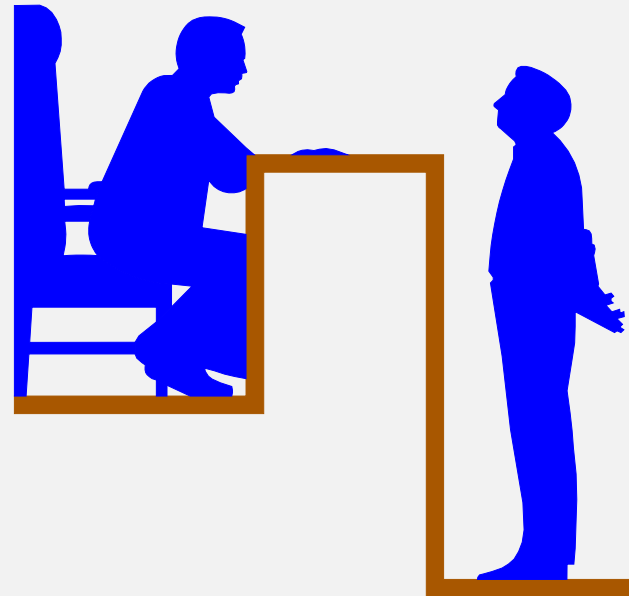


Basics of Contract Drafting

James W. Martin, Esq.
St. Petersburg, Florida
Board Certified in Real Estate Law
by The Florida Bar

Are you ready to defend your Contract in court?



Goal:

draft the contract so clearly that it stays out of court

Before you write the first word

- Ask your client to list the deal points
- Engage your client in “what if” scenarios
- Ask your client for a similar contract
- Search your forms library and online

More (before you write)

- Don't let your client sign a letter of intent without this wording:

- LETTER OF INTENT
- Possible Seller: _____
- Possible Buyer: _____
- Property: _____
- Date: _____, 20_____
- This is a non-binding letter of intent that contains provisions that are being discussed for a possible sale of the Property named above from the possible Seller named above to the possible Buyer named above. This is not a contract. This is not a legally binding agreement. This is merely an outline of possible contract terms for discussion purposes only. This is being signed in order to enable the Possible Buyer to apply for financing of the purchase price. This letter of intent is confidential and shall not be disclosed to anyone other than the parties and their employees, attorneys and accountants and the possible lenders of the Possible Buyer. The terms of the transaction being discussed are attached hereto, but the terms (and the possible sale itself) are not binding unless and until they are set forth in a written contract signed by Possible Seller and Possible Buyer. This is not such a contract. The attached terms are written only as an example of how a contract might read, and it does not mean that the attached terms are or ever will be legally binding.

Writing that first word

- Start with a simple generic contract form

CONTRACT

• AGREEMENT made this _____ day of _____, 20____, between _____, hereinafter called " _____", and _____, hereinafter called " _____".

• WHEREAS, _____;

• NOW THEREFORE, in consideration of their mutual promises made herein, and the sum of \$_____, receipt of which is hereby acknowledged by _____ from _____, the parties, intending to be legally bound, hereby agree as follows:

• 1. Recitals. The parties agree that the foregoing recitals are true and correct and are incorporated herein by this reference.

• 2. _____

• 3. Miscellaneous. Time is of the essence of this agreement. This agreement is made in the State of Florida and shall be governed by Florida law. This is the entire agreement between the parties, supersedes all prior discussions, and may not be modified or amended except by a written document signed by the party against whom enforcement is sought. This agreement may be signed in more than one counterpart, in which case each counterpart shall constitute an original of this agreement. Paragraph headings are for convenience only and are not intended to expand or restrict the scope or substance of the provisions of this agreement. Wherever used herein, the singular shall include the plural, the plural shall include the singular, and pronouns shall be read as masculine, feminine or neuter as the context requires. The prevailing party in any litigation or arbitration relating to this agreement shall be entitled to recover its reasonable attorneys fees from the other party for all matters, including but not limited to appeals. _____ County, Florida, shall be proper venue for any litigation involving this agreement. This agreement may not be assigned or delegated by either party without the prior written consent of the other party.

• IN WITNESS WHEREOF, the parties have signed this agreement as of the day and year first above written.

• _____

More (first word)

- Name the file “Contract draft #1 2016.03.24”
- State the correct legal names of the parties in the first paragraph

Verify entity name with Secretary of State



More (first word)

- Identify the parties by nicknames in quotes to define:
"Buyer" "Seller" "Plaintiff"
"Defendant"
- Be careful when using legal terms for nicknames:
"Contractor" "Agent"
- Include a blank for the date in the first paragraph

More (first word)

- Include recitals to provide background:
- **Whereas, Seller owns real property in _____ County, Florida, legally described as follows ("Property"):**

- **Whereas, Buyer desires to purchase the Property;**

More (first word)

- Outline the contract; write out and underline paragraph headings, in their logical order
- 1. Recitals.
- 2. Settlement.
- 3. No Admission.
- 4. Releases.
- 5. Confidentiality.
- 6. Breach.
- 7. Miscellaneous.

