

The Right Deal in the Right Words: Effective Legal Drafting

By Gregory G. Colomb and Joseph M. Williams

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Neither the execution and delivery by the Borrower or the Sponsor of this Commitment or any of the Collateral Agreements or Basic Agreements to which the Borrower or the Sponsor is a party or the instruments evidencing the Term Loan, nor (subject in the case of clause (i)(B) of this Section 2.4(a) to the Borrower obtaining Permits not yet obtained as of the date hereof) the consummation of the transactions contemplated hereby and thereby, nor the fulfillment of any of the terms hereof and thereof, nor the execution and delivery by the Borrower or the Sponsor of any of the Basic Agreements to which the Borrower contemplates becoming a party (by assignment or otherwise), the consummation of the transactions contemplated thereby or the fulfillment of any of the terms thereof: (i) conflicts with or results or will result in a breach or violation of (A) the Articles or Certificate of Incorporation or the By-laws of the Borrower or the Sponsor, (B) any federal, state or local law or any order, rule or regulation of any federal, state or local government or public authority or agency having jurisdiction over the Borrower or the Sponsor or any of the properties of the Borrower or Sponsor or by which the Borrower or the Sponsor or any of such properties is bound or affected, or (C) any evidence of indebtedness, agreement or instrument to which the Borrower or the

Sponsor is now a party or by which the Borrower or the Sponsor or any of the properties of the Borrower or the Sponsor is now bound or affected; or (ii) results or will result in the creation or imposition of any Lien other than the Liens created by the Deed of Trust, the Debt Protection Fund Agreement, the Pledge Agreement and the Permitted Encumbrances upon any of the properties of the Borrower or the shares of stock of the Borrower.

With contract clauses like this one all too common, it is no wonder that for most people, legal drafting has a bad name. And even among lawyers, few would look to contracts for examples of the best legal writing. What job applicant would submit a contract as a sample of her best writing? Lawyers and clients alike have come to expect contracts, licenses, and other legal instruments to be, if not unreadable, then at least tedious—an expectation that leads only to more unreadable drafting. But even though legal drafting poses special challenges, the quality of its writing is as important to the success of a contract or other instrument as it is to any other legal genre.

Of course, what we prize in a well-written contract differs from what is important in a memo or brief. The first rule for drafting is to get the substance right. A contract will do little good if it commits the parties to unnecessary or harmful provisions or fails to commit them to necessary ones. But it also does little good if the substance is right but expressed in provisions that no one can understand—not the parties, their employees or agents who must carry out the provisions, or worse the courts who must settle the disputes that inevitably follow.

To be effective, a contract, license, or other legal instrument must be drafted so that everyone who needs to understand its provisions can agree on what they mean, which is to say, what each party

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must *do*. Its sentences must be simple enough for careful readers to process them as easily as their substance allows and precise enough that any two careful readers will arrive at the same interpretation; and the whole document must be organized so that readers can find the information they need quickly and surely. The problem is that these documents are typically produced under conditions that make those goals difficult to achieve.

Good legal drafting is like cutting with a scalpel rather than with a chain saw: you need to approach the task with more care than you need when you knock out a quick memo, because a botched paragraph can have serious, which is to say expensive, consequences. In this column, we show you some ways to manage the special difficulties of legal drafting so that you can produce documents that are substantively correct and yet both unambiguous and as readable as their substance allows.

Create Clear and Precise Sentences

That a written agreement should be clear and unambiguous simply reflects the first principle of contract law: All parties should understand what they are agreeing to. When you draft or review an agreement, your goal should be a document that leads all parties to comply with its provisions confidently, and parties are more likely to comply with provisions that they understood and accepted when they signed the document and understand in the same way months, maybe years later. In the heat of negotiations and deal-making, you or your client may be tempted to get others to agree to provisions that they would not accept if they understood them fully, but you seldom help yourself or your client by enabling a deal that results in a series of disputes over what your document means—or, worse, over violations of its terms. In the long run, you best serve everyone if you create a document whose terms are clear and unambiguous to all parties.

