THE ESSENTIALS OF CONTRACT DRAFTING

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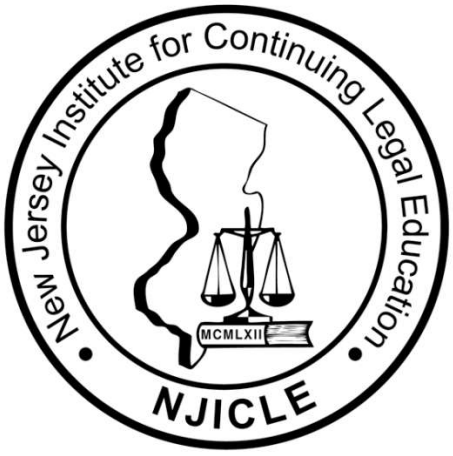

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THE ESSENTIALS OF CONTRACT DRAFTING

Featuring

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How to Draft a Contract:

The Nuts & Bolts of Contract Drafting



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Introduction

"*There are two things wrong with almost all legal writing. One is its style. The other is its content.*" -- Fred Rodell[1]

Contract drafting is one of the most fundamental skills required of lawyers, yet it is the single skill for which we are least prepared. While Legal Writing is a required course at most law schools, Contract Drafting is usually offered as an elective to a small fraction of law students; it is seldom a required course. Most "formal" drafting curricula focus on general mechanics of assembling a contract rather than specific techniques for crafting the language. Many lawyers, professors, and authors still do not distinguish the two topics, although the objectives of legal writing and contract drafting are completely different.

Legal writing generally encompasses briefs and pleadings – documents filed with the court that are primarily used and read by judges and other lawyers. Legal writing is historical in the sense that briefs and pleadings typically describe a specific event that occurred and its known ramifications. The goal of legal writing is to persuade the court of the validity of your client's position. In contrast, "drafting" refers to a specific genre of legal writing that involves future-oriented legal communications, such as contracts, wills, and statutes. These documents are read and used by non-lawyers. The goal of contract drafting is to control *future* behavior.

Because the objectives and purposes of legal writing and contract drafting are so different, lawyers who only study legal writing have not been properly prepared in one of the most fundamental skills required by their profession. Most practicing lawyers learned what they know about contract drafting from the lawyers who hired them out of law school; however, most of these lawyers also received no formal training in contract drafting. Case law and statutes rarely proclaim a "right way" of drafting, which leads many lawyers to the mistaken conclusion that there is no "wrong way" of drafting legal documents.

While lawyers are busily drafting legal documents, writing authorities are producing an ever-expanding supply of hornbook recommendations on how to improve drafting. Surprisingly, many of these self-appointed experts have virtually no meaningful experience in transactional practice. Moreover, lawyers are largely unaware of their recommendations and do not have time available to translate hazy theories of drafting into viable techniques that can be applied in practice.

The drafting techniques introduced in this seminar are not just about vocabulary and grammar, although language is key in excellent drafting. Rather, the focus is on understanding the context of contract drafting and on implementing specific techniques that will enable you to achieve your responsibilities and objectives as a contract drafter. Although laws and cases are rarely cited in written contracts, lawyers must have a good understanding of the legal framework surrounding the finished product. Excellent drafting involves planning, designing,

[1] Fred Rodell, "*Goodbye to Law Reviews*," 23 Va. L. Rev. 38 (1937) at 38.

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and organizing documents, writing clear sentences that create specific legal consequences, and avoiding ambiguity.

Organization of Seminar

The material introduced in this seminar is grouped into four categories:

1) **The Framework,** which includes identifying the characteristics of excellent drafting; understanding the legal context of drafting; recognizing the components of a contract; and understanding what typical performance provisions and boilerplate mean.

2) **Preparation,** which includes ascertaining the basis of the bargain; specific techniques for interviewing clients; identifying the likely audience of the document; and determining whether provisions included in the template document are required by law, essential, recommended, or optional.

3) **Drafting Techniques,** which includes practical tips on how to create defined terms; which words to use to create intended consequences; how to start from a winning position; how to allocate risk; and how to track money and alternative outcomes.

4) **Finishing Strong,** which includes alternative dispute resolution methods; dealing with gender and numbers; appearance; how to review a contract effectively; how to amend a contract; and tips for drafting in "the cloud" using web apps like google docs and iCloud.

Image Repair

The primary objective of this seminar is to teach clear, straightforward principles and techniques that will enable new lawyers to draft with confidence. The preamble to the Model Rules of Professional Ethics states that "[a]s a citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession." This is my reason for offering this seminar, and likely it is your reason for attending.

One reason the legal profession has earned the bad public image it suffers is because of the pompous, atrocious prose it heaps upon undeserving clients. Like other professions, we have our own jargon that we understand perfectly among ourselves; however, because our clients need to understand the documents we draft, and for which we charge generous legal fees, we have a special obligation to communicate effectively and clearly beyond the boundaries of our profession. My aspiration is that by helping lawyers acquire the skills necessary to be successful in transactional practice, our work product will improve, and, ultimately, the public image of our profession will be enhanced.

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1 – The Characteristics of Excellent Drafting

One of the surest ways to reach your destination is to have a good idea where you are going and what you hope to achieve. Often, we intuitively recognize excellent drafting without necessarily being cognizant of what makes it "excellent." So, before we discuss specific drafting techniques, let's begin by defining the characteristics of "excellence" in contract drafting.

1. Accurate – the text is substantively accurate, meaning the provisions have been drafted so they communicate the terms of the agreement hovering in the minds of the parties. This means that the lawyer has selected words and organized sentences that are legally binding and express the specific agreement intended by the parties. We tend to focus on the provisions that are included in the agreement, but there is more to the story than that. Saying what you mean is not always as easy as it seems, as Alice learned the hard way at a mad tea party in Wonderland:[2]

March Hare: *You should say what you mean.*

Alice: *I do say what I mean, at least I mean what I say. That's the same thing, you know.*

Hatter: *Not the same thing a bit! Why, you might just as well say that 'I see what I eat' is the same thing as 'I eat what I see."*

March Hare: *You might just as well say that 'I like what I get' is the same thing as 'I get what I like."*

Dormouse: *You might just as well say that 'I breathe when I sleep' is the same thing as 'I sleep when I breathe'!*

This dialog illustrates the point that it's not enough that the document is legally binding; accuracy means that the drafted document reflects what the parties intended, which is rather a different thing than that the parties mean what the document says. Excellence in drafting means that the document accurately reflects the entire substantive agreement of the parties.

2. Clear – the provisions of the document are clear to the reader. The provisions are drafted so their meaning is unambiguous – capable of only one plausible interpretation – that being the one both parties intended. Clarity is the opposite of ambiguity, and is achieved by structuring sentences properly, choosing words carefully, and ensuring that the terms are internally consistent and complete.

[2] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND, excerpt from Chapter 7, with extreme liberties taken regarding punctuation and dialog.

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3. **Efficient** – the text is "long enough and not one word longer."[3] Efficiency does not mean that the document is short; rather, it means that each word included in the document serves a clear purpose. Efficiency means that each concept is expressed only once within a document; repetitious words, phrases, and provisions are eliminated. The challenge for new lawyers is to identify and eliminate words and phrases that do not add meaning in drafted documents.

4. **Simple** – the text is simple to read and comprehend. Complexity in the text should come from the subjects addressed and not the syntax. Simplicity in contract drafting means the concepts are expressed in simple sentences using the simplest possible words. In drafting, "the simplest word, that is, the word most commonly understood, should in general be preferred."[4]

5. **Resonance –** the text strikes a balance between being too pompous and too casual; it resonates with its intended audience. The proper tone for contracts is professional, using proper grammar, but avoiding pompous-sounding words lawyers know but the audience of the document probably doesn't.

[3] THOMAS R. HAGGARD, Legal Drafting in a Nutshell (2003), at p. 5.
[4] *Id.*

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Exercise:

Identify which characteristic of excellent drafting is absent in each example. *(hint: more than one may apply)*

_____ 1. Consultant acknowledges and agrees that the payment of monies hereunder constitutes monies to which Consultant was not previously entitled and, further, that the payment of monies hereunder constitutes fair and adequate consideration for Consultant's execution of this Agreement.

_____ 2. In exchange for the promises and/or covenants of Employer contained herein, subject to the provisions of this Agreement, Employee will provide the following to Employee:

_____ 3. Company's maximum liability to Service Provider under this GPA (regardless of cause or form of action, whether in contract, tort, or otherwise) shall be limited to the total amount owed Service Provider in payment for Service Provider's fulfillment of its obligations under this Agreement.

_____ 4. Whereas, the party of the first part has heretofore conveyed unto the party of the second part that certain part, parcel and tract of real property whereupon the premises reside, it behooves the aforementioned party of the first part to bequeath the premises to the party of the second part.

_____ 5. The foundation may grant funds to educational institutions and corporations assisting physically impaired individuals.

_____ 6. Buyer shall remit payment by wire transfer to an account designated by Seller within five days after Closing.

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2 – The Legal Context of Contract Drafting

One of the ways that contract drafting differs from legal writing is that while pleadings and briefs analyze, cite, quote, discuss, and argue applicable law, contracts do not; however, you must thoroughly understand the applicable law underlying the transaction to ensure that your contract will be enforceable as your client intends.

2.1 Ethical Standards. Being well-informed is not just a theoretical platitude; it is required of lawyers under Model Rules of Professional Ethics. The comment to Rule 1.1 addresses thoroughness and preparation, and states that:

> "Competent handling of a particular matter **includes inquiry into and analysis of the factual and legal elements of the problem**, and use of methods and procedures meeting the standards of competent practitioners. It also includes **adequate preparation**. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence."

The lawyer who drafts a document without being fully informed of the client's objectives and circumstances has not fulfilled the responsibility to the client. The maximum penalty for a violation of Rule 1.1 is disbarment – reason enough to take the responsibility seriously.[5]

Model Rules

Rule 1.1 – COMPETENCE:

A lawyer shall provide competent representation to a client. Competent representation as used in this Rule means that a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question. Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The maximum penalty for a violation of this Rule is disbarment.

Comment

Legal Knowledge and Skill

[1A] The purpose of these rules is not to give rise to a cause of action nor to create a presumption that a legal duty has been breached. These Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

[5] Per Model Rule 1.1, Comments [2] and [5].

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[1B] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person subject to *Rule 6.2: Accepting Appointments*.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the Model Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should inform the appropriate authority.

There is no disciplinary penalty for a violation of this Rule.

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Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigations when they know of a violation of the Model Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

Obviously, you must take into account any laws that direct pertain to the subject matter of the contract; however, the contract language may also be influenced by other, indirect legal considerations, like 1) unwritten terms that creep into the contract through the UCC and other "gap fillers"; 2) specific disclosures that are required to be included by statute; and 3) case law precedents that dictate how certain provisions will be interpreted.

2.2 UCC and other gap fillers. Take time to research and understand the laws applicable to each transaction. For example, the Uniform Commercial Code provides a general statutory framework for how contracts for the sale of goods will be performed. The parties are free to vary most of the terms of the UCC, but these statutory terms will apply unless the contract is drafted to alter or exclude them. If the contract is silent regarding warranty terms, any express warranties made by the seller during negotiations and the implied warranties of merchantability and fitness for particular purpose will automatically be included. If the client does not desire to invoke the warranty terms provided in the UCC, the written contract must specifically disclaim UCC warranties – by name, clearly, unequivocally, and in a positive manner.[6]

Similarly, corporate documents must comply with the applicable Business Corporation Code requirements, health care transactions must comply with HIPPA, and so on. Carefully analyze the legal context before drafting or risk incurring unintended responsibilities and liabilities, embarrassment, claims for malpractice, and possibly even ethical censure if the transaction ultimately goes sour.

In contract litigation, a trial lawyer's job is to convince the court to construe the contract in a manner favorable to his or her client's interests. A number of tools are at the disposal of trial lawyers to fill the gaps and influence the court if the express terms are not thorough and clear, and you need to be familiar with these tools and take them into account while drafting. Most lawyers are aware that provisions of the Uniform Commercial Code provide a safety net for issues that are not fully addressed in contracts for the sale of goods; however, the UCC also includes a strategy for interpreting the existing language of a contract within the context of the relationship of the parties.

First, in construing the language of an installment contract, or a contract performed over time, the parties are to consider the "**course of performance**," which is the manner in which the parties performed the same contract before the dispute arose. Despite carefully crafted

[6] Some courts have held it is not enough to state that a specific warranty is not given; the language must specifically state that the warranty is disclaimed. SEE e.g., Walker Ford Sales v. Gaither, 265 Ark. 275, 278; 578 S.W. 2d 23, 25, where stating that "this warranty is in place of all other warranties" was deemed insufficient to disclaim implied warranties.

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language, the actual performance by the parties may serve to vary the written terms of a contract without an amendment. A waiver/no waiver provision will likely be helpful in preventing a single compromise from modifying the clear language of a contract, but it will not protect the language in situations where the parties have persistently ignored it. For example, if an installment contract provides for delivery of a ton of limestone on the 1st day of each month but the buyer accepts delivery on the 15th day of the month for ten consecutive months without objection, the performance of the parties may be deemed by the court to have modified the delivery terms of the contract.

A lawyer ordinarily has surprisingly little control over the way a client actually performs the contract but you can do two things before the contract is signed to avoid future problems having to do with course of performance: 1) carefully review the terms with the client to ensure that the scope and delivery terms in the contract accurately reflect the requirements of the transaction; and 2) counsel the client that it must require strict compliance with the terms to prevent unintentional modifications.

Next, the contract may be modified by the "**course of dealing**," which has to do with how these parties have performed under previous contracts with each other. Because prior dealings of the parties can be used to fill gaps, take the time before drafting to discover what the relationship of the parties has been in the past before drafting the contract, and address any problematic prior performance by specifically noting it, like this: "Although in prior contracts Buyer has accepted delivery of the goods on the 15th, the parties intend to change past practices in this Agreement, and Seller shall deliver the goods on the first day of each calendar month during the Term."[7]

Next, in construing the language of a contract "**trade customs**" must be considered. Under UCC §1-303, a trade custom is "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." For example, in an oral contract where there was no express agreement for damages incurred as a result of the loss of drilling equipment, the court enforced a custom in the drilling industry that imposes the risk of loss of a probe used in drilling on the driller.[8] In the construction industry, it is customary that payment by the owner to the general contractor is not a condition on the general contractor's duty to pay subcontractors; therefore, if you intend to create a condition that payment is due from general contractor to a subcontractor only after the general contractor has been paid, this must be stated unequivocally and unambiguously in the contract.[9]

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[7] Even though repetitive statements of agreement are usually unnecessary and inadvisable clutter, I recommend emphasizing that the parties have agreed to do something the courts tend to disfavor, in this case, modify the course of dealing, by including a statement of agreement within the provision, like "the parties have agreed…."

[8] *Threadgill v. Peabody Coal Co.*, 526 P. 2d 676 (1974). The prober, Threadgill, was hired to test soil samples. He provided equipment that was lost by Peabody in the process of drilling test holes. The court explained the reasoning for this particular trade custom: the driller has primary control over the drilling of the hole, and the prober is not involved in the drilling, so the prober must rely on the driller's judgment.

[9] This trade custom was an integral part of the court's decision in *Peacock Const. Co., Inc. v. Modern Air Conditioning, Inc*., 353 So. 2d 840 (1977). The language of the contract definitely reflected the intention of the parties to tie payment to some future event. The court concluded that the provision was ambiguous, although plenty of courts would have concluded otherwise based on the language at issue, demonstrating the court's extreme distaste

The safest method of altering an accepted trade custom is to acknowledge it in a dependent clause, and alter it in the independent clause, like this: "Although it is customary in the construction industry that Sub's payment is not conditioned upon Contractor's receipt of payment from Owner, for purposes of this Agreement, the parties agree that Contractor shall remit the payment to Sub within 30 days after receiving payment from Owner."[10]

Next, in construing the language of a contract, **industry jargon** must be considered, which means that you must be familiar with how terminology used in the contract is used within the client's industry. For example, it is common in some contracts to include a provision that calculations are final "absent manifest error"; however, in the logistics industry, a "manifest" is a list of the items that are included in shipping. In construing a contractual provision involving a logistics company, the word "manifest" could be construed specifically to mean an error on this list.

The **Uniform Commercial Code** provides a general statutory framework for how contracts for the sale of goods will be performed. If the client does not want the transaction to be performed according to the UCC, the written contract must either state how the parties DO intend to perform the transaction or state which provisions of the UCC do not apply. The hierarchy of interpretive tools is established in UCC Section 1-303, which provides that:

> the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable: (1) express terms prevail over course of performance, course of dealing, and usage of trade; (2)course of performance prevails over course of dealing and usage of trade; and (3) course of dealing prevails over usage of trade.

After express terms, course of performance, course of dealing, and usage of trade, the provisions of the UCC itself fill in any remaining gaps in the contract language.

2.3 Disclosures required by statute. Sometimes, statutes require specific disclosures in writing. Consider the following examples, just to name a few:

- Employment and severance agreements – COBRA and other disclosures are required by Federal law to avoid penalties against the employer;
- Corporate documents – minority rights are protected by state corporation codes, and certain disclosures are required when minority shareholders' rights could be affected; all shareholders have the right to access certain corporate records;

---

for overturning established practices. The provision giving rise to litigation indicated that Peacock would make final payment to the subcontractor "within 30 days after the completion of the work included in this subcontract, written acceptance by the Architect and full payment therefor by the Owner." The court concluded this provision was ambiguous, and held that judicial interpretation of an ambiguous provision must be in favor of the subcontractor because of the industry custom.

[10] Again, in a situation like this, where the parties are intentionally deviating from established norms, a statement of agreement, though technically repetitive, is warranted and effective.

- Software licenses – disclosures regarding restrictions on export are required by federal law;

- Government contractors – government trade partners are required to comply, and to ensure that their trade partners comply, with federal laws regarding EEOC, debarment and suspension, lobbying, buy American, no kickbacks, and Executive Order 11246;

- Truth-in-lending – disclosures are required in certain financial transactions, particularly those involving consumers.

Learn whether any language is statutorily required and, if so, make sure it is included in the written contract.

2.4 Enforceability Issues. Case law sometimes dictates how certain provisions will be construed. In Georgia, for example, the courts have judicially decreed that the phrase "reasonable attorneys' fees" means a specific percentage of damages. If you intend that ALL attorneys' fees, or a greater or lesser percentage than specified by case law should be covered, then the contract must so state.[11] Be sure you understand any laws applicable to the enforceability of specific provisions, like the following:

- Provisions that attempt to terminate the contract if one of the parties files for bankruptcy protection;

- Recitals of consideration in contracts signed under seal;

- Click-wrap licenses;

- Limitations of liability;

- Liquidated damages clauses;

- Restrictive covenants; and

- Arbitration clauses, particularly in certain types of agreements.

Much is written about unnecessary verbiage included in contracts out of habit, but keep in mind that all contract language was inserted into the earliest permutation of every provision for some reason. While unnecessary language should certainly be omitted, carefully consider whether the reason to include the language still exists, or exists in the present situation, before you indiscriminately omit it. If you draft without inquiring and analyzing the legal framework,

[11] Note that this creates the dilemma of whether the actual fees should still be "reasonable" under the circumstances, which is the reason many lawyers use the phrase "actual attorneys' fees reasonably incurred."

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you have not fulfilled your responsibility to the client. Besides the possibility of claims for malpractice, you may face ethical sanctions under the Model Rules. The penalty for failing to understand the legal framework may be disbarment – reason enough to take the responsibility seriously.

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3 – The Essential Parts of a Contract

3.1 Essential Parts of a Contract. Lawyers draft contracts for many different types of transactions and purposes, but most contracts consist of the following parts:

1. Name or title of the contract
2. Introduction
3. Statement of purpose
4. Statement of agreement
5. Definitions
6. Performance provisions
7. Boilerplate
8. Signature blocks
9. Schedules and exhibits

1. Name or title of the contract. The name of the contract is listed in bold type at the top of the first page. The name should identify the nature of the transaction, such as "Merger Agreement," "Employment Agreement," or "Shareholders' Agreement." Keep the title brief by eliminating extraneous information, such as the names of the parties, but not too brief – "Agreement" reveals nothing and may cause confusion if there are related documents named the same thing.

2. Introduction. The introductory paragraph identifies the parties to the transaction and may include the effective date of the contract. The parties should be reference by their formal legal names; for corporations and limited liability companies, this should be the name that is used in incorporation or organization documents filed with the Secretary of State. The legal name of an individual is the name by which he or she is generally known; the person's birth certificate is not necessarily determinative. Avoid using a trade name, which is a name under which a person or entity conducts business that is not its legal name. The introduction should designate the corporate status of the parties: e.g., ABC, Inc., a Delaware corporation; or Joshua C. Smith, an individual residing in the State of Missouri. Be sure to identify the capacity in which the parties are entering the transaction if there is any doubt. For example, in a stock purchase agreement, the officer who signs on behalf of the corporation may also be a party to the contract individually as a selling shareholder. The selling shareholder should be identified as a party to the contract in his or her individual capacity. Capacity must be established because in some cases, applicable law depends upon whether a party is a corporation, partnership, or an individual.

3. Statement of purpose. In traditional form contracts, the recital portion of the contract typically includes a string of "whereas" and "now therefore" clauses that provide background information with respect to the parties' reasons for entering into the contract. The current best practice is to provide a "Statement of Purpose" in lieu of the traditional recitals. The Statement of Purpose is a paragraph that provides the background information which summarizes the parties' reasons for entering into the agreement. The Statement of Purpose should not include definitions or operative terms of the agreement. Although some courts have held that the recital section or the Statement of Purpose is not part of the contract, most courts hold it is part of the contract. Because the background information evidences what the parties

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intended when they entered the contract, if a dispute arises performance provisions may be interpreted by the court in light of the Statement of Purpose. The provision must be drafted and reviewed carefully.

4. Statement of Agreement. Traditional form contracts begin with a statement to the effect that in consideration of the promises contained in the contract, the parties agree to the terms that follow. Because consideration is a required element of all contracts, some lawyers mistakenly conclude that a consideration recital is a required element. Under current law in most states, consideration is established *because* the parties have agreed to enter into the transaction, so in most instances recitals stating that consideration has been exchanged are superfluous.[12] The current best practice is to include a simple statement like "the parties agree as follows," "we agree," or "the parties agree to the following terms." Without a statement that the parties agree to the terms that follow, however, the parties technically have not obligated themselves to perform; enforcement of such an agreement would be entirely dependent upon a court's discretion and willingness to infer an agreement that has not been stated; this is perilous at best; malpractice at worst, so always double check to be sure a statement of agreement is included.

5. Definitions. Lawyers define terms in a contract to ensure that the parties are using the terms to have the same meanings. Where five or fewer defined terms are used in a contract, the terms can be defined in the section where they are first used; where more than five defined terms are used it is preferable to create a glossary to assimilate definitions. Some lawyers prefer to put the glossary at the end of the contract, but it makes more sense logically to include the definitions at the beginning so the reader 1) knows where they are; and 2) understands the meaning of the terms when encountering them in context.

6. Performance provisions. The performance provisions of the contract describe the promises each party has made to the other. The performance provisions set out who is obligated to do what, when, and where they are obligated to do it, and what happens if either party fails to perform. Performance provisions are unique to each contract and are usually the terms most heavily negotiated by the parties.

7. Boilerplate. Boilerplate is usually a collection of policies regarding how the contract will be construed and enforced. The term "boilerplate" was coined in the newspaper industry to describe material that was delivered to the newspaper in plate form, ready to print without any changes being possible. Although in a legal context, changes can certainly be made to the boilerplate, these provisions usually are not heavily negotiated, and lawyers sometimes tend to overlook them. Note that the term "boilerplate" sometimes has a different connotation to non-lawyers, who usually interpret it to mean all of the standard provisions in a pre-printed form.

8. Signature blocks. All parties that have an obligation under the contract must sign it in their respective capacities. This means that the officer who is also a selling shareholder as

[12] If the parties intend that the contract be signed under seal, the recital of consideration may have relevance. See LENNE' ESPENSCHIED, CONTRACT DRAFTING: Powerful Prose in Transactional Practice (3d ed., ABA Fundamentals 2019), and consult state law regarding the effect and requirements of signing under seal.

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described in "Introduction" above should sign twice; once as an officer and once in his or her individual capacity as a selling shareholder. The signatures ordinarily appear on the last page of most contracts but may appear elsewhere if a schedule format is used. Note that only the signature of an authorized officer will bind a corporate entity; signatures of directors and shareholders are not binding. Be sure to verify that the person signing on behalf of a corporate entity is in fact authorized to do so in the corporate records. The enforceability of a contract and other important legal issues can turn on how and whether the contract is appropriately signed, so pay close attention to the signature blocks, particularly with respect to contracts signed under seal.

Be sure you understand the effect of signing under seal, particularly when the law of another jurisdiction governs the contract. One effect of signing a contract under seal in jurisdictions where seals have not yet been abolished is that the statute of limitations for contracts signed under seal may be much longer. For example, in Georgia, Delaware, Maine, New Hampshire, Pennsylvania, Rhode Island, South Carolina, and possibly South Dakota, the statute of limitations for contracts signed under seal is 20 years, unless a statutory exemption exists. Many other states impose 10 or 15 year statutes of limitation for contracts signed under seal. Another concern is that in some jurisdictions, it is possible that one party can sign under seal, but not the other. If the word "seal" appears after one party's signature, but not the other, the former is subject to a 20 year statute of limitations, although the latter is not. This means the party that signed under seal can be sued even after potential counterclaims are extinguished.

For some contracts, signing under seal may be advantageous; for others it is not. The determination of whether a contract should be signed under seal may depend upon the party represented. Bank loan documents and real estate transactions are almost always signed under seal in jurisdictions where the concept survives. For example, a 20-year statute of limitations would be advantageous for the buyer in a real estate transaction although the seller would prefer the regular statute of limitations, which is typically about three years but varies from state to state. Similarly, in a merger situation, a 20-year statute of limitations would be advantageous for the surviving company to cover latent liabilities that might not arise until years after the closing, like asbestos or hazardous materials in the acquired company's property. A 20-year statute of limitations could also be advantageous for shareholders of the acquired company if it is ultimately discovered that a representation and warranty given by the surviving company at closing was fraudulent. A 20-year statute of limitations would normally be highly disadvantageous to a technology licensor. Similarly, a manufacturer of goods would prefer a shorter window to be sued for defective products.

If the contract is signed under seal in a jurisdiction that recognizes seals, it is usually necessary to include a "seal recital" immediately before the signatures; the archaic version is "IN WITNESS WHEREOF, I hereunto put my hand and seal"; the more modern version is "Signed, sealed and delivered on March 31, 2023."

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If possible, all signatures should appear on the same page. It may be necessary to insert the phrase "[Signatures on the Next Page]" at the bottom of the last page of text and move the signature block (beginning with the seal recital, if applicable) to the next page. If the date was not included in the text of the contract, it should appear in the signature block. If the contract is to be notarized, the notary recital, signature and seal appear last. Make sure that the lines are all the same length and be sure to allow enough space for the parties to sign.

[Signatures on Next Page]

_____

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Contracts signed under seal:

This Agreement is signed, sealed, and delivered on March 31, 2023.

ACME Widget Corporation [or Company, LLC, etc.]

By: _____
John Paul Jones

Its: _____
[Officer's title]

[CORPORATE SEAL]

EMPLOYEE:

_____ (SEAL)
Mark P. Smith

Contracts NOT signed under seal:

ACME:

ACME Widget Corporation [or Company, LLC, etc.]

By: _____
John Paul Jones

Its: _____
[Officer's title]

EMPLOYEE:

_____
Mark P. Smith

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Electronic Signatures, effective dates, and terminology

Under the cleverly named federal Electronic Signatures in Global and National Commerce Act, or E-Sign, 15 U.S.C.A. §§7001-7031 and the Uniform Electronic Transactions Act, or UETA, adopted by 47 states,[13] electronic signatures are as effective and enforceable as yesteryear's X. An "electronic signature" is defined under UETA as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record," which means that almost any electronic process is sufficient, whether it be clicking "I accept," scanning a signature that is copied and pasted into the file, or scribbling with a finger on a tablet or smart phone. A "digital signature" is a sub-group of electronic signatures that is encrypted and reportedly cannot be forged, copied, tampered with, or altered. Electronic signatures and digital signatures are produced by third party vendors, like EchoSign and HelloSign.

If a contract is "signed" electronically, the record of the signing will automatically include a date and time, so it is not necessary or even advisable to have each signer note the date he or she signed. If the contract is manually signed, unless the effective date is delayed or the parties sign simultaneously, the signature blocks should indicate the date each party signs the contract.

Under the common law, a contract is effective when all of the parties have signed it. Sometimes, the parties desire to have the contract become effective at a later date; if so, the effective date or method of determining it should be specified in the contract, either in the introductory paragraph, in the term and termination section, or in the signature recital just above the signatures (but preferably not in more than one place to prevent contextual ambiguity that arises when one iteration of the effective date gets revised during the course of negotiations but not the other). If the effective date is delayed, consider what the consequences may be if a party reneges before the effective date; in other words, are there any enforceable rights if the contract has not yet come into effect?

Delaying the effective date of a contract is significantly less problematic than back-dating it. The risk of back-dating a contract extends beyond the immediate parties; it can create adverse tax consequences, alter the rights of third parties under other agreements, raise issues regarding sufficiency of consideration, and become problematic in situations where the contract is part of a larger transaction. It is not uncommon within the bar to back-date contracts but it is not recommended; be sure to inform clients about the risks of doing so.

Lawyers often use the terms "execute" and "sign" as if they were interchangeable, but an "executed" contract is one that has been performed. Closing contracts, like a merger agreement, an acquisition agreement, and an assignment of intellectual property rights may indeed be "executed" at the time of signing, but most opening contracts are not, and "signed" is the preferred word for all contracts that are not performed upon signature.

[13] New York, Washington, and Illinois have not enacted UETA, but each of those states has adopted its own electronic signatures statute

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9. **Schedules and Exhibits**

These words describing attachments to a contract are sometimes used as if interchangeable, but "schedule" and "exhibit" are not two words for the same concept. An "exhibit" is a separate document that you wish to connect to the current transaction. An exhibit can be a signed contract, an unsigned contract, a form to be used in complying with a requirement specified in the contract, or another document that is relevant to the current transaction but not part of it. For example, a construction contract might attach as an exhibit the antecedent request for proposal; a consulting agreement might attach as an exhibit the form of non-disclosure agreement the consultant is required to have signed by its employees; and a merger agreement might attach as exhibits its organizational documents and employment contracts for executive officers. Exhibits are usually numbered consecutively, either in A, B, C, or 1, 2, 3 format, and should be arranged in the same order that they appear in the contract.

A "schedule" is an attachment that provides necessary details about the current transaction that would be burdensome to include in the text of the contract.[14] For example, in an acquisition agreement, the list of selling shareholders would be included on a schedule if there are more than a few. In a software development agreement, details about milestones and functional specifications are usually included on a schedule. Schedules are often used to describe the details of exceptions to a provision. For example, "Seller represents and warrants that no hazardous materials have been used on the Premises, except as noted on Schedule 4.7." A schedule is useful in situations where some of the information is not available when you draft the agreement, and a schedule may be useful to maintain privacy in situations where the agreement itself is available for public scrutiny, but the schedules are not. Schedules are usually assigned the number of the provision in which they are referenced in the contract. For example, a schedule referenced in this Section would be called "Schedule 4.2."

If a contract includes schedules and exhibits, number the schedules and use letters for the exhibits. Although it is necessary to link schedules and exhibits to the contract, it is not necessary to use the phrase "incorporated by this reference," or its ilk using taboo words like "herein" and "hereto"; in fact, when the rights and obligations of an exhibit involve other parties, it makes no sense to incorporate an exhibit by reference. Link schedules and exhibits to the contract by simply mentioning them in the text.

3.2 Virtual attachments

Contracts often incorporate by reference documents that are not physically attached. Sometimes, those attachments are available in writing elsewhere, like a privacy policy, a price

[14] One treatise states that schedules are used "to disclose information that would otherwise be in representations and warranties." This is incorrect. Although schedules are often used with representations and warranties, schedules are used with many other types of provisions and with many types of transactions that do not include representations and warranties.

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list, or an employee handbook; other times, those attachments may be posted by one of the parties online. If the attachment is not physically "attached" to the contract, it is necessary to incorporate the terms of the attachment by specifically referencing it. For example: "Contractor shall comply with Owner's billing instructions posted at http://www.hereareourterms.com/billinginstructions, which billing instructions are incorporated by reference."

Be sure to consider how the obligations of the parties are affected by changes in the referenced documents: is the obligation defined by the terms of the referenced attachments at the time the contract was signed, or does the obligation change as the terms are updated and revised from time to time? Most often, when attachments are posted online, the party that controls the website reserves the right to unilaterally change the attachment, and often even imposes a duty on the other party to keep up with any changes. While this is potentially a great benefit to the party that controls the website, it allocates a great risk to the other party. If the client doesn't control the website where virtual attachments are housed, negotiate that the online contract attachment be set as of a specific date, and be sure to retain a permanent copy of the terms as of that date.

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4 – Types of Contracts

4.1 Types of Contracts. Lawyers draft agreements for many different types of transactions. Some transactions are "closings," where once the deal is complete, the parties generally have no ongoing obligations to each other. For example, sales of commercial real estate and mergers are usually structured as closings. When the documents have been signed and filed, the transaction is considered "closed." Other transactions represent "openings," to coin a phrase, because the parties anticipate an ongoing relationship which may be for a specified or unspecified period of time. For example, employment contracts, partnership agreements, software licenses, and distribution agreements are drafted to "open" an ongoing relationship between the parties.

Whether you are drafting for an opening or a closing, the same drafting techniques apply. Although drafting for an opening requires the lawyer to anticipate circumstances and contingencies that may arise over a longer term, a lawyer who drafts closing documents without considering contingencies has failed to provide adequate representation. Before drafting, determine which contract format best suits the particular transaction. The three contract formats used most often in transactional practice are traditional, schedule, and letter.[9] When properly drafted and signed by the parties, each of these contract formats is equally enforceable.

A **traditional form contract** is the most common and is the most appropriate format for closings. In a traditional contract, the tone is slightly more formal and the contract components are arranged so the signatures appear on the last page of the text of the agreement, but before schedules and exhibits.

A **schedule agreement** is arranged so the signatures appear on the first page of the agreement. Performance and boilerplate provisions are contained in schedules that are listed and incorporated by reference on the first page of the agreement along with any other schedules and exhibits. Performance and boilerplate provisions are usually included in a schedule called "General Terms and Conditions," or something similar. Other schedules might include specifications for the goods and services, insurance requirements, or terms included in a request for proposal. Caveat: Unless a schedule is listed on the first page and incorporated by reference, it is not considered part of the agreement. A schedule agreement format is most useful as a "standard" form for a series of transactions that are similar in nature.[10] For example, a large utility company might use a schedule format general services agreement to contract with various local contractors to install utility poles from county to county throughout the state. A large corporation might use a schedule format to purchase goods and services from various vendors.

A **letter agreement** is more cordial in nature and is often used in "openings" where the parties anticipate a more personal, ongoing relationship. The terms of the agreement are contained in a letter written from one party to the other. A letter agreement is commonly used in offering employment, as a confidentiality agreement between parties that wish to explore opportunities for a merger, or as a letter of intent, summarizing preliminary discussions for an

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anticipated transaction. The party sending the letter has already signed it, and a letter agreement must include some mechanism for the other party to indicate acceptance of its terms. This is usually accomplished by including a sentence like this: "If the terms outlined above are acceptable to you, please sign below and return to me." Caveat: Unless the other party signs to indicate acceptance of the terms, no contract has been formed.

4.2 Person in Contracts. In the English language, "person" reveals who or what receives the action of the verb, and there are three possibilities, each of which can be singular or plural:

- **first person** (I or we), which means the communicator is speaking or writing *about* himself, or herself, or a group including himself or herself;

- **second person** (you or you), which means the communicator is speaking or writing *to* someone else – you, which can be singular or plural; and

- **third person** (he, she, it, or they), which means the communicator is speaking or writing *about* someone or something else, a person, place, or thing or a group of people, places or things.

	Singular	**Plural**
First Person	I	we
Second Person	you	you
Third Person	he, she, it, Jones, UPS, or Company	they, the Shareholders

Most business contracts should be drafted in third person, describing the rights and obligations of a particular person or an entity, either by name, like Jones; a defined term, like UPS; by a noun that describes the entity, like the employee or the company; or by a pronoun that refers to the person or entity, like he, she, or it.

Consumer contracts, particularly ones that are required to be written at a lower readability level, are usually drafted using a combination of first and second person, like this: "We will loan you $10,000. You will repay the loan by making payments of $100 per month for the next 120 months." Because a letter agreement is more cordial and is often used in situations where the parties anticipate a more personal, ongoing relationship, letter agreements are often written in a combination of first and second person, like this: "During the course of our negotiations, we may provide you with certain Proprietary Information."

In using a combination of first and second person in a less formal contract, be mindful of the challenge of referring to both parties simultaneously: if "we" is used to refer to one party, how does one refer to "we" and "you" together? The challenge is not insurmountable, the informality may be required to comply with readability requirements, and the advantage of setting a cordial tone in a letter agreement is usually worth the effort. Try "we and you together" or "both we and you" to solve the problem.

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5 – Common Performance Provisions

A transactional lawyer drafts contracts and other legal documents that implement the client's business deals and objectives. A contract drafter is primarily focused on three things: 1) control – the lawyer wants to control the way the parties interact with each other in the future; 2) standards – the lawyer wants to impose certain requirements for measuring the quality of performance; and 3) risk – the lawyer wants to ensure that the risk the client assumes under the contract is appropriate given the benefit(s) the client will receive under it.

Although every contract is different, certain types of performance provisions appear in most contracts of a similar nature. For example, contracts involving acquisitions and mergers typically include one or two sections called "Representations and Warranties." Contracts for the sale of goods usually include either a limited warranty or disclaimer of warranties, which are similar in some respects to representations and warranties provisions but used to warrant the quality of goods or services. It is also common practice in many different types of transactions to include performance provisions seeking to limit liability, or to transfer liability from one party to the other if something goes wrong when the contract is performed. Some contracts may include liquidated damage provisions. Whether drafting or reviewing contracts, you must understand what these terms mean, and how they can impact your client's rights and obligations. Do not copy these provisions from one document to another without considering their ramifications in the context of the current transaction.

5.1 Scope. The scope section should be the first substantive section of the contract. It specifies the duties of the parties: what the parties have agreed to do under the contract, (other than payment terms, which should be grouped in another section) and answers the basic journalistic questions – who, what, when, where, why, how, and how much. These duties should be expressed as a direct obligation on the performing party rather than a reciprocal right of the other party to receive performance. For example, instead of writing "the Buyer has a right to…," phrase that right as an obligation on the other party, like this: "Seller shall…."

Use "shall" to signal a duty in the scope section; don't use "agrees" or "is responsible" to establish duties. Draft duties in active voice; notice that "the deposit will be $10,000, due immediately upon signing" is in passive voice and doesn't impose a duty on *anyone* to pay it.

Risk allocation in a scope paragraph is a function of how absolute the promises are, and sometimes a single word or phrase can greatly shift the risk even though the basic obligation remains the same. The appropriate degree of risk may vary from one transaction to the next, depending upon the preferences of the client. When marking up a prior draft, consider each duty in the context of the current business transaction. For example, when representing the buyer, focus on results; when representing the seller, focus on the process. Watch out for provisions that impose a duty the client cannot control. For example, "Consultant shall obtain consent from the Owner." Note that sometimes, the words in the scope section are the performance, as in a grant of rights or an assignment of rights.

5.2 Representations and Warranties. Representations and warranties are most common in corporate transactions involving acquisitions, mergers, and similar business

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combinations, although they may be used in any transaction where one party relies upon statements made by the other in deciding whether to enter the transaction. Although the terms are sometimes used synonymously, "representations" and "warranties" refer to separate legal concepts so the words are not redundant and usually appear together. A representation states a fact as of a particular point in time, while the warranty assures that the fact is true and provides an implied remedy if it isn't. In smaller transactions, all of the representations and warranties of both parties may be grouped into one section. In larger transactions, the representations and warranties of each party are grouped into separate sections.

Representations in corporate transactions usually have to do with a party's having the ability and proper authority to enter in the transaction. For example, in an acquisition, a buyer may rely upon the representation of the seller that a corporation is in good standing with the Secretary of State.[15] The M&A Market Trends Subcommittee of the ABA's Mergers & Acquisitions Committee recently noted that 94% of the merger and acquisition agreements it reviewed contained representations regarding authority to enter into the transaction and good standing with the Secretary of State.[16] The seller may rely upon the representation of the buyer that its financial statements accurately reflect the buyer's ability to pay the purchase price. If a client is asked to make a representation, investigate with due diligence to ensure that the representation is, in fact, true. A false representation may result in unfavorable remedies, possibly including rescission of the contract, and other unfavorable results, such as lawsuits against the lawyers and accountants involved in the transaction.

Almost all of the merger and acquisition agreements analyzed by the M&A Market Trends Subcommittee provided that the Sellers representations and warranties survive the transaction for a specified period of time, usually 12 -18 months.

Example:

Representations and Warranties of Seller. Seller represents and warrants to Buyer as follows:

(a) The statements set forth in this Section III are true and correct as of the date of Closing.

(b) Seller owns and has good and marketable title to all of the Assets, and as of the Closing date, the Assets are free and clear of all liens, encumbrances, claims, or rights of others or defects in title of any kind whatsoever.

(c) Seller will not default on, breach, or violate any agreement, instrument, or arrangement to which Seller is a party by consummating the transaction contemplated by this Agreement.

[15] Note that while a representation regarding good standing may seem like an insignificant formality, it actually has great significance and should be carefully verified by both parties to the transaction. If a corporation is not in good standing, the Secretary of State will not accept any filings on its behalf, which means the documents effecting the acquisition cannot be filed and the transaction cannot be formally completed.

[16] SRS Acquiom M&A Deals Study, 2022.

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(d) Seller has the right, power, legal capacity and authority to enter into and perform the obligations under this Agreement, and no approval or consent of any other person is necessary for Seller to enter or perform this Agreement.

(e) Seller has no knowledge of any pending litigation, judgment, lien or proceeding relating to the Assets.

(f) Seller has not engaged the services of any broker for the sale of the Assets and no broker has brought about this sale.

(g) Seller has not assigned, licensed, or in any way granted permission for anyone to use the trade name "XYZ."

As a practical matter, **the more difficult the representation is to make, the more important it is to make a complete disclosure in order to avoid potential liability.** If a party is unable or unwilling to give a representation required by the other party, it has several options:

- Refuse to make the representation;
- Give the representation to the best of its knowledge, actual knowledge, or belief;
- Give the representation after disclosing responsive facts, as in "except as disclosed on Schedule 1.3, Seller represents that no hazardous materials have been used on the property."

