

**The Nuts & Bolts of Contract Drafting:
From Basic to Advanced Topics**

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Supplemental Outline

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Exhibit A: Useful Resources for Learning and Improving Drafting Skills

Exhibit B: Summary Tables: Anatomy of a Typical Contract and of Categories of Language

Exhibit C: Fixing Words and Phrases from Ye Olde Contracte

Exhibit D: Attorney Bio: Vincent R. Martorana

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I. SOME CONTRACT-DRAFTING PHILOSOPHY

A. Legal Drafting vs. Conversation/Prose Writing

1. “Forget Common Sense. Anyone can draft a contract that serves as a mere guidebook to the manner in which the parties’ respective actions should be conducted. Don’t draft a clause, and don’t interpret that clause, only in the manner in which that clause is most likely to be read; consider the manner in which drafted language can be ambiguous and “plug the holes.”
2. The Who? What? When? Where? How? Hierarchy. Unlike prose writing, the basis for the inclusion of provisions in (or exclusion of provisions from) a contract should not matter from a contract interpretation/construction standpoint. Note that understanding what the parties intended is different than understanding *why* they intended it.
 - a. Most important. Who? What?
 - b. Of Lesser Importance. When? Where? How?
 - c. Irrelevant. Why?

B. Preferences in Contract Drafting

1. General Preferences. My general preferences in contract drafting are listed below. The preferences are not always directly proportionate to one another. For example, a reduction in ambiguity might result in a lengthier contract.
 - a. ***Unambiguous** is better than **Ambiguous**
 - i. In my opinion, this is the most important of the contract drafting preferences.
 - b. **Concision** is better than **Redundancy**
 - c. **Predictability** is better than **Uncertainty**
 - d. **Plain English** is better than **Jargon**

- e. **Precision** might or might not be better than **Vagueness**
- f. **Consistency** is better than **Inconsistency**
- g. **Straightforward** is better than **Confusing**
- h. **Shorter** is better than **Longer**

C. Contract-drafting Resources

See Exhibit A for a list of my recommended contract-drafting resources.

II. BASIC CONTRACT-DRAFTING CONCEPTS

See Exhibit B for summary tables setting forth the typical “anatomy” of a contract and categories of contract-drafting language.

A. Preamble

1. Typical Contents. The preamble of a contract typically contains the following information:
 - a. the name/type of the contract;
 - b. the date of the contract; and
 - c. the parties to the contract (including, for entities, jurisdiction of organization and entity type).

Practice Tip: It’s best to save descriptive relationships between the parties for the recitals or the body of the contract (e.g., a representation from a party that another party to the contract is such first party’s direct and wholly owned subsidiary).

2. Other Information. Other information should be excluded from the preamble.

Example:

- This ASSET PURCHASE AGREEMENT (this “Agreement”), dated as of June 16, 2015, is made between Big Bad Corporation, a Delaware corporation (the “Buyer”), and Little Guy, LLC, a New York limited liability company (the “Seller” and, collectively with the Buyer, the “Parties”).

B. Recitals and Lead-in

1. Recitals.
 - a. Purpose. The following are some purposes of the recitals to a contract:

- i. describing the background with respect to the contract and giving the reader context for the contract;
- ii. setting up certain defined terms;
- iii. serving as evidence of intent of the parties for entering into the contract; and
- iv. helping to resolve any ambiguities in the body of the contract.

Practice Tip: Do not rely on the recitals to resolve ambiguity.

- b. No Operative Provisions. Do not include operative provisions in the recitals. Operative provisions belong in the body of the contract, after the contract lead-in (see below).

Examples:

- ☺ A. The Parties desire to amend the Loan Agreement in order to, among other things, extend the maturity date of the Loan to June 16, 2015.
 - ☹ A. The Parties hereby amend the Loan Agreement to extend the maturity date of the Loan to June 16, 2015.
 - ☹ A. The Parties shall take such actions as are necessary to implement the terms of this Agreement.
2. Lead-in. The lead-in, which immediately follows the recitals and immediately precedes the body of the contract, indicates that the parties agree to what follows the lead-in.
 - a. Keep the lead-in simple.

Example:

- ☹ NOW, THEREFORE, in consideration of the premises and the respective covenants, representations, warranties and undertakings of the parties hereinafter set forth, and for other good and valuable consideration, the

receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

- ☺ The Parties hereby agree as follows:
- b. If there is genuine concern about whether consideration exists to support the parties' entry into the contract, the mere recitation in the lead-in that consideration exists will not adequately address that concern. Rather, in such a circumstance, include a formal acknowledgment of consideration in the body of the contract as to the consideration.

C. Body

1. Definitions.

- a. General. Defined terms in contracts are extremely useful tools for capturing complex concepts in a concise manner and using those concepts repeatedly throughout a document.

Examples:

- The Seller is engaged as a going concern in the business of designing, manufacturing, marketing, distributing, and selling paper clips (such business, the "Business").
- The Company shall not sell or distribute (each of the foregoing, a "Transfer") the Shares.
- The Company shall not sell, **assign, pledge, encumber, hypothecate, distribute (as a dividend or otherwise), transfer, or otherwise dispose of** (each of the foregoing, a "Transfer") the Shares.
 - b. Including Uncustomary Concepts. Terms can be defined to include concepts that are not customarily considered to be included in a given word or phrase.

Example:

- “Attorney” means an attorney, a legal assistant, a chef, or any individual residing in the state of New York.
 - c. “Stacking” Defined Terms. Defined terms can be “stacked” so that they build upon other defined terms.

Example:

- This STOCKHOLDERS’ AGREEMENT (this “Agreement”) is made as of June 16, 2015, between Example & Co., Inc., an Idaho corporation (the “Company”), those holders of the Company’s Series A Preferred Stock listed on Exhibit A (the “Series A Holders”), those holders of the Company’s Series B Preferred Stock listed on Exhibit B (the “Series B Holders” **and, collectively with the Series A Holders, the “Preferred Stockholders”**), and those holders of the Company’s common stock that are listed on Exhibit C (the “Common Stockholders” **and, collectively with the Preferred Stockholders and those persons that become a party to this Agreement in accordance with the terms hereof, the “Holders”**). **The Holders and the Company are collectively referred to herein as the “Parties”.**
 - d. Defining Terms “On Site” vs. Defining Terms in a “Definitions” Provision. A term can be defined “on site,” meaning that it is defined in an operative provision in which it is used (usually with an appropriate cross-reference in a “definitions” section) or in a separate definitions section. The decision regarding the manner in which to define a term depends upon the context.

“On site” Example:

- “Transfer” has the meaning set forth in Section 2.3.

...

Section 2.3. The Company shall not sell, assign, pledge, encumber, hypothecate, distribute (as a dividend or otherwise), transfer, or otherwise dispose of (each of the foregoing, a “Transfer”) the Shares.

“Definitions Provision” Example:

- “Transfer” means, with respect to a given asset, any sale, assignment, pledge, encumbrance, hypothecation, distribution (as a dividend or otherwise), transfer, or other disposition of such asset. When used as a verb, “Transfer” has a correlative meaning.

...

Section 2.3. The Company shall not Transfer the Shares.

- e. Using the lower-case of a term within that term’s definition. It is perfectly acceptable to include the lower-case of a term within that term’s definition.

Example:

- “Transfer” means any transfer, sale, pledge, hypothecation, encumbrance, or other disposition.
- “Permitted Automobile” means any automobile that is permitted on the Long Island Expressway, including, without limitation, my old 1983 Pontiac Firebird.
 - f. Embedded Obligations. Do *not* embed obligations within a given definition. This conflates administrative language (discussed below), which is the category of language that is used to define a term, with obligations.

Example:

- ⊖ “Net Earnings Statement” means a statement of the Company’s net earnings during the Post-Closing Period in the form attached as Exhibit A, **which the Company shall provide to the Seller no later than 30 days after the last day of the Post-Closing Period.**
 - g. Unbounded Definitions. Do *not* simply use “includes” to define a defined term. Doing so results in ambiguity as to the scope of that term.

Example:

⊖ “Permitted Automobile” includes, without limitation, my old 1983 Pontiac Firebird.

h. Using more than one term to define a concept. Do *not* use more than one term to define a given concept. Doing so is redundant.

Example:

⊖ Verbiage Co., a Delaware corporation (“Verbiage” or the “Company”), is a subsidiary of the Parent.

i. Do not use “shall”. Do not use “shall” when defining a term. As discussed below, “shall” should only be used to create an obligation (and certainly not as a substitute for “and the parties really mean it!”).

Example:

⊖ “Securities Act” shall mean the Securities Act of 1933, as amended.

2. Language of Performance.

a. Usage. Language of performance conveys actions that are being taken *by virtue of* the parties entering into a contract.

Practice Tip: To identify and convey language of performance, think of the word “hereby.”

Practice Tip: Use the active voice, not the passive voice.

Example:

⊖ The License is **hereby granted** to the Licensee by the Licensor.

