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CHECKLIST FOR DRAFTING GOOD CONTRACTS

ADV -- Advocacy & Lawyering Skills

The drafter of a contract wants to craft a document that accomplishes the objectives of the parties while protecting the interests of the client. To accomplish this, the drafter must be able to predict what may happen between the parties, to provide for each contingency, and to protect the client with a remedy. Often the drafter must do this quickly. While each contract involves different concerns, depending on the subject and the context, all contracts involve common requirements and considerations. With a thorough checklist of these requirements and considerations, a drafter need not reinvent the wheel with each contract. Instead, with the use of a checklist, drafters of contracts can ensure that their contracts are complete and effective.

STEP ONE

▲ Determine the substance of the contract

STEP TWO

▲ Analyze the audience.

STEP THREE

▲ Organize the material.

STEP FOUR

▲ Draft the contract.

STEP FIVE

▲ Design the document

STEP SIX

▲ Evaluate the document.

For all drafters, a checklist can ensure that the contract will contain the necessary substantive provisions and that decisions about those provisions will have been made by design, not by accident. For the time-challenged drafter, a checklist eliminates the need to rethink from scratch what to include in a contract and how best to draft it. For the detail-challenged drafter, a checklist ensures that all tasks associated with the drafting are completed. For the occasional drafter, a checklist is an invaluable reminder of content and form that might otherwise be ***80** forgotten. For the experienced drafter, a checklist effectively reminds

the drafter when boilerplate or often-used language is inappropriate, that special circumstances require special language.

Like any legal writing, good drafting requires knowing the law and the substance first, followed by clear organization and by writing appropriate to the audience. It also requires an artist's touch, to ensure that the design of the contract document will aid in its usability and clarity. Finally, good drafting requires critical evaluation, reading the document through the eyes of bad faith or hostile readers, and periodic review to assure that the document continues to meet the parties' needs.

The following six steps of contract drafting will help assure that the drafter of a contract meets these goals.[1]

STEP ONE

▲ Determine the substance of the contract.

I. What does the law require that a contract include?[2]

A contract must include the common law and statutory requirements for contract formation and any specific requirements for the contract being created.

A. Does the contract include provisions that meet the requirements for formation?[3]

1. Does the contract reflect an **offer and acceptance?** The drafter should consider the nature of the agreement, such as a contract of adhesion, and how the contract developed, such as from a battle of forms, a negotiation, or a letter of intent.

***81** 2. Does the contract reflect **consideration?** Consideration is an exchange of something of value.[4] Therefore, the drafter should be wary of drafting an illusory contract that promises nothing such as when one party has the option of not performing, perhaps because of a satisfaction clause, or when a party is not under any obligation to perform, perhaps because of the lack of mutuality.

3. Does the contract include the **essential terms?** For example, a contract for the sale of goods needs to identify the parties, price, quantity, date of delivery, and payment terms unless a statute includes gap-filler provisions. Gap-filler provisions are included in the Uniform Commercial Code: U.C.C. § 2-305 sets "reasonable price at the time of delivery" as the gap-filler for an unsettled term of price; U.C.C. § 2-306 sets "normal or otherwise comparable prior outputs" as the gap-filler for quantity when the output estimates are not stated in the contract; U.C.C. § 2-308 sets the seller's place of business as the gap-filler for the site of delivery when the site of delivery is not stated in the contract; and U.C.C. § 2-309 sets "reasonable time" as the gap-filler for the delivery date when the delivery terms are not stated in the contract.

4. Does the contract include **definite terms?** The drafter must consider statutory or judicial interpretations of key terms, and custom and usage. For example, when the custom of the magazine industry is to publish an article or photo only once, a magazine could not republish articles and photos without infringing on the copyright owned by the photographer and writer.[5]

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In addition, the drafter must beware of relying on definitions outside the terms of the contract, such as making a real estate sale price contingent on an appraisal by a person outside the contract, like the Department of Veterans Affairs; or by making the award of disability benefits contingent on a determination by the Social Security Administration. In these circumstances, an essential term of the contract is not established by the parties to the contract, but instead by an outside entity over which the parties have no control.

Further, the drafter must be sure the contract does not contain conflicting terms concerning material items. For example, a contract contained conflicting terms when one provision made the architect's decisions subject to arbitration and another provision stated the architect's decision was final and conclusive.[6]

B. Does the contract avoid potential defenses to formation?

1. Does the contract violate the law? A contract may violate the law because it is illegal,[7] it fails to follow the form required by law,[8] it uses prohibited ***82** terms,[9] it omits required language,[10] it waives rights where the law does not permit waiver,[11] or it includes unconscionable terms.[12]

2. Does the contract reflect the **capacity** of the parties to contract? The drafter should consider whether issues of capacity are raised by the parties' status, such as mental capacity, age, or lack of authority;[13] or by the parties' behavior, such as fraud, duress, undue influence, or unconscionability.[14]

3. Does the contract avoid the potential defense of **mistake**? The drafter should consider including assumptions in the contract either as recitals (premises),[15] representations,[16] or warranties?[17] For example, if the value of property that is the subject of a real estate contract could change with a change in zoning, the parties to the contract might protect their right to a higher price (seller) or a lower price (buyer) by including a statement in the recitals that the parties considered the current zoning of the property in establishing the price, a representation that the property is zoned X, or a warranty that the zoning will be X on the date conveyed to the buyer.[18]

***83** The drafter also should consider whether the client's interests are best protected by including (or excluding) a merger (or entire agreement) clause, inspection clause, warranty, or an absolute promise to perform.

C. Does the contract include provisions that determine under what circumstances performance should be excused or late?

The drafter should consider what terms will best protect the client for occurrences outside its control, perhaps using a *force majeure* clause; what conditions must occur for performance; and what warranties should be included after checking for any prior oral or written representations, any description of goods, samples or models shown, any plans or blueprints, any specifications, any market or official standards, any brochures, any advertisements, and the quality of goods received.

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For example, a contractor had to comply with the completion date in its contract for constructing a drainage ditch and levee, even though the site flooded after most of the work had been completed, because the contract did not include a provision excusing delays caused by acts of God.[19]

D. Does the contract include appropriate remedies for a breach?

If the client wants specific performance, the drafter must establish the uniqueness of the goods or services, or the special circumstances of the sale.[20] For money damages, the drafter must consider whether to provide expressly for consequential, incidental, cover, liquidated and punitive damages.

The laws governing money damages will vary in different jurisdictions. For example, Oregon allows parties to a contract to agree to limit the measure of damages that a party can recover,[21] but it severely restricts the limitation of consequential damages for consumer goods.[22] The drafter also should consider whether the remedies should include provisions for arbitration and attorney fees.

E. Does the contract include provisions that define its effect on third parties?

A third party may acquire an interest in a contract as a beneficiary if a party to a contract shifts its interest (in whole or in part) to the third party. The drafter must consider whether to allow assignment of rights,[23] delegation of ***84** duties,[24] or transfer of rights and duties.[25]

While public policy favors the ability of a party to a privately negotiated contract to assign its rights under a contract,[26] the drafter may want to prohibit assignment if the client considers the contract rights to be personal. Public policy may also favor the ability of a party to a privately negotiated contract to delegate its duties under a contract but to a lesser extent than assignment, because duties involving personal choice may not be delegated.[27]

F. Does the contract meet any additional requirements imposed by statute?

Statutes may require or bar specific provisions concerning various subjects, such as contracts involving the sale of real estate,[28] or parties, such as consumers.[29]

II. Does the contract meet the requirements of the client?

To determine the requirements of the client, the drafter must be familiar not only with the nature of the transaction, but also the nature of the client's operation, including the client's long-term and short-term business goals, and the nature of the business in general.

A. Does the contract include provisions that achieve the client's goals in entering into the contract?

To achieve this, the drafter must first identify the client's express and implied goals. Express goals are those that would be

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included in the contract, and implied goals might include the client's way of doing business.

