DAN'S LEGAL DRAFTING CHECKLIST

By Daniel J. Churay[*]

---

[*] Mr. Churay is general counsel of a large industrial distributor and has been general counsel to a major transportation and logistics company as well as an oilfield service company. He has also served in a number of business roles, including CEO of an oil and gas company. He began his career with Fulbright & Jaworksi (now part of Norton Rose Fulbright). Mr. Churay earned his J.D. from The University of Houston Law Center, where he was Special Projects Editor of the Houston Law Review. The matters expressed in this article are his own personal opinions and do not reflect the opinions of any past or present companies with whom Mr. Churay is affiliated.

INTRODUCTION

Out of intense complexities intense simplicities emerge. Broadly speaking, the short words are the best, and the old words when short are best of all.

– *Winston Churchill*

You exclaim, "Why? Why? Why?!" Your outside counsel just delivered a 100 plus page draft of a credit agreement to your email inbox. As you begin to review it, frustration and fatigue set in. As inside counsel, your CFO has charged you and your company's treasurer with the task of leading the renewal of the company's credit facilities. Your company needs to continue to finance its working capital requirements and desires to fund a series of tuck-in acquisitions to execute its strategic plan. You hired one of the best Wall Street firms that specializes in the type of credit facilities that your company needs. Full of experienced finance lawyers with prestigious Ivy League degrees, your chosen firm can effectively represent the interests of your company while making your life easier.

Easy is important. All day long you have fielded questions from senior management and advised your internal clients on matters as varied as a products liability lawsuit, an employment law matter, the risk allocation provisions in an acquisition agreement, and now, the refinancing of the credit facilities. The draft document arrives in the late afternoon after a long day. You must read it to make sure it reflects the business goals of your client and the overall transaction terms that your bank agent outlined to your CFO and treasurer. As in-house counsel, you may also need to add a legal point or two. You are hoping for an easy review as your mind is tired from the mental toils of the day and your energy levels are flagging from an already stressful job. However, as you confront the walls of text of the draft credit facility agreement, you realize that reading this draft is NOT going to be easy. Why? Why!

This situation has occurred many times in my career. Whether credit agreements, merger or acquisition agreements, real estate leases, Forms 10-K or prospectuses, an epidemic of poor drafting permeates the legal profession. Seriously, how can this be? Words are a lawyer's tools. The use of the English language should be a core competency of the legal profession. Why do lawyers treat their tools, their craft, with such disdain? David Schneider, a lawyer, colleague, and mentor, once told me that "lawyers are the last of the priest class." He posited that lawyers are among the few remaining persons to care about ethics, rules, the even administration of justice, and language – all the elements of the law. When Shakespeare famously wrote, "let's kill all the

lawyers,"[1] like David, I understand it to mean that if you want chaos and injustice, then removing all the lawyers will seal the result. Lawyers, as the priest class, provide the framework for a just and functioning society. For the legal profession to remain relevant, it must care about these things. Lawyers should not treat their most important tool, the English language, so callously. Lawyers should use their tools appropriately to be useful to their clients. Clients should not need an interpreter to understand the language that their lawyers produce. The world is too complex already without needing to figure out what your own lawyer writes.

In corporate law practice, there are two main objectives of legal writing. First, a document must clearly and accurately reflect the terms of a desired business transaction among the parties and the state of facts underlying the matter. Good drafting can guide the parties through the revisions of multiple drafts to their goal of completing a transaction. Good drafting can help simplify the complex topics that the parties must address to close a deal. Good drafting can provide the parties clarity as to each of their roles in the transaction, their respective rights and responsibilities, and apportionment of the risks among them. Second, a document must act as a clear historical record of the facts and the parties' intent. This is especially important when others, such as a court or future investors, review the transaction or matter. Newcomers to a transaction should be able to review the relevant documents and have the same understanding of the facts and transactions as the parties themselves have. Good drafting should make it easy to read a document and accomplish these goals.

In 1989, I was a newly minted lawyer in the Corporate, Business & Banking section of Fulbright & Jaworski (now Norton Rose Fulbright). A partner assigned me the task of drafting an "agreement among underwriters" for our client, a newly created investment bank, who was going to lead the underwriting syndicate for a public equity offering. In the late 1980s and early 1990s, it was common to have much larger underwriting syndicates than those that exist today. Anywhere from seven to fifteen investment banks might underwrite, distribute, and sell an issuer's stock rather than the four or fewer banks that perform most offerings today. The market for investment banking services was much less concentrated in the period prior to the Great Recession of 2008-2009 than after. The banking syndicate typically entered into an agreement among underwriters to apportion their respective rights, responsibilities and risks. The lead underwriter, our client in this case, was to proffer its draft for the various banks to review and negotiate.

---

1. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SEVENTH act 4, sc. 2.

EDGAR did not yet exist, so I asked our D.C. office to obtain a sample of existing agreements among underwriters that had been filed as exhibits to various companies' filings with the SEC. After reviewing various filings at the SEC reading room for a few days, the firm's legal assistant in D.C. sent me copies of several examples. I opened them with anticipation and found the agreement that the infamous Salomon Brothers used in a recent public offering.[2] Using this as a guide and reviewing the other agreements, I drafted what I thought was the best agreement among underwriters ever written. The draft covered every conceivable issue that I could find and address. It leveraged off the work of many existing Wall Street law firms. It was perfect, or so I thought.

I gave the draft to Harva Dockery, a partner at the firm, to review. I waited in anticipation for a couple of tweaks and an "atta-boy" for covering all the issues. Instead I received a marked-up draft (in red of course) that would make a college English student change his major to German. Harva pointed out so many deficiencies in the draft that I wondered how I graduated from law school. A principal deficiency was that I wrote in passive voice. There were many others. I took the draft back dejected and with a little bit of sour grapes. Couldn't she see that I covered all the issues? Why was she so hard on me? Harva tasked me with a re-write.

I returned, grousingly at first, to my desk and for the next day incorporated all of Harva's comments. As I worked through the draft to remove the passive voice, the emerging clarity of the parties' roles overtook me. Yes, my brothers and sisters at the bar, it was a near religious experience. By the time I was done reworking the draft, I really felt like I had created a work of art. Clarity of the rights, responsibilities and risks of each party shone clearly in the light!

Now, Harva could have revised the document herself, but she did not; rather, Harva took the time to mark the document up and instructed me to revise it. In 1989, there were no redlines to accept in Microsoft Word, comment by comment. In those dark ages, corporate associates at the financial printer used rulers to underline additions and inserted carets (^) where deletions had occurred by hand (I know, I know, we walked uphill in the snow to school too). The act of revising the document was more than instructional, it was transformational.

Since that time, I have approached drafting as a two-step process. First, I create a draft, often using prior work as a start. We lawyers know that there is rarely whole cloth original works. Rather, borrowing from prior contracts or forms is usually the start. Second, I rewrite using a

---

2. Salomon Brothers was eventually merged into Smith Barney, which itself was merged into Morgan Stanley. For a fun read about Salomon Brothers, see MICHAEL LEWIS, LIAR'S POKER: RISING THROUGH THE WRECKAGE ON WALL STREET (1989).

set of simple guidelines or rules, much of it learned from Harva's markup on that day. Often, I set the draft down over night before I turn to the rewrite. This lets me focus on language rather than pure legal content. Finally, I print the document out, then read and revise it on paper. It is amazing how often I find errors to fix or improvements that I can make by reading a document on paper instead of the computer screen. Over time, I have become so used to writing with these guidelines that it has become almost natural. Even so, the second rewrite always seems to improve my work product. I am forever thankful that Harva is part of the "priest class" and took the time to teach me this lesson, one which I have never forgotten. The guidelines and rules that I have learned then and through years of practice are now included in the Legal Drafting Checklist presented below.

David Schneider also taught me about modular drafting. Generally, modular drafting means that each sentence stands on its own. Sentences then build paragraphs, which then stand on their own. Likewise, paragraphs build sections, which also should stand on their own. In legal drafting, the reader should be able to understand each of these elements without referring to other elements. Cross-references in one section of a document to another should be limited or avoided. Finally, in modular drafting, the drafter should use just as many words as needed to accomplish clarity. "Avoidance of doubt" or "without limitation" language is fine, but fewer, consistent words are best. I once had a client complain to a colleague about the length of a contract. My colleague's reaction was to cite the movie Amadeus when Mozart was told that there are too many notes in his music.[3] On the other hand, repeating the same point multiple times in a contract is an unnecessary refrain. In modular drafting, a concept should be treated well once, and no more. A drafter should be confident in that treatment.

