1. BASIC CONCEPTS IN DRAFTING CONTRACTS
Basic Concepts in Drafting Contracts

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presented by
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for the
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Basic Concepts in Drafting Contracts

Summary of Presentation: What this Presentation Covers

- Preliminary Matters
  - Legal Drafting vs. Conversation/Prose Writing
  - The Importance of Language
  - Preferences in Contract Drafting
  - Practical Considerations

- The Framework of a Contract
  - Preamble
  - Recitals
  - ** Body
  - Signature Pages

- Legal Archaisms

Summary of Presentation: What this Presentation does NOT Cover

- The law*
- The structure of any agreement in particular (e.g., asset purchase agreements, stockholders’ agreements, license agreements, etc.) – rather, it deals with how to express concepts in contracts generally
- The drafting process (e.g., integration of comments from multiple sources)
- Certain advanced/specifically nuanced drafting concepts.
- Using drafting skills in connection with negotiations (e.g., “negotiating through the document,” how to use vagueness and ambiguity to your advantage)

* To the extent that this presentation is required to cover the law in order for attorneys to obtain CLE credit, this presentation is deemed to cover the law.
Basic Concepts in Drafting Contracts

Preliminary Matters

- Legal Drafting vs. Conversation/Prose Writing
- The Importance of Language
- Preferences in Contract Drafting
- Practical Considerations

Forget common sense

Example: If my wife wants me to take out the garbage each week, “Vincent, you’re responsible for taking out the garbage” should do the trick. You get the idea – I take out the garbage each week, it gets picked up, I bring the garbage cans back in and I do it all over again in advance of the next scheduled pick-up.
Vincent, you’re responsible for taking out the garbage.

But as an attorney, if I wanted to poke holes in the deal, I could ask:

- What day and time during the week do I take out the garbage?
- Can I take out the garbage only once, or is this an ongoing obligation?
- Can I let the garbage pile up for a year and then take it out?
- Do I need to take out all of the garbage in the house, or just some of it?
- Does the garbage need to be bagged? Can I just throw a half-eaten chicken wing on the front porch?
- Can I sub-contract my garbage-taking-out responsibilities to my daughter?
- …and what exactly constitutes “garbage” anyway?

Vincent, you’re responsible for taking out the garbage.

“Written in lawyer speak…”

“No later than 6 a.m. New York time each Monday and Thursday (and no earlier than 7 p.m. each Sunday and Wednesday, respectively), Vincent shall: (i) place all Garbage on the interior of the house on the premises (the “House”) in trash bags (any such trash bag into which Garbage has been placed, a “Trash Bag”); (ii) seal and place each Trash Bag in one of the garbage cans located on the exterior of the House (any such garbage can into which a Trash Bag has been placed, a “Garbage Can”); and (iii) thereafter place each Garbage Can no more than one inch south of the curb of the sidewalk relating to the premises and between one and seven feet west of the driveway on the premises. Vincent shall place all Garbage Cans on the east side of the House (and adjacent thereto) as of 6 a.m. New York time each Tuesday and Friday. Vincent’s obligations under this paragraph are personal in nature and, as such, are not delegable in whole or in part. “Garbage” means rubbish, as determined by Christine in her sole discretion.”
Basic Concepts in Drafting Contracts

Preliminary Matters > Legal Drafting vs. Conversation/Prose Writing

• The point is, forget “you-get-the-idea” drafting. Forget “contract-as-a-mere-guidebook” drafting. If you want to make a contract tight and less subject to uncertainty and multiple interpretations, ask the questions and plug the holes. Otherwise:
  ➢ The law will plug the holes for you*
  ➢ Your adversary will plug the holes for you
  ➢ It will be unclear what rule will apply, or whether different rules apply in different contexts

* e.g., “public policy” and “fairness” doctrines.

Basic Concepts in Drafting Contracts

Preliminary Matters > The Importance of Language

“A contract is only as good as your ability to successfully enforce it in court.”

But let’s consider how “good” a contract might be in the context of a counterparty considering whether or not to comply with a term of the contract....
“A contract is only as good as your counterparty’s perception of your ability to successfully enforce it in court.”
“A contract is only as good as your counterparty’s perception that you will seek to and successfully enforce it in court” PLUS “your counterparty’s assessment of any damage to its reputation should you seek to [and successfully] enforce it in court.”

PLUS “any sense of moral obligation that your counterparty might have in performing its obligations under the contract.”
The upshot: Language matters! (ex ante and ex post)

- Ambiguous vs. Clear
- Vague vs. Certain
- Straightforward vs. Complex
- Superfluous vs. Tight
- Burdensome vs. Easy-to-comply-with

* Language matters even if it is unenforceable!

Basic Concepts in Drafting Contracts
Preliminary Matters > Preferences in Contract Drafting

Some general preferences in contract drafting are listed below. Note that an "improvement" in one characteristic might result in a "decline" in other characteristics.

- *Unambiguous* is better than *Ambiguous*
- *Concision* is better than *Redundancy*
- *Shorter* is better than *Longer*
- *Predictability* is better than *Uncertainty*
- *Plain English* is better than *Jargon*
- *Precision* might or might not be better than *Vagueness*
- *Consistency* is better than *Inconsistency*
- *Straightforward* is better than *Confusing*
Basic Concepts in Drafting Contracts
Preliminary Matters > Practical Considerations

- Law as a backdrop/basis for provisions
- Reliance on forms (a blessing and a curse)
- Know your audience
  - For this presentation, we will assume that sophisticated business people and attorneys are your audience
- Detail vs. Generality (Will too much of good thing spoil the deal?)
- Holding the pen vs. reacting
- Integrating comments
- "Universal drafting "rules" vs. good practice vs. your own style"
- For more junior attorneys, start developing good drafting habits now so you can easily implement them going forward
  - Quickly draft a tight agreement when you’re holding the pen
  - Spot and exploit drafting weaknesses in opposing counsel’s draft

Useful Resources for Learning/Improving Drafting Skills

- The Structure of M&A Contracts, Kenneth A. Adams (2011)
- Garner on Language and Writing, Bryan A. Garner (2009) – more generalized concepts (including writing skills for litigators)
- Negotiating and Drafting Contract Boilerplate, Tina L. Stark (Ed.) (2003) – For the intersection between law and contract language
- Typography for Lawyers, Matthew Butterick (2010) – This what happens when a font designer becomes an attorney. Great book on formatting legal documents – and more than just fonts!
- Annotated forms
- Successive “redlines” of a document
- Board resolutions
- Due diligence materials
- Experience
Basic Concepts in Drafting Contracts

The Framework of a Contract

- Preamble
- Recitals
- Body
  - Definitions
  - Language of Performance
  - Obligations and Prohibitions
  - Discretionary Language
  - Language of Declaration
    - Representations
    - Acknowledgements
  - Language of Policy
- Signature Pages

Example:

This ASSET PURCHASE AGREEMENT (this “Agreement”), dated as of October 1, 2013, is made between Big Bad Corporation, a Delaware corporation (the “Buyer”), and Little Guy, LLC, a New York limited liability company (the “Seller”) and, collectively with the Buyer, the “Parties”.

- Type of agreement
- Date of agreement
- Parties to agreement (including jurisdiction of organization and entity type)
- Save descriptive relationships between the parties for the recitals or the body of the contract (e.g., the representations)
Basic Concepts in Drafting Contracts

The Framework of a Contract > Recitals

- Describe background; give the reader context
- Set up defined terms

**Example:**

A. The Seller is engaged as a going concern in the business of designing, manufacturing, marketing, distributing, and selling paper clips (such business, the “Business”);

- Can serve as evidence of intent and help to resolve ambiguity (but there’s not going to be any ambiguity in contracts that you draft, right?)

Basic Concepts in Drafting Contracts

The Framework of a Contract > Recitals

- Do not put operative provisions (e.g., language of performance, representations, or obligations) in recitals

Robin

A. The Parties desire to amend the Loan Agreement in order to, among other things, extend the maturity date of the Loan to December 31, 2013.

Sad

A. The Parties are hereby amending the Loan Agreement to extend the maturity date of the Loan to December 31, 2013.

Happy

A. The Parties shall take such actions as are necessary to implement the terms of this Agreement.
Basic Concepts in Drafting Contracts

The Framework of a Contract > Recitals

• Immediately after the recitals, there is typically a lead-in stating that the parties are agreeing to what follows.