***85 B. Does the contract include provisions that reflect the degree of risk that the client is willing to assume?**[30]

1. Has the drafter **determined each imaginable risk**? The drafter must be familiar with the nature of the contract and the business environment in which it will operate. The more the drafter learns about how the client and the client's industry operate, the better the drafter can determine what risks are involved.

2. Has the drafter **assessed the risk** for each imaginable risk identified? The drafter must consider what could cause the risk and how often the risk has been a problem in the past. The drafter should consider the client's prior experience as well as prior experience in the industry to determine if the risk is realistic and if the dangers are significant.

3. Has the drafter **allocated the risk** in a way that reasonably protects the client from risk it does not wish to assume? The drafter must consider how the risk can be avoided (if at all), what the cost of avoidance would be, who would bear the cost of avoidance, how the risk could be reduced, how the risk could be spread, who would be liable for damages if the risk materialized, and what appropriate limitations on that party's liability for damages might be included.

In addition, the drafter must consider whether the law precludes a party from avoiding the risk. For example, a health insurer cannot avoid the risk of covering various health conditions or services by various providers if a statute requires that those risks be covered.[31] In addition, an insurer cannot define the risk in the contract in a way that would make the contract illusory.[32]

STEP TWO

▲ Analyze the audience.

Next, the drafter must analyze the audience for the contract. A reader's goals are to understand the information in the contract and to remember the ***86** information for future reference. How best to meet these goals will depend on learning more about the expected readers. The document should not overload the reader with information, the document should be clearly written and easy to follow, and the document should be understandable given the expected reader's knowledge and experience with the specific subject of the contract.

I. Has the drafter identified who will be the primary and secondary readers of the contract?

Primary readers are the parties to the contract; secondary readers include anyone else who might read the contract. To illustrate, the primary readers of a residential lease are the landlord and the tenant. Secondary readers might include lawyers for the landlord or tenant, potential subtenants, judges interpreting the lease because of a litigated dispute or a forcible eviction, and service providers (such as a plumber or electrician) determining who is responsible for payment.

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II. Has the drafter considered how each reader will use the contract?

The drafter must consider whether the contract will be used as a reference, will not be read, will be read only in part, or will be read with an attorney present.

III. Has the drafter considered what each reader already knows?

The drafter must consider whether special explanations may be needed for technical terms or concepts or to avoid misconceptions.

IV. What is each reader's attitude about the contract?

The drafter must consider the motivation of the readers and whether any of them are potential "bad faith readers" trying to find fault with the document.

STEP THREE

▲ Organize the material.

Most contracts contain a tide, an introduction, recitals, definitions, operative provisions, declarations, a closing, and attachments. The drafter should consider each part of the contract to be drafted, consciously rejecting a segment rather than inadvertently omitting it. Critiquing an Escrow Agreement for computer source code[33] (see the following two pages) will illustrate Steps Three and Four.

87** ***Escrow Agreement

EFFECTIVE this ___ day of _____, ____, this Escrow Agreement by MicroHard Corporation, Willamette, Oregon U.S.A. (MicroHard) and M. H. Jacobson, dba Software Development Company, located at _____ (Company), and Security Bank of Willamette (Escrow Agent), Collins Center, Willamette U.S.A.

Company will provide MicroHard with Company software products in object code form, and Company documentation (Software Programs) pursuant to the certain OEM Remarketing Agreement dated _____, ____, between MicroHard and Company (Underlying Agreement). Except as otherwise indicated, all capitalized terms in this Agreement have the same meaning as defined in the Underlying Agreement. Pursuant to the terms of the Underlying Agreement, Company also provides or is willing and able to provide error correction, maintenance, training and other support services for Software Programs, and, as applicable, Company documentation (collectively "Support Services"). MicroHard relies upon the continuing availability of Support Services to MicroHard as a condition for remarketing of Software Programs and payment of fees to Company for Support Services.

This Escrow Agreement provides assurance to MicroHard of the ability to access Source Code for Software Programs upon the occurrence of the events described in Sections 4 and 5 of this Escrow Agreement and Section 20 of the Underlying

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Agreement.

THEREFORE; in consideration of the mutual covenants set forth in this Escrow Agreement, MicroHard, Company and Escrow Agent agree as follows: [text of the items 1-13 omitted]

1. Deposit of Source Code.
2. Title to Source Code.
3. Release of Source Code to MicroHard.
4. Automatic Release Event.
5. Failure of Company to Provide Support Services.
6. Irreparable Harm.
7. Disputes.
8. License of Source Code.
9. Confidentiality and Use of Source Code.
10. Fees.
11. No Duty to Inquire; Right to Require Additional Documents.
12. No Liability.
13. Notices.

14. Termination. This Agreement may not be terminated or modified except in writing signed by Escrow Agent, Company, and MicroHard. Upon termination of this Escrow Agreement Escrow Agent shall return Source Code to Company and title to the actual copies of Source Code deposited shall revert to Company upon delivery.

15. Entire Agreement. This Agreement and its Attachments set forth the entire agreement and understanding between the parties relating to the subject matter hereof, superceding and merging all prior and contemporaneous discussions, proposals, and agreements, oral or written, and all other communications between the parties relating to this Agreement.

The parties have caused this Agreement by their duly authorized representatives as of the date or dates set forth below.

M. H. JACOBSON dba SOFTWARE DEVELOPMENT COMPANY	MICROHARD CORPORATION
By:	By:
(Authorized Representative)	(Authorized Representative)

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89** ***I. Does the contract include a title that accurately expresses the nature of the contract?

Examples of titles include Employment Contract, Real Estate Contract, Promissory Note, Lease Agreement, Rental Agreement, Partnership Agreement, and Escrow Agreement.

II. Does the contract begin with an introduction?

A contract should begin with an introduction that identifies the parties to the agreement, as well as the nature of the agreement.

A. Does the introduction include essential information of the party names?

Essential information about party names could include a "dba" or special legal status, such as a corporation or limited liability corporation. Also, it might include the short form of any party name, such as last name, key word from a company name, initials, or contractual role such as lessor or lessee.

B. Does the introduction include other optional information concerning the place of business or the date?

This information is optional to the introduction because it also can go at the end of the contract with the signatures.

C. Does the introduction exclude other substantive information?

The introduction should be short; specific terms of the agreement belong elsewhere in the contract.

D. Do the parties state their mutual agreement to the terms of the contract?

This statement may also appear immediately prior to the beginning of the operative provisions of the contract. This is most commonly the case when the introduction and the operative provisions of the contract are separated by recitals.

E. Is the introduction written in complete sentences?

When introductory information is stated as a clause, it is missing either the subject or the verb. Both the subject and the verb are needed to convey the essential information.

90** ***Critique of Escrow Agreement -- Introduction

The introduction in the Escrow Agreement states as follows:

> EFFECTIVE this ___ day of _____, ____, this Escrow Agreement by MicroHard Corporation, Collins Center, Willamette U.S.A. (MicroHard) and M. H. Jacobson, dba Software Development Company, located at 245 Winter Street (Company), and Security Bank of Willamette (Escrow Agent), Collins Center, Willamette U.S.A.

Short forms: This introduction includes name, legal status, and a short form for each party name. However, the short forms should appear after the name (like for "Escrow Agent"), rather than after the address (like for "MicroHard" and "Company").

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Optional information: This introduction includes optional information, the date, and partial addresses. The complete addresses of the parties must appear either here or at the end with the signatures. The effective date may be included here or at the end of the contract. If the effective date is included in both places, the drafter must be sure the dates do not conflict.

Language of agreement: This introduction gives the name of the agreement, but it does not include express language of agreement. While an agreement can be inferred from the contract as whole, the better practice is to state directly that the parties agree to the document's terms.

Sentence: This introduction is not a complete sentence. Revising it to include a verb would provide express language of agreement.