5.3 Express Warranties, Limited Warranties, and Disclaimers. The common law on warranties evolved primarily with respect to contracts for the sale of goods, but warranties are also used in many other types of contracts, like agreements to obtain services and license rights. The UCC identifies three primary types of warranties with respect to goods: 1) express warranties; 2) warranties of merchantability; and 3) warranties of fitness for particular purpose. Beware that courts frequently apply UCC warranty concepts beyond contracts for goods. Additionally, the Magnuson-Moss Consumer Warranty Act regulates the manner in which the warranty must be disclosed to the consumer, although it does not dictate what the warranty must cover.

A warranty is the seller's representation about the quality or character of the goods and services. The warranty usually describes what the seller is obligated to do if the goods or services do not conform to specifications. For example, the warranty will state whether the seller is obligated to repair or replace defective goods, or whether the seller must compensate the buyer for damage incurred by the defective goods. In some instances, the warranty may serve as a condition upon the buyer's obligation to pay for the goods.

Express Warranties. Express warranties are very easy to make; in fact, the seller can make an express warranty without even intending to do so. No magic words are required to make an express warranty – in fact, no words at all are required. An express warranty can be based upon:

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- a statement of fact made by the seller to the buyer;
- a promise made by the seller to the buyer;
- a description of the goods; or
- a sample or model of the goods provided by seller to buyer.

In order to be construed as an express warranty, the statement of fact must be more than mere "puffing"; it is usually more specific in nature. For example, no express warranty would be made by stating that a vehicle gets "great mileage," but an express warranty can be made if the seller states that the vehicle gets 25 m.p.g.

Warranty of Merchantability. If the seller is a "merchant" with respect to the particular goods sold, the warranty of merchantability may be **implied by law.** The warranty of merchantability means that the goods are of at least average quality within the industry and are fit for the ordinary purpose for which they are used. The goods don't have to be perfect or without defect, but suitable for ordinary tasks. For example, an insect spray that also kills the person who applies it would not be suitable for its intended purpose.

Warranty of Fitness for Particular Purpose. This warranty is implied by law where **the seller knows of the buyer's particular purpose in buying the goods**. The warranty of fitness for particular purpose is applied when 1) the seller knows of the particular purpose; and 2) the buyer is relying upon seller's skill or judgment to select the appropriate goods. The warranty applies when the goods might be fit for their ordinary purpose without being fit for the buyer's specific purpose. For example, the warranty could apply in the case of a seller that sells solvents for cleaning equipment, if, before purchasing, the buyer asks if the product is suitable for cleaning printing presses.

The Limited Warranty Paradox. Paradoxically, most warranties that appear in contracts operate to **deprive** the buyer of rights it might otherwise have under statute or common law. For example, a limited warranty is used to express what the seller agrees to warrant. It virtually always excludes warranties of merchantability and fitness for particular purpose, as well as any express warranties that might have arisen in the transaction under common law. For this reason, according to the Magnuson-Moss Act, disclaimers of warranties must be conspicuous. Type is considered conspicuous if it is larger than other type on the page or of contrasting style or color. This is the reason most warranty disclaimers: 1) are typed in all capital letters; 2) specifically disclaim the warranties of merchantability and fitness for particular purpose; and 3) typically state that the disclaimer applies even if the buyer has mentioned its intended purpose for the goods. Also note that to be effective, a contract with a limited warranty should include an integration clause to eliminate any express warranties that may have been made outside the contract text.

Exclusion v. Disclaimer. The words "exclusion" and "disclaimer" are sometimes used interchangeably in warranty provisions, but an important legal distinction exists between them. The word "exclusion" or "excluded" used with respect to implied warranties means that those warranties implied by law are denied entry or admission into the agreement. In other words, if implied warranties are "excluded," it means they never were part of the contract. By contrast, if the implied warranties are "disclaimed," those implied warranties were initially part of the contract but have been repudiated or rejected for some reason.

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Example (Strongly Favoring Seller):

10. Limited Warranty; Exclusion of Warranties.

10.1 LIMITED WARRANTY. ABC WARRANTS THAT IT WILL PERFORM ANY SERVICES REQUIRED UNDER THIS AGREEMENT IN A COMMERCIALLY REASONABLE MANNER AND WILL CONFORM IN MATERIAL RESPECTS WITH THE TERMS OF THIS AGREEMENT.

10.2 EXCLUSION OF WARRANTIES. ALL IMPLIED WARRANTIES AND CONDITIONS OF SALE INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE EXPRESSLY EXCLUDED FROM THIS AGREEMENT.

5.4 Limitations of Liability. Limitation of liability clauses are often included in contracts to limit one or both parties' liability either under tort law, if damage occurs as a result of negligence, or under contract law, if the contract is breached. The parties may also negotiate a limitation of liability with respect to damage incurred by either party as a result of intellectual property infringement. The point of the clause is to provide a ceiling for any liabilities that may arise, so the parties know when they enter the agreement what their maximum exposure may be. This is particularly important in situations where the fees paid are relatively small compared to the potential liability if something goes wrong. The limitation of liability can be expressed as a dollar figure or as a sum that is calculable based on information available at the time the liability accrues. The following are typical limitation of liability clauses:

> Vendor's liability for damages to the Customer whether in contract or in tort, including negligence, gross negligence, or willful and wanton conduct, is limited to $50,000.00.
>
> -Or-
>
> Vendor's liability for damages to the Customer for any cause whatsoever is limited to the sum of fees paid by Customer to Vendor during the two months before the event causing the liability.

[Note that while these two limitation of liability clauses are TYPICAL, they are not ENFORCEABLE in most jurisdictions—see "Tort Claims," below.]

The limitation of liability clause may also specifically exclude all dollar damages and provide an alternative remedy:

> I understand that liability for accurate test materials and adequate administration conditions will be limited to score correction or test retake at no additional fee. I waive rights to all further claims . . . .

Tort Claims. Under the common law, the majority view is that limitations of liability (also called "exculpatory clauses") are valid and binding when a business relieves itself from its own negligence, but not for gross negligence or for willful or wanton conduct. The first two examples of typical limitation of liability clauses shown above are not valid because they include "gross negligence, or willful and wanton conduct" or damages that arise for "any cause whatsoever." Although typical, these limitation of liability clauses are not enforceable in most jurisdictions.

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Breach of Contract Claims. Limitations of liability are usually intended to limit one or both parties' liability under contract law for direct or consequential losses that accrue when the contract is breached. Limitations of liability may seek to limit any or all of the following:

> indirect, special, incidental, or consequential damages, including, but not limited to, loss of profits or anticipated profits and loss of data, arising from, or in connection with, the use, delivery, performance or non-performance of any services offered under this agreement.

Limitations of liability for breach of contract claims are enforceable in most jurisdictions unless a party can prove the limitation is unconscionable or commercially unreasonable and that the party did not have the ability to reject the clause in the contract.[17] Judicial tolerance of limitations of liability clauses based on breach of contract claims reflects an underlying laissez-faire attitude: that the parties should be able to manage their business relationships as they desire.[18] Absent a public policy interest, the parties are free to agree to waive numerous and substantial rights, including the right to seek recourse if the other party breaches the contract. In fact, a contracting party may waive ALL recourse if the other party breaches the agreement, so limitations of liability are particularly useful against claims for breach of contract. Because limitations of liability waive substantial rights, could amount to an accord and satisfaction of future claims, and require a meeting of the minds, they should be stated explicitly, prominently, and unambiguously in the agreement:

> Vendor's liability for breach of contract or for negligence is limited to $50,000.00.

Limitations of liability are not enforceable if contrary to public policy; however, courts tend to exercise extreme caution in declaring contracts void as against public policy and only do so where there is no doubt of injury to public interests. A contract cannot be said to be contrary to public policy unless the legislature has declared it to be so, unless the contract is entered into for the purpose of doing something immoral or illegal, or unless the consideration of the contract is contrary to good morals or contrary to law. Limitation of liability clauses are sometimes prohibited by statute in certain situations.[19]

5.5 Liquidated Damage Clauses. Liquidated damage clauses require one party to make a specific payment to the other if certain events occur during the contract. For example, a contract may provide that if one party terminates for any reason before the specified term expires, a termination fee must be paid. While the courts are reluctant to enforce provisions that are characterized as a penalty, they will enforce liquidated damage clauses in certain instances where it can be shown that:

- the injury caused by breach is difficult or impossible to estimate;
- the stipulated sum is a reasonable preliminary estimate of the probable loss; or

[17] Some jurisdictions, however, treat a limitation of liability clause as a liquidated damage provision. See discussion of liquidated damage provisions in this Section.
[18] WILLISTON ON CONTRACTS, § 65.10.
[19] For example, in Georgia, limitation of liability clauses are not permitted in contracts for construction or repair, or in leases involving a landlord-tenant relationship with regard to a dwelling

- the parties specifically intended to provide for damages.[20]

Most courts will not enforce a liquidated damage clause that is essentially a penalty or is designed to coerce a party to perform by making non-performance prohibitively and unreasonably expensive. The focus of judicial scrutiny is determining whether the liquidated damage clause is intended to compensate an injured party or to penalize a non-performing party. Liquidated damages clauses will be enforced based on the contract law principle of just compensation but may not be used to reap a windfall.

Liquidated damage clauses are most often used in circumstances involving early termination of a contract; however, the clause must approximate loss or injury that may result because most courts will not enforce a clause that is a penalty. For example, in *O'Brian v. Langley School*, the contract specified that the parents were required to pay tuition for the next entire academic year if they did not give timely notice of their decision to withdraw their child from the school. The provision in question read as follows, in all capital letters: "IT IS UNDERSTOOD THAT THERE SHALL BE NO REFUND OF OR RELIEF FROM ANY PORTION OF THE FULL TUITION OR ANY OTHER OBLIGATION ACCEPTED HEREIN FOR ANY REASON IF WRITTEN NOTICE OF WITHDRAWAL OF ANY CHILD IS NOT RECEIVED IN ACCORDANCE WITH THE ABOVE PROCEDURE. SINCE DAMAGE TO THE SCHOOL DUE TO SUCH A WITHDRAWAL WOULD BE DIFFICULT TO DETERMINE, MEMBER AGREES TO PAY AGREED UPON TUITION AS LIQUIDATED DAMAGES, TOGETHER WITH ANY COURT COSTS AND/OR LEGAL FEES THE SCHOOL MAY BE OBLIGED TO INCUR IN THE COLLECTION OF SUCH LIQUIDATED DAMAGES IN THE EVENT OF WITHDRAWAL." The court allowed further proceedings to determine whether the provision was an unenforceable penalty. *O'Brian v. Langley School*, 507 S.E. 2d 363.

A liquidated damage was used in another context in a contract between Microsoft and Sun Microsystems. The contract provided that Microsoft would pay Sun $35 million in liquidated damages for a willful and intentional disclosure of Sun's Java source code, and reports indicate that Microsoft did just that. The case was purportedly settled for a $20 million payment from Microsoft to Sun Microsystems.

In most jurisdictions, if the parties do not attempt to estimate potential damages in advance, then any termination fee is considered to be an unenforceable penalty, regardless of whether it is called "liquidated damages" or anything else. Be sure to draft language into the contract that demonstrates explicitly that the parties have attempted to estimate damages. A liquidated damages clause is not enforceable if damages are capable of being calculated – even if the calculation is complex and costly. The clause is only enforceable if the parties are incapable of calculating damages. Note that very little margin for error exists in calculating an estimate that is *reasonable* where damages are *impossible* to calculate. Be sure to inform the client that the courts may not enforce even the most skillfully drafted liquidated damages provision.

[20] Note that several jurisdictions consider the intention of the parties to be irrelevant, and for opposite reasons. Some jurisdictions apply a 2-prong test (by simply omitting the 3rd prong shown above) and will ENFORCE the clause regardless of the parties' intentions, while other jurisdictions will NOT ENFORCE the clause regardless of the parties' intentions. See WILLISTON ON CONTRACTS, §65.1 et seq.

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Although some lawyers and courts blur the distinction between liquidated damage clauses and limitations of liability, these two types of clauses are usually included in contracts for different purposes. A limitation of liability clause is intended to set a cap on the amount of liability a party can incur under the contract for any reason, while the liquidated damage clause is usually intended to address a specific situation.

Example:

> If Client terminates this Agreement less than 36 months from the Production-Ready Date for any reason other than a material breach by ASP, Client shall immediately pay to ASP as liquidated damages and not as a penalty a termination fee equal to the average of the three preceding months' total fees times the number of months remaining under this Agreement. Client acknowledges and agrees that ASP's pricing for this Agreement is based upon a term of no less than 36 months, and this termination fee is a genuine estimate of ASP's damages for Client's early termination of this Agreement. The termination fee is reasonable in light of the harm that will be caused by early termination, the difficulty of proving the extent of monetary loss, and the inconvenience of otherwise obtaining an adequate remedy at law. The termination fee is in addition to and not in lieu of any transaction fees incurred before termination.

5.6 Term and Termination Provisions. Most contracts contain a section called "Term and Termination," or something similar. The specific provisions included in term and termination sections vary based upon the particulars of the transaction and the parties' negotiations. Term and termination sections can be used: 1) to specify the duration of the contract; 2) to state how the contract can be terminated; and 3) to state what each party's responsibility is following termination. Term and termination provisions can also be used strategically to obtain a better result for your client when the contract is heavily negotiated as explained below.

The first purpose of the termination section is to establish the initial duration, or "term," of the contract. For closing documents, the term is usually relatively short, because the parties want to be able either to close the deal or move on with business as usual. For example, in merger and acquisition documents, the term is ordinarily six months or less, and may be based on whether the deal is consummated by a certain date.

Example:

> If the Merger is not consummated pursuant to this Agreement on or before January 31, 2023, this Agreement may be terminated and abandoned by the parties unless their respective Boards of Directors have agreed to an extension of time in which to consummate the Merger.

For "opening" documents, the term is usually longer. The term of the contract may be open-ended, a definite period of time, or an initial term of a year or so with automatic renewals until terminated by the parties.

Example of open-ended term:

> This Agreement is effective when signed by both parties and remains in full force and effect until terminated by either party.

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Example of definite term:

The term of this Lease begins on March 6, 2023 and, unless terminated sooner as provided below, the term expires on March 5, 2033.

Example with automatic renewals:

Unless earlier terminated as provided below, this Agreement is effective as of the Effective Date and remains in full force and effect for one year. After the initial term, this Agreement will be automatically renewed for successive one year periods (the initial term and all renewal terms are collectively referred to as the "Term"), subject to earlier termination as set forth in Section 9.2 of this Agreement, unless either party notifies the other in writing, on or before 90 days before the end of the then existing Term.

The next purpose of the term and termination section is to state whether, when, and how the agreement can be terminated before it expires. The termination section can be drafted to allow one party or both to terminate the Agreement, either at any time, only after a certain period of time, or only if certain events occur. For example, an executive employment agreement might specify that the employer may terminate the agreement only for "cause." The agreement would then specify what constitutes "cause" for termination. In an employment agreement, "cause" for termination is based on factors negotiated by the parties, from crimes involving "moral turpitude," to failure to meet sales objectives, but the concept of termination for "cause" is also used in other types of agreements. Although it is not as common to prohibit the employee from terminating, some employment agreements include a corresponding "good reason" provision, which states that during the term, the employee can only resign for "good reason."

Example:

ABC may terminate this Agreement at any time upon written notice to Consultant. Consultant may not terminate this Agreement before the project described in Schedule 1 is completed unless ABC breaches this Agreement and fails to cure the breach after 30 days written notice from Consultant.

The termination section usually states how notice of termination is given from one party to the other, and, if the agreement is terminated for "cause," whether there is any right to "cure" the problem.

Term and termination sections often include provisions outlining each party's responsibilities upon termination. These responsibilities usually involve how the transaction will be concluded and may address final billing, return of confidential information, and any matters that will continue after termination.

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Example:

> **9. Term and Termination.**
> **9.1 Term of Agreement.** Unless earlier terminated as provided in this Section, this Agreement is effective as of the Effective Date and remains in full force and effect until the first anniversary of the Installation Date. After the initial term, this Agreement will automatically renew for successive one year periods (the initial term and all renewal terms are collectively referred to as the "Term"), subject to earlier termination as set forth in Section 9.2 of this Agreement, unless either party notifies the other in writing, on or before 90 days before the end of the then existing Term.
> **9.2 Termination.** ABC may terminate this Agreement without further notice: (a) upon Client's material breach of any term of this Agreement if the breach is not remedied within 15 days from the date of written notice; or (b) immediately if Client makes an assignment for the benefit of creditors or begins any proceeding in bankruptcy, insolvency, or reorganization pursuant to bankruptcy laws, whether the proceeding is voluntary or involuntary.
> **9.3 Post-Termination Obligations.** Upon termination of this Agreement for any reason whatsoever, ABC may immediately disable Client's access to the Software. ABC shall then prepare a final invoice for all fees incurred under Section 4 before the effective date of termination, and Client shall pay the invoice within 15 days of receipt. Within ten days after termination Client shall return to ABC any and all written information or manuals provided to Client by ABC and a certification signed by an officer of the Client stating that all written information or manuals have been returned. Upon termination neither party shall disclose to any third party the terms and conditions of this Agreement or the reason it was terminated.
> **9.4 Survival of Terms**. Upon termination or expiration of this Agreement Sections 6.1, 6.2, 7, 8, 9.3, and 10 of this Agreement will continue and survive in full force and effect. [Note: These sections address issues that might arise after termination of the contract: (6.1) an agreement not to use the business partner's trademarks except as provided in the contract; (6.2) indemnification in the event of intellectual property infringement claims; (7) warranty terms; (8) non-disclosure of proprietary information; (9.3) post-termination obligations; and (10) boilerplate provisions like notices, entire agreement, choice of law and an arbitration clause.]

In situations where contract terms are heavily negotiated, it is often a good strategy to table discussion of the Term and Termination section until agreement is reached as to the other performance provisions. The Term and Termination section can be used strategically to obtain a better result especially when the client has been forced to make concessions on other terms. For example, if a commercial lessee negotiates for an expensive build-out, the lessor may negotiate for a longer lease term to recoup its initial costs. If a manufacturer is forced to cut its prices to obtain an exclusive contract with a particular buyer, the manufacturer may prefer a shorter term so it will be able to pursue more lucrative opportunities with other potential customers. Conversely, a buyer who negotiates a favorable purchase price on an installment contract may desire to lock in a longer term.

The client's potential exposure can also be capped by including a buy-out provision in the Term and Termination section, which may provide either party or both an "out" if circumstances change or if the transaction doesn't work out for any reason. Celebrities, high profile executives, professional athletes, and coaches often have buy-out provisions which allow the contract to be terminated early upon payment of all or some portion of the remaining compensation due under the contract.

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6 – Indemnification

Indemnification provisions must be drafted and reviewed with great care, so they warrant their own topic in this seminar. The verb "indemnify" means to reimburse someone for a loss suffered because of a third party's claim. Indemnification clauses are included in contracts where one party or both parties agree to absorb any liability or harm that the other party may incur to third parties as a result of entering into the contract. The extent of the liability may be limited or unlimited by the terms of the contract. The purpose of indemnification clauses is **to transfer** the liability from the party that incurs the liability to the party whose act or omission caused the liability. The indemnitor is interested in limiting the scope of the indemnification obligation; the indemnitee is interested in having a broad scope for indemnification protection, and having protections triggered as soon as possible. Most often, the party paying is the indemnitee, but indemnification obligations can run both ways. In a negotiated transaction, this provision is usually one of the most vigorously contested. Negotiate to ensure that the indemnification provision is proportional to the risks and economic impact your client absorbs under the contract.

Indemnification is particularly useful in situations where one party has a greater ability to control or prevent the liability from arising. For example, in a software license, the party that develops the software is in a far better position than the licensee to ensure that the software does not violate the intellectual property rights of others; however, if the licensee intends to use the software to create derivative works, the licensee may be in a better position to ensure that the derivative works do not violate intellectual property rights of others, so indemnification is sometimes reciprocal, with each party indemnifying the other for the component of risk it controls, like this:

> **Contractor shall indemnify and defend Company** from and against all damages, losses, costs, and expenses (including reasonable attorneys' fees and other costs of litigation) that arise out of or result from any claim that any work produced by Contractor pursuant to this Agreement infringes any copyright or other intellectual property right of any third party.
>
> **Company shall indemnify and defend Contractor** from and against all damages, losses, costs, and expenses (including reasonable attorney's fees and other costs of litigation) that arise out of or result from any claim that any Derivative Works produced by Company pursuant to this Agreement infringe any copyright or other intellectual property right of any third party.

Unlike warranty provisions, which resolve liability between the parties for unsatisfactory performance of the contract, indemnification clauses traditionally involve liabilities due to third parties who usually have privity or some relationship with the indemnitee but do not have direct privity with the indemnitor. In sales of businesses, however, indemnification is also used to resolve direct liabilities between the parties themselves.

Although the traditional concept of indemnification involves liabilities outside the contract to third parties, in some cases, the indemnification provision has been held to apply to direct disputes between the parties. First, the plain language used in many indemnification clauses today to describe what a party is required to indemnify extends the traditional application of indemnification beyond its original intent. For example, in the California *Pacific*

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Gas case, the court construed a provision requiring the defendant to indemnify the plaintiff "against all loss, damage, expense and liability resulting from injury to property, arising out of or in any way connected with the performance of this contract."[21] Although noting that indemnification traditionally covered losses associated with third party claims, the court held that the plain language of the provision in question included "loss," "damage," and "injury to property"; the court held the defendant was obligated to cover the amount spent on repairs to the plaintiff's property and no third party claim was involved. Similarly, New York courts have determined that indemnification can be used to resolve claims between the parties, but only if the language is "unmistakably clear" that the parties intended the indemnification provision to apply to direct claims.

Many lawyers use the doublet "indemnify and hold harmless" out of habit without considering, or even intending, the possible consequences. Although *Black's Law Dictionary* uses "hold harmless" to define "indemnify," and vice versa, and the weight of authority indicates that the terms are synonymous, a few courts have held that the words imply different obligations.[22] This is possibly a bootstrap effect arising because the courts were required to construe a difference between the terms in order to give meaning to each word; the courts that have interpreted a distinction between the terms have done so without citing authority.

A few courts have stated that "hold harmless" is a broader remedy than "indemnify" but the jury is still out as to what, exactly, "hold harmless" entails. Some courts have held that hold harmless is a mechanism for first-party claims. "Hold harmless" has been deemed to be exculpatory, meaning that the indemnitor is not permitted to seek recovery for third party claims from the indemnitee if the indemnitee is "held harmless." Some litigants have argued that the duty to hold harmless encompassed a duty to advance litigation costs. Others argue that "hold harmless" covers a risk of loss like a diminution in value, in addition to liability and damages to third parties traditionally covered by an indemnification clause.

Most lawyers do not intend to create an obligation that covers a diminution in value, which is merely a "book" loss that has not actually been realized and may be temporary. At a minimum, an indemnification clause should require receipts from third parties, which prove that the cost was actually incurred, before one party is required to reimburse the other. In situations where lawyers do intend to cover an unrealized "book" loss, the drafting should be

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[21] *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.,* 442 P. 2d 641, 69 Cal. 2d 33 (1968).

[22] Black's Law Dictionary, Garner's Dictionary of Legal Usage, and Kenneth Adams all conclude that the terms are redundant and hold harmless should not be used. Barron's Law Dictionary, 5th Ed. (2003) uses the term "save harmless" rather than "hold harmless," but save harmless is given as a synonym for indemnify, and vice versa. In JAY M. FEINMAN, 1001 Legal Words You Need to Know (2003), the phrase "hold someone/something harmless" is defined as indemnify (p. 85). In GERRY W. BEYER AND KENNETH R. REDDEN's Modern Dictionary for the Legal Profession, 3rd Ed. (2001), "hold harmless agreement" is defined as a contractual agreement "in which one party assumes the liability inherent in a given situation, thus relieving the other party from the consequences of that party's own negligence arising in the given situation." (p. 484). In WILLIAM P. STATSKY, West's Legal Thesaurus/Dictionary, the terms are listed as synonyms for each other. Also see *Majkowski v. American Imaging Management, LLC* 913 A.2d 572 (2006), *In re Marriage of Ginsberg*, 750 N.W.2d 520 (2008); and *Loscher v. Hudson*, 182 P.3d 25 (2008), holding that the provisions are essentially the same. But see U*.S. v. Contract Mgt., Inc.,* 912 F.2d 1045 (9th Cir. 1990); *Queen Villas H. O. A. v. TCB Property Mgt*, 56 Cal. Rptr. 3d 528 (Ct. App. 2007); and Stewart Title Guarantee Co. v. Zeppieri [2009], holding that there is a slight distinction between the terms, (although disagreeing as to what that distinction is and citing no authority for it.)

much more deliberate than simply tossing in the words "hold harmless," especially where the indemnification obligation is reciprocal, meaning that the risk of the obligation is simultaneously imposed on your client. For example, if the parties intend to be held harmless against loss in value, include mechanisms for determining how the loss in value will be calculated, who gets to decide, and when the loss becomes sufficiently defined to warrant reimbursement. The risk of an unrealized loss in value can be captured within a well-drafted indemnification provision without inviting the court to create and apply its own interpretation meaning of "hold harmless" upon review.

The prevailing majority view is that "hold harmless" is synonymous with "indemnify" and either word is sufficient; however, what was once merely an unnecessary additional word has become an ambiguous trap because of all the different interpretations; therefore, in my opinion, the phrase **"hold harmless" should never be used** at all except in jurisdictions like Florida where the courts have held a clear meaning, and then, solely to invoke that meaning. Whatever the distinction between "hold harmless" and "indemnify" may be, it is a moot point if the provision already requires indemnification against "loss." If the indemnification clause mentions "loss" or "injury to property," it is redundant to use both "indemnify" and "hold harmless" because any potential shade of variation between the two terms would already be covered.

The obligation to defend is never synonymous with the obligation to indemnify or to hold harmless; rather, it is a variable that you may choose to include or not, depending upon the circumstances. For example, for a mom-and-pop business, the right to be defended may be crucial because litigation could be cost prohibitive unless the indemnifying party is also obligated to defend. A Fortune 500 company might prefer to handle its own defense and be reimbursed for attorneys' fees and expenses afterwards; on the other hand, the indemnifying party might insist on being *allowed* to defend if it is ultimately going to be liable for losses and damages. These variables are usually worked out during negotiations between the parties. Be advised, however, that the duty to defend does not necessarily encompass a duty to advance costs and expenses of litigation.

How Indemnification is Used

Indemnification is used in many different kinds of commercial transactions. For example, in the sale of a business, the buyer wants to ensure that the assets it is acquiring are not compromised in some way, that the "facts" the buyer relies on are accurate, and that no liabilities have been hidden or described inaccurately. In a purchase of goods or services, the buyer wants protection against products that were poorly manufactured. In a real estate transaction, a lessee or buyer wants protection against defects of title or hazardous materials on the property. In a software license, the licensee wants protection against claims that the software infringes a third party's intellectual property rights. In order to attract and retain qualified officers and directors, a company must offer protection against lawsuits. Indemnification provisions protect against these issues.

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Types of Indemnification

The first step in drafting or reviewing an indemnification provision is to determine what type of indemnity is, or should be, offered. Most contracts involve one or more of these six types of indemnification:

1. **Unilateral** – Party A indemnifies Party B for claims to third parties incurred in connection with specified events or circumstances.

2. **Reciprocal –** Party A indemnifies Party B for claims of third parties caused by Party A's breach; Party B indemnifies Party A for liabilities caused by Party B's breach.

3. **Exculpatory** – Party A indemnifies Party B against claims of third parties that occur because of Party B's own acts or omissions, including Party B's negligence.

4. **Partial –** Party A indemnifies Party B against claims of third parties *except* those incurred as a result of Party B's own acts or omissions.

5. **Financial –** Party A indemnifies Party B against losses incurred if Party C fails to honor a financial obligation to Party B.

6. **Direct** – Party A indemnifies Party B for Party B's claims (no third party involved).

Indemnification provisions are among the most heavily negotiated provisions in any negotiated contract; therefore, do not assume that the indemnification provision in a template from another transaction is necessarily in your client's best interests. If you represent the buyer, ensure the provision protects the buyer's interests; if you represent the seller, ensure the provision protects the seller's interests. Don't begin the contract negotiation process with a provision that favors the other party.

Drafting an Indemnification Provision

Indemnification provisions have gotten increasingly fancy in the past five to ten years, especially in the mergers and acquisitions arena, with newfangled concepts like "materiality scrapes," "indemnity baskets" and "mini- baskets," "sandbagging" and "anti-sandbagging." The best way to draft an indemnification provision is to analyze each component of the provision separately, and draft or revise it to allocate an appropriate level of risk in this transaction:

1. Who is providing the indemnification?
2. What protection is provided?
3. Who is receiving the indemnification?
4. What events are indemnified against?
5. How does indemnification attach?
6. What is carved out?
7. What are the additional requirements?

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1. **Who is providing the indemnification?** The indemnitor must be one of the parties to the contract in order to be bound by its terms. If the indemnification is reciprocal, both parties will be indemnitors but it is best to treat each obligation separately. Instead of saying "the parties will indemnify each other against any liabilities or losses that arise because of their respective breaches of this agreement," spell out the obligations separately: "Party A will indemnify Party B against any liabilities or losses that arise because of Party A's breach of this agreement. Party B will indemnify Party A against any liabilities or losses that arise because of Party B's breach of this agreement."

2. **What protection is provided?** Is the obligation to indemnify, or to indemnify and defend? Because "hold harmless" is construed to mean so many different things and opens the door to litigation, don't use "hold harmless" unless: 1) the governing law of the contract is a jurisdiction where the meaning of "hold harmless" has been judicially settled, and that is the meaning you intend; or 2) you have defined what you mean by "hold harmless" in the contract. The obligation to defend is never synonymous with the obligation to indemnify or to hold harmless; rather, it is a variable that you may choose to include or not, depending upon the circumstances. For example, for a mom-and-pop business, the right to be defended may be crucial because litigation could be cost prohibitive unless the indemnifying party is also obligated to defend. A Fortune 500 company might prefer to handle its own defense, and be reimbursed for attorneys' fees and expenses afterwards; on the other hand, the indemnifying party might insist on being *allowed* to defend if it is ultimately going to be liable for losses and damages. These variables are usually worked out during negotiations between the parties. Be advised, however, that the duty to defend does not necessarily encompass a duty to advance costs and expenses of litigation. If the indemnity includes an obligation of advancement, this should be addressed separately, as described below.

3. **Who is receiving the indemnification?** The indemnitee is usually a party to the contract, but may include a much larger group; for example:

    - Party A shall indemnify and defend Party B;
    - Party A and Party B, jointly and severally, shall indemnify and defend Party C;
    - Party A shall indemnify and defend Party B and its officers and directors;
    - Party A shall indemnify and defend Party B and past, present and future agents, officers, directors, shareholders, members, partners, partnerships, employees, representatives, attorneys, parents, subsidiaries, affiliates, successors and assigns.

4. **What is indemnified against?** The indemnification provision must define what the indemnitee is protected *from.* It may specify actual legal fees, or actual legal fees reasonably incurred, or the parties may opt not to include legal fees at all. The provision may include direct claims between the parties, like in *Pacific Gas.* The provision may also provide for reimbursement of legal fees incurred in pursuing direct claims, which may or may not otherwise be covered depending upon state law.[23] Although similar language

[23] See *Fallstaff Group, Inc., et al., v. MPA Brickell Key, LLC*, 143 So.3d 1139 (Fl Ct. App. 2014), where the court found that the indemnified party was not entitled to attorneys' fees and costs incurred in the

appears in most indemnification provisions, each item in the list of what is indemnified against is a negotiable variable.

- against any losses, liabilities, and claims;
- from and against any claims, actions, demands, judgments or liabilities, fines, penalties, and expenses, including but not limited to reasonable legal fees;
- against all loss, damage, expense and liability resulting from injury to property;
- from any claim or loss, including reasonable attorneys' fees, court costs and litigation expenses;
- from and against any and all claims, causes of action, costs or damages, including reasonable attorneys' fees and attorneys' fees incurred by Party B in enforcing the covenants and agreements of this agreement.[24]

5. **How does the Indemnification Attach?** The indemnification provision must contain words that identify the segue between the contract and the indemnification, like the following. Note that "related to" and "in any way connected with" are substantially broader than "arising out of." The provision should also specify if if covers something less than the entire agreement, like "arising out of your use of the Materials." Although this language seems similar from one contract to the next, how the obligation attaches is a negotiable variable.

   - arising out of or in any way connected with the performance of this contract;
   - arising from any breach by Party A of any of its covenants or representations in the agreement;
   - arising out of or in any way related to this agreement;
   - arising out of any breach of this agreement;
   - in connection with any matter in any way relating to the agreement or arising out of the matters contemplated under the agreement;
   - arising out of or relating in any way to this Escrow Agreement or any transaction to which this Escrow Agreement relates;
   - resulting from, or alleged to result from, your use of any Materials;
   - to the extent the claim arises solely as a result of;
   - by reason of being or having been a director or officer of the Corporation or serving or having served at the request of the Corporation as a director, trustee, officer, employee or agent of another corporation;
   - incurred or paid by Party B in enforcing this contract;
   - in connection with claims asserted by Party B against Party A relating to the services to be performed pursuant to this agreement;
   - incurred by Party B in connection with the defense or settlement of the action, suit, or proceeding;

process of seeking indemnification, even though the indemnified party was entitled to indemnification under the agreement for funds paid in settling a third- party claim.

[24] This language is important for allowing recovery of attorneys' fees and costs incurred in seeking indemnification under an indemnification agreement in jurisdictions where the contract must be unmistakably clear.

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- arising from Agent's performance of its duties and obligations under this Agreement, or when acting upon the express authority of the Association and its Board of Directors, or when Agent within the course and scope of duties enforces the Association's governing documents against violators;
- arising out of a claim, loss, or liability brought by a third-party based on any action or failure to act by Party A;
- caused by a breach or non-fulfillment of a covenant or obligation in this Agreement or in any Transaction Document by Party A, or by an Acquired Company prior to the Closing, or resulting from a breach of or inaccuracy in a representation or warranty made by Party A in Article 3.

6. **What is carved out or forced in?** The provision should describe any exceptions to the indemnification obligation, or any event that would negate the obligation. The provision should also specify any logically unlikely things that *are* included, like "including Party B's own negligence." Materiality scrapes are discussed separately below.

    - if Party B acted in good faith and in a manner reasonably believed by such Indemnitee to be in the best interests of the Company;
    - If Party A is given notice and an opportunity to defend the claims;
    - Party A retains the right to defend or conduct or control any action or suit through counsel of its choosing;
    - If Party B is successful in that litigation; [in a direct indemnity]
    - Including liabilities or losses incurred as a result of Party B's own negligence;
    - If the alleged infringement was not caused by: (a) Licensee's failure to incorporate a Software update or upgrade that would have avoided the alleged infringement; (b) modification of the software by any party other than Party A; (c) the combination or use of the Software with software, hardware, firmware, data, or technology not licensed to Licensee by Party A or approved by Party A in writing; or (d) unlicensed activities of the Licensee;
    - Except liabilities and losses incurred because of Party B's own negligence;
    - If all the conditions of this section are met;
    - For which all avenues of appeal have been exhausted;
    - unless such loss, liability, cost, damage or expense is finally adjudicated to have been directly caused by the willful misconduct or gross negligence of the Escrow Agent.

7. **What are the additional requirements?** The provision should describe whether the indemnitee is required to do or refrain from doing something to obtain indemnification.

    - if Party B acted in good faith and in a manner reasonably believed by Party B to be in the best interests of Party A; [*particularly for officers and directors, members, and managers, but possibly useful in other close commercial relationships, like distributorships*]
    - To obtain indemnification under this provision, Party B must notify Party A in writing within 10 days of any potential Claim;

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- Party A's obligation to indemnify under this section is null if Party B makes any admissions against Party A's interests, unless made pursuant to a judicial request or order;
- It is a condition to this indemnification provision that Party B shall not agree to settle any Claim without prior written consent of Party A;
- This indemnification provision is conditioned upon Party B's providing all reasonable assistance requested by Party A; and
- Party A shall select and retain legal counsel, in its sole discretion, and shall control the litigation or the settlement of each Claim.

Special Indemnification Issues in M&A Transactions

Indemnification clauses in merger and acquisition transactions are typically used to allocate risk between the parties that result both from direct and third-party claims. The indemnification clause defines the rights of the parties for breaches of the representations and warranties, as well as other specified liabilities. While the seller is interested in completing the transaction without potential future liability, the buyer is interested in obtaining protection in case the quality of the assets acquired turns out to be less than represented, or the liabilities acquired turn out to be more than represented. Protecting the buyer's interests is challenging, since the target usually ceases operations after the acquisition. On the other hand, the seller does not want to absorb the risk of deterioration of the assets after the buyer becomes the responsible steward of them. Lawyers have devised several mechanisms to protect the interests of their respective clients, including indemnity escrows, setting thresholds and using indemnity baskets, setting materiality limits, and putting caps on indemnification.

Indemnity Escrow Agreements

In an indemnity escrow agreement, the parties set aside a portion of the proceeds of the merger to create a general indemnity escrow account to satisfy any subsequent damages associated with breaches of the representations and warranties of the seller, or other specified liabilities. For example, in *Hyatt v. Al Jazeera*, the buyer (Al Jazeera) alleged that the seller had breached the most-favored-nations clauses in three distributor agreements, even though the seller had represented that it was in compliance with its distributor agreements.[25] The indemnity escrow agreement outlines the mechanisms by which the buyer can seek indemnification for those damages from the escrow fund. The process usually requires the buyer to provide written notice of the breach and damages in the form of a "claim certificate" to a person or entity who serves as the representative of the seller. The sellers' representative may contest the validity of the claim within a specified time period, usually 10, 20, or 30 days. After a specified period, usually 12, 18, or 24 months following the merger, the buyer must release the balance in the indemnity escrow to the former shareholders or members of the acquired entity. Here is a link to a sample indemnity escrow agreement: https://www.sec.gov/Archives/edgar/data/1411906/000119312511003133/dex23.htm.

[25] *Hyatt v. Al Jazeera American Holdings II, LLC*, C.A. No. 11465-VCG (Del. Ch. March 31, 2016), at p. 5.

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Thresholds and "Baskets"

Indemnity thresholds are used to set a minimum dollar amount of specific types of losses a party must incur under the purchase agreement before the other party is obliged to indemnify it. Indemnification thresholds are often included in merger and acquisition agreements because the parties recognize that representations about an ongoing business are unlikely to be absolutely accurate. The threshold prevents disputes over trivial issues and insignificant amounts.[26] For example, an indemnification threshold may provide that the seller/indemnitor will not have to indemnify the acquiror for inaccuracies in the representations and warranties contained in the agreement unless the aggregate amount of indemnifiable damages attributable to those inaccuracies exceeds $200,000, in which case the seller/indemnitor will be liable for the full amount, subject to any other specified limitations.

Parties sometimes negotiate a "basket clause" in conjunction with an indemnification threshold. "Baskets" are used to group thresholds for specific types of breaches. For example, the parties may opt for a different materiality standard for "fundamental representations" than for other representations enumerated in the merger agreement. Lawyers typically negotiate to include some or all of the following as "fundamental representations":

- Authority/good standing
- Capitalization
- Broker's fees
- Subsidiaries
- Title
- Taxes
- Non-contravention
- Sufficiency of assets [for carve-out transactions]
- Intellectual property

Baskets are often used to resolve the question of "materiality" and prevent disputes over trivial amounts. For example, a basket provision might state that a breach of warranty, an omission, or a misrepresentation is material (either individually or in the aggregate) only if it causes a specified amount of damage to the acquiror. This will prevent the acquiror from using a minor breach of warranty, an omission, or a misrepresentation as a pretext for refusing to close. It will also protect the acquiror from the cumulative effect of multiple warranty breaches, omissions, or misrepresentations that, in the aggregate, are clearly material even if none, by themselves, reaches the specified amount of materiality.

Baskets can be "first dollar" or "deductible." A "first dollar" basket (sometimes called a "tipping basket") means that the seller is not liable to the buyer until the amount of loss exceeds a specific dollar amount; however, when the amount is exceeded, the seller is liable for the entire basket. In a "deductible basket," when the basket amount is exceeded, the seller is liable for

[26] American Bar Ass'n, Model Stock Purchase Agreement with Commentary 329 (2d ed. 2010): "representations concerning an ongoing business are unlikely to be perfectly accurate and to avoid disputes over smaller amounts." *See also I/Mx Info. Mgmt. Solutions, Inc. v. MultiPlan, Inc.,* 2013 WL 3322293, at 6 (Del. Ch. June 28, 2013).

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only the amount over the negotiated deductible. The amount of the basket usually ranges from .5% to 1% of the transaction value. Here is an example of a first dollar basket provision:[27]

> Claims Basket. Notwithstanding any provision hereof to the contrary, an Indemnified Party shall only be entitled to indemnification pursuant to Section 8.2(a) or Section 8.3(a) for breach of representation or warranty to the extent the aggregate amount of all Damages incurred by such Indemnified Party for which such Indemnified Party is entitled to indemnification pursuant to such section exceeds $100,000 (the "Basket Amount"), at which point an Indemnified Party shall be entitled to indemnification for all Damages (including all Damages incurred prior to exceeding the Basket Amount); provided that no such limitation shall apply in respect of Damages as a result of, arising out of or relating to breaches or misrepresentations of the Fundamental Representation or Damages for which indemnification is provided in Section 7.1.

Materiality Scrapes

If the parties agree to an indemnification threshold, this means that some breaches may occur without any compensation to the buyer. Therefore, the buyer may insist on being compensated for *all* of the breaches, even the immaterial ones, once the indemnification threshold has been met. A "materiality scrape" is a buyer-friendly provision where the parties agree to remove any materiality standards to allow the buyer to recover all damages once the threshold has been met. The purpose of a materiality scrape is to exclude those qualifiers from the buyer's right to indemnification if the representation is breached. This means that the materiality qualifiers will be ignored in determining whether a representation or warranty has been breached, and the corresponding amount of any damages for which indemnification is sought. Obviously, sellers are less enthusiastic about materiality scrapes, and may argue that the risk and difficulty inherent in making 100% accurate representations necessitates the materiality qualifiers without the scrape. This tension between the buyers' interests and sellers' interests means the materiality scrape is one of the most heavily negotiated provisions in a merger agreement. One benefit to both parties is that the materiality scrape can prevent future disputes over the exact meaning of the materiality qualifiers. Here is an example of a materiality scrape:

> For purposes of this Article 9, the Parties will ignore words like 'Material Adverse Effect,' 'material,' 'materially,' 'in all material respects' or similar materiality qualifier contained in any representation or warranty in determining whether there has been a breach of or inaccuracy in a representation or warranty and in measuring the corresponding damages.

