

Title: **Fifty Tips for Drafting Contracts (With Sample Provisions)**

Published in: **The Practical Lawyer (ALI CLE Aug. 2020)**

For More Information, Contact:

James W. Martin, Esq.
Law Office of James W. Martin, P.A.
St. Petersburg, Florida
Web www.jamesmartinpa.com
Email jim@jamesmartinpa.com
Phone (727) 821-0904

FIFTY TIPS FOR DRAFTING CONTRACTS (WITH SAMPLE PROVISIONS)



JAMES W. MARTIN practices real estate, probate, and business law in St. Petersburg, Florida; teaches contract drafting as an adjunct professor of law at Stetson University College of Law; has authored business, real estate, and contracts forms books and articles for Thomson West Publishing, ALI CLE, and The Florida Bar; and has the highest ratings on SuperLawyers, Avvo, and Martindale-Hubbell. More information can be found at his website www.jamesmartinpa.com.

Drafting contracts is one of the pleasures of practicing law. In what other profession will someone pay you by the hour to write? But if your contract ends up in court, you'd better be ready to defend your work. This article provides 50 simple tips for writing the contract that is so clear no one will want to litigate it. It'll be the contract that stays out of court.

These tips apply to writing all kinds of contracts: sales contracts, lease agreements, employment contracts, licensing agreements—you name it. They even apply to stipulations and settlements in litigation. Wherever clarity and simplicity are important, these tips will guide you there. And appended to this article are some sample provisions.

Before you write the first word....

1. Ask your client to list the deal points. This can be in the form of a list, outline, or narration. Doing this will help the client focus on the terms of the agreement.
2. Engage your client in "what if" scenarios. A good contract will anticipate many possible factual situations and express the parties' understanding in case those facts arise. Talking to your client about this will generate many issues you may not otherwise consider.
3. Ask your client for a similar contract. Frequently, clients have had similar transactions in the past or they have access to contracts for similar transactions.

4. Search your computer for a similar form. Many times you can find a similar form used in a prior deal. It may be one you prepared for another client or one you negotiated with another lawyer. Just remember to find and replace the former client's name. Starting with an existing form saves time and avoids the errors of typing.

5. Get legal forms online. Typical forms of contracts can be found online in form books, treatises, and websites. These can be used as the starting point for drafting the contract or as checklists of typical provisions and wording to include in the contract. Here are some websites where you can find forms:

- Law Insider: <https://www.lawinsider.com>
- James W. Martin, P.A.: <https://jamesmartinpa.com/forms/>

6. Don't let your client sign a letter of intent without this wording: "This is a non-binding letter of intent that contains provisions that are being discussed for a possible transaction; this is not a contract; this is not a legally binding agreement; this is merely an outline of possible contract terms for discussion purposes only." Sometimes clients are anxious to sign something to show good faith before the contract is prepared. A properly worded letter of intent is useful at such times. Just be sure that the letter of intent clearly states that it is not a contract. See Appendix A for a sample form. It has no signature lines because we don't want it to look like a contract.

Writing that first word

7. Start with a simple, generic contract form. The form in Appendix B is such a form. It provides a solid starting point for the structure of the contract. Like a house, a contract must have a good, solid foundation.
8. State the correct legal names of the parties in the first paragraph. As obvious as this is, it is one of the most common problems in contracts. And it's important: a breach of contract judgment against a party whose name does not exactly match the bank account you're trying to garnish will not be worth much. For an individual, use the name exactly as it appears on that individual's drivers license. This usually includes middle names or initials. For entities, check the online database for the state of organization, and use the entity name exactly as it appears on the formation documents.
9. Identify the parties by nicknames, which we lawyers call defined terms. Everyone constantly uses nicknames and abbreviations in everyday life in building relationships. Lawyers do the same thing in contracts. Giving each party a nickname in the first paragraph will make the contract easier to read. For example, ABC Enterprises, Inc. would be defined as "ABC."
10. Be careful when using legal terms for nicknames. Do not use "Contractor" as a nickname unless that party is legally a contractor. Do not use "Agent" unless you intend for that party to be an agent, and if you do, then you better specify the scope of authority and other agency issues to avoid future disagreements.
11. Include a blank for the date in the first paragraph. Putting the date in the first paragraph makes it easy to find after the contract is signed. It also makes it easy to describe the contract in other documents in a precise way, such as the "9/1/2020 Contract for Sale of Real Estate."
12. Include recitals to provide background. Recitals are the "whereas" clauses that precede the body of a contract. They provide a simple way to bring the contract reader (judge or jury) up to speed on what the contract is about, who the parties are, why they are signing a contract, and other facts that define its context. The first paragraph in the body of the contract can incorporate the recitals by reference and state that they are true and correct. This will avoid a later argument as to whether or not the recitals are a legally binding part of the contract.
13. Outline the contract by listing paragraph headings and place them in their logical order. The paragraphs should flow in an organized fashion: sometimes based on chronology, sometimes based on importance, and often based on custom. It is not necessary to write them all at once; you can write them as you think of them. Try to group related concepts in the same paragraphs or in adjacent paragraphs. For example, write an employment contract's initial paragraph headings like this:
 1. Recitals
 2. Employment
 3. Duties
 4. Term
 5. Compensation
14. Complete each paragraph by writing the contract terms that apply to that paragraph. This is simple. You learned this in elementary school. Just explain in words what the parties agree to do or not do, paragraph by paragraph.
15. Keep a pad at hand to remember clauses to add. It is normal to think of additional clauses, wording, and issues while writing a contract. Jot these down on a pad as you write; they are easily forgotten. Also keep your client's outline and other forms in front of you as you write, and check off items as you write them.
16. Repeat yourself only when repetition is necessary to improve clarity. Ambiguity is created by saying the same thing more than once; it is almost impossible to say it twice without creating ambiguity. Only if the concept is a difficult one should

