Writing Tips For The Transactional Attorney

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No matter how often you draft transactional documents, you can always do something to make them a little better.

IN THE FOREWORD to the fourth edition of *The Elements of Style*, Roger Angell commented that "writing is hard, even for [those] who do it all the time." Drafting contract provisions—even the standard provisions—is no exception. And it is easy to fall into contract drafting traps.

Applying certain guidelines to your writing can make the drafting process easier, improve your drafting, and help you avoid pitfalls. So, although every deal is unique and although many of the illustrative examples I use below arise in the real estate context in which I primarily practice, the following are a few tips that apply almost universally to contract drafting.

THE INTRODUCTION: MISTAKEN IDENTITIES • Every contract typically begins with

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an introductory paragraph that provides basic information about a transaction. (If your contract is long, however, including a table of contents after a cover page and before the introductory paragraph is a good idea). The introductory paragraph should set forth:

- The type of agreement in question;
- The date of the agreement;
- The names of the parties involved; and
- The defined terms that will be used to refer to the parties so that they will be easy to recognize and distinguish throughout the entire document.

What's In A Name?

Setting forth the names of the parties is especially important, because it can cause some serious problems if you are not careful. Although a misspelled name might seem to be nothing more than a typo, if it shows up in the introductory paragraph (or signature block) of an agreement, it can seriously hobble the due diligence process and even the transaction.

For instance, in many states, certain judgments that attach to real property do not appear when you search for judgments by property description; rather, you have to conduct a judgment search by the seller's name. As the buyer's attorney, if you misspell the seller's name on the contract, you (or your title insurance examiner/agent) may fail to discover judgments that attach to the property your client is purchasing. Similarly, suppose you represent a lender, and you misspell the name of the borrower on a loan and security agreement for a tractor. You might then use that same misspelling to complete and file your client's U.C.C. financing statement, which establishes your client's secured, priority interest in the borrower's tractor. Then, suppose the borrower later enters into a business loan with another lender and pledges all of his equipment, including the tractor, to this new lender. Typically, your client's security interest in the tractor would have priority over the subsequent lender's security interest in all of the debtor's equipment. However, because you misspelled the debtor's name on your client's U.C.C. financing statement, courts in certain jurisdictions may find that your client's security interest does not have priority over the second lender's interest. *See, e.g., Pankratz Implement Co. v. Citizens Nat'l Bank*, 102 P.3d 1165, 1168 (Kan. Ct. App. 2004) (holding that financing statement naming debtor as "Roger House" was not effective in establishing priority when debtor's name was really "Rodger House"). Needless to say, the foregoing scenarios are not situations in which you want to find yourself.

When the parties are organizations, rather than individuals, the same concern with spelling applies. Furthermore, when dealing with companies, one changed letter in a name could mean the difference between a company that has a high net worth and its sister company or subsidiary that does not have nearly the same net worth and is, therefore, not a company with whom your client would want to do business.

When dealing with companies, in addition to correct spelling, you should ensure that a party name is followed by a description of the type of organization it is and where it was formed, such as "X Corp., a Delaware corporation." Furthermore, you should try to verify that the company with whom your client is doing business is in fact properly formed and in good standing. If the jurisdiction in question maintains a web site with information about companies in that state (such as Florida's www.sunbiz.org, California's http://kepler.ss.ca.gov/list.html, and New York's www.dos.state.ny.us/corp/corpwww.html) then it is good practice to take a moment when you start drafting the contract to search the web sites for preliminary verification of an entity's formation and good

standing. In some jurisdictions, however, you may not have this service at your disposal, so you will need to order official formation and good standing certificates from the secretaries of state (or other relevant officials) of those jurisdictions. Moreover, even if you have obtained preliminary confirmation from a web site, you may want to order official certificates in order to ensure that you have obtained the most current information. Nevertheless, checking such a web site at the inception is good practice, because in addition to getting an idea of the company's status, you can also discover potential misspellings that you should investigate, such as finding that "XYZ, Inc." is not on the state database, but "XYZ Subsidiary, Inc." is.