○ NOW, THEREFORE, in consideration of the premises and the respective covenants, representations, warranties and undertakings of the parties hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

○ The Parties hereby agree as follows:

Basic Concepts in Drafting Contracts

The Framework of a Contract > Body

• Definitions
• Language of Performance
• Obligations and Prohibitions
• Discretionary Language
• Language of Declaration
  ➢ Representations
  ➢ Acknowledgements
• Language of Policy
Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > An Initial Thought

An Initial Thought:


The Associate shall deliver the memo to the Partner.

…promptly; no later than 3 p.m. on Tuesday…

…at the meeting; at the Partner’s office…

…by walking it to the Partner’s office; by email…

…in order to “hit the ground running”; because the memo is really important…Does it matter?
Definitions

Lots of power in defined terms!

1. A. The Seller is engaged as a going concern in the business of designing, manufacturing, marketing, distributing, and selling paper clips (such business, the “Business”).

2(a). The Company shall not sell or distribute (each of the foregoing, a “Transfer”) the Shares.

2(b). The Company shall not sell, assign, pledge, encumber, hypothecate, distribute (as a dividend or otherwise), transfer, or otherwise dispose of (each of the foregoing, a “Transfer”) the Shares.

3. “Attorney” means an attorney, a legal assistant, a chef, or any individual residing in the state of New York.
“Stacking” defined terms

This STOCKHOLDERS’ AGREEMENT (this “Agreement”) is made as of October 1, 2013, by and among Example & Co., Inc., an Idaho corporation (the “Company”), those holders of the Company’s Series A Preferred Stock listed on Exhibit A (the “Series A Holders”), those holders of the Company’s Series B Preferred Stock listed on Exhibit B (the “Series B Holders” and, collectively with the Series A Holders, the “Preferred Stockholders”), and those holders of the Company’s common stock that are listed on Exhibit C (the “Common Stockholders” and, collectively with the Preferred Stockholders and those persons that become a party to this Agreement in accordance with the terms hereof, the “Holders”). The Holders and the Company are collectively referred to herein as the “Parties”.

Defining “on site” vs. Defining in a “Definitions” Provision

Defining “On site”

“Transfer” has the meaning set forth in Section 2.3.

…

Section 2.3. The Company shall not sell, assign, pledge, encumber, hypothecate, distribute (as a dividend or otherwise), transfer, or otherwise dispose of (each of the foregoing, a “Transfer”) the Shares.

Definitions Provision

“Transfer” means, with respect to a given asset, any sale, assignment, pledge, encumbrance, hypothecation, distribution (as a dividend or otherwise), transfer, or other disposition of such asset. When used as a verb, “Transfer” has a correlative meaning.

…

Section 2.3. The Company shall not Transfer the Shares.
If defining a term "on site," make sure it is clear which text a definition relates to

- Section 1.1. Johnny shall sell apples to Eve in accordance with Section 1.2 and shall sell oranges to Adam in accordance with Section 1.3 (any such sale, a “Required Sale”).
  - There’s ambiguity as to whether a Required Sale includes sales to Adam only, or includes sales to Eve and sales to Adam.

- Section 1.1. Johnny shall sell apples to Eve in accordance with Section 1.2 and shall sell oranges to Adam in accordance with Section 1.3 (any such sale to Eve or Adam, as the case might be, a “Required Sale”).

OR

- Section 1.1. Johnny shall sell apples to Eve in accordance with Section 1.2 and shall sell oranges to Adam in accordance with Section 1.3. “Required Sale” means any sale described in this Section 1.1.

It's ok to......

•...use the lowercase term as part of a definition
  - “Transfer” means any transfer, sale, pledge, hypothecation, encumbrance, or other disposition.
  - “Permitted Automobile” means any automobile that is permitted on the Long Island Expressway, including, without limitation, my old 1983 Pontiac Firebird.

•...use other defined terms within a definition
  - “Law” means any constitution, law, statute, treaty, rule, directive, requirement, regulation, Order, or any rules or regulations of any self-regulatory organization.
  - “Order” means any order, writ, judgment, injunction, decree, determination, or award, in each case that is issued by a Governmental Entity.
  - “Governmental Entity” means any court, administrative agency, commission, or other governmental authority or instrumentality, domestic or foreign, federal, state, or local.

A “Law” therefore includes, e.g., any injunction issued by a foreign administrative agency.
...but do not...

•...embed obligations within a definition

  “Net Earnings Statement” means a statement of the Company’s net earnings during the Post-Closing Period in the form attached as Exhibit A, which the Company shall provide to the Seller no later than 30 days after the last day of the Post-Closing Period.

  BETTER TO BREAK IT UP AS FOLLOWS:

  “Net Earnings Statement” means a statement of the Company’s net earnings during the Post-Closing Period in the form attached as Exhibit A.

  ...

  Section 2.4. No later than 30 days after the last day of the Post-Closing Period, the Company shall provide the Net Earnings Statement to the Seller.

...and do not...

•...simply use “includes”

  “Permitted Automobile” includes, without limitation, my old 1983 Pontiac Firebird.

•...use more than one term for the same definition

  Verbiage Co., a Delaware corporation (“Verbiage” or the “Company”), is a subsidiary of the Parent.

•...use “shall” to define a term

  “Securities Act” shall mean the Securities Act of 1933, as amended.
Language of Performance

- Deals with actions being taken by the parties by virtue of entering into a contract
- Think: “hereby”
- Use the active voice, not the passive voice
  - The License is hereby granted to the Licensee by the Licensor.
  - The Licensor hereby grants the License to the Licensee.
Some examples

Language of Performance

- The Licensor **hereby grants** to the Licensee a non-exclusive worldwide license to use the Product.
- The Buyer **hereby assumes** the Assumed Liabilities.

Obligations

- The Licensor **shall grant** to the Licensee a non-exclusive worldwide license to use the Product.
- The Buyer **shall assume** the Assumed Liabilities.

Obligations and Prohibitions
Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Obligations and Prohibitions

Obligations
- What a party **has to do** pursuant to a contract
- **Think:** “shall”

Prohibitions
- What a party **is prohibited from doing** pursuant to a contract
- **Think:** “shall not”

Examples:
- The Purchaser **shall pay** the Purchase Price to the Seller at the Closing.
- Each of Moses and his constituents **shall not** covet his respective neighbor’s wife.
- The Presenter **shall not** use any fancy visual effects when transitioning between slides.
Basic Concepts in Drafting Contracts
The Framework of a Contract > Body > Obligations and Prohibitions > "shall" vs. "will" vs. "must"

“shall” vs. “will” vs. “must”

“shall” → “hereby has/have a duty to”

The Purchaser shall wire the Purchase Price to the Seller.

= 

The Purchaser hereby has a duty to wire the Purchase Price to the Seller.
Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Obligations and Prohibitions > “shall” vs. “will” vs. “must”

Do NOT use “shall” unless you want to create an obligation.*

* Avoid the temptation of using “shall” as a proxy for “…and I really mean it!”

This Agreement shall constitute the entire agreement of the Parties with respect to the subject matter hereof.

Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Obligations and Prohibitions > “shall” vs. “will” vs. “must”

- “Will” is sometimes used to create an obligation.

    ☑️ The Purchaser will wire the Purchase Price to the Seller.

- But “will” can also convey futurity, whereas “shall” (in ordinary parlance) is an awkward choice (unless you’re King Arthur).

    ☑️ Davey hereby bets Lou that the Mets will win the World Series this year.

    ☑️ Davey hereby bets Lou that the Mets shall [i.e., hereby have a duty to] win the World Series this year.

    In fact, Davey just lost the bet!
Basic Concepts in Drafting Contracts
The Framework of a Contract > Body > Obligations and Prohibitions > “shall” vs. “will” vs. “must”

- “Must” means “is/are required to.” This could arguably be used as an alternative to “shall” to impose an obligation.
  - The Purchaser must wire the Purchase Price to the Seller.

- But “must” really asserts that a duty merely exists, not that it derives from the provision in which it is used.
  - If companies must [are required to] pay an excise tax on the Product of 20% or less pursuant to applicable law, then Newcomer Co. shall [hereby has a duty to] sell the Product.

- Note that “must” works in instances in which “shall” does not, e.g., in expressing conditions.
  - In order for Lindsay to drive the car home from the pub, she must first convince her mom to give her the keys.
  - In order for Lindsay to drive the car home from the pub, she shall first convince her mom to give her the keys.
    - You should not draft the sentence this way since Lindsay is not obligated to convince her mom to give her the keys, and there should not be a cause of action against Lindsay if she failed to convince her mom to give her the keys. (In fact, it could very well be the other way around if she succeeded in convincing her mom….)