Indemnification Caps

An indemnification cap is a seller-friendly provision that limits the seller's indemnification obligation to a certain dollar value. The indemnification cap is typically 25% or less of the transaction value. Often, the indemnification cap is equal to the indemnification escrow. A seller should never agree to an indemnification cap that is more than the transaction value,

[27] This language was litigated in *I/MX Information Management Solutions, Inc., v. Multiplan, Inc*., (Del. Ch. 2013), at p. 6.

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because if the seller's potential liability is greater than the transaction value, the seller's risk is greater than the reward of selling.

Structuring the Text of the Indemnification Provision

A curiosity of current drafting practice is that lawyers almost universally attempt to cover so many issues within a single indemnification paragraph. A better strategy is to subdivide the many issues to be addressed, like this outline suggests:

5. Indemnification.
5.1 Indemnification for third-party claims
- Who is providing the indemnification?
- What protection is provided?
- Who is receiving the indemnification?
- What events are indemnified against?
- How does indemnification attach?
- What is carved out?
- What are the additional requirements?

5.2 Reimbursement for loss or damage to Company's property.
(a) Duty to reimburse for loss or damage
(b) Measure of loss or damage
(c) Time for recognizing loss
5.3 Other direct claims
5.4 Duty to Defend
5.5 Advancement of Litigation Costs and Expenses.
5.6 Undertaking to Refund

Whether you are drafting the contract or reviewing a document prepared by opposing counsel, the indemnification clause should be at the top of your checklist in terms of assessing risk in the transaction. The liability to third parties could be enormous, sometimes even exceeding the fees earned under the contract. As a practical matter, the party with superior bargaining leverage may attempt to strong-arm business partners to create a lop-sided indemnification obligation, but **the indemnification clause is only as effective as the indemnitor's ability to pay any claims.** If the potential liability is disproportionate to the compensation under the contract, it will likely be to both parties' best interests to rely upon insurance instead of indemnification to eliminate risk.

Rather than flip-flop indemnification strategy based on the client's relative bargaining position in each transaction, a lawyer should help the client develop a comprehensive indemnification policy based on the risks inherent in its industry, taking corporate risk management strategies into account. It may be advisable, if not necessary, to have a tiered approach to indemnification, based on specific levels of risk. At times, it may also be advisable to decline transactions where the potential liability under the indemnification clause is too high.

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7 – Boilerplate Provisions

"Boilerplate" is a casual term that describes standardized language usually included at the end of a contract in a section called "Miscellaneous" or "General Terms." As used by lawyers, "boilerplate" is a collection of rules and policies that determine how the contract will be interpreted and implemented.

To non-lawyers, the term "boilerplate" may mean something slightly different, so take this distinction into account when communicating with clients. Non-lawyers often think of the performance provisions as being "boilerplate," particularly when a pre-printed standard form is used. Non-lawyers using pre-printed forms may consider everything printed that does not have to be completed or filled in as boilerplate.

Although boilerplate is typically not heavily negotiated by the parties, it is still important to the operation of the contract and must be reviewed carefully. Careless lawyers may suffer embarrassing situations where clients, taking more care than the lawyers they pay generously, read through the boilerplate only to find some other client's name mentioned in it. Boilerplate is also edited from time to time to include references to specific related agreements – for example, "This Shareholders' Agreement, the Employment Agreement, and the Confidentiality Agreement represent the entire agreement of the parties"—and if those make their way into a document from a previous contract, it may prove embarrassing if there is no related employment agreement or confidentiality agreement in the current transaction. Conversely, if there is a corresponding Stock Option Agreement that is NOT mentioned in the entire agreement clause, there may also be some red faces (and potential malpractice claims). So even if most of your attention is focused on performance provisions during negotiations, it is critical to review the boilerplate carefully at least once immediately before the contract is signed.

To ensure that boilerplate provisions are used properly, and that the proper provisions are included, be sure you understand the consequences of typical boilerplate provisions and consider whether each provision is applicable to the current transaction. It is handy to have a well-drafted collection of boilerplate terms ready to cut and paste; however, **do not automatically copy a collection of boilerplate provisions into every contract.** Instead, review the boilerplate to ensure it is necessary and applicable to the current transaction. Let's look at the purpose and consequences of some typical boilerplate provisions.

7.1 Entire Agreement/Integration/Merger Clause. This clause with many names states that the contract as written represents the entire, complete, and final agreement of the parties. Anything spoken or written between the parties before the contract is signed is NOT going to be included unless it appears within the "four corners" of the pages that comprise the actual contract. The clause is valuable because it prevents arguments down the road that something was left out of the document; however, be sure that: 1) this really IS the entire agreement of the parties – be sure to list all related documents, if any exist; and 2) all of the terms the client agreed to are, in fact, incorporated into the written form. For example, if certain terms are required in a request for proposal but not included in the agreement signed by the parties, those terms will not be deemed part of the contract under the parole evidence

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rule. Protect against this by incorporating the specific terms or the request for proposal by reference in the entire agreement clause (but take care to avoid contextual ambiguity that could arise if any terms in the request for proposal conflict with the final agreement.)

Example:

> **15.1 Entire Agreement**. This Purchase Agreement and the specifications attached as Exhibit A to the Company's request for proposal dated September 15, 2023 incorporated by reference constitute the entire agreement between the parties and supersede any prior understanding among them. No representations, arrangements, understandings or agreements relating to the subject matter exist among the parties except as expressed in this Purchase Agreement.

7.2 Severability/Saving Clause. This provision ensures that the rest of the contract is going to be enforceable even if a provision within the contract is determined to be invalid. For example, if a court determines that a restrictive covenant in an employment agreement is invalid, the severability clause ensures that the rest of the agreement is still enforceable. This clause is usually recommended and advantageous, but consider whether, for some reason, the client would not want the contract to be enforceable if a certain provision is invalid. If this is the case, include language that states that the entire contract is UNENFORCEABLE if that specific provision is held invalid. Also, be sure to identify WHO has authority to determine whether a provision is invalid: this is usually a court having jurisdiction but could be someone else, for example, a party to the agreement, counsel for a party to the agreement, or an independent arbiter selected by the parties.

Example:

> **15.8 Severability**. If any provision of this Confidentiality Agreement is determined by a court having jurisdiction to be unenforceable to any extent, the rest of that provision and of this Confidentiality Agreement will remain enforceable to the fullest extent permitted by law.

7.3 Assignment. This provision determines whether and how the contract is assignable by one or both of the parties. The provision may state that the contract may not be assigned at all, that only certain rights may be assigned, that one party may assign but not the other, that the contract may be assigned only with the prior written consent of the other party, and what the standard is for withholding consent. The assignment provision may state that the contract may be assigned to an affiliate or subsidiary having approximately equal financial standing, or that it may be assigned to a successor in a change of control transaction. Absent this provision, most contract rights and duties are freely assignable, and your client may wind up doing business with someone it hadn't expected or desired – like a company that is financially unstable, a company with whom the client has previously had an unsatisfactory business relationship, or even a direct competitor! Under common law, however, an assignment only conveys rights unless duties are expressly included. The "successors and assigns" language should be added to impose duties on the assignee under the contract and to obligate the non-assigning party to perform for the assignee. If a party is allowed to assign the contract, the provision should specify whether the assignor will remain liable for the performance or omissions of the assignee.

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Example:

> **15.3 Assignment.** The rights and obligations of Contractor are personal and may be performed only by Contractor. Contractor may not assign any rights or obligations under this Agreement to any other Person without the prior written consent of Company. Any purported assignment that does not comply with this provision is void. This Agreement is binding upon and inures to the benefit of the parties and their respective permitted successors and assigns.

7.4 Governing Law/Choice of Law. This provision specifies what jurisdiction's laws are going to be used to interpret, govern, and enforce the contract. The provision often also addresses jurisdiction – where and in what courts any dispute must be litigated. If this provision is not included in a multi-state contract, the conflicts of laws principles in each state will select the governing law. This provision is very important for at least two reasons. First, the vast majority of lawyers practicing in this country are licensed only in one state. This can be problematic when negotiating a contract across state lines. If the contract is to be governed by the laws of a jurisdiction where you are not licensed, then you may not be aware of any idiosyncrasies of that jurisdiction's laws. The client must either retain local counsel licensed in the jurisdiction to review the contract, or accept a degree of risk as to local practices. Second, each party desires "home field advantage" in litigation because it is time consuming and expensive to litigate from a distance, and out of state litigants sometimes perceive bias favoring the home-town party in local courts.

Both parties are going to negotiate hard for the law of their jurisdiction to govern. Unfortunately, there are few compromises, and the party with superior bargaining leverage usually wins. Possible compromises are: 1) leave out the governing law clause, roll the dice, and let the courts decide whose law governs based on conflicts of laws principles; 2) to discourage litigation, have the law of one party's jurisdiction control in claims brought by the other party, and vice versa; or 3) pick the law of a neutral site. Delaware is a common corporate haven, particularly if either party is incorporated there, or you can choose a jurisdiction where the subject matter of the transaction has been well defined, such as New York for banking and finance matters. Beware that courts may ignore the choice of law provision, especially if there is no other nexus to the jurisdiction chosen.

The phrase "without giving effect to its conflicts of law principles" should be added to prevent a *renvoi*, which is a form of circular logic where the laws of each state point to the other.

Example:

> **15.2 Governing Law.** This Merger Agreement must be governed and construed exclusively by its terms and by the laws of the State of Delaware, without giving effect to its conflicts of laws provisions. The parties submit to the jurisdiction of the federal and state courts located within the State of Delaware.

7.5 Notice. This provision gives the ground rules for how any legal notification required under the contract is properly given and received. For example, a warranty provision may state

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that the buyer has to "notify" the seller within 10 days if the goods are defective, and that the seller has 10 days to correct them. The notice provision specifies:

1) how the buyer can properly give notice – i.e., does notice have to be given by U.S. mail, FedEx, Fax, email, or personal delivery?;

2) how the days for giving notice are counted – i.e., is notice deemed to be given on the day the buyer deposits a letter in the mail or when it is delivered into the seller's offices?;

3) how the seller can properly receive notice – i.e., where and in what format is seller entitled to receive notice?; and

4) when the seller is deemed to have received notice – i.e., is notice deemed received when it is deposited in the mail or when it is actually received?

The provision should either include the appropriate addresses for notice for both parties, or reference where this information should be found. Notice provisions almost always come into play at the earliest stages of a dispute, so they must be drafted and followed with care.

Example:

15.14 Notices. (a) Means of Delivering Notice; Effectiveness. A party may give notice or other communications required or permitted to be given under this Operating Agreement in writing, signed by the notifying party. The notice must specify the section of this Operating Agreement pursuant to which it is given. Notice is deemed given on the date of delivery if (i) delivered in person; or (ii) sent by same day or overnight courier service; or (iii) sent by certified or registered United States Mail, return receipt requested, postage and charges prepaid. Notice given to a Member must be sent to the Member at the address of the Member as reflected on the Company's books and records. Notice given to the Company must be sent to the Company at the following address:

_____
_____
_____

Notice is deemed to have been received: (i) on the date of delivery if delivered in person; (ii) on the first business day after the date of delivery if sent by same day or overnight courier service; or (iii) on the third business day after the date of mailing, if sent by certified or registered United States Mail, return receipt requested, postage and charges prepaid. The time period in which a response to notice must be given, or action must be taken with respect to that notice, will begin to run from the date it was received by the addressee. If the addressee rejects or refuses to accept delivery, or if delivery fails as a result of the addressee's changed address for which notice was not given to the Company as provided above, the addressee will be deemed to have received notice on the date delivery was attempted.

(b) Change of Address. Each party may change its address for notice, election, and other communications from time to time by notifying the Company of the new address in the manner provided above for giving notice.

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(**c) Calculation of Time Periods.** In calculating time periods for notice, when a period of time measured in days, weeks, months, years, or other measurement of time is prescribed for the exercise of any privilege or the discharge of any duty, the first day will not be counted but the last day will be counted.

7.6 Force Majeure. This provision states what will happen if one of the parties is unable to perform as a result of events named in the contract, like an act of God, riot, strike, government action, or war – generally, events that cannot be anticipated or controlled when the contract is written. The provision may state that the contract is temporarily suspended, or that it is terminated if the event of force majeure continues for a prescribed period of time. The most common exception negotiated in force majeure clauses is that a party may not suspend the obligation to make timely payments even if a force majeure event occurs.

Example:

15.4 Force Majeure. Neither party is liable for failure to perform (except with respect to payment obligations) solely caused by:

- unavoidable casualty,
- delays in delivery of materials not caused by Seller,
- embargoes,
- government orders,
- acts of civil or military authorities,
- acts by common carriers,
- emergency conditions (including weather conditions) incompatible with safety or good quality workmanship, or
- a similar unforeseen event that renders performance commercially implausible.

If an event of Force Majeure occurs, the party injured by the other's inability to perform may elect one of the following remedies: (a) to terminate this Agreement in whole or in part; or (b) to suspend the Agreement, in whole or part, for the duration of the Force Majeure circumstances. The party experiencing the Force Majeure circumstances shall cooperate with and assist the injured party in all reasonable ways to minimize the impact of Force Majeure on the injured party, which may include locating and arranging substitute services if necessary.

Because force majeure provisions typically apply to unforeseeable events, the parties should address clearly foreseeable events separately. For example, in addition to the force majeure provision, the parties may opt to include a risk management provision to excuse foreseeable risks, like a market price that exceeds a specified level.

7.7 Amendment/Modification. This provision states that any changes, amendments, or modifications to the written contract must also be in writing. The purpose of this provision is to avoid "he said/she said"-type arguments that the parties have somehow amended the contract orally. Usually, the provision will require the signatures of both parties, or at least the party against whom enforcement is sought, on a writing that explains the changes being made.

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Example:

15.13 Amendments. Any amendment to this Operating Agreement must be made in writing and signed by all Members.

7.8 Waiver/No Waiver. This provision allows one party to overlook a breach by the other party without entirely giving up the right to require strict performance of the breached provision or the entire contract in the future.

Example:

15.6 Waivers. If either party does not seek compensation for breach or insist upon strict performance of any covenant or condition of this Lease Agreement, that party is not prevented from seeking compensation or insisting upon strict performance for a future breach of the same or another provision.

7.9 Survival. This provision allows certain terms within the contract to continue in force and effect after the contract has been performed or terminated. For example, a contract that provides for the purchase and sale of a large piece of equipment will be completely performed when the equipment has been delivered and installed by the seller and paid for by the buyer. Even though the contract has been performed, the duration of the warranty might be 60 months, which would extend beyond the date of discharge of the contract by performance. The survival clause would state that the warranty terms survive the discharge of the agreement so the warranty could still be enforced by the buyer for the duration of the warranty period. In addition to warranties, it may be desirable that other provisions continue in force and effect for issues that arise after discharge, such as indemnification obligations, confidentiality and restrictive covenants, post-termination obligations, choice of law, and alternative dispute resolution provisions. Before drafting the survival provision, take the time to review the document and consider which provisions should remain in force after discharge. Be sure these are listed in the survival provision. If a survival clause is included in the termination section, do not duplicate in the boilerplate section.

Example:

15.7 Survival of Terms. Upon discharge of this Agreement, Sections 6.1, 6.2, 7, 8, 9.3, and 10 of these General Terms continue and survive in full force and effect.

7.10 Captions and Headings. Captions and headings should be used liberally in contracts to help the audience identify what information will be found in each section or paragraph. Lawyers often include a boilerplate provision stating that the captions and headings may not be construed as having any meaning.

Example:

15.5 Headings. The headings, titles and captions in this Consulting Agreement are inserted for convenience only and are in no way intended to describe, interpret, define, or limit the scope, extent or intent of this Consulting Agreement or any provision of it.

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Besides being illogical, this practice comes under vicious attack from drafting authorities, who argue that "this should be regarded as an open admission that the drafter is either too lazy to find the proper words to describe a collection of provisions or lacks the linguistic competence to do so."[28] Wow! Whether you agree or disagree that captions and headings could or should properly describe a collection of provisions, bear in mind that opposing counsel will gleefully quote this reference if the issue ever comes to fruition. So as not to be considered lazy or lacking, avoid wasting ink with this type of provision, and instead, focus on making captions and headings more descriptive.

7.11 Counterparts. This provision allows each party to sign a separate copy of the signature page, so that all the copies assembled together would contain all of the necessary signatures. The provision is especially useful when the parties are in different locations at closing and desire to sign the document simultaneously, but the provision is unnecessary when the parties are together or the contract otherwise provides that it takes effect when the last party signs.

Example:

15.11 Counterparts. This Operating Agreement may be executed in counterparts, each of which may be deemed an original but all of which constitute one and the same instrument.

[28]THOMAS R. HAGGARD AND GEORGE KUNEY, LEGAL DRAFTING: PROCESS, TECHNIQUES, AND EXERCISES, 235 (3d 2007).

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Case Study

Which of these boilerplate provisions from a limited liability company operating agreement would NOT be appropriate in a software license agreement? What changes would need to be made in the defined terms used?

ARTICLE XV MISCELLANEOUS PROVISIONS

15.1 Entire Agreement. This Operating Agreement constitutes the entire agreement between the parties and supersedes any prior understanding or agreement among them respecting the subject matter included in this Operating Agreement. No representations, arrangements, understandings or agreements relating to the subject matter, oral or written, exist among the parties except as expressed in this Operating Agreement.

15.2 Application of Georgia Law. This Operating Agreement must be governed and construed exclusively by its terms and by the laws of the State of Texas.

15.3 Execution of Additional Instruments. Each Member must execute in a timely fashion any other instruments deemed necessary by the Company to comply with any applicable laws, rules, or regulations or necessary to effectuate the purposes of the Company and this Operating Agreement.

15.4 Construction. Whenever the singular number is used in this Operating Agreement and when required by the context, the same includes the plural and vice versa, and the masculine gender include the feminine and the neuter genders and vice versa.

15.5 Headings. The headings, titles and captions in this Operating Agreement are inserted for convenience only and are in no way intended to describe, interpret, define, or limit the scope, extent or intent of this Operating Agreement or any provision of it.

15.6 Waivers. If either party fails to seek redress for breach of or to insist upon the strict performance of any covenant or condition of this Operating Agreement, that party is not prevented from seeking redress or insisting upon strict performance for a future breach of the same or another provision.

15.7 Rights and Remedies Cumulative. The rights and remedies provided by this Operating Agreement are cumulative and the use of any one right or remedy by any party does not preclude or waive the right to use any or all other remedies. The rights and remedies provided in this Operating Agreement are given in addition to any other rights the parties may have by law, statute, ordinance or otherwise.

15.8 Severability. If any provision of this Operating Agreement or the application of the provision to any person or circumstance is invalid, illegal or unenforceable to any extent, the remainder of this Operating Agreement and the application of the provision will not be affected and will be enforceable to the fullest extent permitted by law.

15.9 Heirs, Successors and Assigns. Each of the covenants, terms, provisions, and agreements contained in this Operating Agreement are binding upon and inure to the benefit of the parties and, to the extent permitted by this Operating Agreement, their respective heirs, legal representatives, successors and assigns.

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15.10 Creditors. None of the provisions of this Operating Agreement are for the benefit of or enforceable by any creditors of the Company.

15.11 Counterparts. This Operating Agreement may be executed in counterparts, each of which may be deemed an original but all of which constitute one and the same instrument.

15.12 Copies. One or more copies of this Operating Agreement may be executed but it is not necessary, in proving that this Operating Agreement exists, to provide more than one original copy.

15.13 Amendments. Any amendment to this Operating Agreement must be made in writing and signed by all Members.

15.14 Notices.

(a) Means of Delivering Notice; Effectiveness. All notices, offers, acceptances and other communications required or permitted to be given to any Member under this Operating Agreement must be in writing signed by the party making the same, must specify the section of this Operating Agreement pursuant to which it is given, and will be deemed given on the date of delivery if (i) delivered in person; or (ii) sent by same day or overnight courier service; or (iii) sent by certified or registered United States Mail, return receipt requested, postage and charges prepaid, if sent to a Member, at the address of the Member as reflected on the Company's books and records, and if sent to the Company, to:

_____
_____
_____

and such notice will be deemed to have been received (i) on the date of delivery if delivered in person; or (ii) on the first business day after the date of delivery if sent by same day or overnight courier service; or (iii) on the third business day after the date of mailing, if sent by certified or registered United States Mail, return receipt requested, postage and charges prepaid. The time period in which a response to any such notice must be given, or any action taken with respect to it, however, will commence to run from the date of receipt by the addressee. Rejection, failure, or refusal to accept delivery or the inability to deliver because of changed address of which notice was not given will be deemed to constitute receipt of the notice by the addressee.

(b) Change of Address. Each party may change her address for notice, election, and other communication from time to time by notifying the Company of the new address in the manner provided for giving notice in this Agreement.

(**c) Calculation of Time Periods.** In calculating time periods for notice, when a period of time measured in days, weeks, months, years, or other measurement of time is prescribed for the exercise of any privilege or the discharge of any duty, the first day will not be counted but the last day will be counted.

15.16 Tax Matters Person. John B. Doe, a Member, is designated the "tax matters partner" (within the meaning of Code Section 6231(a)(7) of the Company (the "Tax Matters Person"), as provided in Treasury Regulations pursuant to Code Section 6221 et.seq. If John B. Doe is no longer a Member, then the Tax Matters Person will be another Member designated by the Members by a Majority Vote. The Tax Matters Person will represent the Company (at the expense of the Company) in connection with all examinations of the affairs of the Company by any foreign, federal, state, or local tax authorities, including any resulting administrative and judicial proceedings relating to the determination of items of income, deduction, allocation and credit of the Company and the Members, and to expend funds of the Company for associated professional services and costs. All Tax Decisions will be made by the holders of a Majority in Interest in their sole discretion.

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15.17 Arbitration. Any dispute, controversy or claim arising out of or in connection with, or relating to, this Operating Agreement or any breach or alleged breach hereof will, upon the request of any party involved, be submitted to, and settled by, arbitration in the City of Atlanta, State of Georgia, pursuant to the commercial arbitration rules then in effect of the American Arbitration Association (or at any time or at any other place or under any other form of arbitration mutually acceptable to the parties so involved). Any award rendered will be final and conclusive upon the parties and a judgment thereon may be entered in the highest court of the forum, state or federal, having jurisdiction. The expenses of the arbitration will be borne equally by the parties to the arbitration, but each party must pay for and bear the cost of its own experts, evidence and counsel's fees. Even so, any award may, in the discretion of the arbitrator(s), include the cost of a party's counsel if the arbitrator expressly determines that the party against whom such award is entered has caused the dispute, controversy or claim to be submitted to arbitration in bad faith.

15.18. Determination of Matters Not Provided for in this Operating Agreement. The Members will decide any questions arising with respect to the Company and this Operating Agreement that are not specifically or expressly provided for in this Operating Agreement.

15.19 No Action for Partition. No Member has any right to maintain any action for partition with respect to the Property of the Company.

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8 – The Client Interview

Before you draft a contract be sure you know all the facts concerning the proposed transaction. Unfortunately, clients seldom have a clear understanding of how to structure the contemplated transaction, or even what information is relevant to it. The client usually has a vague idea in mind and has not thought about the particulars as to how the transaction will actually be implemented. Often, in fact, clients have little patience with the legal issues surrounding what they believe is a simple deal where nothing can go wrong! It is usually the lawyer's responsibility to identify and elicit information required to draft the contract.

Information gathering usually begins with a personal interview, a teleconference, or an exchange of email inquiries. Structure the interview with basic journalistic questions – who, what, when, where, how, and why – to elicit the information in a logical manner. Some form books provide checklists, but you will eventually prefer to develop your own.

WHO:

- Parties, names and addresses; verify formal legal names of business entities with Secretary of State records
- General historical information – has the client done business with this person or entity? Was the relationship satisfactory?
- Who is authorized to transact business for each party? Who has legal authority to negotiate, sign, and bind?
- Is there anything significant or unique about this business partner? For example, is this the ONLY supplier of a key ingredient or of the contracted service?
- Are both parties "merchants" for purposes of UCC transactions?
- Do the parties have legal capacity to contract?
- Is either party bound by a previous agreement that would preclude full performance of the contemplated transaction? For example, a prior pledge of collateral to secure indebtedness with another lender.

WHAT:

- What is the subject matter of the transaction – the assets, goods, or services to be sold or acquired?
- What is each party required to do under the contract, and what is the measure of satisfactory performance?
- What does the client assume will happen? What does the client assume will NOT happen? What risks does the client anticipate?
- What are the financial terms of the transaction – how much is to be paid?
- What should happen if the contract is breached?
- What are the client's concerns?

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WHEN:

- When is the contract to be performed? Is the time of performance important, or is a "reasonable" time frame acceptable?
- When is delivery to take place, and when does risk of loss pass and title transfer?[29]
- What is the duration of the contract?
- When is payment due?

WHERE:

- Where is performance to take place?
- Where are deliveries made?
- Is the contract location specific?

HOW:

- How are the goals of the transaction going to be achieved?
- What are the different steps or milestones for delivery?
- What are the mechanics of getting from the concept to the implementation of the transaction?

WHY:

- Why does the client want to enter into this transaction?
- Does the transaction advance the client's long range goals?
- Is this transaction complete of itself or is it part of a larger series?

[29] Note that the client may not be able to answer these legal issues but should be able to provide information to help you make the determination.

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9 – The Audience

Your responsibility in drafting is first and foremost to your client probably lacks sophistication or experience in legal matters; however, many lawyers draft to impress opposing counsel. Ultimately, if a provision is litigated, the language must be precise enough to withstand attacks from intelligent and well-educated adversaries but opposing counsel is not paying your fee. Drafting to impress opposing counsel usually results in misplaced effort and failure to communicate effectively with the most likely audience of the contract.[30]

A contract's audience consists of a wide variety of people who will read the document for differing, and possibly adversarial, purposes. Before drafting, take a moment to identify the potential users of the written contract and draft with these various users in mind. The drafting style and language you use should differ based on the sophistication of the audience. For example, the style you choose in drafting a contract to be used primarily by consumers should differ from the style you choose in drafting a contract for C-suite executives of a large corporation. Also consider whether the users of the contract are likely to be friendly or hostile to your client's interests.

Although lawyers sometimes pride themselves on creating highly complex language that requires a J.D. to decipher, logic dictates that a contract should be understandable to the people who are going to use it. For this reason, the measure of success in legal drafting is the utility of the document to its intended audience.[31] If the audience has difficulty understanding the contract, this should be because of the complexity of the transaction rather than the syntax.[32]

Model Rule 1.4 specifies that the client should understand all important provisions before signing a contract. According to Model Rule 1.4, lawyers are ethically required to ensure the client is able to make informed decisions, and the comments to Rule 1.4 add that the lawyer must: 1) provide sufficient information to enable the client to participate intelligently in decisions; and 2) review important provisions with the client before the document is signed.

[30] An exception to this rule would be seen in the case of contracts traditionally disfavored by the courts, such as non-competition agreements, which must be able to withstand hostile judicial scrutiny.
[31] Maurice B. Kirk, *Legal Drafting: Curing Unexpressive Language*, 3 Tex. Tech. L. Rev. 23, 52 (1971).
[32] Mark Mathewson, *A Critic of Plain Language Misses the Mark*, 8 Scribes J. Legal Writing, 147, 149 (2001-2002).

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Exercise

You are responsible for drafting a partnership agreement for a technology business that will have five equity partners at inception. More partners may be added at a future date. Each partner may bring one or more employees and a client list to the partnership and will be asked to contribute $100,000 as initial capital. Other financial arrangements for the partnership will be made with a local community bank. The prospective partners have hired a bookkeeper recommended by their outside accounting firm. The partnership agreement will contain typical restrictions on transfer in the event of death, disability, or termination of employment.

How many potential users of this contract can you identify?

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10 – Required, Essential, Recommended, and Optional Provisions

One interesting quirk of transactional practice is that the methods and procedures of drafting a contract are almost completely unregulated by statute or case law. Unlike litigation practice, where the timeframe for filing, format, content, number of pages, type size, margins, and even the size of paper for briefs and pleadings are dictated by statute and court rules, very little about drafting a contract is "required." Although contracts are based upon the law, most are completely unregulated in terms of language or format. Contracts are not even required to be clear or legible, and too many of them are neither.

Little drafting is zero-based; most drafting projects begin with a template document that was used in a prior transaction. The genealogy and original purpose of the template, or distinct provisions included in the template, however, are seldom known. Some, if not all, of the provisions included in the template have been negotiated by the parties to previous transactions and may not purely represent either party's best interests.

Understand why each operative provision was included in the template in order to discern whether those provisions are necessary or advisable for the contract you are currently drafting. Provisions may be required, essential, strongly recommended, or optional, but too often, irrelevant provisions are carried forward simply because an inexperienced lawyer is uncertain as to why they were included in the prior draft in the first place, and whether they are relevant to the current transaction. While it may be easier to retain the original verbiage than to determine its *raison d'etre*, unnecessary language causes ambiguity and should be avoided.

If you are unsure why a particular provision was included in the template, look it up! One excellent resource for determining the etymology of legal concepts is *A Dictionary of Modern Legal Usage* by Bryan A. Garner. Also be sure to check an authority on local law; for example, *Georgia Contracts: Law and Litigation* by John K. Larkins, Jr. shows how Georgia courts tend to handle key provisions, like liquidated damages clauses and restrictive covenants. Most states have similar treatises written by practitioners experienced in the particular area of law. Consult more seasoned lawyers before deleting language that appears superfluous. If, after careful research, you are unable to find any reason to include the provision, delete it, but be sure either to redline revisions or to assimilate excised provisions into a separate document the supervising attorney can review before these provisions are permanently banished and the contract is "inked." Errors can occur at both ends of the spectrum, so take as much care not to include unnecessary provisions as not to eliminate necessary ones. For example, to have a negotiable promissory note, it is necessary to include the words "to the order of"; at first glance these words in a prior draft of a promissory note may seem superfluous but without them, the note is non-negotiable.

1. Required. Although there are surprisingly few statutory requirements for contracts, they tend to pop up in the most unlikely places, and the failure to comply with these statutory requirements is usually fatal to the provision, if not the entire contract. For example, in employment severance agreements, if the employee is being asked to waive possible age discrimination claims, according to federal law the contract must inform the employee in writing of the right to consult with counsel before signing the agreement. The waiver is legally ineffective and unenforceable if this language is not included. Similarly, the Federal Trade

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Commission Holder in Due Course Rule, 16 CFR Part 433, requires a specific legend to be included on a consumer credit contract; if the legend is omitted, the payee may incur a penalty of up to $10,000 *per occurrence*. Likewise, in government contracts, the vendor is required to comply, and in turn require its vendors to comply, with a host of government regulations, all of which must be specified in the contracts with those vendors. This language may seem unnecessary or even inappropriate in those third party contracts, but deleting it would be an event of default in the vendor's government contract.

Requirements can creep in other ways; for example, under Georgia statute, arbitration clauses in roughly 20 different types of contracts must be initialed or they are unenforceable. This requirement applies to employment contracts but the statute creating the requirement is not codified with other employment law because it deals with arbitration, generally.

2. Essential. These are provisions that, although not required by statute, are required to make the contract legally effective. For example, a license agreement is useless without a specific grant of rights; a will or deed is ineffective without language of conveyance; a promissory note is just a memorandum without an actual promise to pay; and a contract for the sale of goods must identify the goods to be sold. Unless the essential terms are included in the written agreement, the contract will not be enforceable. Be sure that the operative words that accomplish the act contemplated by the contract are included, for example:

- Licensor grants Licensee the right to use the software under the terms of this agreement.
- I, Charles B. Lee, convey to Tom Anderson the property described in this deed.
- Seller agrees to sell and Buyer agrees to buy 20,000 cases of tea.
- I promise to pay to the order of Bank of America the sum of $15,000 plus interest on or before July 1, 2025.

3. Strongly recommended. These provisions are not required or essential but, in your assessment and experience are important to the transaction. Your experience in dealing with this client or with similar matters usually helps identify substantive provisions that SHOULD be included in a transaction; for example, restrictive covenants in an employment agreement; milestones in a software development agreement; representations and warranties in a merger; a termination fee in a services contract; and limited warranties in a sale of goods. Strongly recommended provisions often have to do with avoiding or remedying problems that could arise if the transaction doesn't go as planned.

4. Optional, Based on the Lawyer's Assessment. After required, essential, and strongly recommended provisions, the client's goals and objective may suggest optional provisions. For example, in a software license agreement, you may opt to include provisions dealing with derivative works if the client envisions the possibility of incorporating the software into new products in the future.

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Exercise

Determine whether the following provisions are required, essential, strongly recommended, or optional.

_____ 1. Contractor shall send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract of understanding a notice to be provided by Company's designated representative advising the labor union or workers' representative of the Contractor's commitments under Section 202 of Executive Order 11246 of September 24, 1965. Contractor shall post copies of the notice in conspicuous places available to employees and applicants for employment.

_____ 2. No shareholder may transfer all or any part of the rights and incidents of ownership of the Shares. Any transfer in violation of this Buy-Sell Agreement is null.

_____ 3. This paragraph does not limit my right to challenge the validity of this Severance Agreement in a legal proceeding under the Older Workers Benefit Protection Act, 29 U.S.C. 626 Section (f) with respect to claims under the Age Discrimination in Employment Act.

_____ 4. If you believe the credit card statement contains a billing error, you may send a written notice setting forth the amount of the error and the reasons you believe it is an error. Within 30 days of receiving your notice, we will acknowledge receiving it; within 90 days we will investigate the matter and either make appropriate corrections or send a written explanation of why the original statement is correct.

_____ 5. If Consultant creates any works protectable under copyright law, including, but not limited to, computer software programs and applications, textual, audio, or visual works ("Works"), each Work will be deemed specially commissioned by the Company for use as a "collective work," and considered a "work made for hire," as those terms are defined in the United States Copyright Act.

_____ 6. The closing for the sale and purchase of the Assets will take place at a mutually agreeable time and place on or before December 31, 2023.

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_____ 7. Employee may participate in bonus incentive plans offered by the Company.

_____ 8. This Agreement is governed and construed according to the laws of the State of New York.

_____ 9. Vendor hereby grants Customer a non-exclusive and non-transferable license to use the Software.

_____ 10. Supplier shall perform the services described in the Statement of Work according to the terms of this Agreement.

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11 – Defined Terms

Lawyers often use defined terms as a shorter method to refer to an entity or concept. For example, instead of writing "International Business Machines Corporation" every time the company is referred to in the text, you can use the defined terms "IBM," "Company," "Corporation," or another suitable label depending on the context, like "Employer," "Seller," "Vendor," or "Purchaser."

Besides shortening sentence length, defined terms should be used to resolve ambiguity where a term could have more than one possible meaning, or where common words are used to have a specific connotation. For example, does "IBM" refer to the parent holding company, or a specific subsidiary? Does the term include subsidiaries, affiliates, successors in interest, officers, directors, shareholders, and employees? A properly crafted definition can be used to specify which of these parties is included each time the defined term is used in the contract. An ambiguously drafted definition poisons every provision in the contract in which the defined term is used.

Definitions can be integrated (included in a parenthetical insert within a sentence), or autonomous (set off as a separate phrase or sentence, or accumulated and set off as a glossary). If the definition is contained in a parenthetical insert, the parenthetical should immediately follow the defining information:

Correct: The Internal Revenue Code of 1981 (the "Code") is determinative.

Incorrect: The Internal Revenue Code (the "Code") of 1981 is determinative.

Incorrect: The Internal Revenue Code of 1981 is determinative (the "Code").

If the definition is autonomous, use "means" if the definition is intended to be complete; use "includes" if the definition is NOT intended to be complete. Do not use "means and includes," because that illogically implies that the term is both complete and incomplete, which can be ambiguous. Do not clutter definitions with useless extra words, like "shall mean," "shall have the following meaning," "has the following meaning," or "shall mean and refer to":

Correct: "ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

Incorrect: "ERISA" includes the Employee Retirement Income Security Act of 1974, as amended.

Incorrect: "ERISA" shall mean and refer to the Employee Retirement Income Security Act of 1974, as amended.

Avoid using "is when" or "is where" to define terms, like "Event of Default" is when X occurs. Also avoid defining a term using the same term in the definition, like "Event of Default" means an event occurs which triggers default.

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Are Articles Required? The question often arises whether to use the article "the," with defined terms; for example, "the Company," or "Company"? The answer to the question turns upon whether you view the defined term as common noun or as a temporary name designated solely for purposes of the contract. "The" is the definite article, so it is used with common nouns, like "the Bank," and using "the" in a contract means that the you are referring to this particular bank, rather than any bank.

If you view "Company" as a common noun identifying this particular entity, it is appropriate to use "the Company." If, however, you view "Company" as a substitute, temporary name, it would be appropriate to omit the article, because most names do not use articles.[33] For example, it would not be appropriate to refer to AT&T as "the AT&T." When common nouns are used as defined terms to identify one of the parties, like "Company," "Corporation," "Employer," "Licensor," "Seller," or "Purchaser," it is appropriate either to use the article "the" or to omit it. The key is that the defined term should be used consistently throughout the contract, so if you choose "the Company," use the article "the" every time; if you choose "Company" do not use the article "the" consistently throughout the contract.

[33] As with any general rule, there are some exceptions; for example, the United States of America, the Netherlands. The names of bodies of water generally use "the," like the Atlantic Ocean.

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12 – Correct Language for the Intended Legal Consequence

The primary purpose of a contract is to create legally binding consequences, but there are many different kinds of consequences. For example, contracts create duties but they also create rights; the flip side of every duty to perform is the right to receive the performance. Contracts also create privileges: the option to do something in the future if the party so desires. Contracts are sometimes used to negate duties, rights, and privileges and to create other types of consequences as well.

One of the most important aspects of contract drafting involves choosing the proper words to create the intended consequences. This sounds easy enough, but even today, drafting authorities disagree to some extent as to which words create which consequences and courts interpret the same words differently. To complicate matters, most lawyers – sometimes including supervising attorneys and opposing counsel – are not aware of the distinctions, so most starting templates contain ambiguous inconsistencies. When words creating consequences are used inconsistently within a contract, even the meaning of words used correctly is disputable because it has been contaminated by the inconsistent usages. So, for example, if the word "shall" is incorrectly used to create a privilege, other usages of "shall" within the same contract intended to create a duty are weakened. The word "shall" is commonly misused in template documents far more often that it is used correctly; look for opportunities to improve documents by strictly limiting "shall" to impose duties on named parties.

12.1 Use "shall" to create direct duties. Only a party to a contract can have a direct duty under it, so unless the word "shall" appears immediately after the name of a party to the agreement, the usage is probably incorrect. On the other hand, there are instances where "shall" can appear immediately after the name of a party to the agreement where no duty was intended; this is incorrect. These are examples of incorrect usages of "shall":

Employee shall be entitled to…
["has a duty to be entitled"]

Company shall have the duty to…
["has a duty to have the duty"]

Licensor shall have authority to…
["has a duty to have authority"]

Purchaser shall notify Seller within 20 days of any defects…
["has a duty to notify"]

12.2 Use "is not required" to negate duties. If you merely intend to eliminate the duty to act, do not use "shall not" because this would prevent the party from acting. "Is not required" states that the party is not required to do something but may in its discretion.

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Landlord is not required to shovel snow and ice off the sidewalks on the premises.

12.3 Use "shall not" to create a duty not to act.

Company shall not assign its rights under this Agreement.

12.4 Use "is entitled to" to create rights. A right under a contract is the flip side of a duty: when X has a duty to act, Y has a right to receive that action; conversely, when Y has a right to do something, X has a corresponding duty. Rights are best expressed as a duty on the other party, so use them sparingly, deliberately, and not our of habit.

Buyer is entitled to inspect the goods for 30 days after delivery.

12.5 Use "is not entitled to" to negate rights.

Buyer is not entitled to return defective goods to Seller without prior notice of defect.

12.6 Use "may" to create a privilege. A privilege is discretionary permission, but there is no corresponding duty other than a duty to accept the choice of the party exercising the privilege. Although "may" is recommended to convey privilege or discretion, "may" is also used colloquially to refer to possibility, something that might happen. This distinction between privilege and possibility can cause ambiguity if you are not careful. For example, if a provision states that "Consultant may receive Proprietary Information regarding the Formula…," this could be interpreted to mean either that Consultant is entitled to receive the information, or that the possibility exists that Consultant might receive the information in the course of performing its duties. To prevent ambiguity, preserve the use of "may" for privilege or discretion by reconstructing sentences intended to convey possibility using "might," like this: "Consultant might receive Proprietary Information regarding the Formula."

Licensee may terminate the license agreement at any time during the Term upon 30 days' notice to Licensor.

The Indemnified Party may retain separate counsel at its sole expense.

12.7 Use "may not" to negate a privilege.

Company may not exercise the option after October 31.

12.8 Use "if" to create a condition. A condition is an event or status that must occur before a duty, right or privilege arises. A condition may be excused, but if it does not occur and is not excused, the party whose duty is conditional will not breach the contract if it does not perform. Create a condition using an if/then construction. Don't use "shall" in the "if" clause, but do use shall in the "then" clause if a duty arises when the condition occurs. If the condition relates to a right or privilege, use "is entitled to" or "may" in the "then" clause.

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If Buyer requests a sample of the Goods, Seller shall provide a sample within ten days. [*correct for conditional duty*]

If the LLC receives an opinion of counsel stating that the Transfer will not violate any laws, then Member may sell his or her Membership Interest. [*correct for conditional privilege*]

If Buyer shall request a sample of the Goods, Seller shall provide a sample within ten days. [*incorrect*]

Company shall pay Employee a bonus of $10,000 if sales exceed $1 Million for the fiscal year. [*correct for conditional duty***]**

12.9 Use a present tense verb to perform an action. If a specific action is taken within the contract itself, use a present tense verb and active voice to state the action taken, like "I grant," "Company assigns," or "Company represents and warrants." Do not use passive voice to perform an action, in "the following are represented and warranted," or "the license is granted to Licensee."

Licensor grants ABC a limited license to use the Software.

Investor acknowledges that it has received the disclosure statement.

Buyer assumes the liabilities secured by the assets.

12.10 Use a present tense verb to state a policy. Policies are rules the parties must observe but do not require action or inaction by either party. Do not use "shall" in expressing policies unless a specific duty is imposed directly on a party.

This Agreement is governed by the laws of the State of Colorado.

12.11 Use "must" to describe indirect duties. If something is required to be done but it is not known at the time the contract is written whether the obligation will arise or which party will incur it, use "must."

Notice of breach must be given by certified mail within ten days.