THE RECITALS: MEMORIALIZING THE DEAL • If the contract you are drafting is extremely straightforward, your introductory paragraph can lead directly into the main body of the agreement. But in more complex transactions, and sometimes even in the simple ones, it is good practice to follow the introductory paragraph with recitals, setting forth background information about the transaction and briefly acknowledging that the transaction is supported by consideration.

Heart Of The Agreement

First, the recitals memorialize the core of the transaction so that anyone picking up the contract at a later time can immediately determine the subject matter and basic premises of the agreement. Well-drafted recitals describe the background events that brought about and that surround the transaction, as well as the transaction itself.

Consideration Clauses

In addition, if the consideration for an agreement comes into question, the recitals may prove helpful. "[A] false recital of consideration cannot create consideration where there was none." Kenneth A. Adams, *A Manual of Style for Contract Drafting* 15 (ABA 2004). But in some jurisdictions, the recital of consideration is prima facie evidence that consideration actually did exist in a transaction. *See, e.g., Terwilliger v. York Int'l Corp.*, 1995 U.S. App. LEXIS 14786, at *5-6, 8 (4th Cir. June 16, 1995); *Sumners v. Service Vending Co., Inc.*, 102 S.W.3d 37, 43 (Mo. Ct. App. 2003); *Hoagland v. Finholt*, 773 S.W.2d 740, 743 (Tex. Ct. App. 1989). So, while a lengthy, archaic recital of consideration is unnecessary and hinders the forward movement of your agreement, inserting a short recital of consideration in standard English after your general recitals (such as the following example), can establish the presumption of consideration in certain jurisdictions: "For valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows...." If the recital of consideration is rebutted, the courts may then look to the general recitals, which, when properly drafted, describe the events surrounding the deal, thereby potentially revealing the particular consideration for the agreement in question. *See* Adams, at 16.

Defining Key Terms

Recitals can also be helpful in other ways. For instance, the recitals in a limited liability company's operating agreement might state that the members of the company were selected for particular reasons specific to those individuals, which would be an indication that the members cannot be replaced or substituted. If one of the members later enters bankruptcy, a bankruptcy court may find the recitals persuasive in its decision to prohibit the assignment of the membership interest in bankruptcy proceedings. *See* Hon. Sheri Bluebond, Remarks at ABA Videoconference, *Limited Liability Company Update* (December 7, 2004). Furthermore, the recitals provide you with an opportunity to define

certain terms that will be used repeatedly throughout the contract. For example, in a lease amendment, a recital might look as follows (remember that "Landlord" and "Tenant" have already been defined in the introductory paragraph that precedes the recitals): "Tenant desires to lease from Landlord and Landlord desires to lease to Tenant an additional five hundred (500) square feet of space contiguous to the initial premises, as more particularly described and shown on Exhibit A hereto (the 'Expansion Space')." Thus, you have established a common vocabulary for the reader, which you can use throughout the document to refer to concepts that are cumbersome to describe in full each time they appear.

THE BODY: MEDIEVAL ENGLISH, MIXED MESSAGES, MISSING ZEROS, AND MEANDERING DEFINITIONS • Although the specific deal points of the transaction at hand constitute the core of your contract, a few guidelines are generally useful in drafting the body of every agreement.

Medieval English

Using plain, modern English in your contracts will ensure that the parties' intent is accurately expressed. Archaic usage and vocabulary do not improve your chances of a court properly interpreting a contract that ends up in controversy. Furthermore, "[d]o not be tempted by a twenty-dollar word, when there is a ten-cent[] [word] handy, ready and able," and avoid pedantic jargon and legalese. Strunk and White, at 76-77; *see also* Adams, at 1; Wilson Follett, *Modern American Usage: A Guide* 341 (Erik Wensberg ed. 1998). Also, use words economically to convey ideas more quickly and effectively. For example, the phrase "in the event that," which is commonly found in contracts, can usually be replaced with the single word "if." Plain, standard English makes it easier for a reader to get through a simple contract and to comprehend complex concepts in more involved contracts.

