any excess costs which he would be able to charge Prose with. Despite this, Prose continued his performance and finished.

On November 19, 1967, Prose filed a mechanics lien against the building. He claimed that he was entitled to be paid 10% of the $224,000 bid submitted

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by Ajax. Since he had only been paid $7,000 he claimed a balance owing of $15,400.

On November 23, Semple demanded that an arbitration be held in accordance with the contract. On November 30, 1968 both parties appointed Albert Finster as arbitrator. Finster is an architect with offices in San Francisco. The arbitration was very informal. The only "meeting" was held on December 7, 1968, attended by Semple, by me, by Prose and by his attorney. I stated that Semple was demanding $71,000 or the difference between the ultimate cost of $296,000 and $225,000. The basis for this $225,000 item was that Semple insisted that in conversations prior to the making of the agreement Prose promised that the project could be completed for $225,000. Prose asked for a balance of $15,400. After both attorneys had stated their positions, Finster looked at the contract form, inspected the premises, and ruled orally that Prose was entitled to his entire claim of $15,400. I tried to present arguments supporting the claim for $71,000 or at the very least for a 4% fee based on $276,000. However, I was not presented the opportunity of making any argument, nor for that matter was Prose's attorney given any opportunity. No evidence or testimony was submitted and the ruling came arbitrarily and without any written findings of any sort. I also tried to state that we had determined that on July 1, 1968 Prose's architectural license had lapsed because he had failed to apply for a renewal. As I was presenting this matter, Finster stated that he wasn't concerned with these problems and refused to listen to me any further. Semple is very unhappy. He wants to know whether he has any chance of upsetting arbitrator award. If the arbitrator's award can be set aside in some way, what would be Semple's chances in court to collect damages and what would be his obligation to pay Prose for his work. We have found out since the arbitration that Finster is Prose's brother-in-law and that in an arbitration a month before Prose gave a very favorable decision to Finster. We did not know this at the time we agreed to use Finster.

Please prepare an opinion letter not to exceed three pages single spaced or six pages double spaced. Also prepare a back up memorandum which will support the position you take in the opinion letter. The opinion letter should be written for Semple and should be understandable to a layman. The memorandum should contain sufficient authorities to support your positions on the legal questions. If you have any questions as to other facts, please see me. The memorandum should not exceed 25 pages double spaced.

Time Schedule

December 4—9:00 a. m.—Problem turned in to Room 355.

December 8—From 4 to 6 p. m.—Problem to be discussed in class with visiting attorneys.

Problem VII (Based on Problem V)

A number of problems have arisen related to the contract you drafted for Amalgamated and Majestic. The contract was signed on November 6, 1967. The $100,000 advance payment was made and the machine was completed toward the end of June, 1968. Instructions were given to the seller to deliver

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the machine to the plant in Brokenpot, Virginia. The machine was delivered by freight car on July 5, 1968.

There were a number of reasons for the delay. Changes suggested in the design by Amalgamated and concurred in by Majestic delayed performance about fifteen days. There was a strike of two suppliers who were furnishing components for the machine. These strikes delayed production approximately thirty days. Other suppliers could have been used, but the contracts between Majestic and the striking suppliers permitted a delay in performance in event of strikes. Also to use other suppliers would have substantially increased the cost of obtaining the components.

Majestic asserts that approximately fifteen days delay was attributable to Amalgamated not sending a progress payment due on April 1, 1968 until April 15, 1968. During this fifteen day period Majestic ceased working on the machine without giving any notice of this to Amalgamated. The reason for the delay was due to a clerk's error in the payment department of Amalgamated.

In any event, the machine was installed on July 8, 1968 and testing was commenced on July 9, 1968. An engineer from Majestic staff was present during the testing period. The performance specifications stated that the machine would turn out 1,000 sheets per each eight hour working day and also that the sheet would be a certain specified quality. For the first few days testing indicated that the best that the machine could do would be to turn out seven hundred sheets and the sheets were not of the quality specified in the contract. The sheets were useable and could generally serve the function for which they were being produced. However, had they complied with the quality specifications, Amalgamated would be able to obtain approximately $2.00 per sheet more than what they could get for the sheets turned out. (Sheets sell from $40 to $44 per sheet depending on quality.)

