

# Contents

## Introduction xvii

### A. Fundamental Principles 1

#### The practicalities of contract drafting 1

- § 1 Use your skills the best you can in the circumstances. 1
- § 2 In your general approach, avoid “extreme drafting” that puts an unreasonable onus on the counterparty—especially if the contract is part of a long-term relationship. 4
- § 3 Know what you want to say. 6
- § 4 Learn to review a contract knowledgeably and efficiently. 9
- § 5 Establish efficient protocols for working with counterparties. 10
- § 6 Date your drafts. 11
- § 7 Retain the final, signed version with the permanent client file in a separate, conspicuously marked folder. 12
- § 8 Adhere most strongly to the conventions recommended in this book when you’re the principal or responsible drafter. 12

#### Accuracy 14

- § 9 Be alert to errors, misstatements, and ambiguities. 14
- § 10 Avoid inconsistent usage. 20
- § 11 Avoid out-of-date or error-ridden forms. 24

#### Clarity and readability 26

- § 12 Use plain English. 26
- § 13 Stick to normal syntax. 34
- § 14 Furnish abundant headings. 37
- § 15 Phrase headings to help readers find the information they want. 42
- § 16 Check and, if necessary, improve your average sentence length. 50

#### Conciseness 53

- § 17 Tighten the prose. 53
- § 18 Condense phrases into words when possible. 57
- § 19 Adopt sensible positions on doublets and triplets of the legal idiom. 59
- § 20 Eliminate zombie nouns. 61
- § 21 Avoid unnecessary detail. 64
- § 22 Use general terms for general ideas when the terms are clear. 68
- § 23 Minimize the duplication of ideas. 72

#### Imposing a consistent numbering system 74

- § 24 Adhere to an exacting system of indented sections and further subsections—preferably the one explained below. 74
- § 25 Impose consistency in numbering. 81
- § 26 Avoid romanettes except as a last resort. 84

## Standard sections and clauses 90

- § 27 Streamline your preamble and (if you include them) recitals. 90
- § 28 Establish the background of the contract (the recitals) as briefly as possible in separate sentences. 93
- § 29 Use a consideration clause that simply betokens a promise for a promise—unless the consideration for covenants is obscure. 100
- § 30 In the body of the contract, state in precise, readable language the promises, rights, conditions, authorizations, and representations. 102
- § 31 Understand the distinct purposes of representations and warranties, and express them well. 103
- § 32 Omit the traditional testimonium clause. 108
- § 33 If you must incorporate by reference, do it straightforwardly. 109
- § 34 Adopt default wordings for housekeeping clauses. 110

### B. Formatting 115

#### Understanding the basic decisions 115

##### Hanging indents 117

- § 35 Commit to using hanging indents that cascade from the left margin. 117
- § 36 Prefer rectilinear indents of the kind illustrated throughout this book. 119

##### Fonts 123

- § 37 Prefer a serif font. 123
- § 38 Use a font size of 10–14 points. 125
- § 39 Use smart quotes and smart apostrophes. 127

##### Emphasis in text 128

- § 40 Boldface your headings. 128
- § 41 Never use underlining. 131
- § 42 Forswear all-caps text. 133

##### Spacing 139

- § 43 Single-space your documents. 139
- § 44 Keep within a range of 45–90 characters per line. 144
- § 45 Prefer one forward space between sentences, not two. 146
- § 46 Use white space intelligently. Detest density. 148

## C. General Conventions 155

### Obligations and prohibitions generally 155

- § 47 Adopt a rigorously consistent approach to modal verbs, preferably excluding the word *shall*. 155
- § 48 If you must use *shall*—either because of institutional pressures or because of personal preference—ensure that it's always replaceable either with “has a duty to” or (less stringently) “is required to.” 166
- § 49 Avoid language of agreement once the terms begin. 168
- § 50 Eliminate *may not*. 172

### Party names 173

- § 51 Prefer real names for the parties. 173
- § 52 Never use a set of *-or /-ee* correlatives. 175
- § 53 Banish *party of the first part*, etc. 179
- § 54 Consider using first- and second-person pronouns (*we* and *you*) in employment contracts, consumer contracts, and the like. 182
- § 55 Avoid first-person ghostwriting for a counterparty. 184
- § 56 Never put parties' names (or other words) in all-caps text. 187