😊 The Licensor **hereby grants** the License to the Licensee.

b. Distinction from Obligations. Language of performance serves a different role, and has a different effect, than

obligations. Language of performance conveys actions that are being taken *by virtue of* the parties' entry into a contract; obligations set forth actions that a party is required to take or refrain from taking.

3. Obligations.

- a. Usage - Obligations. An obligation conveys what a party has to do pursuant to a contract.

Practice Tip: To identify and convey an obligation, think of the word "shall."

Example:

- The Purchaser **shall pay** the Purchase Price to the Seller at the Closing.

- b. Usage - Prohibitions. A prohibition conveys what a party is prohibited from doing pursuant to a contract.

Practice Tip: To identify and convey a prohibition, think of the phrase "shall not."

Example:

- Each of Moses and his constituents **shall not** covet his respective neighbor's wife.

- c. "Shall" vs. "will" vs. "must".

- i. Use "shall" to convey an obligation. Use "shall not" to convey a prohibition. **Do NOT use "shall" otherwise.**

Practice Tip: Substitute (in your mind) the phrase "hereby has/have the duty to" in place of "shall" to ensure correct usage of the word "shall."

Practice Tip: Avoid the temptation of using "shall" as a proxy for "...and I really mean it!"

- ☹ This Agreement shall constitute the entire agreement of the Parties with respect to the subject matter hereof.

Practice Tip: Do not use “is obligated to,” “agrees to” (other than in the lead-in to the body of the contract), “covenants and agrees to,” “shall be obligated to,” or “undertakes to” to convey a contractual obligation.

- ii. Use “will” to convey futurity. “Will” more naturally conveys futurity than “shall.” “Must” cannot convey futurity.

Example:

- Davey hereby bets Lou that the Mets will [not “shall”] win the World Series this year.
- iii. Use of “must”. Use “must” (a) to convey that a duty exists, but that such duty derives from a provision other than the provision in which “must” is being used or (b) in connection with conveying a condition to be satisfied before a conditional clause is to apply.

Example 1:

- ☺ If companies **must [are required to]** pay an excise tax on the Product of 20% or less pursuant to applicable law, then Newcomer Co. **shall [hereby has a duty to]** sell the Product.
- ☹ If companies **shall [hereby have a duty to]** pay an excise tax on the Product of 20% or less pursuant to applicable law, then Newcomer Co. **shall [hereby has a duty to]** sell the Product.

Example 2:

- ☺ In order for Lindsay to drive the car home from the pub, she **must** first convince her mom to give her the keys.
- ☹ In order for Lindsay to drive the car home from the pub, she **shall** first convince her mom to give her the keys.

- d. Active Voice vs. Passive Voice.
- i. General Rule. Use the active voice rather than the passive voice when imposing an obligation because the active voice:
- (a) makes clear which party is the actor and has the obligation;
 - (b) is more concise than the passive voice;
 - (c) is easier to read and more natural than the passive voice; and
 - (d) is consistent with mentally substituting “hereby has/have the duty to” for “shall.”
- ii. Structure (with respect to obligations).
- (a) Active voice: [actor] + shall/shall not + [verb (or verb phrase)] + [object being acted upon]

Example:

- My daughter shall pick up the toys.
- (b) Passive voice (with identified passive agent): [subject being acted upon] + shall/shall not + [verb (or verb phrase)] + by + [passive agent]

Example:

- The toys shall be picked up by my daughter.
- (c) Truncated passive voice (no identified passive agent): [subject being acted upon] + shall/shall not + [verb (or verb phrase)]

Example:

- The toys shall be picked up.
 - e. Third Parties. You can't impose contractual obligations on persons that are not party to the contract. Don't purport to do so.

Example:

- ☹ Upon final resolution of all Disputed Items, the Accountants shall issue a report showing a calculation of the Final Net Working Capital. The Accountants shall make their determination of the Disputed Items within 60 days after having been selected.
- ☹ Upon final resolution of all Disputed Items, **the Accountants must issue** a report showing a calculation of the Final Net Working Capital. **The Accountants must make** their determination of the Disputed Items within 60 days after having been selected.
- ☹ Upon final resolution of all Disputed Items, **the Parties shall cause the Accountants to issue** a report showing a calculation of the Final Net Working Capital. **The Parties shall cause the Accountants to make** their determination of the Disputed Items within 60 days after having been selected.
- ☺ If the Parties are unable to resolve any disagreement as to one or more Disputed Items within 30 days after the Receiving Party's receipt of a Protest Notice, then the Parties **shall promptly engage** Big Accountant Co. (the "Accountants") by signing an engagement letter with the Accountants pursuant to which, among other things, the Accountants **agree to comply with** procedures set forth in this Section 2.4(b)(iii)....The Parties **shall use their respective reasonable best efforts to cause** the Accountants to reach a final determination with respect to all Disputed Items (such determination, a "Final Determination") and to provide to the Parties, no later than the 60th day after the Accountants have been engaged pursuant to this Section 2.4(b)(iii), a report with respect to the NWC Statement (the "Final Determination Report") that includes a calculation of the Net Working Capital.

4. Discretionary Language.

- a. Usage. Discretionary language conveys actions that a party is permitted to do.

Practice Tip: To identify and convey discretionary language, think of the phrase “is/are permitted to.”

Practice Tip: Use discretionary language only as an exception to express or implied prohibitions.

Practice Tip: Do not use the following to convey discretionary language: “is/are authorized to,” “has/have the sole discretion to,” “has/have the option to,” or “is/are free to.”

- b. “May”: “Is/Are permitted to” or “might possibly”? Do not use the word “may” to convey discretion because “may” could connote either (1) discretion (“is/are permitted to”) or (2) possibility (“might possibly”).

Example:

- ☹ The Seller shall deliver in a timely manner all Products that are required to be delivered pursuant to all purchase orders that Key Customers **may submit** during the Pre-Closing Period.

There is ambiguity here: is the provision referring to (1) all the Purchase Orders that Key Customers “might possibly submit” or (2) only those Purchase Orders that Key Customers “are permitted to submit”?

Practice Tip: You can do away with using “may” in contracts altogether!

- c. No “Naked” Discretion. Use discretionary language as an exception to an express or implied prohibition. Do not “give” a party the right to take an action that such party is not otherwise prohibited from taking.

Example:

- Dad: “Matthew, you **are permitted to eat** broccoli or spinach with your dinner.”
 - Matthew: “Great! I’ll have chocolate pudding!”
5. Language of Declaration. Language of declaration conveys assertions of fact that are memorialized in a document.
- a. Representations and Warranties.
 - i. Usage. Representations and warranties are statements made by a party of what was, is, or will be true to induce someone to enter into a contract.

Practice Tip: Because a representation is a statement of fact, it cannot be “breached.” Rather, a representation is either accurate or inaccurate.

Note: For purposes of this outline, we’ll put aside the debate as to whether the “warranties” part is necessary or advisable.

- ii. Control; Knowledge. A representation or warranty need not be within the control or knowledge of the representing party.

Examples:

- Within control/knowledge: Al represents and warrants to George that all of the papers he has written through the date hereof concerning global warming attribute the primary causes of global warming to humans.
- Not within control/knowledge: Al represents and warrants to George that at least 51% of all reports written through the date hereof by reputable scientists concerning global warming attribute the primary causes of global warming to humans.
 - iii. The Lead-in. If a party is making a series of representations, those representations are usually preceded by a lead-in.

- (a) If one party is making representations to one other party, then structure the lead-in as follows: “[Party A] represents to [Party B] as follows:...”
- (b) If more than one party is making representations to one other party, then structure the lead-in as follows: “Each of [Party A] and [Party B] represents to [Party C] as follows:...”

Practice Tip: Do not state that parties “jointly and severally represent” to another party. “Joint and several” is a liability concept (e.g., for use in connection with drafting indemnification provisions).

- iv. Time of Event/Circumstance. Representations can be made with respect to past, present, or future events or circumstances.

Examples – Past Events/Circumstances.

- Matt represents and warrants to Dad that, during December 2012, Matt did not make fun of Julia. (*Past circumstance or event; within the representing party’s control/knowledge*)
- Matt represents and warrants to Dad that, during December 2012, Caroline did not make fun of Julia. (*Past circumstance or event; not within the representing party’s control/knowledge*)

Examples - Present Events/Circumstances.

- Julia represents and warrants to Dad that Julia is a member of the Justice League. (*Present circumstance or event; within the representing party’s control/knowledge*)
- Julia represents and warrants to Dad that Schedule A contains a complete and accurate list of all people with whom Caroline went to the movies yesterday. (*Present circumstance or event; not within the representing party’s control/knowledge*)

Examples – Future Events/Circumstances.

- Caroline represents and warrants to Dad that Caroline will not whine at the dinner table. (*Future circumstance or event; within the representing party's control/knowledge*)

Practice Tip: Consider whether a representation regarding a future event or circumstance is better phrased as an obligation. In that regard, also consider the remedies available in respect of inaccurate representations vs. breaches of obligations. For example, indemnification provisions in purchase agreements often provide for deductibles and caps in respect of losses relating to inaccuracies of certain representations, but do not apply these limitations to losses relating to breaches of obligations.