Various inspections and tests were made to determine the reasons for the non-compliance with the performance specifications. By July 14th it was generally agreed by both parties that there were some defective components and materials and some poor workmanship. If these components and materials were replaced and if certain work was performed on the machine, the proper quality control could be maintained, but at best the machine would never be able to turn out more than 900 sheets per eight hour day.

To correct the defective material and workmanship would involve substantial costs. It was estimated that it would cost about $50,000 for Majestic to replace the defective parts ($30,000) defective material ($10,000) and correct poor workmanship ($10,000). In addition it would involve another $2,000 expense to transport replacement components and material by air express. Also there would be another $5,000 expense because of Majestic having to furnish technical personnel to supervise the corrective work and retesting at the plant of Amalgamated. Finally, it was estimated that the machine could not operate for approximately forty days during the time the machine was being fixed up.

You should anticipate that Majestic will make certain allegations regarding the reasons for the machine not complying. First, they will state that the design and engineering errors were in essence caused by the changes suggested by Amalgamated, that these changes would not permit the machine to

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perform in accordance with these specifications. You can also anticipate that Amalgamated state that this warning was never given to them. Secondly, Majestic is likely to state that the machine could have been tested at the sellers plant in Lima, Ohio and had this been done much of the additional expense now being claimed by Amalgamated could have been avoided. You should assume that had proper inspection and testing been made at the Lima plant, the cost of correcting deficiencies would have been reduced by 50%. Certainly the transportation costs could have been eliminated. What are Amalgamated's rights in this warranty question?

Another dispute has arisen between the parties. They want to know who owns the plans for the machine. Amalgamated may need another machine in the future and would want to be able to use the plans perhaps as corrected when contracting for the manufacture of another machine. The use of the plans would be of some value to Majestic in its operations as well.

In addition to covering the question of the legal responsibility which Majestic may owe to Amalgamated, please go under the question of whether these two disputes have to be arbitrated or whether if unresolved by the parties can be taken directly to court. If they can be taken to court directly, where would the action be properly brought? You can assume that the only contact that Amalgamated made in the State of Ohio is its procurement of this machine from Majestic. It does not sell its products in the State of Ohio at all. It does however sell in most of the western states. You may also assume that Majestic has not built any machines for California companies with the exception for the one it built for Amalgamated. If Majestic sues, where would it be able to litigate this question? If Amalgamated were to sue, where would it be able to litigate this question?

One final problem has developed. Amalgamated sells its products to various defense agencies. It also sells products to suppliers to defense agencies. Amalgamated's president has received a letter from various attorneys from the defense agencies with which it deals stating that Amalgamated must include in its purchase orders provisions requiring that suppliers to Amalgamated not discriminate in employment in accordance with requirements of a federal executive order dealing with nondiscrimination in employment in contracts which relate to federal procurement. Does Amalgamated have to insert such clauses in the suppliers contracts?

Please prepare a legal memorandum not to exceed 25 pages, double spaced, which competently and adequately covers the legal matters raised in this problem. Also prepare an opinion letter which is to be sent to Amalgamated advising them of what their legal rights are relating to these problems. The opinion letter should be understandable to a layman and must not exceed three pages single spaced, or six pages double spaced.

Time Schedule

December 11—9:00 a. m., problem turned in to Room 355.

December 15—1 to 3:00 p. m., problem to be discussed in class with visiting attorneys.

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DRAFTING EXERCISE I

The class will be divided into three drafting groups consisting of students 1 through 4, 5 through 8, and 9 through 12. Each group will jointly draft clauses dealing with the problem which will be set forth on this drafting exercise. During the first class hour, students will propose a solution to the drafting problem. During this hour, the instructor will informally join each group and comment on the methods they are using and answer any questions. In the second class hour, the drafting solutions will be compared and discussed.