I started my professional life as a computer programmer rather than a lawyer. My transformation from programmer to lawyer happened later, but the two professions have much in common. Creating legal documents using modular drafting is much like writing a computer program. In programming, you first define your variables. The variables define the inputs to your program. In modular drafting, you first define your terms. The terms are usually the capitalized defined terms that you use throughout the document. Next, you choose a set of rules in the form of a programming language to write your program, such as C++ or Python. Your program must use the confines of the language or it will not work. In modular drafting, you must create sections that address issues in your transaction or describe a set of facts. Applicable law, like a programming language, and the relevant facts at

3. AMADEUS (Orion Pictures 1984).

hand shape the topics that you must address. Each paragraph then becomes like a subroutine in a computer program, addressing the function the programmer calls upon for the paragraph to process. For those of you who have programmed, the "go to" command in the subroutine, like the cross-reference in a contract is avoided or shunned. The drafters for computer programs and contracts must respectively avoid circular logic in code and contractual definitions. Finally, in computer programming, the programmer does not create two sets of code to carry out the same instruction. In contract drafting, the drafter should treat a concept well one time and one time only. These modular drafting concepts are the background for the Legal Drafting Checklist.

The Legal Drafting Checklist sets forth a set of guidelines or rules to be reviewed in the second rewrite. These are principally for corporate lawyers who draft contracts or disclosure documents, although many of the drafters of other legal documents such as court briefs or IRS Private Letter Ruling requests could find many of the principles in the checklist useful. It is also possible that litigators could use the checklist to discover weaknesses in poorly crafted contracts to exploit in a dispute. There are plenty of more detailed resources for the English wonks among us. Strunk & White's Elements of Style, the Little, Brown Handbook, and the SEC's Plain English Handbook all come to mind.[4] The Legal Drafting Checklist presented here is intended to be a quick guide for busy lawyers. It is not the definitive guide, but I believe drafters who apply the checklist will have more comprehendible documents.

How do you apply the checklist? Following are some suggestions:

1. When you create your first draft, go through the two-step process: draft first for substance, and then rewrite for language. Check each issue in the Legal Drafting Checklist, using your "find" function in your document application (such as Microsoft Word) as needed.

2. When you receive a first draft from opposing counsel, determine how much rewriting for language will be tolerated. Just as I groused about Harva's heavy red pen on my draft, opposing counsel may have too much pride of authorship for you to have your rewrite accepted. If opposing counsel is open, use a heavier hand; if not, consider sections that are really hard to read and focus on those.

3. For any new language or paragraphs that you supply, you should apply the checklist.

---

4. SEC Rule 421, 17 C.F.R. §230.421.

4. Decide how much time you have. Under a tight deadline, there simply may not be enough time for a full rewrite. Even so, if you are a drafter that applies the checklist over time, you will naturally begin to apply the checklist as you write the first draft.
5. If you are in-house counsel and you receive a draft from external counsel that clearly needs work, send it back for a rewrite if you have time. The expense of the rewrite will be worth every penny. It will make it easier to focus on the transaction substance for the rest of the deal and to avoid costly substantive mistakes. Likely, a better, clearer draft will also reduce negotiation time and costs.

A constant objection to rewriting contracts using good drafting is that a contract form has precedent value and the "market" is simply used to seeing the contract in that form. Many lawyers state that a draft is in their firm's "form" and that the draft takes into account interpretations of case law and course of dealing from prior transactions. I generally do not buy this objection.

I once represented a large oilfield services company that had investment grade credit. The company decided to "self-agent" its revolving credit agreement. In-house counsel drafted the form, and the principles in the Legal Drafting Checklist were applied to the prior version of the agreement to create the new document. The draft was then provided to the various banks and their counsel within the bank group. There was no push back that the prior version was upgraded using the checklist. Feedback consisted of substantive rather than language comments.

I have a dream that firms will review their work product and, over time, compile forms or prior deal documents that reflect good drafting in a database. Every time good drafting occurs, a new base document is created that can be borrowed from for the next draft. Can you imagine a world where there are no walls of text? A world where an ISDA Master Swap Agreement is somewhat intelligible? A world where a credit agreement can be read rather than deciphered? If only the Mandarins of the TriBar would provide the same level of focus to the drafting of contracts that we spend focusing on legal opinion practice. There are no silver bullets, but applying the checklist could certainly help. As artificial intelligence (AI) software begins to take hold, I fear the AI engine will "learn" our lack of clarity and propagate the fog of poorly drafted contracts. We must resist the madness before the craft is lost in the Matrix.

The Legal Drafting Checklist is first provided in detail and is then followed by the short form. Each item takes real language from "Big

Law" firms, with the parties' names changed to protect confidentiality. These examples were not made up. Then, each example was rewritten to show how the rule in the checklist would be applied to the example. The rewrites, to emphasize each specific rule, often ignore the other rules and focus on the illustration of the specific rule at hand. There is no pride of authorship here, I learned all of these drafting points from others and stand on their shoulders. There will be a moment in drafting where each rule may or should be broken for good reason, whether substantive or drafting. As Ralph Waldo Emerson once wrote, "A foolish consistency is the hobgoblin of little minds,"[5] and as a former boss once told me, "perfect is the enemy of good." We need good drafting; time rarely allows for perfect, so this checklist should be used to create good drafting.

1. USE MULTIPLE PARAGRAPHS AND SUB-PARAGRAPHS INSTEAD OF A WALL OF TEXT

The following is language from an SEC disclosure describing a company's credit agreement. It purported to follow the SEC's plain English rules. There is nothing worse than a client having to confront a paragraph like the following that is longer than the page. How does anyone read this paragraph without getting lost? Somewhere in the middle a GPS signal is needed to find your way out!

Admittedly, I learned this rule the hard way. I worked on a transaction where our client, a major airline, sold its computerized reservation system business to a consortium of European airlines. As part of the transaction, I drafted a complex purchase price adjustment formula and process. As it was negotiated, the paragraph grew to one and a half pages long. Months later at the closing dinner, the client presented me with a six-foot-tall exhibit board, the kind that is made out of white foam that trial lawyers often use in court. On that exhibit, of course, was my paragraph from top to bottom with the caption: "Most Complicated Legal Provision!"

Don't Do This:

> LINES OF CREDIT
>
> On August 1, 2007, Oil & Gas Corporation (the "Company") entered into a credit agreement with BigBank National Association ("BigBank"), as Administrative Agent, Foreign Bank, as Syndication Agent, Sovereign Bank, as Documentation Agent,

5. RALPH WALDO EMERSON, SELF-RELIANCE (1841).

and lenders from time to time parties thereto (the "Credit Agreement"). Borrowings under the Credit Agreement are limited by a borrowing base that is determined in regard to our oil and gas properties. The borrowing base is $75 million; however, the Credit Agreement provides that the revolving credit facility may be increased to $200 million upon re-determinations of the borrowing base, consent of the lenders and other conditions prescribed in the agreement. Within that borrowing base, outstanding letters of credit are permitted up to a $10 million. Loans made under the Credit Agreement mature on August 1, 2012, and in certain circumstances, the Company will be required to prepay the loans. At the Company's election, borrowings under the Credit Agreement bear interest at a rate per annum equal to (a) the London Interbank Offered Rate for one, two, three, six or nine months ("Adjusted Libor Rate") plus an applicable margin ranging from 100 to 175 basis points or (b) the higher of BigBank's announced prime rate ("Prime Rate") and the federal funds effective rate from time to time plus 0.5%, in each case, plus an applicable margin ranging from 0 to 25 basis points. Interest is payable on the last day of each relevant interest period in the case of loans bearing interest at the Adjusted Libor Rate and quarterly in the case of loans bearing interest at the Prime Rate. The Credit Agreement provides that the borrowing base will be re-determined semi-annually by the lenders, in good faith, based on, among other things, reports regarding the Company's oil and gas reserves attributable to the oil and gas properties of the Company and its subsidiaries, together with a projection of related production and future net income, taxes, operating expenses and capital expenditures. On or before March 1 and September 1 of each year, the Company is required to furnish to the lenders a reserve report evaluating the oil and gas properties of the Company and its subsidiaries as of the immediately preceding January 1 and July 1. The reserve report as of January 1 of each year must be prepared by one or more independent petroleum engineers approved by the Administrative Agent. Any re-determined borrowing base will become effective on the subsequent April 1 and October 1. The Company, or the Administrative Agent at the direction of a majority of the lenders, may each elect once per calendar year to cause the borrowing base to be re-determined between the scheduled re-determinations. In addition, the Company may request interim borrowing base re-determinations upon the proposed acquisition by the Company of proved developed producing oil and gas reserves with a purchase price for such reserves greater than 10% of the then borrowing base. The Credit Agreement contains covenants that restrict the Company's ability to, among other

