The Essentials of Good Contract Drafting

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Plain Language

Contractual law is a basic component of every lawyer's education. Every legal student learns that a contract is a voluntary, legally enforceable agreement entered into by two or more parties for something that will or will not occur. Contracts are based on common law and have been developed over time based upon court systems' ability to define the laws whether or not legal statutes have actually been codified.

Most contracts contain boiler-plate language that is in common use throughout the legal community. Many people who draft a contract use this language because they have read it before in a similar contract and assume that it is the proper language. The actual meanings of the phrases are murky to the average person, and even legal experts might be hard-pressed to explain why certain phrases are commonly used.

Is there a difference between what a party "will" do and what a party "shall" do? If there is a difference, is it clear enough for the average person to understand? If a contract is for the purchase or sale of an item, simply use those terms. Many contracts contain multiple terms for the same transaction, but this is not necessary.

Everyone has heard anecdotes, or perhaps horror stories, about the fine print of legal contracts. Contracts are agreements, and the most basic legal requirement is that two parties must agree to the premise of the contract. For this reason, the most ethical contracts are simple ones. There are certain basic principles behind a good contract, and clients will be best served if these principles are followed for both parties.

A movement towards plain language has been underway in the United States for many years. President Nixon required, in 1972, that the Federal Register be written in layman's terms. Six years later, President Carter issued Executive Order 12044. That document required federal officials to publish all new regulations in plain language so that they would be understandable to the people who would have to comply with them.

E.O. 12044 was rescinded by President Reagan in 1981, but President Clinton again required federal agencies to use plain language in 1998. The Plain Language Action Network was founded that same year to provide government agencies with plain language training. In 2010, President Obama signed the Plain Writing Act into law and required that all new government documents be written in plain language.

Include a Preamble

Many contracts contain a preamble that describes the purpose of the contract. This is not a requirement, but it is an easy way to state, in general terms, the desired goals of both parties. It helps to set the overall tone of the contract and can serve as a contract outline or executive summary.

In a perfect world, contracts would be easily understandable and have very clear, specific meanings. In practice, this is difficult to achieve, and litigation often hinges on the concept of intent. A preamble at the beginning of each contract is an excellent place to state the intent of the agreement.

Offer and Acceptance

Every contract traditionally consists of an offer and an acceptance. The offeror extends an offer for a good or a service in exchange for certain terms, without any additional negotiations, and the offeree accepts the contract by indicating to the offeror that the terms are acceptable. This is usually said to be the point at which both parties are "of one mind."

The terms offeror and offeree are commonly used, but they are poor choices. Although they accurately describe the parties in legal terms, most people find terms like seller and buyer, or contractor and owner, to be easier to identify. It is also a good practice to place these terms in bold print to further draw attention to them.

In the United States, the deposited acceptance rule is an exception to the general rule of contract acceptance. In common law, acceptance takes place when agreement is communicated. The deposited acceptance rule states that acceptance occurs when a written letter is mailed. This rule makes the U.S. Post Office an implied agent of the offeree, and the offer is considered to be accepted whenever it is delivered to the mail system. All risk of loss falls to the offeror, and a stipulation of actual receipt must be included in the contract if the offeror does not wish to abide by the deposited acceptance rule. To keep the terms clear and understandable, every contract should contain a paragraph that specifically states the action that will constitute acceptance.

The Mirror Image Rule

It is quite common for multiple copies of proposed contracts to be distributed. The unequivocal and absolute acceptance requirement, which is often called the mirror image rule, requires that an offer must be accepted exactly as proposed.

Offerees often mark through and change an item of small consequence or correct a typographical error. They do not realize that any change to the contract, no matter how small, can constitute a counteroffer.

The issue can be confusing. The Uniform Commercial Code dispenses with the mirror image rule, and most states have adopted the UCC. The UCC does not, however, cover all types of contracts. For some issues, correcting a name or changing a date would be perfectly legal. For others, the change would invalidate the contract. In the interest of clarity and uniformity, all contracts should contain a statement that they cannot be changed

without the consent of both parties. That consent is indicated by requiring signatures of all parties at each handwritten change. A better practice is to simply not allow handwritten changes to any contract.

Binding Offers Versus Invitations to Bargain

Contracts should clearly state that the offer is a binding offer and not an invitation to bargain. Invitations to bargain may be advertisements of a price, invitations to view items, or requests for bids or offers. When the buyer decides to purchase the item at the advertised price, a contract is not immediately created. In case law, Spencer v Harding is often cited as an example. The defendant offered to sell stock, but did not sell it to the highest bidder. The court ruled that the defendant had issued an invitation to bargain instead of offering a contract. The seller was therefore permitted to review all responses and accept or reject them as desired.

Revocability

Most offers are considered to be revocable at any time prior to acceptance. Even offers that state that they are irrevocable are, in fact, usually revocable. The exception is a firm offer as defined by the Merchants Firm Offer Rule. Firm offers create an option contract without any required consideration from the potential buyer. Option contracts hold the sellers to higher standards than the buyers, and the legal interpretations differ from older, more traditional common law views.

Firm offers must be for the purchase or sale of goods, must be made by a merchant, and must be in writing and signed. Contracts that do not meet these requirements are revocable prior to acceptance, and they should not state otherwise in the body of the contract.

Consideration

All contracts must contain a description of the consideration. The consideration is anything of value offered through the contract, and no contract can exist without consideration from both parties. An offer to give an item to another person is not a contract unless the other person also offers some consideration in exchange.

Contracts should clearly list the considerations being promised by both parties. This will establish the legal basis for the contract and serve as another clear statement of the purpose of the contract. Anything of value can be a consideration in a contract. Money, goods, services, promised actions or even inactions can serve as considerations. The consideration must be something which is not already owed to the contractual party, and the wording of the contract should make this clear.

Value is a relative term, and what has value to one person may not have apparent value to another. For this reason, a contract should always be specific when listing

considerations offered in exchange for the agreement.

Authorized Representation

For contracts to be legally binding agreements, the signatories must be authorized to obligate the company or person to the contractual requirements. When a contract is between two persons, this is simple to determine. When the contract involves one or more corporate parties, the issue can become less certain. The articles of incorporation and by-laws of the entity should always be consulted to ensure that the person being listed in the contract has the legal authority to bind the company to an agreement.

Multiple copies of the contract should be prepared, and each party should sign each copy so that both sides of the agreement are provided with original signatures. In some venues, copies without original signatures may be questioned. A signed original for each party eliminates this possibility.

Proper Grammar

The final issue that is essential for a good contract is one that is often overlooked. Legal specialists become so concerned with issues of law that issues of grammar fall to the wayside. The use of a semicolon instead of a comma can, under certain conditions, render a different meaning to a phrase in a contract. A typographical error in the spelling of a name can bring into question the legitimacy of the agreement.

For example, is “XYZ Corporation” bound by a signed contract that lists the company name as “XTZ Corporation”? This is an issue that should never occur in a well-drafted contract. The entire purpose of the document is the elimination of all ambiguity and the establishment of clear terms and conditions. The use of correct spelling and punctuations is a minimal step towards that goal that all legal professionals should take.