

LAW OFFICES OF ROBERT D. GORMAN

A Professional Association

Telephone (505)243-5442

Office Address:

*1201 Lomas Boulevard, NW
Suite A
Albuquerque, New Mexico 87102*

Mailing Address:

*Post Office Box 25164
Albuquerque, New Mexico 87125
Fax Number (505) 247-1539*

TOP TEN LIST OF DRAFTING DOS AND DON'TS

Samuel Goldwyn, the famous producer and studio founder is credited with saying:

“A verbal contract isn't worth the paper it's written on.”

Unfortunately, many written contracts are also not worth the paper they are written on because they are unclear and fail to communicate the agreement. Sometimes the contract is the result of a layperson trying to avoid paying legal fees by drafting their own agreement (a great source of litigation business), and sometimes the document is the product of a lawyer's efforts.

Contracts are not the only documents that lawyers draft and review, but they are probably the most common. The following suggestions also apply to the preparation of corporate resolutions, wills and trusts, and other legal documents. New lawyers have typically spent some amount of time working on legal memoranda, briefs and other advocacy documents, but very little time drafting contracts, or documents designed to govern conduct. The focus of this article is not on documents prepared for litigation, although you may find some of the suggestions helpful in that context as well.

My top ten list is certainly not intended to be a comprehensive list of things you should do or not do in drafting. Every experienced lawyer has their own list of what should go into document drafting, and pet peeves about documents that they have reviewed in the past. The list probably changes with the passage of time and with experience. After 25 years of practice, the following is a list that I have found helpful in drafting documents. I encourage you to develop your own list.

- 1. Do make sure you understand the deal.** Nothing is more important than having a clear understanding of the objectives of the document you are drafting. You can't draft an effective contract unless you have a clear understanding of the deal. Often a lawyer will get a call from a client with a request that the lawyer draft “a simple purchase agreement” followed by a very brief summary of the terms. Clients always want a “simple” document (which usually means, “I don't want to pay a lot in legal fees.”), but the terms of the deal really dictate how simple the contract will be.

Preparation of a well drafted document involves at least four phases:

- A. Interviewing. This is the fact gathering process. You should not be bashful

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about saying to a client, “I really don’t understand how your business works, and it would be helpful to have an overview of your business and what you are trying to accomplish in this deal.” Many areas of business have complex needs and requirements, and customs that have developed over time. A new lawyer will probably not have much or any business experience, and may not know anything about the client’s industry. It is a mistake to sit down and start drafting when you don’t even know what the client does, or their real objective.

- B. Planning. Once you understand the client’s goals, planning the documents necessary to achieve the objectives is the next step. In reality, as you are conducting the interview you should be thinking about the nuts and bolt of how the goal is going to be accomplished. You need to think about all documents necessary to get the client where they want to be. Ask yourself:
 - i. Where does the client want to be;
 - ii. Where is the client now;
 - iii. What must be done to get the client where he or she wants to be;
 - iv. What can go wrong along the way; and
 - v. If something does go wrong, how can we fix it.

- C. Negotiating. Negotiation is an on ongoing process that transcends the entire process. The client has usually had discussions with the other party and reached a tentative outline of a deal. As you interview and gather the facts, you realize that there are loose ends that need to be addressed, or contingencies that have not been thought about. When your client sees your first draft, and later, when the other party reviews your draft, there are additional discussions about terms that have been included or left out. The client usually depends on the lawyer to evaluate the risk associated with a particular provision. In the end, the client must decide what they can live with, and what they can live without. Negotiating implies give and take, which means your client won’t get everything they want, or everything you recommend. A risk-benefit analysis will determine the final outcome.

- D. Drafting. Again, this may be a process that overlaps with the other steps, but the end goal is to get a document that reflects the parties’ objectives in clear and unambiguous language.

- 2. **Do use plain English.** One of the greatest impediments to successful document drafting is the use of legalese, where plain English does the job even better. New lawyers and old alike often start the drafting process by gathering up forms that seem to look like the deal

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they are working on. The form becomes the foundation for the agreement. We tend to think that the form worked for someone before, so it will probably work in this deal. Many form books or documents created by others are rampant with legalese. Most of us have seen contracts that begin with “*Witnesseth.*” and include words and phrases such as, “Whereas,” “Now therefore,” “hereinabove,” “hereinafter,” “to wit,” or “aforesaid.” These archaic terms don’t make you sound like a lawyer, they make you sound pompous.

The same rules that apply to writing in general, apply to drafting documents: be simple, concise, clear and direct.

3. **Don’t include provisions you don’t understand or can’t explain to your client.** Another hazard of using forms or documents from others is the inclusion of provisions that don’t make sense in your deal, or perhaps in any deal. Many lawyers think that more is better. If another lawyer included the provision, maybe I should as well. Avoid this tendency. Obviously you need to include all of the material terms of the deal. But you should not include a provision that you don’t understand and can’t explain. If you have doubts, do some research, consult with another lawyer, and consult with your client. If the provision must be included, make sure that it can be read and understood by everyone involved.
4. **Do use check lists.** Even experienced lawyers forget important provisions. Check lists help to avoid embarrassment and assure a complete, well drafted document. There are at least two types of check lists.

First, various form books have been published that include check lists of common provisions in various types of contracts. For example, in a business purchase agreement have you addressed such things as:

- Asset purchase v. stock purchase
- Excluded assets
- Financing terms
- Security
- Representations about the condition of the assets
- Representations about the books and records reviewed and relied upon.
- Survival of representations and warranties
- Inspections and contingencies
- Closing.
- Documents of title.
- Remedies in case of default.

