

# CHAPTER 1

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## Introduction to Contract Drafting

**Objective of this Chapter:** To introduce the topic of contract drafting and identify characteristics of excellent drafting.

**Key Techniques:**

- Understand key differences between contract drafting and legal writing.
- Define the characteristics of excellent contract drafting.
- Attend to appearance.

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### Introduction

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Transactional lawyers have to be skilled in many ways. They must have excellent analytical skills, powerful negotiation skills, keen business acumen, a vast knowledge of the law, exceptional drafting skills, and sharp editing skills. Many experienced, sharp lawyers are far better at analytical or negotiation skills than drafting and editing skills, and most lawyers today are more knowledgeable about substance than

style in contract drafting. The result is that many lawyers have *drafting* skills that are not quite on par with their other *lawyering* skills.

Most lawyers draft contracts on a weekly basis. Contract drafting is a core competency almost universally required in the practice of law; yet, relatively few practicing lawyers have formal training in contract drafting as a distinct discipline. Even fewer report that the training they received was effective and sufficient to prepare them for the demands of drafting in practice. Most lawyers learned what they know about contract drafting from the lawyers who hired them out of law school. Their drafting styles evolved based on what they absorbed through continual exposure to the good, bad, or indifferent works drafted by others. The lack of formal training in contract drafting for past generations is still evident in the contracts transactional lawyers work with every day; in most cases, lawyers simply mark up old contracts to reflect new business terms without tinkering much with habitual language, thereby perpetuating poor drafting habits from one generation of lawyers to the next.

When a client hires a lawyer to draft a contract, the implicit requirement of the engagement is that the lawyer will draft an *enforceable* contract that will reliably protect the client's interests if something goes wrong. When the parties litigate to enforce contractual rights, it is rarely strictly a matter of non-performance; most contract litigation involves interpretation of the provisions the lawyer has drafted. If the court finds, as a matter of law, that a contractual provision is ambiguous, and therefore, unenforceable, the lawyer has failed his or her essential mission. Obviously, lawyers need to be competent drafters; therefore, they must proactively take the necessary steps to hone their drafting proficiencies. This treatise offers an expansive resource to help lawyers draft better contracts.

## What Is Drafting?

“**Drafting**” refers to the genre of legal writing that seeks to control future events, like legislation, wills, contracts, documents, and agreements.<sup>1</sup> Excellent drafting has two primary components: substance and style. **Substance** is what goes into the contract: the provisions that advance and protect the client's interests. **Style** is the manner of expressing those provisions clearly, so they will be understood and enforceable as intended. This treatise contains many recommendations

regarding substance: what provisions to include in a contract, and how to negotiate those provisions effectively. This treatise also contains many recommendations regarding style, to help experienced contract drafters improve the language used in contracts and eliminate ambiguity that thwarts their purposes.

Although a transactional lawyer advocates, negotiates, revises, and edits to advance his or her clients' interests, a signed contract is **objective**: it defines the rights and obligations of *both* parties. Even a one-sided, non-negotiated contract defines the rights of both parties. In this respect, drafting differs significantly from legal writing, which is **subjective**, where the goal is to be persuasive about a client's position. Drafting also differs from creative writing, where the goal is to entertain. The goal in contract drafting is not to persuade or to entertain; rather, the goal is to be indisputably clear regarding future events. This is why it is necessary to study contract drafting as a distinct legal skill.

### What Does a Transactional Lawyer Do?

A transactional lawyer helps clients conduct business. Transactional practice involves representing clients in managing a business or exchanging assets, goods, services, or any kind of property. Transactional lawyers are sometimes called "**deal lawyers**." A transactional lawyer advises the client as to how a deal should be structured; identifies legal issues; negotiates legal and, sometimes, business terms; and drafts contracts to memorialize the parties' respective rights and duties in the transaction. Transactional lawyers represent clients throughout the entire life cycle of a business, from organization of the entity to its ultimate dissolution, and every transaction in between.

In drafting contracts to implement the client's business deals and objectives, a transactional lawyer is primarily focused on three things: 1) **control**—to control the way the parties interact with each other in the future; 2) **standards**—to impose certain requirements for measuring the quality of performance; and 3) **risk**—to ensure that the client assumes an appropriate degree of risk under the contract, given the benefit(s) the client will receive under it.