- Caroline **shall not** whine at the dinner table.
- Caroline represents and warrants to Mommy that none of Caroline's friends will whine at the dinner table. (*Future circumstance or event; not within the representing party's control/knowledge*)

We could phrase this as **an obligation**, as follows:

- Caroline **shall encourage** each of her friends to not whine at the dinner table.
- ☹ Each of Caroline's friends **shall not whine** at the dinner table.

b. Acknowledgments.

- i. Usage. Acknowledgments are statements in a contract that a party accepts as true.

Example:

- The Shareholder acknowledges that the Shares have not been registered under the Securities Act.
 - ii. Purpose. Acknowledgments can serve to expressly align the intentions of the parties to a contract and can serve as an estoppel against a party.

Practice Tip: Use an acknowledgment for important statements that you want a party to acknowledge, rather than putting such statements in the recitals.

- iii. Do not introduce other categories of language. Do not use an acknowledgment to introduce other categories of language.

Example:

☹ The Purchaser acknowledges that the Purchaser shall pay the Closing Costs at the Closing.

- iv. Eliminate adverbs. There is no need to use an adverb, such as “unconditionally” or “expressly,” before using the word “acknowledges.”

Example:

☹ Luke Skywalker begrudgingly acknowledges that the Dark Side of the Force has a certain appeal.

- v. Do not conflate with other categories of language. Do not “mix” acknowledgments with other categories of language. Separate each concept into its own sentence or clause.

Example:

☹ The Consultant acknowledges and agrees that he has reviewed a copy of, and shall comply with, the Company Policies as in effect on the Effective Date.

☺ The Consultant acknowledges that he has reviewed a copy of the Company Policies as in effect on the Effective Date. The Consultant shall comply with the Company Policies.

6. Administrative Language.

- a. Usage. Administrative language is language that (1) states rules governing an event or circumstance or (2) addresses the scope, meaning, or duration of a contract provision.

Practice Tip: Think: “The rules of the game.”

Example – Rules Governing an Event or Circumstance:

- Any attempted transfer in contravention of Section 2.1 will be void.

Example – Language Addressing the Scope, Meaning, or Duration of a Contract Provision:

- This Agreement terminates on December 31, 2015.
 - b. Verb Tense. In conveying administrative language, (1) use the present tense for policies that apply on the effectiveness of the contract and (2) use “will” for policies relating to future events that might or might not take place.

Examples:

- This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof.
- If the Prevailing Interest Rate drops below the Adjusted Rate, then this Agreement will thereby terminate.

III. SIGNATURE PAGES

A. The Lead-in

1. Don't use "IN WITNESS WHEREOF" as a lead-in on the signature page. It is unclear what that language means and what benefit it provides.
2. Don't use "executes and delivers" in the lead-in on the signature page. Delivery of a contract is not determined by what is stated in that contract.

B. Practice Tips

Practice Tips:

- On the page before the signature page, use "[Signature page follows]" rather than "[THE REMAINDER OF THIS PAGE HAS BEEN INTENTIONALLY LEFT BLANK.]" First, the recommended phrasing is shorter. Second, when a contract is ready for signature, there might not be all that much "blank" at the bottom of the penultimate page.
- Use a "Section Break" prior to the signature page, rather than a "Page Break." Doing so will enable you to separately adjust or delete the headers and footers on the signature page without affecting the headers and footers on the pages to the main portion of the contract.
- Make sure that you, your client, and your adversarial counterpart are aligned with respect to the appearance of the signature pages, as well as the number of original signature pages that should be obtained for each document.
- Scan signature pages and entire documents once contracts have been signed.
- Be mindful of negotiable instruments and documents for which there should only be one original signature page (and whether counterpart signature pages are acceptable).

IV. MORE-ADVANCED CONTRACT-DRAFTING CONCEPTS

A. Conditional Language

1. Definition of a Condition. A condition is an uncertainty upon which the applicability of certain contract language depends.
2. Components.
 - a. Conditional clause
 - b. Subordinator (e.g., *if, as long as, so long as, until, unless*)
 - c. Matrix clause

Example:

- If the Seller becomes aware that a representation contained in Article 3 is inaccurate, then *the Seller shall promptly notify the Buyer thereof*.
 - **Subordinator**, conditional clause, *matrix clause*

Practice Tip: Use “then” to create an “if..., then...” structure; by doing so, you’ll clearly delineate the conditional clause and the matrix clause.

Practice Tip: Avoid using “provided that” to create a condition. Depending upon the context, it can be unclear whether “provided that” is being used to create a condition, limitation, addition, or exception.

3. Do not use “shall”. Do not use “shall” in the conditional clause.

Example:

- ☹ If the Borrower shall be in default, then the Interest Rate will increase to the Default Rate by virtue thereof.
- ☺ If the Borrower defaults, then the Interest Rate will increase to the Default Rate by virtue thereof.

4. “If” vs. “To the extent that”.
 - a. “If” is a “binary” concept; the language in the matrix clause will apply to its full extent if the language in the conditional clause is true.
 - b. “To the extent that” is a “sliding scale” concept; it implies that the language in the matrix clause will apply to varying degrees.

Practice Tip. Don’t use “to the extent that” for conditional clauses expressing a “binary” concept.

- ☹ To the extent that the Company is a Delaware corporation, the Company shall file all applicable reports required by Delaware state law.

B. Language of Exception and Subordination

1. Identifying Language.

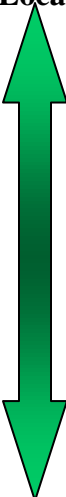
“except”	Ernie shall not annoy Bert, except that Ernie is permitted to annoy Bert on Christmas morning.
“subject to”	<u>Section 1</u> . Subject to <u>Section 2</u> , Ernie shall not annoy Bert. <u>Section 2</u> . Ernie is permitted to annoy Bert on Christmas morning.
“notwithstanding”	Ernie shall not annoy Bert. Notwithstanding the immediately foregoing sentence, Ernie is permitted to annoy Bert on Christmas morning.
“except as otherwise provided in”	Except as otherwise provided in the Lease, Ernie shall not annoy Bert.

Practice Tip: You don’t need to use both “subject to” and “notwithstanding” to convey a single subordinated concept.

2. Localized Exceptions vs. Broad Inoculations.

a. Location (or potential location) of trumping language

Examples:

- 
- Each Party shall not make any public statements with respect to the Transaction; **except** that each Party is permitted to make internal announcements to their respective employees regarding the Transaction.
 - **Subject to Section 9.5**, each Party shall not make any public statements with respect to the Transaction.
 - **Except as otherwise permitted hereunder**, each Party shall not make any public statements with respect to the Transaction.
 - **Except as otherwise permitted under the Confidentiality Agreement**, each Party shall not make any public statements with respect to the Transaction.
 - **Except as the Parties have otherwise agreed or might otherwise agree**, each Party shall not make any public statements with respect to the Transaction.

b. Scope of trumping language

Example: Subject to Section 9.5, each Party shall not make any public statements with respect to the Transaction.

<u>Length of trumping language</u>	
• Short	<u>Section 9.5</u> . Each Party is permitted to disclose the Transaction to Bob.
• Long	<u>Section 9.5</u> . Each Party is permitted to disclose the Transaction under the following 37 circumstances:...
<u>Specificity/Vagueness of trumping language</u>	
• Specific	<u>Section 9.5</u> . Each Party is permitted to disclose to Sonny and Cher the existence of the Merger Agreement, the identity of the Parties, and the Purchase Price.
• Vague	<u>Section 9.5</u> . Each Party is permitted to disclose the Transaction to the extent that it is reasonably necessary to do so.

Practice Tip: If possible, take a “localized” approach.

3. “Trailing Exceptions”. Be clear how “far back a trailing exception reaches.”

Examples:

- ☹️ The Seller is not obligated to indemnify a Buyer Indemnitee in respect of a Claim: (i) to the extent that Losses in respect of all Claims exceed \$1,000,000; and (ii) except to the extent that the amount of Losses suffered by the Buyer in respect of such Claim exceeds \$50,000; except that **the foregoing** does not apply with respect to Claims based upon breaches of the Seller’s obligations set forth in Section 6.5.
 - 😊 The Seller is not obligated to indemnify a Buyer Indemnitee in respect of a Claim: (i) to the extent that Losses in respect of all Claims exceed \$1,000,000; and (ii) except to the extent that the amount of Loss suffered by the Buyer in respect of such Claim exceeds \$50,000; except that **the foregoing clauses (i) and (ii)** do not apply with respect to Claims based upon breaches of the Seller’s obligations set forth in Section 6.5.
4. Implied Exceptions. Don’t imply an exception in circumstances in which there is no exception. Doing so implies a prohibition.

Example:

- ☹️ During the Post-Closing Period, the Buyer shall not sell the Assets to any Competing Enterprise; except that, after the Post-Closing Period, the Buyer is permitted to sell the Assets to the Key Vendors.
5. “Unless the context otherwise requires”. Do not use “unless the context otherwise requires”; that phrase is ambiguous.

