Contract Drafting Fundamentals

PRESENTED BY

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Will Marshall is a co-founder of UBM Law Group. He has substantial experience in drafting and negotiation of a wide range of commercial contracts, including SaaS and traditional software licensing agreements, supply, distribution, and broker agreements, confidentiality agreements, and shareholders' agreements. Mr. Marshall also advises clients on compliance with the California Consumer Privacy Act (CCPA) and the EU's General Data Protection Regulation (GDPR). He is CIPP/E certified with the International Association of Privacy Professionals (IAPP) in EU data protection. Prior to co-founding UBM Law Group, Mr. Marshall served as General Counsel and SEVP of Operations of Javo Beverage Company, a publicly traded manufacturing company in Vista, California. As one of the founding executives of Javo, he was integral in leading the ground-up capitalization and commercialization of the company over the course of a decade and has a deep understanding of the business challenges and concerns facing startup, micro- and small-cap companies.
Education: University of California, Los Angeles, JD; University of California, Santa Barbara, BA, Eng. Lit.

Overview

- Resources
- Outside the Contract
- Anatomy of a Contract
- Categories of Language
- Ambiguity
- General Tips

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Resources

- Kenneth A. Adams
  - *A Manual of Style of Contract Drafting (Fourth Edition)*, Kenneth A. Adams (2018)
  - Blog (www.adamsdrafting.com/blog)
- Bryan A. Garner
  - (*Black's Law Dictionary, The Elements of Legal Style)*
  - Lawprose.org
- Vincent Martorana
  - CLE presentation decks - search for "Vincent Martorana" + "drafting."
  - *Guide to Contract Interpretation* (2014) - also available on the internet.
- *Negotiating and Drafting Contract Boilerplate*, Tina L. Stark (2003)
- *Contract Boilerplate for Non-Lawyers,* Will Marshall https://ubmlaw.com/contract-boilerplate-for-non-lawyers/
- *Working With Contracts: What Law School Doesn't Teach You*, (Second Edition), Charles M. Fox (2008)

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Resources

- IP Draughts - Mark Anderson (https://ipdraughts.wordpress.com/) - English law – drafting resources
- Redline.net –forum for licensed attorneys to discuss contract drafting issues
- On Contracts – D.C. Toedt (www.oncontracts.com) – see choice of law cheat sheets
- The Contracts Guy – Brian Rogers (www.thecontractsguy.net)
- *Transactional Skills Training: Contract Drafting – The Basics*, Stark, Kuney http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1162&context=transactions
- *Transactional Skills Training: Contract Drafting – Beyond the Basics*, Burnham et. al. http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1167&context=transactions
- Contractcollective.com – to be launched marketplace for attorneys to buy/sell contract templates and resources.
- Keith Bishop Blog (www.calcorporatelaw.com) (not contracts oriented, but great corporate information for California, Delaware, and Nevada)

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Goals of Good Drafting

- Be concise. Avoid redundancy and needless elaboration.
- Be precise. Avoid ambiguity.
- Be direct.
- Be consistent.
- Be literal. Don’t rely on common sense assumptions.
- Be complete (to an appropriate degree).
- Use plain English. Avoid archaisms.
- Make user friendly.
- Balance above with practical constraints.

Factors Affecting Drafting

- Relative leverage of the parties
- Client cost sensitivity
- Time constraints
- Over-reliance on samples and forms
- Fear of deviating from common practice
- Value or importance of transaction
- Magnitude of risk
- Likelihood of risk
- Client tolerance for risk
- Client tolerance for lengthy contracts
- Client acceptance of the importance of written contracts
- Client sophistication
- Client sacred cows
- Term/type of contract (full performance at execution vs. long term relationship)
- Preparing first draft or reviewing counterparty's draft (and drafting subsequent changes) – has cost implications for your client
- Other side has same considerations

Opportunities to implement best practices?

- Most — your most-used forms drafted on your own time.
- Medium — you produce first draft.
- Least — counterparty produces first draft.

Opportunities to develop drafting skills are not as frequent as one might think.

Producing the first draft can provide a negotiating advantage as well as a greater opportunity to hone drafting skills.