### Exercise:

A couple of years ago, Richard and Bobby, two smart and independent techno-geeks, left the company they had been working for and started

their own business in Bobby's garage. They have been developing a new technology for harnessing the power of positive thinking using software imbedded in a micro-chip they call the "Lilypad." They have come into your office today because they are ready to begin marketing their product and have heard that there is a way to limit their personal liability by forming a partnership or some sort of corporate entity they want to call "Tadpole." They have arranged to have their product manufactured at a nearby plant.

The next year, Richard and Bobby realize that their backgrounds as techno-geeks provided them with little sales and marketing experience. They want to hire a sales manager but do not want that person to steal their technology. (In the next year or two, the pair will also realize that they need a CEO and a CFO.)

A few years after hiring their sales manager, Tadpole has long outgrown Bobby's garage and Richard and Bobby call you to say they are looking for office/warehouse space. They also are talking with a bank about getting "real" financing. Soon, Tadpole needs outside help from consultants to tweak its technology and design its own plant for manufacturing Lilypads. Tadpole has begun purchasing silicon and other items necessary to manufacture the chips.

Five years after your initial meeting with Richard and Bobby, regional sales are off the charts and Tadpole wants to hire subcontractors to install the Lilypads for customers. Tadpole also wants to figure out a way to sell its product nationally. One of Tadpole's biggest customers has asked for the right to use the underlying technology in another manner.

**What types of contracts will Tadpole need?**

## **Focus of this Treatise**

This treatise is written to equip lawyers with the skills they need to draft excellent contracts. It explains the lawyer's responsibilities and objectives in drafting a contract and recommends techniques that will help achieve them. Excellent drafting involves the following:

- Understanding the legal framework of contract drafting;
- Planning, designing, and organizing contracts;
- Choosing the best words to express the concepts addressed in the contract;
- Drafting efficient, clear sentences; and
- Understanding how to allocate risk among the parties to achieve the appropriate level of risk for the client.

These and many other topics are addressed in this treatise. Language is more than a tool for communicating; it is an essential component of the *process* of thinking. As you focus on improving the language, concepts become clearer and the substance of a contract is invariably improved as well.<sup>2</sup>

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## 1.1 Understand Key Differences between Contract Drafting and Legal Writing.

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Although the goals of legal writing and contract drafting are completely different, the terms “**legal writing**” and “**drafting**” are often used interchangeably, even by drafting authors. This treatise distinguishes between “legal writing” and “drafting.” Legal writing is historical in the sense that briefs and pleadings typically describe a specific event that occurred and its known ramifications. Most cases are resolved within a few years and briefs and pleadings are quickly forgotten. By contrast, drafting (statutes, wills, and contracts) is future oriented and may have a very long shelf life. Statutes may be in effect for hundreds of years, wills may control the transfer of wealth through generations, and contracts often govern relations between parties for decades. A contract must address risks and circumstances that may arise during its term as the future unfolds. For example, a lawyer must anticipate how cryptocurrencies and block chain systems may impact payment terms in a 50-year contract.

Briefs and pleadings typically cite, quote, and argue relevant statutes and case law. Contracts occasionally cite statutes but do not quote or argue them, and never reference case law. In pleadings, mistakes are less significant, and amendments can be filed to correct errors without approval of the other party. Mistakes in contract drafting can be crucial, and each word may have great significance (e.g., “One month” or “30 days?” “No later than” or “within?”). Million dollar contractual disputes have turned on nothing more than the placement of a single comma.<sup>3</sup> Mistakes in contracts can be cured by amendments, but the other party has to agree to amend most contracts.

Another key difference between contract drafting and legal writing is that the specific language used in a contract may be challenged by adversaries. Although opposing counsel may disagree with certain

words that are used in a brief to characterize people or events, or with the arguments presented, he or she is not bent on ripping the text of a brief to shreds. In contract litigation, however, a highly trained adversary may be motivated to shred the provisions in dispute to prevent their being construed against her client.

The most significant difference between contract drafting and legal writing is the intended audience. Briefs and pleadings are generally intended to be read by judges and other lawyers, from start to finish; however, most contracts are written for business people who consult specific provisions sporadically throughout the term of agreement when they need information. The format of briefs and pleadings, the time frame for filing, style, number of pages, type size, margins, and even the size of paper are dictated by statutes and court rules. Conversely, little about drafting a contract is “required.” The form and format of a contract are almost completely unregulated by statute or case law; the same contract could be documented in three sentences or in 100 pages and the lawyer must decide what level of detail is suitable under the circumstances. Contracts are not even “required to be clear, or even legible, and too many of them are neither.”<sup>4</sup>

