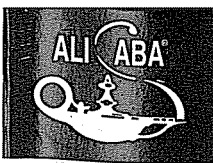


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Fifty Tips for Writing the Contract That Stays
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Tips for Writing the Contract That Stays Out of Court (with Forms)

James W. Martin

*Clarity in the contract can keep you and your
client out of court.*

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 had better be ready to defend your

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work. This article provides 50 simple tips for writing the contract that is so clear that no one will want to litigate it.

These tips apply to writing all kinds of agreements: real estate sales contracts, employment contracts, equipment leases, prenuptial agreements, and property settlement agreements. They even apply to stipulations and

settlements in litigation. Wherever clarity and simplicity are important, these tips will guide you there.

Appended to this article are four sample forms: Appendix A is a Basic Form of Contract, Appendix B is a Basic Form of Notary Acknowledgement, and Appendix C is a Letter of Intent Form.

Before You Write the First Word

1. Ask your client to write down the terms of the contract. 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 set forth the agreement should those facts come into existence. This will flush out many issues that you may not think of on your own.
3. Ask your client for a similar contract. Frequently, clients will have had a similar transaction in the past or access to contracts for similar transactions.
4. Check the form books and treatises for a contract form. Typical forms of contracts can be found in form books, such as West's Legal Forms and AmJur Legal Forms, as well as in treatises and CLE publications. 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.
5. Buy forms on disk or CD ROM. Many treatises and form books now come with forms on disk or CD ROM. Capsoft is also selling forms with its HotDocs document assembly software. No matter how you get them, using forms on disk or CD ROM saves time and avoids the errors of typing.
6. Don't let your client sign a letter of intent without this wording. 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, but that it is merely an outline of possible terms for discussion purposes. Appendix C is a sample Letter of Intent Form.

Writing That First Word

7. Start with a simple, generic contract form. The form in Appendix A 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. For individuals, include full first and last name, and middle initials if available, and other identifying information, if appropriate, such as Jr., M.D., etc. For corporations, check with the Secretary of State where incorporated.
9. Identify the parties by nicknames. Giving each party a nickname in the first paragraph will make the contract easier to read. For example, James W. Martin would be nicknamed "Martin."
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 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 "December 20, 1996, 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's reader (party, judge, or jury) up to speed on what the contract is about, who the parties are, why they are signing a contract, etc. 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 on whether the recitals are a legally binding part of the contract.
13. Outline the contract by writing out and underlining paragraph headings in their logical order. The paragraphs should flow in logical, organized fashion. 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 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. Title it "Contract." Do not leave this one to chance. If your client wants a contract, call it a contract. A judge now sitting on the federal bench once ruled that a document entitled "Proposal" was not a contract even though signed by both parties. The lesson learned is, "Say what you mean." If you intend the document to be a legally binding contract, use the word "Contract" in the title.

18. Write in short sentences. Short sentences are easier to understand than long ones.

19. Write in active tense, rather than passive. Active tense sentences are shorter and use words more efficiently, and their meaning is more apparent.

20. Don't use the word "biweekly." It has two meanings: twice a week and 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." 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 nicknames for a lease because they are easily reversed or mistyped. Use "Landlord" and "Tenant" instead.

23. Watch out when using "herein." Does "wherever used herein" mean anywhere in the contract or anywhere in the paragraph? Clarify this ambiguity if it matters.

24. Write numbers as both words and numerals: ten (10). This will reduce the chance for errors.

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 on the rules of grammar. The rules of grammar that you learned in school are not universal. The judge or jury interpreting the meaning of your contract may have learned different rules. Write the contract so no matter what rules they learned, the contract is clear and unambiguous.

27. Don't be creative with words. Contract writing is not creative writing and is not meant to provoke reflective thoughts or controversies about nuances of meaning. Contract writing is clear, direct, and precise. Therefore, use common words and common meanings.

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 alternate calling them "goods" and "items." Maintaining consistency is more important than avoiding repetition.

29. Be consistent in grammar and punctuation. The rules of grammar and punctuation you learned may differ from others, but you had better be consistent in your use of them. Be aware of such things as where you put ending quote marks, whether you place commas after years and states, and similar variations in style.

30. Consider including choice of law, venue selection, and attorneys' fee clauses. If your contract gets litigated, you might as well give your client some "ammunition" for the fight. Examples of these clauses appear in Appendices A and C.

Write for the Judge and Jury

31. Assume that the reader is a knowledgeable layperson. If your writing is so clear that a nonprofessional could understand it, it is less likely that it will 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, the word "Goods" shall mean the goods that Buyer has agreed to purchase from Seller under this contract.

Buyer hereby agrees to purchase from Seller ten (10) frying pans, hereinafter called the "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 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 interpret and apply the contract do not. Therefore, explain the contract's terms and concepts within the contract itself.

Keep Your Client Informed While You Write

35. All contracts 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. 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 time is spent trying to word a contract.

What To Do After the First Draft Is Written

38. Use your word processor's spelling and grammar checker. This almost goes without saying today, especially since Microsoft Word now checks your spelling and grammar as you type.

39. Let your secretary or paralegal read it. