



TIPS FOR ACHIEVING CLARITY IN CONTRACT DRAFTING*

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Contracts, by their very nature, are prospective documents. Unlike legal memoranda and briefs that generally look back at past actions, contracts are forward-looking and serve a planning purpose to guide future behavior. A significant reason for putting a contract in writing is to memorialize what the parties have agreed upon in hopes of preventing future disputes. The goal when drafting contracts should be to draft every sentence with precision such that only one possible interpretation follows—the interpretation the drafter intends. You should aim to avoid any ambiguity in the contract. Below are some tips to keep in mind when drafting a contract.

These tips serve as a guide for general contract drafting in practice. If you are searching for tips for contract drafting in specific areas of law, please see the Further Resources section below.

- 1. Start with a Term Sheet:** Before drafting a contract, take some time to understand your client’s positions. Before you write a paper, you should outline; before you draft a contract, you should outline relevant provisions and your client’s positions on the provisions.
 - For example, do you know what key provisions the client needs? Do you understand the client’s risk tolerance?
- 2. Don’t Reinvent the Wheel:** Generally, the best place to start when drafting is to search for “precedents.” Precedent is previous agreements that can be used as templates or model documents. Just like any other type of research, search for multiple sources of contracts, then compare contracts to find the right precedent for you. Law firms may have their own “precedent banks,” and asking your supervisor for relevant precedent may be the best starting point.

When determining what the right precedent is for you or your client, keep the following in mind:

* Created by Christina Costa & Muyiwa Odeniyide; updated by Shelby Young. In creating this document, we heavily relied on KENNETH A. ADAMS, *A MANUAL OF STYLE FOR CONTRACT DRAFTING* (2004); LENNE E. ESPENSCHIED, *CONTRACT DRAFTING: POWERFUL PROSE IN TRANSACTIONAL PRACTICE* (2d ed. 2015); ROSS GUBERMAN & GARY KARL, *DEAL STRUCK: THE WORLD’S BEST DRAFTING TIPS* (2014); STEPHEN L. SEPINUCK & JOHN F. HILSON, *TRANSACTIONAL SKILLS: HOW TO STRUCTURE AND DOCUMENT A DEAL* (2d ed. 2018); TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2d ed. 2013); MARGARET TEMPLE-SMITH & DEBORAH CUPPLES, *LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS* (2013).

- Are key provisions present?
 - For example, if this is an M&A agreement, are there Representations and Warranty sections?
 - What jurisdiction governs the precedent?
 - When was this precedent created? Has the governing law changed since the precedent's drafting?
3. **Use Plain English:** Do your best to avoid legalese and use Plain English in drafting a contract. Legalese adds clutter to a contract and makes provisions difficult to understand. Avoiding legalese makes the contract readable to all audiences, including the parties themselves and a judge who could interpret the document later on.
 - Incorrect - Legalese: "Seller has not entered into any other contract or agreement to sell or encumber the Property or any part *thereof*."
 - Correct - Plain English: "Seller has not entered into any other contract or agreement to sell or encumber the Property or any of *its* parts."
 4. **Use Short Sentences:** Shorter sentences often make a contract more readable. As a rule of thumb, if a sentence is longer than three lines, you should consider reworking it by either reformatting the provision into sub-sections or breaking it up into two or more sentences.
 5. **Use Sub-Sections:** An easy way to add clarity to a contract is to use sections and subsections effectively. Using shorter sections generally makes a contract easier to read. When a provision consists of a large block of text, the reader's eyes may be tempted to glaze over it. You can break up such a provision by drafting a general heading for the section in addition to more specific sub-section headings. Be sure that the headings you give to the sections and sub-sections correctly describe and apply to that *entire* section or subsection's contents.
 - For example, in a provision about the company's officers, the section heading could read "The Company's Officers" with sub-sections titled "Appointment of Officers," "Approval of Officers," and "Indemnity of Officers."
 6. **Use Words Consistently:** In non-legal writing, authors aim to vary their language to make for more interesting prose. Contract drafters, however, must avoid variation and inconsistency. Maintaining consistency is more important than avoiding repetition.
 - For example, if you refer to the subject matter of a sales contract as "goods," use the same term throughout the contract to refer to that subject matter instead of calling it "items" or something different.
 7. **Check Definitions:** Check the "Definitions" Section or defined terms found throughout the contract to ensure (1) you have consistently used the same word as defined, (2) if you have not used any of the definitions or defined terms, delete them, and (3) you have capitalized defined words throughout the contract.