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Basic Concepts in Drafting Contracts
The Framework of a Contract > Body > Obligations and Prohibitions > “shall” vs. “will” vs. “must”

- Note that “must” works in instances in which “shall” does not, e.g., in expressing conditions.
  - In order for Lindsay to drive the car home from the pub, she must first convince her mom to give her the keys.
  - In order for Lindsay to drive the car home from the pub, she shall first convince her mom to give her the keys.
    - You should not draft the sentence this way since Lindsay is not obligated to convince her mom to give her the keys, and there should not be a cause of action against Lindsay if she failed to convince her mom to give her the keys. (In fact, it could very well be the other way around if she succeeded in convincing her mom….)

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Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Obligation and Prohibitions > “shall” vs. “will” vs. “must”

**Use:**
- “shall” to convey an obligation
- “will” to convey futurity
- “must” to convey a condition to be satisfied or to point to an obligation that exists but that derives from another provision

**Do not use:**
- “is obligated to”
- “agrees to”
- “covenants and agrees to”
- “shall be obligated to”
- “undertakes to”

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Basic Concepts in Drafting Contracts


**Active Voice**

**vs.**

**Passive Voice**
General rule: Use the active voice rather than the passive voice when imposing an obligation.*

- Makes clear which party is the actor
- More concise than the passive voice
- Easier to read/More natural than the passive voice
- In the context of an obligation, consistent with substituting "hereby has/have the duty to" for "shall"

* There are certain instances in which it makes sense to use the passive voice (e.g., those in which the identity of the actor does not matter).

Active Voice: The actor is the sentence’s subject.
General format (for an obligation) =

\[\text{[actor] + shall/shall not + [verb (or verb phrase)] + [object being acted upon]}\]

Example: My daughter shall pick up the toys.

- actor
- verb phrase
- object being acted upon
Passive Voice (with identified passive agent): The subject of the sentence is not the actor.

General format (for an obligation) =

[subject being acted upon] + shall/shall not + [verb (or verb phrase)] + by + [passive agent]

Example: The toys shall be picked up by my daughter.

• Does not fit the "hereby has/have a duty to" rule
• Less concise and more awkward than active voice

Truncated Passive Voice (no identified passive agent): The actor is not identified.

General format (for an obligation) =

[subject being acted upon] + shall/shall not + [verb (or verb phrase)] + by + [passive agent]

Example: The toys shall be picked up.
Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Obligations and Prohibitions >
Active Voice vs. Passive Voice

**Truncated Passive Voice (no identified passive agent)**

Example: The toys shall be picked up.

- **subject being acted upon**
- **verb phrase**

Who is obligated to pick up the toys?

- My daughter, Julia?
- My son, Matthew?

ån **Answer:** Mommy and Daddy.

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Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Obligations and Prohibitions >
Third Parties

** You can’t impose obligations upon persons that are not party to the contract. *(Example 1 – Accountants)*

Upon final resolution of all Disputed Items, the Accountants shall issue a report showing a calculation of the Final Net Working Capital. The Accountants shall make their determination of the Disputed Items within 60 days after having been selected.

- What if the Accountants don’t issue a report showing a calculation of the Final Net Working Capital?
- What if the Accountants don’t make their determination within 60 days?
** You can’t impose obligations upon persons that are not party to the contract. *(Example 1 – Accountants)*

😊 Upon final resolution of all Disputed Items, the **Accountants must issue** a report showing a calculation of the Final Net Working Capital. **The Accountants must make** their determination of the Disputed Items within 60 days after having been selected.

😊 Upon final resolution of all Disputed Items, the **Parties shall cause the Accountants to issue** a report showing a calculation of the Final Net Working Capital. **The Parties shall cause the Accountants to make** their determination of the Disputed Items within 60 days after having been selected.

😊 If the Parties are unable to resolve any disagreement as to one or more Disputed Items within 30 days after the Receiving Party’s receipt of a Protest Notice, then the Parties **shall promptly engage** Big Accountant Co. (the “Accountants”) by signing an engagement letter with the Accountants pursuant to which, among other things, the Accountants **agree to comply with** procedures set forth in this Section 2.4(b)(iii)....The Parties **shall use their respective reasonable best efforts to cause** the Accountants to reach a final determination with respect to all Disputed Items (such determination, a “Final Determination”) and to provide to the Parties, no later than the 60th day after the Accountants have been engaged pursuant to this Section 2.4(b)(iii), a report with respect to the NWC Statement (the “Final Determination Report”) that includes a calculation of the Net Working Capital.
Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Obligations and Prohibitions > Third Parties

** You can’t impose obligations upon persons that are not party to the contract. (Example 2 – Parent Companies)

Assume that only Blocker and Basic are parties to the Stockholders’ Agreement.

- Each of Blocker, Basic and the Parent shall not directly or indirectly Transfer any Shares.
- Each of Basic and Blocker shall not directly or indirectly Transfer (and shall not cause or permit their respective Affiliates to directly or indirectly Transfer) any Shares.

Potential solutions:
- Make the Parent a party to the Stockholders’ Agreement. (Be sure to pick up Transfers by and to "intermediate entities," and permitted exceptions for Transfers to Affiliates.)
- Impose a consequence if the Parent directly or indirectly Transfers Shares or if there is a "Change of Control" with respect to Blocker and/or the Parent (e.g., a put or call right in favor of Basic is triggered).
Discretionary Language

- Deals with what a party is permitted to do
- Think: “is/are permitted to”
- Discretionary language is really an exception to prohibitions:
  - in a contract (i.e., an exception to “shall not”)
  - that are default rules (e.g., Section 18-702(b) of the Delaware Limited Liability Company Act provides that, unless otherwise provided in a limited liability company agreement, a member of a limited liability company ceases to have the power to exercise any rights or powers of a member upon the assignment of all of the member’s limited liability company interest)
Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Discretionary Language > "is/are permitted to" vs. "might possibly"

• “May” can convey what a party is entitled/permitted to do, or it can convey what a party might possibility do (particularly when used with respect to a third party).

• Example: “may” = “is permitted to”

♫ The Seller shall not encumber the Shares; except that the Seller may pledge the Shares to the Bank in connection with a loan provided by the Bank to the Seller.

Some background on “may”

• Example: “may” = “might possibly”

♫ The Seller shall deliver in a timely manner all Products that are required to be delivered pursuant to all purchase orders that Key Customers may submit during the Pre-Closing Period.

★ There is ambiguity here: is the provision referring to (1) all the Purchase Orders that Key Customers “might possibly submit” or (2) only those Purchase Orders that Key Customers “are permitted to submit”?

♫ If a Key Customer delivers a purchase order to the Seller during the Pre-Closing Period, then the Seller shall deliver in a timely manner all Products that are required to be delivered pursuant to such purchase order.
Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Discretionary Language > “Naked” Discretion

- Use discretionary language to create an exception to a prohibition in a contract.
  - At the Closing, the Buyer shall convey the Assets to the Seller. During the period (such period, the “Post-Closing Period”) beginning on the Closing Date and ending on the date that is 10 days after the Closing Date, the Buyer **shall not sell** the Assets to any Competing Enterprise; **except** that, during the Post-Closing Period, the Buyer **is permitted to sell** the Assets to any Key Vendor that is a Competing Enterprise.

- In this example, it is clear that “is permitted to sell” is being used as the exception to the prohibition “shall not sell.”

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Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Discretionary Language > “Naked” Discretion

- Generally, do not use discretionary language if the permitted action is not otherwise prohibited.
  - **At the Closing, the Buyer shall convey the Assets to the Seller.** During the period (such period, the “Post-Closing Period”) beginning on the Closing Date and ending on the date that is 10 days after the Closing Date, the Buyer **shall not sell** the Assets to any Competing Enterprise. **After the expiration of the Post-Closing Period,** the Buyer is permitted to sell the Assets to any Key Vendor that is a Competing Enterprise.

- “is permitted to sell” does not add anything here: there is nothing otherwise prohibiting the Buyer from using the Assets after the Post-Closing Period.

- In fact, including the superfluous language might create an unwanted implication: the Buyer is permitted to sell the Assets after the Post-Closing Period, **but only** to Key Vendors that are Competing Enterprises.
Language of Declaration

• Assertions of fact memorialized in a contract
• Two types:
  • Representations
  • Acknowledgments
Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Language of Declaration > Representations

- Statements made by a party of what was, is, or will be true to induce someone to enter into a contract
- Need not be within the control or knowledge of the party making the representation
  - Within control/knowledge: Al represents to George that all of the papers he has written through the date hereof concerning global warming attribute the primary causes of global warming to humans.
  - Not within control/knowledge: Al represents to George that at least 51% of all reports written through the date hereof by reputable scientists concerning global warming attribute the primary causes of global warming to humans.