The subject matter for this drafting exercise is a clause relating to a market research contract under which the purchaser of the services (Cartwright Catsup Inc.) will be given the right to terminate the research company's (ENI, Inc.) performance at designated stages of the contract.

The contract itself deals with a market research study to determine methods of improving the sales of catsup in a designated geographical area. The contract performance is divided into three stages. The total contract price will be $25,000 with $3,000 being payable at the end of Stage I, an additional $7,000 being payable at the end of Stage II, and $15,000 being payable at the end of Stage III. Performance commences on January 1, 1968. Stage I is to be completed by February 29, 1968, Stage II by May 30, 1968, and Stage III by September 30, 1968. Cartwright is to have absolute right to terminate at the end of any stage. Please draft a clause for inclusion in this market research contract which will give Cartwright this right to terminate. Keep in mind that the ENI is to be paid the contract price for any completed stage which it performs.

In addition, please draft a provision which will insure that any data, etc. which is collected pursuant to ENI; performance will be forwarded to Cartwright at the end of the performance or at the end of any stage where performance has been terminated by Cartwright. The work to be performed will consist of questionnaires, individual and group interviews (this data could be valuable to competitors).

DRAFTING EXERCISE II

The class will be divided into three drafting groups consisting of students 1, 2, 5 and 6; 3, 4, 11 and 12 and 7, 8, 9 and 10. Each group will jointly draft clauses dealing with the problem which will be set forth on this drafting exercise. During the first class hour students will propose a solution to the drafting problem. During this hour the instructor will informally join each group and comment on the methods they are using and answer any questions. In the second class hour the drafting solutions will be compared and discussed.

This exercise concerns a 5-year contract under which the buyer (Moon Steel Co.) will purchase 30% of his iron ore requirements from seller (Ferro Inc.). (It will purchase 40% from Vulcan Steel and 30% from Forge Steel). The purchase price is $10 a long ton with a price escalation if certain costs to the seller are increased or decreased during the term of the contract. Seller has agreed that seller will meet any competitive price or release the buyer *pro tanto*. This is called a "meeting competition" clause.

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Draft a meeting competition clause for the contract with Ferro. Note that ore deliveries are to be made in quarterly installments based upon an estimate of the designated (30%) requirements. Deliveries will be on February 1, May 1, August 1, and November 1. The buyer will notify the seller 30 days before the delivery date as to the quantity of ore to be delivered.

DRAFTING EXERCISE III

The class will be divided into three drafting groups consisting of students 1, 4, 7, 10; 2, 5, 8, 11 and 3, 6, 9, 12. Each group will jointly draft clauses dealing with the problem which will be set forth on this drafting exercise. During the first class hour students will propose a solution to the drafting problem. During this hour the instructor will informally join each group and comment on the methods they are using and answer any questions. In the second class hour the drafting solutions will be compared and discussed.

You represent the Acme Tool Co. Acme uses coal at present in their manufacturing and plant heating processes. They have a five year contract with Standard Coal Co. with a fixed quantity. There is still four years to go on this contract. Standard and Acme have agreed to change the term to the *requirements* of Acme. There is a price escalation provision in the contract with a provision under which neither party can assign its rights nor duties under the contract.

Please draft a clause making this a requirements contract which can be inserted into the old contract in place of the present quantity provision.

Acme is willing to obligate itself to a 1,000 ton a year minimum if you think this is helpful (they usually use 25,000–40,000 tons a year). If not needed, don't use any minimum. You should insert a 50,000 ton maximum for the protection of the seller.

Also insert a clause under which Standard has a right to examine any records of Acme which involve the determination of Acme's requirements and a clause under which Acme can examine the records of Standard to see if a price escalation is warranted by increases in the escalatable costs (labor, transportation and taxes).

Acme is in the driver's position as far as a bargaining power is concerned. Make certain the contract does not fail for lack of mutuality but short of this make the clauses as favorable as you can for Acme.

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