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13 – Allocation of Risk

Contracts serve to allocate risk among the parties to a transaction. For most contractual provisions, there is an approach that allocates more risk to the party acquiring assets, goods, or services; an approach that allocates risk to the party providing assets, goods, or services; and a range of possibilities between the extremes. The way a provision is drafted affects the level of risk and responsibility each party undertakes in the contract. Sometimes, a single word or phrase can have an enormous impact. For example, inserting the phrase "to the extent that" in an indemnification provision activates proximate cause limitations to reduce the indemnifying party's risk. Relatively simple edits in the language shift the risk from one party to the other.

Marking up the Prior Draft

Drafting is a collaborative process in the sense that virtually all drafting begins with a document used in a prior transaction. Lawyers usually find it helpful to develop a portfolio (sometimes called a "read file") of "standard" forms for transactions that are similar in nature. Be careful that the form you use as your starting template is drafted from the same perspective as the current transaction. For example, if your firm represents the buyer in the current transaction, look for a form from a prior transaction in which your firm also represented the buyer. Keep in mind that in a negotiated transaction, the final version of the contract probably contains quite a few compromises; the final version of a previous contract is usually *not* the best starting position for the next transaction.

Whether marking up a prior draft or drafting from scratch, every contract should be considered an original composition from beginning to signatures. Look for ways to improve the language and organization as you mark up the prior draft; don't assume it was written perfectly the first time.

Start from a Winning Position

Each provision to a contract allocates risk among the parties, and virtually every sentence in the text can be written in a manner that favors one party over the other. It is your responsibility to be sure that your client assumes the correct level of risk. It is surprising how often provisions in one party's "standard" form actually favor the other party. While your buyer client may ultimately wind up accepting no more than an attempt at deliver by the seller as a result of pertinent negotiations between the parties, by no means should you START the negotiation process at this position; the buyer has absorbed all risks if the goods are not delivered on time.

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Consider how the risk shifts in the following provisions:

1. Seller shall deliver the goods on or before July 31.

2. Seller shall use best efforts to deliver the goods on or before July 31.

3. Seller shall use best efforts to deliver the goods on or before July 31. For purposes of this Agreement, "best efforts" means that Seller will obtain the goods on the open market and absorb any additional costs incurred to fulfill its delivery obligations on a timely basis.

4. Seller shall use commercially reasonable efforts to deliver the goods on or before July 31.

5. Seller will attempt to deliver the goods on or before July 31.

Draft to Allocate Risk

The risk allocation between buyer and seller varies in each of the examples given above. Relatively simple edits in the language shift the risk from the Seller in the first sentence to the Buyer in the last. In the first sentence, the Seller has more risk because in order to comply with the terms of the agreement, the goods have to be delivered by July 31 without exception.[34] The second example provides a small exception: the Seller will not breach the agreement if it uses best efforts but is unable to deliver the goods by July 31. The Seller still has the risk of ensuring that its efforts rise to the level of being "best efforts," which can be a tough standard. "Best efforts" implies that the Seller will do anything within its power to see that the goods are delivered on or before July 31, which may be financially unfeasible. The third example whittles away from the Seller another small degree of risk because the term "best efforts" is defined within the contract. In the fourth example, the risk is shifting more towards the Buyer, because Seller is only obligated to use "commercially reasonable" efforts to deliver the goods, which means the Seller is not obligated to use efforts that are financially unfeasible. In the last example, the Buyer has assumed the risk because the Seller has only agreed to attempt to deliver by July 31, meaning that the Buyer will have no recourse if the Seller attempts but is unable to deliver the goods.

[34] For purposes of this discussion, we assume that time is of the essence of the agreement, although that is not the case for contracts for the sale of goods under the UCC, which applies a reasonableness standard. In some states, it is necessary to state in the agreement that time is of the essence if the parties intend it to be. For example, under O.C.G.A. § 13-2-2, time is not of the essence of the agreement, but the parties can so stipulate. This means that if the parties do not stipulate in the agreement that time is of the essence, delivery on August 1st or 2nd would be satisfactory in most situations under "reasonableness" standards. This is the reason a "time is of the essence" clause is often included in the boilerplate.

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These words and phrases are often used in contracts to shift risk:

Absent manifest error
Absolute certainty
Approximately
As soon as practicable
Average quality
Best efforts
Commercially reasonable efforts
Highest industry standards
Industry standards
Material
Reasonable
Reasonable assurance
Significant
Substantial, substantially
To the extent that

These concepts can be built into performance provisions to shift risk:

Actual knowledge vs. belief
Attempt vs. success
Bonus or penalty related to timely completion
Contingencies
Cure and cure period
Degree of accuracy or composition (e.g., 98.5% pure)
Effect of delay (e.g., payment is not due until delivery)
Grace period
Including or excluding specific categories of damages
Notice and the amount of time allowed for notice (e.g., if the goods do not conform, Buyer shall notify Seller within 10/15/30/60/? days)
Precision of the description (e.g., "blue" vs. indigo, royal, navy, peacock; "tree" vs. Chinese maple)
Process vs. results
Sign off approval for satisfactory performance

Identify the Range of Risk

The biggest challenge for new lawyers is to determine the parameters of the range of risk for each contractual obligation. In other words, when you begin "marking up" a prior draft to fit the current transaction, how do you determine whether a provision is neutral or whether it favors one of the parties over the other? Where does this particular provision fall in the overall range of risk as currently written? Does it advance your client's interests, or is it more favorable to the other party? If your client prefers a more aggressive approach, how do you know whether the provision is one-sided enough or whether it needs to be tightened up?

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To some extent, this knowledge is gained through experience, which is why it is called the "practice" of law, and why partners' billing rates are substantially higher than new associates' rates. For the diligent, however, some sources exist that can help identify the range of risk. The best source for identifying the range of risk for a particular provision is an experienced mentor. If a reliable mentor is not available, the next best source is your law firm's or law department's form files. Try to find a contract where your firm represented the buyer and compare it to a contract where your firm represented the seller. The final forms most likely have been heavily negotiated, so the best source is the first draft submitted to opposing counsel, if your firm drafted the contract, or the first revision, if your firm reviewed an initial draft prepared by opposing counsel. Study the revisions requested by counsel for each party and observe how experienced lawyers have fine-tuned the language to shift risk from one party to the other.

If form files are not available, look for a good form book. Some topical form books are well written and often include forms labeled as to which party they favor, like this: "Software License (Favoring Licensee)."[35] Sometimes, form books are annotated with a running commentary as to why each provision is phrased a certain way, with alternative language included. By comparing forms favoring a licensee and a licensor side by side you can begin to identify the range of risk for each provision.

[35] Look for form books that are subject-matter specific, but avoid form books that contain thousands of forms covering a multitude of legal practice areas.

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Case Studies

Notice how the risk shifts between the parties based on relatively small changes to the wording of each provision.

Warranties.

1. Warranty. Seller warrants that the goods will conform to buyer's specifications.

2. Warranty. Seller warrants that the goods will conform in all material ways to buyer's specifications.

3. Limited Warranty. Seller warrants that the goods are merchantable. Seller specifically disclaims the warranty of fitness for particular purpose.

4. Limited Warranty. Seller warrants that it will use commercially reasonable efforts to comply with the terms of this Agreement. Seller specifically disclaims all other warranties, including the warranty of merchantability and the warranty of fitness for particular purpose.

5. No Warranty. Seller disclaims all warranties under this Agreement, including the warranty of merchantability and the warranty of fitness for particular purpose.

Conditions of Transfer:

1. The Transferring Owner shall have delivered to the Company a written opinion of counsel for the Company substantially in the form attached to this Agreement as Schedule 14.1 that the Transfer will not result in a violation of applicable law.

2. The Transferring Owner must have delivered to the Company a written opinion of counsel for the Company or of other counsel satisfactory to the Company substantially in the form attached to this Agreement as Schedule 14.1 that the Transfer will not result in a violation of applicable law.

3. The Transferring Owner shall have delivered to the Company a written opinion of counsel reasonably satisfactory to the Company that the Transfer will not result in a violation of applicable law.

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4. The Transferring Owner shall have delivered to the Company a written opinion of counsel that the Transfer will not result in a violation of applicable law.

Licenses:

1. Licensor grants Company all intellectual property rights in the Software.

2. Licensor grants Company the right to use the Software and all rights appurtenant to use of the Software, including the right to modify the Software and the right to create derivative works.

3. Licensor grants Company the right to use the Software in any manner consistent with the terms of this Agreement.

4. Licensor grants Company the right to use the Software for the specific purposes described in this Agreement. Except as stated in this Agreement, no other rights are granted by Licensor to Company.

Assignment:

1. Seller may not assign any rights or duties under this Agreement.

2. Seller may not assign any rights or duties under this Agreement without the consent of Buyer, which consent may be withheld for any reason or no reason.

3. Seller may not assign any rights or duties under this Agreement without the consent of Buyer, which consent may not be unreasonably withheld.

4. Neither party may assign any rights or duties under this Agreement without written consent of the other party.

5. Neither party may assign any rights or duties under this Agreement except to a parent, affiliate or subsidiary or except to a successor in interest in the event of a change in control.

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Exercise

Identify the range of allocating risk between a buyer and seller with respect to an indemnification provision. Start with a simple provision more favorable to the Buyer, develop into a provision that is neutral, and end with a provision more favorable to Seller.

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14 – Money Trail and Alternative Outcomes

One of the distinctions between contract drafting and legal writing is that contracts must anticipate and provide for future events. Contextual ambiguity can arise where the terms of a document are incomplete with respect to all possible outcomes of a transaction or a particular provision. For example, a distribution agreement may grant an exclusive territory and provide a bonus if the distributor meets or exceeds certain required sales objectives. What happens if the distributor fails to achieve the sales objectives? If the agreement fails to provide for this outcome, contextual ambiguity may arise between the parties as to the distributor's fate.

One tool to avoid contextual ambiguity caused by incomplete terms is to flow-chart potential outcomes. A flow-chart is basically a diagram to help you visualize how the transaction as a whole or a particular provision operates. A substantive provision is broken down into a series of simple yes or no questions. Each question is written in a box with arrows indicating the next step whether the answer is "yes" or "no" until the ultimate conclusion is reached.

Although computer programmers use specific flow-charting symbols, arrows, and decision blocks to answer a series of yes/no questions, it's not necessary to master flow-charting as an art form to obtain the chart's benefits of logic and to visualize potential outcomes. A simple flow chart that tracks the potential flow of money or alternative outcomes is sufficient to help you identify substantive gaps in either the terms of the transaction or the document itself. Consider the following provision:

> The husband agrees that upon the sale of the marital residence, or on April 1, 2001, whichever event first occurs, he shall pay from the proceeds of the sale to the wife all of the net proceeds from the sale of the house, but not more than $50,000.[36]

A flow chart illustrates in pictorial form all of the alternative outcomes that should be addressed in a provision. Errors can be more easily spotted in that picture than in 1,000 words! Flow-charting a complicated provision helps you visualize and clarify its substantive components. A flow chart can identify omissions or duplications that are potential sources of contextual ambiguity. A flow chart may also illustrate that a particular provision has been poorly organized. Be sure to compare your flow chart to the facts gathered during the client interview to ensure that the provision is substantively accurate and complete.

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[36] **Horwitz v. Weil**, 275 Ga. 467 (2002). The ambiguity and litigation in this matter arose because all possible outcomes were not addressed in the settlement agreement. The husband did not sell the residence before April 1; hence, there were no proceeds from a sale to distribute to the wife. The appellate court held that the provision was not ambiguous, but it was unenforceable because it was contingent upon a sale. The Georgia Supreme Court reversed, saying that the provision IS contextually ambiguous because the requirement to pay exists in two separate events, whereas the source of payment funds only exists upon the occurrence of one of the events. Under these circumstances, there is an ambiguity as to the rights and responsibilities when April 1, 2001 passes and there are no sales proceeds. The contextual ambiguity arose because a vital piece of information – how the purchase price was to be paid if the house had not been sold by April 1, 2001 – was omitted.

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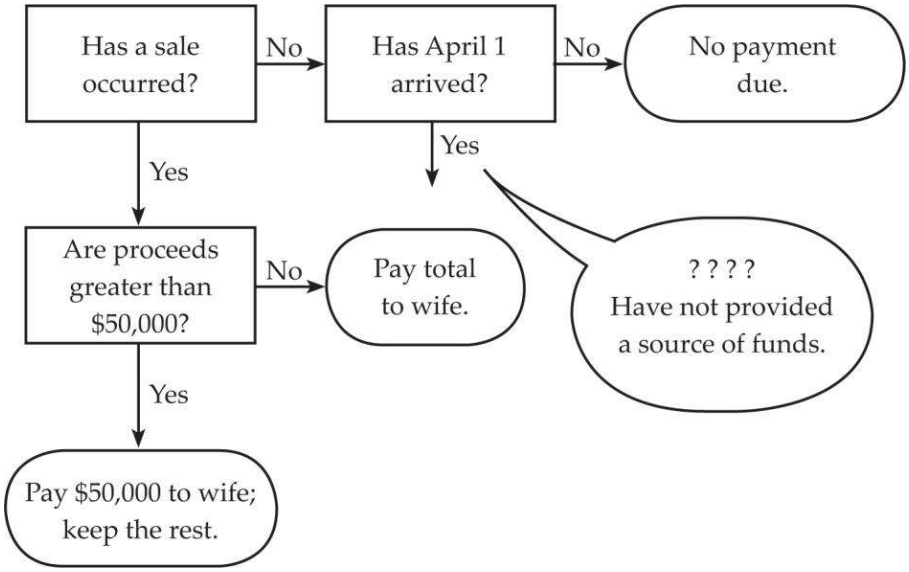

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15 – Alternative Dispute Resolution Clauses

Despite our best efforts, disputes sometimes arise among the parties to a contract. Anticipate what types of problems are likely to arise and consider how best to address them so appropriate methods of dispute resolution can be built into the contract. Litigation can be costly, time consuming, and destructive to the parties' long-term business relationship.

In an effort to avoid litigation, lawyers have developed several alternative methods to resolve disputes, including step negotiation, mediation, arbitration, and standing neutral, but no solution devised to date is perfect for every situation. Arguments can be made for and against each alternative form of dispute resolution. Some lawyers are diametrically opposed to any method of dispute resolution that involves waiving constitutional rights to a trial by judge and jury. Convincing arguments can be made that in certain situations, litigation remains the best alternative (particularly by lawyers who make their living litigating.) Be aware of the alternatives available and consider the advisability of each in context of the particular transaction and the nature of likely disputes. It is just as short-sighted automatically to include the same ADR provision in every contract as it is automatically to exclude them.

1. Step Negotiation. In step negotiation, the parties require a good faith effort to resolve any dispute before escalating to litigation or arbitration. The parties agree that each dispute will be referred first to their respective lowest level of management having authority to resolve the dispute. The step negotiation provision may require the parties to exchange position papers to define each party's position on the issues and highlight areas of agreement before they meet to resolve the dispute. If the lowest level of management is not able to resolve the dispute within a given time frame, the parties are required to elevate the matter through higher levels of management until it is resolved or the parties conclude that it cannot be amicably resolved by step negotiation.

One unique advantage of step negotiation is that each level of management is motivated to try to resolve the dispute without having to pass it up through the executive hierarchy. Potential disadvantages are that: 1) the negotiations are non-binding; and 2) step negotiation may not work well in situations where a great disparity exists between the sizes of the entities involved. A mom-and-pop entity would not have as many levels of management to refer the matter to as a Fortune 500 company, and may not be satisfied with the decision of a mid-level manager of the other party when its own hierarchy is exhausted.

Example:

The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this contract. The parties shall elevate the issues to their respective upper management levels as necessary to resolve the dispute. If the parties are unable to resolve within 60 days any dispute arising out of or relating to this Agreement, or the breach thereof, the parties shall submit the dispute to final, binding arbitration administered by the American Arbitration Association.

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2. Mediation. The parties agree that each dispute will be referred to a mediator who will work with the parties to try to achieve a compromise. Advantages are: 1) mediation is usually less expensive than litigation and arbitration; 2) matters are usually resolved much quicker than in litigation; 3) the dispute can be referred to a person knowledgeable in the subject matter; 4) mediation tends to be less destructive to the relationship of the parties than litigation or arbitration because the parties work together and must ultimately use teamwork to settle the dispute; and 5) it is not necessary for either party to admit fault in order to resolve the problem. The disadvantages are that mediation is not binding, and the parties cannot be forced to agree.

> **Example:**
> The parties shall submit any dispute or claim in law or equity arising out of this agreement to neutral, non-binding mediation before beginning arbitration, litigation, or any other proceeding before a trier of fact. The parties shall act in good faith to identify a mutually acceptable mediator. If a mediator cannot be agreed upon by the parties, each party shall designate a mediator and those mediators will select a third mediator who will act as the neutral mediator, assisting the parties to mediate in good faith to reach a resolution. The parties to the mediation shall share equally in its cost. If the dispute or claim is resolved successfully through the mediation, the resolution will be documented by a written agreement executed by all parties. If the mediation does not successfully resolve the dispute or claim, the mediator will provide written notice to the parties and the parties may then seek an alternative form of resolution of the dispute or claim, according to the remaining terms of this agreement and other rights and remedies afforded to them by law.

3. Arbitration. The parties agree that each dispute will be referred to an arbitrator or panel of arbitrators under the rules of the American Arbitration Association or similar entity. The arbitration provision should specify 1) where the arbitration will be held; 2) whether a single arbitrator or panel of arbitrators will decide the dispute, and how the arbitrator(s) are selected; 3) what governing law will control; 4) who will bear the costs of the arbitration; 5) what damages the arbitrator can award, and whether there is a cap on damages.

Some of the primary advantages of arbitration are: 1) arbitration is usually less expensive than litigation; 2) the dispute can be referred to a person or panel knowledgeable in the subject matter; and 3) the decision of the arbiter can be binding if the parties agree in the contract to make it so. The primary disadvantages of arbitration are that: 1) the parties in arbitration are usually represented by lawyers who are likely to insist on "adequate" preparation and discovery; 2) the arbitrators may not have the discretion to hear only part of the dispute, as would be the case of a hearing for summary judgment or declaratory judgment within the judicial system, so the lawyers have to prepare and present the entire case; and 3) decisions of the arbitrator cannot be appealed.

Courts are eager to enforce arbitration clauses, and have done so with respect to contracts that are neither negotiated nor negotiable – "contracts of adhesion." For example, in *Hill v. Gateway*[37], the court enforced an arbitration clause in Gateway's Standard Terms and Conditions that was delivered inside the package after the point of sale. Canadian courts also

[37] *Hill v. Gateway 2000, Inc*., 105 F.3d 1147, cert. denied 522 U.S. 808.

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zealously enforce arbitration clauses in non-negotiable contracts, absent statutory intervention. In *Seidel v. Telus Communications*[38] Ms. Seidel obtained cellphone service from Telus Communications pursuant to a standard form contract, which required mandatory arbitration and waived the user's right to a class action. Despite this waiver, Ms. Seidel brought a class action under the British Columbia Business Practices & Consumer Protection Act. The Act voids any waiver of rights specifically granted under the Act. The BC Supreme Court allowed the class action to proceed based on the Act, but the case established two important points: 1) the court clearly viewed the form as a contract, despite the fact that it was essentially a contract of adhesion, neither negotiated nor negotiable; and 2) the court plainly stated that the arbitration clause would be enforced if not for statutory intervention: "Absent legislative intervention, the Courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause."

> **Example:**
> The parties shall settle any controversy or claim arising out of or relating to this contract, or its breach, by arbitration administered by the American Arbitration Association in accordance with its commercial arbitration rules, and judgment on the award entered by the arbitrator(s) may be entered in any court having jurisdiction.

4. Standing Neutral. At the inception of the contract, the parties appoint a standing neutral who functions throughout the term as a counselor of sorts. The parties keep the standing neutral informed as the transaction progresses, and the standing neutral is essentially "on call" to propose a solution to any disputes that arise. The advantages are: 1) the process is usually less expensive than litigation; 2) the standing neutral can be a person knowledgeable in the subject matter; 3) the standing neutral is available to respond immediately so disputes are resolved quickly before they escalate into more complicated problems; 4) the standing neutral is – neutral!; and 5) the arrangement helps the parties work as a team and avoid damage to ongoing business relationships. The primary disadvantages are: 1) the standing neutral is paid a fee regardless of whether a dispute actually arises; 2) the decision is non-binding, although a neutral's recommendation can be entered as evidence in a judicial proceeding.[39]

> **Example:**
> The parties shall endeavor to settle any dispute arising under or related to this Agreement by mediation under the CPR Mediation Procedure in effect on the date of this Agreement. The parties have selected [insert name] as the mediator in any such dispute, and [he][she] has agreed to serve in that capacity and to be available on reasonable notice. If [mediator] becomes unwilling or unable to serve, the parties have selected [insert name] as the alternate mediator. If neither person is willing or able to serve, the parties will agree on a substitute with the assistance of CPR. Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals.

[38] *Seidel v. Telus Communications Inc.* [2011] 1 SCR 531, 2011 SCC 15 (S.C.C.).
[39] James P. Groton, Beijing Workshop Materials (2006). I am grateful to Mr. Groton for sharing his work and for his tireless efforts over at least three decades promoting alternative dispute resolution within the legal profession.

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16 – Gender Free Drafting

During the feminist movement of the 1960s and 1970s, the legal profession proactively considered the issue of handling gender-specific language. Many feminists of the day resented the latent sexism lurking in legal documents. Certainly, a document that offends, annoys, or distracts half its audience is less effective than one that does not. Even so, lawyers who have struggled to find suitable language are likely to become more tolerant of gender-specific language than those who have not yet tried to draft a contract without it.

Many alternatives have been attempted with varying degrees of success, and no alternative works in every situation. The first volley came in the form of boilerplate clauses essentially stating that "he" means "she" when the context requires. Next, lawyers experimented with "he/she," "s/he," alternating he and she, and using both – "he or she." With practice, lawyers have found workable ways of drafting gender free.

Whatever your personal views may be along the politically correct spectrum, be aware that it is no longer considered appropriate to use a masculine form with the assumption that both genders are included, and that masculine gender forms are considered "old fashioned." Be persistent in recognizing and eliminating gender-specific references or risk criticism from their peers for failing to do so. The good news is that gender-neutral language eliminates the need to edit back and forth according to the individual involved in the transaction and thus may save drafting time in the long run.

Consider the following example:

A lawyer must handle gender references carefully to avoid offending his client.

1. Plural Nouns. Try using a plural noun so you can use a plural pronoun; plural pronouns are gender neutral (they, them, their):

Lawyers must handle gender references carefully to avoid offending their clients.

2. Second Person. Try drafting in second person (you, yours) so you can use a second person pronoun (but do not shift between first, second, and third person in the same sentence):

You [lawyers] must handle gender references carefully to avoid offending your clients.

3. Articles. Try using an article (a, an, the) instead of a pronoun:

A lawyer must handle gender references carefully to avoid offending the client.

4. Repeat the Noun. Though it causes some redundancy, try repeating the noun to avoid use of gender specific pronouns. As between the two, it is better to have repetition than language that offends the sensibilities of half the audience:

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A lawyer must handle gender references carefully to avoid offending the lawyer's clients.

5. Omit it? Try omitting the pronoun unless it causes ambiguity:

A lawyer must handle gender references carefully to avoid offending clients.

6. Indefinite Pronouns. Try using indefinite pronouns – all, another, any, both, each, either, every, few, many, most, much, neither, nobody, none, no one, nothing, one, ones, other, others, several, some, and words that end with these suffixes: --one, --body, and –thing.

7. **Zoom Out.** It is sometimes possible to create a sentence using a collective noun where the focus is on the individuals that make up the collective. In this situation, and only this situation, it is appropriate to use a plural pronoun with a singular noun.

The bar must handle gender references carefully to avoid offending their clients.

Also avoid using gender specific titles, like these:

Fireman	fire fighter
Chairman	chair, chairperson
Foreman	foreperson
Policeman	police officer
Businessman	business executive
Craftsman	artisan
Spokesman	spokesperson

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17 – Appearance

Regardless of how perfect the language is, if the contract does not have a professional appearance, the audience is going to be skeptical of it. New lawyers may not have all the skills required to draft a complex contract, but they certainly can and will be expected to make any contract look "pretty." If you are asked to "pretty it up," be sure to attend to all of the following:

- Readable typeface and point size;
- Plenty of "white space" on the page;
- Effective numbering system;
- Headings and subheadings to direct the user;
- Ragged right margin, but above all, consistent margins;
- Tabulations used to set off lists;
- Single-spaced text; double-spaced between paragraphs;
- Consistent formatting;
- Correct spelling;
- Correct grammar;
- Correct cross reference;
- Correct formal names of parties; and
- Consistent defined terms.

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Exercise:

Correct the appearance of this contract.

MANUFACTURING AGREEEMENT

This Manufacturing Agreement ("Agreement") is entered on this ___ day of June , 2023 between ABC, Inc., a corporation organized and existing under the laws of the State of Georgia, having its principal place of business at 2210 Busy Street, Suite 700, Atlanta, Georgia 30339 ("Buyer"), and Peach State Manufacturing, Inc., a corporation organized and existing under the laws of Georgia, having its principal place of business at 1492 Crowded Parkway , Austell, Georgia ("Manufacturer").

Witnesseth:

WHEREAS, Buyer have designed, owns, and continues to develop for industrial application the specifications for one or more fiberglass vaults (the "Products"); and

WHEREAS, Buyer desires to engage Manufacturer to manufacture its Products upon the terms and conditions of this Agreement.

NOW, THEREFORE, it shall be agreed between the parties as follows:

1. Scope of Agreement. Manufacturer owns and operates a manufacturing facility located at 1492Crowded Parkway. Manufacturer is in the business of manufacturing products designed and owned by others upon their specifications. Buyer have designed, developed and desires to manufacture and sell certain fiberglass vault Products related to backflow testing. Such development efforts are ongoing and remain incomplete as of the date of this Agreement. Upon completion of development, the specifications for Buyer's first Product, Model #___, will be attached to and incorporated into this Agreement as Exhibit A. Pursuant to the terms of this Agreement, Buyer engages Manufacturer, and Manufacturer accept such engagement, too manufacture Buyer's Products upon Buyer's specifications for sale and distribution to Buyer's industrial customers.

2. Purchase Orders and Time of Completion. From time to time during the term of this Agreement, Buyer may submit their Purchase Order for the manufacture of a specified quantity of one or more of its Products. All orders placed by Buyer shall be subject to the terms and conditions of this Agreement and, to the extent that they specify quantities, destinations, and delivery dates, to Buyer's Purchase Orders. Manufacturer shall acknowledge Buyer's Purchase Order within 24 business hours of receipt. No term, condition or provision off this Agreement may be altered, amended, or modified by the terms, conditions, or provisions of any bid, confirmation, invoice, or other business form of Manufacturer unless otherwise

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specifically agreed in writing signed by both parties containing an express reference to this Paragraph 2 of this Agreement. Timely completion and delivery of the Products is of the essence of this Agreement. In the event that Manufacturer fails to deliver Products by the date specified in the Purchase Order, Buyer may offset against the purchase price a $300.00 penalty for each day that the shipment is late.

3.

3. PRICE AND PAYMENT. Buyer shall remit to Manufacturer the per unit price of $_____ for each Model # _____ Product manufactured and delivered in accordance with Buyer's specifications and in accordance with the terms of this Agreement, free from defects, satisfactory to Buyer and free and clear of all liens and claims of any kind. Buyer shall be entitled to deduct from any payment any outstanding penalties for late delivery. Payment shall be made provided that Manufacturer is not then in default under any terms of this Agreement, within thirty (30) days of Buyer's receipt of payment for the Product from the end-user.

4. ***Shipment***

(a.) Destination. Manufacturer shall ship the Products Delivered Duty Paid Atlanta (DDP Destination), via mutually agreed upon carriers.

(b.) Risk of Loss. Manufacturer shall assume the risk of loss or damage to all Products until delivery to their Destination.

5. Miscellaneous Provisions

a. Relationship of Parties. Nothing contained in this Agreement shall be deemed or construed as creating a joint venture or partnership between Buyer and Manufacturer. Neither party shall have any power or authority to control the activities and operations of the other and their status is, and at all times will continue to be, that of independent contractor with respect to each other. Neither party shall have any power or authority to bind or commit the other

b. Governing Laws. This Agreement shall be construed and enforced in accordance with the laws of the State of Georgia, United States of America.

c. Entire Understanding. This Confidentiality Agreement constitutes the entire understanding of the parties hereto and may not be modified or amended except in writing signed by both parties. No person not a party hereto shall have any interest herein or be deemed a third party beneficiary hereof.

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18 – Effective Contract Review

In most negotiated transactions, both parties are involved in crafting the language that memorializes the agreement of the parties, but one party has to begin the process by creating the initial draft. Although you ultimately have more control over documents you create, about half of the time your responsibility will be to review the drafts drawn by opposing counsel. Sometimes, the initial draft is created specifically for the transaction, but other times you will be required to review a more or less "standard" form prepared by counsel for your client's business partner.

Most new lawyers and their clients are surprised to learn that it usually takes longer to review a contract prepared by someone else than to draft it yourself, particularly where your practice niche is very narrow and you have an arsenal of contracts available to mark up on a recurring basis. Because clients tend to underestimate the amount of time required to review a contract properly, they will often ask for review within an excruciatingly short time. Stories abound of clients who call for legal review moments before they expect to "ink" the transaction. In these situations, clients have already made up their minds to go forward with the transaction and are looking for a scapegoat to blame if something goes wrong. Accept this representation at your own peril!

The steps described in this technique can help streamline the review process, but in some situations, the lawyer may be required by ethical standards to decline the representation if there is inadequate time for proper review. In this regard, in-house lawyers may have a distinct disadvantage because at times their continued employment may depend upon meeting impossible demands of their uninformed employers.

Proper review of a contract involves much more than casual, or even studious, reading. Proper review requires several passes through the document, especially for newer lawyers and especially for more complicated transactions. Experienced lawyers may be able to compress some of the steps described below, but I have not yet met the lawyer who could effectively review a complicated document in a single pass. Reviewing contracts is more of an art than a science, and you will eventually develop a more personalized approach that incorporates the components described below.

Before you make any revisions on the document, make a copy of it!

1. Prepare.

Just as you prepare to draft a contract, so you must prepare to review one. Preparation includes understanding: 1) the client's objectives for the transaction; 2) the law related to the transaction, including gap fillers and industry standards; and 3) typical legal issues associated with this type of transaction.

If you are reviewing a particular kind of agreement for the first time, it is very helpful to look at contracts prepared for similar transactions, either from your firm's form files or form books. Try to review at least one contract favoring each party to the transaction. For example,

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in an asset purchase, try to review a contract that favors the buyer and then review another contract that favors the seller. Compare the ranges of how similar provisions are drafted to favor one party versus the other.

2. Familiarize.

Before you begin to review the language of the contract, take a moment to flip through the pages quickly to get an idea of what provisions are included and where they are located. How long is the document? How much time should be allocated to review it? What is the subject matter, and are you familiar with applicable laws? Who are the parties? Is there a glossary? Are schedules and exhibits attached, and are key performance-based terms included in them? Are restrictive covenants included? Is there a termination section, a limitation of liability, a warranty, an indemnification provision? Knowing what types of provisions are included in the document will streamline the review process, because you won't waste time drafting inserts for provisions that are already included further in the text.

3. Verify Key Business Terms.

The next step is to verify that the key business terms conform to your client's expectations. Key business terms usually involve who does what, how payment is made, who owns it, and what happens if the contract is breached. In most cases, if there is a discrepancy in the key business terms, further negotiation is going to be necessary, and better to hammer out the key business terms than to waste time reviewing a document where the parties may never agree. Discrepancies in key business terms can occur for many different reasons: misunderstanding of the parties; miscommunication between a party and its lawyer (possibly on your end); rapid market fluctuations; advice from opposing counsel against the terms previously agreed upon; typographical error; a better offer; change of heart, etc. Where there is a discrepancy in key business terms, it may very well be that your work on the project is finished; at a minimum, you should immediately consult with the client as to whether to proceed.

4. Identify Legal Issues.

This is the step where the lawyering really begins and where most of your time will be spent. Read the entire contract from start to finish and begin spotting legal issues. Jot notes in the margin, underline, circle, highlight – use whatever method works best for you to flag attention to **issues that need further consideration**. Mark with a check mark, question mark, asterisk or other symbol **every representation or promise given by your client** so you can verify its accuracy. Note any **provisions that are too one-sided** that need to be revised to shift risk towards the other party. Read and contemplate **provisions that affect your client's liability and remedies**, such as representations and warranties, indemnification, warranties, limitations of liability, and termination. Be sure to read the definitions when you read a performance provision that uses them.

After reading the text of the document, consult other forms to determine whether any important provisions have been omitted.

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Understand that if the contract is well drafted by experienced and knowledgeable counsel, the first draft does not usually represent the other party's actual expectations or requirements; it's more of a wish list! If you don't object to something, opposing counsel hasn't pushed far enough. (This is a very good point to keep in mind in situations where you prepare the initial draft.)

5. Identify Ambiguous Language

After you have read the contract considering legal issues, review it again to consider the specific language. Are any provisions ambiguously drafted? It is generally inappropriate to request revisions that have no substance and are nothing more than a matter of style, but when a provision can be interpreted two or more ways, it is ambiguous and should be edited. Focus most of your attention on provisions where ambiguity is most likely to affect your client's risk, obligations, and expected bargain.

6. Discuss with Your Client

When you've reviewed the contract, but before you begin making the necessary revisions, discuss the legal issues and recommended changes with the client. Note again the lawyer's ethical obligation under Model Rule 1.4 to ensure that the client understands the important provisions of the transaction before signing. Be sure the client is aware of each representation and promise made in the document and it is accurately stated.

Don't be surprised if some of the issues you've spotted are of little or no concern to the client. Most clients will prefer that you pursue some issues and ignore others. If you've advised the client appropriately, you are obligated under the Model Rules to follow the client's directives except in situations where doing so would constitute malpractice.

7. Revise

After your client has agreed to the changes you've recommended, the next step is to revise the draft. There are several ways of doing this, depending on your access:

1) if opposing counsel provides the document electronically or gives access via a project managing application in the cloud, you can make revisions directly on the file;

2) if opposing counsel provides the document on paper, you can make revisions manually on the page;

3) if opposing counsel provides the document in pdf or other format you can't revise, you can make changes on a separate document, like an addendum or special stipulations insert; and

4) if opposing counsel provides the document in pdf or other format you can't revise, you can request changes verbally, either by conference or teleconference, and provide inserts electronically.

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8. Proofread. After all revisions have been made, proofread the contract carefully to ensure that all agreed-upon changes have been appropriately made, and that no other changes have been made to the language you reviewed.

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19 – Amendments

It is often necessary to make changes to a contract after it has been signed. The contract may contain mistakes that need to be corrected, one or both parties may desire to change the terms of the deal, or new circumstances may arise that need to be addressed. Amendments may be used to add new terms or to modify existing provisions. Ordinarily, neither party is obligated to amend the contract, although the contract may require them to negotiate in good faith if certain circumstances occur.

An amendment is essentially a new contract between the parties and usually requires its own consideration.[40] If amendments are not properly drafted, contextual ambiguity arises that may even poison the terms of the original contract. The first step in drafting an amendment is to consult the original contract to determine what is required to amend. Although under common law, some contracts can be amended verbally, most contracts contain boilerplate terms requiring amendments to be in writing and signed by at least one party. If the underlying contract specifies a process for amendments, the amendment must satisfy those requirements. General principles of contract law apply equally to amendments. For example, except for sales of goods under the UCC, separate consideration must be exchanged with respect the amendment; consideration for the original agreement is not sufficient to support the new agreement.

Carefully consider the terms of the amendment in light of the existing contract. First, language used in the amendment, including defined terms, should be consistent with the original contract. Also consider whether any other provisions in the original contract are impacted by the amendment. For example, if the parties amend a contract to extend a deadline by 15 days, are any subsequent deadlines affected?

Each amendment should be numbered so the parties can account for all changes if the contract is amended multiple times. You likely will not know when you draft the first amendment whether there will be 1 or 20 amendments, so name even the first one, like this: "First Amendment to the Agreement Dated…." Most lawyers use ordinal numbers (first, second, third, etc.) but cardinal numbers work just as well (Amendment No. 1, Amendment No. 2, etc.). Whether you use ordinal or cardinal numbers, just be sure to use them consistently.

When only a few changes are being made, it is usually most practical to amend rather than restate the contract. Conversely, if many changes are made or if cumulatively many changes have been made, it may be better to restate the contract in its entirety as it now reads, incorporating all modifications from prior amendments.

The amendment should specify exactly what provisions are being changed and clearly set out the changes being made. Provide clear instructions, like this: "Section 4.3 is replaced in its entirety and the following language inserted in its place"; "Section 4.3 is modified to read as follows:", "Section 4.3 is modified by inserting the following sentence after the third sentence in the second paragraph," or so on.

[40] One exception is that under the UCC contracts for the sale of goods do not require consideration for amendments.

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Case Study:

Form of Amendment

FIRST AMENDMENT TO

GENERAL SERVICES AGREEMENT

This First Amendment to the General Services Agreement is entered into between Company and Contractor pursuant to Section 12.5 of the GSA. The parties desire to amend the terms of the GSA as indicated below. The parties, intending to be legally bound, agree as follows:

1. The parties desire to modify Section 1.2 by deleting that section in its entirety and inserting the following new Section 1.2 in its place:

"1.2 [Insert New Text Here]."

2. Except as specifically modified in this First Amendment, all other provisions of the GSA remain the same. Defined terms used in this amendment have the meanings ascribed to them in the GSA. If any of the terms of this Amendment conflict with the GSA, the terms of this Amendment control.

The duly authorized representatives of the parties have executed this Amendment to be effective on the date indicated below.

Company:	**Contractor:**
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

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20 – The Status of Cloud Computing in Our Profession

"Cloud Computing" means using software or services that are not installed on the individual's computer but are accessed and used through the Internet. "Cloud Services," also called "web services" or "hosted services," means computer processing services that are hosted by a third party, like Amazon or Microsoft. In fact, Amazon's web services unit is consistently one of its most profitable businesses, generating $62.2 billion in revenue in 2021.

The ABA's Law Practice Division issued its 2022 Legal Technology Survey Report on Cloud Computing in November 2022. The report noted that solo, small, and medium size law firms are apparently using Cloud Computing more than large firms, although with large IT staffs to handle details, large firm lawyers may be less tech-savvy and may have underreported their Cloud usage. Nevertheless, in 2021, 70% of the survey's respondents reported that they used cloud computing, compared with just 57% of respondents in 2019 and 60% in 2021. Among solo practitioners, cloud users increased to 84% from 52% the prior year. More lawyers are using consumer based Cloud apps, like DropBox, than legally specific Cloud services, like Clio, Rocket Metter, and Net Documents.

The Report listed several recognized benefits of using Cloud-based services:

- Anytime, anywhere access to data;
- Low cost of entry to access many software services;
- Predictable expense (averaging around $199/user/year);
- Automatic data backup; and
- Greater security that's more affordable than individuals can obtain separately.

The Report also listed lawyers' biggest concerns with using Cloud Computing:

- Confidentiality of data (62% ranked this important);
- Security of data;
- Fear of losing data (40% ranked this important);
- Data control and ownership;
- Ethical issues; and
- Vendor reputation (97% ranked this important).

Hypothetical:

A lawyer has decided to use Cloud Computing to draft and share contracts with clients and opposing parties. The lawyer should:

a) Check with other lawyers for vendor recommendations, and engage accordingly.

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b) Inquire of her I.T. contractor for vendor recommendations, and engage accordingly.
c) Hire the biggest consumer cloud vendor in her state, which is probably the most reliable.
d) Conduct due diligence on specialized vendors and negotiate confidentiality terms.

Finally, the Survey itself listed 13 possible precautionary security measures lawyers could and should be taking before engaging Cloud Computing vendors, but the responses to this part of the survey were abysmal, and an indication that lawyers may not understand their ethical obligations under Model Rule 5.3. Some of the possible precautionary security measures were:

- Reviewing the vendor's privacy policy;
- Reviewing the vendor's terms of service;
- Reviewing the vendor's history and customer reviews;
- Reviewing LEOs and ethical decisions on Cloud Computing;
- Making data backups on the user's own systems;
- Using only services with encryption capabilities;
- Negotiating a confidentiality agreement with the vendor; and
- Negotiating service agreements with the vendor.

Even though 97% of lawyers considered the vendor's reputation to be important, only 27% of lawyers reviewed evaluated the vendor's history before signing a contract. The most commonly taken security measure, reviewing the vendor's privacy policy, was undertaken by only 27% of lawyers. As the Report notes, as a profession, we're not "walking the walk," and we're taking risks we'd never advise our clients to take. In fact, the lack of general precautionary security measures in engaging a Cloud Computing service is alarming, especially in light of the fact that most lawyers seem to be well aware of the risks, and they're focused on the right risks.

If it's a near certainty that your firm WILL BE hacked, the only way to protect yourself from possible ethical violations under Rule 1.6 is to take and document appropriate precautionary measures.

Recommendations:

With more than half of U.S. lawyers now using it, we've passed the tipping point and Cloud Computing is "mainstream" for our profession, despite the legitimate concerns over confidentiality. I offer these recommendations with the caveat that everything is subject to change!

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1. Keep a record of your due diligence. The State Bars that have opined on the subject have authorized Cloud Computing as long as the lawyer is convinced that the vendor offers adequate protection of confidential data. Keep a permanent record of the steps you've taken to comply with Model Rule 5.3.

2. Obtain client consent. Have the client authorize Cloud Computing by describing it in plain English in your engagement letter, with a brief description of the risks.

3. Do not use free cloud computing software apps unless and until the issues described above have been resolved.

4. Secure all of your devices and vigilantly protect passwords. Consider passwords that expire and have to be changed from time to time; also consider adding applications to mobile devices that allow them to be "wiped" remotely in the event they are lost.

5. Do not use Cloud Computing for highly sensitive matters, no matter what.

6. Read reviews of the app, including those published online by other lawyers. In your due diligence review of the cloud app, be sure to consider these issues:

- Does the vendor offer a free trial period or demo to test out the interface and functionality of the cloud app?
- If you currently use equivalent traditional software, what features do you use most frequently and are they available in the cloud app?
- How many attorneys are currently using this product?
- What type of support is included with the purchase price/monthly subscription?
- Is the cloud app compatible with my preferred platform/device/web browser?
- Are any relevant guarantees or disclaimers of liability included in the vendor's Terms of Service (TOS)?
- How does the vendor safeguard the privacy/confidentiality of stored data?
- How often is the user's data backed up? Does the vendor backup data in multiple data centers in different geographic locations to safeguard against natural disaster?
- What is the history of the vendor? Where does the vendor obtain financing and is the vendor financially stable? Can I get my data "off" their servers for my own offline use/backup? If I decide to cancel my subscription to the software, will I get my data? Is data supplied in a non-proprietary format that is compatible with other software?
- Does the vendor's Terms of Service or Service Level Agreement address confidentiality and security? If not, would the vendor be willing to sign a confidentiality agreement in keeping with your professional responsibilities?

