

WESTERN STATE UNIVERSITY
COLLEGE OF LAW

SYLLABUS, POLICIES, AND ASSIGNMENTS
2012 SPRING SEMESTER
WILLS AND TRUSTS DRAFTING §623A
PROFESSOR C. JAFFKE

**YOU MAY NOT ENROLL IN THIS COURSE
UNLESS YOU HAVE COMPLETED THE ESTATES
COURSE.**

CLASS MATERIALS:

REQUIRED TEXT

Estate Planning: Principles & Problems by Gazur and Phillips. It is published by Aspen and is a Wolters Kluwer law & Business book. You will need the third edition, earlier editions are not acceptable.

You will also need access to the California Probate Code. You may use a California Probate Code book or be able to access the Code on your computer during class.

COURSE COVERAGE AND OPPORTUNITIES:

The course of Wills and Trust Drafting provides students with the opportunities to review various doctrines learned in the courses of Property and Estates and to apply that knowledge to study various techniques concerning the counseling of clients regarding estate planning, and the drafting of various types of estate plan documents with a focus on the drafting of wills and express trusts.

**SOME GENERAL PRINCIPLES REGARDING THE DRAFTING OF
TRUSTS AND WILLS**

Goals

The goals of drafting non-adversarial, legal documents are:

- Use of language in a manner that is understandable to the reader; and
- Use of language in a manner that is precise.

Attorneys use various types of legal writings in an attempt to persuade another or others. However, persuasion is not the aim or goal of certain types of legal instruments. By and large, transactional documents (e.g., trusts and wills) fall into the latter category.

Typical Checklist

- Understanding the client's goal or goals
 - Development of an outline of the manner in which the client's goal or goals will or might be achieved
- Investigation of facts
- Investigation of legal issues
- Preparation of a time and responsibility chart
- Evaluate whether a particular type of document is necessary
- Review of related and similar documents
- Preparation of a checklist or outline of issues
- Draft document(s)
- Review final draft(s) with client
- Prepare for execution ceremony (checklist, chart, or table)
- Monitor or complete follow-up (i.e., post-execution) matters.

Basic Principles of Trusts and Wills Drafting

The goals of understandability and preciseness are achieved when a document is drafted in a manner that:

- Enables interested parties to understand the content of the document.
- Is understood by laypersons.
- Is the result of the attorney ascertaining and understanding the details of the client's intent.
- Transforms imperfectly formed ideas of the client into a legally enforceable document in the manner explained by legal counsel to the client.
- Establishes and protects the rights of the interested parties.
- Anticipates risks and problems and evidences the manner in which those risks and problems are allocated or resolved.

Basic Purposes of Express Trusts and Wills

- Basic Purposes of an Express Trust
 - To provide for the administration and transfer ownership of property for the benefit of designated beneficiaries.
 - To satisfy laws which mandate certain formalities (e.g., statutes of frauds, or statutes of wills).
- Basic Purposes of a Will
 - To designate or nominate the representative of the decedent's testamentary estate.
 - To designate to whom interests in the decedent's testamentary estate are transferred effective as of the time of the death of the decedent.
 - To satisfy laws which mandate certain formalities (e.g., statutes of wills).

General Principles Regarding Organization of Provisions

- General provisions should precede specific provisions.
- Major provisions should precede minor provisions.
- Provisions that will be used more often should come before provisions that will be used less often.
- The statement of a rule should precede the statement of exceptions to the rule.
- Permanent terms should come before temporary terms.

Style and Word Usage

Should the document be written in “plain English”? Should the drafter include or omit Latin terms? Should the drafter include or omit formal, legal language (i.e., “legalese”)?

Many of the experts in the field of legal writing note that an effective document is one that is written in language the interested parties can read and understand.

Some experts advocate the drafting and use of “plain English” or “plain language” documents. However, what does it mean to draft a document in “plain English” or “plain language”? Some experts list the following as characteristics of “plain English” documents:

- The inclusion of familiar words.
- The avoidance of legalese and foreign terminology.
- The omission of needless words or redundancy.
- The inclusion of active, rather than passive, verbs.
- The inclusion of short, specific sentences, paragraphs, and sections.
- The use of “bullets,” or numbered clauses, to break up long sentences and lists.
- Where appropriate, the inclusion of article, section, or paragraph headings.
- The use of multiple columns if the document must be printed in a small font size.