Many drafters try to make the terms of an agreement clear and unambiguous by reaching verbal understandings of the meaning of each provision. But what survives that exercise is not

your explanations, and certainly not the parties' memory of what you said; what survives is an agreement whose provisions were not clear enough to those in the best position to understand them at the time. Not only can the original parties forget or distort those explanations, but they are often not the only ones who need to understand the agreement. Once they are signed, agreements become instruction manuals—for new principals, for lower level employees or other agents responsible for carrying out the provisions, and for accountants, lenders, bankers, and others responsible for evaluating them. And ultimately, they become manuals for the arbitrators, judges, or juries who must settle disputes.

What most counts in contracts and other instruments is not immediate agreement; what most counts is an understanding by possibly unknown parties. So just as you cannot trust your own too-easy understanding of what you intend a provision to mean, neither can you trust the original parties' tutored understanding of it.

In earlier columns, we explained why in all revising you need mechanical ways to bypass your own too-easy understanding of your own prose. Here, we offer four mechanical ways to ensure that your contract provisions will be clear not just to you or your client but to anyone who needs to understand them.

1. Make Subjects Characters and Verbs Actions

As in all documents, sentences in contracts are clearer—and less ambiguous—when subjects are characters and verbs are their key actions. Compare:

- a. The acceptance of any order from or the sale of any Products to Abco after the termination or expiration of this Agreement shall not be construed as a renewal or extension of the Agreement, nor as a waiver of termination.
- b. After this Agreement has expired or been terminated by Defco, Defco shall not be deemed to renew or extend the Agreement nor waive any termination if it accepts any order from or sells any Products to Abco.

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The task of every agreement is to require specific actions by specific characters. The more you build your sentences around those characters and their actions, the more effective they will be.

2. Use Characters to Assign Specific Responsibility for Specific Actions

In most documents, you can choose to make the subject of a sentence any of its characters, even an object, idea, or action. Often, the most effective character for the subject of a sentence might not be the person who performed its action. For example,

On cross-examination, Dr. Smith had to acknowledge that his opinion was based on a cursory review of the record rather than a close study of the defendant.

Here the main character/subject (Dr. Smith) is the subject and even seeming agent of *acknowledge*. But Dr. Smith is implicitly the *receiver* of an action: under cross-examination, someone *forced* him to acknowledge something. But the role of that hidden character (another lawyer? a prosecutor?) has such a small part in this story that he is absent from the sentence entirely.

In contracts you have less choice about whom to make the subject/agent of an action, because your goal is to document not just what the parties will do but which specific party is responsible for each specific action. So in contracts, your subjects should be not any character associated with the action but its agent, the specific character who performs it. Compare:

a. Work will not be deemed ready for Abco’s written acceptance until completion of all items indicated on the completion list. Upon said completion and satisfactory reinspection, Abco will issue Contractor a written certificate indicating acceptance of the Work. Before issuance of the final payment, satisfactory evidence must be submitted showing that all payrolls, material bills, and other indebtedness connected with the Work for which Abco has paid have been paid by Contractor or its subcontractors. Thereupon, Contractor

will be paid the balance of any amount owing to Contractor including the retained amount, if any, referred to in Paragraph 6.02(c), but such payment will not alter or amend the terms of any warranty provided herein.

b. Work will not be deemed ready for Abco’s written acceptance until Contractor has completed all items indicated on the completion list. When the Contractor has completed the Work, Abco will again inspect it. If Abco is satisfied with the Work, it will issue Contractor a written certificate indicating that it has accepted the Work. Before Abco issues the final payment to Contractor, Contractor must submit evidence satisfactory to Abco that Contractor or its subcontractors have paid all payrolls, material bills, and other indebtedness connected with the Work for which Abco will pay. Thereupon, Abco will pay Contractor the balance of any amount owing to Contractor including the retained amount, if any, referred to in Paragraph 6.02(c). However such payment will not alter or amend the terms of any warranty provided herein.

Version (a) sets forth the substance of the agreement in relatively unambiguous terms. But we have to read closely to determine exactly who must perform each of the actions specified. In contrast, (b) is more explicit about who must do what, so that it is not only a more precise agreement but a more useful instruction manual.