### Dating the contract 189

- § 57 Understand the conventions about effective dates, signing dates, and backdating. 189
- § 58 Consider putting the effective date in the preamble. 193
- § 59 Be careful with dated signatures. 194
- § 60 Consider an effective-date clause. 197
- § 61 Be savvy about other dates mentioned in the contract. 199

### Grammatical number 201

- § 62 Prefer the singular over the plural if it's a realistic option. 201
- § 63 Avoid parenthesized singular/plural alternatives. 203

### Tense 205

- § 64 Prefer the present tense when a provision can be worded naturally in the present. 205
- § 65 For a condition precedent, default to the present-perfect tense. 207

### Voice 208

- § 66 Prefer active voice over passive voice. 208
- § 67 When feasible, replace passive voice with an adjective. 212
- § 68 Use passive voice in limited circumstances. 214

### Positives and negatives 216

- § 69 Prefer positive statements over negative ones. 216

- § 70 Use negative statements when necessary. 218

### Gender-neutrality 219

- § 71 Strive to achieve invisible neutrality. 219

### Numbers, percentages, and currency 225

- § 72 Prefer numerals over written-out numbers. 225
- § 73 Don't use word-numeral doublets—a hallmark of amateurishness. 228
- § 74 Prefer the percent sign (%) and section sign (§) over the words. 232
- § 75 Scratch “.00” on round dollar amounts. 234
- § 76 Use calculations, diagrams, charts, and other graphics when they help clarify complicated information. 235

### Cross-references 238

- § 77 Eliminate cross-references if you can readily do so through reorganization. 238
- § 78 Use the power of your computer to update cross-references automatically, but check cross-references manually before the documents are signed. 240

## D. Structure 241

### Organization 241

- § 79 Provide a table of contents for any contract of six or more pages. 241
- § 80 Arrange provisions sensibly. 244
- § 81 Group related items together. 248

### Structural divisions 251

- § 82 Use subparts to maximize readability. 251
- § 83 Observe the two-part requirement for subdivided provisions. 256
- § 84 Streamline and simplify references to structural divisions. 257

### Enumerations 260

- § 85 Set off enumerated items as distinct subparts. 260
- § 86 To enhance readability, consider using an appositive to foreshadow an enumeration. 263
- § 87 Put enumerated items in parallel form. 265
- § 88 Observe the principle of economical parallelism. 267
- § 89 Avoid unnumbered dangling flush text. 271
- § 90 Use bullets when desirable. 275
- § 91 Use lowercase at the outset of subparts that are technically continuations of the sentence. 279
- § 92 Avoid unhelpful enumeration, or “splintering.” 280

**Key terms and their definitions 281**

- § 93 Be a minimalist when it comes to definitions. But if you introduce a defined term, use it consistently. 281
- § 94 Employ precise definitional terminology. 288
- § 95 Avoid tag-on defined terms—those included in parentheses after the term being defined. 290
- § 96 If you define a term, use an everyday shorthand name for it. Avoid alien-sounding acronyms and initialisms. 292
- § 97 Define terms in the singular, not the plural. 294
- § 98 Make your definition a literal substitute for the term being defined. 295
- § 99 Never use a completely counterintuitive definition. 296
- § 100 Avoid tautologies in defining. 297
- § 101 Don't put substantive provisions within definitions. 298
- § 102 Collect in one place the definitions for terms that appear throughout the document. Put provision-specific definitions in their place—using the definition section as an index to find these particular definitions. 299
- § 103 Prefer putting a long definitional section at the end of the document—unless you have just a few definitions. 302

**E. Syntax 305****Kernel sentence parts 305**

- § 104 Keep the subject and the main verb reasonably close together. 305
- § 105 Keep the main verb and its objects pretty close together. 307
- § 106 Renounce the idea of putting all qualifications into one sentence. 308