Types of Review

Business terms -	Making sure you've captured the deal points.
What's missing -	Discerning what's missing vs. reacting to what's there.
Land mine -	Expedited review looking for major issues and risk.
Remedies -	Calling breach is a blunt remedy. Tailored consequences/remedies?
Opposing party -	Reviewing from the opposing party's perspective.
Obtuse -	Eliminating the unconscious use of common sense to fill in blanks.
Pure drafting -	Evaluating for clarity, concision, precision (ambiguity), etc.
Fresh eyes -	Getting away from the draft. You will see things you missed.
Polishing/proofing -	Punctuation, formatting, cross-references, orphaned defined terms, etc.

https://blawg401.com/modes-of-contract-review/

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Anatomy of a Contract

- Introductory Clause
- Recitals
- Opening Statement
- Business Terms
- Representations and Warranties
- Covenants
- Conditions
- Risk Allocation
- Carveouts, Baskets, and Caps
- Definitions; Defined Terms
- Boilerplate
- Closing Statements; Signatures

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Introductory Clause (Preamble)

Identifies title of agreement, agreement date, and the parties, including defined terms for the parties

Examples:

Don't: This Securities Purchase Agreement (this "**Agreement**"), dated as of the 1st day of July, 2020, is made by and between Giant Co., a Nevada corporation, and its affiliates ("**Giant**") and Investor, LLC, a California limited liability company ("**Investor**"). The parties may sometimes also be referred to in this Agreement individually as a "Party" and together as the "Parties."

Do: This Services Agreement is dated July 1, 2020, (the "**Effective Date**") and is between Giant Co., a Nevada corporation, ("**Giant**"), Tiny, LLC, a Delaware limited liability company, ("**Tiny**" and with Giant, the "**Giant Parties**") and John Doe, an individual, ("**Customer**").

Do: This Securities Purchase Agreement (this "**Agreement**") is effective on the date of the latest signature below (the "**Effective Date**") and is between Giant Co., a Nevada corporation ("**Giant**") and John Smith, an individual, ("**Investor**").

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Introductory Clause: Dating Issues

- State a date in the preamble or have the signatories date their signatures, but not both.
- Use a fixed date on larger transactions with multiple related documents where signatures will be collected and held on different days, but a specific closing date is desired. Also, where continuity is important (e.g. Software as a service subscription renewal).
- "dated as of" is supposed to indicate date shifting, but is inconsistently used that way.
- Be careful when backdating or forward dating. It can be harmless. It can create unintended consequences. It can be fraudulent.
- If the contract has significant disconnect between the desired date of the contract and date of the signatures, consider directly addressing rather than just backdating or forward dating.
- See http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1112845 for an article on backdating agreements.

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Recitals

- Use to provide background or context that would be helpful to a later reader of the contract.
- Do not include recitals that contribute nothing.
- Do not include operative contract language (but ok to define terms).
- Don't incorporate recitals into the "Agreement" by reference or affirm that the recitals are accurate. Recitals are not the place for material statements of fact. Instead include as representations.
- Do not use "WHEREAS." List as 1,2,3/A,B,C or without enumeration.

Opening Statement

Don't:

W I T N E S S E T H

"NOW, THEREFORE, in consideration of the mutual obligations hereinafter set forth and for other good and valuable consideration the sufficiency of which is hereby acknowledged, the parties to this Agreement hereby agree as follows:"

Do:

Without Recitals: "The parties agree as follows:"

With Recitals: "The parties therefore agree as follows:"

"Agree" should only appear in the opening statement.

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Business Terms

These express the basic business terms.

"Joe shall provide the Services to Bob. Bob shall pay Joe a fee of $40."

This is often the total focus for clients.

- They express the commercial "deal" by which benefit is gained.
- It's often good to aggregate these terms into an exhibit, order form, or SOW where business people can view the deal terms one place.

Representations and Warranties

Representation

- A statement of a past or present fact made to induce someone to enter into a contract.
- Used as an alternative or supplement to due diligence or to otherwise risk shift. If I cannot know or practically investigate whether an important thing is accurate, I can force the other party to state that it's accurate at their risk of being liable if it's not.
- can be structured in various ways as to timing when made, period covered, whether knowledge qualified, how multiple parties making them are doing so (separately, jointly, etc.). Be careful.

Warranty

- A term or promise in a contract, breach of which entitles the innocent party to damages or other specific remedy but not to treat the contract as discharged by breach.
- A promise that something in furtherance of the contract is guaranteed by one of the parties, especially a party's promise that the thing being sold is as promised.