C. The Concept of “Deemed”

1. Function of “deemed”. Creates (or potentially creates) a legal fiction for purposes of a contract (or portion thereof).

Examples:

- All apples are deemed to be vegetables.

- If Jack passes the bar exam, then he will thereby be deemed to be worthy of a job at a big law firm.
2. Use of the Passive Voice. It is acceptable to use the passive voice to express a “deemed” concept.
 3. “not [be] deemed to” vs. “[be] deemed not to”. These two expressions have different effects.
 - a. “not [be] deemed to” negates a “deemed” rule.
 - b. “[be] deemed not to” is a “deemed” rule that expresses that something does not possess a certain quality or characteristic.

D. References to Time

1. Function. References to time could be used in a contract: (a) to reference the date of something or to give a date to something; (b) to specify a point in time; (c) to specify the beginning or end of a time period; or (d) to apportion a quantity per unit of time.
2. Start and End Points. Be clear as to when a referenced time period starts and ends. Consider including a time of day of a referenced date.

<p><u>Practice Tip</u>: Consider whether a time zone should be referenced.</p>
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3. Avoid “within”. Avoid using “within” when referencing a time period. “Within” might create ambiguity as to whether a referenced time period includes the end point referenced and/or whether the referenced time period is meant to refer to the period before or after a specified point in time.

Example:

- ⊗ The term of this Agreement ends at 5 p.m. New York time on June 16, 2015; except that if, **within 10 days of** a Major Event, the Company provides notice of termination of this Agreement to the Consultant, then this Agreement will thereby terminate.

E. “And,” “Or,” and “And/Or” Ambiguities

1. “And”.

- a. General. “And” concerns a set in its totality.
- b. Potential Ambiguity. Depending upon the context, it might be unclear whether the members of an “AND SET” are acting, being acted upon, or to be considered (1) collectively only, (2) separately only, or (3) either collectively or separately.
 - i. Whether there is ambiguity depends upon (among other things) the category of language being used and whether the members of the “AND SET” are the subject or the direct object of the sentence.

Example of distributive ambiguity with “and”:

⊖ Transfers and Loans made in contravention of this Agreement will be void.

- Does “made in contravention of this Agreement” modify (i) Transfers and Loans or (ii) Loans only?

2. “Or”.

- a. General. “Or” concerns a choice between members of a set.
- b. Potential Ambiguity. Depending upon the context, it might be unclear whether the members of an “OR SET” are acting, being acted upon, or to be considered (1) exclusively or (2) inclusively.
 - i. Whether there is ambiguity depends upon (among other things) the category of language being used and whether the members of the “OR SET” are subject or the direct object of the sentence.

- ii. The “exclusive or”. If “or” is read to be an “exclusive or,” then that interpretation implies that the selection of one member of the “OR SET” precludes the selection of each other member of the “OR SET.”

Examples:

- Caroline shall not eat any dessert, except that Caroline is permitted to eat for dessert ice cream or cake.
 - Inclusive “Or”: Caroline shall not eat any dessert, except that Caroline is permitted to eat for dessert ice cream, cake, *or both ice cream and cake*.
 - Exclusive “Or”: Caroline shall not eat any dessert, except that Caroline is permitted to eat for dessert ice cream or cake, *but not both ice cream and cake*.
- Moe shall not terminate any employees; except that Moe is permitted to terminate employees who are (a) knuckleheads or (b) wise guys.
 - In this instance, the attributes of the direct object might overlap. There is ambiguity as to whether Moe can terminate “knucklehead-wise guys.” And there is added ambiguity as to whether the “or” is inclusive or exclusive (i.e., whether Moe can terminate knuckleheads only, wise guys only, or both).

Practice Tip: Any given use of “and” or “or” can give rise to one or more ambiguities. If there is uncertainty, ask yourself:

- “And”: (1) collectively; (2) separately; or (3) either collectively or separately?
- “Or”: “inclusive” or “exclusive”?

3. “And/Or”.

- a. General. “And/Or” can create ambiguities. It can be used to mean “either” or “both” – and sometimes it’s unclear which alternative meaning is being conveyed.

Example:

- If ALF fails (i) to meet the Work Deadline and/or (ii) to meet the CO Deadline, then ALF will be liable to RT Jedburg.
 - If “and/or” means “either”: ALF is liable if ALF fails to meet just the Work Deadline or if ALF fails to meet just the CO Deadline (but not if ALF fails to meet both).
 - If “and/or” means “both”: ALF is liable if ALF fails to meet both the Work Deadline and the CO Deadline.
 - Potential Solution:

If ALF fails to meet any Deadline, then ALF is liable to RT Jedburg.
“Deadlines” means the Work Deadline and the CO Deadline, collectively.

F. Formulas

1. Order of Operations

Rule 1: Do what’s in the parenthesis first (trumps Rule 2)

Rule 2: Do multiplication and division first; do addition and subtraction (in each case from left to right)

2. Tips to clearly convey formulas and order of operations in contracts

- a. Use identifying leading text (e.g., “the result of,” “the sum of,” “the product of”)

☺ “Hurdle Rate” means the Base Rate plus the product of the First Target Rate and the Second Target Rate.

☹ “Hurdle Rate” means the product of the First Target Rate and the Second Target Rate plus the Base Rate.

- b. Use enumeration; use defined terms
- c. Use formatting
- d. Use algebraic variables

- e. Use examples... but be careful

G. Attachments to Contracts

1. Made part of the contract by referencing in a provision; no need to “incorporate by reference”
2. Use defined terms from the body of the contract
3. Don’t embed hidden obligations and reps (at least in disclosure schedules)
4. Practical tips
 - a. “in” not “on” an attachment
 - b. “attachment” = “exhibit”; “index”; “schedule”; “annex”; “appendix”
 - c. Don’t forget attachments to attachments!

H. Ambiguities Relating to Modifiers

1. Preceding Modifiers

- Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) **red** Honda Odyssey, Toyota Camry, or Pontiac Firebird.
- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) **red** (a) Honda Odyssey, (b) Toyota Camry, or (c) Pontiac Firebird.
- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) **red** Honda Odyssey, **red** Toyota Camry, or **red** Pontiac Firebird.
- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) (a) **red** Honda Odyssey, (b) Toyota Camry, or (c) Pontiac Firebird.

☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Pontiac Firebird, Toyota Camry, or **red** Honda Odyssey.

2. Trailing Modifiers

☹ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Honda Odyssey, Toyota Camry, or Pontiac Firebird **that is located on the Dealer's lot.**

☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) (a) Honda Odyssey, (b) Toyota Camry, or (c) Pontiac Firebird **that is located on the Dealer's lot.**

☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Pontiac Firebird **that is located on the Dealer's lot,** Honda Odyssey, or Toyota Camry.

☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) of the following **that is located on the Dealer's lot:** a Honda Odyssey; a Toyota Camry; or a Pontiac Firebird.

☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Honda Odyssey **that is located on the Dealer's lot,** Toyota Camry **that is located on the Dealer's lot,** or Pontiac Firebird **that is located on Dealer's lot.**

☺ "Dealer Car" means any car that is located on the Dealer's lot.

Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Dealer Car that is a (a) Honda Odyssey, (b) Toyota Camry, or (c) Pontiac Firebird.

3. Both Preceding and Trailing Modifiers

☹ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) **red** Honda Odyssey, Toyota Camry, or Pontiac Firebird **that is located on Dealer's lot.**

4. Opening Clauses

- ☹️ **Except as permitted by Section 6**, the Seller shall not disclose any Confidential Information and the Seller shall not take any Extraordinary Actions.
- 😊 **Except as permitted by Section 6**, (a) the Seller shall not disclose any Confidential Information and (b) the Seller shall not take any Extraordinary Actions.
- 😊 (a) **Except as permitted by Section 6**, the Seller shall not disclose any Confidential Information and (b) the Seller shall not take any Extraordinary Actions.
- 😊 The Seller shall not disclose any Confidential Information (**except as permitted by Section 6**) and the Seller shall not take any Extraordinary Actions.

5. Closing Clauses

- ☹️ The Seller shall not disclose any Confidential Information and the Seller shall not take any Extraordinary Actions, **except as permitted by Section 6**.

6. “In each case...”

- a. Can be useful for resolving ambiguity, usually for trailing clauses
- 😊 Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Honda Odyssey, Toyota Camry, or Pontiac Firebird, **in each case** that is located on the Dealer’s lot.
- 😊 Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Honda Odyssey, Toyota Camry, or Pontiac Firebird, **in each case** that is red.

b. But be careful with list items that are plural

☹ Chuck shall not buy any cars; except that Chuck is permitted to buy one or more Honda Odysseys, Toyota Camrys, or Pontiac Firebirds, **in each case** that is located on the Dealer's lot.