A revised introduction might look like this:

> MicroHard Corporation (MicroHard), Collins Center, Willamette U.S.A.; M. H. Jacobson, dba Software Development Company (Company), Silicon Valley, California U.S.A.; and Security Bank of Oregon (Escrow Agent), Collins Center, Willamette U.S.A. enter into this Escrow Agreement effective _____, ____.

91** ***III. Does the contract include recitals?

This section of the contract might also be called Premises. Its purpose is to state information that forms the foundation or background for the contract. Recitals reflect what was true before the contract existed, not what the parties agree to do after the contract.

A. Can the drafter identify the purpose for including each recital?

To avoid overdoing the recitals, the drafter should exclude any recital for which he or she cannot identify a purpose for including. Appropriate purposes for recitals include to clarify intent, such as the reasons why the parties want the contract; to resolve problems of negotiation, such as facts that would support arms length negotiations; to add to consideration, such as when the consideration involves more than money or when the value of the consideration may not be readily apparent; or to bolster the importance of conditions in the contract, such as the reason why time is of the essence to one of parties.

B. Do the recitals exclude representations or agreement?

A party to a contract may not have any remedy if a representation appears in the recitals and is not true. Likewise, an agreement (such as a definition) may not be enforceable when it is not within the operative provisions of the contract.

C. Do the recitals avoid the use of "whereas"?

While recitals are traditionally introduced with this term, the term is legalese that does not add meaning to the recitals. Simply numbering each recital will eliminate the need for this introductory word.

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92** ***Critique of Escrow Agreement -- Recitals

The recitals in the Escrow Agreement state as follows:

> WHEREAS; Company will provide MicroHard with Company software products in object code form, and Company documentation (Software Programs) pursuant to the certain OEM Remarketing Agreement dated _____, ____, between MicroHard and Company (Underlying Agreement). Except as otherwise indicated, all capitalized terms in this Agreement have the same meaning as defined in the Underlying Agreement. Pursuant to the terms of the Underlying Agreement, Company also provides or is willing and able to provide error correction, maintenance, training and other support services for Software Programs, and, as applicable, Company documentation (collectively "Support Services"). MicroHard relies upon the continuing availability of Support Services to MicroHard as a condition for remarketing of Software Programs and payment of fees to Company for Support Services.
>
> WHEREAS; This Escrow Agreement provides assurance to MicroHard of the ability to access Source Code for Software Programs upon the occurrence of the events described in Sections 4 and 5 of this Escrow Agreement and Section 20 of the Underlying Agreement.
>
> NOW, THEREFORE; in consideration of the mutual covenants set forth in this Escrow Agreement, MicroHard, Company and Escrow Agent agree as follows:

***93 Purpose:** Only three sentences include proper recitals: the first and last sentences in the first paragraph and the sentence in the second paragraph. These sentences include proper recitals because they clarify intent, add to consideration, and bolster the importance of conditions in the contract.

Representations or agreement: The remainder of these recitals include substantive provisions of the contract: the first sentence includes a definition, the second sentence is a term of agreement, and the third sentence is a definition in its entirety.

Legalese: Each paragraph begins with unnecessary legalese. In addition, the last sentence is written in unnecessary legalese.

Revised recitals might look like this:

> RECITALS:
>
> 1. Company has agreed to provide MicroHard with Company software products in object code form and Company documentation in the OEM Remarketing Agreement dated _____, ____, between MicroHard and Company.
>
> 2. MicroHard relies on the continuing availability of Support Services to MicroHard as a condition for remarketing of Company software products and payment of fees to Company for Support Services.
>
> 3. This Escrow Agreement assures MicroHard of access to the Source Code for Company software products if Company enters bankruptcy or fails to perform support services.

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Therefore, MicroHard, Company, and Escrow Agent agree:

94 *IV. Does the contract include definitions?

Definitions can appear at the beginning of the contract or where the word first appears. Traditionally, drafters have placed definitions at the beginning of the contract in a definition section. However, this format can be awkward when referring to definitions in a lengthy document or when the definition section becomes quite long. More modernly, drafters have placed the definition where the word first appears. However, this also can be awkward when the word appears throughout a document, because the reader may have difficulty finding the original definition. The better rule puts definitions at the beginning of the contract if the term appears in multiple sections of the document and puts the definition where the term first appears if the term appears in only that one part.

A. Does the contract include definitions where necessary?

1. Does the drafter define technical words or terms of art that the user of the document may not know?

2. Does the drafter define words when they are used in a manner different from their commonly understood definition? For example, the common meaning of robot is a mechanical device resembling a human, but in the context of the Internet, it means a program that searches the Internet for files.

3. Does the drafter define words when they might be ambiguous? For example, the word "ton" could mean 2,000 pounds or a long ton of 2,200 pounds.

4. Does the drafter define words when doing so will eliminate a string of words? For example, the drafter might define *transfer* to mean "sell, transfer, assign, pledge, encumber, or otherwise dispose of or convey," eliminating the need to repeat those words later in the contract.

5. Does the drafter exclude lexical (dictionary) definitions when using a word in its dictionary, or commonly understood, sense?

6. Does the drafter have as few definitions as possible, rather than as many as possible?

7. Does the drafter use every term that is defined?

B. Does the contract include clear stipulative definitions?

Stipulative definitions can be full or partial. Stipulative definitions are full definitions when the drafter creates a definition for a term, such as "*writing* means writing in longhand," or when the drafter creates a term, such as "*MicroHard EDA environment* means any electronic design automation (EDA) environment developed by MicroHard." Stipulative definitions are partial

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definitions when they enlarge on a definition, such as "*mortgage* includes a deed of trust"; confine a definition, such as "*writing* does not include typewriting"; or both, such as "*farm animal* includes domesticated llamas but does not include domesticated emus."

***95** 1. Does the contract include a stipulative definition when the drafter wants to limit the range of a lexical definition or to single out one of multiple lexical definitions?

2. Does the drafter avoid assigning a common word to define a concept? When a drafter assigns a common word an uncommon definition, it can confuse the reader and potentially creates an ambiguity.

3. Does the drafter avoid definitions that enlarge commonly understood terms when doing so contradicts ordinary usage? A definition that contradicts ordinary usage is a strained definition and one that might confuse the reader. An example of a strained and potentially confusing definition would be to define "motor vehicle" to include a bicycle or a skateboard.

4. Do the full definitions read: "A" means B?

5. Do the partial definitions that enlarge read: "A" includes B?

6. Do the partial definitions that confine read: "A" does not include B?

Critique of Escrow Agreement -- Definitions

A critique of the introduction from the Escrow Agreement helps to illustrate these concerns.

The Escrow Agreement does not include a definition section.

The only defined terms appear in the recitals: the recitals incorporate definitions from another agreement by reference.

The recitals define the terms Software Programs and Support Services, but these definitions are not in the proper form as outlined in Section IV.B.

In addition, depending on the reader's knowledge of the subject matter, the definitions may not be complete: e.g., will the reader know what *object code form* is?

C. Do the definitions conform with generally accepted drafting conventions?

1. Does the drafter use consistent terminology throughout after defining a term? That is, does the drafter always use the same

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word or phrase for the same concept unless a different meaning is intended? For example, if *out of service* is the defined term, then *not in service* means something different because the latter phrase does not match the wording of the defined term.

2. Does the drafter use definitions to define terms, rather than to include other substantive information? Definitions that are more than one sentence may violate this rule.

3. Are definitions drafted using present tense? Since a contract will operate indefinitely, definitions should read so that they express the current state and so that they always apply.

***96** 4. Do the definitions appear prior to or contemporaneous with the first use of the defined term?

5. Are the definitions in the definition section in alphabetical order?

V. Does the contract include the operative provisions that establish the obligations of the parties?

The operative provisions of a contract are those that establish the performance the agreement requires, the consideration for that performance, and the terms under which the agreement will operate.

A. Has the drafter organized the provisions in appropriate divisions?

Operative provisions are organized most effectively when the most significant provisions are at the beginning of the document and the administrative (or housekeeping) provisions, such as declarations of private law, are at the end. In addition, similar topics should be grouped together and identified with appropriate headings.