Even if it is the common practice of a drafter of legal documents to use “plain English,” the drafter might determine that the inclusion of Latin terms, or legalese, or specialized vocabulary in the subject document is appropriate.

The following is a list of Latin terms and English counterparts. The list is not a complete or exhaustive listing of Latin terms and English counterparts.

Latin Terms

English Counterparts

<i>ab initio</i>	from the beginning
<i>ad valorem</i>	according to value
<i>de facto</i>	in fact, actually
<i>de jure</i>	of right
<i>eo instanti</i>	at that instant
<i>e.g., exempli gratis</i>	for example
<i>et al., et alii (or et alius)</i>	and others (and another)
<i>et seq., et sequentia</i>	and following
<i>force majeure</i>	irresistible force
<i>inter alia</i>	among other things
<i>per annum</i>	for each year
<i>per diem</i>	for each day
<i>per se</i>	by, in or of itself
<i>per capita</i>	share equally
<i>pro tanto</i>	as far as it goes
<i>quid pro quo</i>	something for something
<i>vice versa</i>	with the relations reversed
<i>viz.</i>	namely, to wit

The following is a sampling of specialized real estate vocabulary. The sampling is not a complete or exhaustive list.

appurtenant easement	leasehold
condominium	life tenant
covenant running with the land	perpetuity
deed of trust	profit a prendre
dominant tenement	remainderman
easement in gross	running with the land
fee estate	servient tenement
hereditament	zoning

It is not always easy to adopt an approach to drafting that involves the process of word simplification throughout the subject document. Effective use of thesauri may be helpful when you engage in the process of word simplification. The following is a brief listing of examples of word simplification:

Legalese

accorded
cause it to be done
consequence
donate
effectuate
expiration
necessitate
retain
utilize

Plain English

given
have it done
result
give
carry out
end
require
keep
use

Additional examples of legalese or lawyerisms are:

and/or
anything to the contrary
as to
herein
hereinabove
hereinbelow
hereof
in witness whereof
namely

Now, therefore,
notwithstanding
referred to
said, such
therein
thereof
to wit
whereas
witnesseth.

Another type of legalese or lawyerism is the use of redundancies. Some authorities in the field of legal writing suggest that redundancies should be avoided. Those authorities also opine that the avoidance of redundancies in attorney work product will achieve the goal of simple precision of expression. The following are examples of redundancies:

alter or change
cease and desist
convey, transfer and set over
due and payable
for and during
force and effect
free and clear
free and harmless
full and complete
good and sufficient
good and workmanlike

kind and character
last will and testament
null and void
order and direct
perform and discharge
rest, residue and remainder
save and except
suffer or permit
terms, conditions and provisions
undertake and agree
unless and until.

A drafter should avoid sex-specific words, whenever possible, when not specifically referring to a male or female. Put another way, a drafter should avoid the use of vocabulary that is regarded as sexist. Some suggestions follow:

- Avoid references to gender where gender is not relevant.
- Avoid sex-based job descriptions and titles where reasonable alternative descriptions are available.
- Avoid the use of masculine-singular pronouns. Use neutral designations whenever possible. Examples of neutral designations include “buyer,” “optionee,” “shareholder,” “seller.”

There are two factors that limit the extent to which simple words can be used in legal instruments. Those factors are:

- The expression of complex ideas might require the use of complex, but understandable, words or phrases.
- The simpler of synonyms might be ambiguous, and, therefore, the objective of precision is not achieved by use of the simpler synonym.

Some words sound like other words. Even though the words in question might sound alike, each probably does not mean the same thing. The difference in the manner of spelling of one word as opposed to another might be a single letter. A drafter must be sure that a word that might sound like another word that has a different meaning to the word used in the document is a word that is being used correctly in the document. The same is true regarding words that are spelled in a similar, but different, manner

Examples:

advice	advise
affect	effect
amend	emend
appraise	apprise
capitol	capital
counsel	council
credible	creditable
device	devise
elicit	illicit
extent	extant
farther	further
insure	ensure
intrastate	interstate
persecute	prosecute
prescribe	proscribe
principle	principal
stationary	stationery
therefore	therefore.

A drafter should adhere to rules of punctuation. Those rules include, but are not limited to, proper use of capitalization, proper use of periods, proper use of commas, proper use of colons, proper use of semi-colons, proper use of quotation marks, and proper use of parenthesis and brackets.