Mixed Messages

"Variety is the bane of drafting; it befuddles readers and quickens the blood of sharp-eyed litigators." Adams, at 1; *see also* Strunk and White, at 26 (stating that one should "express coordinate ideas in similar form"). Consistency prevents mixed messages and makes a court's job easier when a dispute arises. Although you may have to be vigilant to ensure that you are using the same language for similar ideas, parallel construction is easy: If you said it one way one time, say it the same way the next time. Otherwise, a reader (who may be a judge) may think that you stated the ideas differently because you intended a different meaning. For instance, consider the following hypothetical excerpts from a retail lease agreement:

- "1. Tenant's parking rights described in this Section 1 are contingent upon Tenant continuously leasing and occupying the entire premises."

- "2. Tenant's signage rights described in this Section 2 are contingent upon Tenant continuously leasing the entire premises."

The drafting is not precisely consistent, but is it really problematic? Probably. The right to prime parking and prime signage in a shopping center is often granted based on the large amount of space that the tenant will be using or based on the tenant's "big-name" status, making it an anchor tenant at the property. When a tenant sublets to someone else, it is technically still "leasing" though not "occupying" the premises. Because section 1 above states that the parking rights are conditioned on continuous leasing and occupancy, if the tenant sublets, its special parking rights will no longer apply. However, because section 2 conditions the sig-

nage rights only on continuous "leasing," even if the tenant sublets and no longer "occupies" the space, the landlord may be obligated to continue providing the tenant with the same signage rights. As a result, the landlord may not be able to give such signage rights to another tenant that may then be better situated to be the anchor tenant. If you represented the landlord in the development of the above agreement, and your client did not specifically agree to the difference in language/conditions in sections 1 and 2, the landlord would most likely be an unhappy client.

Missing Zeros

Beware of missing zeros. When drafting the provisions that deal with amounts to be paid in connection with the transaction, double check your numbers. A missing zero at the end of a figure may (again) seem like a minor typo, but suppose you represent the bank in a loan transaction and mistakenly draft a secured interest of $92,000 for a loan in the amount of $92,000,000? It may generate litigation and settlement costs for your client and even make you a malpractice defendant. *See, e.g., Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, 573 N.Y.S.2d 981 (N.Y. App. Div. 1991), *aff'd*, 605 N.E.2d 318 (N.Y. 1992).

Meandering Definitions

When you are drafting a lengthy agreement, it is good practice to include a section containing the definitions of terms used in the document. Locations for such definition sections vary. Some attorneys prefer to place the definitions at the beginning of the agreement so that the reader will know what the terms mean when she reaches the operative terms of the contract; other attorneys believe that the definitions should be placed at the end of the agreement to avoid impeding the flow of the agreement. The choice of placement is up to you, but there are certain guidelines that are universally applicable in drafting the definition section.

Put Defined Terms In Once

If you include a definition section, you should ensure that each defined term in the contract appears in the definition section. You must first decide whether a term is better defined in the definition section or in the provision in which the term first appears. Even if you decide to define the term where it first appears, however, you should refer to that term in the definition section as well, and follow it with a phrase such as "has the meaning set forth in Section ___." Otherwise, a reader may read the defined term's meaning in the section where it first appears, forget it by the time she reaches the next section where the term appears, and not be able to find the first reference to the term in order to re-read the definition. If you refer to the term in the definition section, providing the cross-reference where it is defined, the reader will always be able easily to refresh her memory by turning to the definitions and finding the section reference.

Create Distinguishable Terms

When creating defined terms, try to choose words that do two things:

- Distinguish themselves from other defined terms; and
- Reflect the meaning of the term.

If you have already created another defined term that includes three of the four words in the term you are currently creating, reconsider; it might confuse the reader, who might have difficulty recognizing the subtle difference between the two terms.

Nouns=Nouns; Verbs=Verbs

When you define terms, try to use nouns to define nouns, verbs to define verbs, and use as

few modifiers as possible. For example, when defining the decisions that the managing member of a limited liability company cannot make unilaterally without the non-managing member's consent, call them "Major Decisions," rather than "Non-Managing Member's Consent Decisions," which is too long and cumbersome, or "Decisions Requiring Non-Managing Member's Consent," which is too long and contains a present participle. Too many words will disrupt the rhythm of your document. And unnecessary modifiers will hinder the reader's recognition of the defined term, retention of the term's definition, and comprehension of the agreement.