you write it in more than one way. In addition, if you use an example to clarify a difficult concept or formula, be sure that all possible meanings are considered and that the example is accurate and consistent with the concept as worded.

What to watch out for when writing

17. Use the word “contract” in the title. Do not leave this one to chance. If your client wants a contract, call it a contract. Early in my practice a judge ruled that a document entitled “Proposal” was not a contract even though signed by both parties. The lesson learned is to say what you mean. If you intend the document to be a legally binding contract, use the word “contract” in the title whenever possible. Sometimes, custom demands the title be “agreement” instead of “contract,” but I keep thinking of that judge ruling against me....
18. Write in short sentences. Short sentences are easier to understand than long ones.
19. Write in the active voice, rather than the passive. Active voice sentences are shorter, use words more efficiently, and their meaning is more apparent. Example of active: “Sellers shall sell the Property to Buyer.” Example of passive: “The Property shall be sold to Buyer by Seller.”
20. Don’t use the word “biweekly” because it is often misinterpreted as “semiweekly.” Semi-weekly means twice a week; biweekly means every other week. (The same applies to “bimonthly.”) Instead, write “every other week” or “twice a week.”
21. Don’t say things like “active termites and organisms.” It’s ambiguous. Must the organisms be active, or just the termites? Avoid ambiguity by writing either “active termites and active organisms” or “organisms and active termites.” When adding a modifier like “active” before a compound of nouns like “termites and organisms” be sure to clarify whether you intend the modifier to apply to both nouns or just the first one. If you intend it to apply to both, use parallel construction and write the modifier in front of each noun. If you intend it to apply to just one noun, place that one noun at the end of the list and the modifier directly in front of it.
22. Don’t say “lessor” and “lessee.” These are bad terms to use in a lease because they are easily reversed or mistyped. Use “landlord” and “tenant” instead. The same applies to “lienor” and “lienee,” “mortgagor” and “mortgagee,” “grantor” and “grantee,” “licensor” and “licensee,” “party A” and “party B.” This is where you can use your creativity to come up with a different name for a party, as long as you use it consistently throughout the contract.
23. Watch out when using “herein.” Does “wherever used herein” mean anywhere in the contract or anywhere in the paragraph or anywhere in the sentence? Clarify this ambiguity if it matters.
24. Write numbers as both words and numerals: e.g., “ten (10).” This will reduce the chance for errors. It makes the numbers stand out. Just make sure the word matches the number.
25. When you write “including” consider adding “but not limited to.” Unless you intend the list to be all-inclusive, you had better clarify your intent that it is merely an example.
26. Don’t rely too much on the rules of grammar. The rules of grammar you learned in school are not universal. The judge or jury reading your contract may have learned different rules. Write the contract so that no matter what rules the reader learned, the contract is clear and unambiguous. Follow this test for clear writing: Remove all periods and commas, then read it. Choosing the right words and placing them in the right order makes the writing clear without punctuation.
27. Don’t be creative with words. Contract writing is not creative writing and is not meant to provoke reflective thoughts or musings about the nuances of meaning. Contract writing should be clear, direct, and precise. Therefore, use common words with common meanings. Write for the common reader.