Characters are especially important in consumer contracts or any document that addresses inexperienced readers. The more such an agreement reads like an instruction manual or a recipe, the more familiar and understandable it will seem. In this clause, for example, the customer or the company is the subject and main character of almost every sentence. Note that the main character is called *you* and not the *buyer*:

§9.1 If you have a Dispute with Abco (as defined in §4.1), you must first try to resolve it through the informal dispute resolution

process defined in §4.3. If you and Abco cannot resolve the Dispute informally, you or Abco may choose to arbitrate that Dispute in accordance with the terms of this Section 9. In that case you will receive a hearing before a neutral arbitrator instead of in a court by a judge or jury. You and Abco agree that if one party chooses arbitration, neither party will litigate the Dispute in court, except to appeal the arbitrator's decision (as described in 9.7). The party that chooses arbitration will also choose which of the following three organizations will conduct the arbitration: [LIST]. The selected arbitrator will apply the appropriate rules for consumer arbitration claims, including applicable statutes of limitation and discovery rules. (This means that you may be required to provide relevant information and documents to Abco and vice versa.) The arbitrator will honor either party's claims of privilege recognized by law and will take reasonable steps to protect your account information and other confidential or proprietary information.

When you draft agreements like this one, not only do you reduce disputes and encourage compliance, but you also help your client inspire confidence in its customers that it will deal with them fairly and forthrightly.

3. When They Matter, Specify When, Where, and How

In many cases, users of an agreement need to know not just who must do what, but when, where, and how to perform the action. For every major provision, ask yourself whether you need to specify those qualifications. For example, the first version of this inspection provision leaves open opportunities for misunderstanding and disputes; the second improves the chances that the parties will know whether and when the goods have been accepted in accord with the agreement.

- a. Upon delivery of the machinery, Abco will inspect each device individually. If Abco discovers any defect or damage beyond normal wear and tear, Defco will either

repair the device at its own expense or have it shipped back to the Houston facility.

- b. Abco will inspect each device individually within two weeks of the delivery date (as defined above). If Abco discovers any defect or damage beyond normal wear and tear, it must notify Defco in writing within three weeks of the delivery date. Otherwise, Abco will be deemed to have accepted delivery. Once Defco receives notice of any defect or damage, it will have 30 days to repair the device at its own expense or have it shipped back to the Houston facility.

When you add these additional specifications, do not clutter your sentences by cramming them all into one. You will be clearer if you turn one sentence into several (as the second sentence of (a) becomes three in (b)).

4. Use Words Precisely

In contracts and other instruments, not only must your sentences be clearer and more explicit than in other kinds of legal writing, so must your words. Here are four ways to reduce ambiguity through your choice of words.

- **Don't vary words.** If you use different words to refer to the same objects, actions, or ideas, readers may think that you are using those different words to communicate different meanings. Judges are especially prone to think that when drafters use different words, they may have in mind different meanings. The terms *SUV*, *automobile*, *car*, and *vehicle* may all refer to the same object in the minds of the drafter, but might not for someone who has to adjudicate a dispute.
- **Use words familiar to readers.** Unless you need to invoke a specific legal concept, use the names for things used by the users of the agreement. If an agreement refers to a client's financial statements, give them the specific names that the client uses, not the generic names that a lawyer or accountant would use.

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- Use singulars and plurals precisely. Don't use indefinite plurals that might actually be singular. Use plurals only when an action must be undertaken by more than one party (and then specify which parties must act—*both, all, some, any*, etc.). Otherwise, use singulars: *not*, “Tenants will report problems . . .” *but*, “Each tenant will report any problem . . .”
- Use *and* and *or* precisely. Don't leave readers to guess whether a provision that someone may do “X or Y” means that they can do only one but not the other. Choose among the following more precise patterns:
 - either X or Y
 - X or Y, or both X and Y
 - both X and Y

Manage Unavoidable Complexity

Shorter, simpler sentences are clearer, but some contract sentences have to be longer and more complex, usually because you have to be exhaustively precise. Sometimes, you cannot precisely name the characters or actions in a provision in a word or two; sometimes there are several of each. In that case, the character-action structure won't be enough to make a sentence easy to read. For example, the following provision is expressed in a sentence whose subject names several characters (underlined), whose indirect object names several more (**bold**), and whose object (*italicized*) names more entities yet.

