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DRAFTING EFFECTIVE CONTRACTS

How to Revise, Edit, and Use Form Agreements

By Susan M. Chesler

When I first started teaching legal writing, my courses focused on teaching first-year law students to analyze, research, and write in the litigation context. I was a litigator before I started teaching, so this made perfect sense to me. But then I had the opportunity to teach a contract drafting course while I was an adjunct professor at New York Law School, and a light bulb went off. Not only do many law students not find themselves as practicing litigators after law school, but even I, as a former litigator, spent a lot of my time working with contracts—reading them, interpreting them, drafting them, and filing many motions relating to their meaning. It is now several years later, and I teach a course titled “Contract

Drafting and Negotiating” at Sandra Day O’Connor College of Law at Arizona State University. The goal of my course is to provide students with the opportunity to learn the basic principles of contract drafting, interpretation, and negotiation. My aim is to make students proficient at drafting contracts that effectuate their (fictional) clients’ needs, and at using the drafting process to anticipate, and hopefully avoid, potential legal disputes. But the truth is that lawyers rarely, if ever, draft contracts from scratch. So when I was designing my course, I asked myself how I was going to prepare my students to enter the workforce with effective drafting skills while recognizing that they will almost always be starting with an inadequate and poorly drafted form agreement. The result: I teach my students how to effectively revise, edit, and use form contracts.

On the first day of class, I announce to my students that they are able to

use any form or model agreement that is publicly available, either in print or online, in any way that they deem useful. Across the classroom, smiles widen and I hear sighs of relief. After all, how difficult can it be, they think, to edit a form contract and tailor it to the facts of the assignment? But they quickly learn that it is not so easy after all. I advise my students in that first class that most form agreements are outdated, drafted using archaic language and legalese, incomplete, and often inadequate, and are always generic in their scope. Handing in an assignment that closely resembles that form contract will not land my students a good grade.

My course focuses on much more than just “drafting”; it also focuses on planning, interpreting, and negotiating contracts; it addresses the principles and theories behind effective drafting; and it teaches students about the role of transactional lawyers and how they

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communicate with their clients. Yet the aspect of the course that resonates with most students, and will likely be used by them when they enter the workforce, is how to effectively use a form contract.

Practical Guidelines

The following six practical guidelines that I provide to my students will assist any law student or practicing lawyer in successfully revising a form contract, tailoring it, and turning it into a well-drafted, complete, and effective contract that meets their client's needs.

1. *Think through the life of the contract under various fact patterns.* First, hypothesize performance. What will happen, moment by moment, if the parties comply with all of the terms in a timely manner? Does the contract contain all of the necessary "rules" and details to assist the parties in knowing how to perform their duties? Most form contracts do not adequately set forth the steps necessary for the parties

contained in most form contracts are rarely adequate and they generally do not comply with the parties' intentions; the remedy of the default provision is usually termination of the contract and for many breaches, the nondefaulting party still does not desire to terminate the contractual relationship.

Finally, consider the worse case scenario. Assume that the parties become hostile toward each other, seeking to undermine the other party at every opportunity. Will the contract provide sufficient guidance to govern the relationship? Will it provide sufficient guidance to a court interpreting the contract or imposing remedies, if necessary?

2. *Clearly and consistently set forth the parties' rights and obligations.* In its most basic sense, a contract sets forth the private law governing the parties' relationship. Therefore, it is vital that it clearly and precisely sets forth the parties' contractual obligations and rights. It is also very important that these duties and rights are consistently

The contract must clearly distinguish between a party's mandatory legal duty subject to breach, and his or her privilege to perform.

Finally, state conditions with the word *must*; you should be able to substitute "has to do X before Y will happen" whenever you use the word *must*. The key distinction between a mandatory duty and one that is conditional is that in the latter, the party's legal obligation to perform does not become mandatory unless and until the condition is met. In other words, the party's failure to perform that obligation results in a breach only if and when the condition has been met.

3. *Understand every provision of the contract.* One of the problems with using a form contract is that you were not the drafter of the document; thus, you may not understand every provision of the agreement, and not every provision in the form is relevant to the transaction at hand. I offer this guidance to my students: when using a form agreement, never leave in a pro-

ARE THE CONSEQUENCES OF FAILURE TO PERFORM STATED IN THE AGREEMENT?

to understand what needs to be done to carry out their contractual obligations. Every contract should clearly answer these six questions: (1) who is obligated to perform; (2) what is the obligation; (3) by when must the obligation be performed; (4) where will the performance take place; (5) how is the obligation to be performed; and (6) if performance involves money or goods, how much?

Second, envision nonperformance and default. Ask yourself what if one or both parties fail to perform all or part of the contract—are the consequences of failure to perform stated in the agreement and closely linked to the performance required? I encourage my students to get into the habit of resolving these issues at the drafting stage, rather than waiting for the parties to have a dispute. The contract should protect your client by stating a remedy for the potential default of each obligation. Default provisions

drafted throughout the contract. While there are several acceptable choices of language to use when drafting, the key is to be consistent throughout the agreement. I teach my students that whenever a party has a mandatory contractual obligation, state that obligation with the word *shall* and never use the word *shall* to have any other meaning. Thus, you should be able to substitute "has the duty to" whenever you use the word *shall*. Since a mandatory contractual obligation is synonymous with a legal duty, a party's failure to perform that duty rises to the level of a breach and may result in an award of damages.