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7. Study the terms and conditions of the license agreement and negotiate for terms that enable you to comply with Model Rule 5.3. Study the vendor's terms and conditions, as well as other policies that are referenced in the primary documents. If the vendor retains the right to modify the terms and conditions online, determine an appropriate schedule for reviewing to ensure you're aware of any modifications that are made and set up a tickler file. Keep a permanent record of your periodic reviews.

In negotiating a confidentiality or license agreement, consider the following:

- **Location of the data** – is the data stored by the vendor outside the U.S.? If so, foreign laws may govern; negotiate for domestic storage.

- **Suspension of service** – does the vendor have the right to suspend service? If so, what happens to the data during the suspension? Is the vendor required to return or destroy data after the suspension?

- **Ownership** – the lawyer should own the data at all times; vendor should acquire no right to use the data; the vendor should not retain the right to use the data as collateral to secure payment for services.

- **Publicity** – does the vendor have the right to use customers' names for its publicity? Try to negotiate around this, but at least avoid granting the vendor the right to use logos or to present your name or your clients' names in a manner that suggests your endorsement of the vendor.

- **Downtime** – how is it handled?

- **Warranty** – try to obligate the vendor to perform in accordance with specifications and have the vendor warrant that the app doesn't infringe the intellectual property of any 3rd party.

- **Modifications** – negotiate for input on modifications; at a minimum, the license should prohibit modifications that are materially detrimental or materially diminish capabilities.

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How to Draft a Contract:
Tips and Techniques for
Better Contracts

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1


Decathlon = 10 Events/2 Days
100 meters
Long jump
Shot put
High jump
400 meters
110 meters hurdles
Discus throw
Pole vault
Javelin throw
1500 meters

2


Contract Drafting Is Like A Decathlon
10 Skills
Listening
Critical reading
Analytical skills
Knowledge of the law
Research
Negotiation
Business acumen
Organization/time management
Drafting
Editing

3


Observation: Drafting skills are not on par with other lawyering skills.

4

"There are two things wrong with almost all legal writing. One is its style. The other is its content." -- Fred Rodell

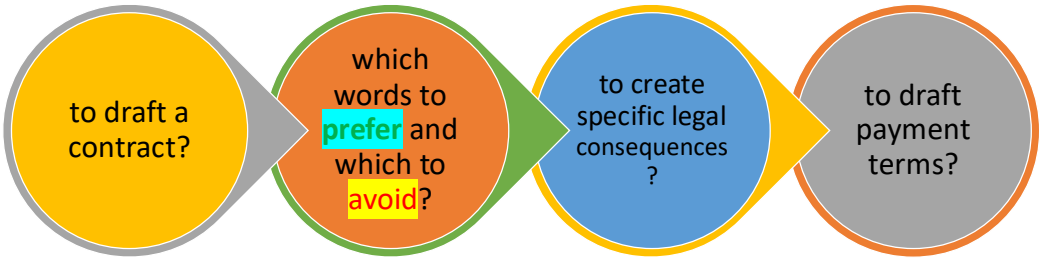
---

"It doesn't matter how much you know about the substance if you don't express it properly in the form." -- Yours truly



5

How did you learn:



6

How law schools fail…

How some “experts” fail…



7

How to Draft a Contract

Framework: characteristics; context; components; strategies; indemnification

Preparation: client interview; the audience; required vs. optional provisions

Techniques: defined terms; correct words for intended circumstances; risk; a winning position; the money trail

Finish: ADR; gender; appearance; effective contract review; amendments; cloud computing

8

As a citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession."

– Preamble to the Rules of Professional Conduct

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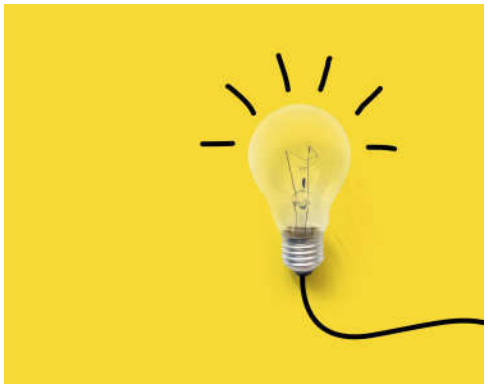
1. 5 Characteristics of Excellent Drafting



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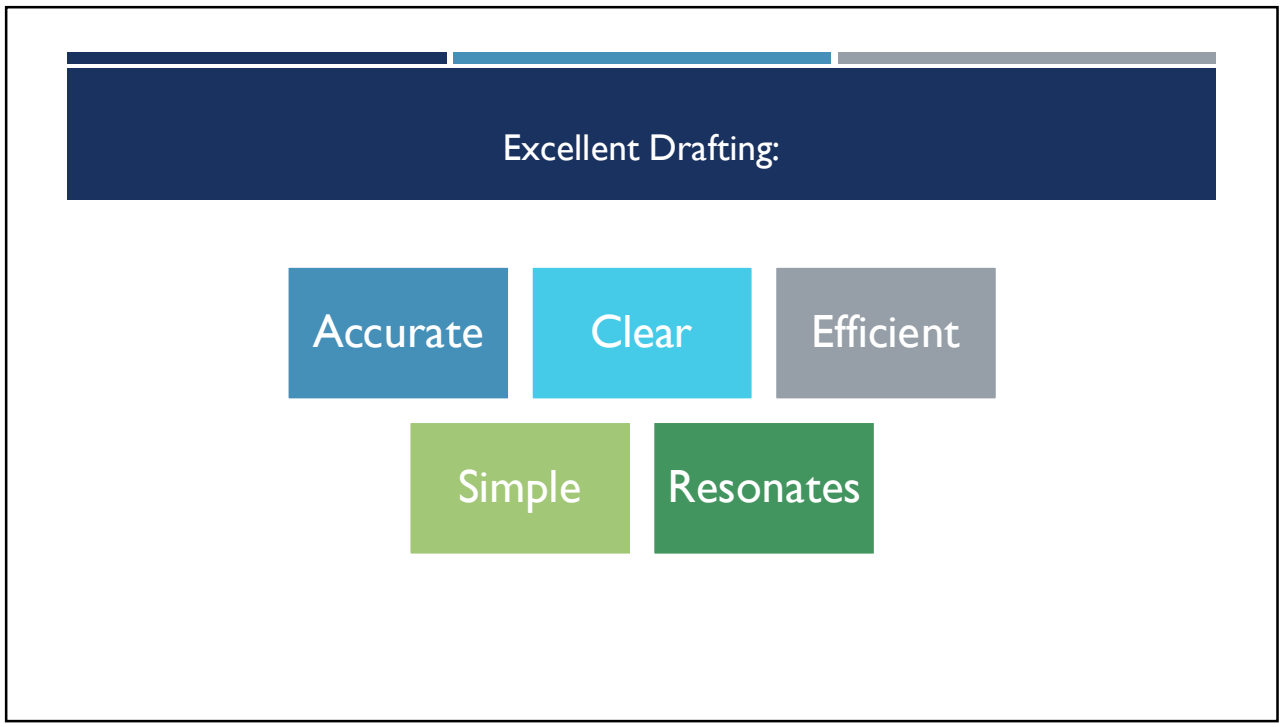
Excellent Drafting:
Accurate
Clear
Efficient
Simple
Resonates

11

EXERCISE

1. Consultant acknowledges and agrees that the payment of monies hereunder constitutes monies to which Consultant was not previously entitled and, further, that the payment of monies hereunder constitutes fair and adequate consideration for Consultant's execution of this Agreement.

2. In exchange for the promises and/or covenants of Employer contained herein, subject to the provisions of this Agreement, Employee will provide the following to Employee:

3. Company's maximum liability to Service Provider under this GPA (regardless of cause or form of action, whether in contract, tort, or otherwise) shall be limited to the total amount owed Service Provider in payment for Service Provider's fulfillment of its obligations under this Agreement.

4. Whereas, the party of the first part has heretofore conveyed unto the party of the second part that certain part, parcel and tract of real property whereupon the premises reside, it behooves the aforementioned party of the first part to bequeath the premises to the party of the second part.

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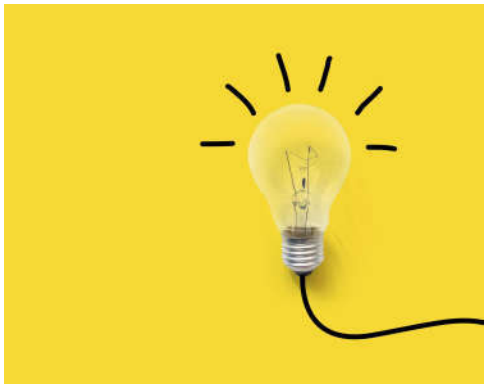
5. The foundation may grant funds to educational institutions and corporations assisting physically impaired individuals.

6. Buyer shall remit payment by wire transfer to an account designated by Seller within five days after Closing.

2. The Context of Contract Drafting



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"Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve."

19

Context:

- Unwritten terms that creep in through the UCC and other "gap fillers"
- Disclosures required by statute
- Case law precedents that dictate enforceability
- Third party arrangements (financing, non-competes, etc.



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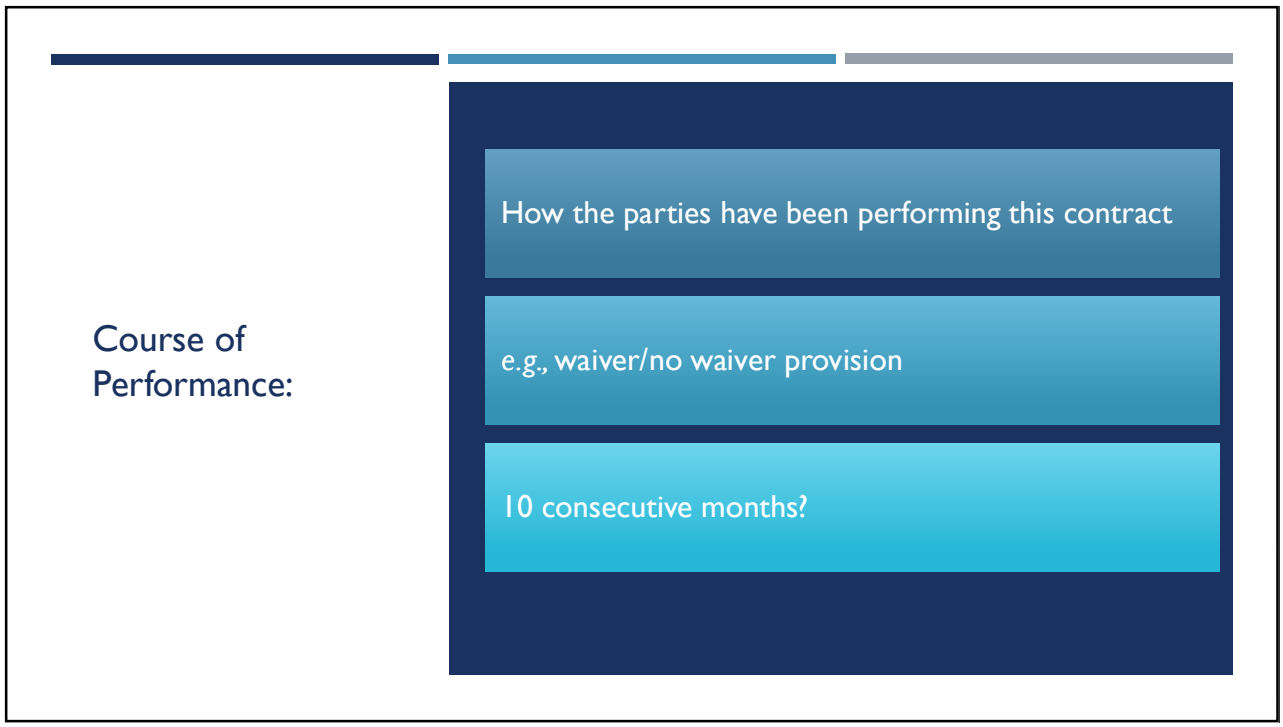
Context of drafting:

Gap Fillers:

- Course of Performance
- Course of Dealing
- Trade Customs
- Industry Jargon
- UCC




Course of Performance:
How the parties have been performing this contract
e.g., waiver/no waiver provision
10 consecutive months?
22

Practical Tip:



Investigate to determine how the parties have been performing the contract.



The written terms may not be reliable.

Course of Dealing:

- How the parties have been performing other contracts
- Especially if they've faced a similar issue

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Trade Customs:

- UCC §1-303:
- "Any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question"
- May establish rights and obligations in an emergency situation like COVID-19

Practical Tip:

Investigate: does a trade custom exist?

Acknowledge in a dependent clause; alter in an independent clause

"Although it is customary that Sub's payment is not conditioned upon Contractor's receiving payment, for purposes of this Agreement, the parties agree that Contractor shall remit the payment to Sub no later than 30 days after Contractor receives payment from Owner."

Deviate with extreme caution; unambiguously

Industry Jargon:

- Specific terminology used in the industry
- "Indication" – SRS v. Gilead
- "Demo"
- "Manifest"

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§1-303:

"The express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable: (1) express terms prevail over course of performance, course of dealing, and usage of trade; (2) course of performance prevails over course of dealing and usage of trade; and (3) course of dealing prevails over usage of trade."

Hierarchy:

*express terms
*course of performance
*course of dealing
*trade usage
*UCC

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Practical Tips:



- Business world ➡ check the box
- Investigate before drafting
- Reference changes to practice or trade customs
  1. Acknowledge in dependent clause; alter in independent clause
  2. "Although it is customary that X, the parties agree that Y"
- Before the contract is signed:
  1. Carefully review the terms with client
  2. Counsel regarding strict compliance

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Examples of disclosures required by statute:

- **Employment and severance agreements** – COBRA and other disclosures are required by Federal law to avoid penalties against the employer; e.g., in Georgia, arbitration clauses in employment contracts must be initialed to be enforceable.
- **Corporate documents** – minority rights are protected by the corporation code;
- **Software licenses** – disclosures regarding restrictions on export are required by federal law;
- **Government contractors** – government trade partners are required to comply, and ensure that their trade partners comply, with federal laws regarding EEOC, debarment and suspension, lobbying, buy American, no kickbacks, and Executive Order 11246;
- **Truth-in-lending** – disclosures are required in certain financial transactions.

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Examples of enforceability issues:

- Terminations for bankruptcy
- Recitals of consideration
- Click-wrap licenses
- Limitations of liability
- "Reasonable" attorney's fees
- Restrictive covenants
- Arbitration clauses

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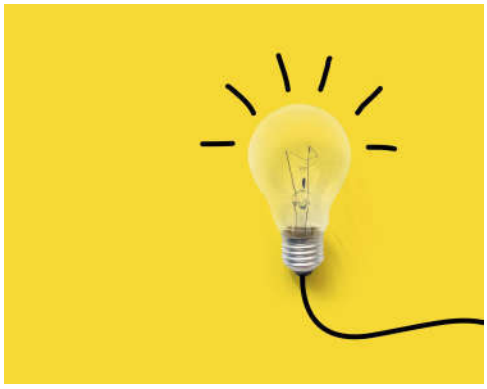
3. The Parts of a Contract.



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1. Title
2. Introduction
3. Statement of Purpose
4. Statement of Agreement
5. Definitions (situational)
6. Performance provisions
7. Boilerplate
8. Signatures
9. Schedules and Exhibits



33

Title:

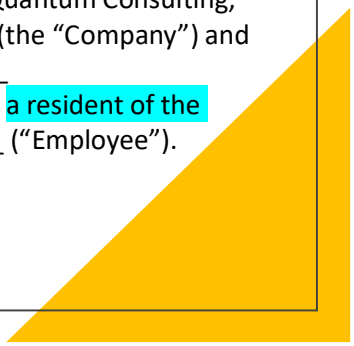
- Employment Agreement
- Buy-Sell Agreement
- Consulting Agreement

- **Not:** Employment Agreement between Quantum Consulting, Inc. and Tom Jones Dated May 1, 2023
- **Not:** Agreement

Introduction:

EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT is made this ___ day of May, 2023, between Quantum Consulting, Inc., a Delaware corporation (the "Company") and _____ _____, a resident of the State of _____ ("Employee").



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Statement of Purpose:

WITNESSETH:

Whereas, Alpha Services Corporation ("Alpha") is in the business of managing business intelligence and call center operations; and

Whereas, Presto Appliance, Inc. ("Presto") is in the business of designing, manufacturing, and distributing small household appliances; and

Whereas, Presto desires to engage Alpha to provide call center services with respect to warranty claims;

Now, therefore, Alpha and Presto, intending to be legally bound, agree as follows.

Statement of Purpose:

STATEMENT OF PURPOSE

Alpha Services Corporation ("Alpha") is in the business of managing business intelligence and call center operations. Presto Appliance, Inc. ("Presto") is in the business of designing, manufacturing, and distributing small household appliances. Presto desires to engage Alpha to provide call center services with respect to warranty claims. Alpha and Presto, intending to be legally bound, agree as follows.

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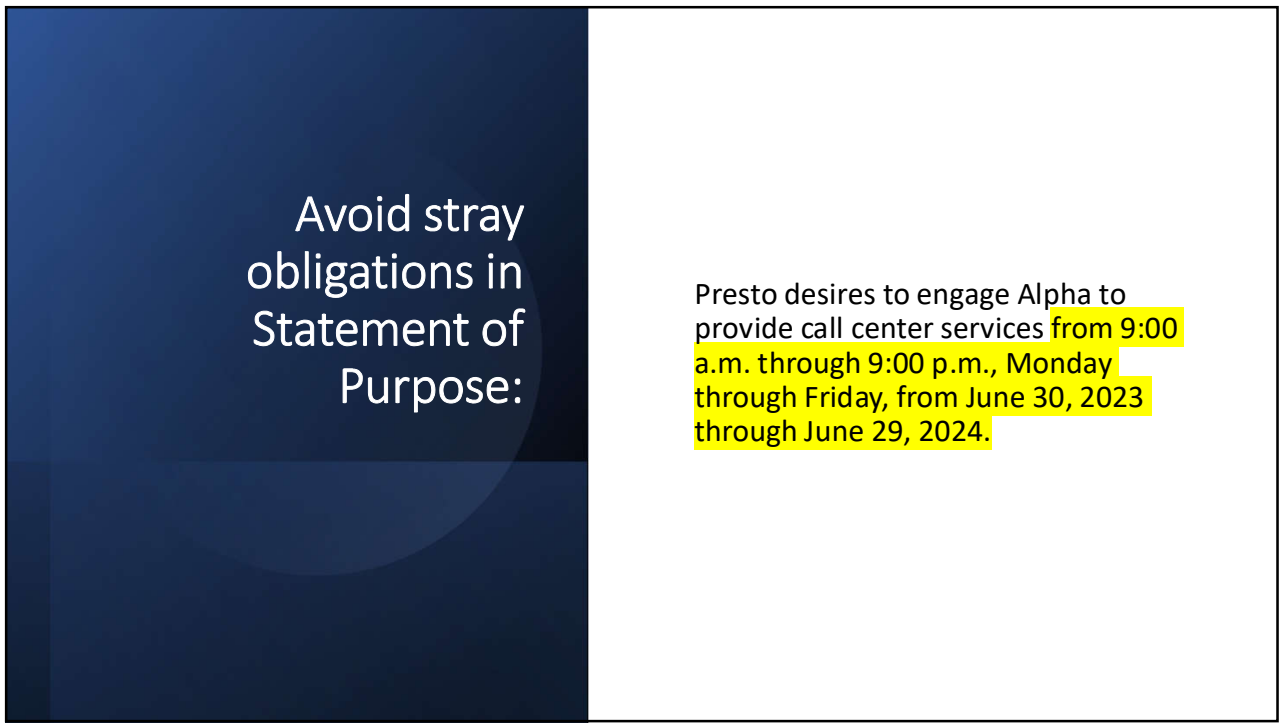
Avoid stray obligations in Statement of Purpose:
Presto desires to engage Alpha to provide call center services from 9:00 a.m. through 9:00 p.m., Monday through Friday, from June 30, 2023 through June 29, 2024.

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Statement of Agreement:

Intending to be legally bound, the parties agree as follows.

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- Definitions [*situational*]
- Performance Provisions
- Miscellaneous Provisions
- Signature Blocks

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Signature Block -- Contracts Under Seal:

This Agreement is signed, **sealed,** and delivered on October 31, 2023.

ACME Widget Corporation [Company, Inc., or LLC]*

By: _____

Paul Jones

Title: _____

[CORPORATE SEAL]

EMPLOYEE:

_____ (SEAL)

Mark P. Smith

*Use formal corporate name as filed with Secretary of State

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Signature Block -- Contracts NOT Under Seal:

This Agreement is signed and delivered on October 31, 2023.

^

ACME Widget Corporation [Company, Inc., or LLC]*

By: _____

Paul Jones

Title: _____

EMPLOYEE:

_____

Mark P. Smith

*Use formal corporate name as filed with Secretary of State

E-SIGN:

- Electronic Signatures in Global and National Commerce Act
- 47 states
- New York, Washington, and Illinois have their own
- Electronic signatures = ___X___.

- "**Electronic signature**" – an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document

- **"Digital signature"** – a subgroup of electronic signatures that is encrypted and purportedly cannot be forged or hacked



Twists of E-sign:

- Automatically includes a date stamp
- Don’t use date blanks
- A later effective date is not problematic but needs to be addressed
- “backdating” is problematic

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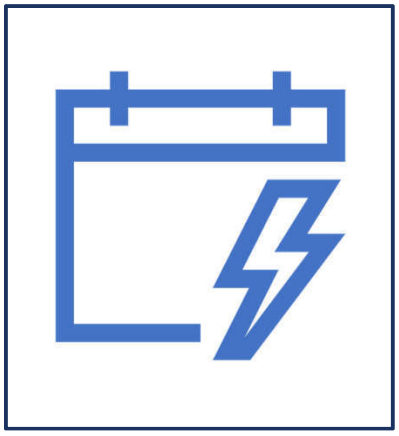
Schedules and Exhibits



- "Schedule" - necessary details
  - selling shareholders,
  - milestones
  - functional specifications
- Often, reps and warranties, but not limited
- Privacy
  - a will, schedules are not filed

Schedules & Exhibits:

- Schedule 4.7, Schedule 9.3
- Not consecutive, but in order
- "Exhibit" -- a separate document
- Exhibit 1; Exhibit A
- Consecutive numbering; in order
- Number schedules; letter exhibits.

Virtual Attachments

- Not physically attached
- E.g.s: Privacy policy; price list; specific instructions; specifications in an RFP
- "Contractor shall comply with Owner's billing instructions posted at http://www.hereareourterms.com/billinginstructions, which billing instructions are incorporated by reference."



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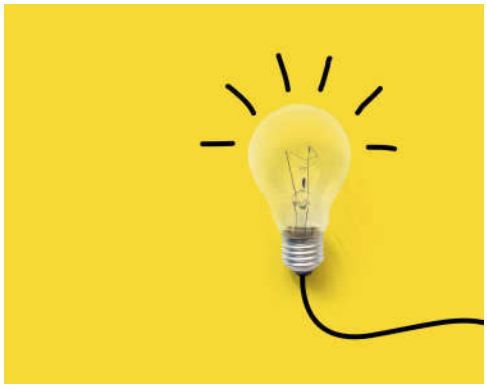
Issues with virtual attachments:

- When is the obligation defined?
- Does the obligation change?
- Unilateral changes
- Changes without notice
- Negotiate to fix terms as of a specific date
- Keep a copy

4. 3 Types of Contracts



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Formats for contracts:

- Traditional Form Contract
- Schedule Agreement
- Letter Agreement



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LYFT, INC.

INDEMNIFICATION AGREEMENT

This Indemnification Agreement (this "***Agreement***") is dated as of [*insert date*], and is between Lyft, Inc., a Delaware corporation (together with its subsidiaries, the "***Company***"), and [*insert name*] ("***Indemnitee***").

RECITALS

A. Indemnitee's service to the Company substantially benefits the Company.

B. Individuals are reluctant to serve as directors or officers of corporations or in certain other capacities unless they are provided with adequate protection through insurance or indemnification against the risks of claims and actions against them arising out of such service.

C. Indemnitee does not regard the protection currently provided by applicable law, the Company's governing documents and any insurance as adequate under the present circumstances, and Indemnitee may not be willing to serve as a director or officer without additional protection.

D. In order to induce Indemnitee to continue to provide services to the Company, it is reasonable, prudent and necessary for the Company to contractually obligate itself to indemnify, and to advance expenses on behalf of, Indemnitee as permitted by applicable law.

E. This Agreement is a supplement to and in furtherance of the indemnification provided in the Company's certificate of incorporation and bylaws, and any resolutions adopted pursuant thereto, and this Agreement shall not be deemed a substitute therefor, nor shall this Agreement be deemed to limit, diminish or abrogate any rights of Indemnitee thereunder.

The parties therefore agree as follows:

Schedule Agreement:

- Signatures on first page
- *List attached schedules
- *Incorporate by reference
- Useful as a “standard” form

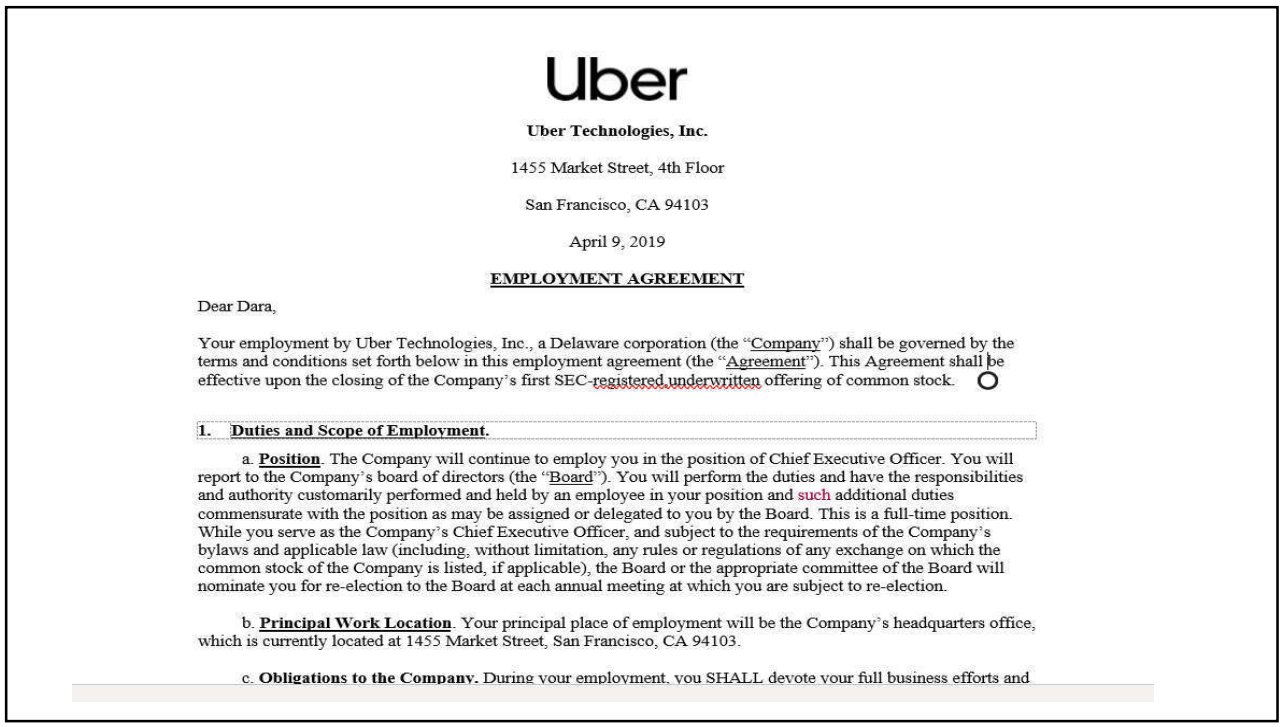
Master Services Agreement

This Agreement between Company and Vendor governs all Services provided by Vendor to Company and its Affiliates. Vendor shall comply with the provisions of the attached Schedules and Exhibits which are incorporated into and made a part of this Agreement.

Schedules	Included (as of Effective Date)
Schedule A – General Terms and Conditions	Yes ☒ No ☐
Schedule B – Staff Hourly Rates	Yes ☐ No ☐
Schedule C – Form of SOW	Yes ☐ No ☐
Schedule D – Insurance Requirements	Yes ☐ No ☐
Schedule E – Privacy and Information Security Agreement	Yes ☐ No ☐
Exhibit E1: Information Security Requirements	Yes ☐ No ☐
Exhibit E2: Privacy Policy	Yes ☐ No ☐
Exhibit E3: Confidentiality Agreement	Yes ☐ No ☐
Schedule F – Company Policies	Yes ☐ No ☐
Exhibit F1: Travel and Expense Reimbursement Policy	Yes ☐ No ☐
Exhibit F2: _____ Policy	Yes ☐ No ☐

Letter Agreement:

- Cordial
- Ongoing relationships: employment, merger, letter of intent
- Sender has already signed
- Other party must sign
- "If the terms outlined above are acceptable to you, please sign below and return to me."
- Caveat: if the other party doesn't sign, no contract



Uber

Uber Technologies, Inc.

1455 Market Street, 4th Floor

San Francisco, CA 94103

April 9, 2019

EMPLOYMENT AGREEMENT

Dear Dara,

Your employment by Uber Technologies, Inc., a Delaware corporation (the "Company") shall be governed by the terms and conditions set forth below in this employment agreement (the "Agreement"). This Agreement shall be effective upon the closing of the Company's first SEC-registered underwritten offering of common stock.

1. Duties and Scope of Employment.

a. **Position**. The Company will continue to employ you in the position of Chief Executive Officer. You will report to the Company's board of directors (the "Board"). You will perform the duties and have the responsibilities and authority customarily performed and held by an employee in your position and such additional duties commensurate with the position as may be assigned or delegated to you by the Board. This is a full-time position. While you serve as the Company's Chief Executive Officer, and subject to the requirements of the Company's bylaws and applicable law (including, without limitation, any rules or regulations of any exchange on which the common stock of the Company is listed, if applicable), the Board or the appropriate committee of the Board will nominate you for re-election to the Board at each annual meeting at which you are subject to re-election.

b. **Principal Work Location**. Your principal place of employment will be the Company's headquarters office, which is currently located at 1455 Market Street, San Francisco, CA 94103.

c. **Obligations to the Company.** During your employment, you SHALL devote your full business efforts and

"If the terms outlined above are acceptable to you, please sign below and return to me."



56

Person in Contracts:

- First person – about himself, herself, or a group including himself or herself
- Second person – to someone – you
- Third person – about someone or something

	Singular	Plural
First Person	I	we
Second Person	you	you
Third Person	he, she, it, Jones, UPS Company	they, the Shareholders

57



- **Business contracts** → third person
- **Consumer contracts** → first and second person
  - Higher readability
  - "We will loan you $10,000. You will repay the loan by making payments of $100 per month for the next 120 months."
- **Letter agreements** → first and second person:
  - "During the course of our negotiations, we may provide you with certain Proprietary Information."

- We and you together; both we and you

58

Shifts in Point of View:



Grammatical errors



Ambiguity – pronoun reference

59

Shifts in Point of View?

1. When the lawyer calls, tell them I'm not available.
2. If AT&T wants to win this case, you must follow the advice of counsel.
3. In the deposition, he should answer only the specific question asked; otherwise, you may expose other issues.
4. In law school our writing professor would never give you better than a C.
5. If one reads the transcript they will discover the key to success upon appeal.

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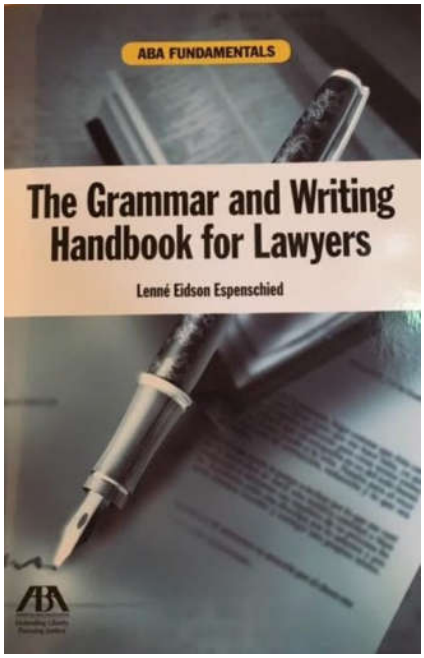
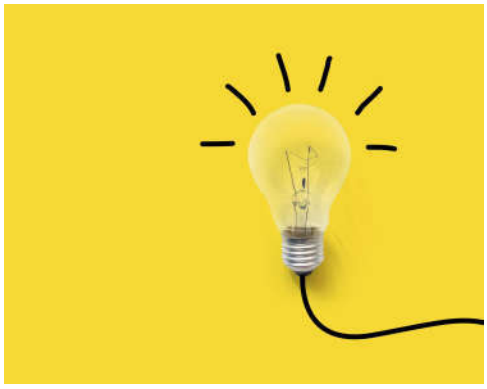
61

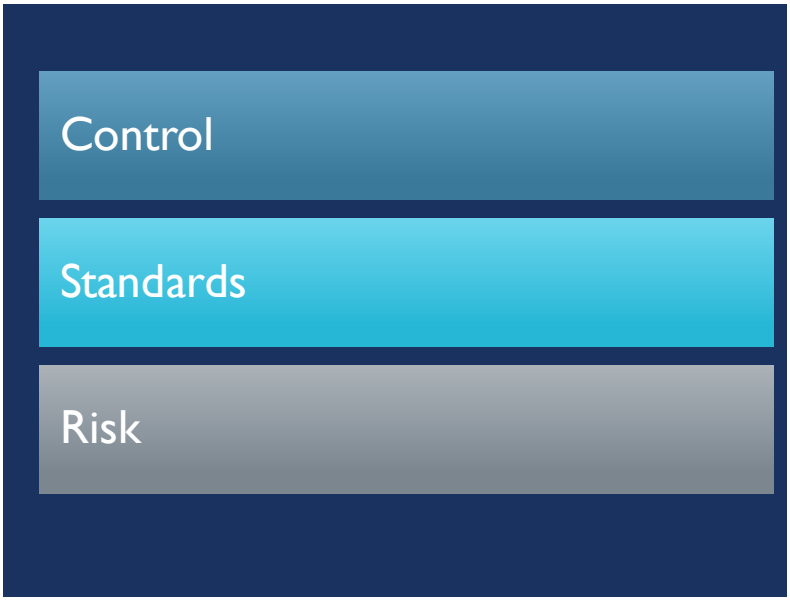

ABA FUNDAMENTALS
The Grammar and Writing Handbook for Lawyers
Lenné Eidson Espenschied

62

5. 6 Common Performance Provisions



Focus on 3 things:



64

Ambiguity:

- Semantic
- Syntactic
- Contextual

65

Scope section: goods purchased; license granted; terms of merger; property purchased

Describes:

- Who
- What
- When
- Where
- Why
- How
- How much



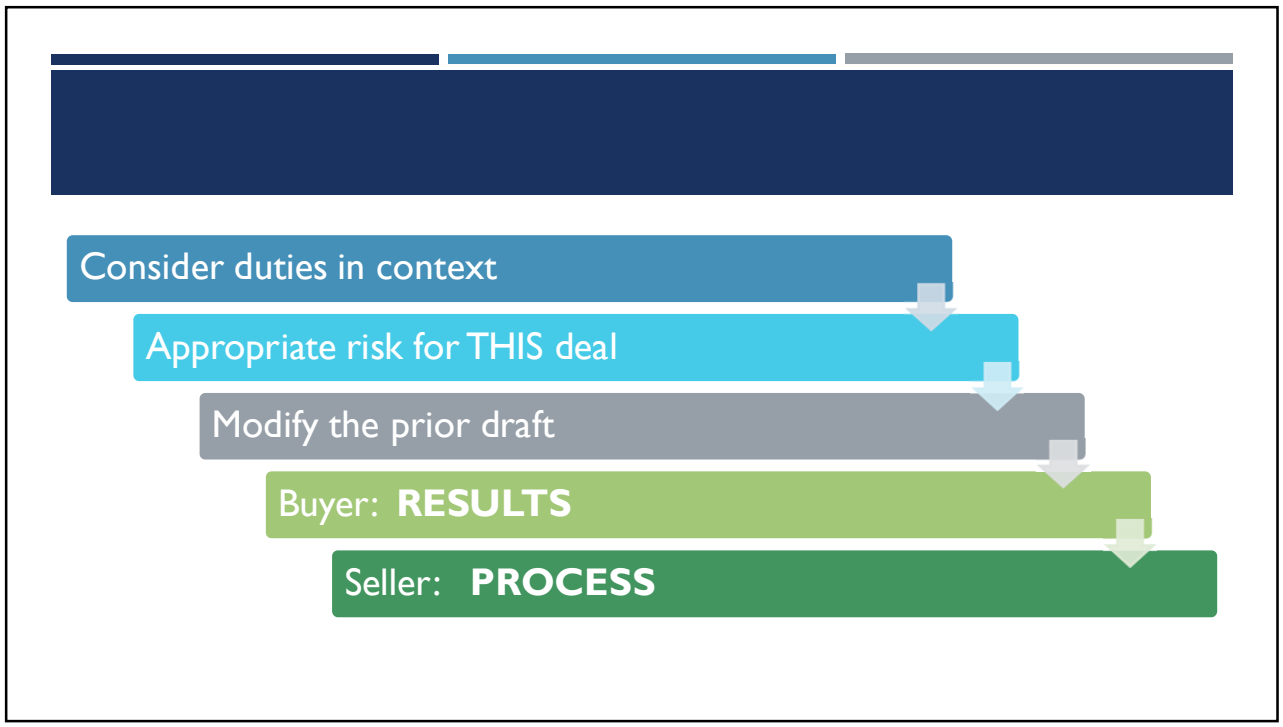
66

Focus on risk:

- Duties of buyer; duties of seller (other than payment)
- Expectations IN

- Risk = how absolute the promises are

67


Consider duties in context
Appropriate risk for THIS deal
Modify the prior draft
Buyer: RESULTS
Seller: PROCESS

68

What is happening to seller's risk?:

- Seller **shall deliver**
- Seller shall use **best efforts** to deliver….
- Seller shall use **best efforts** to deliver…. (with "best efforts" defined and limited)
- Seller shall use **commercially reasonable efforts** to deliver….
- Seller will **attempt** to deliver….

Drafting Tips for Scope Provisions:



70

Representing Buyer:

- Focus on results rather than procedure: Vendor shall deliver X
- Use active voice and task-oriented statements
- Build in numeric, quantifiable measures of quality if possible

Representing Seller:

- Focus on process rather than results: Vendor shall use best efforts to deliver
- Use qualifying words

71

Concepts that Influence Risk:

- Actual knowledge vs. belief
- Attempt vs. success
- Bonus or penalty tied to timely completion
- Contingencies
- Cure and cure period
- Degree of accuracy or composition (*e.g., 98.5% pure*)
- Effect of delay (e.*g., payment is not due until delivery*)

Concepts that Influence Risk:

- Grace period
- Including/excluding specific categories of damages
- Notice/time allowed for notice (*e.g., Buyer shall notify Seller within 10/15/30/60/days*)
- Precision of description (*e.g., "blue" vs. indigo, royal, navy, peacock; "tree" vs. Chinese maple*)
- Process vs. results
- Sign off for satisfactory performance

What to include in a payment provision:

Who	is paying
How Much	is due; how is it calculated; is there a discount; 2/10; net 30
When	does the payment obligation arise; when is it due
Where	is payment to be made
Why	does the payor owe the payee
How	is payment made [check, certified or bank check, wire transfer, promissory note, exchange of goods, stock, or rights]; in what currency



74

What triggers the obligation to pay?

- Due at signing
- Due upon performance of a specific obligation of payee
- Due automatically on a specific date, without invoice
- Due because an invoice or statement is submitted

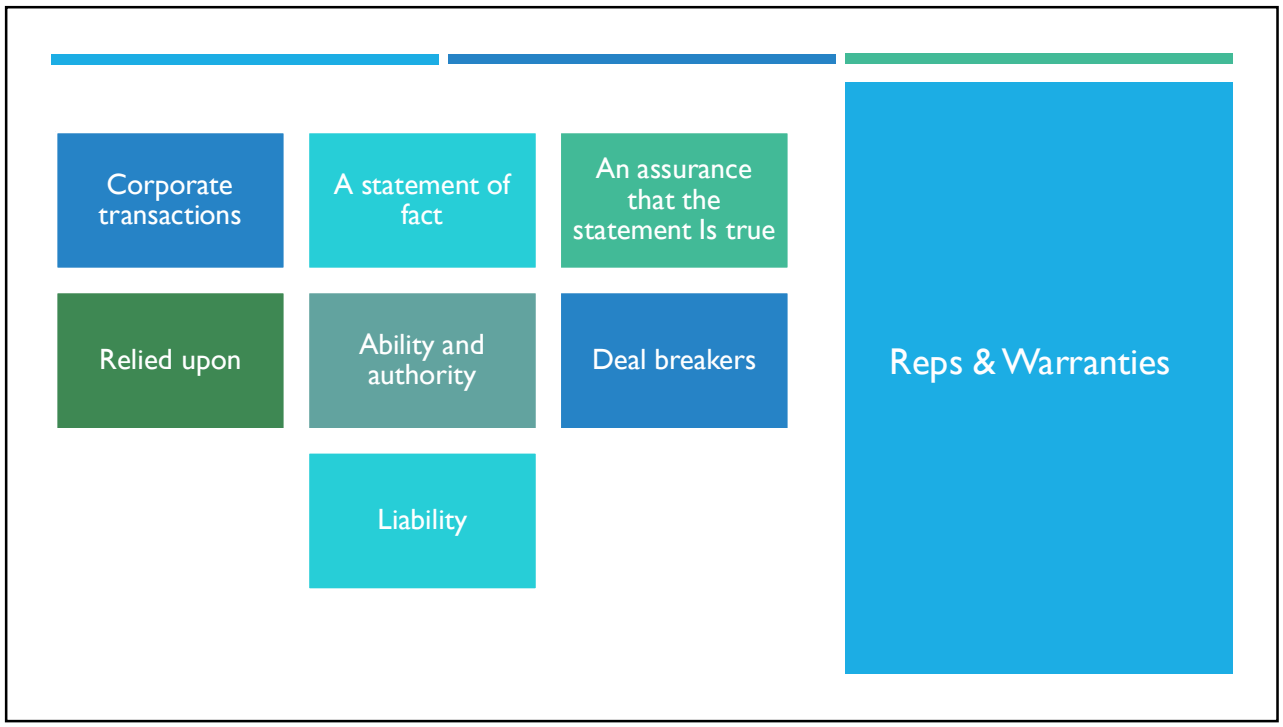
What happens if payment is late? Is the payee required to give notice? Is there a grace period? Is a late fee added? Does the past due amount bear interest?