Unless specifically authorized by the Company in writing, Consultant, its direct employees, and any additional persons or entities employed by Consultant (including independent science experts, data collection agents, and data storage or manipulation technicians who have executed separate Confidentiality Agreements) shall not intentionally or unintentionally disclose to any persons associated with or employed by **independent science experts, data collection agents, and data storage or manipulation**

technicians who have not personally signed Confidentiality Agreements or to any other third party any science, business, or marketing data, any devices or processes for data analysis, any production or disposal processes observed on Company premises, or any other Proprietary Information.

Suppose the main units in that sentence had short names: *Joe's associates*, *outsiders*, and *secrets*. Now the provision couldn't be clearer:

Unless specifically authorized by the Company in writing, *Joe's associates* shall not intentionally or unintentionally disclose to any *outsiders* any of the Company's *secrets*.

Your problems with complex sentences get even worse when a provision involves not just multiple characters but multiple conditions, consequences, and provisos.

What follows are some ways to help readers move through unavoidably complex sentences, if not easily, then at least without being defeated by them.

5. If Possible, Get to the Subject and Verb Quickly

If you express required actions as verbs and the agent of those actions as subjects, arrange your sentences so that readers get to those subjects as verbs as quickly as possible.

- In the case of all specifications, drawings, sketches, models, samples, tools, computer or other apparatus programs, technical or business information, and data, written, oral or otherwise (herein designated “information”), you acknowledge that Abco retains ownership of all such materials furnished to you hereunder or in contemplation hereof.
- You acknowledge that Abco retains ownership of all materials furnished to you hereunder or in contemplation hereof, including all specifications, drawings, sketches, models, samples, tools, computer or other apparatus programs, technical or business information, and data, written, oral or otherwise (herein designated “information”).

6. Break up Long Sentences into Shorter Ones

Although drafters often assume that they have to cram all related ideas into a single sentence, you can often make sentences simpler by revising one into several:

a. **2.3 Use of name.** Except for disclosure by Abco of the Company's support for the Research Activities in research publications and except for disclosure by the Company to potential partners, investors, or other parties with a legitimate business or regulatory interest in the Research Activities, including but not limited to New Genetics, that the Research Activities are being conducted at Abco or under the direction of the Research Specialist, no party to this Agreement shall use the name of any other party or of any staff member, employee, or student of any other party or any adaptation, acronym, or name by which any party is commonly known, in any advertising, promotional, or sales literature or in any publication without the prior written approval of the party or individual whose name is to be used.

b. **2.3 Use of name.** Abco may acknowledge in research publications the Company's funding support for the Research Activities. The Company may disclose that the Research Activities are being conducted at Abco or under the direction of the Research Specialist to potential partners, investors, or other parties with a legitimate business or regulatory interest in the Research Activities, including but not limited to New Genetics. Otherwise, all parties to this Agreement may not use in any publication or advertising, promotional, or sales literature (i) the name of any other party or of any staff member, employee, or student of any other party or (ii) any adaptation, acronym, or name by which any party is commonly known, without the prior written approval of the party or individual whose name is to be used.

7. Move Complexity to the End of a Sentence

When you cannot reduce complexity by breaking up sentences, move the complexity (especially lists) to the end of the sentence. Then if you can, make the parallel elements in the complexity visually parallel with tabular white space:

- a. Neither the execution and delivery by the Borrower or the Sponsor of this Commitment or any of the Collateral Agreements or Basic Agreements to which the Borrower or the Sponsor is a party or the instruments evidencing the Term Loan, nor (subject in the case of clause (i)(B) of this Section 2.4(a) to the Borrower obtaining Permits not yet obtained as of the date hereof) the consummation of the transactions contemplated hereby and thereby, nor the fulfillment of any of the terms hereof and thereof, nor the execution and delivery by the Borrower or the Sponsor of any of the Basic Agreements to which the Borrower contemplates becoming a party (by assignment or otherwise), the consummation of the transactions contemplated thereby or the fulfillment of any of the terms thereof results or will result in a breach or violation of the Articles or Certificate of Incorporation or the Bylaws of the Borrower or the Sponsor.
- a. The Borrower or the Sponsor does or will not breach the Articles, Certificate of Incorporation, or Bylaws of the Borrower or Sponsor if it
- (i) executes and delivers this Commitment, any Collateral Agreements or Basic Agreements to which the Borrower or Sponsor is a party, or the instruments evidencing the Term Loan,
 - (ii) consummates the transactions contemplated hereby, subject in the case of clause (i)(B) of this Section 2.4(a) to the Borrower obtaining Permits not yet obtained as of the date hereof,

“Although drafters often assume that they have to cram all related ideas into a single sentence, you can often make sentences simpler by revising one into several.”