Don't Add What You Don't Need

In addition, obligations regarding a defined term should not be buried in the definition of the term unless the obligation in question is in fact the essence of the term. Otherwise, the obligation may be overlooked, and the term may not work properly in each context in which it arises throughout the agreement. For instance, after defining the Base Rent (i.e. the rent per square foot) and the Additional Rent (i.e. a tenant's share of operating expenses) in a lease, you may decide to define the term "Rent" as "the Base Rent, the Additional Rent, and any and all other payments that the tenant is required to make pursuant to the terms of this Lease as it may be amended from time to time." You should avoid, however, adding a "time of payment" clause at the end of the foregoing phrase, such as "which payments shall be made in advance on the first day of each month," because this is an obligation that is not central to the definition of the term.

Moreover, there may be payments that are not made on a monthly basis. Suppose that you later negotiate a lease amendment with the tenant, whereby the tenant reduces the size of its premises, making a partial termination payment to the landlord in exchange. In such cases, it is not unusual for the termination payment to be due on date the reduction takes place, so you might provide in the lease amendment that "tenant shall pay the termination payment to Landlord on the effective date of the reduction in the premises," rather than on the first day of the next calendar month. If the additional "time of payment" clause above had been included in your definition of Rent in the original lease, you could be facing an ambiguity as to when the termination payment is actually due and payable —on the first of the month in accordance with the original lease or on the effective date of the space reduction in accordance with the lease amendment.

THE MISCELLANEOUS PROVISIONS: MIRED IN MISCELLANY • When drafting a contract, you may be so busy structuring the transaction that you underestimate the danger lurking in the boilerplate miscellaneous provisions. As harmless as these provisions may seem, they can cause trouble down the road. You have to review this form language carefully to ensure that it reflects the transaction at hand.

The Notice Provision

Mistakes in the notice provision can prove fatal to your client's deal. A good notice provision sets forth the name of the contact persons who should receive formal notices pursuant to the agreement on behalf of each party and all of their contact information. When you have drafted several contracts for a client in the past, you may take a shortcut by copying the notice provision information from an old contract into a new contract. Your client, being a busy person, may skip the miscellaneous section altogether when reviewing your contract draft. Consequently, neither of you may realize that the notice information you used is outdated, and

when a notice is sent to your client by the other party, your client may not receive it.

For example, suppose you represent the seller of real property, and the buyer sends your client a notice stating that she has only one objection to a minor title matter, which your client can easily remedy at little or no cost. Under the contract, your client's failure to agree to cure the title objections in a written notice is deemed refusal to cure. Your contract also states that all notices are effective three days after deposit in the U.S. mail. Because the buyer's objection notice was sent to the incorrect address set forth in the notice provision, your client does not receive the notice, does not respond within the allotted time period to agree to remedy the title matter, and is, therefore, deemed to have refused to cure it. As a result, the buyer exercises her right to take back her deposit and walk away from the deal.

This leads us to the procedures required by notice provisions. Some notice procedures are drafted in a way that makes compliance with them difficult. Consider the notice provision described in the preceding paragraph, which makes notices effective three days after deposit in the mail. Now suppose that you are the buyer's attorney in the scenario discussed above, and your objection notice is due seven days after you receive the title commitment; otherwise, your client is deemed to have waived any objections and will be obligated to close on the purchase with title remaining "as-is." Given that the notice procedure makes notice effective three days after deposit, you really have only four days to review title and give notice of objections. Thus, it is advisable to provide for a variety of alternative notice procedures. It is also advisable to make notice effective upon receipt, which can be confirmed by a return receipt from the U.S. mail or any formal courier service. This is preferable to having to allocate a certain number of days from your substantive deliberation period to a ministerial notice procedure. Moreover, making notice effective upon receipt, rather than deposit or a few days thereafter, diminishes the risk that an important notice will become effective without the notified party's actual receipt of the notice. Your jurisdiction may, however, have particular rules, precedent, or customs regarding the determination of when notice is effective, to which you should conform your notice procedures.