1. Do the divisions make the contract easy to use as a reference document?

2. Is each division mutually exclusive? For example, if the group *human beings* was divided into parts called *men, women,* and *American*, the divisions would not be mutually exclusive because men and women can also be Americans.

3. Do the divisions, when added together, equal the whole? For example, the divisions in the prior example do not equal the whole because they do not include children.

4. Is a single principle consistently applied throughout a division? For example, the divisions *men*, *women*, and *American* begin with gender classifications and then shift to nationality.

B. Has the drafter provided each division with an appropriate heading?

1. Do the headings inform the reader of the topic of the division? If the heading is misleading or if the division contains

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information not related to the heading, a court might not enforce the provision.[34]

2. Is each heading sufficiently general to cover all the contents of the division and sufficiently specific to avoid covering provisions covered elsewhere?

3. Are the headings stylistically consistent?

4. Are the headings of roughly the same weight or breadth?

***97** 5. Should any heading be a subheading under another heading?

6. Is each heading numbered or lettered using a consistent scheme?

C. Has the drafter organized the divisions in a logical manner?

1. Is information placed where the user of the document would expect to find it?

2. Are closely related provisions placed together? Putting closely related provisions together eliminates unnecessary cross-referencing.

3. Is the contract free from gaps and overlaps among the divisions?

4. Are the divisions presented in some evident logical plan?

a. Are events presented chronologically as they are expected to happen?

b. Are ordinary, expected events before extraordinary?

c. Are the more important provisions before the less important provisions?

d. Are the frequently referred to provisions before the less frequently referred to provisions?

e. Are general rules before exceptions?

98** ***Critique of Escrow Agreement -- Headings

To determine if the headings reflect appropriate divisions, the drafter should list and critique the content and structure of the headings. The headings in the Escrow Agreement are as follows:

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1. Deposit of Source Code

2. Title to Source Code

3. Release of Source Code to MicroHard

4. Automatic Release Event

5. Failure of Company to Provide Support Services

6. Irreparable Harm

7. Disputes

8. License of Source Code

9. Confidentiality and Use of Source Code

10. Fees

11. No Duty to Inquire; Right to Require Additional Documents

12. No Liability

13. Notices

14. Termination

15. Entire Agreement

Here, the divisions fail to reflect a clear organization: headings 1, 2, 3, 4, 8, and 9 all concern the Source Code, but they are not near each other. The headings also hinder the use of the document as an easy reference: headings 10, 11, and 12 concern the obligations to and responsibilities of the Escrow Agent but this organizing principle is not reflected in the wording of these headings. Further, the headings are not mutually exclusive: headings 3 and 4 both concern the release of the Source Code; and the headings are not complete: they lack a definition section.

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Finally, some of the headings reveal other flaws. Each of the headings is not of equal weight; for example, headings 3 and 4 could be combined into one division concerning release of the Source Code. Some headings might be more appropriate as subheadings, such as all the sections concerning the Source Code, which could be reorganized with fewer main sections and more subheadings. Further, some headings do not accurately reflect the content of the section, such as "Termination," which also includes information on how to modify the agreement.

99** ***VI. Does the contract include declarations of what private law will govern?

A. Does the contract include a *force majeure* provision?

A *force majeure* provision determines what happens when performance becomes impracticable because of events beyond the parties' control.

B. Does the contract include a merger provision?

A merger provision clarifies what constitutes the agreement and the enforceability of provisions not included.

Critique of Escrow Agreement -- Merger Provision

The merger provision in the Escrow Agreement states as follows:

> **15. Entire Agreement.** This Agreement and its Attachments set forth the entire agreement and understanding between the parties relating to the subject matter hereof, superceding and merging all prior and contemporaneous discussions, proposals, and agreements, oral or written, and all other communications between the parties relating to this Agreement.

This could be more simply stated like this:

> **15. Entire Agreement.** This agreement constitutes a final written expression of all the terms of this agreement and is a complete and exclusive statement of those terms.

C. Does the contract include a choice of law provision?

A choice of law provision states what law will apply in the event of a dispute. Beware that the choice of law provision may be mandated. For example, the choice of law provision is mandated by international agreement in the Vienna Convention of the United Nations Commission on International Trade for the Sale of Goods).

D. Does the contract include an assignment and delegation provision?

A provision may state whether the parties may assign their rights under the contract or delegate their duties. Consider these examples:

> Either party may assign its rights [delegate its duties] under this agreement.

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***100** OR:

> Neither party may assign any right or interest in this contract without the written permission of the other party. This clause is meant to prohibit assignment of rights but not delegation of duties.

E. Does the contract include a modification provision?

A modification provision states how the parties may modify the contract.

Critique of Escrow Agreement -- Modification Provision

The merger provision in the Escrow Agreement states:

> **14. Termination.** This Agreement may not be terminated or modified except in writing signed by Escrow Agent, Company, and MicroHard ....

This could be more simply stated like this:

> **14. Termination.** The parties to this Agreement may terminate or modify it only in writing signed by all parties.

F. Does the contract include a severability provision?

A severability provision states whether the parties can enforce remaining provisions if one or more provisions is unenforceable. For example, consider:

> The invalidity of any term of this agreement does not affect the validity of the remainder of the agreement.

If a contract includes a key provision that is unenforceable, the parties may not want to proceed under the contract even if the unenforceable provision does not go to the essence of the contract. Consider these examples:

> If a court refuses to enforce any provision in Part II, no party shall enforce ....
>
> OR:
>
> If a court refuses to enforce a part of this agreement, the remainder of the agreement is unenforceable.

***101 G. Does the contract include a headings provision?**

A headings provision states whether the headings are a substantive part of the contract. For example, consider:

> The headings in his agreement are for reference only and do not affect the interpretation of any term or condition in the agreement.

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H. Does the contract include a limitation of actions provision?

A limitation of actions provision states in what period a suit must be brought or what procedure to follow before filing a lawsuit. For example, the contract could require that a person bring suit within eighteen months or that the person complain to the company before filing suit.

I. Does the contract include an attorney fee provision?

An attorney fee provision allocates responsibility for attorney fees in the event of a dispute. The allocation of attorney fees must be consistent with public policy and the law.[35]

J. Does the contract include dispute resolution provisions?

Dispute resolution provisions state how to resolve a dispute without litigating. To avoid the expense and inconvenience of litigation, modern contracts commonly include provisions for resolving disputes informally or as an alternative to litigation. For example, an informal dispute resolution provision might provide that the parties meet and discuss any dispute within a short period of time (such as ten days) after notice of the dispute. An alternative dispute resolution provision might provide that the parties mediate their dispute before a mutually acceptable mediator prior to litigation or it might require that the parties arbitrate their dispute before an arbitrator whose decision will bind the parties.

VII. Does the contract include an appropriate closing?

A. Is the closing governed by law?

A statute might require that additional information be included in the closing.[36] A statute might also require that the signers have a local address if the ***102** laws of the state are to govern the agreement.[37] Finally, a person signing for an entity, such as a corporation, partnership, or trust, may need to disclose its relationship to the entity, such as a title or capacity.[38]

B. Does the closing include a signature line for the parties signing the contract?

C. Does the closing include the name of the person signing?

The name of each person signing the agreement should be typed or printed under the signature line.

D. Does the closing include the title or capacity of the person signing?

The title or capacity of each person signing an agreement should be included to confirm that the person has the authority to sign. The drafter also may want to specially verify that the person signing the contract has representative power.

E. Does the closing include signature dates for each party?

Each signature may have a different date. In addition, the signature dates may be different from the agreement date in the introduction and the effective date of the contract.

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F. Does the closing include addresses and telephone numbers for each party?

103** ***Critique of Escrow Agreement -- Closing

The closing in the Escrow Agreement states as follows:

> IN WITNESS WHEREOF, the parties have caused this Agreement by their duly authorized representatives as of the date or dates set forth below.