The lead-in*…

😊 [Party A] represents to [Party B] as follows:…

😊 Each of [Party A] and [Party B] represents to [Party C] as follows:…

😊 [Party A] and [Party B] **jointly and severally** represent to [Party C] as follows:…

* Not for this presentation, but the lead-in can be structured in different manners with respect to the date or dates as of which the reps as a whole are made, which will affect closing conditions, termination rights, and indemnification rights.
Example: Mitt represents to Newt as follows:

- During December 2011, Mitt did not disparage Newt. *(Past circumstance or event; within the representing party’s control/knowledge)*
- During December 2011, no writer for *Iowa Daily* disparaged Newt. *(Past circumstance or event; not within the representing party’s control/knowledge)*

Example: Hillary represents to Barack as follows:

- Hillary is a member of the Justine League. *(Present circumstance or event; within the representing party’s control/knowledge)*
- *Schedule A* contains a complete and accurate list of all interns with whom William works on a weekly basis. *(Present circumstance or event; not within the representing party’s control/knowledge)*
Example: Ron represents to Rick as follows:…

😊 Ron will not mention the Federal Reserve in any upcoming debate.

(Future circumstance or event; within the representing party’s control/knowledge)

➢ This is probably better phrased as an obligation, as follows:

😊 Ron shall not mention the Federal Reserve in any upcoming debate.

Example: Rick represents to Newt as follows:…

😊 Each of Rick’s Constituents will attend at least three Newt Rallies.

(Future circumstance or event; not within the representing party’s control/knowledge)

➢ We could phrase this as an obligation, as follows:

😊 Rick shall encourage each of his Constituents to attend at least three Newt Rallies.

➢ Phrasing this as a representation, however, ensures (at least to a certain degree) that Rick is “on the hook” if each of his Constituents do not attend at least three Newt Rallies, whether or not he encouraged them to do so.

😊 Each of Rick’s Constituents shall attend at least three Newt Rallies.
Basic Concepts in Drafting Contracts
The Framework of a Contract > Body > Language of Declaration > Acknowledgments

• A statement in a contract that a party accepts as true
• Why?
  ➢ Aligns intentions
  ➢ Serves as an estoppel
  ➢ Stronger than recitals

Examples:
• The Shareholder acknowledges that the Shares have not been registered under the Securities Act.

• The Consultant acknowledges that he has reviewed a copy of the Company Policies as in effect on the Effective Date.

• The Employee acknowledges that she has had an adequate opportunity to consult with her own counsel in connection with this Agreement.
Do not…

- ...use acknowledgments to introduce other categories of language.
  - ☎ The Purchaser acknowledges that it shall pay the Closing Costs at the Closing.

- ...use "unconditionally" or "expressly" (or other adverbs) before "acknowledge"
  - ☎ Luke Skywalker begrudgingly acknowledges that the Dark Side of the Force has a certain appeal.

Do not…

- ...use "acknowledges and agrees"
  - ☎ The Consultant acknowledges and agrees that he has reviewed a copy of, and shall comply with, the Company Policies as in effect on the Effective Date.
  - ☎ The Consultant acknowledges that he has reviewed a copy of the Company Policies as in effect on the Effective Date. The Consultant shall comply with the Company Policies.
Language of Policy

Two basic types:

- Language that states rules governing an event or circumstance
- Language addressing the scope, meaning, or duration of a contract or provision
Basic Concepts in Drafting Contracts
The Framework of a Contract > Body > Language of Policy

Language that states rules governing an event or circumstance

• Any purported transfer in contravention of Section 2.1 will be void.
• The Post-Closing Statement will be deemed final upon the Accountant’s delivery of the Final Report.

Language addressing the scope, meaning, or duration of a contract or provision

• This Agreement terminates on December 31, 2013.
• This Agreement constitutes the agreement of the Parties with respect to the subject matter hereof.
• If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable by reason of excessive scope as to geographical, temporal, or functional coverage, then such provision will be deemed to extend only to the maximum geographic, temporal, and functional scope as to which it is permitted to be enforceable.
Verb Tenses: Present vs. Future

- Use present tense for policies that apply on the effectiveness of the contract

  ☑ This Agreement **constitutes** the entire agreement of the Parties with respect to the subject matter hereof.

  ☑ This Agreement **shall constitute** the entire agreement of the Parties with respect to the subject matter hereof.

- Use “will” for policies relating to future events that might or might not take place

  ☑ If the Prevailing Interest Rate drops below the Adjusted Rate, then this Agreement **will terminate**.

  ☑ If the Prevailing Interest Rate drops below the Adjusted Rate, then this Agreement **will thereby terminate**.

  ☑ If the Prevailing Interest Rate drops below the Adjusted Rate, then this Agreement **will terminate by virtue thereof**.
Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Recap

- Definitions
- Language of Performance
- Obligations and Prohibitions
- Discretionary Language
- Language of Declaration
  - Representations
  - Acknowledgements
- Language of Policy

Basic Concepts in Drafting Contracts

The Framework of a Contract > Signature Pages

Entities can sign on behalf of limited liability companies and partnerships – you need to “reach an authorized human.”

Each Party is signing this Agreement as of the Effective Date.

BASIC STRUCTURE, INC.

By: ____________________
Name: Adam Smith
Title: President

ULTIMATE SUB, LLC

By: PASS-THROUGH, LP,
its Managing Member

By: USELESS INTERMEDIATE SUB, LLC,
its General Partner

By: ULTIMATE PARENT, INC.,
its Managing Member

By: ____________________
Name: Dr. Complicated
Title: Chief Difficulty Officer
Drafting tips for the lead-in on the signature page

- Each of the Parties has executed this Agreement as of the ____ day of October, 2013.
- Each of the Parties has executed this Agreement as of October ___, 2013.
- Each of the Parties has executed this Agreement as of __________, 2013.
- Each Party is signing this Agreement as of the Effective Date.
- Each Party has executed and delivered this Agreement as of the Effective Date.

Drafting tips for the lead-in on the signature page

- For written consents of stockholders of a Delaware corporation, *H-M Wexford LLC v. Encorp, Inc.* takes a strict approach with respect to DGCL Section 228(c) – do not use a “hardwired as of” date
  - Each of the undersigned is signing this Written Consent as of the date appearing next to such undersigned’s signature.
Practical Tips

- On the page prior to the sig page:
  - Use "[Signature page follows]" rather than "[THE REMAINDER OF THIS PAGE INTENTIONALLY HAS BEEN LEFT BLANK]"
  - Insert a “Section Break” prior to the sig page, not a “Page Break”
- Get rid of headers and footers on the sig page
  - Exception: You might want to specifically label the footer of the sig page to denote the counterpart being signed (e.g., “Signature Page to Assignment Agreement (Foreign Seller to Domestic Purchaser)"

Practical Tips

- Make sure that you and your adversarial counterpart are “on the same page” – Think ahead!
  - Same exact counterparts
  - Number of executed originals per document (be mindful of documents that are negotiable instruments….)
- Make sure that you and your client are “on the same page” – Think ahead!
  - Number of executed originals per document (be mindful of documents that are negotiable instruments….)
  - ** Executive availability
Practical Tips

- Scan signature pages (and, once the deal is closed, entire documents) and keep originals in a safe place.
- Be mindful of negotiable instruments and post-closing documents to be signed by officers of the target who will continue as officers of the company post-closing (e.g., CEO employment agreement, stockholders’ agreement).
- Follow up quickly and aggressively after closing to catalogue signature pages received and obtain any missing signature pages.
Basic Concepts in Drafting Contracts

Legal Archaisms

"that" vs. "which" (vs. ", which")

- **"that"** – Think: restrictive; limiting
  - I’ll give you all the books in my library **that** I have read.
    - i.e., I’m not going to give you all of the books in my library – just those that I have read.

- **", which"** – Think: descriptive
  - I’ll give you all the books in my library, **which** I have read.
    - i.e., I have read all of the books in my library and I will give them to you.

- **"which"** [no preceding comma] – Think: Can I replace with “that”?
  - I’ll give you all the books in my library **which** I have read.
    - It’s unclear whether you get all the books in my library or only those that I have read.

---

**Purchased Assets** means all of the assets owned by the Company and its Subsidiaries, other than those assets owned by Ambiguity Sub **which** are not material to the Company’s operations.

- If "which" is interpreted to mean "that", then only the blue (small) rectangle gets carved out
- But if "which" is interpreted to mean ", which", then the green (medium) rectangle gets carved out

Assets of the Company

Assets of Ambiguity Sub

Immaterial Assets of Ambiguity Sub
Lancelot does hereby conveyeth his undying love for Guenevere and henceforth shall stave off with sword all others who attempteth to bring her harm.