28. Be consistent in using words. If you refer to the subject matter of a sales contract as “goods” use that term throughout the contract; do not alternately call them “goods” and “items.” Maintaining consistency is more important than avoiding repetition. Don’t worry about putting the reader to sleep; worry about the opposing lawyer a year from now hunting for ambiguities to get your contract into court.
29. Be consistent in grammar and punctuation. The rules of grammar and punctuation you learned may differ from others, but you’d better be consistent in your use of them. Be aware of such things as where you put ending quotation marks, whether you place commas after years and states, whether you capitalize dollar amounts, and similar variations in style.
30. Consider including choice of law, venue selection, and attorneys’ fees clauses. If your contract gets litigated, you might as well give your client some ammunition for the fight.

Write for the judge and jury

31. Assume the reader is a knowledgeable layperson. If your writing is so clear that a layperson could understand it, then it is less likely to end up in court.
32. Define a word by capitalizing it and putting it in quotes. Capitalizing a word indicates that you intend it to have a special meaning. The following are two sample clauses for defining terms:
 - Wherever used in this contract, “Goods” means the items of tangible personal property listed on Exhibit “A” and incorporated herein by reference.
 - Buyer hereby agrees to purchase from Seller ten (10) frying pans (“Goods”).
33. Define words when first used. Instead of writing a section of definitions at the beginning or end of a contract, consider defining terms and concepts as they first appear in the contract. This will make it easier for the reader to follow.

34. Explain technical terms and concepts. Remember that the parties might understand technical jargon, but the judge and jury who read the contract might not. Therefore, explain the contract’s terms and concepts within the contract itself. Let the contract speak for itself from within its four corners.

Keep your client informed while you write

35. Every contract should come with a cover letter. This gives you a place to instruct your client on how to use and sign the contract.
36. Tell your client the ideas that come as you write. Many ideas will occur to you as you write: things that could go wrong with the deal, things that might happen in the future, things that happened in the past, ways to structure things better, other possible clauses to include. Write these in your letter to the client.
37. Inform your client of the risks. Writing a letter to the client as you write the contract is the perfect way to inform the client of the risks and rewards of entering into the contract. Frequently, problems do not become apparent until the contract drafting is underway.

What to do after the first draft is written

38. Check spelling, paragraph numbering, and cross-references both manually and with your spelling and grammar checkers. This almost goes without saying today, especially since Word checks your spelling and grammar as you type. (Unfortunately it also changes “per stirpes” to “per stupid” if you fail to watch it closely.)
39. Ask your partner, associate, paralegal, or assistant to read it. Not only will they frequently find spelling and grammar errors you overlooked, but they will find inconsistencies and confusing areas that you missed when drafting.
40. Type in the top margin “Draft #1 [date].” This may be the first of many drafts, so avoid confusion early on by numbering and dating all drafts at the top of the first page. It is also a good idea to type “DRAFT” in the header or footer of each page to preclude

the possibility of an impatient client signing a draft rather than waiting for the final version.

41. Let your client read it. Letting the client in on reading the first draft assures that your drafting will stay in tune with the client's wishes. Besides that, clients don't want the first document they read to say "Draft #3."

42. Save the drafts as multiple files. The filename for the first draft would be "Contract Jones d1 6-1-2020," where d1 indicates the first draft. The second draft would be "Contract Jones d2 6-2-2020" and so on.

43. Compare the current version to prior versions. If you save draft versions, it is very easy to compare one version to another using Word's document compare feature. When you compare draft #2 to draft #1, save the comparison as "Redline Contract Jones compare d2 to d1 6-2-2020" and save it as a PDF to show the client what changes were made.

How to print and sign the final draft

44. Print on pages using the same paper, and if pages are changed, reprint the document using the same paper. This will avoid an argument that pages were substituted after the contract was signed.

45. Sign the contract in blue ink, not black ink. This will make it easier to differentiate the signed original contract from photocopies.

46. Initial every page of the contract. Having each party initial each page of the contract will make it less likely that anyone could claim a page was changed after the contract was signed.

47. If signing electronically with Citrix Rightsignature, DocuSign, or another platform, be sure to keep a record of both your Word document and your PDF upload. When fully signed, be sure to not only download a PDF of the signed contract but also the certificate of electronic signing provided by the platform. And it's a good idea to screenshot the history of the document on the signing platform just in case the platform is not

around when or if someone questions the validity of contract execution.

48. Identify the parties and witnesses who sign by providing blank lines below their signature lines for their printed names and addresses. This will make it easier to find the witnesses if the contract is contested. And remember to include two witnesses when required by your state's laws.

