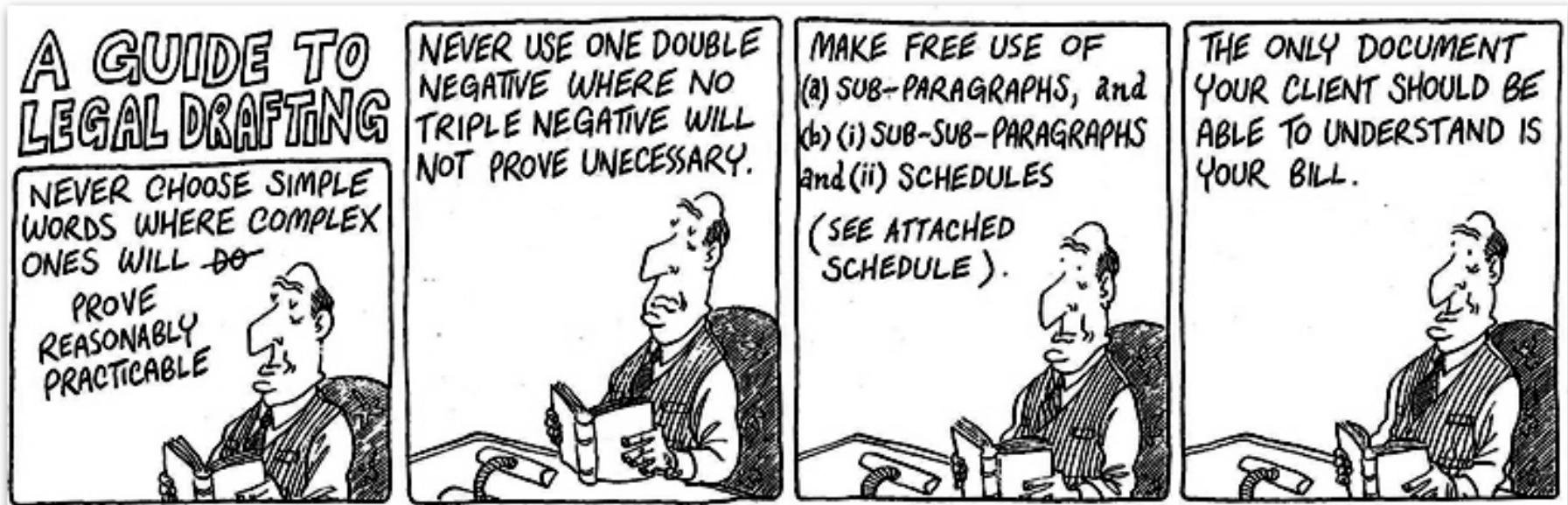


Top 5 Tips For Counseling Government Clients on Drafting Better Contracts



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Context and intent are key



Why Worry?

- I have a good relationship with the vendor
- If we have a problem we will talk it out
- The vendor and I both know what we meant, even if the contract doesn't say it
- If we have to litigate, we'll explain the contract to the judge

Tip #1

**REMEMBER WHO YOU ARE
WRITING FOR**

The parol evidence rule and the plain meaning rule

- Absent ambiguity, the parties' intentions must be discerned **from the four corners of the document**, and extrinsic evidence may not be considered
- If there is an **ambiguity**, extrinsic evidence **might** be introduced to explain the parties' intention **at the time the contract was drafted**. But other methods of interpretation exist as well, so do not assume you will be able to introduce evidence

What is ambiguity?

A word, phrase, term, etc. that is reasonably capable of two or more meanings

- “Dollar” could be Canadian or US
- An employment contract states that the employee “must wear the uniform in the employee locker”
- “Execute” can mean perform the contract or sign the contract
- “Profits” can mean net profits or gross profits
- “Biweekly” can mean twice a week and every other week
- “Liability” and “Debt” can mean two different things

Sometimes you just don't know
what something means



Tip #2

**CLARIFY
AMBIGUOUS
TERMS**

- Carefully draft definitions
- Know industry jargon
- You and your client are a team
- Ambiguity can also arise from seemingly unrelated provisions – know how the entire contract works as a whole
- Especially termination and notice provisions

Ambiguities are interpreted against the drafter of the contract

In other words, if terms could be reasonably interpreted in different ways, the court will likely rule in the way most beneficial to the person who didn't write the contract.