M. H. JACOBSON, dba SOFTWARE DEVELOPMENT COMPANY	MICROHARD CORPORATION
By:	By:
(Authorized Representative)	(Authorized Representative)
Name	Name
Title	Title
Date	Date

SECURITY BANK OF WILLAMETTE

By:

(Authorized Representative)

Name

Title

Date

Identity of parties: This closing identifies each party and assures that whoever signs for each party is authorized to do so (and therefore can bind the entity).

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Contact information: This closing does not include addresses and telephone numbers for each party. Since this information was also not included in the introduction, it should be included here.

Clarity: The introductory sentence to the closing is typical, but it is nearly incomprehensible legalese. In addition, this sentence may confuse the effective date of the agreement because the dates of the signatures could be different from the date at the beginning of the agreement. A good drafter would want to clarify this.

***104** A revised closing might look like this:

> **16. Effective date.** This Agreement takes effect on July 1, 2008, or on the date on which the last party signs it, whichever is later.
>
> The parties sign this agreement on the dates written below.

M. H. JACOBSON, dba SOFTWARE DEVELOPMENT COMPANY	MICROHARD CORPORATION
By:	By:
(Authorized Representative)	(Authorized Representative)
Name	Name
Title	Title
Date	Date
Address:	Address:
245 Winter Street	900 State Street
Collins Center, WL 97301	Silicon Valley, CA 97500
(971) 555-1234	(415) 555-4321

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SECURITY BANK OF WILLAMETTE

By:

(Authorized Representative)

Name

Title

Date

Address:

105** ***VIII. Does the contract include attachments?

A. Are the attachments incorporated by reference somewhere in the contract?

B. Are the provisions of those attachments that are incorporated by reference consistent with the provisions of the contract?

C. Does the drafter distinguish between attachments that are binding and attachments that are only for reference?

D. Does the drafter label the attachments consistently?

STEP FOUR

▲ Draft the contract.

I. Are the sentences clear?

A. Have you used a simple sentence structure?

Sentences written in a simple structure (subject-verb-object) are easy to read and understand.

1. Is the true subject of the sentence in the subject? Edit for sentences where the subject is *it* or *there* and neither the *it* nor the *there* refers to something specific. Also edit for nominalizations (verbs converted to nouns); most likely the nominalization should be the verb rather than the subject. Compare *the specifications in the rule are* with *the rule specified*.

2. Is the action in the verb? Edit for *to be* verbs: is, are, am, was, were, be, been, being. *To be* verbs convey definition, status, or description rather than action.

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3. Is the verb strong and simply stated? Strong verbs create a picture for the reader; for example, consider whether the reader would know what action is occurring when asked to *effectuate*. Simply stated verbs avoid unnecessary repetition: *she did work* becomes *she worked*, *he interposed an objection* becomes *be objected*, and *they must make a statement* becomes *they must state*.

4. Is the contract drafted in active voice? Contracts must use active voice to express the responsibilities of the parties. Passive voice avoids directly stating who is doing what to whom and, therefore, it can be ambiguous. Most passive voice involves a *to be* verb with a past participle (such as *is written*), and it makes sense when followed with *by whom* or *by what*. The drafter should eliminate all passive voice absent an express reason for leaving it, such as when the parties to the contract do not know or do not want to disclose who the actor will be, or when the recipient of a representation or warranty wants it in passive voice, ***106** depending on the risk allocation desired.[39]

5. Are the subject and verb close to each other? When the subject and verb are too far apart, the sentence is less clear and harder to read because the reader needs to retain all the information in the subject, plus any modifying clauses, before knowing what to do with it through the action that the verb communicates.

B. Are the sentences short?

Long sentences are hard to understand because the logical order is sometimes distorted and because the length may strain the reader's memory.

1. Are most sentences 25 or fewer words in length?

2. For sentences that are more than 25 words, is the information presented as simply as possible to aid the reader in following it?

3. Are modifiers next to what they modify? Ambiguity occurs when modifiers are misplaced (i.e., they are not next to what they really modify), squinting (i.e., they modify both the preceding and following terms) or dangling (i.e., they modify something that is not in the sentence).

4. Are any lists presented in parallel construction? Parallel grammatical construction makes any sentence with a list (such as multiple objects, verb phrases or clauses) easier to read.

5. Has any extra language been deleted? Concise writing will not only be easier to read, but it will also avoid ambiguities created by the extra words.

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107** ***Critique of Escrow Agreement -- Drafting

Examples of wordiness and legalese include these highlighted words:

> WHEREAS; This Escrow Agreement provides assurance to MicroHard of the ability to access Source Code for Software Programs upon the occurrence of the events described in Sections 4 and 5 of this Escrow Agreement and Section 20 of the Underlying Agreement.
>
> NOW, THEREFORE, in consideration of the mutual covenants set forth in this Escrow Agreement, MicroHard, Company and Escrow Agent agree as follows:

These provisions could be more simply stated like this:

> 3. This Escrow Agreement assures MicroHard of access to the Source Code for Software Programs when the events described in Sections 4 and 5 of this Escrow Agreement and Section 20 of the Underlying Agreement occur.
>
> OR
>
> 3. This Escrow Agreement assures MicroHard of access to the Source Code for Company software products if Company enters bankruptcy or fails to perform support services.
>
> Therefore, MicroHard, Company, and Escrow. Agent agree as follows:

***108 C. Are proper connectors used?**

1. Is *and* used when a party must comply with each of the options?

2. Is *or* used when a party need only comply with one of the options? Using *or* does not preclude a party from complying with more than one of the options.

3. Is the use of *and/ or* avoided? This phrasing is ambiguous: if the drafter does not know if *and* or *or* applies, how will the reader?

D. Are conditions clearly identified?

Use sentence structure to make conditions clear, especially when they are conditions precedent. One sentence structure that makes conditions clear is *if* ..., *then* ... where *if* ... states the condition precedent.

II. Are appropriate word choices made that will further the purposes of the parties and promote clarity?

A. Is flexible language used where needed?

Use general terms when they are useful to give the parties the flexibility they need, for example, terms with multiple configurations such as *substantially conform, properly package*. General terms may be vague but they will not be ambiguous (and, therefore, dangerous) when they are used purposefully.

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B. Are the same words used for the same meaning?

Different words, even though synonyms, are assumed to have a different meaning, and the same words are assumed to have the same meaning.

C. If any terms of art are used, are they appropriate for the audience or are they defined for the audience?

When terms of art do not have a synonym in ordinary English, be sure to define them. In addition, avoid using terms of art that are noun strings, such as *customer electronic design automation environment*. Noun strings are dense and hard to read.

D. Is unnecessary legalese eliminated?

Legalese is wordy, imprecise, and archaic writing, including such terms as *now therefore, be it known that in consideration of*, and other similar phrases. Legalese can also create unclear references or provide an illusion of precision; the *said Agreement* or the *within Agreement* is really just *this Agreement*.

E. If any terms of authority are used, are they used correctly?

1. Is *shall* reserved for orders? Avoid false imperatives. For example, *the rent shall be due* is an impossible order because the rent cannot be ordered to do ***109** something; it should be re-drafted to state that *the rent is due*.

Critique of Escrow Agreement -- Drafting

In Paragraph 14, the Escrow Agreement states as follows:

> Escrow Agent shall return Source Code to Company and title to the actual copies of Source Code deposited shall revert to Company upon delivery.

The first use of *shall* is appropriate because it orders the Escrow Agent to do something, to return the Source Code. The second use of *shall*, however, is not appropriate, because the contract cannot order the title to do something. This revision eliminates the false imperative and clarifies the wording:

> Escrow Agent shall return Source Code to Company, and title to Source Code reverts to Company upon delivery.

2. Is *must* reserved for creating a condition precedent? Edit to avoid using *must* when the appropriate word is *shall*. For example, *the landlord must provide* should be *the landlord shall provide*.