I. Contract Interpretation

1. Overarching question: What is the intent of the parties?

a. Determine intent at the time the contract was made

i. "Four Corners Rule": Best evidence of intent is the words on the page (i.e., within the "four corners" of the document), unless those words are ambiguous

ii. Don't use parole evidence to create ambiguity

iii. Don't inject "equity" or "fairness"

iv. Possible exception: Scrivener's error

v. Determine "manifested intent" rather than "actual intent"

2. Definition of "ambiguous"

a. A provision is ambiguous if it is [reasonably]/[fairly] susceptible to more than one meaning when interpreted by an objective reader.

b. Some other factors that might come into play in the definition:

i. an objective reader "in the position of the parties"

ii. "...who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business..."

- iii. But some courts have said that when plain, common, and ordinary meaning of a word lends itself to only one reasonable interpretation, that interpretation controls.
- iv. The contract should be viewed in light of the circumstances under which it was made.
- v. As between two interpretations, the court will not adopt an absurd interpretation.
- vi. Not ambiguous simply because one party urges an alternative interpretation.
- c. “Vagueness” distinguished
 - i. Vagueness is a lack of precision.

Example

“Vinny is tall.” (vague) vs. “Vinny is six feet, zero inches tall.” (precise)

- d. Vagueness is a type of ambiguity, but with a “spectrum” of different reasonable meanings that often depend upon context.
- e. Drafters also use vagueness of a tool.
- 3. Determining whether a provision is ambiguous
 - a. Matter of law for the court to decide
 - b. Is the language clear on its face?
 - c. Holistic principles (some overlap)
 - i. Read the contract as a whole; don’t read provisions in a vacuum.
 - ii. Provisions [must]/[should] not be interpreted so as to render any term superfluous or meaningless.

- iii. Terms should be harmonized and read in context.
 - (a) *Query whether “harmonize” means (1) interpreting so as to reduce or eliminate surplusage, or (2) to let other provisions (which might or might not be superfluous) guide the selection of one alternative interpretation over another. Meaning #2 is slightly broader.
- iv. Contracts entered into contemporaneously and for the same purpose [must]/[should] be read and interpreted together.

4. Parol Evidence

- a. Parol evidence allowed if provision is ambiguous
- b. Determining intent is a question of fact
- c. Possible exception: where parol evidence is uncontroverted or so one-sided that no reasonable person could decide otherwise
- d. Types of parol evidence
 - i. Statements of parties
 - ii. Acts of parties
 - iii. Prior dealings
 - iv. Industry custom

V. MISCELLANEOUS PROVISIONS IN CONTRACTS¹

A. Parties, Beneficiaries, and Obligees

1. Assignment and Delegation

- a. Assignment: the transfer of a right to a third party
 - i. the transfer extinguishes the transferor's right to receive performance and gives that right to the third-party transferee
- b. Delegation: a party's appointment of a third party to perform an obligations under the contract or to satisfy a condition to the other party's performance under a contract
 - i. The delegating party is not discharged from its obligation to perform under the contract
 - (a) Exception: Novation – the non-delegating party agrees that the delegating party is relieved from performing under the contract with respect to the obligation that is delegated
 - ii. The delegee becomes primarily liable to the non-delegating party; the non-delegating party is a third-party beneficiary of the delegation
- c. Courts might distinguish between “assignments” and “delegations.”
- d. Rights are generally assignable and obligations are generally delegable

¹ The author would like to thank Vanida Narrainen, Stephanie Oduro, and Andrew Silver for their help in preparing the materials relating to the subject matter of this portion of the supplemental outline.

- i. Examples of exceptions to this general rule:
 - (a) Statutes (e.g., assignment of wages)
 - (b) Personal service contracts (e.g., Luciano cannot delegate his duty to sing to Vinny)
 - (c) Assignments and delegations that are against public policy
- e. Don't just prohibit (purported) assignments and delegations (language of obligation); make them void as between the parties (administrative language)
- f. Mergers
 - i. Most courts will consider a forward merger (but not a reverse merger) to be an assignment/delegation by operation of law
 - (a) But why is any "merger" an "assignment"/"delegation"? Organizational identities are being merged.
 - (b) To be on the safe side, simply prohibit mergers.
- g. Sample provision:

Each Party shall not, and shall not purport, to assign any of such Party's rights hereunder, to delegate any of such Party's obligations hereunder, or to delegate such Party's performance in satisfaction of any conditions to any obligations of any other Party hereunder (and shall not enter into any Contract that requires any such assignment or delegation) without the prior written consent of the other Party, and any such purported assignment or delegation without obtaining such written consent will be void. [Each Party shall not merge, combine, or amalgamate with any other Person.]

2. Successors and Assigns.

a. Sample Provision:

This Agreement is binding upon, and inures to the benefit of, the parties and their respective successors and [permitted] assigns.

- b. But is this language really useful?
 - i. The assignment and delegation provision should address the extent to which rights and obligations under a contract are assignable and delegable.
 - ii. The assignment and delegation provision should also address the extent to which a party is entitled to assign rights without delegating obligations
 - iii. Better to address the issue head-on in an assignment and delegation provision
- c. Drafting point: Do not define a “Party” to mean “the Party and the Party’s successors and permitted assigns.” As best, it’s superfluous. At worst, if the Party assigns/delegates its rights/obligations, then the defined term “Party” continues to include the assignor/delegator.

3. Third-party Beneficiaries.

- a. General Rule: Only the parties to a contract can enforce the provisions of that contract.
- b. Certain Potential Exceptions: donees; creditors of a promisee
- c. To reduce the chances that a third party can enforce a contract, include a “no third-party beneficiaries” provision

[Except as provided in **Section [__]**,] no provision hereof is intended to confer, no provision hereof will confer, and no provision hereof will be deemed to confer benefits, rights, or remedies upon any Person other than upon the Parties, their respective successors, and their respective permitted assigns.

- d. Be sure to carve out any provisions for which a person is an intended third-party beneficiary (e.g., indemnification provisions)

B. Interpreting the Contract

1. Amendments and Waivers.

a. Amendments.

i. Sample Provision (each party must consent):

This Agreement can be amended if, and only if, such amendment is in writing and is signed by each Party.

(a) Administrative language

(b) “cannot be amended” rather than “the Parties shall not amend” or “the Parties are permitted to amend...only”

ii. Purpose: to prevent oral modification

iii. Exceptions: Oral modification despite “no oral modification”?

(a) “Justice” and “Equity”: Common law and courts might nonetheless overrule (e.g., to avoid “inequitable” (whatever that means) results); consistent with the Restatement of Contracts

(b) Separate contract rather than amendment to existing contract?

(c) Course of conduct to permit oral modification (e.g., the evils of the U.C.C.)

(d) Promissory Estoppel -- express promise to modify for which it is reasonably foreseeable that the other party will rely upon the promise (to take action or to refrain from taking action)

(e) Equitable Estoppel -- one party conceals or misrepresents a fact and result of enforcing

the no oral modification provision would be unjust.

- iv. Consider whether a termination is a modification (courts have construed it as such)
 - (a) To avoid any doubt, consider including “rescind” and “terminate” in the Amendments provision
- v. Multi-party contracts

This Agreement may be amended if, and only if, such amendment is in writing, and is signed by the Company and all of the Class A Common Unit Members; except that any amendment that affects the Class B Common Unit Members as a class in a materially adverse manner will not be effective unless approved by the Class B Common Unit Members holding a majority of all issued and outstanding Class B Common.

- (a) Helpful if there are many parties to a contract, particularly if there is a group of parties with the same or similar rights under the contract (e.g., passive investors in a partnership)
- (b) “Material” and “Adverse” are inherently vague terms (unless defined)
 - (1) Consider including an “including” or a “deemed”
- (c) Idiosyncratic Materiality

...and (b) any amendment that affects a Member of a class of Units in materially adverse manner relative to the manner in which other Members of a class are affected will not be effective unless approved by such Member.

- (d) Proxy to sign amendments

Any amendment to this Agreement that is approved in accordance with this **Section 8.1** will be effective as against all Parties, and each Party shall sign any

such amendment that is so approved. Each Class B Common Unit Holder hereby appoints each of the Company and each Person that the Company might designate, individually, as such Class B Common Unit Holder's proxy and attorney-in-fact, with full power of substitution and resubstitution, to sign any such amendment to this Agreement that is approved in accordance with this **Section 8.1**. The proxy and power of attorney set forth in the immediately foregoing sentence (the "**Proxy**") is given to secure the performance of the duties of the Class B Common Unit Holders under this **Section 8.1**. Each Class B Common Unit Member shall take such further action and execute such other instruments as might be necessary to effectuate the intent of the Proxy. The Proxy is irrevocable during the term hereof, is deemed to be coupled with an interest sufficient in law to support an irrevocable proxy, and operates to revoke any and all prior proxies or powers of attorney that each Class B Common Unit Holder granted with respect to the Class B Common Units. The power of attorney granted pursuant to this **Section 8.1** is a durable power of attorney and will survive each Class B Common Unit Holder's Incapacity. The Proxy terminates upon the termination hereof.

(e) Clarify that emails are not "Signed Writings"

Emails, including emails that bear an electronic "signature block" identifying the sender, do not constitute signed writings for purposes of this **Section 8.1**.

b. Waivers.