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Representations and Warranties

"represents and warrants"

- Ken Adams argues that the phrase "represents and warrants" is a pointless redundancy and that one should say "states" or, for a series of statements, "states that the following facts are accurate:"
- See Adams' *MSCD* and posts such as https://www.adamsdrafting.com/the-semantics-fallacy-underlying-represents-and-warrants/ for debate on "represents and warrants"
- Don't: Company represents, warrants, covenants, and/or agrees . . .

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Covenants

A covenant is a continuing promise to do or refrain from doing something.

Ancillary obligations to mitigate risk, protect a party's interests, help ensure performance, etc. as distinguished from central obligations.

Some types of covenants:

- Financial covenant – Maintain a financial state – e.g., a liquidity ratio
- Operating covenant – Maintain a business operations state – e.g., have at least 100 restaurant locations.

Common in debt and equity financing arrangements and in merger and acquisition transactions.

Conditions

An uncertainty the outcome of which determines the applicability of certain contract provisions.

Condition Precedent: X must occur or be satisfied before I am obligated to do Y.

Condition Subsequent: If X happens, then my obligation to do Y will cease.

Examples:

- If the audit shows an underpayment exceeding 5% of the aggregate payments during the preceding 12 months, Licensee shall pay . . .
- If Big Co. fails to procure insurance, Newco may purchase insurance at Big Co.'s expense.
- This agreement will terminate upon Big Co. filing bankruptcy.

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Conditions

If the closing conditions are not satisfied, Buyer is not obligated to purchase Newco.

Conditional clause (the uncertainty)	If the closing conditions are not satisfied
Subordinator	if (so long as, until, unless)
Matrix clause (provision triggered)	Buyer is not obligated to purchase Newco.

The proviso, "provided that" or "provided, however, that" is often used as a subordinator to mean "on condition that." However, it can have multiple other meanings – limitation, addition, exception. Use more precise wording.

- "except that"
- "on condition that"
- "in any event"

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Conditions

Don't use "shall" in a conditional clause.

Don't: "Seller's landlord shall have consented to the lease assignment. . . "

Do: "Seller's landlord has consented to the lease assignment . . ."

"to the extent that" as a subordinator

Company shall indemnify Customer unless the Claim resulted from Customer negligence.

Company shall indemnify Customer except to the extent the Claim is due to Customer negligence.

The first is binary. The second indicates proportionality.

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Risk Allocation

Indemnification – a promise by one party (indemnitor) to compensate another party (indemnitee) for specified claims, liabilities, and losses, usually in relation to a third party (although not in M&A). It is a means of shifting or allocating risk to a particular party.

> Seller shall indemnify, defend, and hold harmless, Buyer from and against all third party demands, claims, losses, liabilities, damages, judgments, costs, fees (including reasonable attorneys' fees and costs) arising out of or relating to the actual or alleged infringement or misappropriation by the Products of a third party's Intellectual Property Rights. The foregoing obligation in conditioned upon Buyer promptly providing Seller with written notice of the claim. Seller may assume control of the defense of the claim and may settle the claim without the consent of Buyer if the settlement includes a final release of all claims against and does not impose any obligations on Buyer.

"indemnify"	to pay or compensate other party for its own liabilities/losses
"defend"	creates duty to defend (hire attorneys and litigate) on behalf of indemnitee.
"hold harmless"	conflicts as to meaning. Some say synonymous with indemnify. Some say confusing jargon. Others say it is a release by indemnitor of claims against indemnitee.

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Risk Allocation

An indemnity is like a mini insurance policy.

- Consider the solvency of the indemnitor as the “insurer.”
- Consider the capacity and likelihood of the “insurer” to resist indemnifying.
- Consider all the procedures needed for “coverage” that aren’t always addressed in an indemnity provision, such as notice of the claim and right to control the defense and settled claims.
- Consider the above whether you represent indemnitee or indemnitor.

Risk Allocation

Limitations of Liability – Provisions that limit types and amounts of damages and liability of a party.

Sample: In no event will either party be liable to the other party or any third party for consequential, special, indirect, incidental, or punitive damages arising out of this agreement.

