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Contract Drafting Fundamentals

Best Practices for Drafting, Analyzing and Interpreting Contracts

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Today's faculty features:

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**Contract-Drafting Fundamentals:
Best Practices for Drafting, Analyzing and
Interpreting Contracts**

Presented by

Vincent R. Martorana

for

Strafford

March 14, 2012

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
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- Exhibit D: Table of Potentially Substantive Changes
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Disclaimer

This presentation and the supplemental materials related to this presentation (this presentation and such materials, collectively, the “Materials”) are intended to constitute a continuing legal education course and are intended for an audience of attorneys. Neither the Materials, nor any portion thereof, is intended for any other purpose or for anyone other than an attorney.

Neither the Materials nor any portion thereof constitutes legal advice.

Neither the Materials nor any portion thereof is permitted to be distributed without the express written consent of Vincent R. Martorana.

OUTLINE

I. SOME CONTRACT-DRAFTING PHILOSOPHY

A. Legal Drafting vs. Conversation

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**

C. **Contract-Drafting Resources**

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

II. **SUMMARY OF BASIC CONCEPTS**

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

III. **MORE ADVANCED CONCEPTS**

A. **Active Voice vs. Passive Voice.**

1. 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.”

2. 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.

B. 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.

C. **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:

- 
- Local** • 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.
 - Remote** • **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 requires otherwise”. Do not use “unless the context requires otherwise”; that phrase is ambiguous.

D. 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.

E. 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.

Practice Tip: Consider whether a time zone should be referenced.

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 March 14, 2012; 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.

F. “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.

IV. 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. Tables of Legal Archaisms and Suitable Replacements

See Exhibit C for a list of common legal archaisms from Ye Olde Contracte and suitable replacements. See Exhibit D for a table of those changes in phrasing that could be potentially substantive in a contract, depending upon the context.

V. VINCENT R. MARTORANA – ATTORNEY BIO

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

Exhibit A

Useful Resources for Learning and Improving Drafting Skills

- *A Manual of Style for Contract Drafting (Second Edition)*, Kenneth A. Adams (2008)
 - 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).
- *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.
- 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 Contract-Drafting 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
Language of Policy	<ul style="list-style-type: none"> • Addresses rules governing an event or circumstance • Addresses the scope, meaning, or duration of 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

<i>Ye Olde Contracte</i>	Replace With...
<i>14th day of March, 2012</i>	<i>March 14, 2012</i>
<i>by and between, by and among</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>do hereby, 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>
<i>covenants and agrees to</i>	<i>shall</i>
<i>shall be obligated to</i>	<i>shall</i>
<i>has the option to</i>	<i>is permitted to</i>

<i>Ye Olde Contracte</i>	Replace With...
<i>telecopier, telex, cablegram</i>	<i>facsimile</i>
<i>One Hundred Fifty Seven Dollars (\$157)</i>	\$157
<i>thirty (30) days</i>	30 days
<i>said vehicle</i>	<i>the vehicle, that vehicle, such vehicle, the Vehicle</i>
<i>null and void</i>	void
<i>terms and conditions</i>	terms
<i>in any regard whatsoever</i>	delete
<i>in the event that</i>	if
<i>IN WITNESS WHEREOF</i>	delete
<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

Table of Potentially Substantive Changes

Table of Potentially Substantive Changes

Typical Language	Replace With...
<i>which</i>	<i>that</i> or , <i>which</i> (usually, depending upon the context)
<i>may</i>	<i>is/are permitted to</i> (to convey discretion) <i>might</i> (to convey possibility)
<i>provided, provided, however</i>	<i>except</i> (to convey an exception) <i>but only if</i> or <i>on the condition that</i> (to convey a condition)
<i>for the avoidance of doubt</i>	consider clarifying rule and deleting this text
<i>it being understood</i>	consider clarifying rule and deleting this text
<i>unless the context requires otherwise</i>	consider clarifying rule and deleting this text

Exhibit E

Vincent R. Martorana – Attorney Bio



Vincent R. Martorana, Counsel

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Vincent R. Martorana is Counsel in the Corporate & Securities Group with Reed Smith's New York office. His practice includes the representation of clients in domestic and cross-border mergers, stock and asset acquisitions and divestitures, joint ventures, strategic alliances, licensing arrangements, corporate restructurings, private equity investments, and securities offerings. He also regularly provides advice on corporate governance and state laws governing business entities (including Delaware and New York corporate, partnership, and limited liability company law). Vincent has represented a wide range of clients—from start-up and early-stage companies to well-established enterprises—in various industries, including technology, healthcare, pharmaceutical products, consumer products, and energy.

Vincent has extensive experience providing advice on contract drafting, analysis, and interpretation relating to disputes, settlements, and negotiated transactions. He has presented his continuing legal education contract-drafting courses at various bar associations, including the American Bar Association, the New York State Bar Association, the New York City Bar Association, the New York County Lawyers Association, the Brooklyn Bar Association, the Suffolk County Bar Association, and the Westchester County Bar Association.

Vincent received a J.D. from the University of Chicago Law School and a B.S. in Economics (with concentrations in Finance and Operations & Information Management), *magna cum laude*, from the Wharton School at the University of Pennsylvania.