All notices, consents, approvals, reports, designations, requests, waivers, elections, and other communications (collectively, “Notices”) authorized or required to be given pursuant to this Agreement shall be given in writing and either personally delivered to the Partner to whom it is given or delivered by an established delivery service by which receipts are given or mailed by registered or certified mail, postage prepaid, or sent by telex, electronic telecopier or telegram, addressed to the Partner at his or its address listed beneath such Partner’s respective signature hereto.
Basic Concepts in Drafting Contracts

Legal Archaisms

😊 WITNESSETH:

😊️ WITNESSETH:

😊️ WITNESSETH:

Summary

• Language matters.
• The law matters, too. But that’s a story for another day…
• Understand the concept, then put it in words – this is often easier said than done!
• Separate out the function of each provision or clause (e.g., language of performance, language of obligation, language of declaration, etc.).
• Taking time to develop good drafting habits now will make you a much more effective drafter when time is of the essence.
• Read what you draft to see if it makes sense. If not, fix the problem/cure the ambiguity.
Basic Concepts in Drafting Contracts

The End > This is the end of the presentation. Any questions? Please feel free to ask me now, as I’m packing up, or via email or a phone call.

Questions?

About the Presenter

Vincent R. Martorana is Counsel in the Corporate & Securities Group with Reed Smith’s New York office. His practice includes the representation of clients in domestic and cross-border mergers, stock and asset acquisitions and divestitures, joint ventures, strategic alliances, licensing arrangements, corporate restructurings, private equity investments, and securities offerings. He also regularly provides advice on corporate governance and state laws governing business entities (including Delaware and New York corporate, partnership, and limited liability company law). Vincent has represented a wide range of clients—from start-up and early-stage companies to well-established enterprises—in various industries, including technology, healthcare, pharmaceutical products, consumer products, and energy.

Vincent has extensive experience providing advice on contract drafting, analysis, and interpretation relating to disputes, settlements, and negotiated transactions. He has presented his continuing legal education contract-drafting courses for in-house legal departments and at various other venues, including Practising Law Institute, Strafford Webinars, The Business Development Academy, the National Academy of Continuing Legal Education, Commercial Law WebAdvisor, the American Bar Association, the New York State Bar Association, the New York City Bar Association, the New York County Lawyers Association, the Brooklyn Bar Association, the Suffolk County Bar Association, and the Westchester County Bar Association.

He is also the author of Drafting Points (www.draftingpoints.com), a blog that is dedicated to contract-drafting issues. He has also written several articles on contract drafting and interpretation and is the co-author of the Reed Smith LLP white paper A Guide to Contract Interpretation (February 2013).

Vincent received a J.D. from the University of Chicago Law School and a B.S. in Economics (with concentrations in Finance and Operations & Information Management), magna cum laude, from the Wharton School at the University of Pennsylvania.

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Tel: +1 212 549 0418
Email: vmartorana@reedsmith.com

To receive regular updates on contract-drafting issues, subscribe to Drafting Points at www.draftingpoints.com.
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Fin!
Basic Concepts in Drafting Contracts

Presented by

Vincent R. Martorana
Reed Smith LLP

For the

New York State Bar Association
October 1, 2013

Supplemental Outline
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**Exhibit A:** Useful Resources for Learning and Improving Drafting Skills

**Exhibit B:** Summary Tables: Anatomy of a Typical Contract and of Categories of Language

**Exhibit C:** Fixing Words and Phrases from *Ye Olde Contracte*

**Exhibit D:** Attorney Bio: Vincent R. Martorana
Notice; Disclaimer

This presentation and the supplemental materials related to this presentation (this presentation and such materials, collectively, the "Materials") are intended to constitute a continuing legal education course and are intended for an audience of attorneys. Neither the Materials, nor any portion thereof, is intended for any other purpose or for anyone other than an attorney.

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OUTLINE

I. PRELIMINARY MATTERS

A. Legal Drafting vs. Conversation/Prose Writing

1. “Forget Common Sense”. Anyone can draft a contract that serves as a mere guidebook to the manner in which the parties’ respective actions should be conducted. Don’t draft a clause, and don’t interpret that clause, only in the manner in which that clause is most likely to be read; consider the manner in which drafted language can be ambiguous and “plug the holes.”

2. The Who? What? When? Where? How? Hierarchy. Unlike prose writing, the basis for the inclusion of provisions in (or exclusion of provisions from) a contract should not matter from a contract interpretation/construction standpoint. Note that understanding what the parties intended is different than understanding why they intended it.

   a. Most important. Who? What?
   c. Irrelevant. Why?

B. Preferences in Contract Drafting

1. General Preferences. My general preferences in contract drafting are listed below. The preferences are not always directly proportionate to one another. For example, a reduction in ambiguity might result in a lengthier contract.

   a. *Unambiguous* is better than *Ambiguous*

      i. In my opinion, this is the most important of the contract drafting preferences.

   b. *Concision* is better than *Redundancy*

   c. *Shorter* is better than *Longer*
d. **Predictability** is better than **Uncertainty**

e. **Plain English** is better than **Jargon**

f. **Precision** might or might not be better than **Vagueness**

g. **Consistency** is better than **Inconsistency**

h. **Straightforward** is better than **Confusing**

C. **Contract-Drafting Resources**

See Exhibit A for a list of my recommended contract-drafting resources.

II. **THE FRAMEWORK OF A CONTRACT**

See Exhibit B for summary tables setting forth the typical “anatomy” of a contract and categories of contract-drafting language.

A. **Preamble**

1. **Typical Contents.** The preamble of a contract typically contains the following information:

   a. the name/type of the contract;

   b. the date of the contract; and

   c. the parties to the contract (including, for entities, jurisdiction of organization and entity type).

   **Practice Tip:** It’s best to save descriptive relationships between the parties for the recitals or the body of the contract (e.g., a representation from a party that another party to the contract is such first party’s direct and wholly owned subsidiary).

2. **Other Information.** Other information should be excluded from the preamble.
Example:

- This ASSET PURCHASE AGREEMENT (this “Agreement”), dated as of October 1, 2013, is made between Big Bad Corporation, a Delaware corporation (the “Buyer”), and Little Guy, LLC, a New York limited liability company (the “Seller” and, collectively with the Buyer, the “Parties”).

B. Recitals and Lead-in

1. Recitals.

   a. Purpose. The following are some purposes of the recitals to a contract:

      i. describing the background with respect to the contract and giving the reader context for the contract;

      ii. setting up certain defined terms;

      iii. serving as evidence of intent of the parties for entering into the contract; and

      iv. helping to resolve any ambiguities in the body of the contract.

   Practice Tip: Do not rely on the recitals to resolve ambiguity.

   b. No Operative Provisions. Do not include operative provisions in the recitals. Operative provisions belong in the body of the contract, after the contract lead-in (see below).

Examples:

😊 A. The Parties desire to amend the Loan Agreement in order to, among other things, extend the maturity date of the Loan to December 31, 2013.

😊 A. The Parties hereby amend the Loan Agreement to extend the maturity date of the Loan to December 31, 2013.
A. The Parties shall take such actions as are necessary to implement the terms of this Agreement.

2. **Lead-in.** The lead-in, which immediately follows the recitals and immediately precedes the body of the contract, indicates that the parties agree to what follows the lead-in.

   a. Keep the lead-in simple.

Example:

NOW, THEREFORE, in consideration of the premises and the respective covenants, representations, warranties and undertakings of the parties hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

The Parties hereby agree as follows:

b. If there is genuine concern about whether consideration exists to support the parties’ entry into the contract, the mere recitation in the lead-in that consideration exists will not adequately address that concern. Rather, in such a circumstance, include a formal acknowledgment of consideration in the body of the contract as to the consideration.

C. **Body**

1. **Definitions.**

   a. **General.** Defined terms in contracts are extremely useful tools for capturing complex concepts in a concise manner and using those concepts repeatedly throughout a document.

Examples:

- The Seller is engaged as a going concern in the business of designing, manufacturing, marketing, distributing, and selling paper clips (such business, the “Business”).
• The Company shall not sell or distribute (each of the foregoing, a “Transfer”) the Shares.

• The Company shall not sell, assign, pledge, encumber, hypothecate, distribute (as a dividend or otherwise), transfer, or otherwise dispose of (each of the foregoing, a “Transfer”) the Shares.

  b. Including Uncustomary Concepts. Terms can be defined to include concepts that are not customarily considered to be included in a given word or phrase.

Example:

• “Attorney” means an attorney, a legal assistant, a chef, or any individual residing in the state of New York.

  c. “Stacking” Defined Terms. Defined terms can be “stacked” so that they build upon other defined terms.