Company's aggregate liability under or relating to this agreement, regardless of the form of action (whether contract, tort or otherwise), is limited to an amount equal to the lesser of (i) aggregate paid sales of product hereunder during the six months preceding the date on which the claim first accrued (as indicated by invoice date) and (ii) $100,000.

Both are often subject to certain exceptions such as breach of confidentiality and intellectual property ownership.

Certain risks like data breach are often made subject to super-caps as a compromise.

Terms like "consequential" and "incidental" damages are often misunderstood in this context. Be careful when excluding these damages and things like "lost profits" and "diminution in value damages", particularly in the mergers and acquisition context! You might be cutting off expected, recoverable damages.

See: https://www.adamsdrafting.com/excluding-consequential-damages-is-a-bad-idea/

https://www.adamsdrafting.com/follow-up-on-consequential-damages/

https://www.weil.com/~/media/files/pdfs/Bus_Lawyer_May_08_West.pdf

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Carveouts, Baskets, Caps

Provisions can have exceptions and limits of different types.

- **Carveout** – a permitted exception
  - The Issuer shall not incur any Indebtedness, except in form of trade debt incurred in the ordinary course of business.

- **Basket** – an exception permitted up to some specified amount (usu. in dollars).
  - The Issuer shall not incur any Indebtedness, except for Indebtedness in an aggregate amount not exceeding $10,000 at any one time.

Carveouts, Baskets, Caps

Different types of exceptions and limits.

- **Deductible Basket** – A party must indemnify the other party for claims/losses over a certain threshold.
  - The Indemnifying Party will not be liable to the Indemnified Party for indemnification under Section 8.02 until the aggregate amount of all Losses in respect of indemnification under Section 8.02 exceeds $50,000 (the "Deductible"), in which event the Indemnifying Party will only be liable for Losses in excess of the Deductible.
- **Tipping Basket** – Once an amount exceeds a threshold, then party must indemnify from the first dollar.
  - Buyer will not be liable to the Seller for indemnification under Section 8.02 until the aggregate amount of all Losses in respect of indemnification under Section 8.02 exceeds 1% of the Purchase Price, in which event Buyer will be liable for all the Losses from the first dollar.
- **Mini Basket** - A small threshold below which the amount will not even be counted toward a general basket to avoid bothering a party over immaterial amounts.

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Definitions; Defined Terms

Create appropriate and helpful defined terms

Don't: "Pink Bunny" means a shareholder selling Shares pursuant to Section 4.

Do: "Selling Shareholder" means a shareholder selling Shares pursuant to Section 4.

Don't use "shall mean"

Don't: "Selling Shareholder" shall mean a shareholder selling Shares pursuant to Section 4.

Do: "Selling Shareholder" means a shareholder selling Shares pursuant to Section 4.

Don't embed operative provisions in a definition.

Don't: "Indebtedness" means trade debt, bank debt, and lease obligations, which Company shall not incur in an amount in excess of $10,000 following the Closing Date.

Don't draft circular definitions.

Don't: "Procedure" means the procedure Vendor shall follow.

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Definitions; Defined Terms

Don't overuse defined terms.

Be careful when using defined terms. They are very powerful and can have unintended consequences. Do a 'find' on the term to review each use of it and make sure the definition is appropriate.

They can be inline in the text of the contract, placed in a separate definitions section, or both.

When defining inline, make sure the defined term encompasses the desired definition.

trademarks, patents, and copyrights ("Intellectual Property") owned by Seller

trademarks, patents, and copyrights owned by Seller ("Intellectual Property")

Placement of defined term can cause ambiguity.

A blue ball and a teddy bear (a "Toy") . . . (is Toy only a teddy bear or also a blue ball?)

A blue ball and a teddy bear (each, a "Toy") . . .

Don't: The agreement (this "Agreement") dated June 5, 2020, between Bigco Inc. ("Bigco") and Tinyco Inc. ("Tinyco").

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Boilerplate

See article *Contract Boilerplate for Non-Lawyers*, by Will Marshall available at https://ubmlaw.com/contract-boilerplate-for-non-lawyers/ for more information.

