



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 that can add clarity when drafting a contract.

1. Use Plain English: Like in litigation documents, you should 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.

- E.g., “Seller has not entered into any other contract or agreement to sell or encumber the Property or any part *thereof*.” Here, “its” can replace “thereof.” This sentence can be rewritten as “Seller has not entered into any other contract or agreement to sell or encumber the Property or any of *its* parts.”
- E.g., “Borrower acknowledges that Lender is about to fund the Loan on the date contemplated *hereby*.” Here, “hereby” can be replaced with the thing by which “hereby” is referring to. This sentence can be rewritten as “Borrower acknowledges that Lender is about to fund the Loan on the date contemplated *by this Agreement*.”

2. “Shall v. Will”: Be very careful that you use each of these words 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.

* In creating this document we heavily relied on 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); MARGARET TEMPLE-SMITH & DEBORAH CUPPLES, *LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS* (2013); TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2007); KENNETH A. ADAMS, *A MANUAL OF STYLE FOR CONTRACT DRAFTING* (2004).

- E.g., “Seller *shall* reimburse Buyer for all delivery fees.”
- E.g., “This Agreement *will* be governed by the laws of the State of Delaware.”

3. Using “May”: 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.”

- E.g., “For as long as Mark Jackson has a fifty-percent stake in the company, he *may* appoint one director to the board.”

4. The Power of 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 the Active Voice and Keep the “Core” Together: Like in litigation documents, contracts written in the active voice are generally easier to read. Because contracts obligate parties to take action, the active voice is especially preferred. In using active voice, it is helpful to keep the “core” of the sentence together. 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.

- E.g., “Ten days prior to Closing, Borrower shall furnish an updated and current Rent Roll.” In this sentence, the active voice is used, and the “core” is kept together. The subject (“Borrower”), the verb (“shall furnish”) and the object (“an updated and current Rent Roll”) all next to each other.
- E.g., “Exelon may not, without the prior written consent of Empire Industries, 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 “transfer.” This sentence can be rewritten as: “Exelon may not transfer the Class A Shares to any Person without the prior written consent of Empire Industries.”

6. Beware of Modifier Placement: 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 reader of a contract 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. Make sure when drafting that it is absolutely clear what items the modifier actually modifies. Using commas can help fix a potential ambiguity.

- E.g., “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.”

7. Try Not to 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.

- E.g., “Immediately following issuance of the stock...” can be rewritten as “Immediately after Exelon issues the stock...”

8. 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.

- E.g., 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.

9. Avoid 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.

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

10. Formatting Sections and Sub-Sections: An easy way you can add clarity to a contract is to use sections and subsections effectively. Using shorter sections generally make 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 and drafting 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.

- E.g., 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.”