COURSE METHODOLOGY:

I will use the lecture method sparingly to introduce various concepts to the class or to highlight a portion of assigned reading.

The bulk of your classroom experience will be in the form of collaborative learning via participation in assigned discussion groups. You will be placed into groups of 3-4 and will be a law firm for the entire semester. Each law firm has the opportunity to accumulate law firm 😊 . The law firm at the end of the semester with the most 😊 will win a prize selected by the class at the beginning of the semester. The 😊 has no bearing on your course grade.

You will be required to complete various drafting assignments and to submit those assignments to me at the start of a designated class session for my subsequent assessment and feedback to you. Please bring two copies of your drafting assignments to class.: one to turn in to me at the beginning of class and the other to use for any classroom discussion.

COURSE WEBSITE:

There will be no course website for this course. Instead you will be placed on a course listserv and will receive e-mails from your Supervising Attorney, me.

GRADING:

The maximum number of points you can earn in this course is 100. At the end of the semester, you will draft two documents that will be worth 100 points total (called the final drafting assignment). These two documents will satisfy the upper level writing requirement. The two documents will be cumulative of what you have learned over the course. The assignments you submit before class will either earn you a +1 for a good faith effort or a -1 for an incomplete, bad faith or not submitted assignment. Those points will be added to your final drafting assignment score before the grade is calculated. Your class participation points will also be added to that.

Your academic performance in this course will be measured and recorded using a numeric grade system on a scale of 0.0 to 4.0.

**OFFICE HOURS, OFFICE TELEPHONE NUMBER, EMAIL ADDRESS, FAX
NUMBER:**

I encourage you to communicate with me on a regular basis. If you are not able to meet with me during my office hours during a particular week for any reason whatsoever, please do not hesitate to communicate with me via email, telephone, or fax.

I will **not** maintain regular office hours after the last day of classes for this semester and prior to the course exam.

You may contact me via email by addressing your communication to chjaffke@wsulaw.edu or taxprof920@yahoo.com.

You may contact me via telephone by calling (714) 459-1138. The faculty fax number is (714) 525-2786.

ATTENDANCE, CLASS PARTICIPATION, DECORUM, AND SEATING:

Attendance in class is mandatory. If you miss more than two (2) classes, you will be administratively withdrawn from the course. If you have not already done so, you should study the appropriate portions of the current edition of the “Student Handbook” regarding attendance requirements.

To be successful in law school, you must be an active learner. You will gain maximum benefit from class attendance only if you have engaged in a proper preparation for class. Proper preparation for class by you will include, but not be limited to: proper time management; engaging in a critical reading and re-reading of text assignments; briefing case opinions included in the assigned reading; critically reading and re-reading text notes and footnotes; analyzing problems included in the assigned reading; critically reading court opinions of the cases cited in the text notes or text problems; reviewing and editing your class notes from prior class sessions; personally preparing and reviewing study aids (e.g., sections of your personally prepared course outline, flash cards, and/or flow charts); reading and re-reading appropriate segments of hornbooks, treatises, or commercial study aids; and including some form of exam taking exercise as part of your daily study habits.

You should be prepared to participate in class on a regular basis. You should be an active listener in class at all times when you are not speaking in class. Being an active listener includes assessing whether you understand, or you do not understand, comments being made by me, or by one of your classmates. If you conclude that you do not understand the comments, you should raise your hand to be recognized, and when recognized by me, you should voice your questions. If you understand the comments, you should then assess whether you agree or

disagree with those comments. More importantly, you should assess the reason or reasons for your agreement or disagreement. Please do not hesitate to seek recognition to voice your questions or comments along those lines as well.

You are expected to maintain proper decorum when entering the classroom, while attending and participating in each class session, and when departing the classroom. The subject of classroom decorum is covered in the current edition of the “Student Handbook.”

READING ASSIGNMENTS:

To be properly prepared for class sessions, you must complete an appropriate, critical reading and study of the assignments that are listed in the “Table of Assignments” . The Table of Assignments will be distributed at the first class.

This reading assignment progress depends upon you. If you are unprepared and do not contribute to the class discussion, then we may not complete the entire reading assignment. However, the final drafting assignment will cover everything that is assigned here, regardless of whether or not we discuss it in class.

For the first class, you need to have read chapter 1 on the course textbook. If you have sample documents that are mentioned in chapter 1 that you have completed for another course or at work, please bring them. The first class you will be organized into law firms and will receive your first law firm assignment.