Successors and assigns -	Provides that a non-assigning party is bound to treat assignee as they would the assigning party. Often misunderstood and subject to varied court interpretation.
Force Majeure -	Excuses performance for unforeseen events that make performance not practicable or possible. Use care in using this clause. Sometimes you expect the other party to plan for events that might be accidentally excused by a typical FM clause (e.g. a power outage for a hosting provider).
Severability -	Where a provision in a contract is deemed unenforceable, this provision attempts to tip the court in favor of enforcing the remainder of the agreement instead of deeming the entire contract unenforceable. Make sure if provisions of questionable enforceability were not enforced that you would still want the rest of the contract enforced.

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Boilerplate

See article *Contract Boilerplate for Non-Lawyers*, by Will Marshall available at https://ubmlaw.com/contract-boilerplate-for-non-lawyers/ for more information.

Integration clause -	States that the contract is the entire agreement in order to avoid a claim that external representations or other terms not in the contract were nevertheless enforceable parts of the contract. Make sure not to inadvertently supersede existing or ancillary agreements.
Time is of the essence -	Often overlooked clause. Allows buyer/customer to treat what would otherwise be usually deemed immaterial performance delays as material breach or grounds for termination. To be enforceable, must be used deliberately as to specific performance obligations and not purport to apply to the entire agreement. Some argue it has no predictable meaning in practice. Time sensitivity is better expressed more directly.

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Closing Statements; Signatures

The closing statement or concluding clause can reference either the date at the beginning or dates entered by the signatories.

The closing statement is not legally necessary.

Examples:

Don't: IN WITNESS WHEREOF, the parties hereto have caused this Licensing Agreement to be executed as of [the date first written above][the Effective Date][the latest date entered below] by their respective officers thereunto duly authorized.

Do: The parties are signing this Purchase Agreement on the date stated in the introductory clause.

Avoid archaisms like "In Witness Whereof."

Where there are multiple related transaction documents, insert a section break before the signature page (to be able to omit a page number on the sig page) and consider making a reference to the agreement title (e.g. this Security Agreement) so that it can be appropriately married with the correct agreement.

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Closing Statements; Signatures

Signature Block Examples

For a natural person:

_____
Sally Smith

For an entity:

ACME CORPORATION:

By:_____
Name:_____
Title:_____

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Closing Statements; Signatures

Nested Signature – go until you reach an authorized human.

GET RICH PARTNERS, LP

By: Venture Fund IV, LP
its general partner

By: Venture Corp.,
its general partner

By: _____
Name: Sally Smith
Title: President

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Categories of Contract Language

- Agreement
- Performance
- Obligation (Prohibition)
- Discretion
- Declaration
- Policy
- Intention

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Language of Agreement

Indicates agreement to the contract language generally.

Should appear only in the opening statement.

Do: The parties agree as follows:

Don't: Company agrees that it will deliver the Performance Report.

Don't: The parties agree they will negotiate a security agreement.

Don't: The parties hereby agree as follows.

Language of Performance

Where performance is accomplished by entering into the agreement.

Indicated by appropriateness of “hereby” – (“hereby” means “by the language in this agreement, I perform”)

Use active voice and present tense.

Do: Big Co. hereby grants Acme Co. a license to . . .

Don’t: Big Co. agrees to assign . . .

Don’t: Big Co. does hereby license . . .

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Language of Obligation (or Prohibition)

Indicates a duty or obligation to do something (or refrain from doing something).

Use “shall” or “shall not.” But can also be expressed by “will” or “must”. However, “will” is better used to express futurity. “Must” is better used to express a condition or separate duty or requirement.

> If the Business must obtain a license, then I shall notify you.

Test for language of obligation and appropriate use of “shall” by mentally replacing “shall” with “has a duty to.”

Do: Company shall [has a duty to] deliver the Product on the Delivery Date.

Don’t: Company must deliver the Product on the Delivery Date.
Don’t: Company agrees to deliver the Product on the Delivery Date.
Don’t: The Product shall be delivered by Company on the Delivery Date.
Don’t: Company undertakes to deliver the Product on the Delivery Date.

Language of Obligation (or Prohibition)

Don't purport to impose an obligation on a non-party.

Don't: Company's accounting firm shall deliver the Financials to Big Co. on or before . . .

Do: Company shall cause its accounting firm to deliver the Financials to Big Co. on or before . . .

Don't create obligations that are not in the party's control.

Don't: Big Co. shall obtain the consent of Landlord.

Do: Big Co. shall use reasonable efforts to obtain the consent of Landlord.