Example:

• This STOCKHOLDERS’ AGREEMENT (this “Agreement”) is made as of October 1, 2013, between Example & Co., Inc., an Idaho corporation (the “Company”), those holders of the Company’s Series A Preferred Stock listed on Exhibit A (the “Series A Holders”), those holders of the Company’s Series B Preferred Stock listed on Exhibit B (the “Series B Holders” and, collectively with the Series A Holders, the “Preferred Stockholders”), and those holders of the Company’s common stock that are listed on Exhibit C (the “Common Stockholders” and, collectively with the Preferred Stockholders and those persons that become a party to this Agreement in accordance with the terms hereof, the “Holders”). The Holders and the Company are collectively referred to herein as the “Parties”.

  d. Defining Terms “On Site” vs. Defining Terms in a “Definitions” Provision. A term can be defined “on site,” meaning that it is defined in an operative provision in which it is used (usually with an appropriate cross-reference in a “definitions” section) or in a separate definitions section. The
decision regarding the manner in which to define a term depends upon the context.

“On site” Example:

- “Transfer” has the meaning set forth in Section 2.3.

... Section 2.3. The Company shall not sell, assign, pledge, encumber, hypothecate, distribute (as a dividend or otherwise), transfer, or otherwise dispose of (each of the foregoing, a “Transfer”) the Shares.

“Definitions Provision” Example:

- “Transfer” means, with respect to a given asset, any sale, assignment, pledge, encumbrance, hypothecation, distribution (as a dividend or otherwise), transfer, or other disposition of such asset. When used as a verb, “Transfer” has a correlative meaning.

... Section 2.3. The Company shall not Transfer the Shares.

- Using the lower-case of a term within that term’s definition. It is perfectly acceptable to include the lower-case of a term within that term’s definition.

Example:

- “Transfer” means any transfer, sale, pledge, hypothecation, encumbrance, or other disposition.

- “Permitted Automobile” means any automobile that is permitted on the Long Island Expressway, including, without limitation, my old 1983 Pontiac Firebird.

- Embedded Obligations. Do not embed obligations within a given definition. This conflates language of policy (discussed below), which is the category of language that is used to define a term, with obligations.
Example:

“Net Earnings Statement” means a statement of the Company’s net earnings during the Post-Closing Period in the form attached as Exhibit A, which the Company shall provide to the Seller no later than 30 days after the last day of the Post-Closing Period.

g. **Unbounded Definitions.** Do not simply use “includes” to define a defined term. Doing so results in ambiguity as to the scope of that term.

Example:

“Permitted Automobile” includes, without limitation, my old 1983 Pontiac Firebird.

h. **Using more than one term to define a concept.** Do not use more than one term to define a given concept. Doing so is redundant.

Example:

Verbiage Co., a Delaware corporation (“Verbiage” or the “Company”), is a subsidiary of the Parent.

i. **Do not use “shall.”** Do not use “shall” when defining a term. As discussed below, “shall” should only be used to create an obligation or a prohibition (and certainly not as a substitute for “and the parties really mean it!”).

Example:

“Securities Act” shall mean the Securities Act of 1933, as amended.

2. **Language of Performance.**

a. **Usage.** Language of performance conveys actions that are being taken by virtue of the parties entering into a contract.

Practice Tip: To identify and convey language of performance, think of the word “hereby.”
Practice Tip: Use the active voice, not the passive voice.

Example:

 совершенная {The License is hereby granted to the Licensee by the Licensor.}

 совершенная {The Licensor hereby grants the License to the Licensee.}

b. Distinction from Obligations. Language of performance serves a different role, and has a different effect, than obligations. Language of performance conveys actions that are being taken by virtue of the parties’ entry into a contract; obligations set forth actions that a party is required to take or refrain from taking.

3. Obligations and Prohibitions.

a. Usage - Obligations. An obligation conveys what a party has to do pursuant to a contract.

Practice Tip: To identify and convey an obligation, think of the word “shall.”

Example:

• The Purchaser shall pay the Purchase Price to the Seller at the Closing.

b. Usage - Prohibitions. A prohibition conveys what a party is prohibited from doing pursuant to a contract.

Practice Tip: To identify and convey a prohibition, think of the phrase “shall not.”

Example:

• Each of Moses and his constituents shall not covet his respective neighbor’s wife.

c. “Shall” vs. “will” vs. “must”.

i. Use “shall” to convey an obligation. Use “shall not” to convey a prohibition. Do NOT use “shall” otherwise.
Practice Tip: Substitute (in your mind) the phrase “hereby has/have the duty to” in place of “shall” to ensure correct usage of the word “shall.”

Practice Tip: Avoid the temptation of using “shall” as a proxy for “…and I really mean it!”

This Agreement shall constitute the entire agreement of the Parties with respect to the subject matter hereof.

Practice Tip: Do not use “is obligated to,” “agrees to” (other than in the lead-in to the body of the contract), “covenants and agrees to,” “shall be obligated to,” or “undertakes to” to convey a contractual obligation.

ii. Use “will” to convey futurity. “Will” more naturally conveys futurity than “shall.” “Must” cannot convey futurity.

Example:

- Davey hereby bets Lou that the Mets will [not “shall”] win the World Series this year.

iii. Use of “must”. Use “must” (a) to convey that a duty exists, but that such duty derives from a provision other than the provision in which “must” is being used or (b) in connection with conveying a condition to be satisfied before a conditional clause is to apply.

Example 1:

- If companies **must** pay an excise tax on the Product of 20% or less pursuant to applicable law, then Newcomer Co. **shall** sell the Product.

- If companies **shall** pay an excise tax on the Product of 20% or less pursuant to applicable law, then Newcomer Co. **shall** sell the Product.
Example 2:

😊 In order for Lindsay to drive the car home from the pub, she **must** first convince her mom to give her the keys.

😊 In order for Lindsay to drive the car home from the pub, she **shall** first convince her mom to give her the keys.

d. **Active Voice vs. Passive Voice.**

i. **General Rule.** Use the active voice rather than the passive voice when imposing an obligation because the active voice:

   (a) makes clear which party is the actor and has the obligation;

   (b) is more concise than the passive voice;

   (c) is easier to read and more natural than the passive voice; and

   (d) is consistent with mentally substituting “hereby has/have the duty to” for “shall.”

ii. **Structure (with respect to obligations).**

   (a) **Active voice:** [actor] + shall/shall not + [verb (or verb phrase)] + [object being acted upon]

   Example:

   - My daughter shall pick up the toys.

   (b) **Passive voice (with identified passive agent):** [subject being acted upon] + shall/shall not + [verb (or verb phrase)] + by + [passive agent]
Example:

• The toys shall be picked up by my daughter.

(c) Truncated passive voice (no identified passive agent): [subject being acted upon] + shall/shall not + [verb (or verb phrase)]

Example:

• The toys shall be picked up.

e. Third Parties. You can’t impose contractual obligations on persons that are not party to the contract. Don’t purport to do so.

Example:

⁻⁰⁻ Upon final resolution of all Disputed Items, the Accountants shall issue a report showing a calculation of the Final Net Working Capital. The Accountants shall make their determination of the Disputed Items within 60 days after having been selected.

⁻⁺⁻ Upon final resolution of all Disputed Items, the Accountants must issue a report showing a calculation of the Final Net Working Capital. The Accountants must make their determination of the Disputed Items within 60 days after having been selected.

⁻⁻⁻ Upon final resolution of all Disputed Items, the Parties shall cause the Accountants to issue a report showing a calculation of the Final Net Working Capital. The Parties shall cause the Accountants to make their determination of the Disputed Items within 60 days after having been selected.

⁻⁻⁺ If the Parties are unable to resolve any disagreement as to one or more Disputed Items within 30 days after the Receiving Party’s receipt of a Protest Notice, then the Parties shall promptly engage Big Accountant Co. (the “Accountants”) by signing an engagement letter with the Accountants pursuant to which, among other things, the Accountants agree to comply with procedures set forth in this Section 2.4(b)(iii)….The Parties shall use their respective reasonable best
efforts to cause the Accountants to reach a final determination with respect to all Disputed Items (such determination, a “Final Determination”) and to provide to the Parties, no later than the 60th day after the Accountants have been engaged pursuant to this Section 2.4(b)(iii), a report with respect to the NWC Statement (the “Final Determination Report”) that includes a calculation of the Net Working Capital.

4. Discretionary Language.

a. Usage. Discretionary language conveys actions that a party is permitted to do.

Practice Tip: To identify and convey discretionary language, think of the phrase “is/are permitted to.”