Another key difference between contract drafting and legal writing is that contract drafting is a collaborative process in at least two major respects. First, lawyers rarely draft contracts completely from scratch. In drafting a new contract, the lawyer starts with a form from a prior transaction, cuts and pastes language from other sources, adds, deletes, edits, and revises until the form fits the current transaction. Specific language in most forms is compiled over time through the edits of many lawyers in a chain of those who have worked with earlier variations and permutations of the forms. The genealogy of any provision in a “standard form” and the purpose for which it was originally drafted, are seldom known. Second, contract drafting is a collaborative process in the sense that during negotiations, the parties work together to sculpt contract language. The terms of most contracts evolve as the parties edit and refine the language to suit their respective objectives. Ambiguity in contracts from poor organization, lack of consistency, misuse or even conflicting use of defined terms, and redundant language is often caused by the collaborative process.

## Contract Drafting vs. Legal Writing

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| <ul style="list-style-type: none"><li>• Future behavior</li><li>• Must anticipate</li><li>• Long shelf life</li><li>• Mistakes very damaging</li><li>• Objective</li><li>• May be challenged by adversaries</li><li>• Consulted sporadically</li><li>• Read by business executives</li><li>• Format is unregulated</li><li>• Rarely references statutes</li><li>• Collaborative process</li></ul> | <ul style="list-style-type: none"><li>• Historical events</li><li>• Known effect</li><li>• Quickly forgotten</li><li>• Mistakes less important</li><li>• Subjective</li><li>• Writing to persuade</li><li>• Read start to finish</li><li>• Read by judges and other lawyers</li><li>• Format dictated by courts</li><li>• Cites statutes and caselaw</li><li>• Singular effort</li></ul> |
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## 1.2 Define the Characteristics of Excellent Drafting.

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The starting point for improving drafting skills is a good understanding of what constitutes “excellent” drafting. Excellent drafting has the following five attributes.

**1. Accuracy.** The contract reflects the entire agreement of the parties; it is substantively accurate and complete. An “accurate” contract correctly describes the business terms the parties have agreed to; the numbers, dates, names are correct with no typos; nothing has been omitted; nothing has been included erroneously. All the provisions from the prior draft apply to this transaction, and the client absorbs the appropriate amount of risk, given its risk tolerance preferences. Lewis Carroll captured the nature of the challenge in this conversation between Alice and her new friends in Wonderland:

“Then you should say what you mean,” the March Hare went on. “I do,” Alice hastily replied; “at least—at least I mean what I say—that’s the same

thing, you know.” “Not the same thing a bit!” said the Hatter. “Why, you might just as well say that ‘I see what I eat’ is the same thing as ‘I eat what I see!’” “You might just as well say,” added the March Hare, “that ‘I like what I get’ is the same thing as ‘I get what I like!’” “You might just as well say,” added the Dormouse, which seemed to be talking in its sleep, “that ‘I breathe when I sleep’ is the same thing as ‘I sleep when I breathe!’”<sup>5</sup>

Similarly, an excellent contract says what the parties mean, and means what the parties say, which are two different things.

**2. Clarity.** The contract is understandable to the reader. Clarity is the opposite of ambiguity; it means that the provisions are drafted so their meaning is clear, and capable of only one plausible interpretation—that being the one both parties intended. Clarity is achieved by structuring sentences properly, choosing words carefully, and ensuring that the terms are internally consistent and complete.

**3. Efficiency.** The contract is “long enough and not one word longer.”<sup>6</sup> Efficiency means that each word included in the contract serves a clear purpose. Efficiency also means that each concept is expressed only once so the contract is free of clutter and repetition. Although few lawyers would argue that meaningless words should be included in a contract, the challenge is to identify inefficient words and phrases. Efficiency prefers the shortest words and sentences that successfully convey the intended meaning. “The briefest words and forms of expression, provided they convey the meaning intended, are to be preferred to the longer words and forms of expression.”<sup>7</sup>

**4. Simplicity.** The contract is simple to read and comprehend. 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.”<sup>8</sup>

**5. Resonance.** The contract resonates with its audience like mama bear’s porridge in *Goldilocks and the Three Bears*. The language is not too pompous and not too casual; it is written at an appropriate readability level for the audience, using professional language and proper grammar.



## Exercise 1.2:

Identify which characteristic of excellent drafting is missing from each example.

(Hint: several 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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## 1.3 Attend to Appearance.

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Regardless of how perfect the language is, if the contract does not have a professional appearance, the audience is going to be suspicious 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 "pretty." To "**pretty up**" a contract means to be sure it has all of the following attributes:

- Readable typeface and font size;
- Plenty of "white space" on the page;