The second type of check list is a deal specific check list. Who is going to do what, and when. What must happen before the deal closes (approvals by government agencies, financing approval, approval of the assignment of lease, etc.). This type of check list should

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be updated as the deal proceeds. Make note of what has been accomplished and when it was accomplished. Note deadlines and who must satisfy the deadline. Include what must happen at closing and after closing.

5. **Do know the law.** It should go without saying, but you must know the law that applies to the deal you are working on to do a competent job. Nevertheless, lawyers frequently grab form books and draft agreements for transactions involving areas of the law that they know nothing about. Many industries have special legal requirements that affect how they do business. For example, the sale of a bar and restaurant is going to require approval of the transfer, by sale or lease, of a liquor or beer and wine license. The State and local government will have specific requirements that must be met before your closing can occur. If you are unfamiliar with the legal requirements, and the process, you might set a closing date that can't possibly be achieved. In addition, tax issues could affect your transaction. In a sale of a business, the purchaser could be stuck with successor in business liability for State income and gross receipts taxes if they fail to obtain a tax clearance certificate. There is a similar pre-closing notice requirement with respect to State unemployment taxes.

If you represent the seller and you are financing the deal, you want to be sure that you comply with any requirements to perfect security interests, and you want to make sure that your documents require that the proper documents are signed at closing to allow you to perfect the security interest.

6. **Do use recitals to provide context.** Recitals are the introduction to the legal document. They give context to the terms of the deal, and they help orient the reader. However, they don't need to begin with "Whereas." A simple section at the beginning of the document titled "Background" with a narrative description about the deal gets the job done. Keep in mind that recitals are not usually part of the agreement unless they are specifically made a part of the agreement. However, if there is an ambiguity in a contract term a court might look to the recitals to determine the intent of the parties, so don't assume they are meaningless.
7. **Do think about the boilerplate.** Almost every contract includes a number of provisions that are often thought of as "standard" provisions. Many times they are included in contracts without much thought. Litigation is frequently decided on the basis of such boilerplate clauses. For example, when a contract or deed includes the term "for consideration paid," New Mexico courts have held that this opens the door for parol evidence to explain the consideration. If the term is important, you should spell out the consideration and not simply use a vague reference.

Other typical boilerplate clauses include the following:

Binding Effect. A provision stating that the contract is binding on successors and assigns.

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Do you want to permit assignment?

Governing Law. If the contract is to be performed in more than one State, what law will govern? When reviewing contracts drafted by out of state lawyers they will typically incorporate the law of their State. This could be a good or a bad thing. In any event, it may require that you have a lawyer licensed in that State review the contract to determine any material differences.

Entire Agreement. Many cases have been decided on the basis of a clause that says that the written document is the entire agreement, and there are no other agreements other than those in the document. Don't assume that side deals or unwritten understandings will be enforced.

Time is of the Essence. If deadlines are critical, you should always include this clause.

Venue. Many contracts stipulate that if litigation is instituted, it must be commenced in a particular venue. Think about this provision. Will your client be at a significant disadvantage if you have to litigate in the home town of the other party, where they are the major employer?

Alternative Dispute Resolution. Do you want to require negotiation or mediation before litigation can be commenced? Do you want to require arbitration instead of a court proceeding? What rules will apply? What relief will be available?

Notice Provisions. The inclusion of the method and place of notice helps to avoid uncertainty. Is a fax copy or email permitted? Must the delivery be in person? What address, phone number or email address will be used? Is first class mail, certified mail, or delivery service appropriate? When does the notice become effective?

Elimination of Presumptions. A long standing rule of contract construction holds that in the event of an ambiguity, the contract will be construed against the party who drafted the document. In most documents both parties have significant input. Consider including a clause that eliminates the application of the presumption.

Attorney Fees and Costs. Give some thought to this clause. Will attorney fees and costs be recovered only if litigation is commenced? What if a demand letter is sent? What if a party dies and the other party must become involved in probate proceedings? How will the award be determined?

8. Don't use inherently ambiguous terms. How many times have you seen a contract with

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the phrase “and/or”? What does the term mean? Must both things happen, or only one? If the drafter would stop and think about the provision he or she would realize that the provision probably requires the use of one word and not the other.

Another example is the use of the word “reasonable.” The term is used throughout the Uniform Commercial Code, and we refer to the “reasonable man” standard as an objective standard. However, in the context of a contract reasonable usually implies that the parties have not decided on something. A reasonable time for one party may be unreasonable to the other.

9. **Do use consistent terminology.** Use of inconsistent terms in a contract can lead to much confusion. Often inconsistent terminology is the result of a “cut and paste” document. Words such as “buyer” and “purchaser,” “property” and “real property” or “land” may be used interchangeably and create confusion. Even terms such as “the date of this Agreement” may raise issues. Consider incorporating a definitions section, and then use the defined terms consistently throughout.
10. **Do proof read your document.** There is no substitute for proof reading your document. Read the document for spelling errors, grammatical errors, misnumbering, incorrect names, pagination errors, and all of the typical corrections that come from proof reading. It can be very embarrassing to have your client discover another client’s name or address in the contract (usually the result of cutting and pasting). Sloppy drafting undermines client confidence.

More importantly, read the document to make sure that it makes sense. Have others read the agreement to get a fresh perspective. Review your checklist and make sure you have covered everything.

This list is by no means comprehensive. With experience I am sure you will develop your own list. One final word of advice. Never hesitate to ask for help. Experience counts.