- i. Similar concerns as for amendments: actions (or inactions) or oral statements (or the lack thereof) being construed as a waiver of rights or a condition to an obligation
 - ii. Waiver of a condition vs. "waiver" of a right or remedy
 - iii. A court will not always respect a no-oral-waiver provision
- (a) Example: estoppel principle: the other party's reliance (to its detriment) on the "waiving" party's action or inaction

- iv. Best approach might be to “do what you can” to prevent oral waivers
- v. Sample Provision:

No waiver by any Party of such Party’s rights, powers, or privileges hereunder, will be binding against the other Party. No such waiver by a Party will be enforceable against such Party unless such waiver was given in a written instrument signed by such Party. The waiver by any Party of any of such Party’s rights, powers, or privileges hereunder arising because of any claimed breach, default, or misrepresentation under or with respect to a provision hereof, whether intentional or not, will not thereby extend (and will not be deemed to thereby extend) to any prior separate or subsequent breach, default, or misrepresentation, respectively, by such Party and will not affect in any way any rights, powers, or privileges arising by virtue of any such prior separate or subsequent occurrence. No failure or delay by any Party in exercising any of such Party’s rights, powers, or privileges hereunder will operate as a waiver thereof, nor will any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power, or privilege hereunder or otherwise.

2. Merger/Integration.

- a. Purpose:
 - i. Supersede prior agreements (written and oral)
 - ii. Supersede contemporaneous agreements (written and oral)
- b. Preliminary Note: Conflicting standards and court cases relating to integration and the use of parol evidence.
- c. Parol Evidence Rule: If a contract is “integrated,” then evidence of prior or contemporaneous agreements is inadmissible to contradict that contract’s written terms.
 - i. “Integrated” writing = “final” expression of the parties’ agreement in the writing.

- (a) Can use parol evidence to supplement, but not contradict
- ii. “Completely integrated” writing = “final, exclusive, and complete” expression of the parties’ agreement in the writing.
 - (a) Cannot use parol evidence (even if consistent with written terms)
 - (1) Exception: If a term or provision is ambiguous.

d. Sample Provision:

This Agreement and the Ancillary Documents (a) are a final, complete, and exclusive statement of the agreement and understanding of the Parties with respect of the subject matter hereof and thereof, (b) collectively constitute the entire agreement of the Parties with respect to the subject matter hereof and thereof, and (c) supersede, merge, and integrate herein any prior and contemporaneous negotiations, discussions, representations, understandings, and agreements between any of the Parties (including the Term Sheet and the Confidentiality Agreement), whether oral or written, with respect to the subject matter hereof or thereof.

e. Potential Exceptions:

- i. Courts might have different opinions as to whether a merger clause is conclusive evidence of integration or one factor to be used in determining integration
- ii. Course of performance might be deemed a waiver
- iii. Fraudulent inducement to enter into a contract
- iv. Oral conditions precedent to effectiveness of a contract

f. Practical considerations:

- i. In transactions with multiple deal documents, consider the scope and subject matter of other deal documents
- ii. What is “the subject matter of this Agreement”?
- iii. Do you really want to include “all documents referenced herein and therein”?
- iv. Contemporaneous side letters

3. Captions/Headings.

- a. Purpose: to clarify that a caption does not affect the interpretation of the applicable section or of the applicable contract.
- b. Potential concern: If the caption doesn’t accurately describe the contents of the applicable section
 - i. Can a caption affect the scope of vagueness within a section?
 - ii. Can a caption affect the scope of vagueness within other sections or of a contract generally?
- c. Sample Provision:

Titles, captions, and headings included herein are for convenience of reference only and are not to affect the meaning, construction, or interpretation hereof or of any provision hereof.

- d. Will a court nonetheless use a caption to assist in interpretation?
 - i. Understanding the parties “manifested intent” is key

C. Enforcing the Contract

1. Severability.

- a. Purpose: Indicate to the court that, if one or more provisions are found to be unenforceable, then the entire contract should not thereby be unenforceable.
 - i. A court might elect to sever a provision in any event, but having a severability provision might help the court determine the intent of the parties.
 - ii. A court might not respect a severability clause in certain instances, e.g., if, upon severing, the essential terms of the contract do not remain intact.
- b. Blue-pencil rule; rule of reasonableness
 - i. Does it matter what your severability provision says? Might guide a court in a jurisdiction for which courts can elect from a range of alternatives when faced with an unenforceable provision.
- c. Consider including language that specifies which terms are “essential” (such that, if those terms are found to be unenforceable, then the contract as a whole would be unenforceable)
 - i. Be sure to negate any implication that identified essential terms are the *only* essential terms
- d. Sample Provision:

If any portion or provision hereof is to any extent determined to be illegal, invalid, or unenforceable by a court of competent jurisdiction, then the remainder hereof, and the application of such portion or provision in circumstances other than those as to which it is so determined to be illegal, invalid, or unenforceable, as applicable, will not be affected thereby. Without limiting the generality of the immediately foregoing sentence, if any portion or provision hereof is determined by any court of competent jurisdiction to be unenforceable by reason of excessive scope as to geographic, temporal, or functional coverage, then such provision will be deemed to extend only over the

maximum geographic, temporal, and functional scope as to which such court determines it is permitted to be enforceable.

2. Governing Law and Forum Selection.

a. Governing Law.

i. Purpose:

- (a) provide greater certainty as to which law will apply;
- (b) reduce the cost in a dispute that would be associated with determining which law will apply;
- (c) take advantage of the law of certain jurisdictions (e.g., employee-favorable laws in California)

ii. Enforceability:

- (a) Most governing law clauses are enforceable if a connection or **reasonable relationship between the chosen jurisdiction and the transaction** can be demonstrated
 - (1) Examples: principal place of business of the parties; jurisdiction in which the contract was negotiated
 - (2) Some states have statutes that do not require such a nexus (but instead are based upon amount in controversy) (e.g., §5-1401 of the New York General Obligations Law). Some courts have nonetheless required a reasonable nexus.

- (b) A court might disregard in cases against public policy, adhesion contracts, or contract induced by fraud
- (c) Certain subject matter might be governed by law other than that chosen (e.g., corporate governance, UCC rules relating to secured transactions)

iii. Practical Points:

- (a) Make clear that the chosen state's choice-of-law provisions do not apply (avoid *renvoi*)
- (b) Consider whether the selection of law applies to contract claims, as well as extra-contractual claims (e.g., tort)
- (c) Consider whether multiple jurisdictions should be designated, depending upon the subject matter
- (d) Consider referencing or tracking the language of a choice-of-law statute, if applicable

iv. Sample Provision:

This Agreement is governed by, and is to be interpreted and enforced in accordance with, the internal Laws of the State of New York applicable to contracts entered into and performed entirely within the State of New York (pursuant to Section 5-1401 of the New York General Obligations Law), without giving effect to any choice of law or conflict of laws rules or provisions (whether of the State of New York or any other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of New York. The Parties acknowledge that (a) this Agreement was negotiated by or on behalf of the Parties, in whole or in part, in the State of New York, (b) the Parties are delivering this Agreement in the State of New York, and (c) the State of New York has a substantial relationship to Parties and to the Transactions.

- b. Forum Selection.
- i. Purpose: Parties agree that one or more courts can adjudicate a dispute between them arising under a contract.
 - ii. Enforceability: Generally respected, absent a showing of unreasonableness.
 - iii. Exclusive vs. Permissive. The forum provision can provide (1) the only court or courts before which a dispute can be brought or (2) a court or courts to which the parties submit to a jurisdiction (but does not limit bringing disputes before other courts)
 - iv. Forum Non-conveniens Defense: One exception to the submission of jurisdiction rule is if a party complains, and the court finds, that a given forum is not the most convenient forum in which to litigate.
 - (a) Include a prohibition that each party shall not argue that the chosen is not convenient and include language whereby a party waives its right to contest jurisdiction
 - v. Service of Process: Forum selection clauses often include language whereby the parties stipulate acceptable methods to serve process (e.g., pursuant to the contract's notice provisions)
 - vi. Other Methods of Resolution: Be sure to carve out those provisions that provide for alternative dispute resolution mechanisms (e.g., arbitration provisions and purchase price adjustment provisions)
 - (a) But forum selection clauses can still be useful for obtaining a court order to enforce the ruling of an arbitrator or an accountant

vii. Sample Provision:

Each Party hereby irrevocably and unconditionally submits to the exclusive jurisdiction of, and venue in, any state or federal court located within the City of New York in the State of New York (any such court, a “**Permitted Court**”) for the purposes of any Suit arising out of this Agreement or any of the transactions contemplated hereby, and in each case the appropriate appellate courts therefrom, and each Party shall not commence any such Suit in a court other than any Permitted Court. Service of any process, summons, notice, or document by personal delivery or by U.S. registered mail to a Party’s address set forth in **Section 7.1** [provision concerning notice] (or such other address if changed in accordance with **Section 7.1**) will be effective service of process for any such Suit. Each Party (a) hereby irrevocably and unconditionally waives any objection to the laying of venue of any Suit arising out of this Agreement or any of the transactions contemplated hereby in any Permitted Court, and (b) hereby irrevocably and unconditionally waives any objection that such Party might now or in the future have, and shall not plead or claim, that any such Suit brought in any Permitted Court has been brought in an inconvenient forum. A judgment in any Suit is permitted to be enforced in other jurisdictions by suit on the judgment or in any other manner provided by Law. A Party’s submission to jurisdiction and venue set forth in this **Section 7.7** does not constitute a general submission by such Party to service of process in the City of New York or the State of New York for any purpose other than as provided in this **Section 7.7** and does not confer, and will not be deemed to confer, rights on any Person other than the Parties.