- 8. Check Cross-References:** If you are using precedent, you must ensure any sections or sub-sections that may have been mentioned throughout the precedent are correctly referencing the sections in your contract.
- 9. Understand “Shall v. Will”:** Be careful to use each word correctly in a contract. You should use “shall” when referring to an obligation to be completed by a party. If a party does not precede the word “shall,” then “shall” has probably been used incorrectly. Use “will” to establish future consequences of events and circumstances that do not obligate the parties.
- Shall: “Seller *shall* reimburse Buyer for all delivery fees.”
 - Will: “This Agreement *will* be governed by the laws of the State of Delaware.”
- 10. Use “May” for Obligatory Statements:** May, like “shall” and “will,” should be used very carefully. Courts usually read the word “may” to mean permissive or discretionary unless the context indicates otherwise. You can use “may” as the auxiliary verb in a statement permitting, but not obligating, a party to act in a particular way. “May” can be thought of as replacing the phrase “reserves the right to.”
- May: “For as long as Mark Jackson has a fifty-percent stake in the company, he *may* appoint one director to the board.”
- 11. Use the Active Voice and Keep the “Core” Together:** Like litigation documents, contracts written in the active voice are generally easier to read. Because contracts obligate parties to act, the active voice is especially preferred. In using active voice, keeping the “core” of the sentence together is helpful. The “core” consists of the sentence’s subject, verb, and object. Try to avoid creating a break between the subject and verb or between the verb and object with clauses and phrases.
- Incorrect: “Exelon, without the prior written consent of Empire Industries, may not transfer the Class A Shares to any Person.”
 - In this sentence, “without the prior written consent of Empire Industries” creates a break between the subject “Exelon” and the verb “may not transfer.”
 - Correct: “Exelon may not transfer the Class A Shares to any Person without the prior written consent of Empire Industries.”
 - In this sentence, the active voice is used, *and* the “core” is kept together. The subject (“Exelon”), the verb (“may not transfer”), and the object (“the Class A Shares”) are all next to each other.
- 12. Don’t Bury Verbs:** In drafting your contract, try not to use abstract nouns at the expense of verbs. This is often called “burying” the verb. Buried verbs allow you to avoid naming the actor like the use of the passive voice sometimes does.
- Incorrect: “Immediately following issuance of the stock...”
 - In this clause, it is unclear who is responsible for the action because there is not a subject or verb but rather an abstract noun (“issuance of the stock”).
 - Correct: “Immediately after Exelon issues the stock....”

- In this clause, it is clear who is responsible for the action because there is a subject (“Exelon”) and verb (“issues”).

13. Place Modifiers Correctly: A modifier is a phrase or clause that changes the meaning of another part of a sentence. Modifiers are used frequently in contract provisions. For example, “to the knowledge of the Seller” is a common modifier. Modifiers can add ambiguity when they precede or follow a compound phrase or a series. A contract reader may be confused about whether the modifier applies to all items in the compound phrase or series or only the item closest to the modifier. When drafting, make sure that it is clear what items the modifier is actually modifying. Using commas can help fix a potential ambiguity.

- For example, “No litigation against the Seller is pending or, to the knowledge of the Seller, threatened.”
 - In this sentence, the commas help make clear that the modifier “to the knowledge of the Seller” *only* modifies litigation that is “threatened,” and does not modify litigation that is “pending.”

14. Understand Materiality as a Qualifier: Materiality is a tool to make a threshold higher for the party that is obligated to follow the statement in the sentence.[†] Take the following examples into account:

- High Threshold: Borrower will not violate any law, rule, or regulation.
 - This threshold is the highest because “any” is all-encompassing.
- Medium Threshold: Borrower will not violate any material law, rule, or regulation.
 - This threshold is lower because “material” qualifies law, rule, or regulation.
- Low Threshold: Borrower will not violate any law, rule, or regulation, in any material respect.
 - This threshold is the lowest because “any material respect” qualifies not just the law, rule, or regulation but the respects within them.

15. Don’t Use Gender-Specific Language: Gender-specific language may mislead, distract, or offend some readers. You can avoid using gender-specific language by using a plural noun or repeating the noun.

- For example, “Directors will not receive compensation for their services.”
 - This sentence avoids gender-specific language by using the plural noun “Directors.”
- For example, “The Executive Director will not receive compensation for the Executive Director’s services.”

[†] In practice, qualifiers are negotiated heavily. However, courts have noted there is not an interpretive difference when using qualifiers such as “best efforts,” “reasonable best efforts,” and “commercially reasonable efforts.” See *Williams Cos. v. Energy Transfer Equity, L.P.*, 159 A.3d 264 (2017); *All. Data Sys. Corp. v. Blackstone Cap. Partners V L.P.*, 963 A.2d 746 (2009); *Holland Loader Co. v. FLSmidth A/S*, 313 F.Supp.3d 447 (2018). However, a Delaware court noted there was an interpretive difference between *materiality qualifiers* such as “material adverse change/effect” and “in all material respects.” See *Akorn, Inc. v. Fresenius Kabi AG*, 198 A.3d 724 (2018).

- This sentence avoids gender-specific language by repeating the noun “Executive Director.”

Further Resources:

- Bloomberg, Transactional Precedent Search
 - Bloomberg’s Transactional Precedent Search is a great tool for finding specific contracts across all practice areas. If you do not have relevant precedent from a supervisor or professor, this tool can help you find precedent for your practice area, type of contract, and within your jurisdiction.
- Bloomberg, Draft Analyzer, Market Standards for Clauses
 - Bloomberg’s Draft Analyzer compares provisions across industry/market standards. For example, are you unsure which level of materiality qualifier to use? This tool can help you find the market standard for the exact type of clause you are drafting.
- Westlaw, Practical Law, Draft Assistance, Deal Proof
 - Westlaw’s Deal Proof Draft Assistance helps you take a final look at your contract. Imagine spell check, but for contracts, and with more checks than spelling. For example, this tool will flag if you have inconsistently used definitions, among other errors.