“No one expects a contract to carry them from clause to clause as a good story carries us from episode to episode.”

- (iii) executes and delivers any additional Basic Agreements into which the Borrower contemplates entering (by assignment or otherwise),
- (iv) fulfills the terms of any additional Basic Agreements, or
- (v) consummates the transactions contemplated in any Basic Agreement.

8. If You Can't Simplify, Add a Précis

Sometimes you cannot avoid or simplify a complex sentence, especially those with multiple interrelated characters or actions that you cannot name in a word or two. If you have structured the sentence in character-action form, then the only challenge for readers is to recognize the basic story behind the complex names for the characters and their actions.

You can help readers do that in two ways. First, help readers more easily see the multiple characters as a group that plays the same role in the sentence by summarizing the list in one or more category terms. For example, the confidentiality clause at the beginning of this section would have been easier to read if the long list of confidential information began with a category term (italicized):

Not: Consultants may not disclose any science, business, or marketing data, any devices or processes for data analysis, any production or disposal processes observed on Company premises, or any other Proprietary Information.

But: Consultants may not disclose any *Proprietary Information*, including any science, business, or marketing data, any devices or processes for data analysis, or any production or disposal processes observed on Company premises.

Second, help readers recognize the underlying story by introducing a complex clause with a sentence that summarizes the story. This next précis (italicized) would be imprecise standing alone, but it helps readers get through the following, more complex sentence without diminishing its precision.

Unless specifically authorized by the Company in writing, Consultant must keep confidential all of the Company's Proprietary Information. In particular, Consultant and its direct and indirect employees (including any additional persons or entities such as independent science experts, data collection agents, and data storage or manipulation technicians who have executed separate Confidentiality Agreements) shall not intentionally or unintentionally disclose to any third party (including persons associated with or employed by independent science experts, data collection agents, and data storage or manipulation technicians who have not personally signed Confidentiality Agreements) any Proprietary Information (including science, business, or marketing data, any devices or processes for data analysis, or any production or disposal processes observed on Company premises).

If the complex sentence is the only one in a clause, you can also use a shortened version of the summary sentence as a heading for the clause.

Organize by Topics and Episodes

No one expects a contract to carry them from clause to clause as a good story carries us from episode to episode. But an effective instrument does need a clear and useful organization, one that not only helps a reader find the specific provision she is looking for but that also helps her know what to look for in the first place. So don't simply list clauses like beads on a string. But don't bother to make them a good read from beginning to end. Instead, group provisions and use headings so that they help a reader use the agreement as a reference document: What order will most help someone know what to do or how to solve a problem?

9. Organize for Future Reference

You generally have two choices for organizing a contract or other instrument: by topic (*Record-keeping, Confidentiality, Scope of License*) or by situation or action (*Termination, Delivery of Goods, How to Report Equipment Failures*). Although most contracts use some of both, the two schemes have different effects and are suited for different users.

■ Choose a topical organization if the contract will be used primarily by lawyers, accountants, or other professionals who consult it to avoid or settle disputes, as for example in a large acquisition or joint venture. Experienced professionals think in terms of legal and business topics when they work on familiar deals.

■ Choose a situational organization if the contract will be used by parties who consult it to know what they should do or have done, as in a consumer contract or a consulting agreement. These users approach a contract in terms of what it requires of them in a particular situation.

If you expect a contract to have both kinds of users, choose a situational organization because a topical one may defeat ordinary users.

10. Group Actions That Occur Together or Depend on One Another

Organize each unit so that it tells a piece of the story. Think of an individual clause as one step in the overall deal, and think of groups of clauses as episodes. If you organize sections by topic, the subsections are likely to be related conceptually rather than narratively. But you usually can design subsections so that each is one piece of the story.

Always group actions or requirements that depend on one another, especially if one triggers the next. For example, suppose an agreement requires a Licensee to (1) investigate local trademark violations, (2) collect samples, (3) report violations, (4) not take any formal legal action, and (5) cooperate in and if requested join any suit. Group these related provisions in one unit rather than, for instance, separating 1–3 into a general trademark section and 4–5 into a remedies section.