> things, materially change the Company's business, make dividends, enter into transactions with affiliates, create or acquire additional subsidiaries, incur indebtedness, sell assets, make loans to others, make investments, enter into mergers, incur liens, and enter into agreements regarding swap and other derivative transactions. The Credit Agreement also requires the Company to meet, on a quarterly basis, minimum financial requirements of consolidated current ratio, EBITDA to interest expense and total debt to EBITDA. Proceeds of the initial borrowing under the Credit Agreement were used to repay, in full, and terminate the existing credit agreement of Oil & Gas IV, LLC, a wholly owned subsidiary of the Company. The Company expects that subsequent borrowings under the Credit Agreement will be used to finance the Company's working capital needs, and for general corporate purposes in the ordinary course of its business, including the exploration, acquisition and development of oil and gas properties. Obligations under the Credit Agreement are secured by mortgages on the oil and gas properties of the Company's subsidiaries located in the states of Texas and Wyoming. The Company is required to maintain liens covering the oil and gas properties of the Company and its subsidiaries representing at least 80% of the total value of all oil and gas properties of the Company and its subsidiaries.

Do This:

> LINES OF CREDIT
>
> On August 1, 2007, the Company entered into a credit agreement with BigBank National Association ("BigBank"), as Administrative Agent, Foreign Bank, as Syndication Agent, Sovereign Bank, as Documentation Agent, and lenders that from time to time become parties (the "Credit Agreement"). A borrowing base based on our oil and gas properties limits our borrowings under the Credit Agreement. The borrowing base is $75 million; however, the Credit Agreement provides that the lenders may consent to increasing the revolving credit facility to up to $200 million upon re-determinations of the borrowing base and other conditions that the Credit Agreement prescribes. Within that borrowing base, the Credit Agreement permits outstanding letters of credit of up to $10 million. Loans made under the Credit Agreement mature on August 1, 2012, and in certain circumstances, the Company will be required to prepay the loans. At the Company's election, borrowings under the Credit Agreement bear interest at a rate per annum equal to either

(a) the London Interbank Offered Rate for one, two, three, six or nine months ("Adjusted Libor Rate") plus an applicable margin ranging from 100 to 175 basis points; or

(b) the higher of BigBank's announced prime rate ("Prime Rate") and the federal funds effective rate from time to time plus 0.5%,

in each case, plus an applicable margin ranging from 0 to 25 basis points. The Company pays interest on the last day of each relevant interest period in the case of loans bearing interest at the Adjusted Libor Rate and quarterly in the case of loans bearing interest at the Prime Rate.

The Credit Agreement provides that the lenders will re-determine the borrowing base semi-annually based on, among other things, reserve reports regarding the Company's oil and gas properties, together with a projection of related production and future net income, taxes, operating expenses and capital expenditures. The Company, or the Administrative Agent at the direction of a majority of the lenders, may each elect once per calendar year to cause the borrowing base to be re-determined between the scheduled re-determinations. In addition, the Company may request interim borrowing base re-determinations upon the Company's proposed acquisition of proved developed producing oil and gas reserves with a purchase price greater than 10% of the then borrowing base.

The Credit Agreement contains covenants that restrict the Company's ability to, among other things, do the following:

- materially change the Company's business,
- make dividends,
- enter into transactions with affiliates,
- create or acquire additional subsidiaries,
- incur indebtedness,
- sell assets,
- make loans to others,
- make investments,
- enter into mergers,
- incur liens, and
- enter into agreements regarding swap and other derivative transactions

The Credit Agreement also requires the Company to meet, on a quarterly basis, the following minimum financial requirements:

- consolidated current ratio of [__],

- EBITDA to interest expense of [___], and
- total debt to EBITDA of [__]

> The Company used the proceeds of the initial borrowing under the Credit Agreement to repay, in full, and terminate the existing credit agreement of OilCo IV, a wholly owned subsidiary of the Company. The Company expects that subsequent borrowings under the Credit Agreement will be used to finance the Company's working capital needs, and for general corporate purposes in the ordinary course of its business, including the exploration, acquisition and development of oil and gas properties. Mortgages on the oil and gas properties of the Company's subsidiaries located in the states of Texas and Wyoming secure obligations under the Credit Agreement. The Company is required to maintain liens covering the oil and gas properties of the Company representing at least 80% of the total value of all of the Company's oil and gas properties.

Two things often occur when you use subparagraphs or write in lists. First, the drafter often observes that there is a mismatch in English usage, such as a difference in the number for subjects and verbs. Second, the parties now really focus on each sub-point to determine if the parties really want to agree to the particular point. These points are no longer lost in the wall of text.

2. WRITE IN ACTIVE VOICE, NOT PASSIVE VOICE

Search your documents for the word "by" as an indicator that passive voice is in use. Passive voice obfuscates who has an obligation. This may be good in a negotiation where the parties agree on a course of action but not on who is obligated to act. However, it is usually better to make clear who has the obligation. Phrases often contain passive voice even if the subject and verb in the sentence do not.

<u>Don't Do This</u>:

> (1) The compensation shall **be paid** annually to contractor.
>
> (2) When the Employer needs additional employees **covered by** this Agreement, it shall give the Local Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not **be required** to hire those **referred by** the Local Union. Upon a written request from the referring Local Union, the Employer shall inform the Local Union of whether an applicant **is being hired** or not **hired**, or whether no decision **has been made**. Requests from the Local Union with respect to any individual applicant shall be limited to one (1) per month. Violations of this subsection shall be **reviewed by** the Grievance Committee. It

> is recognized that the Employer legally is not permitted to share with the Local Union information regarding the reasons for a refusal to hire an applicant.

Do This:

> (1) The owner shall **pay** the compensation annually to contractor.
>
> (2) When the Employer needs additional employees **that** this Agreement **covers, the Employer** shall give the Local Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those **applicants that** the Local Union **refers**. Upon a written request from the referring Local Union, the Employer shall inform the Local Union of whether **the Employer hired** an applicant **that the Local Union referred** or whether **the Employer has not yet** made a decision. Local Union requests with respect to any individual applicant shall be limited to one per month. Violations of this subsection shall be subject to Grievance Committee **review**. It is recognized that the Employer legally is not permitted to share with the Local Union information regarding the reasons for a refusal to hire an applicant.

3. CONSIDER ADDING ALL OR PART OF A REFERENCES SECTION TO REMOVE UNNECESSARY WORDS AND SHORTEN YOUR DOCUMENT

It is not necessary to use capitalized words to define a term. It is possible to define a term using lower case words. This is especially useful when using words that are commonly understood like "person." A reader will find a defined term, such as the commonly understood term, "Person", which is often used throughout a document, distracting while reading. Consider defining it as a lowercase term.

Do This:

> 1.2 References. Unless the context expressly requires the contrary, references in this Agreement to:
>
> (a) the singular include the plural, and the plural includes the singular;
>
> (b) the masculine, feminine, or neutral gender, shall include all other genders;
>
> (c) "includes" or "including" means "includes, without limitation," or "including, without limitation";
>
> (d) "persons" include natural persons and legal entities (including corporations, partnerships, trusts, estates, limited

liability companies, or other legal entities), including their respective permitted successors, assigns or heirs, as the case may be;

(e) "Sections", "Exhibits", or "Schedules" mean the sections, exhibits or schedules to this Agreement; and

(f) the "parties" mean the parties to this Agreement.