3. Waiver of Jury Trial.

- a. Presumption in Favor of Jury Trial: There is a presumption that a party is entitled to a jury in connection with a dispute (e.g., U.S. Constitution and state constitutions)
- b. Purpose of Waiver:
 - i. The parties might consider a non-jury trial to be quicker and less expensive.
 - ii. An institution might think that a jury will favor “the little guy.”

- c. Enforceability:
 - i. Waiver should be “knowing, intentional, and voluntary”
 - ii. More likely to be enforced if parties are of equal bargaining strength
 - iii. More likely to be enforced if the provision was specifically negotiated, including with the advice of legal counsel
 - iv. Location and formatting are key – provision should be prominently displayed.
- d. Sample Provision:

To the extent permitted by Law, each Party irrevocably and unconditionally waives any right that such Party might have to a trial by jury in any Suit arising out of or relating to this Agreement or the transactions contemplated hereby. Each Party acknowledges that: (a) such Party has considered the implications of the waiver in this **Section 7.18**; (b) such Party will continue to rely upon the waiver in this **Section 7.18** in such Party’s future dealings arising out of or relating to this Agreement, and the Transactions contemplated hereby, and (c) this provision is a material inducement for such Party to enter into this Agreement and the Transactions contemplated hereby.

4. Cumulative Remedies and Election of Remedies.

- a. Purpose: Clarify the scope of remedies that a party can seek in connection with a dispute.
 - i. But by default, a party is generally not precluded from seeking remedies
 - ii. Might be useful in instances in which remedies are specified to avoid the implication that only such specified remedies are available
- b. Practice Point: Be careful of including this provision if certain provisions of the contract are intended to have

specific and exclusive remedies (e.g., indemnification provisions in M&A contracts)

c. Sample Provision:

All rights and remedies hereunder are cumulative and in addition to, and not in lieu of, any other remedies available to any Party at law, in equity, or otherwise[, except to the extent expressly provided in **Section 11.2** to the contrary].

D. Other

1. Force Maieure.

a. Purpose: Excuse performance of an obligation if failure to perform results from forces beyond the control of the obligor, usually because of extreme circumstances.

b. Examples:

- i. acts of God
- ii. flood, fire, earthquake or explosion
- iii. war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest
- iv. government order or law
- v. actions, embargoes or blockades in effect on or after the date of this Agreement
- vi. action by any governmental authority
- vii. national or regional emergency
- viii. strikes, labor stoppages or slowdowns or other industrial disturbances
- ix. shortage of adequate power or transportation facilities

- c. Nuances:
 - i. Potential Obligations of Affected Party
 - (a) Must notify party entitled to performance within a certain period of time after becoming aware
 - (1) Consider making this a condition, as well
 - (b) Must state details of condition and expected length of delay
 - (c) Must demonstrate that the event or circumstance:
 - (1) prevented all or some performance
 - (2) substantially hindered all or some performance
 - (3) materially and adversely affected the party's ability to perform
 - (d) Must use reasonable efforts to mitigate, if possible
 - ii. Other Nuances
 - (a) "whether foreseeable or unforeseeable" (the court might otherwise read in an unforeseeability requirement)
 - (b) Performance is excused "to the extent" that the event or circumstance prevented performance (rather than complete excuse if event or circumstance occurs)
 - (c) List of events is exhaustive or non-exclusive

- (d) Common exclusion: economic hardship
- (e) Non-performing party not liable for damages to the party entitled to receive performance while force majeure event prevent performance
- (f) Allocation of costs associated with delay in performance (between nonperforming party and party entitled to receive performance)
- (g) Non-performing party and/or party entitled to receive performance is entitled to terminate if the force majeure event persists for a certain period of time
- (h) If the end of term of a contract occurs while a force majeure event in effect, toll term
 - (1) Should extra time be added on to term if a force majeure event starts and ends prior to the end of the term of a contract?

2. Further Assurances.

- a. Purpose: A general statement that the parties will take actions to achieve the objectives of a contract
- b. Sample Provision:

Each Party shall, at the reasonable request of the other Party, take additional actions, or execute and deliver additional documents, to evidence or confirm the completion of the Transactions or the fulfillment of such other Party's obligations under any of the Transaction Documents.

- c. Nuances:
 - i. Include a non-exhaustive list of actions that must be taken

- ii. Standard of effort: reasonable efforts; best efforts
- iii. Request of a party to take action required
- iv. Advice of legal counsel (as to necessity) required
- v. Be sure to clarify that the standard of performance in a further assurances clause (e.g., reasonable efforts) will not operate to modify any specific standard of performance required by contract language

3. Transaction Costs/Expenses.

- a. Purpose: State clearly which parties are responsible for which transaction costs. Usually, each party is responsible for its own transaction costs.
- b. Sample Provision:

Each Party will be responsible for bearing such Party's expenses incurred in connection with the preparation, negotiation, execution, and delivery of this Agreement, including all fees and expenses of the Parties' respective agents, representatives, brokers, counsel (internal and outside), consultants, advisers, and accountants.

- c. Is this provision necessary? More of a prudential measure since the general default is that each party should bear its own costs.
- d. Carve-outs: Be careful to carve out those costs that should not be borne by the party incurring them, such as:
 - i. Costs that would be included within the definition of "Indemnifiable Losses" (or similar term)
 - ii. Any costs that a party is required to bear in connection with the termination of the contract

4. Notices.

- a. Purpose: Set forth: (1) the manner in which notices and other communications must be given in order to be acceptable under a contract and (2) the point in time when a notice will be deemed to have been given.
 - i. Don't leave notice and deemed notice to chance or to whatever defaults are prescribed by law
- b. Components of a Notice Provision:
 - i. Form of notice
 - ii. Method of delivery
 - iii. Time when delivery is deemed effective
 - iv. Contact information
 - v. Manner of updating contact information
- c. Form of notice: nearly all contracts with a notice provision provide that notice must be in writing.
- d. Method of Delivery:
 - i. Personally
 - ii. Regular mail/certified mail
 - iii. Overnight courier service
 - (a) Usually, a "nationally recognized" overnight courier service is stated; consider "internationally recognized" courier service for cross-border deals
 - iv. Fax
 - (a) Be sure that contact information includes fax numbers

- v. Email
 - (a) Be sure that contact information includes email
 - (b) Consider whether sending an email is sufficient or whether the sender must send a signed notice attached as a .pdf (or similar form of attachment)
- e. Time when delivery is deemed effective:
 - i. Personally – when established as having been given
 - (a) How is proof of delivery established?
 - ii. Certified/Regular mail - X Business Days after having been mailed
 - (a) Or consider requiring sending “return receipt requested”
 - iii. Overnight courier – as shown on evidence received from the courier
 - iv. Fax – on the date and at the time when shown as received in the notice of receipt (or, if that time is after business hours (or a specific time), then on the next Business Day)
 - v. Email – at the time that notice of receipt is generated electronically by the recipient party opening the email (i.e., request a read receipt, which some recipients might be able to ignore) or at the time that the sender can demonstrate electronically that the email has been delivered (i.e., request a delivery receipt), or at such other time as the receiving party acknowledges receipt

- f. Contact information:
 - i. Include all applicable information (e.g., fax number, email address)
 - ii. Consider whether to address to an individual or to a title
 - iii. Consider requiring that copies be sent to legal counsel (and be sure to include all applicable contact information for legal counsel)

- g. Method of updating contact information:
 - i. Pursuant to a notice provided by the party to all other parties that is delivered in accordance with the notice provision
 - ii. Other readily ascertainable address for legal counsel

- h. Obligation vs. Condition: Distinction between making delivery requirements an obligation (“To provide notice to a recipient Party, a Party *shall*...”) or a condition precedent (“To be valid for purposes of this Agreement, any notice that is given pursuant to this Agreement *must*...”)
 - i. Would a court disregard notice if actual delivery could be demonstrated?
 - ii. Deemed effective time of delivery might be important
 - iii. Do NOT write: “Notice shall be given as follows...”
 - (a) Truncated passive voice
 - (b) Unclear whether this purports to impose and obligation or a condition

5. Counterparts.

- a. Purpose: To prevent a party from claiming that a contract cannot be signed and delivered through separate counterparts.
- b. Drafting points:
 - i. Counterparts provisions often specify that counterparts can be delivered via facsimile
 - (a) Note: a party can't "execute" via facsimile
 - ii. Counterparts provisions often specify that counterparts can be delivered via a .pdf attachment (or similar attachment) to an email displaying the party's signed signature page
- c. Sample Provision:

Each Party is permitted to execute this Agreement in multiple counterparts, each of which will be deemed an original and all of which taken together will constitute one and the same instrument. Each Party is permitted to deliver this Agreement to the other Party by means of delivery of one or more counterpart signature pages via facsimile or as an attachment in portable document format (.pdf) or other email attachment format to an email addressed to the recipient Party. Any photographic copy, photocopy, or similar reproduction of this Agreement, any electronic file of this Agreement in portable document format (.pdf), or other email attachment format, or any copy of this Agreement delivered by facsimile transmission, in each case with all signatures reproduced on one or more sets of signature pages, will be considered as if it were manually executed.