3. Is *will* reserved for future tense? Edit to avoid using *will* when the appropriate word is *must*.

4. Is *may* reserved for circumstances when the act or the authority is discretionary?

5. Is the use of *may not* avoided? Rather than being a polite way of stating *shall not*, the phrase *may not* negates discretionary

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authority. Since *may* indicates discretionary authority, some courts have construed *may not* to also mean *may*.[40]

F. Are the nouns clear and the pronouns grammatically correct?

1. Are noun strings avoided? Noun strings are hard to read and sound bureaucratic. Cure a noun string by eliminating unnecessary words and inserting appropriate transitions. For example, *Pretrial Document Identification Request* becomes *Request for Pretrial Identification of Documents*.

2. Do the nouns and pronouns agree in number? While a committee, jury, ***110** or company includes multiple people, each is a singular entity. Therefore, *the committee adopted their minutes* should be *the committee adopted its minutes*.

III. Does the writing use gender-neutral terms?

Using gender-neutral terminology reflects good legal writing because it is precise, avoids unnecessarily offending the reader, and is an accurate reflection of the law. Many statutes, administrative regulations, and court rules in the United States require gender-neutral language unless a specific gender is intended.[41] Gender-specific terminology reflects a subtle, but powerful, gender bias because the reader is most likely to assume that the language refers only to the gender specified. In addition, gender-specific terminology is ambiguous. For example, gender-specific terms such as "he" and "man" always include men, but, depending on the context of the reference, they may or may not also include women.

A. Are status, occupations, or positions described with alternative gender-neutral terms?

Nearly every gender-specific occupational title has a gender-neutral equivalent that is gender-inclusive. For example, *chairman* becomes *chair*, *fireman* becomes *firefighter*, *policeman* becomes *police officer*, *mailman* becomes *letter carrier*, *waiter* and *waitress* becomes *server*, and *councilman* becomes *councilor*.

B. Are subjects converted to plurals, where appropriate?

Plural subjects allow the use of *they* or *them*, two gender-neutral plural pronouns.

C. Are gender-specific pronouns omitted, where appropriate?

One way to eliminate gender-specific pronouns is to repeat the noun.

D. Is language avoided that calls attention to the gender of an individual when gender is irrelevant?

For example, use *staff* or *labor* instead of *manpower*, use *people* instead of *mankind*.

E. Are confusing alternatives avoided when eliminating gender-specific language?

Using *s/he*, *he/she*, and *wo/man* is awkward and makes the reader stumble. Using plural pronouns with singular nouns is grammatically incorrect. Alternating feminine and masculine pronouns compounds the problem of gender bias by excluding

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men when feminine terminology is used and women when masculine ***111** terminology is used.

IV. Is the punctuation correct and correctly placed?

The drafter must be sure that the correct punctuation is used and that it is correctly placed. Many a lawsuit has disputed the terms of a contract because of the ambiguity that incorrect or misplaced punctuation has created.

For example, an incorrect comma in a contract may cost Rogers Communications Inc., an extra $2.13 million. Rogers thought it had a five-year contract with Aliant Inc. to string Rogers's cable lines.[42] However, the placement of a comma, where no comma should have been, led a court to interpret the contract as being subject to cancellation after only one year.

Similarly, a misplaced comma in a sales contract cost Lockheed Martin Corporation $70 million.[43]

STEP FIVE

▲ Design the Document.

I. Does the layout of the contract improve its readability?

A visually appealing document is one that will be easier to read, easier to understand, and easier to use as a reference.[44]

A. Is white space used effectively?

The general rule in graphic design is that 50 percent of a page should be text and the rest should be white space.[45] The drafter should check margins, indentations, and spacing to be sure the writing does not appear cramped. When writing is cramped, the reader tends to skip over it because reading it is too much work.[46] The more work it is to read the text, the less likely that the reader will understand it. Giving the text room to breathe also allows the reader to breathe mentally.

***112 B. Are the type size and font easy to read?**

The drafter should check for any statutes or rules that might specify the type size and font for the type of contract. States often adopt laws that include such requirements to protect consumers, such as for contracts that involve insurance,[47] home improvements,[48] personal property,[49] assisted living,[50] or investments.[51]

C. Are unnecessary capital letters avoided?

Over-capitalizing nouns or using blocks of capitalized print can make a document more difficult to read[52] besides being generally annoying.

D. Are blanks included where needed for dates or signatures?

E. Is some device used to keep signatures or headings from being severed from the text?

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To avoid separating signatures from text, create a page break so that some of the text accompanies the signature or number pages "1 of 3," and so on. To avoid separating headings from text, check the instructions for the word processor; most have a mechanism that will prevent a heading from dangling at the end of a page.

II. Do appropriate headings and enumeration make the document easier to read and use?

A. Is each section numbered or lettered with a scheme that is easy to understand and follow?

B. Are headings used to communicate the topic of each section?

C. Are the headings easily distinguishable from the text?

***113 STEP SIX**

▲ Evaluate the document.

I. Has the drafter tabulated (outlined) the language of the contract to check for drafting errors?

Tabulation describes the outlining of sentences in a draft to evaluate their coherency and clarity.[53] Tabulation helps break down dense material, helps point out drafting errors, and helps determine if a provision should be drafted in tabulated form (e.g., as a list) to aid in clarity. Tabulating a sentence helps the drafter find drafting errors, including the use of different terminology for the same thing, lack of parallelism, problems with modifiers, unclear sentence structure, problems with cross-references, and problems with connectors.

Consider this example:

> "Consumer transaction" means a sale, lease, assignment, award by chance, or other disposition of an item of goods, a consumer service, or an intangible to an individual for purposes that are primarily personal, family, or household or that relate to a business opportunity that requires both the individual's expenditure of money or property and personal services on a continuing basis and in which the individual has not been previously engaged, or a solicitation by a supplier with respect to any of these dispositions.

***114** The tabulated version follows:

"Consumer transaction" means

A.

(1) a sale, lease, assignment, award by chance, OR other disposition

(2) of an item of goods, a consumer service, OR an intangible

(3) to an individual for purposes

1. primarily personal, family, OR household,

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OR

2. that relate to a business opportunity

a. that requires both

1) expenditure of

a) money OR

b) property

AND

2) personal services on a continuing basis

AND

b. in which the individual has not been previously engaged

OR

B. a solicitation by a supplier with respect to any of these dispositions.

II. Does the document hold up when viewed through the eyes of a bad faith (or hostile) reader?

Evaluating the document through the eyes of someone who wants to avoid its provisions helps to uncover ambiguities and gaps in the text.

115** ***III. Does the document hold up after considering the rules for construing contractual provisions?

A. Is word usage consistent with the plain and normal meaning of the words?

1. Does the document explain when word usage may vary from the normal meaning of words?

2. Does the document provide that technical words will be given their technical meaning?

B. Is every provision consistent with the general purpose of the contract?

C. Has the drafter considered that the meaning of general words or provisions will be restricted by more specific descriptions of the subject matter?

D. Has the drafter considered that words generally will be construed most strongly against the party using them?

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IV. Will the contract be scheduled for periodic review to determine whether it should be revised based on experience, changes in circumstances, or changes in law?

Conclusion

When drafting effective contracts, the devil is in the details. A checklist helps drafters to organize and prioritize those details, so that drafting a contract is a more manageable task. In addition, a checklist will lead the drafter to a better document, one crafted after considering the parties' goals and all options, contingencies, and pitfalls for achieving those goals. No finer compliments will a drafter receive than that a contract served the parties well and that the document was easy to read, use, and understand.

116** ***Additional sources

General texts

For additional information on drafting contracts, consider the following general resources:

Kenneth A. Adams, *A Manual of Style for Contract Drafting* (ABA 2005).

Susan L. Brody, Jane Rutherford, Laurel A. Vietzen & John G. Dernbach, *Legal Drafting* 203 (Little, Brown & Co. 1994).