Language of Obligation (or Prohibition)

"Shall" is frequently misused – so much so that Garner advocates not using it at all.

It is often (improperly) used to communicate, "I mean it!"

Don't: This agreement shall be governed by the laws of California.

Don't: The Licensor shall be in breach if . . .

Don't: Supplier's liability shall be limited to $100.

Don't: Affiliate shall mean an entity that owns or is owned by a party.

Don't: In no event shall Customer be obligated to disclose . . .

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Language of Discretion

Indicates that a party is permitted to do or not do something.

Can be expressed with “may” or “is permitted to.”

Indicating permission to do one thing can imply prohibition against doing other things. This is referred to as “naked discretion.”

e.g., You may go to the store on Tuesday.

Implies that I am not allowed to go to the store on other days or perhaps at all.

Thus, discretion should be used only as an exception to an obligation/prohibition - not by itself.

Do: Big Co. shall not grant a License, except Big Co. may grant a License to Acme Co.

Don’t: Big Co. may grant a License to Acme Co. (naked discretion)

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Language of Discretion

Don't use language of discretion to impose an obligation.

Don't: Company may solely purchase Company's requirements for the Goods exclusively from Supplier during the term.

This could mean Company has the option (discretion) to buy only from Supplier or to not buy only from Supplier.

Do: Company shall purchase Company's requirements for the Goods exclusively from Supplier during the term.

See https://www.adamsdrafting.com/shall-not-unless-versus-may-only-if/ for Adams, Stark, Martorana, and others debating approaches to conveying discretion.

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Language of Declaration

A statement as to the accuracy of (or acknowledging) a fact.

Examples:

- Company represents that . . .
- Purchaser acknowledges it has received a copy of the Shareholders' Agreement.

Language of declaration is akin to language of performance in that the words themselves have the effect.

Don't include extraneous adverbs. E.g., "Company unconditionally represents and warrants" or "Company expressly acknowledges"

Don't say a party "acknowledges and agrees"

Language of Policy

States rules for one or more parties (other than an express obligation or prohibition), or for interpretation or structure of the agreement.

Examples:

- Any attempted assignment of Consultant's obligations is void.
- The term of this Agreement commences on the Effective Date and expires on July 4, 2021.
- "End User" means an individual authorized pursuant to Section 4 to use the System.
- The internal laws of the state of California govern all matters arising out of this Agreement.

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Language of Policy

Use present tense for policies that apply upon effectiveness or express something that will occur at a specific time in the future.

> The Transition Period terminates on May 22, 2017.

Use “will” for future events that may or may not occur or will occur at an uncertain time.

> Period will terminate upon a Significant Corporate Transaction.

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Language of Intention

A statement expressing what the parties intend but cannot necessarily make so through the agreement.

Examples:

- The parties intend for this Incentive Plan to be exempt from Rule 409A.
- The parties intend that Contractor will be an independent contractor of the Company.

Language of Intention

Often drafters state intention in the form of declaration notwithstanding the uncertainty.

Example:

- Contractor is an independent contractor of the Company.

As a related matter, magic words and phrases are often used to try to make a thing so. Saying it doesn't make it so.

- "coupled with an interest"
- "signed by the party's duly authorized agent"
- "for good and sufficient consideration"

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Ambiguity with “And”

“And” – a set in its totality.

Subject Ambiguity

Example:

- Parent Co and Sub Co shall notify Shareholder.

This could mean:

- Parent Co shall notify Shareholder and separately Sub Co shall notify Shareholder.
- Parent Co and Sub Co, acting collectively, shall notify Shareholder.
- Parent and Sub, collectively or separately, shall notify Shareholder.

Consider whether “and” means collectively or separately or both.

Ambiguity with “And”

“And” – a set in its totality.

Modifier or Distributive Ambiguity

Example:

- Transfers and Assignments by Contractor prohibited by this Agreement are void.

This could mean:

- Transfers prohibited by this Agreement are void and Assignments by Contractor prohibited by this Agreement are void.
- Transfers by Contractor prohibited by this Agreement are void and Assignments by Contractor prohibited by this Agreement are void.
- Transfers are void and Assignments by Contractor prohibited by this Agreement are void.

It can be unclear what a modifier is intended to modify – A & B or just B.

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Ambiguity with "Or"

"Or" – a choice among members of a set.