Practice Tip: Use discretionary language only as an exception to express or implied prohibitions.

Practice Tip: Do not use the following to convey discretionary language: “is/are authorized to,” “has/have the option to,” or “is/are free to.” But “sole discretion” and other specified factors for exercising discretion appears to have some force

b. “May”: “Is/Are permitted to” or “might possibly”? Do not use the word “may” to convey discretion because “may” could connote either (1) discretion (“is/are permitted to”) or (2) possibility (“might possibly”).

Example:

😊 The Seller shall deliver in a timely manner all Products that are required to be delivered pursuant to all purchase orders that Key Customers may submit during the Pre-Closing Period.

There is ambiguity here: is the provision referring to (1) all the Purchase Orders that Key Customers “might possibly submit” or (2) only those Purchase Orders that Key Customers “are permitted to submit”?

Practice Tip: You can do away with using “may” in contracts altogether!
c. No “Naked” Discretion. Use discretionary language as an exception to an express or implied prohibition. Do not “give” a party the right to take an action that such party is not otherwise prohibited from taking.

Example:

- Dad: “Matthew, you are permitted to eat broccoli or spinach with your dinner.”
- Matthew: “Great! I’ll have chocolate pudding!”

5. Language of Declaration. Language of declaration conveys assertions of fact that are memorialized in a document.

a. Representations.

i. Usage. Representations are statements made by a party of what was, is, or will be true to induce someone to enter into a contract.

Practice Tip: Because a representation is a statement of fact, it cannot be “breached.” Rather, a representation is either accurate or inaccurate.

Note: For this presentation, we’ll put aside the debate as to whether the “warranties” part is necessary or advisable.

ii. Control; Knowledge. A representation need not be within the control or knowledge of the representing party.

Examples:

- Within control/knowledge: Al represents to George that all of the papers he has written through the date hereof concerning global warming attribute the primary causes of global warming to humans.

- Not within control/knowledge: Al represents to George that at least 51% of all reports written through the date hereof by reputable scientists concerning global warming attribute the primary causes of global warming to humans.
iii. The Lead-in. If a party is making a series of representations, those representations are usually preceded by a lead-in.

(a) If one party is making representations to one other party, then structure the lead-in as follows:
“[Party A] represents to [Party B] as follows:…”

(b) If more than one party is making representations to one other party, then structure the lead-in as follows:
“Each of [Party A] and [Party B] represents to [Party C] as follows:…”

Practice Tip: Do not state that parties “jointly and severally represent” to another party. “Joint and several” is a liability concept (e.g., for use in connection with drafting indemnification provisions).

iv. Time of Event/Circumstance.
Representations can be made with respect to past, present, or future events or circumstances.

Examples – Past Events/Circumstances.

- During December 2011, Mitt did not disparage Newt. *(Past circumstance or event; within the representing party’s control/knowledge)*

- During December 2011, no writer for *Iowa Daily* disparaged Newt. *(Past circumstance or event; not within the representing party’s control/knowledge)*

Examples - Present Events/Circumstances.

- Hillary is a member of the Mickey Mouse Club. *(Present circumstance or event; within the representing party’s control/knowledge)*
• Schedule A contains a complete and accurate list of all interns with whom William works on a weekly basis. *(Present circumstance or event; not within the representing party’s control/knowledge)*

**Examples – Future Events/Circumstances.**

• Ron will not mention the Federal Reserve in any upcoming debate. *(Future circumstance or event; within the representing party’s control/knowledge)*

**Practice Tip:** Consider whether a representation regarding a future event or circumstance is better phrased as an obligation. In that regard, also consider the remedies available in respect of inaccurate representations vs. breaches of obligations. For example, indemnification provisions in purchase agreements often provide for deductibles and caps in respect of losses relating to inaccuracies of certain representations, but do not apply these limitations to losses relating to breaches of obligations.

• Ron **shall not** mention the Federal Reserve in any upcoming debate.

• Each of Rick’s Constituents will attend at least three Newt Rallies. *(Future circumstance or event; not within the representing party’s control/knowledge)*

  We could phrase this as an **obligation**, as follows:

  • Rick **shall encourage** each of his Constituents to attend at least three Newt Rallies.

    ☐ Each of Rick’s Constituents **shall attend** at least three Newt Rallies.

  b. **Acknowledgments.**

    i. **Usage.** Acknowledgments are statements in a contract that a party accepts as true.

**Example:**

• The Shareholder acknowledges that the Shares have not been registered under the Securities Act.
ii. **Purpose.** Acknowledgments can serve to expressly align the intentions of the parties to a contract and can serve as an estoppel against a party.

| Practice Tip: Use an acknowledgment for important statements that you want a party to acknowledge, rather than putting such statements in the recitals. |

iii. **Do not introduce other categories of language.** Do not use an acknowledgment to introduce other categories of language.

**Example:**

- The Purchaser acknowledges that the Purchaser shall pay the Closing Costs at the Closing.

iv. **Eliminate adverbs.** There is no need to use an adverb, such as “unconditionally” or “expressly,” before using the word “acknowledges.”

**Example:**

- Luke Skywalker begrudgingly acknowledges that the Dark Side of the Force has a certain appeal.

v. **Do not conflate with other categories of language.** Do not “mix” acknowledgments with other categories of language. Separate each concept into its own sentence or clause.

**Example:**

- The Consultant acknowledges and agrees that he has reviewed a copy of, and shall comply with, the Company Policies as in effect on the Effective Date.

- The Consultant acknowledges that he has reviewed a copy of the Company Policies as in effect on the Effective Date. The Consultant shall comply with the Company Policies.
6. **Language of Policy.**

   a. **Usage.** Language of policy is language that (1) states rules governing an event or circumstance or (2) addresses the scope, meaning, or duration of a contract provision.

   Practice Tip: Think: “The rules of the game.”

   **Example – Rules Governing an Event or Circumstance:**

   - Any purported transfer in contravention of Section 2.1 will be void.

   **Example – Language Addressing the Scope, Meaning, or Duration of a Contract Provision:**

   - This Agreement terminates on December 31, 2013.

   b. **Verb Tense.** In conveying language of policy, (1) use the present tense for policies that apply on the effectiveness of the contract and (2) use “will” for policies relating to future events that might or might not take place.

   Examples:

   - This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof.

   - If the Prevailing Interest Rate drops below the Adjusted Rate, then this Agreement will thereby terminate.

D. **Signature Pages**

1. **The Lead-in.**

   a. Don’t use “IN WITNESS WHEREOF” as a lead-in on the signature page. It is unclear what that language means and what benefit it provides.

   b. Don’t use “executes and delivers” in the lead-in on the signature page. Delivery of a contract is not determined by what is stated in that contract.
2. **Practice Tips.**

**Practice Tips:**

- On the page before the signature page, use “[Signature page follows]” rather than [THE REMAINDER OF THIS PAGE HAS BEEN INTENTIONALLY LEFT BLANK.].” First, the recommended phrasing is shorter. Second, when a contract is ready for signature, there might not be all that much “blank” at the bottom of the penultimate page.

- Use a “Section Break” prior to the signature page, rather than a “Page Break.” Doing so will enable you to separately adjust or delete the headers and footers on the signature page without affecting the headers and footers on the pages to the main portion of the contract.

- Make sure that you, your client, and your adversarial counterpart are aligned with respect to the appearance of the signature pages, as well as the number of original signature pages that should be obtained for each document.

- Scan signature pages and entire documents once contracts have been signed.

- Be mindful of negotiable instruments and documents for which there should only be one original signature page (and whether counterpart signature pages are acceptable).

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**III. LEGAL ARCHAISMS**

A. **“that” vs. “which” vs. “, which”**


2. “, which”. “, which” is descriptive. It describes a clause.

3. “which [no preceding comma]”. When used to modify a clause, “which [no preceding comma]” is ambiguous.

**Example:** Suppose I have 20 books in my library and I’ve read 15 of them.
• “I’ll give you all the books in my library that I’ve read.” You’ll get 15 books.
• “I’ll give you all the books in my library, which I’ve read.” You’ll get 20 books.
• “I’ll give you all the books in my library which I’ve read.” It’s unclear how many books you’ll get.

Practice Tip: If there is uncertainty between using “that” and using “which,” “that” is usually the correct choice.

B. **Table of Legal Archaisms and Suitable Replacements**

See Exhibit C for a list of common legal archaisms from *Ye Olde Contracte* and suitable replacements.

IV. **Attorney Bio: Vincent R. Martorana**

My attorney bio is attached as Exhibit D. Please feel free to contact me if you have any questions or comments.
Exhibit A

Useful Resources for Learning and Improving Drafting Skills

  - There are many books on contract drafting. Many advocate styles and techniques that are prevalent in drafting, but that are incorrect or inefficient. Ken Adams’s book is by far the best guide for discussing how concepts are expressed in contracts.