The Dispute Resolution Provision

Your miscellaneous section should also address the dispute resolution mechanisms in a deal. For instance, you should state which court(s) will have jurisdiction over any disputes arising under the agreement. Or, if the parties desire an alternative dispute resolution procedure, then you should set forth:

- What rules will be used in such procedure;
- Who will be eligible to serve as the arbitrators or mediators; and
- How the arbitrators or mediators will be selected.

As always, however, you should check with the laws of your jurisdiction to ensure that your dispute resolution mechanism is enforceable in the jurisdiction governing the transaction given the context of your transaction. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. §171.001(b) (Vernon 2004) (stating that an agreement to arbitrate is valid and enforceable except when a party has grounds for revocation at law or in equity under general contract principles).

In some transactions, if the dispute resolution mechanism will be litigation, the parties may wish to waive the right to a jury trial in the miscellaneous provisions. Any other waivers that the parties will be making, such as waivers of punitive damages and the like, should be included in the miscellaneous provisions as well (unless such waivers related specifically to a

particular provision in the body of your agreement). It is good practice to make waiver provisions conspicuous, which is often done by capitalizing all the letters in each word of a waiver provision, but you should check the practices and applicable law in the jurisdiction that governs the transaction, since certain jurisdictions have particular customs and requirements regarding waivers. *See, e.g.,* Cal. Civ. Code §2954.10 (2005) (requiring the obligor to initial any waiver of the prohibition on prepayment penalties for early satisfaction of loans); *In re Bassett,* 285 F.3d 882, 886-887 (9th Cir. 2002) (holding that the lower-case words were more conspicuous than the capitalized words on a page of a contract). Furthermore, the validity of jury trial waivers, specifically, may be questionable depending on the jurisdiction governing your agreement. *See, e.g., Grafton Partners LP v. Superior Court,* 9 Cal. Rptr. 3d 511 (Cal. Ct. App. 2004), *rev. granted by* 88 P.3d 24 (Cal. 2004) (holding that contractual pre-dispute jury trial waivers are unenforceable under California's constitution).

The Severability Provision

A severability provision is advisable, stating that the agreement is intended to be performed in accordance with and to the extent permitted by applicable law, and that, if any provision of the agreement is found unenforceable by reason of violation of applicable law or otherwise, the remainder of the agreement will be enforced to the greatest extent permitted by law. These provisions typically prevent the unenforceability of one provision from making the entire agreement unenforceable. *See, e.g., Kruger Clinic Orthopaedics, LLC v. Regence Blueshield,* 98 P.3d 66, 75 (Wash. Ct. App. 2004); *Key v. Naylor, Inc.,* 602 S.E.2d 192, 196 (Ga. Ct. App. 2004). The inclusion of a severability clause will not always ensure that the remaining provisions of your agreement will be enforced after one provision is found unenforceable, however. *See, e.g., Nyulassy v. Lockheed Martin Corp.,* 16 Cal. Rptr. 3d 296, 311 (Cal. Ct. App. 2004) (stating that a court may choose not to sever unconscionable provisions from the rest of a contract, if the unconscionability permeates the agreement); *Hill v. Names & Addresses, Inc.,* 571 N.E.2d 1085, 1100 (Ill. Ct. App. 1991) (holding that when an unenforceable provision is essential to the contract, such provision is not severable despite a general severability provision elsewhere in the agreement). Nevertheless, courts find the inclusion of a severability provision to be a strong indication of the parties' intent. *See, e.g., Key,* supra, 602 S.E. 2d at 196.

The Integration Provision

It is also important to focus on the integration provision you may find in your form contracts.

Superseding Prior Agreements And Representations

For instance, in a commercial transaction, the parties may have signed a letter of intent, term sheet, or proposal letter outlining certain terms to be contained in the ultimate contract. Those terms as documented in the contract are more carefully and specifically drafted and usually should supersede the terms in the letter of intent, term sheet, or proposal letter. An integration clause, an example of which follows, causes the contract to supersede any prior agreements:

"This Agreement contains the entire understanding between the parties and supersedes any prior understanding and agreements between them respecting the subject matter hereof. There are no representations, agreements, arrangements or understandings, oral or written, between the parties hereto relating to the subject matter of this Agreement which are not

fully expressed herein."