Inclusive/Exclusive Ambiguity

- Company may blacklist any facility that (i) has a Recall or (ii) fails an Inspection.

This could mean:

- Company may blacklist any facility that (i) has a Recall or (ii) fails an Inspection or both (i) and (ii).
- Company may blacklist any facility that (i) has a Recall or (ii) fails an Inspection, but not both.

Consider whether the "or" is meant to be inclusive (first meaning) or exclusive (second meaning) and revise accordingly.

- Company may blacklist any facility that (i) has a Recall or (ii) fails an Inspection or both (i) and (ii).

There is not always ambiguity with an "or" set. E.g. "Bigco, Smallco, or Midco shall pay the fee." (As soon as one pays, the obligation is performed.)

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Ambiguity with "and/or"; Final Thoughts

"And/or"

- A and/or B means A or B or both A and B.
- Saying "A or B or both" or "one or both of A and B" is better.
- Saying "A, B, and/or C" could mean "one or all" or "one or more" of them.
- Saying "A and/or B shall do X" is ambiguous. Do both need to do it or will one suffice?
- Many use "and/or" when they really mean "or" or "and."
- See this from Garner: https://www.lawprose.org/lawprose-lesson-209-ban-andor/

Try to become attuned to this type of ambiguity and then restructure (usually requiring extra words) to eliminate the ambiguity.

Read chapters in Adams' *MSCD* on ambiguity and *Transactional Skills Training: Contract Drafting – Beyond the Basics*, Burnham on ambiguity (see discussion of "and" "or" on pg. 258)

- http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1167&context=transactions

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General Tips

"That" vs. "Which"

"that" introduces essential information. Limits it to what follows "that."

"which" is preceded by a comma and simply adds extraneous description. Nonrestrictive.

Example: I have 10 apples in a basket. Four have worms and six do not.

Do: "Let's eat the apples in the basket that have no worms in them."
– refers to 6 apples.

Do: "Let's eat the apples in the basket, which have some worms in them."
– refers to all 10 apples.

Don't: "Let's eat the apples in the basket which have worms in them."
- ???

"Which" is overused and usually incorrectly. It generally does not belong in a contract, which is not a place for extraneous information. (Note, England follows different rules on this.)

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General Tips

Avoid the inadvertently overbroad statement.

- Shareholder has no voting rights in Acme Corp.
- Shareholder has no voting rights in Acme Corp. on account of its preferred shares.

Know the value of generating ("controlling") the initial draft of a contract or of having the pen in drafting later agreed changes. But also appreciate that your client may not be able to afford that.

In negotiating, whenever asking for something that is often drafted as a mutual provision (e.g., a limitation of liability), if you ask for it unilaterally in your favor be prepared for the other side to ask to make it mutual in which case you may have to be on the receiving end of your own language.

General Tips

Use brackets “[]” around language that is rough, needs to be later completed, and around inline comments. You can use the “find” function to quickly look for them later when cleaning up the document.

Use yellow highlighting for items you wish the client to see. They will not see brackets. They will also always leave in brackets.

Provide comments in an email in a numbered list. This allows easier tracking of counter-comments.

Be careful to distinguish comments (in and out of the contract) meant for your client only and those that can be shared with the counterparty. Some clients are not sensitive to this and forward internal comments to the other side.

Subsection enumerations in the form of (i), (ii), etc. are called romanettes as in “refer to romanette (iv) of Section 5.”

General Tips

Document file management and Microsoft Word tips:

- Invest in a good document comparison program. I use Change-Pro by Litera. Don't rely on the other side's redlines being accurate. Check for unmarked edits. Use to compare different drafts to orient yourself.
- Develop a sound file naming convention to indicate who marked up the draft and its position in the various versions. Some use dates, however, since I can turn multiple versions on a single date, I mark the end of the file with my initials in parentheses (WM) and then v2, v3 etc. as in "Purchase Agreement(WM).v3.docx"
- I advance the version (e.g., v2 to v3) whenever I have sent the document to anyone or if I want to preserve a version because I'm going to make significant global changes (trying to fix formatting) or if I haven't worked on the document for a significant period and want to preserve the draft in its form when I last worked on it.
- Read my article on Microsoft Word tips here: https://www.sdcba.org/index.cfm?pg=BusinessandCorporate20170221

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Contract Drafting Fundamentals

Questions?

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