More (first word)

- Complete each paragraph by writing the terms that apply to it
- Keep a pad at hand to remember clauses to add
- Repeat yourself only when necessary for clarity
- Writing need not be hard; it's just thinking on “paper”

What to watch out for when writing

- Title it “Contract” or “Agreement”
- Write in short sentences:
 - Seller agrees to sell Property to Buyer, and Buyer agrees to purchase Property from Seller, on the following terms:

More (watch out)

- Write in active tense:
 - **I hit the ball.**
- Not in passive tense:
 - **The ball was hit.**

More (watch out)

- Don't say "biweekly"
 - Say "every other week" or "twice a week"
- Don't say "active termites and organisms"
 - Say "active termites and active organisms" or "organisms and active termites"
- Don't say "Lessor" and "Lessee"
 - Say "Landlord" and "Tenant"

More (watch out)

- Watch out when using “herein”
(wherein lies herein?)
- Write numbers as both words and numerals: ten (10)
- When you write “including” consider adding “, but not limited to,”

More (watch out)

- Don't rely on rules of grammar to resolve ambiguous writing
- Authorities differ on grammar
- Test: remove all periods and commas, then read it

More (watch out)

- Don't be creative with words
- Be consistent: use the same word over and over for the same meaning
- Be consistent in grammar and punctuation:
dates, numbers, capitalizing, commas and punctuation
- Consider including choice of law, venue selection and attorneys fees clauses

Write for the judge and jury

- Assume the reader is a knowledgeable layman
- Explain technical terms and concepts

More (judge and jury)

- Attorney David Boies, in re his closing argument in the Microsoft antitrust trial:

“Obviously, the judge looked at me as a partisan. But I wanted to perform, as much as possible, a law clerk's role.”

(Ken Auletta, *World War 3.0: Microsoft and Its Enemies* page 287)

More (judge and jury)

- Define words when first used
- Define a word with capitals and quotes:
 - `Wherever used herein, the word "Goods" means the goods that Buyer agrees to purchase from Seller under this Contract.`
 - `or`
 - `Buyer hereby agrees to purchase from Seller ten (10) frying pans, hereinafter called the "Goods."`

Keep your client informed AS you write

- All contracts should come with a cover letter
- Tell your client the ideas that come as you write
- Inform your client of the risks

What to do after the first draft is written

Check the:

- Spelling
- Paragraph numbering
- Cross references to sections

Use both computer and manual proofing

More (after first draft)

- Let your associate, partner, secretary or paralegal read it
- Let your client read it
- Name the second draft “Contract draft #2 2016.03.25”

More (after first draft)

- Save drafts as multiple files in client folder:
 - “Contract d1 2016.03.24.docx”
 - “Contract d2 2016.03.24.docx”
- Make a redline comparison using Word:
 - Tools | Track Changes | Compare Documents

How to print & sign the Final draft

- Print all pages using the same type of paper, and if pages are changed reprint the entire document
- Sign in blue ink, not black ink
- Initial every page

More (print & sign)

- Identify parties and witnesses by providing blank lines below signatures for printed names and addresses:
 - Seller:
 - Sign: _____
 - Print: _____
 - Address: _____
 - _____

More (sign & print)

- Be sure that corporate officers include their titles, the corporation name and the words “by” and “as”:

**ABC Corporation, a Florida
corporation**

By: _____

As its: _____

More (sign & print)

- Add a notary clause that complies with the notary law where the contract is signed:

STATE OF FLORIDA

COUNTY OF PINELLAS

The foregoing instrument was acknowledged before me this
_____ day _____, _____, by _____.

Notary Public-State of Florida:

sign _____

print _____

Personally Known _____; OR Produced Identification ____

Type of Identification Produced: _____

Affix Seal Below:

Useful references

- Strunk & White, *The Elements of Style*
- Garner, Bryan A., *The Elements of Legal Style*, Oxford University Press 2002
- Adams, Kenneth A., *A Manual of Style for Contract Drafting*, 3d Ed., ABA 2013
- Kuney, George W., *The Elements of Contract Drafting*, 3d Ed, West 2011
- Garner, Bryan A., *Garner's Modern American Usage*, Oxford University Press 2009

Sample forms in appendix

- Basic Form of Contract
- Basic Form of Notary Acknowledgement
- Basic Form of Letter of Intent

Conclusion

- Be careful with your words
- Don't regret what you say or how you say it

THE END

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