VI. LEGAL ARCHAISMS

A. “that” vs. “which” vs. “, which”

1. “That”. “That” is restrictive. It limits the scope of a clause.
2. “, which”. “, which” is descriptive. It describes a clause.
3. “which [no preceding comma]”. When used to modify a clause, “which [no preceding comma]” is ambiguous.

Example: Suppose I have 20 books in my library and I’ve read 15 of them.

- “I’ll give you all the books in my library that I’ve read.” You’ll get 15 books.
- “I’ll give you all the books in my library, which I’ve read.” You’ll get 20 books.
- “I’ll give you all the books in my library which I’ve read.” It’s unclear how many books you’ll get.

Practice Tip: If there is uncertainty between using “that” and using “which,” “that” is usually the correct choice.

B. Table of Legal Archaisms and Suitable Replacements

See Exhibit C for a list of common legal archaisms from Ye Olde Contracte and suitable replacements.

VII. ATTORNEY BIO: VINCENT R. MARTORANA

My attorney bio is attached as Exhibit D. Please feel free to contact me if you have any questions or comments.

Also, for more information on contract drafting, analysis, and interpretation, please stop by my blog, *Drafting Points*, at www.draftingpoints.com.

Exhibit A

Useful Resources for Learning and Improving Drafting Skills

- *A Manual of Style for Contract Drafting (Third Edition)*, Kenneth A. Adams (2013)
 - There are many books on contract drafting. Many advocate styles and techniques that are prevalent in drafting, but that are incorrect or inefficient. Ken Adams's book is by far the best guide for discussing how concepts are expressed in contracts.
- *The Structure of M&A Contracts*, Kenneth A. Adams (2011)
- *Garner on Language and Writing*, Bryan A. Garner (2009)
 - This book includes more general writing concepts (including writing skills for litigators).
- *Drafting Contracts: How & Why Lawyers Do What They Do* (Second Edition), Tina Stark
- *Negotiating and Drafting Contract Boilerplate*, Tina L. Stark (Ed.) (2003)
 - This book is a great resource for discussing the intersection between law and contract language.
- *Typography for Lawyers*, Matthew Butterick (2010)
 - This is what happens when a font designer becomes an attorney. Great book on formatting legal documents—and more than just fonts!
- *A Guide to Contract Interpretation* (July 2014) (Reed Smith white paper) – Vincent R. Martorana (freely available on the web; Google “contract interpretation”)
- www.adamsdrafting.com
- www.draftingpoints.com

- Annotated forms
- Successive “redlines” of a document
- Board resolutions
- Due diligence materials
- Experience and practice

Exhibit B

Summary Tables: Anatomy of a Typical Contract and of Categories of Language

Anatomy of a Typical of a Contract

Preamble	<ul style="list-style-type: none">• Type of agreement, date of agreement, parties (name, jurisdiction, entity type)• Save descriptive relationship between the parties for the recitals or reps
Recitals	<ul style="list-style-type: none">• Provide background, context, evidence of intent• Only area of a contract that might address “why?”• Do not include operative provisions• But ok to define terms
Body	<ul style="list-style-type: none">• Main part of contract• Preceded by “The Parties hereby agree as follows:” (or something similar)• Contains categories of language
Signature Pages	<ul style="list-style-type: none">• Need to “get to an individual”• Practical considerations: obtaining signature pages in advance; holding signature pages “in escrow”; correct signature blocks; footers; warehousing/following up after closing
Attachments (Exhibits, Schedules, Annexes, Appendices)	<ul style="list-style-type: none">• Form part of the contract• Beware of unintended rights and obligations

Categories of Language

<u>Category</u>	<u>Description</u>	<u>Think</u>	<u>Example</u>	<u>Notes</u>
Language of Performance	Addresses actions being taken by the parties by virtue of the contract	"hereby"	Willie hereby transfers to Charlie all of his rights, title, and interest in and to the Chocolate Factory.	<ul style="list-style-type: none"> • Use the active voice • Don't use "shall"
Obligation	Addresses what a party has to do pursuant to the contract	"shall" ↓ "hereby has/have a duty to"	Charlie shall arrive at the Chocolate Factory no later than 11 a.m. on Friday.	<ul style="list-style-type: none"> • Don't use will (which conveys futurity) • Don't use "must" (save that for conditions and other contexts) • Don't try to impose obligations on third parties
Prohibition	Addresses what a party is prohibited from doing pursuant to the contract	"shall not" ↓ "hereby has/have a duty not to"	Willie shall not unduly pressure children to run his Chocolate Factory.	
Discretionary Language	Addresses what a party is permitted to do under a contract	"is/are permitted to"	Willie shall not unduly pressure children to run his Chocolate Factory, except that Willie is permitted to do so with respect to any child who passes the Test.	<ul style="list-style-type: none"> • Use discretionary language as an exception to a prohibition; no "naked discretion" • "may" → "is/are permitted to" or "might possibly"

<u>Category</u>	<u>Description</u>	<u>Think</u>	<u>Example</u>	<u>Notes</u>
Language of Declaration: Representation	Statement made by a party of what was, is, or will be true to induce the other party to enter into the contract	Assertion of truth	Charlie represents to Willie that he obeyed all the rules of the Chocolate Factory.	<ul style="list-style-type: none"> • Need not be within control or knowledge of representing party • Should reps concerning future facts be rephrased as obligations? • Can't "breach" a rep
Language of Declaration: Acknowledgment	Statement that a party is accepting as true	Acceptance as truth	Charlie acknowledges that Willie pays his workers in bars of chocolate, rather than in generally recognized currency.	<ul style="list-style-type: none"> • Aligns intentions; potential estoppel • Don't mix with other categories of language
Administrative Language	<ul style="list-style-type: none"> • Addresses rules governing an event or circumstance • Addresses the scope, meaning, or during of language, a provision, or a contract 	The "rules" of the contract	"Chocolate Factory" means the factory on the plot of land located at 123 Gene Wilder Way, Skokie, IL 60076, United States.	<ul style="list-style-type: none"> • Don't use "shall" • Use present tense for policies that apply upon effectiveness of the contract

Exhibit C

Fixing Words and Phrases from Ye Olde Contracte

**Fixing Words and Phrases from
Ye Olde Contracte**

Ye Olde Contracte	Replace With...
<i>16th day of June, 2015</i>	<i>June 16, 2015</i>
<i>by and between</i>	<i>between</i>
<u>WITNESSETH</u>	delete
WHEREAS	A. B. etc.
<i>therefore</i>	if not in recitals, delete
<i>NOW, THEREFORE, in consideration of the premises and mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:</i>	<i>The Parties hereby agree as follows:</i>
<i>which</i>	<i>that or , which</i> (usually, depending upon the context)
<i>do hereby</i>	<i>hereby</i>
<i>does hereby</i>	<i>hereby</i>
<i>undertakes to</i>	<i>shall</i>
<i>is obligated to</i>	<i>shall</i>
<i>agrees to</i>	<i>shall</i>

Ye Olde Contracte	Replace With...
<i>covenants and agrees to</i>	<i>shall</i>
<i>shall be obligated to</i>	<i>shall</i>
<i>may elect to; may</i>	<i>is/are permitted to</i>
<i>has the option to</i>	<i>is permitted to</i>
<i>telecopier, telex</i>	<i>facsimile</i>
<i>One Hundred Fifty Seven Dollars (\$157)</i>	<i>\$157</i>
<i>thirty (30) days</i>	<i>30 days</i>
<i>said vehicle</i>	<i>the vehicle, that vehicle, such vehicle, the Vehicle</i>
<i>null and void</i>	<i>void</i>
<i>terms and conditions</i>	<i>terms</i>
<i>in any regard whatsoever</i>	<i>delete</i>
<i>for the avoidance of doubt</i>	<i>consider clarifying rule and deleting this text</i>
<i>it being understood</i>	<i>consider clarifying rule and deleting this text</i>
<i>in the event that</i>	<i>if</i>
<i>IN WITNESS WHEREOF</i>	<i>delete</i>
<i>IN WITNESS WHEREOF, the parties hereto have set their respective hands and seals as of the day and year first above written.</i>	<i>The Parties are signing this Agreement as of the Effective Date.</i>

Exhibit D

Attorney Bio: Vincent R. Martorana