Who pays the costs of collection?

Who pays any taxes, and what kind of taxes? Does the fee include taxes?

Are there any additional fees? If so, how are they calculated and when are they due?

75


Corporate transactions
A statement of fact
An assurance that the statement Is true
Relied upon
Ability and authority
Deal breakers
Liability
Reps & Warranties

76

Seller represents and warrants to buyer as follows:

(a) The statements set forth in this Section III are true and correct as of the date of Closing.

(b) Seller owns and has good and marketable title to all of the Assets, and as of the Closing date, the Assets are free and clear of all liens, encumbrances, claims, or rights of others or defects in title of any kind whatsoever.

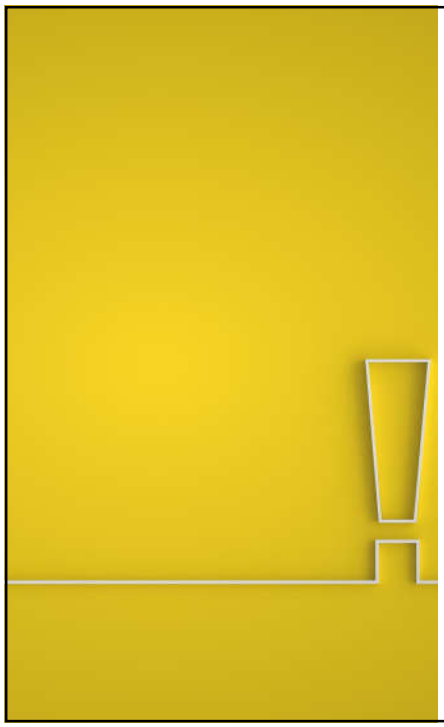
(c) Seller will not default on, breach, or violate any agreement, instrument, or arrangement to which Seller is a party by consummating the transaction contemplated by this Agreement.

(d) Seller has the right, power, legal capacity and authority to enter into and perform the obligations under this Agreement, and no approval or consent of any other person is necessary for Seller to enter or perform this Agreement.

(e) Seller has no knowledge of any pending litigation, judgment, lien or proceeding relating to the Assets.

(f) Seller has not engaged the services of any broker for the sale of the Assets and no broker has brought about this sale.

(g) Seller has not assigned, licensed, or in any way granted permission for anyone to use the trade name "XYZ."



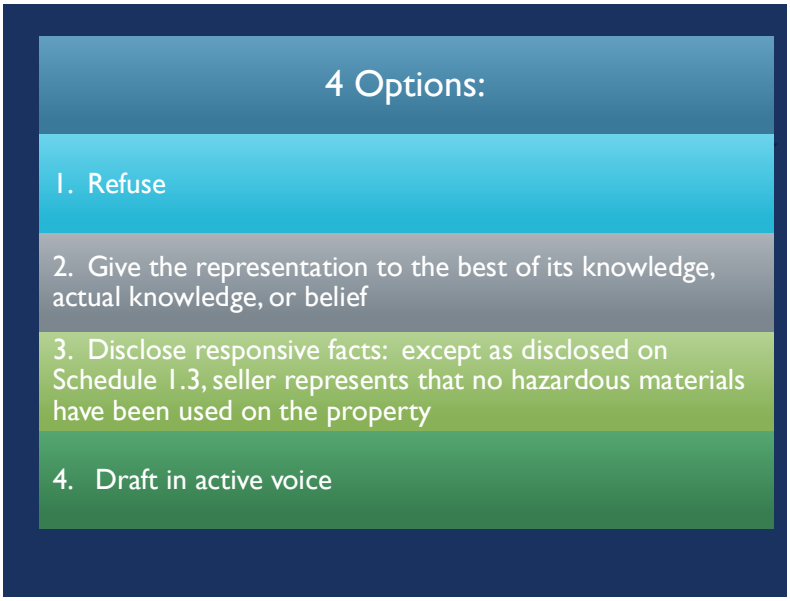
Don't "represent" promises regarding future performance!

Incorrect: Licensee represents that it will use reasonable efforts to safeguard Owner's Confidential Information and Proprietary Materials.

Correct: Licensee shall use reasonable efforts to safeguard Owner's Confidential Information and Proprietary Materials.

79

The More Difficult, the More Important



80

2 risk-shifting provisions:



1. Limitations of Liability: Cash or Formula

- Vendor's liability…whether in contract or tort, including negligence, gross negligence, or willful and wanton conduct, is limited to $50,000.
- Vendor's liability…for any cause whatsoever is limited to the sum of fees paid by Customer during the two months before the event causing liability.

81

Limitations of liability: alternate remedy; no cash

"I understand that liability for accurate test materials and adequate administration conditions will be limited to score correction or test retake at no additional fee. I waive rights to all further claims."

Explicit, prominent, unambiguous:

Vendor's liability for breach of contract or for negligence is limited to $50,000.



83


Limitations of liability for Tort Claims:
Limitation of Liability is binding with respect to actions based on **negligence**
Not binding with respect to **gross negligence** or **willful and wanton conduct** in most jurisdictions

84

Limitations of liability for Contract Claims:

- May waive ALL recourse for breach.
- Caveats:
  - **Must be unambiguous**
  - **Not contrary to public policy**
  - **Not prohibited by statute**

Focus on 3 things:



CAP



TRIGGER



EXCEPTIONS

86

Consider carve-outs:

The limitations in this section do not apply to:

(a) claims arising out of a breach of warranty;

(b) any infringements of third-party intellectual property rights; and

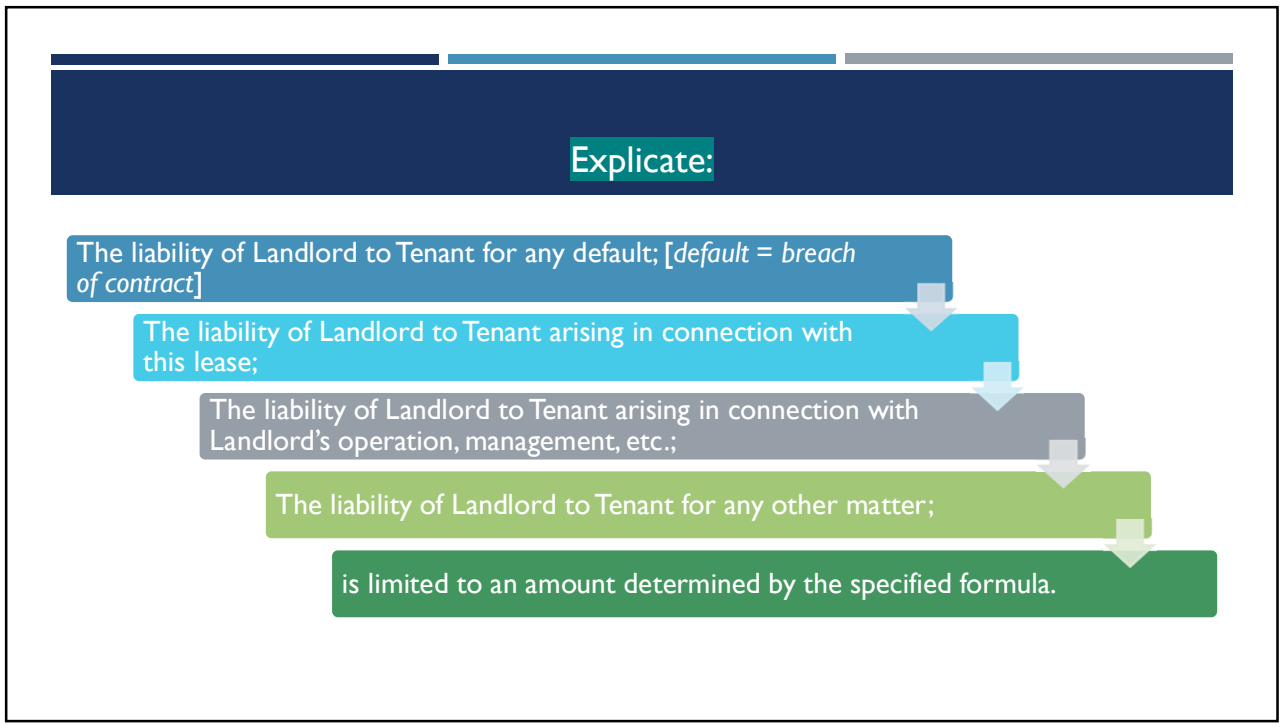
(c) any claims for attorney's fees and other litigation costs either party is otherwise entitled to recover pursuant to this Agreement.

Section 29.13 Exculpation [miscellaneous provisions]

The liability of Landlord or the Landlord Parties to Tenant for any default by Landlord under this Lease or arising in connection herewith or with Landlord's operation, management, leasing, repair, renovation, alteration or any other matter relating to the Project or the Premises **shall be limited** solely and exclusively to an amount which is equal to the lesser of (a) the interest of Landlord in the Building or (b) the equity interest Landlord would have in the Building if the Building were encumbered by third-party debt in an amount equal to eighty percent (80%) of the value of the Building (as such value is determined by Landlord), **provided that** in no event shall such liability extend to any sales or insurance proceeds received by Landlord or the Landlord Parties in connection with the Project, Building or Premises. Neither Landlord, nor any of the Landlord Parties shall have any personal liability therefor, and Tenant hereby expressly waives and releases such personal liability on behalf of itself and all persons claiming by, through or under Tenant. The **limitations of liability** contained in this Section 29.13 shall inure to the benefit of Landlord's and the Landlord Parties' present and future partners, beneficiaries, officers, directors, trustees, shareholders, agents and employees, and their respective partners, heirs, successors and assigns.

Liability waivers are enforceable in California solely to the extent they shift to the customer the risk of *ordinary* negligence. Under California law, a liability waiver cannot excuse an injury caused by a defendant's gross negligence, recklessness or intentional wrongful act. Nor can the defendant avoid liability if the defendant has failed to comply with California or federal law. Additionally, to be enforceable in California a waiver of liability must be clear, unambiguous, and explicit in expressing the parties' intent. This means waivers printed in faint or small font, or in an inconspicuous place (deep in a document, on the back of a page, etc.), **are less likely to be held enforceable.**

89


Explicate:
The liability of Landlord to Tenant for any default; [*default = breach of contract*]
The liability of Landlord to Tenant arising in connection with this lease;
The liability of Landlord to Tenant arising in connection with Landlord's operation, management, etc.;
The liability of Landlord to Tenant for any other matter;
is limited to an amount determined by the specified formula.

90

- The liability of Landlord to Tenant for any default; [*default = breach of contract*]
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- The liability of Landlord to Tenant arising in connection with Landlord's operation, management, etc.;
- The liability of Landlord to Tenant for any other matter;
- is limited to an amount determined by the specified formula.

- 1st phrase – enforceable
- Next 3 phrases – probably not
- Provision is too broad; doesn't exclude gross or willful
- If you intend to limit liability, be sure you do
- 5 sentences; average 74 words **Is this plainly and clearly?**
- Proviso at 107th word is foolish

91

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The liability of Landlord or the Landlord Parties to Tenant for any default by Landlord under this Lease or arising in connection herewith or with Landlord's operation, management, leasing, repair, renovation, alteration or any other matter relating to the Project or the Premises **shall be limited** solely and exclusively to an amount which is equal to the lesser of (a) the interest of Landlord in the Building or (b) the equity interest Landlord would have in the Building if the Building were encumbered by third-party debt in an amount equal to eighty percent (80%) of the value of the Building (as such value is determined by Landlord), **provided that** in no event shall such liability extend to any sales or insurance proceeds received by Landlord or the Landlord Parties in connection with the Project, Building or Premises. Neither Landlord, nor any of the Landlord Parties shall have any personal liability therefor, and Tenant hereby expressly waives and releases such personal liability on behalf of itself and all persons claiming by, through or under Tenant. The **limitations of liability** contained in this Section 29.13 shall inure to the benefit of Landlord's and the Landlord Parties' present and future partners, beneficiaries, officers, directors, trustees, shareholders, agents and employees, and their respective partners, heirs, successors and assigns.

Explicate:

- The liability of Landlord to Tenant for any default; [*default = breach of contract*]
- The liability of Landlord to Tenant arising in connection with this lease;
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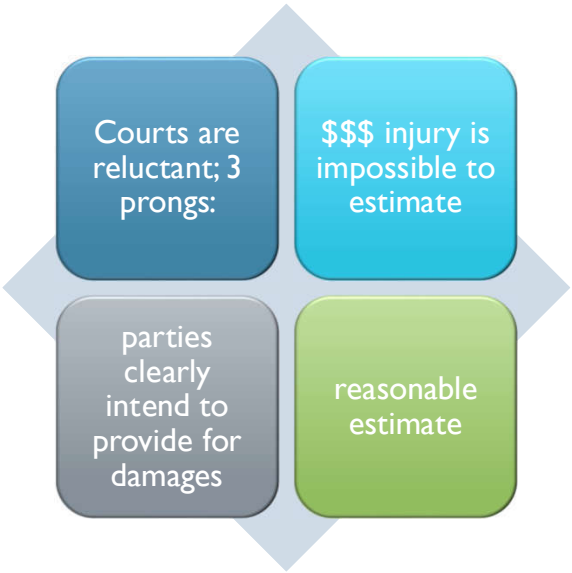
- Proviso at 107th word is foolish
- **Unfortunate reveal**

93

2. Liquidated damage clauses



94

Liquidated damage clause:

"If Client terminates this Agreement less than 36 months from the Production-Ready Date for any reason other than a material breach by ASP, Client shall immediately pay to ASP as liquidated damages and not as a penalty a termination fee equal to the average of the three preceding months' total fees times the number of months remaining under this Agreement. **Client acknowledges and agrees** that ASP's pricing for this Agreement is based upon a term of no less than 36 months, and this termination fee is a **genuine estimate** of ASP's damages for Client's early termination of this Agreement. The termination fee is **reasonable** in light of the harm that will be caused by early termination, the **impossibility** of proving the extent of monetary loss, and the inconvenience of otherwise obtaining an adequate remedy at law. The termination fee is in addition to and not in lieu of any transaction fees incurred before termination."

Liquidated damages:

- Elevator vs. sum certain
- Can't be a penalty
- Especially in a negotiated contract
- Opt for smaller per diem

96

Term and Termination for a Closing Transaction:

If the Merger is not consummated pursuant to this Agreement on or before December 31, 2023, this Agreement may be terminated and abandoned by the parties unless their respective Boards of Directors have agreed to an extension of time in which to consummate the Merger.

Term and Terminations for "Opening" Contracts

- **open-ended:**

This Agreement is effective when signed by both parties and remains in full force and effect until terminated by either party.

- **definite term:**

The term of this Lease begins on March 6, 2023 and, unless terminated sooner as provided below, the term expires on March 5, 2033.

98

Automatic Renewals:

Unless earlier terminated as provided below, this Agreement is effective as of the Effective Date and remains in full force and effect for one year. After the initial term, this Agreement will be automatically renewed for successive one year periods (the initial term and all renewal terms are collectively referred to as the "Term"), subject to earlier termination as set forth in Section 9.2 of this Agreement, unless either party notifies the other in writing, on or before 90 days before the end of the then existing Term.

Who and How?

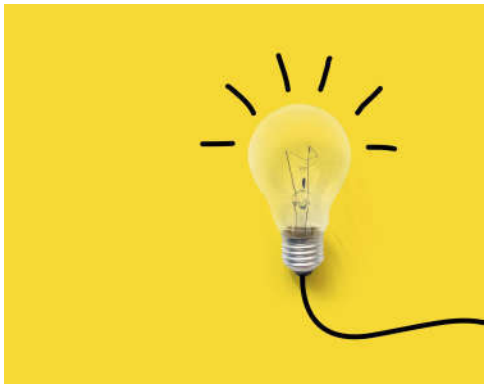
This Agreement may be terminated by ABC at any time upon written notice to Consultant. This Agreement may not be terminated by Consultant before the project described in Schedule 1 is completed **unless** ABC breaches this Agreement and fails to cure the breach after 30 days written notice from Consultant.

Term and Termination

- When it's effective
- Automatic renewals/term of renewals/kick out
- When notice is required to terminate
- When notice is not required to terminate
- Cure period
- Disable software/final invoice/payment of final invoice
- Return of confidential info and certification
- Nondisclosure
- Which provisions survive

101

6. Indemnification Provisions



INDEMNIFY:

To reimburse someone for a loss suffered

103

Traditional Concept:

- 3rd parties
- **transfer** liability
- one party has greater ability to control and prevent
- top of the checklist

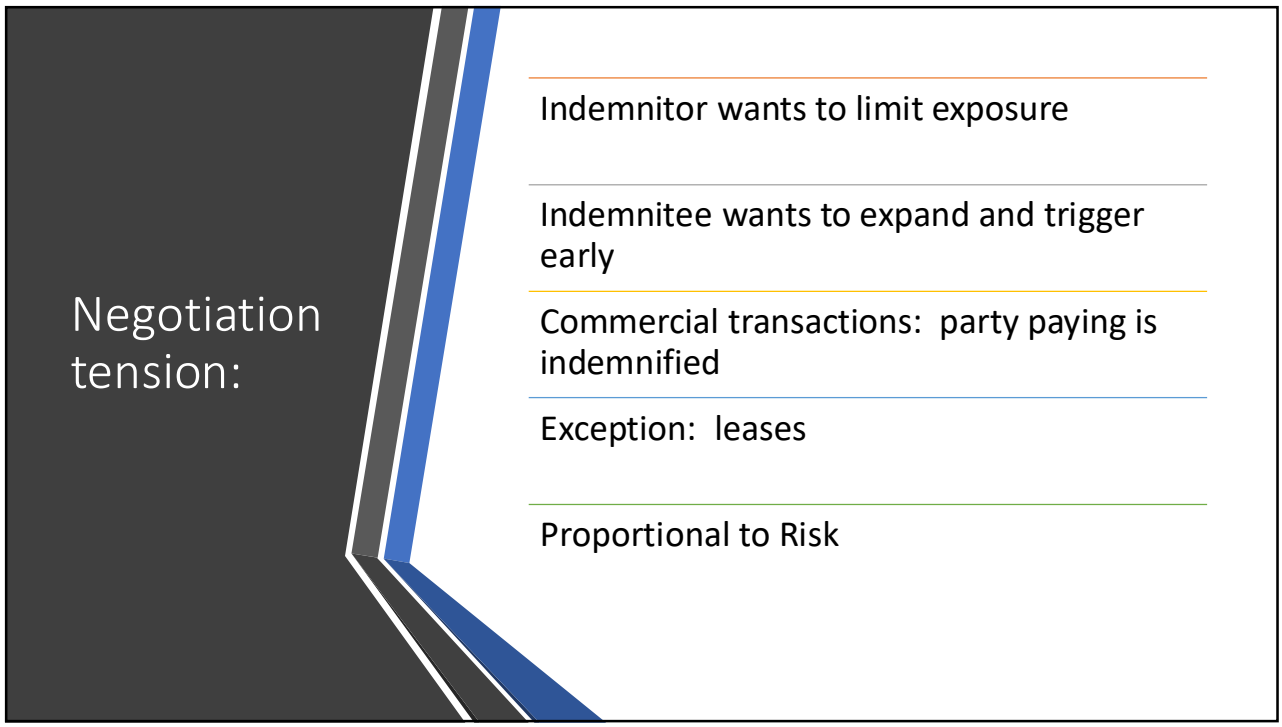


104

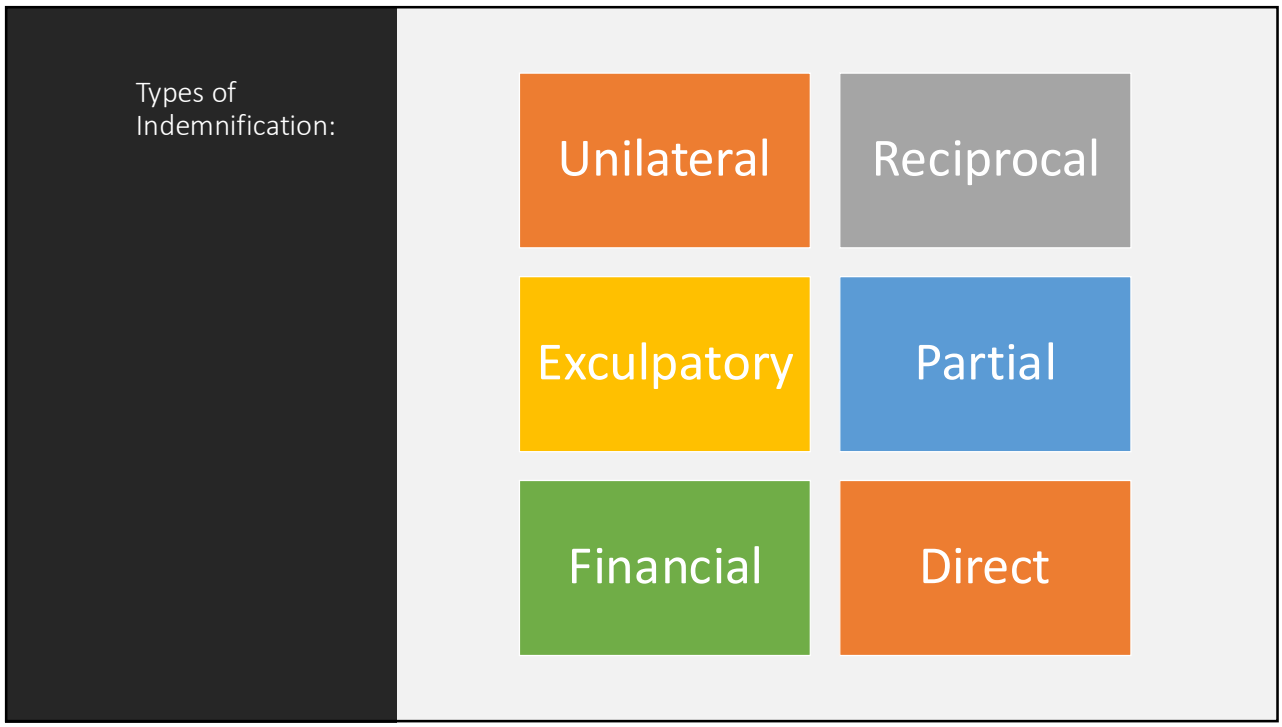
Other possible applications:

- First-party claims
- Mergers & acquisitions

105


Negotiation tension:
Indemnitor wants to limit exposure
Indemnitee wants to expand and trigger early
Commercial transactions: party paying is indemnified
Exception: leases
Proportional to Risk

106


Types of Indemnification:
Unilateral
Reciprocal
Exculpatory
Partial
Financial
Direct

107

1. Unilateral

- Party A Indemnifies Party B

Company shall indemnify and defend ABC from any claims related to Company's breach of this Agreement.



2. Reciprocal

- Party A indemnifies Party B for claims caused by Party A

--and--

- Party B indemnifies Party A for claims caused by Party B



- Best Practice – state separately
  - Not: Each party shall indemnify the other…
- Pay close attention to deviations
- Never use "indemnify and hold harmless" in reciprocal

Reciprocal Indemnification:

Contractor shall indemnify and defend Company against all damages, losses, costs, and expenses (including reasonable attorneys' fees and other costs of litigation) that arise out of or result from any claim that any work produced by Contractor pursuant to this Agreement infringes any copyright or other intellectual property right of any third party.

Company shall indemnify and defend Contractor against all damages, losses, costs, and expenses (including reasonable attorney's fees and other costs of litigation) that arise out of or result from any claim that any Derivative Works produced by Company pursuant to this Agreement infringe any copyright or other intellectual property right of any third party.

3. Exculpatory:

- Party A indemnifies Party B against claims of 3rd parties because of Party B's own acts or omissions, **including Party B's negligence**

Owner shall indemnify Contractor from any liability or loss, including any liabilities or losses resulting from Contractor's own negligence or breach.

- Clear and explicit
- Construed against indemnitee
- Must specifically address indemnitee's negligence

111

4. Partial:

- Party A indemnifies Party B against claims of 3rd parties, **except** those incurred as a result of Party B's negligence

Consultant shall indemnify Company against all losses and liabilities except to the extent the losses or liabilities are caused by Company's negligence.

5. Financial:

- Party A indemnifies Party B against losses incurred if Party C fails to honor a financial obligation

Indemnitor shall indemnify Guarantor from any losses incurred by Guarantor under the Guaranty.

113

6. Direct

- Party A indemnifies Party B for Party B's claims against Party A

The Indemnitor shall indemnify the Acquiror from Losses incurred by Acquiror as a result of any breach of a rep and warranty of the Principals.

- No third party involved

Pacific Gas, Cal:

- "against all loss, damage, expense, and liability resulting from injury to property, arising out of or in any way connected with the performance of this contract."

- 3rd Cir: under NJ law **does not** apply to 1st party
- NY: "**unmistakably clear**"

Drafting an Indemnification Provision

1. "Harmless" is **Harmful**



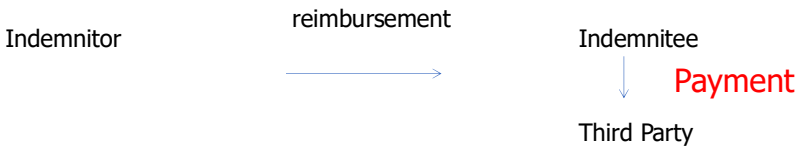
116



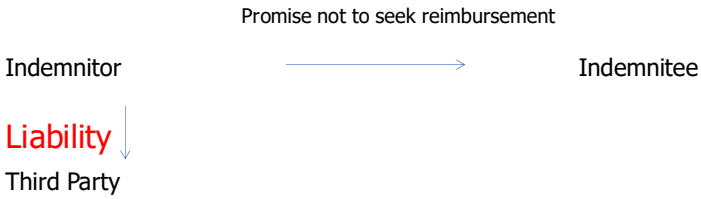
What does “hold harmless” mean?

117

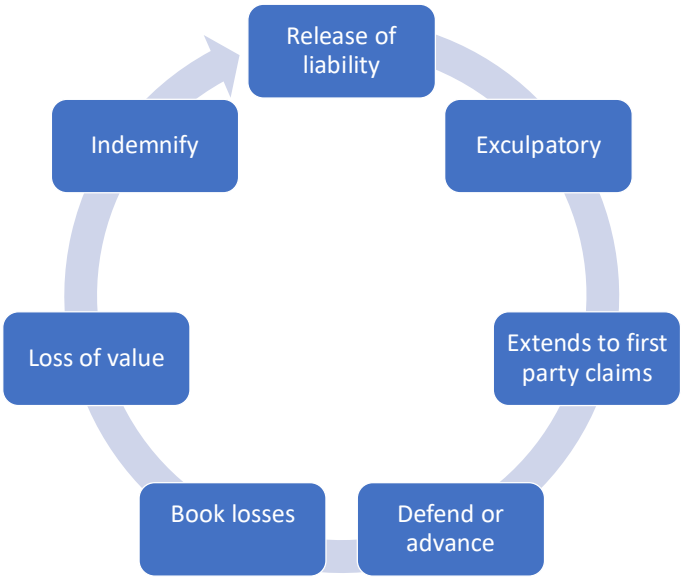
Indemnification:



Hold Harmless:

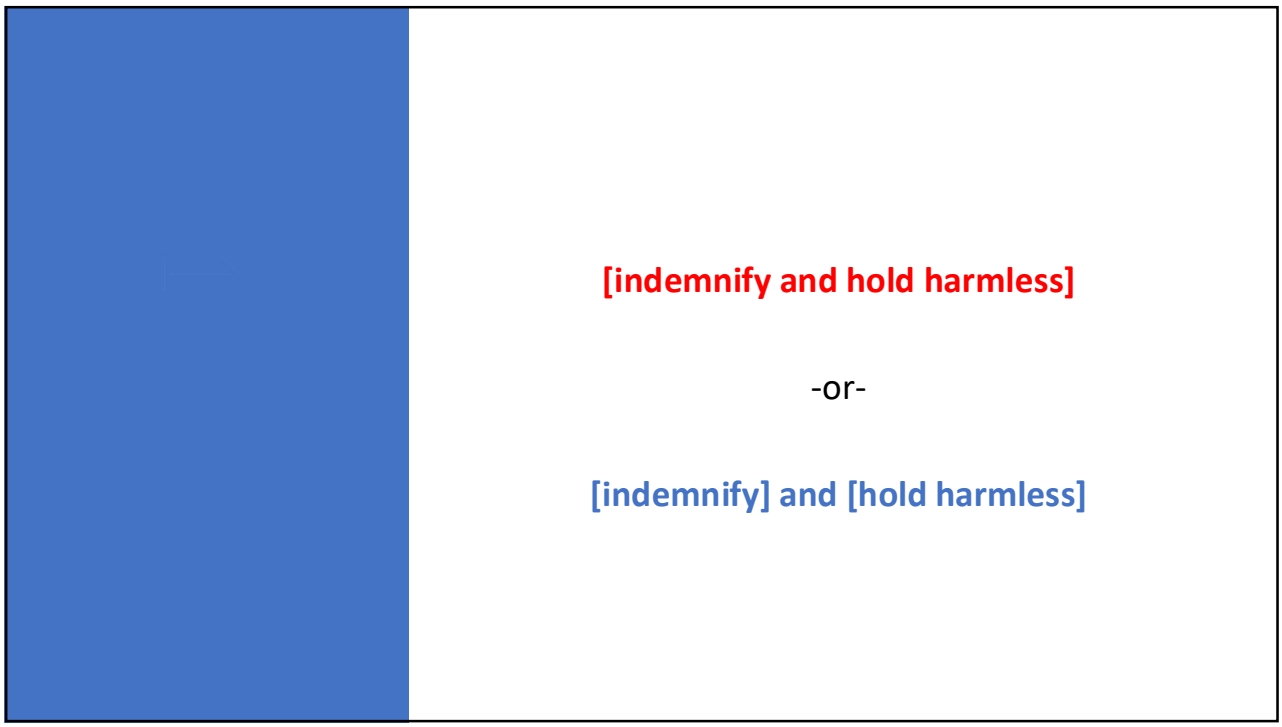


What is hold harmless?





119


[indemnify and hold harmless]
-or-
[indemnify] and [hold harmless]

120

Majority View + Delaware:

[indemnify and hold harmless]

California, Florida; Canada:

[indemnify] and [hold harmless]

121

Never use "indemnify and hold harmless":

- ***If you represent the indemnitor***
- ***In a reciprocal indemnity***
- ***To attempt to create a specific right or duty***

--except when California, Florida, or Canadian law controls, to invoke that specific meaning

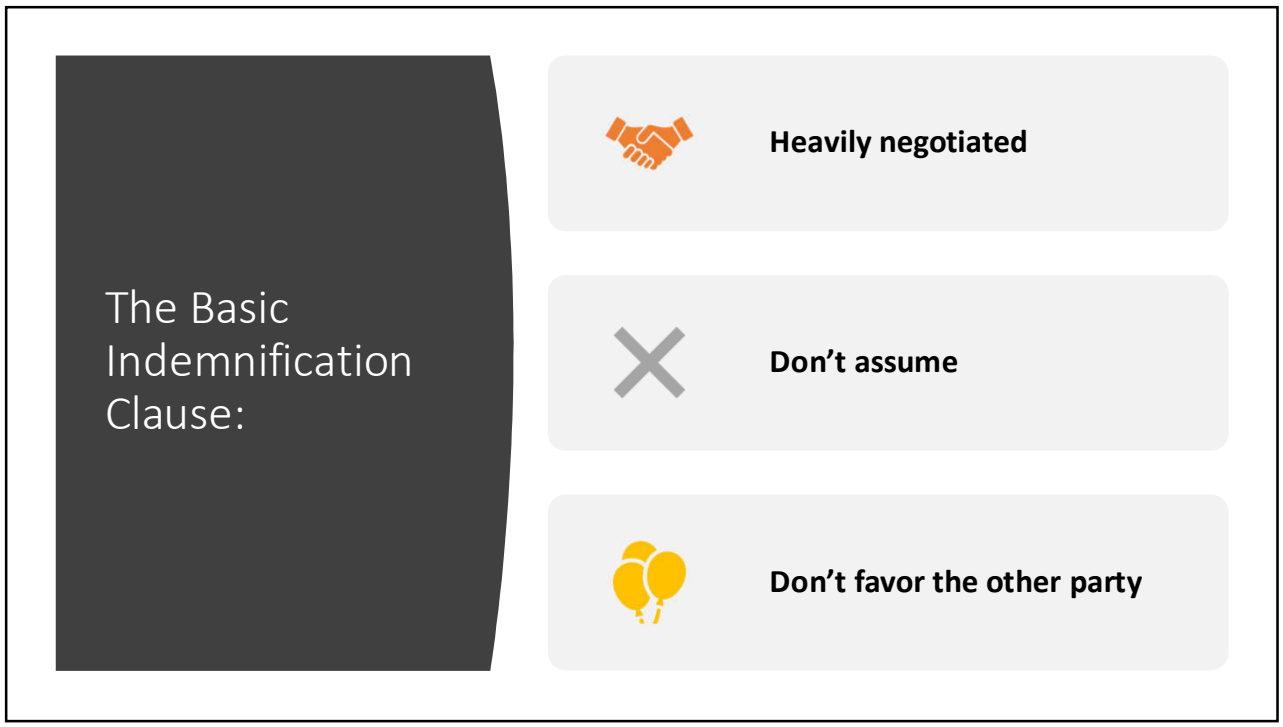
122

Drafting an Indemnification Provision

2. Defense is a **Variable**

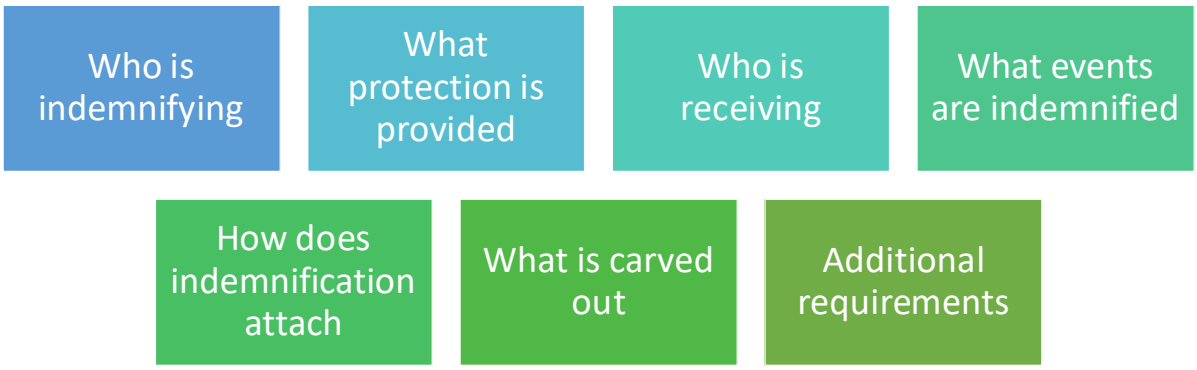


123


The Basic Indemnification Clause:
Heavily negotiated
Don’t assume
Don’t favor the other party

124

7 variable components of indemnification:



125



Break down the components:

You agree to defend, indemnify, and hold harmless ABC, its officers, directors, employees and agents, from and against any claims, actions, demands, judgments or liabilities, fines, penalties, and expenses, including but not limited to reasonable legal and accounting fees, resulting from, or alleged to result from, your use of any Materials. ABC will provide notice to you promptly of any such claim, suit, or proceeding, and will assist you at your expense, in defending any such claim, suit, or proceeding.

126

Identify the components:

1. You
2. Defend and indemnify
3. ABC, its officers, directors, employees and agents,
4. from and against any claims, actions, demands, judgments or liabilities, fines, penalties, and expenses, including but not limited to reasonable legal and accounting fees,
5. resulting from, or alleged to result from, your use of any Materials.
6. [nothing carved out in this provision]
7. ABC shall provide notice to you promptly of any such claim, suit, or proceeding, and will assist you at your expense, in defending any such claim, suit, or proceeding.



127

Who is indemnifying?

- Party A
- Party A and Party B shall indemnify Party C
- Party A and Party B, jointly and severally
- Party A and Party B, severally and not jointly

- Party A shall indemnify….
- Not: Party B shall be indemnified against…

What protection is provided?

- Indemnify
- Indemnify and defend
- Indemnify and release from all liability
- Indemnify and release from all liability except to the extent caused by Party B's negligence
- Indemnify, defend, and release from all liability except liabilities related to Party B's negligence

- address advancement separately

129

Who is indemnified?

- Party A shall indemnify Party B
- Party A shall indemnify Party B and its officers and directors
- Party A shall indemnify Party B and its past, present, and future agents, officers, directors, shareholders, members, partners, subsidiaries, affiliates, successors, assigns, attorneys, representatives

130

Bifurcate to treat items differently, rather than lumping everything into the same treatment:

- ABC shall indemnify, defend and hold harmless the Company and its past, present and future agents, officers, directors, shareholders, members, partners, partnerships, employees, representatives, attorneys, parents, subsidiaries, affiliates, successors, and assigns…

- ABC shall indemnify and defend the Company and its officers and directors against all claims.
- ABC shall indemnify the Company's employees if Company is successful at trial.
- ABC shall indemnify the Company's representatives, agents, shareholders, members, partners, partnerships, attorneys, parents, subsidiaries, affiliates, successors, and assigns if Company is successful at trial and all avenues of appeal are exhausted.

131

What is indemnified against?

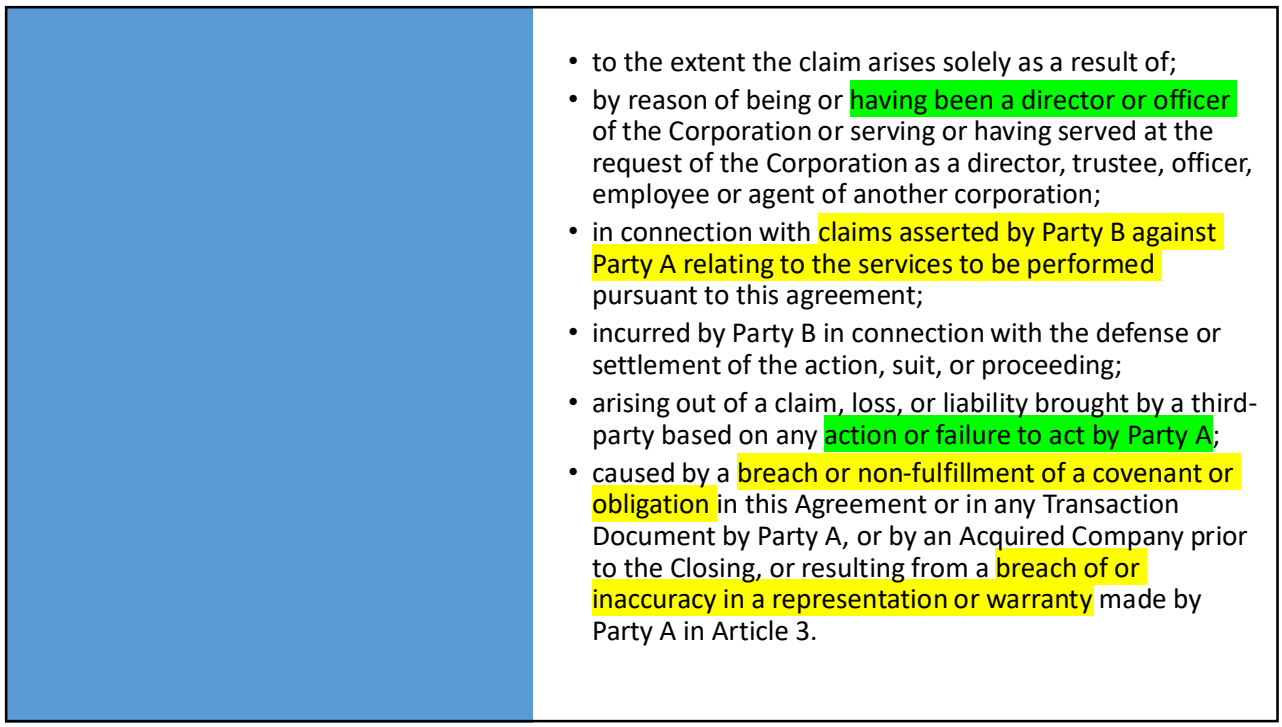
- against any losses, liabilities, and claims;
- from and against any claims, actions, demands, judgments or liabilities, fines, penalties, and expenses, including but not limited to reasonable legal fees;
- against all loss, damage, expense and liability resulting from injury to property;
- from any claim or loss, including reasonable attorneys' fees, court costs and litigation expenses;
- from and against any and all claims, causes of action, costs or damages, including reasonable attorneys' fees and attorneys' fees incurred by Party B in enforcing the covenants and agreements of this agreement.

132

How does indemnification attach?