The integration clause usually prevents a party from later successfully claiming that a prior oral or written understanding or agreement is still applicable to the transaction at hand. *See, e.g., Toy v. Metropolitan Life Ins. Co.*, 863 A.2d 1, 13 n.4 (Pa. Super. Ct. 2004) (holding that an integration clause nullifies all prior representations thereby precluding parol evidence as to prior representations); *London v. American Hearing Ctrs., Inc.*, No. 245774, 2004 WL 2124626, slip op. at *3 (Mich. App. Sept. 23, 2004) (holding that an integration clause nullified all prior agreements, including prior promises). It is true that under certain circumstances and in certain jurisdictions, a court may allow parol evidence and look to prior understandings despite an integration clause. *See, e.g., Shawmut-Canton LLC v. Great Spring Waters of America, Inc.*, 816 N.E.2d 545, 549 (Mass. Ct. App. 2004) (holding that in cases of fraudulent inducement, an integration clause does not bar parol evidence of prior understandings, even when the parties are sophisticated). However, in most cases, the courts defer to integration clauses, and, even in jurisdictions where a presumption of integration exists by operation of law, the inclusion of an integration clause in your contract may give a court the additional support it needs to render a judgment in favor of integration. *See, e.g., Worthington v. Speedway SuperAmerica LLC*, No. 2004 WL 2260501 at *3 (Ohio Ct. App. Sept. 20, 2004) (stating that Ohio courts will presume integration and that the presumption "is strongest when the written agreement contains a merger or integration clause").

Account For Amendments And Concurrent Contracts

On the other hand, if you are drafting a document such as an amendment, you will probably want to modify your integration provision to state that the original agreement as modified by the amendment constitutes the entire agreement, rather than stating that the amendment alone constitutes the entire agreement. Furthermore, suppose your transaction involves various agreements, and in drafting Contract A, you have incorporated Contract B by reference into Contract A. In this case, using the integration provision as drafted above would mean that both contracts A and B govern the subject matter at hand. Thus, the integration clause, like the other miscellaneous provisions, needs your complete attention in each transaction that you document.

CONCLUSION: MODIFYING AND MELIORATING YOUR CONTRACT • In conclusion, I leave you with this thought from renowned author E. B. White: "Few writers are so expert that they can produce what they are after on the first try." Strunk and White, at 72. This applies to novelists, journalists, and attorneys—even transactional attorneys who draft contracts every day! Take the time to review your contract in full and make modifications when necessary, appropriate, or helpful in clarifying the transaction at hand and effectuating it in accordance with the parties' intent.

PRACTICE CHECKLIST FOR
Writing Tips For The Transactional Attorney

The following is a checklist to use when drafting contracts. You should be able to answer "yes" to each of the questions below.

- For the introductory paragraph, did you:

__ Describe the type of agreement and define the agreement?
__ Spell all party names correctly?
__ Describe and define corporate parties adequately?
__ Include the date of the agreement?

- With respect to recitals, did you:

__ Describe the basic agreement so that the subject matter can be quickly determined?
__ Describe the background of the deal?
__ Describe the consideration involved and include a short recital of consideration?

- In the body, did you:

__ Use plain, modern English throughout the document?
__ Use the same language for similar ideas?
__ Double check all numbers?
__ Refer to all defined terms in the definition section (even those defined in the body)?
__ Draft defined terms that are distinguishable from one another?
__ Use a maximum of four words in each defined term?
__ Omit language regarding ancillary obligations from all definitions?

- For the miscellaneous provisions, did you:

__ Use the current, correct contact person and contact information for notice purposes?
__ Draft notice procedures that are reasonably feasible?
__ Include a dispute resolution provision?
__ Include a severability provision?
__ Carefully review the integration clause to ensure that it has the desired effect?

- In reviewing and revising, did you:

__ Review the agreement from beginning to end?
__ Revise the agreement for greater clarity?