Consider this clause from contract between a lawyer and a client that provides for payment of the attorney's out-of-pocket expenses.

- *These out-of pocket expenses **include** court reporting services, expert witness fees, reasonable travel expenses, if any, fees paid to trial witnesses and the cost to create demonstrative trial exhibits*
- The client argued that the word “**include**” was a term of limitation that should be interpreted as “include” only. Therefore, he shouldn't have to pay for anything that wasn't on the list, such as photocopies and online research.
- The lawyer argued that “**include**” was a term of expansion, used to preface a few common examples. In other words, the client had to pay for *all* reasonable out-of pocket expenses, whether or not they were on the list.

- Licensee shall deliver to Licensor quarterly sales reports and litigation reports requested by Licensor.
 - What does “requested by” modify?
 - What does “quarterly” modify?

“chicken” standing alone is ambiguous

Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.,
190 F. Supp. 116, 117 (S.D.N.Y. 1960)

Plaintiff ordered “chickens” and received stewing chickens, not broilers or fryers.

- The issue in the case was, what is “chicken?”

“Chicken” means.....

- Defendant’s interpretation is supported by:
 - One dictionary meaning
 - USDA regulations (which the contract referenced)
 - Market data
 - Statements by plaintiff that he wanted “any kinds of chickens”
 - Plaintiff’s conduct in accepting the first shipment

See also



AIU Ins. Co. v. Robert Plan Corp., 14 Misc. 3d 1216(A), 836 N.Y.S.2d 483 (Sup. Ct.), adhered to on reargument, 14 Misc. 3d 1216(A), 836 N.Y.S.2d 483 (Sup. Ct. 2006), aff'd, 44 A.D.3d 355, 841 N.Y.S.2d 878 (2007)

- “Paragraph 9” – whether “which” is a non restrictive pronoun when not preceded by a comma

Spotting and Removing Ambiguity

- An accounting **system** acceptable to the STATE will be **established** by the ASSOCIATION to track **its** expenditures for salaries and wages, equipment, supplies, and 10% administration fee for each project listed in **the annual operating plan**.

A “train the trainer” approach to training will be used on this project, where the Systems Integrator and Contractor will work with the Agency project team and power users to train them on the delivered system and then these users will then train the Agency users. The project team will be an integral part of the project and will expect to be power users by the conclusion of the project.

The ASSOCIATION hereby agrees to perform the duties of fire hazard management specified in Title 30, Chapter 4, Idaho Code, and **appropriate** administrative rules and manuals pertaining to **it.**

Tip #3

AVOID

PASSIVE VOICE

SENTENCE CONSTRUCTION

(retrain your scientist and technical clients)

Recognize passive voice:

Conjugated form of “to be” + past participle

–If it *is determined* that

–Work may commence when a notice to proceed has been received. . . .

THE FIX FOR PASSIVE VOICE

- Subject-verb-object sentence structure
- Make actor the subject
 - If Contractor determines. . . .
 - Contractor may begin work when it receives a notice to proceed.

PASSIVE VOICE IN CONTRACT - EXAMPLE

BEFORE

Included in the primary assessment at RDU is a mental health screening

AFTER

Contractor shall perform a mental health screening at the RDU before the Offender enters general population

Spotting and Fixing Passive Voice

At the request of any Investor, a legal opinion in the form set forth in Exhibit A shall be delivered.

Whenever an emergency fire condition **is** determined to exist within the ASSOCIATION's protection boundary, and upon the request of the ASSOCIATION, mutual assistance shall **be** provided as conditions warrant.

Better?

Whenever the ASSOCIATION determines that an
emergency fire condition ~~is determined to exist~~s
within the ASSOCIATION's protection boundary,
and upon the request of the ASSOCIATION, the
State shall provide mutual assistance ~~shall be~~
~~provided~~ as conditions warrant.

The contractor shall not commence Work until~~may be commenced once~~ the contractor has received a signed copy of the contract and a written Notice to Proceed, and the contractor and contract supervisor have completed a pre-work conference. ~~is completed with the contract supervisor, and receipt of a Notice To Proceed document that identifies the appraisals to be reviewed.~~

You may need to ask your client
to clarify intent

[Someone?] shall forward instructions to the
Contractor ~~shall be forwarded through the~~
DESIGN PROFESSIONAL.