- arising out of or in any way connected with the performance of this contract;
- arising from any breach by Party A of any of its covenants or representations in the agreement;
- arising out of or in any way related to this agreement;
- arising out of any breach of this agreement;
- in connection with any matter in any way relating to the agreement or arising out of the matters contemplated under the agreement;
- arising out of or relating in any way to this Escrow Agreement or any transaction to which this Escrow Agreement relates;
- resulting from, or alleged to result from, your use of any Materials;

133



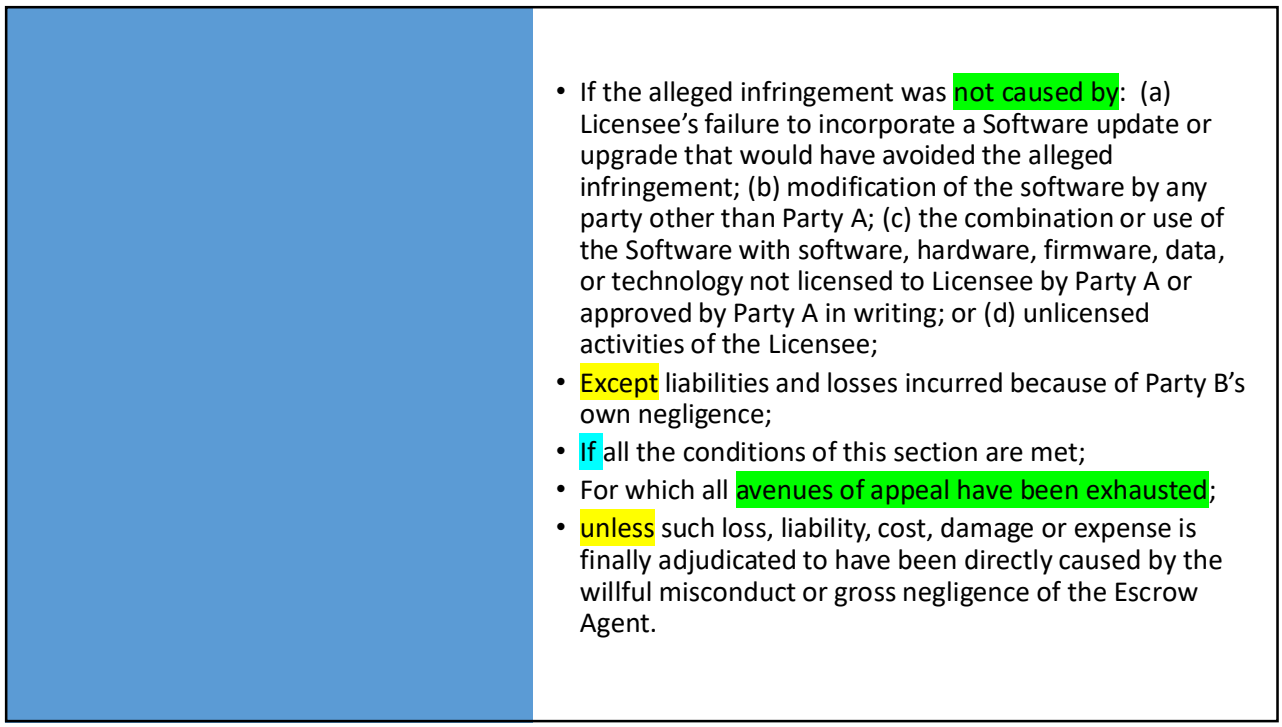
- to the extent the claim arises solely as a result of;
- by reason of being or having been a director or officer of the Corporation or serving or having served at the request of the Corporation as a director, trustee, officer, employee or agent of another corporation;
- in connection with claims asserted by Party B against Party A relating to the services to be performed pursuant to this agreement;
- incurred by Party B in connection with the defense or settlement of the action, suit, or proceeding;
- arising out of a claim, loss, or liability brought by a third-party based on any action or failure to act by Party A;
- caused by a breach or non-fulfillment of a covenant or obligation in this Agreement or in any Transaction Document by Party A, or by an Acquired Company prior to the Closing, or resulting from a breach of or inaccuracy in a representation or warranty made by Party A in Article 3.

134

What is carved out or forced in?

- if Party B acted in good faith and in a manner reasonably believed by such Indemnitee to be in the best interests of the Company;
- If Party A is given notice and an opportunity to defend the claims;
- Party A retains the right to defend or conduct or control any action or suit through counsel of its choosing;
- If Party B is successful in that litigation; [in a direct indemnity]
- Including liabilities or losses incurred as a result of Party B's own negligence;

135



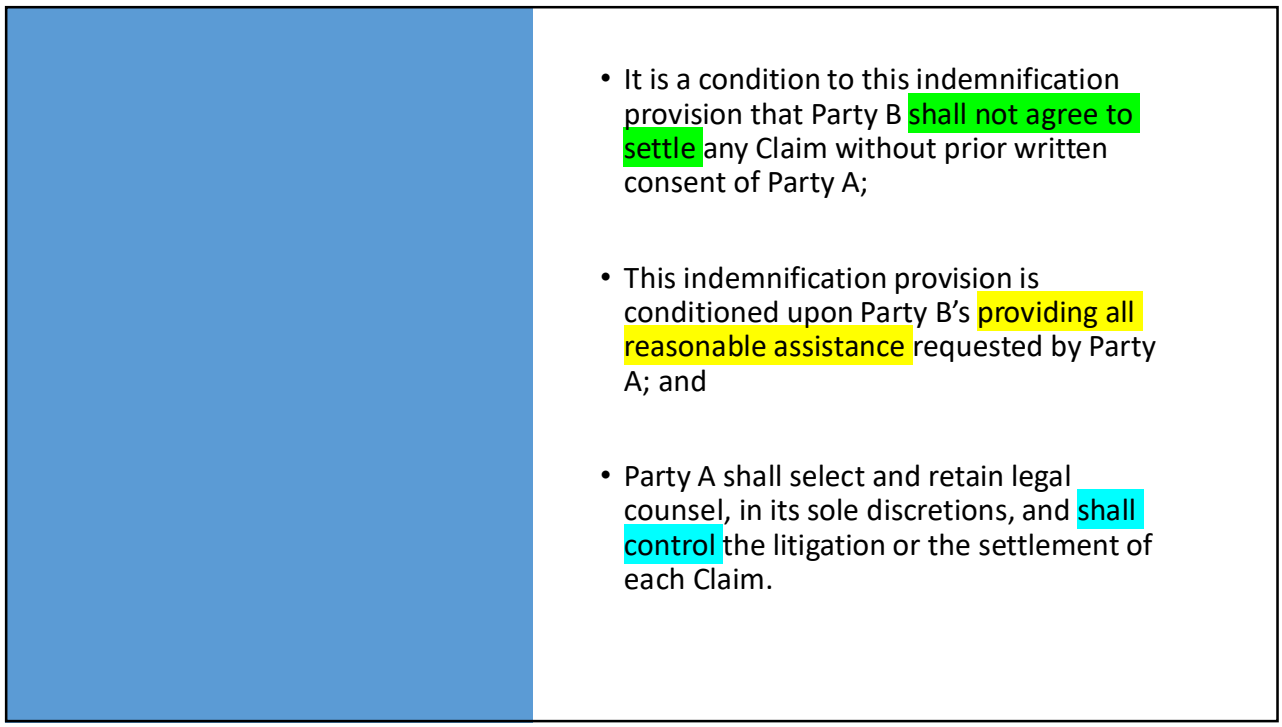
- If the alleged infringement was not caused by: (a) Licensee's failure to incorporate a Software update or upgrade that would have avoided the alleged infringement; (b) modification of the software by any party other than Party A; (c) the combination or use of the Software with software, hardware, firmware, data, or technology not licensed to Licensee by Party A or approved by Party A in writing; or (d) unlicensed activities of the Licensee;
- Except liabilities and losses incurred because of Party B's own negligence;
- If all the conditions of this section are met;
- For which all avenues of appeal have been exhausted;
- unless such loss, liability, cost, damage or expense is finally adjudicated to have been directly caused by the willful misconduct or gross negligence of the Escrow Agent.

136

What are the additional requirements?

- if Party B acted in good faith and in a manner reasonably believed by Party B to be in the best interests of Party A; [*particularly for officers and directors, members, and managers, but possibly useful in other close commercial relationships, like distributorships*]
- To obtain indemnification under this provision, Party B must notify Party A in writing within 10 days of any potential Claim;
- Party A's obligation to indemnify under this section is null if Party B makes any admissions against Party A's interests, unless made pursuant to a judicial request or order;

137


• It is a condition to this indemnification provision that Party B shall not agree to settle any Claim without prior written consent of Party A;
• This indemnification provision is conditioned upon Party B's providing all reasonable assistance requested by Party A; and
• Party A shall select and retain legal counsel, in its sole discretions, and shall control the litigation or the settlement of each Claim.

138

Assemble the components:

Party A

+ shall indemnify and defend

+ Party B and its officers and directors

+ against any losses, liabilities, and claims, including attorneys' fees and expenses

+ arising out of any breach by Party A of this Agreement

+except liabilities caused by Party B's own negligence.

+Party A shall select and retain legal counsel, in its sole discretion, and shall control the litigation or settlement of each claim.

139

Strategies:

- Avoid "hold harmless" → **inherently ambiguous**
- "Hold harmless" opens the door
- "Defend" ≠ "indemnify."
- Duty to advance is not automatic; express it
- Reserve for 3rd party claims; handle 1st party claims separately
- Check "standard" provisions for 1st party claims.
- Distill it down; remove definitions; use white space; resolve muddled thinking; articulate clearly and precisely.

Divide and Conquer:

5. Indemnification.

5.1 Indemnification for third-party claims

5.2 Reimbursement for loss or damage to Company's property.

(a) Duty to reimburse for loss or damage

(b) Measure of loss or damage

(c) Time for recognizing loss

(d) Appeal or cure

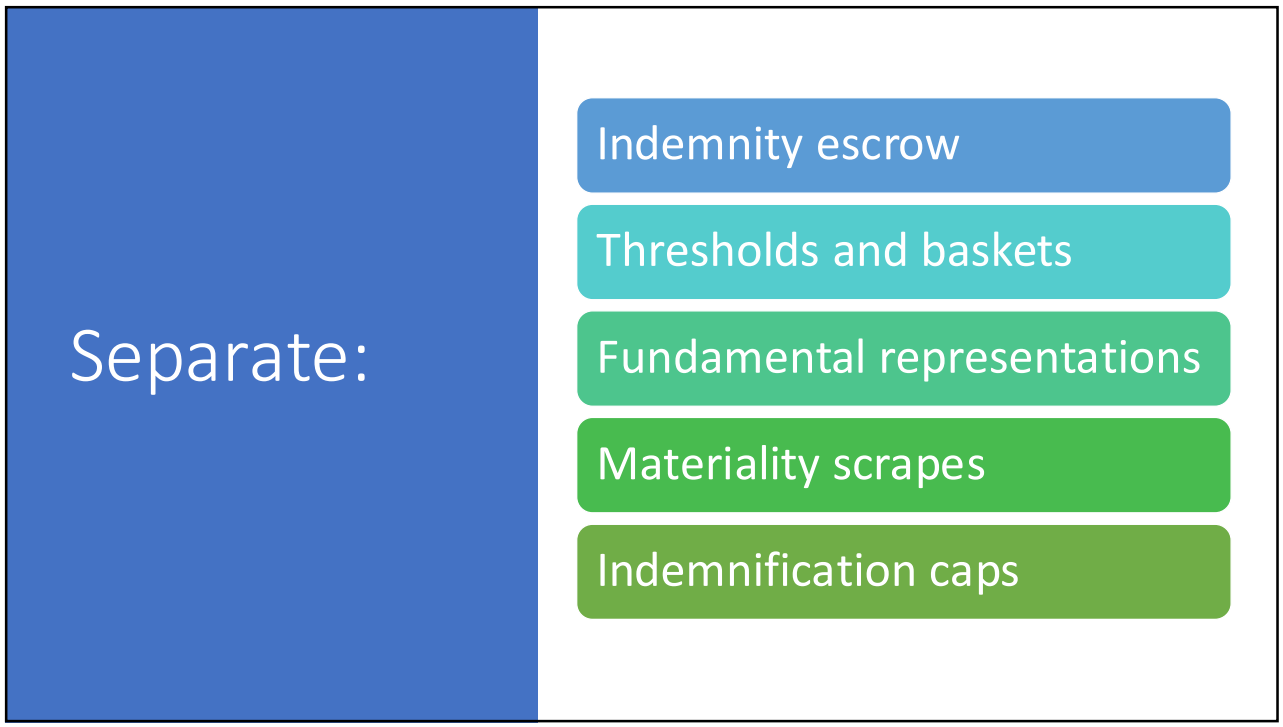
5.3 Release from first party claims

5.4 Duty to Defend

5.5 Advancement of Litigation Costs and Expenses

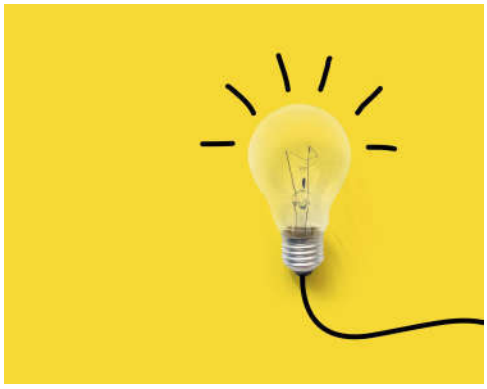
5.6 Good faith standard

5.7 Undertaking to refund [required for corporate advances in some juris.]


Separate:
Indemnity escrow
Thresholds and baskets
Fundamental representations
Materiality scrapes
Indemnification caps

142

7. Boilerplate Provisions

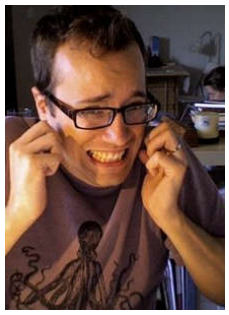


143


"Boilerplate" Provisions
• 1950's
• slang
• language used in many contracts
• non-substantive
• Not heavily negotiated
• "Miscellaneous"

144

- "Boilerplate" - different meaning to non-lawyers
- Well written
- Edit carefully
  - (wrong client; wrong references)
- Don't mindlessly copy



145

This Operating Agreement constitutes the entire agreement between the parties and supersedes any prior understanding among them. No representations, arrangements, understandings or agreements relating to the subject matter, oral or written, exist among the parties except as expressed in this Operating Agreement.

Entire Agreement/Integration/Merger Clause:

Be sure it really *is* the *entire* agreement:

15.1 Entire Agreement. This Purchase Agreement **and the specifications attached as Exhibit A to the Company's request for proposal dated September 15, 2022** incorporated by reference constitute the entire agreement between the parties and supersede any prior understanding among them. No representations, arrangements, understandings or agreements relating to the subject matter exist among the parties except as expressed in this Purchase Agreement.

147

If any provision of this Operating Agreement or the application of the provision to any person or circumstance is deemed unenforceable to any extent by a court having jurisdiction, the remainder of that provision and this Operating Agreement will not be affected and will be enforceable to the fullest extent permitted by law.

Severability/savings clause:

148

The rights and obligations of Contractor are personal and may be performed only by Contractor. Contractor may not assign any rights or obligations under this Agreement to any other Person without the prior written consent of Company. Any purported assignment that does not comply with this provision is void. **This Agreement is binding upon and inures to the benefit of the parties and their respective permitted successors and assigns**.

Assignment:

149

This Operating Agreement is governed and construed exclusively by its terms and by the laws of the State of Texas without giving effect to its conflicts of laws provisions.

Choice of law/governing law:

150

Notice. **(a) Means of Delivering Notice; Effectiveness**. A party shall give notice or other communications required or permitted to be given under this Operating Agreement in writing, signed by the notifying party. The notice must specify the section of this Operating Agreement pursuant to which it is given. Notice is deemed **given** on the date of delivery if (i) delivered in person; or (ii) sent by same day or overnight courier service; or (iii) sent by certified or registered United States Mail, return receipt requested, postage and charges prepaid. Notice given to a Member must be sent to the Member at the **address** of the Member as reflected on the Company's books and records. Notice given to the Company must be sent to the Company at the following address:

Notice:

151

(b) Notice is deemed to have been **received**: (i) on the date of delivery if delivered in person; (ii) on the first business day after the date of delivery if sent by same day or overnight courier service; or (iii) on the third business day after the date of mailing, if sent by certified or registered United States Mail, return receipt requested, postage and charges prepaid. The time period in which a **response** to notice must be given, or action must be taken with respect to that notice, will begin to run from the date it was received by the addressee. If the addressee rejects or refuses to accept delivery, or if delivery fails as a result of the addressee's changed address for which notice was not given to the Company as provided above, the addressee will be deemed to have received notice on the date delivery was attempted.

Notice:

Neither party is liable for failure to perform (except with respect to payment obligations) solely caused by:

- unavoidable casualty,
- delays in delivery of materials not caused by Seller,
- embargoes,
- government orders,
- acts of civil or military authorities,
- acts by common carriers,
- emergency conditions (including weather conditions) incompatible with safety or good quality workmanship, or
- any similar unforeseen event that renders performance commercially implausible.

Force majeure:

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If an event of Force Majeure occurs, the party injured by the other's inability to perform may elect one of the following remedies: (a) to terminate this Agreement in whole or in part; or (b) to suspend the Agreement, in whole or part, for the duration of the Force Majeure circumstances. The party experiencing the Force Majeure circumstances shall cooperate with and assist the injured party in all reasonable ways to minimize the impact of Force Majeure on the injured party, which may include locating and arranging substitute services if necessary.

Force majeure:

Any amendment to this Operating Agreement must be made in writing and signed by all Members.

Amendment/modification:

155

If either party does not seek compensation for breach or insist upon the strict performance of any covenant or condition of this Operating Agreement, that party is not prevented from seeking compensation or insisting upon strict performance for a future breach of the same or another provision.

Waiver/no waiver:

Upon termination or expiration of this Agreement, Sections 6.1, 6.2, 7, 8, 9.3, and 10 of these General Terms continue and survive in full force and effect.

Survival of terms:

157

The headings, titles and captions in this Operating Agreement are inserted for convenience only and are in no way intended to describe, interpret, define, or limit the scope, extent or intent of this Operating Agreement or any provision of it.

Captions and headings:

158

"This should be regarded as an open admission that the drafter is either too lazy to find the proper words to describe a collection of provisions or lacks the linguistic competence to do so." – *Thomas Haggard*

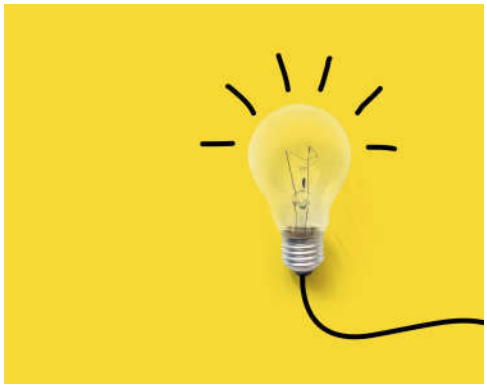


159

This Operating Agreement may be executed in counterparts, each of which may be deemed an original but all of which constitute one and the same instrument.

Counterparts:

8. The Client Interview



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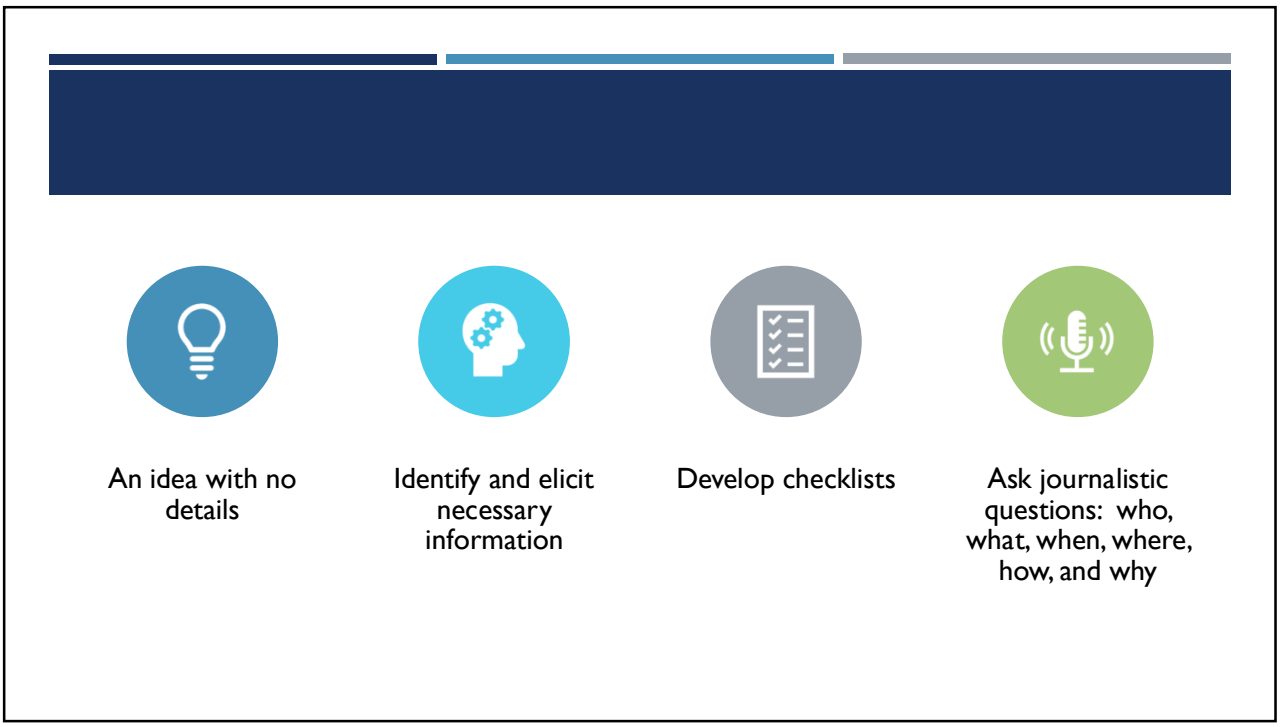

An idea with no details
Identify and elicit necessary information
Develop checklists
Ask journalistic questions: who, what, when, where, how, and why

162

Who?

- Names and addresses – Corporate registry records
- Historical information
- Authorized to negotiate, sign, bind?
- Significant or unique?
  - this is the ONLY supplier of a key ingredient or software
- Capacity?
- Bound by a 3rd party agreement?

163

What?



Assets, goods, or services to be acquired



Measure of performance; what is each party required to do?



What **should** happen? What should not happen? Known risks?



Financial terms?



Breach?



Inability to perform?



Other concerns?

164

When?

01	02	03	04	05	06
Date or timeframe	Does the date matter?	Is time of the essence?	Possession, title and delivery	Duration	Payment

165

Where?



Site of work



Deliveries



Logistics

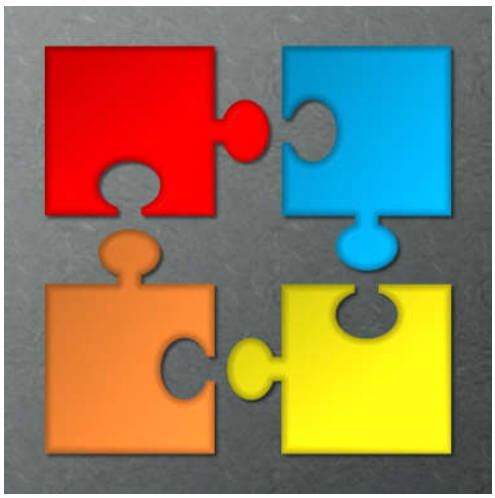


Location specific?

166

Why?

- Routine business
- Long range plans
- Complete or series



167

How?



Implementation process



Steps or milestones



Mechanics of project management

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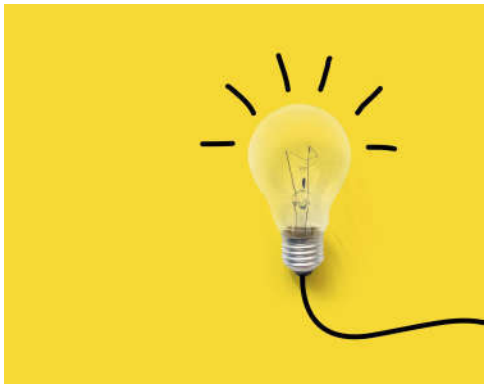
9. The Audience



169

The audience?



- **Logic**
- **Understandable** to the people who use it
- Variety of people; differing, possibly adversarial purposes
- Substance; not the syntax

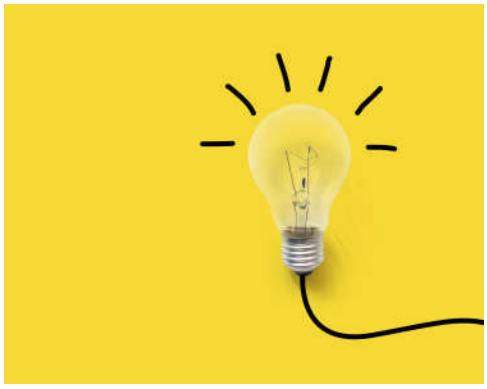
Exercise:

You are responsible for drafting a partnership agreement for a technology business that will have five equity partners at inception. More partners may be added at a future date. Each partner may bring one or more employees and a client list to the partnership and will be asked to contribute $100,000 as initial capital. Other financial arrangements for the partnership will be made with a local community bank. The prospective partners have hired a bookkeeper recommended by their outside accounting firm. The partnership agreement will contain typical restrictions on transfer in the event of death, disability, or termination of employment.

How many potential users of this contract can you identify?

171

11. Defined Terms



1. Basic Rules for Drafting Definitions

- Integrated
- Autonomous

173

Integrated Definitions:

Correct:

The Internal Revenue Code of 1986 (the "Code") is determinative.

Incorrect:

The Internal Revenue Code (the "Code") of 1986 is determinative.

Incorrect:

The Internal Revenue Code of 1986 is determinative (the "Code.")

If the Members (acting through the Board) are unable to agree on a matter requiring Board or Member approval (a "*Deadlock*"), except as provided in Section 16(c) [below], any Member may serve on the other Member a notice (a "*Deadlock Notice*") specifying the matter in dispute (the "*Disputed Matter*"). . . .

2. Where does this definition begin?

175

If the Members (acting through the Board) are unable to agree on a matter requiring Board or Member approval (a "*Deadlock*"), except as provided in Section 16(c) [below], any Member may serve on the other Member a notice (a "*Deadlock Notice*") specifying the matter in dispute (the "*Disputed Matter*"). . . .

Where does this definition begin?

176

- Arbitration is not "in a vacuum"
- Provisions must be read in context
- Disputed Matter – instances where the members are unable to agree on a matter requiring Board or member approval
- This is not "all" disputes

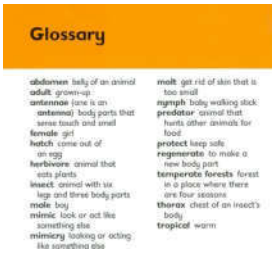
The scope of arbitration is explicitly limited.

177

Autonomous Definitions:

In this Agreement, "Code" means the Internal Revenue Code of 1986.

***Glossary or separate sentence



3. Complete Or Incomplete?



- "ERISA" means the Employee Retirement Income Security Act of 1974, as amended.
- "Paid Holidays" include Federal Holidays designated by the U.S. Congress.

179

Be precise:

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended.



"ERISA" includes the Employee Retirement Income Security Act of 1974, as amended.



"ERISA" shall mean and refer to the Employee Retirement Income Security Act of 1974, as amended.

180

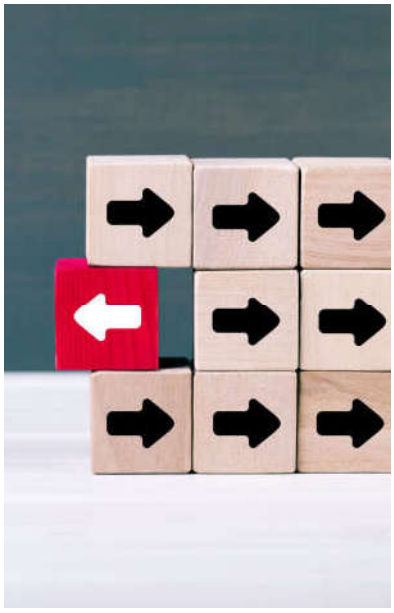


4. To article, or not to article?

- The Company vs. Company
- The Seller vs. Seller

- Grammatically, "the" means this particular one; not any similar one

181



- Common noun vs. substitute name

  The AT&T vs. AT&T

- Most names don't use "the" (exceptions)
- Key is consistency

182

5. Multiple Glossaries: A Trap

(c) Certain Defined Terms. As used in this **Section 4.2**, the following terms shall have the meanings indicated below:

(i) "***Transfer***" and "***Transferred***" shall mean . . . a transfer of a share of Acquiror Common Stock to a broker or other nominee (regardless of whether there in a corresponding change in beneficial ownership), or the transfer of, or entering into a binding agreement with respect to, Voting Control (as defined below).

4.3 Escrow Shares. Each Company Stockholder shall . . . . except the right of possession or Transfer thereof.

183



Common Errors:

- Defined terms not used
- Capitalized terms not defined
- Terms defined with inconsistent meanings
- Stuffed definitions
- Glossary is incomplete
- Counter-intuitive definitions

Potent Poison

184

6. Autonomous Definitions Streamline the Text

(c) Change in Control: shall be deemed to have occurred if (i) any "person" (as such term is used in Sections 13(d) and 14(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act")) (other than a trustee or other fiduciary holding securities under an employee benefit plan of the Company or a corporation owned directly or indirectly by the stockholders of the Company in substantially the same proportions as their ownership of stock of the Company, and other than any person holding shares of the Company on the date that the Company first registers under the Act or any transferee of such individual if such transferee is a spouse or lineal descendant of the transferee or a trust for the benefit of the individual, his spouse or lineal descendants), is or becomes the "beneficial owner" (as defined in Rule 13d-3 under the Exchange Act), directly or indirectly, of securities of the Company representing 30% or more of the total voting power represented by the Company's then outstanding Voting Securities, or (ii) during any period of two consecutive years, individuals who at the beginning of such period constitute the Board and any new director whose election by the Board or nomination for election by the Company's stockholders was approved by a vote of at least two-thirds (2/3) of the directors then still in office who either were directors at the beginning of the period or whose election or nomination for election was previously so approved, cease for any reason to constitute a majority of the Board, or (iii) the stockholders of the Company approve a merger or consolidation of the Company with any other entity, other than a merger or consolidation that would result in the Voting Securities of the Company outstanding immediately prior thereto continuing to represent (either by remaining outstanding or by being converted into Voting Securities of the surviving entity) at least 80% of the total voting power represented by the Voting Securities of the Company or such surviving entity outstanding immediately after such merger or consolidation, or ….

Create definitions to streamline the text:

Added Director means any Person who becomes a member of the Board of Directors during any consecutive two-year period and whose nomination was approved by at least two-thirds of the Original Directors.

Beneficial Owner has the meaning given in Rule 13d-3 of the Exchange Act.

Exchange Act means the Securities Exchange Act of 1934.

Original Director means a Person who was a Director of the Company at the beginning of any period of two consecutive years.

Person has the meaning given in Sections 13(d) and 14(D) of the Exchange Act.

Stockholders means all Persons owning common stock of the Company.

Change in Control means that any one or more of the following have occurred:

(i) any Person becomes the Beneficial Owner, directly or indirectly, of 30% or more of the Company's then outstanding Voting Securities;

(ii) during any consecutive two-year period, the Original Directors plus Added Directors cease to constitute a majority of the Board of Directors;

(iii) the Stockholders approve a merger or consolidation of the Company with any other entity, except that a Change in Control is not deemed to occur if the Stockholders retain at least 80% of the combined voting power of the merged or consolidated entity; or

(iv) the Stockholders approve a plan to liquidate the Company, or agree to sell or dispose of, in one transaction or a series of transactions:

- the stock of the Company; or
- all or substantially all of the Company's assets.

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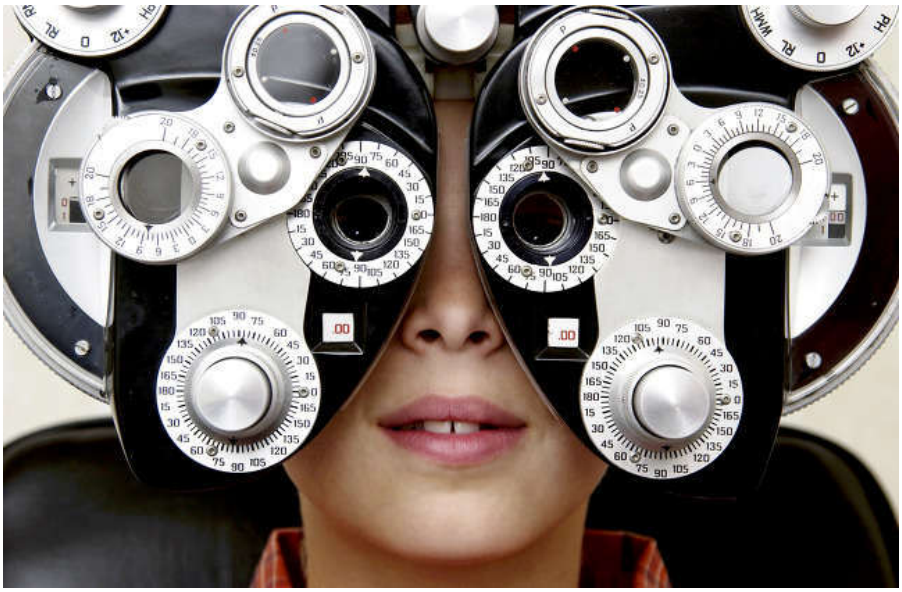


188

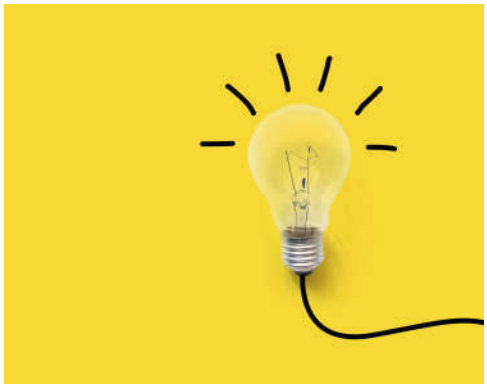
2. What is the definition of this definition?



Seller is relieved of its obligation to sell such applicable Committed Volumes to Buyer and may sell the applicable Committed Volume directly to a third party and at a **mutually agreed upon** alternate delivery point ("Alternate Buyer/Delivery Point")….

189

12. Standardize the Language for specific Legal Consequences



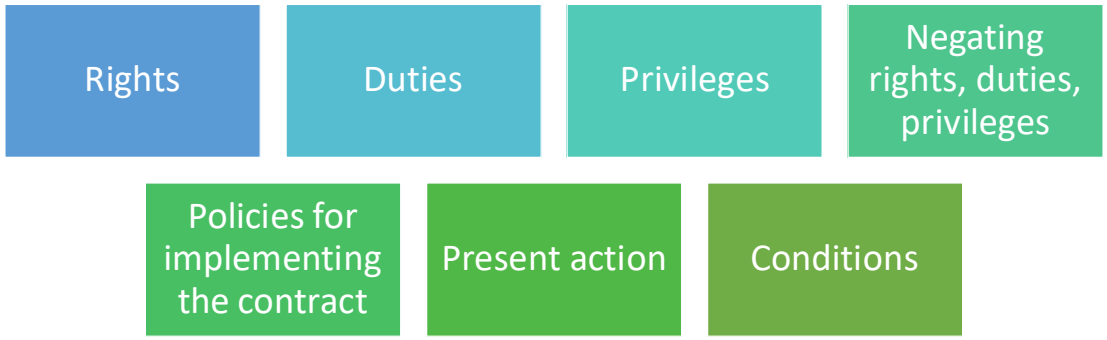
190

*WILL*Y NILL*Y*

- *(informal)*
- *adjective*
- Without order or plan; haphazardly

191

A. Different kinds of consequences:



192

Standardize the language:

For this consequence:	Use this:
1. Duty	shall
2. Negate a duty	is not required to
3. Duty not to do something	shall not
4. Indirect duty	must
5. Right	is entitled to
6. Negate a right	is not entitled to
7. Privilege	may
8. Possibility	might
9. Negate a privilege	may not
10. Present action	present tense verb
11. Policy	present tense verb
12. Condition	if/then; subject to

193

Legal consequences:

- Can be expressed several different ways
- Consider which legal consequence is best
- $42/share => right to receive, or duty to pay?
- Standardize the language

To create a duty:

Use "shall"

Manufacturer shall comply with applicable environmental laws.

Not: The product shall comply

Not: Manufacturer agrees to comply

195

To create a duty:

"Shall" should follow a named party;

however, it can follow a named party and still be incorrect:

- NOT: Employee shall be entitled to…
- NOT: Company shall have the duty to…
- NOT: Licensor shall have authority to…

196

To Test, Substitute:

*has a duty to

*is required to

Use “shall” solely to impose a direct duty on a named party.

Not a grammatical issue

Semantic ambiguity

197

Possible alternatives to "shall":

Must:

Seller **must** deliver the Goods by November 30, 2021.

Favored by Garner

Hard to sell in practice

Will:

Seller **will** deliver the Goods by November 30, 2021.

The parties will not take the following into account to determine whether there has been or will be a Material Adverse Effect.

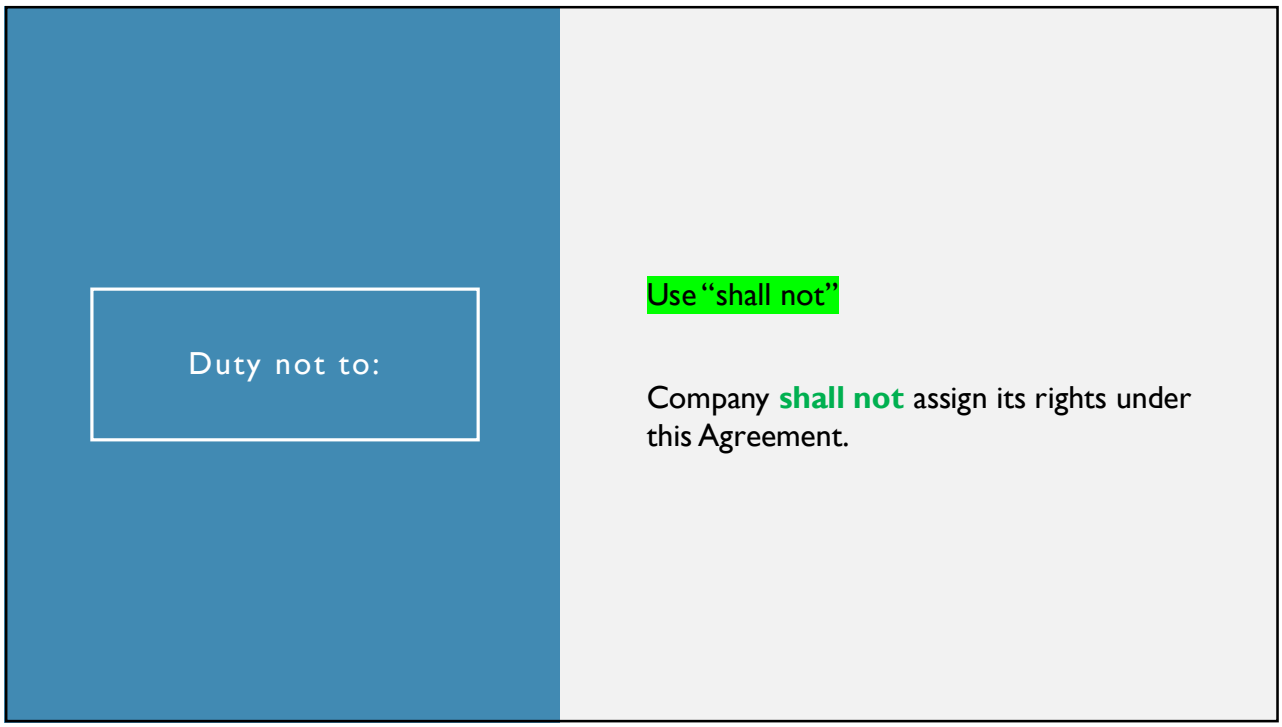
198

To negate a duty:

Use "is not required to"

Landlord **is not required to** provide HVAC on weekends or Federal holidays.

199


Duty not to:
Use "shall not"
Company shall not assign its rights under this Agreement.

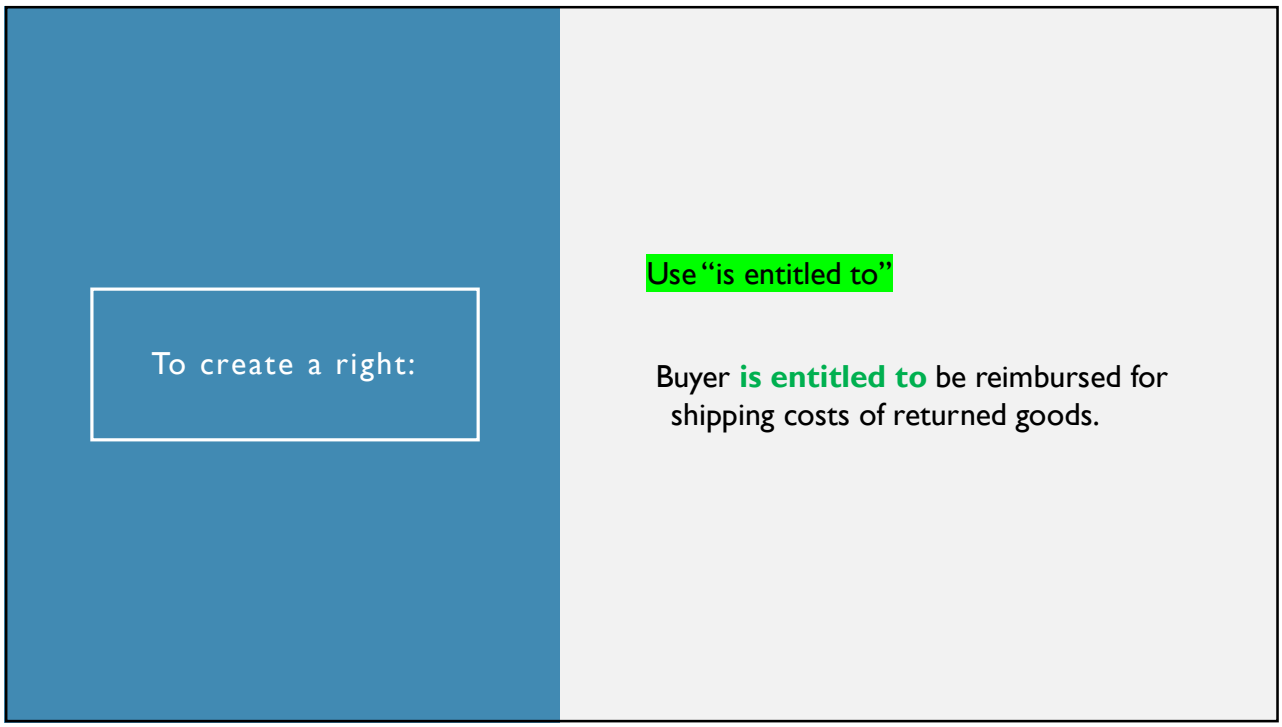
200

To describe indirect duties:

Use "must"

Notice of breach **must** be given by certified mail within ten days.

201


To create a right:
Use "is entitled to"
Buyer is entitled to be reimbursed for shipping costs of returned goods.

202

To negate a right:

Use "is not entitled to"

Buyer **is not entitled to** return defective goods to Seller without prior notice of defect.