  - This book includes more general writing concepts (including writing skills for litigators).

  - This book is a great resource for discussing the intersection between law and contract language.

  - This what happens when a font designer becomes an attorney. Great book on formatting legal documents – and more than just fonts!


- Feel free to drop by my blog, *Drafting Points*, at [www.draftingpoints.com](http://www.draftingpoints.com).

- Annotated forms; board resolutions; due diligence materials

- Successive “redlines” of a document

- Experience and practice
Exhibit B

Summary Tables: Anatomy of a Typical Contract and of Categories of Language
### Anatomy of a Typical of a Contract

| **Preamble** | - Type of agreement, date of agreement, parties (name, jurisdiction, entity type)  
|             | - Save descriptive relationship between the parties for the recitals or reps |
| **Recitals** | - Provide background, context, evidence of intent  
|             | - Only area of a contract that might address “why?”  
|             | - Do not include operative provisions  
|             | - But ok to define terms |
| **Body** | - Main part of contract  
| | - Preceded by “The Parties hereby agree as follows:” (or something similar)  
| | - Contains **categories of language** |
| **Signature Pages** | - Need to “get to an individual”  
| | - Practical considerations: obtaining signature pages in advance; holding signature pages “in escrow”; correct signature blocks; footers; warehousing/following up after closing |
| **Attachments (Exhibits, Schedules, Annexes, Appendices)** | - Form part of the contract  
| | - Beware of unintended rights and obligations |
# Categories of Language

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
<th>Think</th>
<th>Example</th>
<th>Notes</th>
</tr>
</thead>
</table>
| Language of Performance   | Addresses actions being taken by the parties by virtue of the contract      | “hereby”      | Willie **hereby** transfers to Charlie all of his rights, title, and interest in and to the Chocolate Factory. | • Use the active voice  
• Don’t use “shall”                                                   |
| Obligation                | Addresses what a party **has to do** pursuant to the contract               | “shall”       | Charlie **shall** arrive at the Chocolate Factory no later than 11 a.m. on Friday. | • Don’t use will (which conveys futurity)  
• Don’t use “must” (save that for conditions and other contexts)  
• Don’t try to impose obligations on third parties                      |
| Prohibition               | Addresses what a party **is prohibited from doing** pursuant to the contract | “shall not”   | Willie **shall not** unduly pressure children to run his Chocolate Factory. |                                                                                  |
| Discretionary Language    | Addresses what a party **is permitted to do** under a contract              | “is/are permitted to” | Willie **shall not** unduly pressure children to run his Chocolate Factory, **except** that Willie **is permitted to** do so with respect to any child who passes the Test. | • Use discretionary language as an **exception to a prohibition**: no “naked discretion”  
• “may” → “is/are permitted to” or “might possibly”                       |
<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
<th>Think</th>
<th>Example</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Language of Declaration: Representation</td>
<td>Statement made by a party of what was, is, or will be true to induce the other party to enter into the contract</td>
<td>Assertion of truth</td>
<td>Charlie represents to Willie that he obeyed all the rules of the Chocolate Factory.</td>
<td>Need not be within control or knowledge of representing party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Should reps concerning future facts be rephrased as obligations?</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Can’t “breach” a rep</td>
</tr>
<tr>
<td>Language of Declaration: Acknowledgment</td>
<td>Statement that a party is accepting as true</td>
<td>Acceptance as truth</td>
<td>Charlie acknowledges that Willie pays his workers in bars of chocolate, rather than in generally recognized currency.</td>
<td>Aligns intentions; potential estoppel</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Don’t mix with other categories of language</td>
</tr>
<tr>
<td>Language of Policy</td>
<td>• Addresses rules governing an event or circumstance</td>
<td>The “rules” of the contract</td>
<td>“Chocolate Factory” means the factory on the plot of land located at 123 Gene Wilder Way, Skokie, IL 60076, United States.</td>
<td>Don’t use “shall”</td>
</tr>
<tr>
<td></td>
<td>• Addresses the scope, meaning, or during of language, a provision, or a contract</td>
<td></td>
<td></td>
<td>Use present tense for policies that apply upon effectiveness of the contract</td>
</tr>
</tbody>
</table>
Exhibit C

Fixing Words and Phrases from *Ye Olde Contracte*
Fixing Words and Phrases from

Ye Olde Contracte

<table>
<thead>
<tr>
<th>Ye Olde Contracte</th>
<th>Replace With…</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st day of October, 2013</td>
<td>October 1, 2013</td>
</tr>
<tr>
<td>by and between</td>
<td>between</td>
</tr>
<tr>
<td>WITNESSETH</td>
<td>delete</td>
</tr>
</tbody>
</table>
| WHEREAS | A.  
B.  
enetc. |
<p>| therefore | if not in recitals, delete |
| NOW, THEREFORE, in consideration of the premises and mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows: | The Parties hereby agree as follows: |
| which | that or, which (usually, depending upon the context) |
| do hereby | hereby |
| does hereby | hereby |
| undertakes to | shall |
| is obligated to | shall |
| agrees to | shall |</p>
<table>
<thead>
<tr>
<th>Ye Olde Contracte</th>
<th>Replace With…</th>
</tr>
</thead>
<tbody>
<tr>
<td>covenants and agrees to</td>
<td>shall</td>
</tr>
<tr>
<td>shall be obligated to</td>
<td>shall</td>
</tr>
<tr>
<td>may elect to; may</td>
<td>is/are permitted to</td>
</tr>
<tr>
<td>has the option to</td>
<td>is permitted to</td>
</tr>
<tr>
<td>telex</td>
<td>facsimile</td>
</tr>
<tr>
<td>One Hundred Fifty Seven Dollars ($157)</td>
<td>$157</td>
</tr>
<tr>
<td>thirty (30) days</td>
<td>30 days</td>
</tr>
<tr>
<td>said vehicle</td>
<td>the vehicle, that vehicle, such vehicle, the Vehicle</td>
</tr>
<tr>
<td>null and void</td>
<td>void</td>
</tr>
<tr>
<td>terms and conditions</td>
<td>terms</td>
</tr>
<tr>
<td>in any regard whatsoever</td>
<td>delete</td>
</tr>
<tr>
<td>for the avoidance of doubt</td>
<td>consider clarifying rule and deleting this text</td>
</tr>
<tr>
<td>it being understood</td>
<td>consider clarifying rule and deleting this text</td>
</tr>
<tr>
<td>in the event that</td>
<td>if</td>
</tr>
<tr>
<td>IN WITNESS WHEREOF</td>
<td>delete</td>
</tr>
<tr>
<td>IN WITNESS WHEREOF, the parties hereto have set their respective hands and seals as of the day and year first above written.</td>
<td>The Parties are signing this Agreement as of the Effective Date.</td>
</tr>
</tbody>
</table>
Exhibit D

Attorney Bio: Vincent R. Martorana
Vincent R. Martorana is Counsel in the Corporate & Securities Group with Reed Smith’s New York office. His practice includes the representation of clients in domestic and cross-border mergers, stock and asset acquisitions and divestitures, joint ventures, strategic alliances, licensing arrangements, corporate restructurings, private equity investments, and securities offerings. He also regularly provides advice on corporate governance and state laws governing business entities (including Delaware and New York corporate, partnership, and limited liability company law). Vincent has represented a wide range of clients—from start-up and early-stage companies to well-established enterprises—in various industries, including technology, healthcare, pharmaceutical products, consumer products, and energy.

Vincent has extensive experience providing advice on contract drafting, analysis, and interpretation relating to disputes, settlements, and negotiated transactions. He has presented his continuing legal education contract-drafting courses for in-house legal departments and at various other venues, including Practising Law Institute, Strafford Webinars, The Business Development Academy, the National Academy of Continuing Legal Education, Commercial Law WebAdvisor, the American Bar Association, the New York State Bar Association, the New York City Bar Association, the New York County Lawyers Association, the Brooklyn Bar Association, the Suffolk County Bar Association, and the Westchester County Bar Association.

He is also the author of Drafting Points (www.draftingpoints.com), a blog that is dedicated to contract-drafting issues. He has also written several articles on contract drafting and interpretation and is the co-author of the Reed Smith LLP white paper A Guide to Contract Interpretation (February 2013).

Vincent received a J.D. from the University of Chicago Law School and a B.S. in Economics (with concentrations in Finance and Operations & Information Management), magna cum laude, from the Wharton School at the University of Pennsylvania.