Scott J. Burnham, *The Contract Drafting Guidebook: A Guide to the Practical Application of the Principles of Contract Law* (Michie 1992).

Scott J. Burnham, *Drafting and Analyzing Contracts: A Guide to the Practical Application of the Principles of Contract Law* (3d ed., LexisNexis 2003).

Barbara Child, *Drafting Legal Documents: Principles and Practices* (2d ed., West Publg. Co. 1992).

Reed Dickerson, *Fundamentals of Legal Drafting* (2d ed., Little, Brown & Co. 1986).

Robert A. Feldman & Raymond T. Nimmer, *Drafting Effective Contracts: A Practitioner's Guide* (2d ed., Aspen Publishers 2003 & Supp. 2006).

Carl Felsenfeld & Alan Siegel, *Writing Contracts in Plain English* (West 1981).

Charles M. Fox, *Working With Contracts: What Law School Doesn't Teach You* (PLI 2002).

Thomas Haggard, *Legal Drafting, Process, Techniques, and Exercises* (2d ed., West 2008).

Thomas Haggard & George W. Kuney, *Legal Drafting in a Nutshell* (3d ed., West 2007).

Robert E. Keeton, *Guidelines for Drafting, Editing, and Interpreting* (LexisNexis 2002).

George W. Kuney, *The Elements of Contract Drafting with Questions and Clauses for Consideration* (2d ed., Thomson West 2006).

Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (Aspen Publishers 2007).

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Specialized texts

In addition, specialized texts exist for particular types of contracts. Examples would include:

Don A. Allen & Lanny J. Davis, *Allen & Davis on Computer Contracting: A User's Guide With Forms and Strategies* (Aspen Publishers 1992).

***117** Paul P. Ashley, *Oh, Promise Me, But Put It In Writing: Living-together Agreements Without, Before, During, and After Marriage* (McGraw-Hill 1978).

Rebecca Attree, *International Commercial Agreements* (Thorogood 2003).

Kurt H. Decker, *Drafting and Revising Employment Contracts* (Wiley Law Publishers 1991 & Supp. 1997).

Michael A. Epstein & Frank Politano, *Drafting License Agreements* (4th ed., Aspen Publishers 2002 & Supp. 2007).

Mark Filip, *Covenants Not to Compete* (Aspen Publishers 2005).

William F. Fox, Jr., *International Commercial Agreements: A Functional Primer on Drafting, Negotiating and Resolving Disputes* (3d ed., Aspen Publishers 1998).

Gary Goldman, *Drafting a Fair Office Lease* (2d ed., ALI-ABA 2000).

Paul S. Hoffman, *The Software Legal Book* (Shafer Books 1981 & Supp. 2003).

Richard O. Kummert et al., *Drafting Buy-Sell Agreements* (Wash. L. Sch. Found. 1992).

N. Peter Lareau, *Drafting the Union Contract* (Matthew Bender 1988 & Supp. 2003).

John J. McGonagle, *Business Agreements: A Complete Guide to Oral and Written Contracts* (Chilton Bk. Co. 1982).

Ted Nicholas, *The Business Agreements Kit* (Upstart Publg. 1996).

Oregon Law Institute, *Using Leverage to Acquire an Oregon Business: Fundamentals, Emerging Issues, and Drafting Techniques* (Or. L. Inst. 1989).

Oregon State Bar, *Planning and Drafting Partnership Agreements* (Or. St. Bar 1989).

Lori Salzarulo et al., *Drafting and Enforcing Real Estate Documents* (Wash. St. Bar Assn. 2002).

David F. Simon, *Computer Law Handbook Software Protection, Contracts, Litigation, Forms* (ALI-ABA 1990).

Gary Skoloff et al., *Drafting Prenuptial Agreements* (Aspen Publishers 1994 & Supp. 2006).

Robert R. Tufts, ed., *Drafting Agreements for the Sale of Businesses* (Cal. Continuing Educ. 1988 & Supp. 2007).

Anthony C. Valiulus & Kurt H. Decker, *Covenants Not to Compete* (John Wiley & Sons 1994).

Martin M. Volz and Arthur L. Berger, *The Drafting of Partnership Agreements* (7th ed., ALI-ABA 1976).

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Footnotes

a1 © M.H. Sam Jacobson 2008. Instructor, Willamette University College of Law. I especially want to thank Angela Wanak and Jon Kulas for their excellent research assistance, and Linda Berger and the peer reviewers for their helpful comments.

1 The checklist is presented in a question format; the drafter of a contract should be able to answer "yes" to each question.

2 The discussion in this article assumes that the reader is familiar with American contract law; it provides only a checklist of the key provisions that the drafter of a contract must consider. For a general discussion of American contract law, consider one of the treatises on contracts, such as Arthur Linton Corbin et al., *Corbin on Contracts* §§ 1320-33 (LexisNexis 1952 & Supp. 2007); Samuel Williston et al., *A Treatise on the Law of Contracts* (4th ed., West 1990) or E. Allan Famsworth et al., *Farnsworth on Contracts* (Aspen Publishers 2004); or one of several summaries of contract law, such as John D. Calamari & Joseph M. Perillo, *The Law of Contracts* (5th ed., West 2003) or John Edward Murray, Jr., *Murray on Contracts* (4th ed., LexisNexis 2001). Additional valuable information on American contract law is contained in the *Restatement (Second) of Contracts* (1981).

3 Requirements for the formation of contracts are discussed in any of the treatises, *supra* n. 2. Additional sources include the Uniform Commercial Code for contracts involving the sale of goods and the *Restatement (Second) of Contracts* for other types of contracts. The Uniform Commercial Code includes §§ 2-201 (Formal Requirements; Statute of Frauds); 2-204 (General Formation), and 2-206 (Offer and Acceptance in Formation of Contract). The *Restatement (Second) of Contracts* includes §§ 17 (Requirement of a Bargain); 18 (Manifestation of Mutual Assent); 24 (Offer Defined); 50 (Acceptance Defined); and 71 (Requirement of Exchange).

4 *E.g. Restatement (Second) of Contracts* § 71 (Requirement of Exchange).

5 *Ward v. National Geographic Society*, 208 F. Supp. 2d 429, 439 (S.D.N.Y. 2002).

6 *Roosevelt U. v. Mayfair Constr. Co.*, 331 N.E.2d 835, 845-46 (Ill. App. 1975).

7 *E.g. Restatement (Second) of Contracts* §§ 192 (Promise Involving a Tort); 178 (When a Term is Unenforceable on Grounds of Public Policy).

8 *E.g.* Or. Rev. Stat. § 646A.262 (2007) (contract between consumer and credit services organization must be in at least 10-point type).

9 *E.g. Restatement (Second) of Contracts* § 178 (When a Term is Unenforceable on Grounds of Public Policy).

10 *E.g. Restatement (Second) of Contracts* § 163 (When a Misrepresentation Prevents Formation of a Contract).

11 *E.g.* Wis. Stat. § 218.0171(6) (2001) (prohibiting consumers from waiving their rights under the state "lemon law" statute).

12 *E.g. Restatement (Second) of Contracts* § 208 (Unconscionable Contract or Term). Unconscionable terms could include the use of boilerplate contractual language if the terms are stated in the most favorable language possible to one party and if they could not be negotiated; significant price-cost disparity or excessive price; denial of basic consumer rights; penalty clauses; language incomprehensible to the other party; and other similar events. *See e.g. Restatement (Second) of Contracts* § 205 (Duty of Good Faith and Fair Dealing).

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[13] *E.g. Restatement (Second) of Contracts* §§ 12 (Capacity to Contract), 14 (Infants), 15 (Mental Illness or Defect), and 16 (Intoxicated Persons).

[14] *E.g. Restatement (Second) of Contracts* §§ 162 (When a Misrepresentation is Fraudulent or Material), 174-77 (Duress and undue influence), and 208 (Unconscionable Contract or Term).