You Don't Have to Do This:	You Can Now Do This:
The **party or parties** to the lawsuit shall release the judgment **lien(s)** upon the **defendant's or defendants'** payment.	The **parties** to the lawsuit shall release the judgment **liens** upon the **defendants'** payment.
The Employer shall not terminate any employee, and no employee may take vacation without giving notice. Neither **he nor she** shall give the notice before 30 days.	The Employer shall not terminate any employee, and no employee may take vacation without giving notice. **He** shall not give the notice before 30 days.
The Transferred Equity Interest, together with all rights accruing or attached thereto (**including, without limitation**, the rights to obtain all dividend, distribution, or investment repayment declared for distribution by the Company on or subsequent to the Closing Date), shall be transferred to the Buyers upon the Closing Date.	The Seller shall transfer the Transferred Equity Interest, together with all rights accruing or attached to the Transferred Equity Interest (**including** the rights to obtain all dividend, distribution, or investment repayment the Company declared for distribution on or subsequent to the Closing Date), to the Buyers upon the Closing Date.
Any **person, corporation, partnership, trust, estate, limited liability company or other legal entity** may bring a claim against the Company by the first anniversary of the date of this Agreement.	Any **person** may bring a claim against the Company by the first anniversary of the date of this Agreement.
Contractor's obligations to remediate the discharge of Hazardous Materials shall be in accordance with Section 5 **hereto**	Contractor's obligations to remediate the discharge of Hazardous Materials shall be in accordance with Section 5 and

and Exhibit 20 **of this Agreement**.	Exhibit 20. But Clarify This: Contractor's obligations to remediate the discharge of Hazardous Materials shall be in accordance with Section 5 **of this Agreement** and Exhibit 20 **of the Construction Agreement**.
The parties **to this Agreement** may enter into arbitration regarding Section 7 **hereof** to resolve any disputes.	The parties may enter into arbitration regarding Section 7 to resolve any disputes.

4. CLARIFY WHETHER A PHRASE FOLLOWING A LIST APPLIES TO THE ENTIRE LIST OR ONLY THE LAST ITEM IN THE LIST

Don't Do This:

> Other than sales or dispositions by a Subsidiary to the Company or another Subsidiary or by the Company to a Subsidiary, or sales in the ordinary course of business, the Company shall not sell, lease, or otherwise dispose of its assets, business, stock, or other investment in any Subsidiary **having a value in excess of $25,000,000**.

Does the phrase "having a value in excess of $25,000,000" only apply to a disposition of an "investment in any Subsidiary", or does it also apply to a disposition of "assets", "business" or "stock"?

Do This:

> Other than sales or dispositions by a Subsidiary to the Company or another Subsidiary or by the Company to a Subsidiary, or sales in the ordinary course of business, the Company shall not sell, lease or otherwise dispose of its assets, business, or stock or other investment in any Subsidiary, **in each case**, having a value in excess of $25,000,000.

Alternative Solution:

> Other than sales or dispositions by a Subsidiary to the Company or another Subsidiary or by the Company to a Subsidiary, or sales in the ordinary course of business, the Company shall not sell, lease or otherwise dispose of its assets **having a value in excess of $10 million**, business **having a value in excess of $20 million**

> or stock or other investment in any Subsidiary, **either of which**, having a value in excess of $25,000,000.

5. CORRECTLY USE "WHICH"/"THAT" AND KNOW THE DIFFERENCE BETWEEN RESTRICTIVE AND NON-RESTRICTIVE (DESCRIPTIVE) CLAUSES

Question: Is there a difference in meaning between these two sentences?

> DeathCare Corp. shall sell all of its cemeteries **that** are in France to Buyer.
> DeathCare Corp. shall sell all of its cemeteries, **which** are in France, to Buyer.

Answer: Of course, or why would I ask the question?

Use "that" without a comma to designate restrictive clauses. The sentence, "DeathCare Corp. shall sell all of its cemeteries that are in France to Buyer," contains a restrictive clause. This sentence implies that DeathCare Corp. has cemeteries outside of France, but that DeathCare Corp. is only obligated to sell to Buyer the cemeteries that are located in France. The restrictive clause "that are in France" restricts the larger set of cemeteries that DeathCare Corp. owns to a subset.

Use "which" with a comma to designate non-restrictive or descriptive clauses. The sentence, "DeathCare Corp. shall sell all of its cemeteries, which are in France, to Buyer," contains a non-restrictive or descriptive clause. This sentence says that DeathCare Corp. must sell all of its cemeteries to Buyer and represents that all of the cemeteries are located in France. If DeathCare Corp. has cemeteries outside of France, this sentence implies that DeathCare Corp. must also sell them to Buyer and that DeathCare Corp. misrepresented their location. The non-restrictive clause does not restrict to a subset of the larger set. It is merely descriptive and provides additional information about the cemeteries.

Question: What does the following sentence mean?

> DeathCare Corp. shall sell all of its cemeteries **which** are in France to Buyer.

Answer: It is unclear what this sentence means. Without the commas, did the drafter intend the clause to be restrictive or descriptive? When drafting legal documents, we strive for clarity, so the drafter should avoid using "which" without a comma. "Which" should not be used without a comma.

6. ONLY REFERENCE SECTIONS AND NOT ARTICLES, SECTIONS, SUB-SECTIONS AND PARAGRAPHS

The practice of using articles, sections, sub-sections and paragraphs just adds legalese that the client must chop through to understand the document. By consistently using only the term "section," the reader can quickly move up and down to the larger sections and smaller sub-sections without having to figure out which is which.

Don't Do This:

> The parties shall resolve their disputes in accordance with **paragraph** (c) of **subsection** 3 of **Section** B of **Article** I.

Do This:

> The parties shall resolve their disputes in accordance with **Section** I(B)(3)(c).

7. DO NOT USE "AND/OR"

Judges have ruled that "and" means "or" and "or" means "and." How can this be? There are two opposing paradigms for viewing conditions in a list: Boolean logic and set theory. In Boolean logic, the word "and" means that all conditions in a list (the "if" statement) must be true for the resulting action (the "then" statement) to be true. Pursuant to the following example, it is only true that the lender may accelerate the note if all of the following are also true: the payment is due, the borrower has not paid, and the cure period has lapsed.

> *Example*: If the payment is due, the borrower has not paid **and** the cure period has lapsed, the lender may accelerate the entire principal balance of the note as due and payable.

In Boolean logic, the word "or" means that only one or more of the conditions in a list (the "if" statement) need be true for the resulting action (the "then" statement) to be true. Pursuant to the following example, the lender may accelerate the note if one or more of the following are true: the payment is due, the borrower has not paid, or the cure period has lapsed.

> *Example*: If the payment is due, the borrower has not paid **or** the cure period has lapsed, the lender may accelerate the entire principal balance of the note as due and payable.

However, in set theory, if one or more of the conditions in a set occurs, then the resulting action is applicable. Pursuant to the following example, the items with the bullet points define a set: the payment is

due, the borrower has not paid **and** the cure period has lapsed. If any one of those items occurs, the lender may accelerate the note. In set theory, "and" means "or."

> *Example*: The lender may accelerate the entire principal balance of the note as due and payable if one of the following occurs:
>
> - the payment is due,
> - the borrower has not paid **and**
> - the cure period has lapsed.

If I haven't confused the issue enough, Boolean logic also differentiates between exclusive and nonexclusive "or." Exclusive "or" means only one of the items in a series is true, and non-exclusive "or" means one or more of the items in a series are true.

So why can't I use "and/or"? The construct "and/or" means non-exclusive "or" in Boolean logic. It means that one or more of the items must be true for the action to be true. The problem is that, when we draft, we rarely use the construct "and/or" in every place that we use the word "or." When we use the construct "and/or," are we implying that everywhere else in the document that we use the word "or," we mean only exclusive "or"? What does "and/or" imply under set theory where a condition is true if one out of a list is true? To see the problem, take a recent piece of writing and search for every use of the word "or." If you changed every "or" to "and/or," the writing would be very difficult to read.

What do you do then? Assume that "or" means one or more of the conditions (i.e. non-exclusive "or"). If you need to emphasize that all conditions must be met, write "when all of the following occur, then the action can be taken." If you need to emphasize that one or more of the conditions must be met, write "when one or more of the following occur, then the action can be taken." If you need to emphasize that only one condition can be met, write "when only one the following conditions occurs, then the action can be taken."

8. APPLY THE ANTECEDENT RULE CORRECTLY

The antecedent rule states that a pronoun refers to the noun immediately preceding the pronoun.

> *Example*: The Company shall pay the Contractor **its** share of the expenses.

The preceding sentence means that the Company shall pay the Contractor the Contractor's share of expenses because the pronoun "its" refers to the immediately preceding noun, "the Contractor." If the Contractor had advanced the Company's expenses and the Company

was required to pay the Contractor back, the sentence should have been drafted as follows:

> *Example:* The Company shall pay the Contractor **the Company's** share of the expenses.