On the other hand, whenever a party does not undertake a legal obligation, but is entitled to exercise a right or privilege under the contract, state the authorization with the word *may*; you should be able to substitute "is authorized to" or "is entitled to" whenever you use the word *may*.

vision because you do not understand its purpose (do not assume it must be important or relevant), and never take out a provision simply because you do not understand its purpose. You must review each provision until you understand it completely. Only then can you decide whether to include, omit, or modify that provision.

4. *Use recitals and definitions to reflect the parties' specific transaction.* Although not part of the operative terms of the contract, recitals can effectively be used to state the parties' intentions or to provide relevant background information. Since the contract may eventually require interpretation by a court, it should include within its four corners all of the information that may be useful to explain the parties' contractual relationship, any past history, and the parties' intentions that may not be clear from the operative terms of the contract itself. For example, while courts are becoming increasingly

hostile to contracts in which parties surrender fundamental rights, such as access to the court system, if the parties truly wish to waive their rights to a jury trial, they may do so. In these contracts, the waiver should be drafted so that it is clear and conspicuous, and the recitals should include some language regarding the parties' intent to waive their legal rights to a jury trial. However, drafters must be careful not to include any representations in the recitals that may have legal significance because the recitals are not part of the body of the agreement and, therefore, there may not be any legal remedies if the representations are, in fact, false.

Additionally, the use of definitions enables the drafter to tailor the meanings of certain terms used in the contract to the subject transaction, and also can prevent inadvertent changes of language. Generally, if the word or phrase as used in the contract is intended to vary in any way from the standard dictionary definition of that word or phrase, or if the word or phrase does not have a standard dictionary definition, it should be defined within the contract. There are three basic types of definitions: (1) precise definitions, drafted using the word *means*; (2) enlarging definitions, drafted using the phrase "including but not limited to" after the definition, followed by illustrative examples; and (3) limiting definitions, drafted using the phrase "but does not include" after the definition, followed by the limitations of the definition. An example of each type of definition follows: (1) "Land" means the property located at 123 Smith Lane; (2) "Land" means the property located at 123 Smith Lane, including but not limited to the residential house, separate garage, and vacant barn; or (3) "Land" means the property located at 123 Smith Lane, but does not include the vacant barn.

Throughout the semester, I remind my students numerous times of the golden rule of contract drafting: never change your language unless you wish to change your meaning, and always change your language if you wish to

change your meaning. In an effort to teach them to draft contracts with the goal of avoiding litigation, ambiguity is not tolerated.

5. *Use plain language.* Contracts should be drafted with clarity and should be easy to read and understand by legal and lay audiences alike. Thus, omit legal jargon and unnecessary words, and eliminate wordy phrases from form contracts. I tell my students to think like an attorney, but to try not to sound like one. Since the words of the document will govern the parties' relationship, rights, and legal duties, they should clearly communicate their meaning to the parties themselves, and not only to their counsel. As most practicing lawyers are aware, a majority of available form contracts fail to adhere to this advice. They are strewn with "whereas," "witnesseth," and "to wit"—all of which detract from the readability and comprehension of the contract. It is also important to check to see if your jurisdiction has a plain language law, mandating contracts to be written in a clear and coherent manner using words with common meanings; in fact, in some states, plain language laws dictate the number of syllables in the words and the number of words in each paragraph of the contract. Failure to follow the application of plain language laws may impact the enforceability of the contract.

6. *Use proper grammar, a clear writing style, and logical organization.* Contracts generally describe events that will take place in the future, but it is a continually speaking document and should be drafted in the present tense. Draft using the active voice. Ask who is obligated to do something or to refrain from doing something, and make the subject do the action. When drafters use the active voice, the identity of the actor is clear. This is vital so that the contract clearly and unequivocally expresses the parties' legal duties.

In addition, draft useful headings and organize the terms around those headings. Even if your form contract contains a boilerplate provision stating that the headings should not have any operative meaning, the fact is that

those headings are read by the parties, their counsel, and possibly a court; therefore, make them work. Keep sentences short, where possible, or use tabulation for clarity. Be sure to connect modifying words to what they modify, i.e., in "the new house and car" phrase, is the car new too? Finally, use proper punctuation to avoid costly misinterpretation of the contract. For example, one legal dispute resulted in a finding that the contract could be terminated at any time with proper notice, contrary to one party's understanding that the contract had an initial five-year term. This ruling was based solely on the (mis)placement of a single comma, and saved the other party to the agreement an estimated \$1 million by enabling it to terminate the contract within the first five years of the contract term.

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As an idealistic professor, my goal would be to convince each of my students to throw out the antiquated form contracts and start drafting from scratch using effective drafting principles and plain language. But as a former practicing lawyer, I fully understand the utility, and benefit, of relying on existing form and model agreements. I can only hope that I achieve both goals by teaching my students how to effectively revise, edit, and use form contracts.

Thinking back to when I first entered the legal profession, I wish that law school had provided me with an arsenal of the skills that I would need to practice law effectively. Fortunately, under the ABA's Standard 302, law schools are now required to provide their students with substantial instruction in professional skills necessary for effective participation in the legal profession, such as contract drafting skills. As a result, more students at more schools are now able to take practical courses like the one that I offer at ASU. Hopefully, with a new generation of lawyers trained in drafting, the antiquated form contracts will be a thing of the past. **BLT**