[15] Recitals (or premises) establish why the parties are entering into the agreement. They are not an enforceable part of the contract. *E.g.* *Green River Valley Found., Inc. v. Foster*, 473 P.2d 844, 847 (Wash. 1970) ("operative provisions prevail over recitals"). However, they help establish the parties' intent and the intended scope of the agreement. *E.g.* *Golden West Baseball Co. v. City of Anaheim*, 31 Cal. Rptr. 2d 378, 395 (Cal. App. 4th Dist. 1994).

[16] Representations are statements of fact that induce a party to act. If a representation is false and material, the contract may be rescinded, even if the representation was innocently made. *E.g.* *Holland Furnace Co. v. Korth*, 262 P.2d 772, 775 (Wash. 1953)..

[17] Warranties are promises that statements of fact are true at the time made. *E.g. Felley v. Singleton*, 705 N.E.2d 930, 934 (Ill. App. 1999) (statement that the car was "in good mechanical condition" was an express warranty).

[18] *See e.g. Pendelton v. Witcoski*, 836 So. 2d 1025, 1025-1026 (Fla. App. 2002) (abuse of trial court's discretion to rescind a contract for mutual mistake of fact concerning its zoning).

[19] *See e.g. Prather v. Latshaw*, 122 N.E. 721, 722 (Ind. 1919).

[20] *E.g.* U.C.C. § 2-716.

[21] Or. Rev. Stat. § 72.7190(1)(a) (2007).

[22] Or. Rev. Stat. § 72.7190(3) (2007).

[23] An assignment of rights occurs when a party who has the right to receive a performance under the contract shifts the right to receive performance to another person (third-party). *Restatement (Second) of Contracts* § 316 ant C (1981). For the assignment to be enforceable, it must involve consideration. *See e.g. Restatement (Second) of Contracts* § 317 (Assignment of Right).

[24] A delegation of duties occurs when a party to a contract who has the obligation to perform a duty under the contract shifts the duty to another person. *Restatement (Second) of Contracts* § 318(1). The party conferring the power to perform on a third-party remains liable for performance unless the delegation involved consideration. *Id.* at § 318(3); U.C.C. § 2-210(1).

[25] In the Restatement, an assignment of rights *and* delegation of duties constitutes an assignment of the contract. *Restatement (Second) of Contracts* § 328 (1).

[26] *E.g.* *Farmland Irrigation Co. v. Dopplmaier*, 308 P.2d 732, 740 (Cal. 1957) (noting "[t]he statutes in this state clearly manifest a policy in favor of the free transferability of all types of property, including tights under contracts").

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27 *E.g.* *Restatement (Second) of Contracts* § 318 (2).

28 *E.g.* Cal. Com. Code § 10206 (West 1988) (discussing special requirements for an offer and acceptance in the formation of a lease contract).

29 *E.g.* Ot. Rev. Stat. § 646.607 (2007) (prohibiting unconscionable tactics concerning consumers).

30 For a more detailed discussion of risk allocation, see Murray, *supra* n. 2, at §§ 112-116, 725-766. Additional discussions of risk allocations appear in the discussion of impossibility in Corbin et al., *supra* n. 2, at vol. 1 §§ 1320-33, 1088-1111; Farnsworth et al., *supra* n. 2, at vol. II §§ 9.1-9.9a, 583-681; and Williston et al., *supra* n. 2, at vol. 8 §§ 19:31-19:79, 340-602.

31 *E.g.* Or. Rev. Stat. §§ 743A.110 (2007) (must cover mastectomy-related services); 743A.080 (2007) (must cover pregnancy and child-birth expenses); 743A.184 (2007) (must cover diabetes self-management); 743A.012 (2007) (must cover emergency services); 743A.040 (2007) (must reimburse for optometrist); 743.706 (must cover maxillofacial treatments); 743A.090 (2007) (must insure newly born child and adopted children); 743A.048 (2007) (must reimburse for psychologists); 743A.036 (2007) (must reimburse for nurse practitioner); 743A.028 (2007) (must reimburse for denturist); 743A.024 (2007) (must reimburse for clinical social worker); 743A.014 (2007) (must reimburse for ambulance care and transportation); 743A.014 (2007) (must reimburse for acupuncturist); 743.725 (must reimburse for physician's assistant); 743.727 (must cover mammograms); and 743.728 (must cover annual pelvic exams and Pap smears).

32 E.g. *Chase Manhattan Bank v. New Hampshire Ins. Co.*, 749 N.Y.S.2d 632, 638-39 (N.Y. Sup. Ct. 2002) (noting that an insurance contract, by definition, covers fortuitous events and so not covering fortuitous events would result in an illusory contract).

33 Source code is the written form of a computer software program; access to source code is necessary to write a program to allow the software to be used on other computer platforms or in additional applications. Because the source code is valuable to the company that developed the software, the company takes precautions, such as placing the source code in escrow, to be sure that anyone using its source code cannot divulge or keep it. This Escrow Agreement is an illustration and is modified from an agreement graciously provided by Mentor Graphics, Wilsonville, Oregon.

34 *E.g.* *Haynes v. Farmers Inc. Exchange*, 89 P.3d 381, 385 (Cal. 2004) (court did not enforce a provision limiting coverage that was included in a section labeled "Other Insurance").

35 *E.g.* Wis. Stat. § 218.0171(7) (2001) (granting reasonable attorney fees to a consumer who prevails under the *lemon law* statute).

36 *E.g.* Ariz. Rev. Stat. § 44-287.A.8 (requiring a statement above the signatures in motor vehicle contracts that buyers may submit any complaints to the department of financial services); Cal. Bus. & Prof. Code § 11238(7) (West 2006) (requiring a statement above the signatures in time-share contracts that buyer may cancel within seven days of signing); 815 Ill. Comp. Stat. § 375/3 (c) (1) (1969) (requiring the words "RETAIL INSTALLMENT CONTRACT" before the signature of the buyer).

37 *See e.g.* Cal. Corp. Code § 1505(a) (1) (West 1990) (foreign corporation must have address in this state for an agent to accept service of process).

38 *See* *Bath Gaslight Co. v. Claffy*, 45 N.E. 390, 391 (N.Y. 1896) (if a contract binding a corporation was not expressly authorized, it is *ultra vires*).

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[39] Tina Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* 117-118 (Aspen Publishers 2007).

[40] *See e.g. John Deere Waterloo Tractor Works v. Derifield*, 110 N.W.2d 560, 562 (Iowa 1961).

[41] *E.g.* Or. Rev. Stat. 174.129 (2007).

[42] Grant Robertson, *Comma Quirk Irks Rogers*, Toronto Globe & Mail (Aug. 6, 2006) (available at http://www.theglobeandmail.com/servlet/story/RTGAM.20060806.wr-rogers07/BNStory/Business/home).

[43] *Misplaced Comma is Costly*, Baltimore Sun (June 19, 1999) (available at 1999 WLNR 1133822).

[44] *See* Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design Into the Text of Legal Writing Documents*, 2 J. ALWD 108, 113 (2004).

[45] *Id.* at 124.

[46] Michael L. Bernard et al., *Examining children's reading performance and preference for different computer-displayed text*, 21 Behavior & Information Technology 87-96 (2002).

[47] *E.g.* Or. Rev. Stat. § 735.435(6) (2007) (requiring certain language in bold type); Wash. Rev. Code § 48.20.012(2) (1999) (setting size of font and standardizing type).

[48] *E.g.* Cal. Bus. & Prof. Code § 7030 (a) (West 1996)

[49] *E.g.* N.Y. Pers. Prop. Law § 302(1) (McKinney 2007) (retail installment contract).

[50] *E.g.* 210 Ill. Comp. Stat. § 9/90 (West 2007).

[51] *E.g.* Fla. Stat. § 520.07(1)(b) (West 2002).

[52] Robbins, *supra* n. 44, at 115-118.

[53] For additional discussion on and examples of tabulation, see Scott J. Burnham, *The Contract Drafting Guidebook* §§ 8.7.2 and 8.7.3 (Michie 1992).

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