9. KNOW THE DIFFERENCE BETWEEN "SHALL," "WILL," "MAY," "SHOULD," "COULD," AND "WOULD"

"Shall" is the imperative.

Use it in contracts to place responsibility on a party to take or omit to take (shall not) an action.

"Will" is the future tense.

Use it to describe what will happen in the future. "Will" is rarely used in contracts; however, "will" is often used in securities disclosure documents to describe what a party will do in the future under a given set of events. "Will" in a securities disclosure document often describes a "shall" in a contract provision. A contract might state "Borrower **shall** repay the loan on
December 31, 2007." A securities document might describe that provision by stating "The Company **will** repay the loan on December 31, 2007."

> *Example:* This Annual Report on Form 10-K contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended. The word "will", and similar words or expressions are intended to identify forward-looking statements. The Company's expectation regarding its repayment of the loan by December 31, 2007 is only the Company's expectation regarding the repayment. Actual results may differ materially from these expectations and are dependent on the following factors: no action to accelerate the repayment of the loan under its terms has occurred or the Company has adequate cash flow to repay the loan or has entered into an alternative financing to refinance the loan.

However, plaintiff's lawyers often use the word "will" in a securities disclosure document to argue that the company is guaranteeing a future state of events. In this case, the Company is guaranteeing that it will repay the loan on December 31, 2007. If the Company does not repay the loan, for instance, because it does not have adequate cash flow due to a bad year, the plaintiff's lawyer will argue that the Company misrepresented the repayment. Thus, in a securities document, "will" indicates a forward-looking statement under the Private Securities Litigation Reform Act of 1995 and usually requires

forward-looking statement disclosure. It is very important to avoid using boiler plate factors in forward-looking statement disclosure but rather to use factors that are specific to the forward-looking statement made. A standard form of a forward-looking statement disclosure is as follows:

> This [name of disclosure document] contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended. The word "will" and similar words or expressions are intended to identify forward-looking statements. These statements are only the Company's expectations regarding the discussed matters. Actual results may differ materially from these expectations and are dependent on the following factors: [list factors that might occur that could cause the forward-looking statement not to be true.]

"May" is permissive.

It is used when a party can exercise discretion in determining whether or not to take ("may not") an action.

"Should" indicates that a party is not required to take or omit to take ("should not") an action but would be advised to do so.

"Could" or "can" indicates capability.

It is used to show that a party is either capable of taking an action or permitted to take the action. In a disclosure document, "could" can turn "will" from a forward-looking statement into a statement of current capability.

> *Example:* Our new service **will** provide customers with faster turnaround times.

A plaintiff's lawyer could read this statement as a forward-looking guarantee that customers will have faster turnaround times; however, this guarantee can be avoided by rewriting the sentence as follows:

> Our new service **can** provide customers with faster turnaround times.

This statement is now a statement of capability indicating that the service is capable of providing faster turnaround times, but that capability may not be utilized to accomplish this speed. This sort of change is particularly useful when drafting press releases or marketing materials where the advertisements oversell the service or product.

"Would" uses the subjunctive voice.

It provides a possible state of future facts, rather than a prediction or actual state of future facts. "Would" is appropriate when drafting proposals or non-binding letters of intent.

> *Example:* Seller **would** sell the Company to Buyer, and Buyer **would** pay Seller $1 million.

This language proposes that Seller would sell the Company but does not obligate Seller to do so, as the parties are merely discussing the possible outlines of a transaction rather than creating a legal commitment to carry it out. In Texas, drafters would often include a Texaco/Pennzoil clause to make it clear that the transaction is not binding until a binding agreement evidencing the transaction is executed.[6]

10. ONCE YOU USE A PHRASE ONE WAY, REMAIN CONSISTENT WITH THAT USE

The goal of a legal drafter is to make information clear to the reader. The goal of a literary author is to entertain, inform and make the reader think. Literary authors often try to find multiple unique ways to convey a single idea but legal drafters should not do this. If a legal drafter states a concept in multiple ways within the same draft, there may be uncertainty as to what exactly the drafter meant. A rule of judicial construction is that every word in a contract is meant to have a specific meaning.[7] If a drafter uses different words intending to mean the same thing, there is a possibility that others, including courts, will be unclear as to the word's definition.

Don't Do This:

> Upon the Borrower's repayment, Lender shall release **all liens, mortgages, pledges, encumbrances, whether perfected or filed, and any other security interests** on Borrower's property. Lender shall execute any releases that Borrower reasonably requests to release those **mortgages, pledges, encumbrances or other security interests**. The Lender shall pay the costs of releasing all of these **security interests**.

---

6. *See generally* Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768 (Tex. App. 1987) (discussing when letters of intent are binding). A whole generation of Texas lawyers grew up on this famous takeover case among Texaco, Pennzoil and Getty Oil.

7. *See, e.g.*, Gonzalez v. Mid-Continent Cas. Co., 969 F.3d 554, 562 (5th Cir. 2020) ("Under Texas law, '[w]e must read all parts of the contract together, striving to give meaning to every sentence, clause, and word to avoid rendering any portion inoperative.'") (citation omitted); LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp., 424 F.3d 195, 206 (2d Cir. 2005) ("In interpreting a contract under New York law, 'words and phrases . . . should be given their plain meaning,' and the contract 'should be construed so as to give full meaning and effect to all of its provisions.'") (citations omitted).

Do This:

> Upon the Borrower's repayment, Lender shall release all **liens, mortgages, pledges, encumbrances and any other security interests**, in each case, whether perfected or filed, on Borrower's property. Lender shall execute any releases that Borrower reasonably requests to release those **liens, mortgages, pledges, encumbrances and security interests**. The Lender shall pay the costs of releasing all of these **liens, mortgages, pledges, encumbrances and security interests**.

Better Yet, Do This:

> "**Security Interests**" means liens, mortgages, pledges, encumbrances, and any other security interests, in each case, whether perfected or filed.
>
> Upon the Borrower's repayment, Lender shall release all **Security Interests** on Borrower's property. Lender shall execute any releases that Borrower reasonably requests to release those **Security Interests**. The Lender shall pay the costs of releasing all of these **Security Interests**.

11. DO NOT OVER-DEFINE YOUR TERMS OR USE CIRCULAR DEFINITIONS

A circular definition is when you use the same defined term to define itself.

Don't Do This:

> "**Encumbrance**" means a security interest or other **Lien**, in each case, whether perfected or filed, on the property of a Person, whether real or personal.
>
> "**Lien**" means an **Encumbrance** on the property of a Person, whether perfected or filed.
>
> "Mortgage" means a mortgage or other security interest on the real property of a Person.
>
> "Person" means natural persons and legal entities (including corporations, partnerships, trusts, estates, limited liability companies or other legal entities).
>
> "**Security Interests**" means **Liens**, Mortgages, pledges, **Encumbrances** and any other security interests, in each case, whether perfected or filed, on a Person.

Do you see the circularity? "Encumbrance" means a "Lien", but "Lien" means an "Encumbrance", and "Security Interest" means both "Liens" and "Encumbrances"?

Do This:

> "Security Interest" means a lien, mortgage, pledge, encumbrance, or any other security interest, in each case, whether perfected or filed, whether on real or personal property.

12. DEFINED TERMS NEED NOT BE CAPITALIZED, ESPECIALLY WHEN THEY MAKE COMMON SENSE

For instance, don't define "person" or "party", especially if those terms are contained in a references section. See item 3 above.

13. USE SHORT DEFINED TERMS THAT MAKE SENSE AND ARE CONSISTENT WITH THE COMMON ABBREVIATED LANGUAGE FOR THE ITEM YOU ARE DEFINING

Don't Do This:

> "**Amendment and Restatement No. 1 of Credit and Letter of Credit Facility**" means the Amendment and Restatement No. 1 of Credit and Letter of Credit Facility dated August 1, 2007, among the Company, as Borrower, BigBank National Association, as Administrative Agent, Foreign Bank, as Syndication Agent, Sovereign Bank, as Documentation Agent, and lenders from time to time parties thereto.

Do This:

> "**Credit Facility**" means the Amendment and Restatement No. 1 of Credit and Letter of Credit Facility dated August 1, 2007, among the Company, as Borrower, BigBank National Association, as Administrative Agent, Foreign Bank, as Syndication Agent, Sovereign Bank, as Documentation Agent, and lenders from time to time become parties to this facility.