11. Use Headings to Identify the Point or Purpose of a Clause

Almost all well-conceived units in a contract have an underlying point or purpose, and readers understand a provision more easily and accurately when they know that purpose before they work through the details—especially readers inexperienced with contracts or with a particular kind of deal. So whenever possible, make that point

or purpose evident in a heading (which, of course, you will later specify is only for clarity and not part of the agreement itself).

When you organize by situations, the purpose of a unit should be obvious: *Delivery of Goods* or *How to Report Equipment Failures*. But even topically organized units usually have a point—what you would answer if a client asked, *So why are you including that part? So that you can protect your confidential information. So that you are protected if by signing this agreement the other party violates some other agreement we don't know about.* It may seem when you are drafting that there is no real difference between these headings:

Confidentiality

Consultant's Duty to Protect Company's Confidential Information

The first may clearly imply everything in the second for anyone who has participated in the deal, but the conceptual framework of the second eases the understanding of anyone not used to such agreements or even of an experienced reader reviewing this document for the first time.

Some Useful Drafting Processes

Rarely will you have to draft a document without a model. And when a deadline looms, you may find it hard to resist the temptation to draft by filling in blanks from some previous contract. Models are essential tools in effective and *cost-efficient* drafting, but only if you use them at the right time in the right way. If you start with a model or with the other party's draft, then your document is less likely to represent the best current deal for your client. So try always to start by sketching out the keys to success for your client in this particular deal. (If the current deal is a new kind for you, you can review models first, but only to get a sense of the general shape such deals take.) Then go to the models to make sure you haven't missed anything and then to borrow ideas, usable clauses, and boilerplate—remembering, of course, that any other document is right for some *other* deal.

“Models are essential tools in effective and cost-efficient drafting, but only if you use them at the right time in the right way.”

“When you draft, you gain some control over the process. You set the framework for subsequent discussions, and any negotiations start from your best deal.”

Here are four steps to take before you turn to models.

12. Write the First Draft if You Can

Try to be the first drafter for anything but a routine agreement. You may add to your client's cost and your work, but being the first drafter has several advantages over responding to someone else's—advantages that may save more than the drafting costs. When you draft, you gain some control over the process. You set the framework for subsequent discussions, and any negotiations start from your best deal. You can't, of course, be so aggressive that your draft doesn't pass the laugh test. But you will not gain what you do not ask for, and it is always easier to retain a favorable position already in a document than to add one later. Drafting also helps you be better prepared. You will know the intricacies of a document you prepared far better than one you simply reviewed. Moreover, drafting gives you more time and better focus for thinking through the implications of and interactions among a document's provisions.

13. Start by Summarizing the Deal

Unless the deal is routine, don't start by listing or drafting provisions. Start with a narrative summary of the deal, focusing on what your client hopes to achieve and the predictable problems she hopes to avoid. Fill out your narrative with those steps and problems that you can anticipate but the client has not. Don't sweat the details; you need only a rough sketch or outline. But do make sure that the narrative make sense. Imagine what the parties have to do to play out your narrative. Then imagine all the ways it can go wrong.

14. Draft Key Provisions Before You Consult Models

Any effective agreement has to cover a range of contingencies that are not, strictly speaking, part of the deal. Your role in the process includes anticipating all of those unlikely and unforeseen contingencies—something inexperienced lawyers do best by consulting models. But the heart of an agreement has to be not those lawyerly contingencies but the key elements of the particular deal at hand. So before you consult any models for things you may otherwise miss, draft those provisions that set out the main story line of the deal. Use them to organize the document, and then start adding in provisions you find in models. Save boilerplate for last.

15. Talk as You Draft

Lawyers always risk writing in a way that no ordinary person would ever talk, but never more so than in legal drafting. If as you draft you converse only with the other contracts you use as models, you're likely to produce prose that will mystify the parties and even challenge other lawyers. So as you draft, take every opportunity to explain the key provisions to anyone involved in the deal who will listen. You can't simply transcribe those explanations in your draft. But if you model your clauses on those explanations rather than on what you find in other contracts, your client and anyone else who has to use your draft will thank you.

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