49. Be sure that persons signing for entities include their titles, the entity name and the words "by" and "as its;" Failure to do this can result in personal liability of the signer. The proper way to sign in a representative capacity is as follows:

ABC Corporation, a [state] corporation

By:_____

John Jones, as its President

50. Add a notary clause that complies with the state notary law.

Concluding advice

If these 50 tips don't keep your contracts out of court, try mastering Strunk & White's Elements of Style. I hear it's real handy in appellate work. It is now available for free online at: <http://www.bartleby.com/141/index.html>

APPENDIX A

Sample letter of intent form

LETTER OF INTENT FOR POSSIBLE CONTRACT FOR SALE OF ASSETS

Possible Seller: _____

Possible Buyer: _____

Business: _____

Date: _____, 20_____

This is a non-binding letter of intent that contains provisions that are being discussed for a possible sale of the Business named above from the possible Seller named above to the possible Buyer named above. This is not a contract. This is not a legally binding agreement. This is merely an outline of possible contract terms for discussion purposes only. This is being signed in order to enable the Possible Buyer to apply for financing of the purchase price. This letter of intent is confidential and shall not be disclosed to anyone other than the parties and their employees, attorneys and accountants and the possible lenders of the Possible Buyer. The terms of the transaction being discussed are attached hereto, but the terms (and the possible sale itself) are not binding unless and until they are set forth in a written contract signed by Possible Seller and Possible Buyer. The word "shall" is used in the attached terms only as an example of how a contract might read, and it does not mean that the attached terms are or ever will be legally binding.

APPENDIX B

Basic form of contract

CONTRACT FOR _____

AGREEMENT made this _____ day of _____, 20____, between _____, a [state, entity] _____ (“_____”), and _____, a [state, entity] _____ (“_____”).

Whereas, _____;

Whereas, _____; and

Whereas, _____;

NOW THEREFORE, in consideration of their mutual promises made herein, the parties, intending to be legally bound, hereby agree as follows:

Recitals. The parties agree that the foregoing recitals are true and correct and are incorporated herein by reference.

Heading. _____

Heading. _____

Heading. _____

Heading. _____

Miscellaneous. Time is of the essence of this agreement. This agreement is made in [state] and shall be governed by [state] law. This is the entire agreement between the parties, supersedes all prior discussions, and may not be modified or amended except by a written document signed by the party against whom enforcement is sought. This agreement may be signed in several counterparts, all of which together shall constitute one agreement even though all parties have not signed the same counterpart. Paragraph headings are for convenience only and are not intended to expand or restrict the scope or substance of the provisions of this agreement. Wherever used herein, the singular shall include the plural, the plural shall include the singular, and pronouns shall be read as masculine, feminine or neuter as the context requires. The prevailing party in any litigation or arbitration relating to this agreement shall be entitled to recover its reasonable attorneys fees from the other party for all matters, including but not limited to appeals. [Venue] shall be proper venue for any litigation involving this agreement. This agreement may not be assigned or delegated by either party without the prior written consent of the other party. The terms and provisions of this agreement may be enforced by temporary and permanent injunction, specific performance, and damages (to the extent, if at all, that damages are ascertainable; including but not limited to compensatory, incidental, consequential, punitive, exemplary, and lost-profits damages), in addition to any other remedies for breach hereof. Irreparable harm and lack of adequate remedy at law shall be conclusively presumed without the need for specific proof thereof,

the parties agreeing that a purpose of this agreement is to safeguard _____'s favorable reputation as well as its rights and privileges.

Alternate: Miscellaneous. This transaction and agreement, and all prior transactions and agreements between the parties, were made in [state], and all payments under prior transactions were due and made in [state]. This transaction and agreement shall be governed by the domestic law of [state], and [state] shall be the sole jurisdiction and venue for any litigation or proceeding relating to this transaction and agreement. This is the entire agreement between the parties, supersedes all prior discussions, and may not be modified or amended except by a written document signed by the party against whom enforcement is sought. This agreement may be signed in several counterparts, all of which together shall constitute one agreement even though all parties have not signed the same counterpart. A PDF or TIFF image of this agreement showing that it has been signed by a party shall be sufficient evidence of the signing of this document. This signed agreement may be transmitted by email, fax or other form of electronic delivery without delivery of the paper document. Paragraph headings are for convenience only and are not intended to expand or restrict the scope or substance of the provisions of this agreement. Wherever used herein, the singular shall include the plural, the plural shall include the singular, and pronouns shall be read as masculine, feminine or neuter as the context requires. The prevailing party in any litigation or arbitration relating to this agreement shall be entitled to recover its reasonable attorneys fees from the other party for all matters, including but not limited to appeals. Each party shall pay its own attorneys fees for preparing and reviewing this agreement. This agreement may not be assigned or delegated by either party without the prior written consent of the other party.

IN WITNESS WHEREOF, the parties have signed this agreement as of the day and year first above written.

Witnesses:

a [state, entity] _____

By: _____

Title: as its _____

Witnesses:

a [state, entity] _____

By: _____

Title: as its _____

[state, county]