14. DO NOT UNDER-DEFINE YOUR TERMS

Don't Do This:

> Upon the Borrower's repayment, Lender shall release all **liens, mortgages, pledges, encumbrances and any other security interests**, in each case, whether perfected or filed, on Borrower's property. Lender shall execute any releases that Borrower reasonably requests to release those **liens, mortgages, pledges, encumbrances and security interests**. The Lender shall pay the costs of releasing all of these **liens, mortgages, pledges, encumbrances and security interests**.

Do This:

> "**Security Interests**" means liens, mortgages, pledges, encumbrances and any other security interests, in each case, whether perfected or filed.
>
> Upon the Borrower's repayment, Lender shall release all **Security Interests** on Borrower's property. Lender shall execute any releases that Borrower reasonably requests to release those **Security Interests**. The Lender shall pay the costs of releasing all of these **Security Interests**.

15. USE A DEFINITION SECTION UP FRONT WHEN YOU DEFINE MULTIPLE TERMS IN A LONG CONTRACT FOR EASE OF REFERENCE

Definition sections in the back of long contracts get lost among the signature pages, exhibits, and schedules and are hard for the reader to find. Consider whether cross-references to terms that the drafter has defined in the text of the contract help the reader find the definition later or add unnecessary length to the document.

16. BOUND YOUR LISTS

This is one of many of the modular drafting concepts.

Don't Do This:

> 1.1 Liabilities Not Assumed. Notwithstanding anything to the contrary in this Agreement, the Seller shall retain (to the extent possible) and agrees to pay, perform and discharge the **following liabilities** (the "Retained Liabilities"):
>
> (a) the debts, duties and obligations arising out of warranties for claims related to, or associated with respect to any goods or products sold in connection with the Business on or prior to the Closing Date in excess of reserves for such items provided for on the Closing Date Balance Sheet; and
>
> (b) all liabilities, damages or obligations relating to any litigation, claim, suit or proceedings with respect to the Business for product liability and product warranties; in each case for products manufactured, sold or shipped by Sub or the Business on or before the Closing Date.

Questions: Does "following liabilities" mean any liabilities mentioned from this point forward through the end of the contract or just the liabilities mentioned in Section 3.1? In a long contract, did the drafter really mean "[n]otwithstanding anything to the contrary in this Agreement"? Did the drafter accidentally cause Seller to retain a liability

that the other party was obligated to discharge elsewhere in the agreement?

Do This:

Narrow the "notwithstanding" to only the intended section containing the language that is to be negated:

> 1.1 Liabilities Not Assumed. **Notwithstanding anything to the contrary in Section 5.2**, the Seller shall retain (to the extent possible) and agrees to pay, perform and discharge the following liabilities (the "Retained Liabilities") **in this Section 3.1**:
>
> (a) the debts, duties and obligations arising out of warranties for claims related to, or associated with respect to any goods or products sold in connection with the Business on or prior to the Closing Date in excess of reserves for such items provided for on the Closing Date Balance Sheet; and
>
> (b) all liabilities, damages or obligations relating to any litigation, claim, suit or proceedings with respect to the Business for product liability and product warranties; in each case for products manufactured, sold or shipped by Sub or the Business on or before the Closing Date.

17. CARE ABOUT YOUR BOILERPLATE PROVISIONS

Generally, clients do not care about boilerplate provisions in a contract until a contract dispute arises. Carefully consider whether or not to include each of the following provisions in your contracts and whether you should modify the provisions to address the unique situation that your contract addresses.

> Expenses. The party incurring the costs and expenses in connection with the negotiation of this Agreement shall pay those costs and expenses.
>
> Brokers and Finders. Except for the Target's retention of Big Investment Bank, whose fees the Surviving Corporation shall pay, which fees are considered to be current liability for purposes of Net Working Capital, the parties and their respective agents have directly carried on all negotiations on behalf of Acquiring Corporation and Target Corporation relating to this Agreement and the transactions this Agreement contemplates without the intervention of any other person in such manner as to give rise to any claim against Acquiring Corporation, Newco or Target Corporation for financial advisory fees, brokerage or commission fees, finder's fees or other like payment. Except as provided above in this Section 10.1, no party shall be liable to any other party for any of those fees or payments.

Entire Agreement. This Agreement constitutes the entire agreement among the parties with respect to its subject matter and supersedes all other prior agreements and understandings, both written and oral, among the parties or any of them with respect to the subject matter of this Agreement.

Assignment. A party shall not assign this Agreement without the prior written consent of the other parties to this Agreement.

Further Assurances. From time to time as and when the Acquiring Corporation requests, Target Corporation and the officers and directors of Target Corporation shall execute and deliver such further agreements, documents, deeds, certificates and other instruments and shall take or cause to be taken such other actions, including those as shall be reasonably necessary to vest or perfect in or to confirm of record or otherwise Target Corporation's title to and possession of, all of its property, interests, assets, rights, privileges, immunities, powers, franchises and authority, as shall be reasonably necessary or advisable to carry out the purposes of this Agreement and effect the transactions that this Agreement contemplates.

Enforcement of the Agreement. The parties agree that irreparable damage would occur and monetary damage alone would be insufficient remedy if a party failed to perform or breached any of the provisions of this Agreement in accordance with their specific terms. Each party shall be entitled to an injunction without bond or other security to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement, in addition to any other remedy to which a party is entitled at law or in equity.

Severability. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement, which shall remain in full force and effect.

Notices. A party shall have duly given all notices, requests, claims, demands and other communications under this Agreement when delivered in writing in person, by e-mail or by registered or certified mail (postage prepaid, return receipt requested) or internationally recognized courier services such as FedEx, UPS or DHL (with the carrier confirming delivery) to the respective other parties as follows:

if to [party], to:

[party's name]
Attention: [party's contact]
[address]
E-mail address: _____

with a copy to:

[party's name]
Attention: [party's contact]
[address]
E-mail address: _____

or to such other address as the person to whom notice is given may have previously furnished to the others in writing in the manner set forth above (*provided* that notice of any change of address shall be effective only upon receipt of the notice). Any notice that is addressed and delivered in the manner that this Agreement provides shall be conclusively presumed to have been duly given to the party to which it is addressed at the close of business, local time of the recipient, on the tenth day after the day it is so placed in the mail. Any notice that is sent by e-mail shall be deemed to have been duly given to the party to which it is addressed upon e-mail confirmation of the same as this Agreement provides.

Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, regardless of the laws that might otherwise govern under applicable principles of conflicts of laws of that state.

Parties in Interest; No Third Party Beneficiaries. This Agreement shall be binding upon and inure solely to the benefit of each party and their respective heirs, successors or permitted assigns, as the case may be. Nothing in this Agreement, express or implied, is intended to confer upon any other person any rights or remedies of any nature whatsoever under or by reason of this Agreement.

Counterparts. This Agreement may be executed in two or more counterparts (which counterparts may be delivered by facsimile transmission), each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement.

Incorporation by Reference. Any and all schedules, exhibits, annexes, statements, reports, certificates or other documents or instruments referred to herein or attached hereto are incorporated herein by reference hereto as though fully set forth at the point referred to in the Agreement.

A note on notice provisions: Consider removing facsimile notices from your notice provision. As e-mail and scanned documents have become ubiquitous, the poor old fax machine is going the way of the telex and telegraph (except in doctors' offices and health insurance, where surely the COVID-19 pandemic may bring these industries into the modern world).

A note on arbitration provisions: While many consider arbitration provisions to be "boilerplate", the drafter should give careful consideration when drafting arbitration provisions. The drafter should consider consulting with litigation counsel, who has arbitrated the same sort of agreement as the drafter is preparing, to determine if there are any practical language changes that the litigator would suggest. Questions such as the following (among many others) should be addressed:

- Does the client care about the expense of three arbitrators if a dispute is a relatively small amount?
- If the dispute is over a large amount, is one arbitrator too arbitrary?
- Is the arbitration capable of appeal to another forum if the law is mistakenly applied?
- Is it better to litigate the claim in court rather than arbitrate?
- What sort of discovery is available in arbitration?
- Will the arbitrator provide a statement of facts and law?
- Are the facts of an arbitration likely to be in the possession of the client or the other parties?
- Can discovery be compelled? If so, is court action required? How expensive is this?
- Would the client want the dispute available to the public?
- If the arbitration proceeding is material to the client, do any confidentiality provisions prevent the client from discharging its obligations under securities laws to disclose relevant facts?
- Is the arbitral award or court judgment enforceable?
- Should the arbitration be a legal or accounting arbitration?
- What set of arbitration rules should be used?