**Principle of end weight 310**

- § 107 Understand that in English, the end of a sentence is the greatest position of emphasis. 310
- § 108 Understand that within a sentence containing set-off enumerations, the end of each provision is a position of emphasis. 311

**Conditions—in general 316**

- § 109 Use *if* as the default term for creating conditions. 316
- § 110 Unearth hidden conditions to make them explicit, using the word *if*. 317
- § 111 If a condition is relatively short and seeing it first would help the reader avoid a miscue, put it at the beginning of the sentence. 319
- § 112 If a condition is long and the main clause is short, put the main clause first and move directly into the condition. 320

**Exceptions 324**

- § 113 Use *except* or *unless* as the default wording for an exception. 324
- § 114 If an exception needs to be understood before the sentence can be easily read, state it briefly at the beginning of the sentence. 325
- § 115 If an exception cannot be stated briefly, or if it refers to truly extraordinary circumstances—and hence no miscue is likely—put it at the end. Or start a new sentence with *But*. 326

**Provisos 327**

- § 116 Reword every instance of *provided that*. 327

**Interruptive phrases 333**

- § 117 Avoid subject-verb and verb-object separation. 333
- § 118 Split the verb phrase if you must insert an adverbial phrase. 334

**Modifiers 337**

- § 119 Put related words together. 337
- § 120 Reword when moving the modifier doesn't make the meaning clear. 338

**Prepositional phrases 339**

- § 121 Minimize prepositional phrases generally. 339
- § 122 Minimize *of*-phrases in particular. 340
- § 123 When you can, change a prepositional phrase to an adjective. 341
- § 124 When you can, change a prepositional phrase to a possessive. 342

**Punctuation 343**

- § 125 Learn and use standard punctuation. 343
- § 126 Place a colon before an indented enumeration. 343
- § 127 Put a semicolon at the end of each nonterminal part. 344
- § 128 Place a comma after an introductory phrase or subordinate clause. 345
- § 129 Use the serial comma as well as the serial semicolon. 346
- § 130 For important interpolations within a sentence, use the double-dash construction. 347
- § 131 Don't hyphenate most prefixed terms. 349
- § 132 Avoid comma splices and other common punctuation errors. 351
- § 133 Hyphenate phrasal adjectives. 353

**Capitalization 356**

- § 134 Capitalize defined terms to signal that they've been defined. 356
- § 135 Capitalize the word *agreement* when referring to the very contract into which the parties are entering. 358
- § 136 Otherwise, adhere to the capitalization rules for Standard Written English. 359

**F. Words and Phrases 361**

**Big words and unnatural idioms 361**

- § 137 Prefer the familiar word to the unfamiliar. Avoid legalese. 361
- § 138 Avoid unnatural idioms that typify legalistic writing. 370

**Pronouns and their antecedents 371**

- § 139 Use pronouns when it's natural to do so and the construction is unambiguous. 371
- § 140 Ensure that every pronoun has an antecedent. 373
- § 141 Ensure that every pronoun agrees in number and person with its antecedent. 374
- § 142 Avoid cataphora—using a pronoun before telling the reader what its referent is. 376

**Relative pronouns 377**

- § 143 Distinguish between *that* and *which*. Avoid the nonrestrictive *which*. 377
- § 144 Eliminate remote relatives. 380

**Conjunctions 382**

- § 145 Use *and* and *or* advisedly. 382
- § 146 Use *but* instead of *and* to introduce a contrasting idea. 383
- § 147 Prefer *But* or *Yet* over *However* as a sentence-starter. 384

**Usage 385**

- § 148 Pay special attention to certain wordings. 385
- § 149 Avoid these “forbidden words and phrases.” 405
- § 150 Know where to find answers to usage questions not covered here. 456

**Conclusion 457**

**Appendix A**

**Statements of Work 459**

**Appendix B**

**A Model Contract Using These Guidelines 465**

**Appendix C**

**A Typical Contract Needing an Overhaul, with Annotations 487**

**Appendix D**

**A Second Typical Contract Needing an Overhaul, with Annotations 493**

**Appendix E**

**A Third Typical Contract Needing an Overhaul, with Annotations 505**

**Select Bibliography 521**

**General Index 525**