- ~~Support by~~ The contractor shall provide
support to [someone] ~~should be made~~
~~available~~ during the testing.

Tip #4

**NON-APPROPRIATION AND TERMINATION FOR
CONVENIENCE ARE NOT
GET-OUT-OF-JAIL-FREE CARDS**

(take your contract drafting, performance,
and management seriously)

What they have in common:

- Courts do not like illusory contracts
- Courts do not like to put contractors at the mercy of government agencies

Termination for convenience

- Change in circumstances needed before triggering.
- Things that are not adequate change in circumstances, and are probably bad faith:
 - Taking advantage of lower price
 - Harming the contractor
 - Having no intention of honoring contract
 - Suspecting there is a breach but making no inquiry

Contractor will likely recover*:

- Contract price for work completed (including lost profits)
- Costs of preparing final settlement/accounting
 - Legal and accounting fees
- Demobilization, storage, etc.

* will vary depending on type of contract, and whether termination is partial or total. See *e.g.*, 48 C.F.R Part 31, and 49.

Termination for Non-Appropriation

- Statement of separation of powers – or limit of contractual liability?
- Cannot be used to disregard contractual obligations
- Think governmental, not proprietary

At a minimum agencies should:

- Include in budget request to governor
- Not actively oppose in legislature
- Tell contractor as soon as possible that funding is in question
- Read the language!

Most likely to succeed if:

- The need for the service or goods is completely gone, not just shifted
- Facts support finding that budgetary crisis existed or cut was necessary to proper and efficient administration
- No other unrestricted funds exist to meet contractual obligations

When the two collide

- Contractor might argue that non-appropriation should be termination for convenience, so that contractor can recover some payment.
- State might argue that termination was for non-appropriation, not for convenience.

Tip #5

AVOID CONTRACT BY ACCRETION

The Martha Stewart Case

Macy's Inc. v. J.C. Penney, 45 Misc.3d 274 (2014); affirmed as modified by *Macy's Inc. v. Martha Stewart Living Omnimedia, Inc.* 127 A.D 348 (2015)

- Parol evidence not admitted – no ambiguity
- Definitions were key
- No such thing as “boilerplate”
 - No waiver clause

Seller shall deliver 100 pounds of mackerel graded at least A-2 (or, if Buyer exercises its option to delay the delivery past December 5, 2013, at least Grade A-4) to Buyer's warehouse no later than 12 noon on December 1, 2013, unless Seller notifies Buyer of a delay by 12 noon on November 30, 2013, in which case, Seller shall deliver the mackerel no later than 12 noon on December 3, 2013, or, at Buyer's option exercised by notice to Seller delivered no later than 10 A.M. on December 1, 2013, on any date thereafter through and including December 15, 2013.

Example Courtesy of Charles A. Fox

Better? Accurate?

Seller shall deliver 100 pounds of mackerel graded at least A-2, or if Buyer exercises its option to delay the delivery past December 5, 2013, then at least Grade A-4.

Seller shall deliver the mackerel to Buyer's warehouse no later than 12 noon on December 1, 2013. Notwithstanding the foregoing:

- a. If Seller notifies Buyer of a delay by 12 noon on November 30, 2013, then Seller shall deliver the mackerel no later than 12 noon on December 3, 2013; or
- b. If Seller receives notice from Buyer by 10 A.M. on December 1, 2013, that Seller is exercising its option to extend delivery then Seller shall deliver the mackerel *[in accordance with such notice, but in no event later than December 5, 2013?]*

Tips to avoid drafting by accretion

- Use short sentences with only one topic
- Use subparts in outline form (not bullets)
- Do not use parentheses
- Use colons and lists
- Use visual cues to help the reader

termination provisions by accretion

- Pay close attention to termination provisions and remove any ambiguity that arise when tacking specific requirements on to pre-existing terms and conditions

Miscellaneous thoughts

- Document/data sharing
 - What format/program/medium
 - When is it due
 - Part of contract price?
- Reporting duties
 - Who is responsible for making required reports to third parties (i.e., federal government)
 - Part of contract price?
- Transition plans
 - When is it due
 - What level of detail
 - Part of contract price?