18. EXCEPT IN RARE INSTANCES, DO NOT USE LATIN WORDS WHEN ENGLISH WORDS WILL SUFFICE

Don't Do This:

> As soon as practicable after the Closing Date, the Parent and the Buyer shall jointly prepare IRS Form 8594 to report the allocation of the Purchase Price in conformity with the preceding sentence which reflects ***inter alia*** the agreed fair market value of the Purchased Assets.

Do This:

> As soon as practicable after the Closing Date, the Parent and the Buyer shall jointly prepare IRS Form 8594 to report the allocation of the Purchase Price in conformity with the preceding sentence which reflects, **among other things**, the agreed fair market value of the Purchased Assets.

Occasionally, a Latin word has substance and should be used. The use of *mutatis mutandis*, for instance, is a Latin phrase that is difficult to replace in some contracts.

19. USE "OF THIS AGREEMENT" INSTEAD OF "HEREOF", "HEREIN", "THEREOF", "THEREIN", "HERETO" AND "THERETO"

Remember that the reader, including your client, does not want to read legalese.

Don't Do This:

> The parties **hereto** shall notify each other when a default occurs under their respective Loan Agreements with the Lenders in accordance with the notice provisions **herein** and **therein**.

Do This:

> The parties **to this Agreement** shall notify each other when a default occurs under their respective Loan Agreements with the Lenders in accordance with the notice provisions of **this Agreement** and **their respective Loan Agreements**.

Please note: If the references section had defined "parties" as Item 3 suggests, the above could have been written as follows.

> The **parties** shall notify each other when a default occurs under their respective Loan Agreements with the Lenders in accordance with the notice provisions of this Agreement and their respective Loan Agreements.

20. USE "THIS"/"THAT"/"THESE"/"THOSE"/"THE" INSTEAD OF "SUCH"

People do not ordinarily use the word "such" until they go to law school. Before law school, they use "this", "that", "these", "those", and "the". When using these words, be aware of the antecedent rule. See Item 8.

Don't Do This:

> Section 1.1 *Purchase and Sale*. Upon the terms and subject to the conditions of this Agreement, at the Closing, (i) the Seller will sell, assign, transfer and deliver to the Buyer, and **such** Buyer will purchase, acquire and accept from **such** Seller, the Shares, and (ii) the Parent will cause its Subsidiaries to sell, convey, assign,

transfer and deliver, to **such** Buyer, and **such** Buyer will purchase, acquire, accept, and assume from **such** Subsidiaries, all right, title and interest of the Parent and **such** Subsidiaries in the Purchased Assets. Upon the terms and subject to the conditions of this Agreement, at the Closing, the Buyer will pay to **such** Parent (on behalf of the Seller and **such** Subsidiaries), in consideration of the transfer by **such** Seller and **such** Subsidiaries of the Shares and the Purchased Assets and in addition to the related assumption of the Assumed Liabilities from **such** Subsidiaries, an amount equal to $10.2 million in cash, subject to adjustment as provided in Section 1.9, by wire transfer of immediately available funds to an account or accounts designated by the Parent prior to the Closing (the "Purchase Price").

Do This:

Section 1.1 *Purchase and Sale*. Upon the terms and subject to the conditions of this Agreement, at the Closing, (i) the Seller will sell, assign, transfer and deliver to the Buyer, and **the** Buyer will purchase, acquire and accept from **the** Seller, the Shares, and (ii) the Parent will cause its Subsidiaries to sell, convey, assign, transfer and deliver, to **the** Buyer, and **the** Buyer will purchase, acquire, accept, and assume from **the** Subsidiaries, all right, title and interest of the Parent and the Subsidiaries in the Purchased Assets. Upon the terms and subject to the conditions of this Agreement, at the Closing, the Buyer will pay to **the** Parent (on behalf of the Seller and **the** Subsidiaries), in consideration of the transfer by **the** Seller and **the** Subsidiaries of the Shares and the Purchased Assets and in addition to the related assumption of the Assumed Liabilities from **the** Subsidiaries, an amount equal to $10.2 million in cash, subject to adjustment as provided in Section 1.9, by wire transfer of immediately available funds to an account or accounts designated by the Parent prior to the Closing (the "Purchase Price").

21. USE "IF" INSTEAD OF "IN THE EVENT THAT"

Don't Do This:

In the event that the Parent and the Buyer cannot agree on the calculation of any amount relating to Taxes or the interpretation or application of any provision of this Agreement relating to Taxes, a nationally recognized accounting firm mutually acceptable to each of the Parent and the Buyer shall resolve the dispute, and the firm's decision shall be final and binding upon all persons involved, and the firm's expenses shall be shared equally by the Parent and the Buyer.

Do This:

> **If** the Parent and the Buyer cannot agree on the calculation of any amount relating to Taxes or the interpretation or application of any provision of this Agreement relating to Taxes, a nationally recognized accounting firm mutually acceptable to each of the Parent and the Buyer shall resolve the dispute, and the firm's decision shall be final and binding upon all persons involved, and the firm's expenses shall be shared equally by the Parent and the Buyer.

22. USE "TO"/"FOR" INSTEAD OF "IN ORDER TO"/"IN ORDER FOR"

Don't Do This:

> The Closing Date Balance Sheet shall be prepared in accordance with the provisions of Schedule 2.4 **in order to** determine the Working Capital Amount as of the Closing Date.

Do This:

> The Closing Date Balance Sheet shall be prepared in accordance with the provisions of Schedule 2.4 **to** determine the Working Capital Amount as of the Closing Date.

23. USE A DESCRIPTIVE OR DEFINED TERM INSTEAD OF "HE/SHE" OR "HER/HIS"

Don't Do This:

> The Company shall pay the Employee **his/her** share of the expenses.

Do This:

> The Company shall pay the Employee **the Employee's** share of the expenses.

24. USE "PROVIDED THAT" INSTEAD OF "PROVIDED, HOWEVER, THAT"

Don't Do This:

> Employer shall pay for Employee's commercial driver's license training; **provided, however, that** Employee is not already in possession of a qualified, current commercial driver's license.

Do This:

> Employer shall pay for Employee's commercial driver's license training; ***provided*** **that** Employee is not already in possession of a qualified, current commercial driver's license.

I often italicize "provided" to make it easier for the reader to find the proviso.

25. USE "MEANS" INSTEAD OF "SHALL MEAN"

Don't Do This:

> "Security Interest" **shall mean** a lien, mortgage, pledge, encumbrance or any other security interest, in each case, whether perfected or filed, whether on real or personal property.

Do This:

> "Security Interest" **means** a lien, mortgage, pledge, encumbrance or any other security interest, in each case, whether perfected or filed, whether on real or personal property.

26. USE "WHOLLY OWNED" INSTEAD OF "WHOLLY-OWNED"

> *Example:* Small Corporation is a **wholly owned** subsidiary of Parent Company.

In the above sentence, "wholly" is an adverb that modifies the adjective "owned". You do not need a dash to separate an adverb from an adjective. You would not write the following:

> *Example:* His Porsche was **brightly-colored** yellow.

27. FOR NUMBERS THAT ARE TEN AND SMALLER, WRITE THEM IN WORDS; FOR NUMBERS GREATER THAN TEN, WRITE THEM IN NUMERALS; WRITE BOTH THE WORD AND THE NUMERAL IF YOU ARE DRAFTING FOR MULTIPLE LANGUAGES OR DRAFTING A NEGOTIABLE INSTRUMENT

Don't Do This:

> Interest on the credit facility accrues and is payable at a rate per annum equal to the base rate from time to time in effect plus **one percent (1.0%)** and the maturity is **eleven** years.

Do This:

> Interest on the credit facility accrues and is payable at a rate per annum equal to the base rate from time to time in effect plus **one percent** and the maturity is **11** years.

Multiple Language Exception: When drafting for cross-border transactions, some languages use commas instead of decimals and use periods instead of commas. Thus, "$1,000.00" in the U.S. is written "$1.000,00" in parts of continental Europe. In these situations, write out the number in words and numerals, so the reader is certain which convention is being utilized: "**One thousand dollars ($1,000.00)".**

Negotiable Instrument Exception: Many banks also prefer that numbers be written in both numerals and words on negotiable instruments, such as notes and checks, to ensure that there are no

typographical errors when they disburse money. So, "$1,000.00" should be written "One thousand dollars ($1,000.00)".