203

To create a privilege:

Use "may"

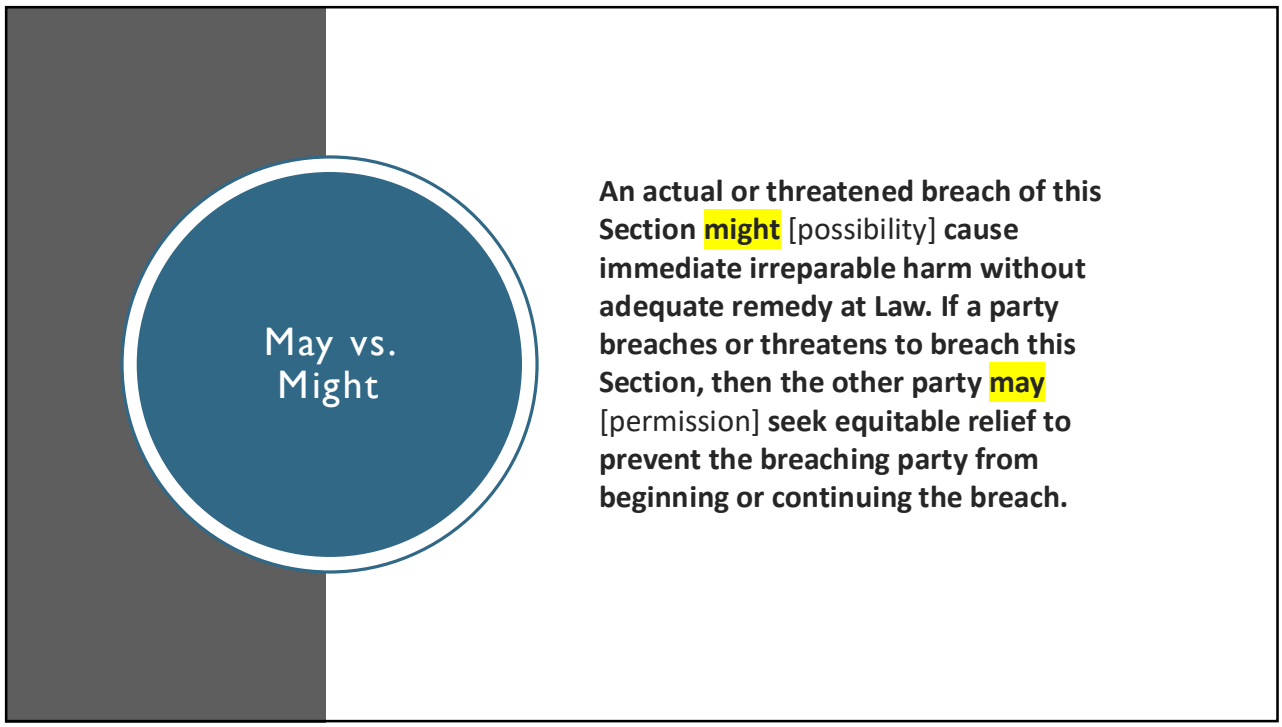
Licensee **may** terminate the license agreement at any time during the Term upon 30 days' notice to Licensor.

The Indemnified Party **may** retain separate counsel at its sole expense.

Be careful to distinguish between "may" and "might"

May = permission

Might = possibility


May vs. Might
An actual or threatened breach of this Section might [possibility] cause immediate irreparable harm without adequate remedy at Law. If a party breaches or threatens to breach this Section, then the other party may [permission] seek equitable relief to prevent the breaching party from beginning or continuing the breach.

205

To negate a privilege:

Use "may not" to negate a privilege:

Company **may not** exercise the option after October 31.

[clarify if necessary – possibility vs permission]

206

To perform an action:

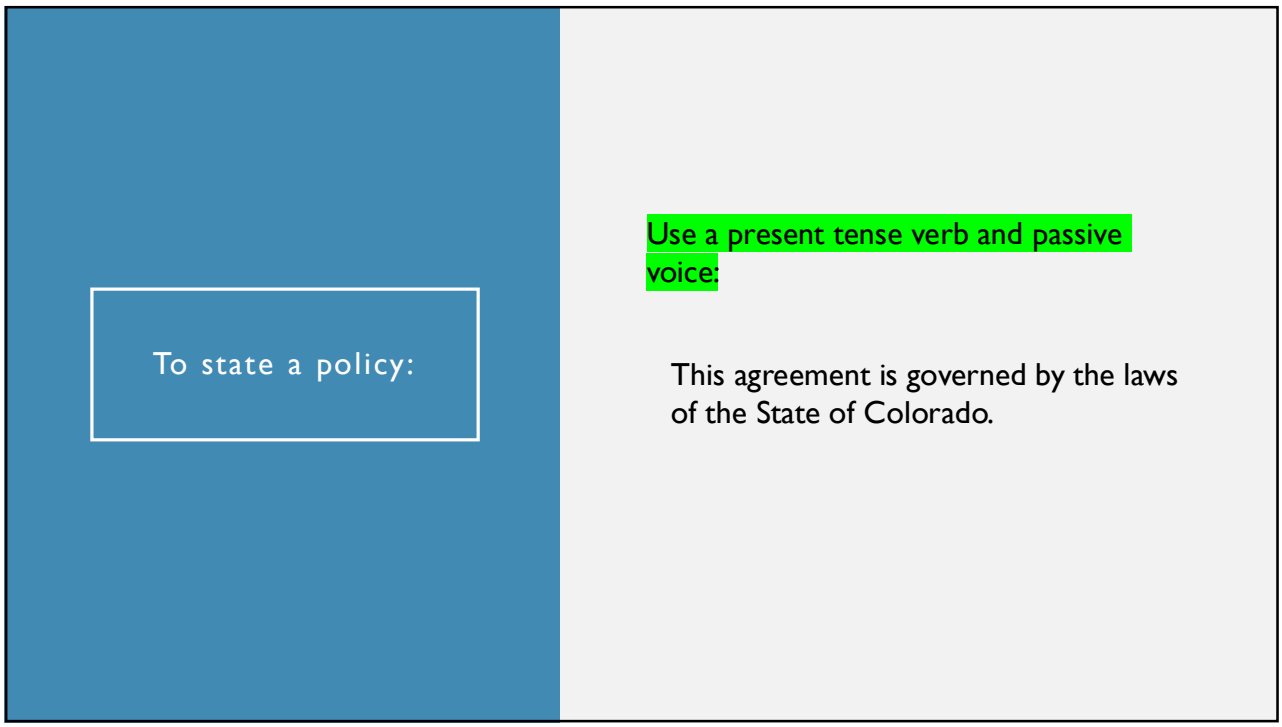
Use a present tense verb:

Licensor **grants** ABC a limited license to use the Software.

Investor **acknowledges** that it has received the disclosure statement.

Buyer **assumes** the liabilities secured by the assets.

207


To state a policy:
Use a present tense verb and passive voice:
This agreement is governed by the laws of the State of Colorado.

208

To create a condition:

Use if/then:

If Buyer requests a sample of the Goods, Seller **shall** provide a sample within ten days.
[*conditional duty; "then" is understood*]

Company **shall** pay Employee a bonus of $10,000 **if** sales exceed $1 Million for the fiscal year. [*reversed*]

If the LLC receives an opinion of counsel stating that the Transfer will not violate any laws, then Member **may** sell his or her Membership Interest.
[*conditional privilege*]

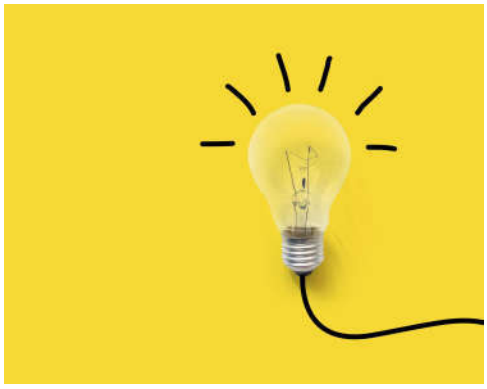
If Buyer **shall** request a sample of the Goods, Seller shall provide a sample within ten days.
[*incorrect*]

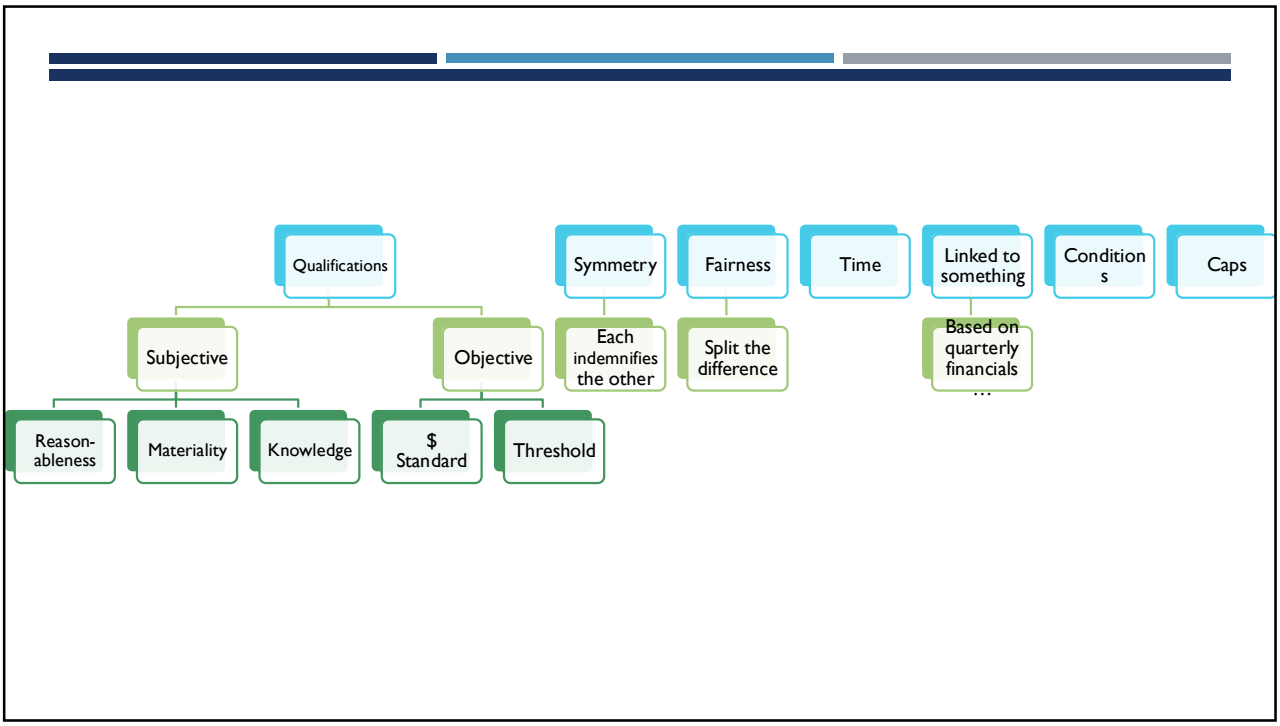
Alternative: Subject to:

Buyer's obligations are **subject to** the following….

209

13. Allocate Risk




Qualifications
Subjective
Objective
Reason-ableness
Materiality
Knowledge
$ Standard
Threshold
Symmetry
Each indemnifies the other
Fairness
Split the difference
Time
Linked to something
Based on quarterly financials
…
Condition s
Caps

211

Add/remove people or entities who are affected:

The parties, and their past, present and future agents, employees, representatives, attorneys, estates, and assigns (the "Releasing Parties")

Each of the other parties, and each of their past, present and future agents, officers, directors, shareholders, members, partners, partnerships, employees, representatives, attorneys, estates, vendors, owners, parents, subsidiaries, affiliates, successors and assigns (the "Released Parties")

Bifurcate to treat items differently, rather than lumping everything into the same treatment



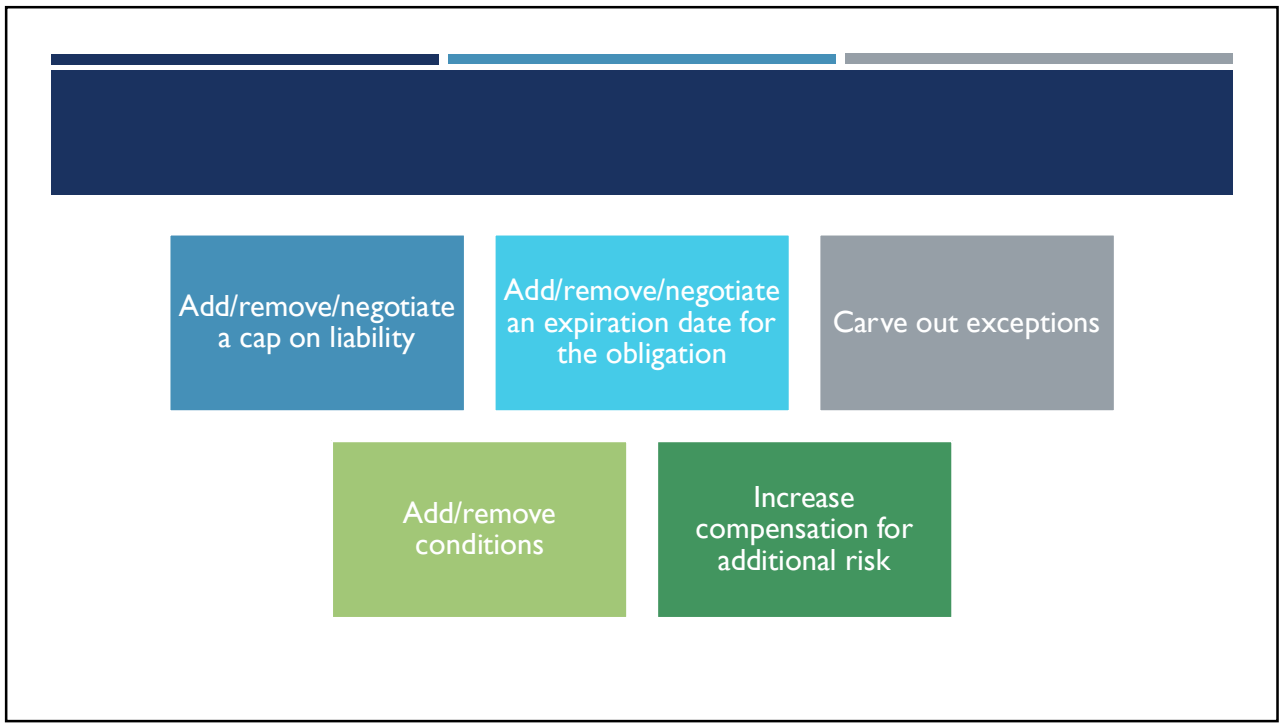
ABC shall indemnify, defend and hold harmless the Company and its past, present and future agents, officers, directors, shareholders, members, partners, partnerships, employees, representatives, attorneys, parents, subsidiaries, affiliates, successors, and assigns…

ABC shall indemnify and defend the Company and its officers and directors against all claims.

ABC shall indemnify the Company's employees if Company is successful at trial.

ABC shall indemnify the Company's representatives, agents, shareholders, members, partners, partnerships, attorneys, parents, subsidiaries, affiliates, successors, and assigns if Company is successful at trial and all avenues of appeal are exhausted.

213

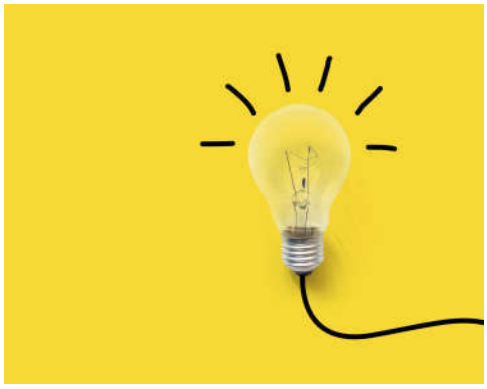

Add/remove/negotiate a cap on liability
Add/remove/negotiate an expiration date for the obligation
Carve out exceptions
Add/remove conditions
Increase compensation for additional risk

214

- Add qualifications to your client's duties
- Remove qualifications from the other party's duties

215

14. Track the $$$$$



Track the Money and Alternative Outcomes

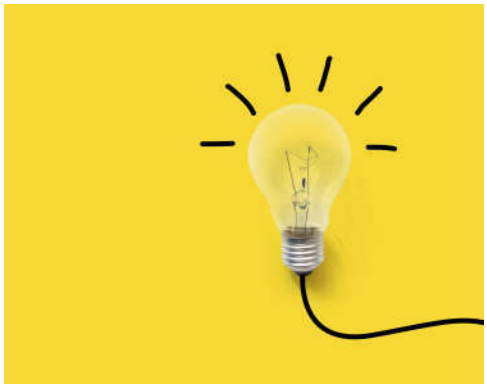


The husband agrees that upon the sale of the marital residence, or on April 1, whichever event first occurs, he shall pay from the proceeds of the sale to the wife all of the net proceeds from the sale of the house, but not more than $50,000.

FLOW CHART:



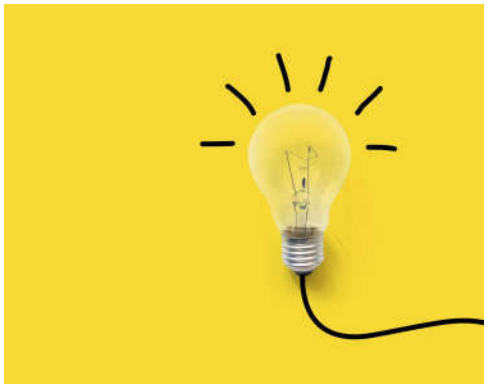
15. Alternative Dispute Resolution Clauses




Step Negotiation
Mediation
Arbitration
Standing Neutral

220

16. Gender-free drafting



Gender-free has evolved

- Boilerplate clause: "he means she"
- He/she; s/he; he or she
- Alternating references
- Neutral terms:

Fireman	Firefighter
Chairman	Chair
Foreman	Foreperson
Policeman	Police Officer
Spokesman	Spokesperson
Salesman	Salesperson

222

"Language-change Index"

Measures how widely accepted language aberrations have become.

5 Stages of aberrations:

1 – rejected
2 – widely shunned
3 – widespread
4 – ubiquitous
5 – fully accepted

223

GARNER:

- Inevitable?
- Resistance is "unfortunate"?

"That it sets many literate Americans' teeth on edge is an unfortunate obstacle to what promises to be the ultimate solution to the problem."

ESPENSCHIED, ADAMS:

"Would I use it in contracts? Not at the moment…"

There's always a better alternative!

Each Party shall pay its own expenses.

Each Party shall pay his or her own expenses.

NOT

Each Party shall pay their own expenses.

A lawyer must handle gender references carefully to avoid offending **his** client.

- **Plural:** Lawyers must handle gender references carefully to avoid offending their clients.
- **2nd Person**: Lawyers, handle gender references carefully to avoid offending **your** clients.

226

A lawyer must handle gender references carefully to avoid offending **his** client.

- **Repeat:** A lawyer must handle gender references carefully to avoid offending **the lawyer's** client.
- **Omit?** A lawyer must handle gender references carefully to avoid offending clients.
- **Indefinite:** A lawyer must handle gender references carefully to avoid offending **any** clients.
- **Zoom out:** The bar must handle gender references carefully to avoid offending their clients. [A collective noun, but used in a sense that requires plural pronoun.]

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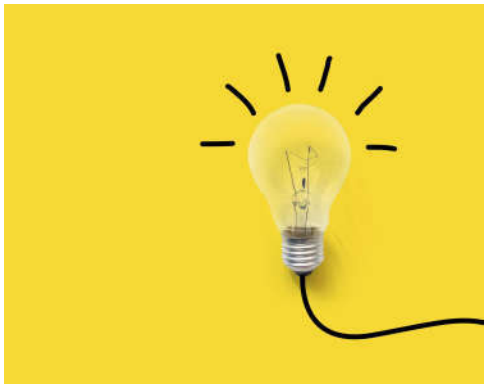
17. Appearance



228

Appearance:

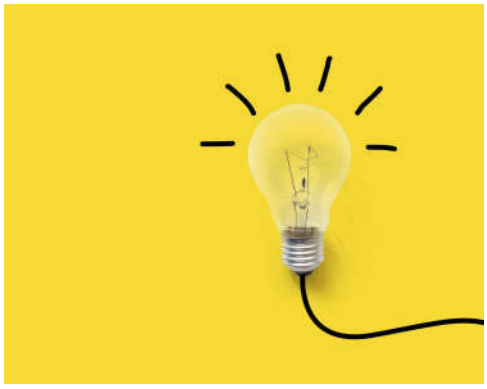
Readable typeface and point size	Plenty of "white space" on the page	Effective numbering system with headings and subheadings	Ragged right margin, but above all, consistent margins	Tabulations to set off lists
Single-spaced text, double-spacing between paragraphs	Consistent formatting	Correct spelling	Correct grammar	Correct cross references

229



Exercise, p. 86

18. Effective contract review

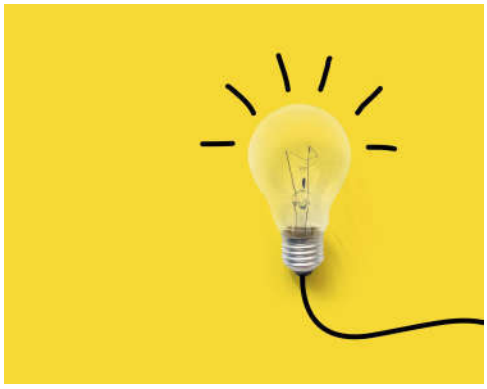


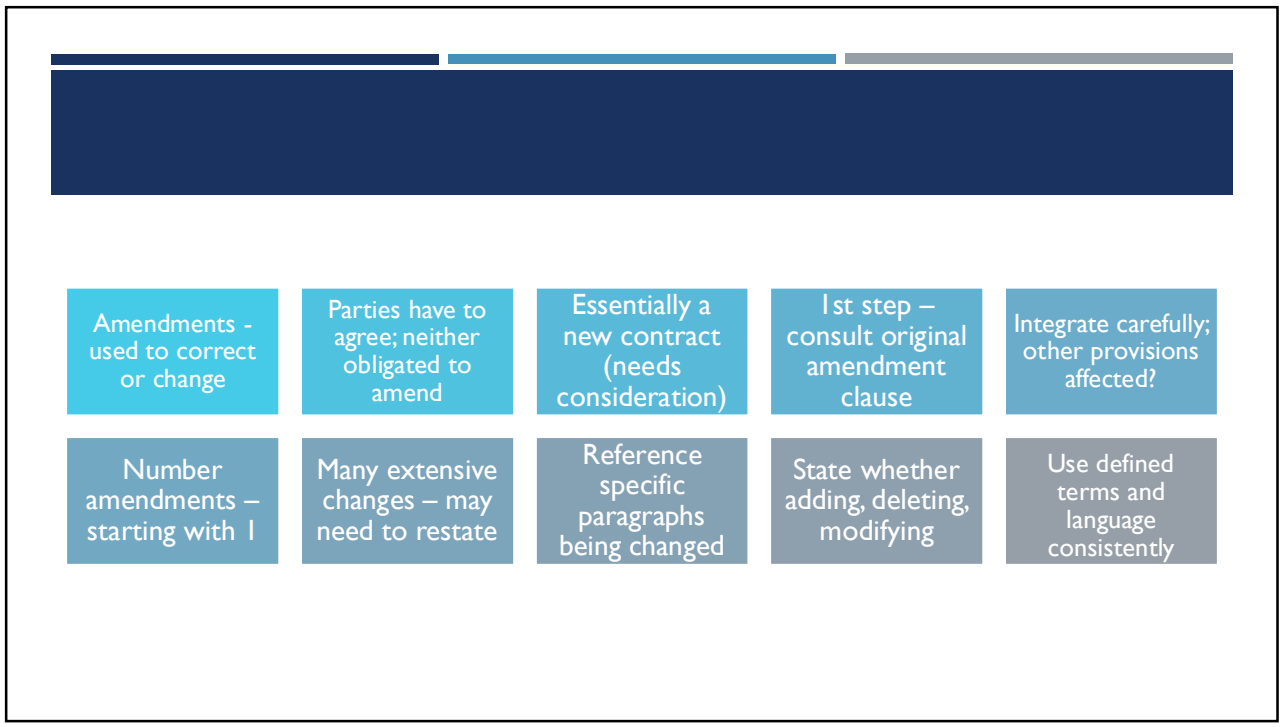


1. Prepare
2. Familiarize
3. Identify key business terms
4. Identify legal issues
5. Identify ambiguous language
6. Discuss with client
7. Revise
8. Proofread

232

19. Amendments




Amendments - used to correct or change
Parties have to agree; neither obligated to amend
Essentially a new contract (needs consideration)
1st step – consult original amendment clause
Integrate carefully; other provisions affected?
Number amendments – starting with 1
Many extensive changes – may need to restate
Reference specific paragraphs being changed
State whether adding, deleting, modifying
Use defined terms and language consistently

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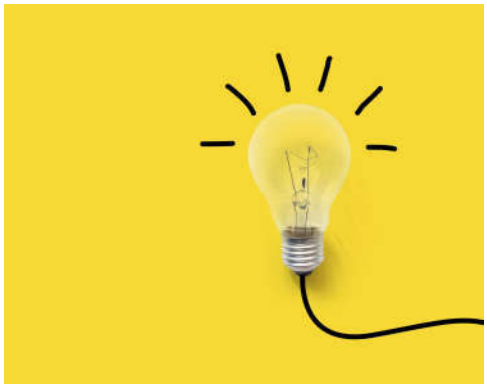
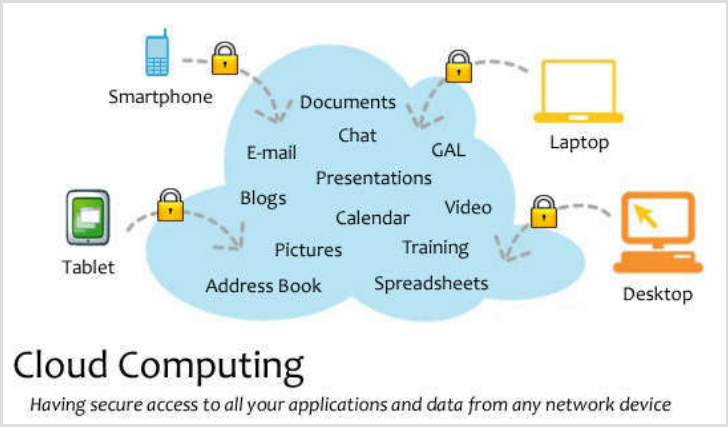
20. “The Cloud”



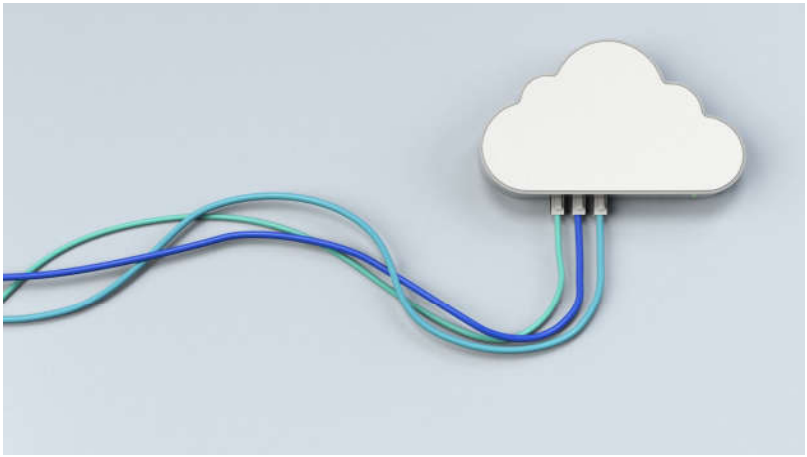
235


Smartphone
Documents
Chat
E-mail
GAL
Laptop
Presentations
Blogs
Calendar
Video
Tablet
Pictures
Training
Address Book
Spreadsheets
Desktop
Cloud Computing
Having secure access to all your applications and data from any network device

236

Vocab:

- "The Cloud" = location where data is stored
- "Cloud Computing"
- "SaaS" = Software as a Service



237


Advantages of cloud computing:
1. Access data anywhere
2. Latest version of web applications
3. Interfaces with Mac and PC; iPhones, iPads and other electronic gizmos
4. Safer → apps don't have to be downloaded
5. Enables transfer of large files; automatic backup
6. Doesn't require multiple licenses for other devices
7. Predictable expense ($300/user/year average)

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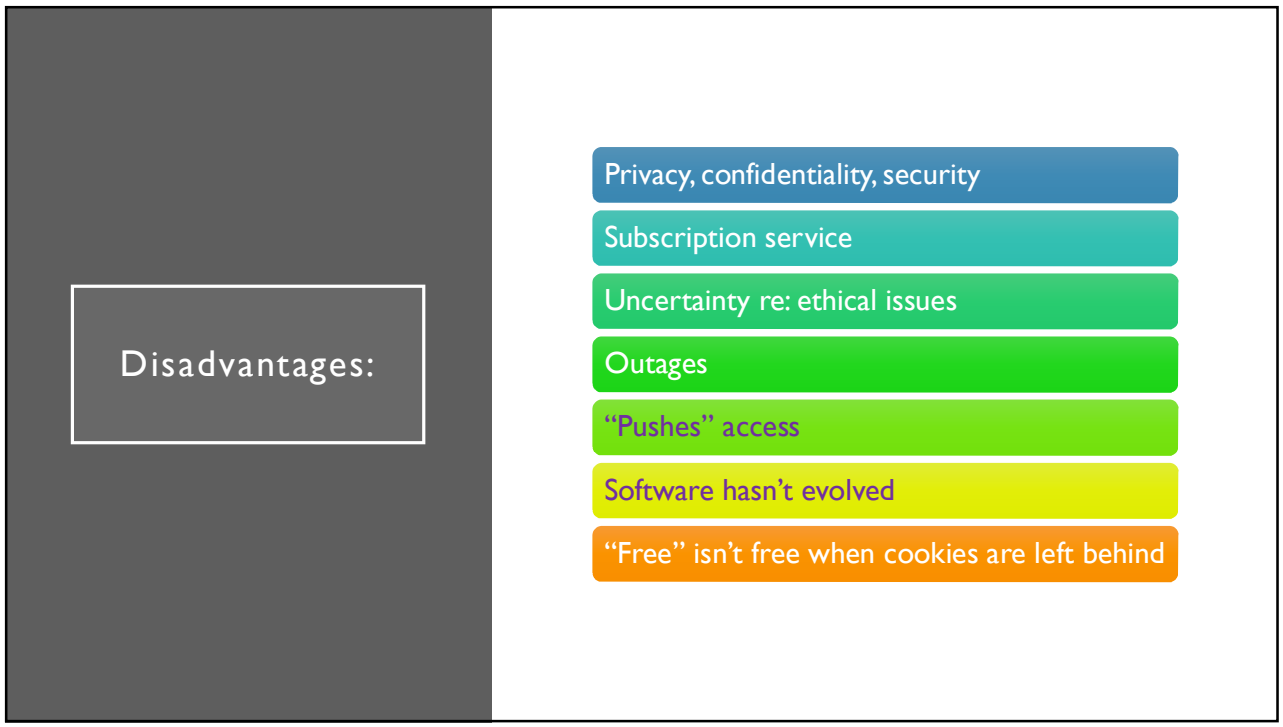
Disadvantages:
Privacy, confidentiality, security
Subscription service
Uncertainty re: ethical issues
Outages
"Pushes" access
Software hasn't evolved
"Free" isn't free when cookies are left behind

239

Is cloud computing ethical?

ABA's Law Practice Division 2022 Legal Technology Survey Report on Cloud Computing

Issued November 2022



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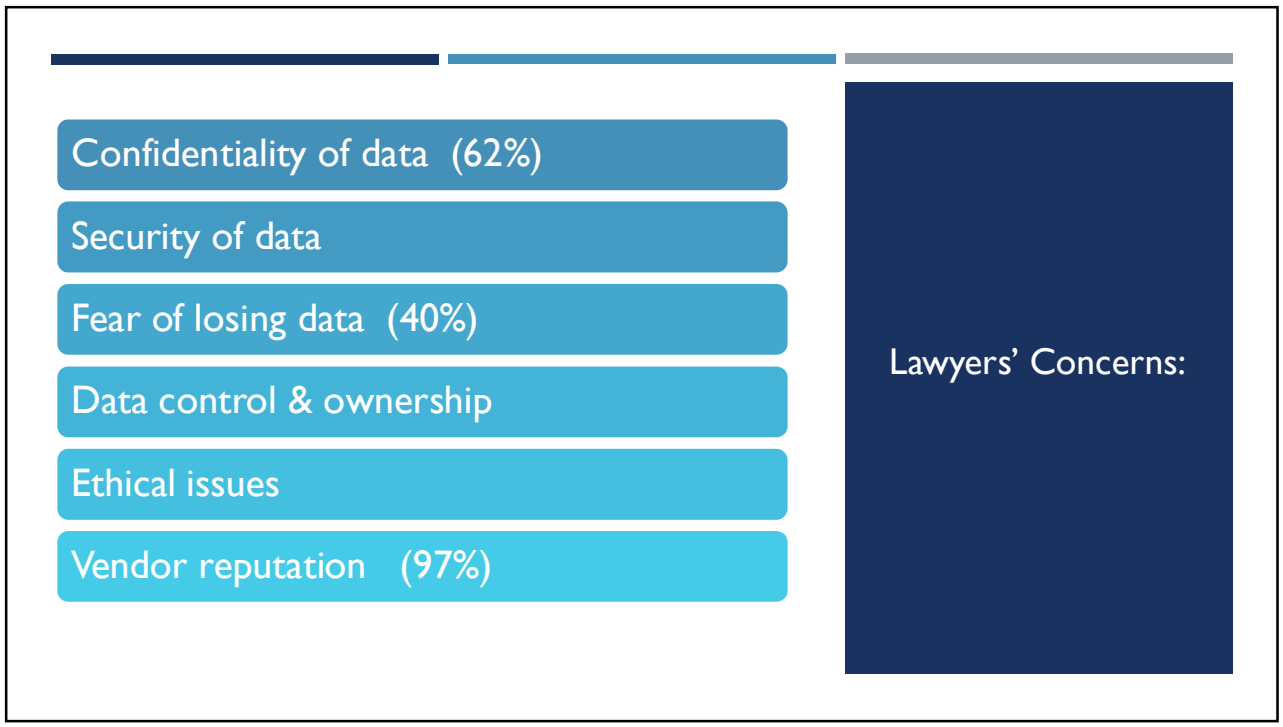
Comment 3:

A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations.

241


Confidentiality of data (62%)
Security of data
Fear of losing data (40%)
Data control & ownership
Ethical issues
Vendor reputation (97%)
Lawyers' Concerns:

242

Hypo:

a. Check with other lawyers for vendor recommendations; engage accordingly.

b. Inquire of her I.T. contractor for vendor recommendations; engage accordingly.

c. Hire the biggest consumer cloud vendor in her state, which is probably the most reliable.

d. Conduct due diligence on specialized vendors and negotiate confidentiality terms.

Precautionary Measures:



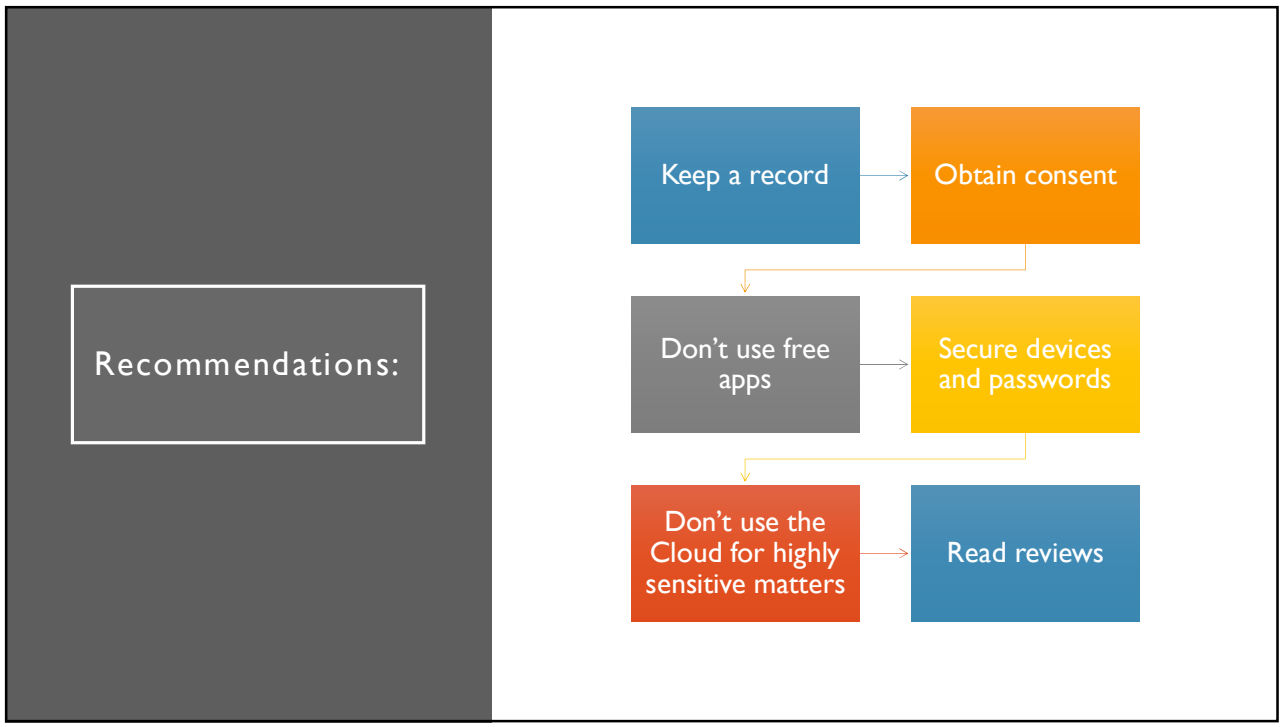
- Reviewing the vendor's privacy policy; (only 27%)
- Reviewing the vendor's terms of service;
- Reviewing the vendor's history and customer reviews;
- Reviewing LEOs and ethical decisions on Cloud Computing;
- Making data backups on the user's own systems;
- Using only services with encryption capabilities;
- Negotiating a confidentiality agreement with the vendor; and
- Negotiating service agreements with the vendor.

- Only 27% evaluated vendor's history

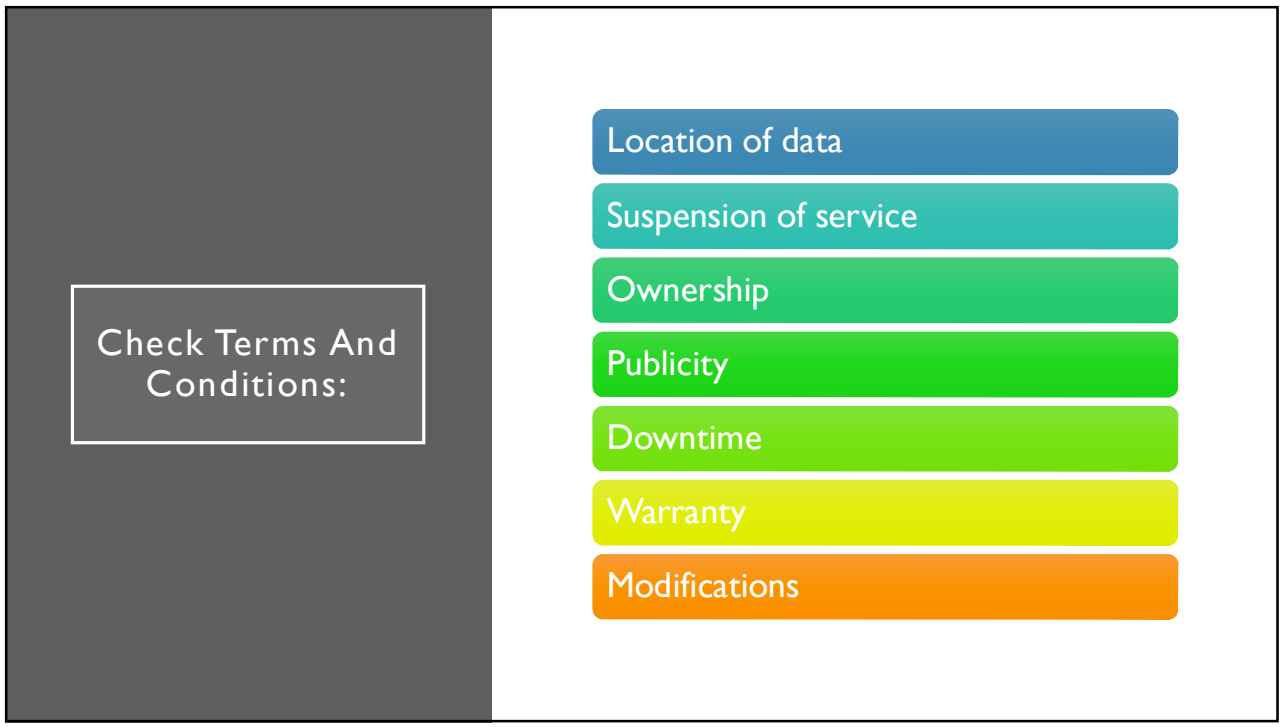
ABA Concerns:

- Preventing unauthorized access
- Where's the data stored?
- Ownership of data
- Access after termination
- Client changes firms

245


Recommendations:
Keep a record
Obtain consent
Don't use free apps
Secure devices and passwords
Don't use the Cloud for highly sensitive matters
Read reviews

246


Check Terms And Conditions:
Location of data
Suspension of service
Ownership
Publicity
Downtime
Warranty
Modifications

247



For attending!

About the Panelist…

Lenné Eidson Espenschied is a national speaker from Atlanta, Georgia, who has trained thousands of lawyers in the U.S. and Canada in the art of contract drafting through continuing legal education seminars for bar associations, law firms and corporate legal departments. Her passion is helping new lawyers acquire the skills they need to be successful in transactional practice.

Ms. Espenschied practiced law in Atlanta, Georgia for 25 years, and focused on technology and intellectual property matters. She began her legal practice with the firm now known as Eversheds Sutherland and eventually worked as senior counsel in the legal department of Bank of America. Prior to attending law school she was a Certified Public Accountant at Ernst & Young, where she audited Fortune 500 companies and assisted in preparing financial statements and reports for shareholders.

Ms. Espenschied is the author of two books published by the American Bar Association: *Contract Drafting: Powerful Prose in Transactional Practice* (ABA Fundamentals, 3rd Ed., 2019) and *The Grammar and Writing Handbook for Lawyers* (ABA Fundamentals, 2011). She was a Professor at Charlotte School of Law and an Adjunct Professor at the University of Georgia School of Law, and taught commercial law, contracts and contract drafting. She is also a contributing faculty member at Thomson/Reuter's West Legal Ed Center.

Ms. Espenschied received her B.B.A., with high honors, from the University of Georgia and her J.D., *magna cum laude*, from the University of Georgia School of Law, where she served on the Editorial Board of *Georgia Law Review* and was a member of Order of the Coif. She also won a prestigious award as a teaching assistant in the UGA Terry College of Business.

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