28. SEPARATE INDEPENDENT CLAUSES WITH COMMAS

Don't Do This:

> The Seller is a company with independent legal status **and** the Seller is duly registered and validly existing under the laws of China.

Do This:

> The Seller is a company with independent legal status**, and** the Seller is duly registered and validly existing under the laws of China.

29. IN LEGAL DRAFTING, PLACE THE COMMA OUTSIDE OF THE QUOTATION MARKS

This rule may lean towards my personal preference; however, leaving the comma outside of the quote prevents the problem where it is unclear whether a comma inside of a quote is part of a definition or part of quoted language.

Don't Do This:

> "this," "that," "these," "those," and "the"

Do This:

> "this", "that", "these", "those" and "the"

30. DO NOT UNDERLINE DEFINITIONS

This rule may also lean towards my personal preference; however, removing underlines from definitions prevents the occasional problem where it is unclear whether or not the underline is part of the definition. Furthermore, a removal of underlined words prevents the reader from focusing solely on the underlined words, which may divert the reader's attention from the rest of the text.

Don't Do This:

> "**Security Interest**" means a lien, mortgage, pledge, encumbrance or any other security interest, in each case, whether perfected or filed, whether on real or personal property.

Do This:

> "**Security Interest**" means a lien, mortgage, pledge, encumbrance or any other security interest, in each case, whether perfected or filed, whether on real or personal property.

31. DO NOT USE "AGREE OR ACKNOWLEDGE THAT"

Don't Do This:

> **It is agreed and acknowledged by the parties hereto that** Borrower shall repay the loan at maturity.

Do This:

> Borrower shall repay the loan at maturity.

32. WHEN USING FORMAL CONTRACT INTRODUCTIONS, BE AWARE OF WHETHER A SENTENCE IS FORMED

Don't Do This:

> This Supply Contract dated September 23, 2020 (this "Contract"), between Customer Corporation (the "Company") and Supplier Corporation ("Supplier").
>
> WHEREAS, Company desires to obtain product from Supplier, and Supplier desires to sell product to the Company,
>
> NOW, THEREFORE, in consideration of the premises, the agreements that the parties make in this Contract, and other good and valuable consideration that the parties to this Contract acknowledge:

Do This:

> This Supply Contract dated September 23, 2020 (this "Contract"), **is** between Customer Corporation (the "Company") and Supplier Corporation ("Supplier").
>
> WHEREAS Company desires to obtain product from Supplier, and Supplier desires to sell product to the Company,
>
> NOW, THEREFORE, in consideration of the premises, the agreements that the parties make in this Contract, and other good and valuable consideration that the parties to this Contract acknowledge, **the parties agree as follows**:

Alternate Solution:

> This Supply Contract dated September 23, 2020 (this "Contract"), between Customer Corporation (the "Company") and Supplier Corporation ("Supplier")
>
> **WITNESSETH:**
>
> WHEREAS Company desires to obtain product from Supplier, and Supplier desires to sell product to the Company,

> NOW, THEREFORE, in consideration of the premises, the agreements that the parties make in this Contract, and other good and valuable consideration that the parties to this Contract acknowledge, the parties agree as follows:

Note, that "witnesseth" is a verb in the imperative voice.

33. USE THE CORRECT FORM FOR SIGNATURE BLOCKS

I am constantly surprised that many litigators do not use the correct form of a signature block for legal entities when drafting settlement agreements.

Don't Do This:

_____	_____
ABC Corporation	ABC Partnership
_____	_____
Joe Smith, VP	Joe Smith, VP

Do This:

ABC Corporation	ABC Partnership By: Its General Partner, ABC Corporation
By:_____	By:_____
Joe Smith	Joe Smith
Its Vice President	Its Vice President

34. DO NOT PLACE A COMMA BEFORE A CONJUNCTION IN A LIST

Don't Do This:

> Security interests include pledges, liens, charges**,** and other security interests.

Do This:

> Security interests include pledges, liens, charges **and** other security interests.

35. USE HARD SPACES AND HARD DASHES

A "hard" space or dash is a special character in Microsoft Word and most other document processing applications that keeps a number from

getting separated from its descriptor by having the number start a new line.

Don't Do This:

> The Closing Date Balance Sheet shall be prepared in accordance with the provisions of **Schedule**
> **2.4** to determine the Working Capital Amount as of the Closing Date.

Do This:

> The Closing Date Balance Sheet shall be prepared in accordance with the provisions of **Schedule 2.4** to determine the Working Capital Amount as of the Closing Date.

36. WATCH YOUR PAGE BREAKS

Review your document at the end. Make sure you have not "orphaned" any headings at the bottom of the page. Ensure that the heading is with the text to which it belongs. Likewise, you may have an orphaned line that you prefer to move to the next page with its relevant text.

* * * * *

For those English and drafting wonks that have made it to the end, a few words from the late, great comic, Allan Sherman:

One Hippopotami

One hippopotami cannot get on a bus,
Because one hippopotami is two hippopotamus.
And if you have two goose, that makes one geese.
A pair of mouse is mice; a pair of moose is meese
A paranoia is a bunch of mental blocks,
And when Ben Casey meets Kildaire, that's called a paradox.
When two minks fall in love, with all their heart and soul,
You'll find the plural of two minks is one mink stole.

Singulars and plurals are so different, bless my soul.
Has it ever occurred to you that the plural of half is whole?
A bunch of tooth is teeth; a group of foot is feet,
And two canaries make a pair, they call it a parakeet.
A paramecium is not a pair.
A parallelogram is just a crazy square.
Nobody knows just what a paraphernalia is
And what is half a pair of scissors, but a single sciz?
With someone you adore, if you should find romance,
You'll pant, and pant once more, and that's a pair of pants![8]

8. ALLAN SHERMAN, *One Hippopotami*, *on* MY SON, THE GREATEST: THE BEST OF ALLAN SHERMAN (Rhino Records 1988).

DAN'S LEGAL DRAFTING CHECKLIST

1. Use multiple paragraphs and sub-paragraphs instead of a wall of text.
2. Write in active voice, not passive voice.
3. Consider adding all or part of a references section to remove unnecessary words and shorten your document.
4. Clarify whether a phrase following a list applies to the entire list or only the last item in the list.
5. Correctly use "which"/"that" and know the difference between restrictive and non-restrictive (descriptive) clauses.
6. Only reference sections and not articles, sections, sub-sections and paragraphs. Do not reference both a section and a sub-section in the body of your text.
7. Do not use "and/or".
8. Apply the antecedent rule correctly: a pronoun refers to the noun immediately preceding the pronoun.
9. Know the difference between "shall", "will", "may", "should", "could" and "would".
10. Once you use a phrase one way, remain consistent with that use. Say it the same way each time you use that phrase.
11. Do not over-define your terms or use circular definitions.
12. Defined terms need not be capitalized, especially when they make common sense.
13. Use short defined terms that make sense and are consistent with the common abbreviated language for the item you are defining.
14. Do not under-define your terms.
15. Use a definitions section up front when you define multiple terms in a long contract for ease of reference.
16. Bound your lists.
17. Care about your boilerplate provisions.
18. Except in rare instances, do not use Latin words when English will suffice.
19. Even if it means using a few more words, use "of this Agreement" instead of "hereof", "herein", "thereof", "therein", "hereto" and "thereto".

20. Use “this”, “that”, “these”, “those” and “the” instead of “such”.
21. Use “if” instead of “in the event that”.
22. Use “to” or “for” instead of “in order to” or “in order for”.
23. Use a descriptive or defined term instead of “he/she” or “her/his”.
24. Use “provided that” rather than “provided, however, that”.
25. Use “means” instead of “shall mean”.
26. Use “wholly owned” instead of “wholly-owned”.
27. For numbers that are ten and smaller, write them in words. For numbers greater than ten, write them in numerals. Write both the word and the numeral if you are drafting for multiple languages or drafting a negotiable instrument.
28. Separate independent clauses with a comma if they are connected by a conjunction.
29. In legal drafting, place the comma outside of the quotes.
30. Do not underline definitions.
31. Do not use “agree or acknowledge that”.
32. When using formal contract introductions, be aware of whether a sentence is formed.
33. Use the correct form for signature blocks.
34. Do not place a comma before a conjunction in a list.
35. Use hard spaces and hard dashes.
36. Watch your page breaks.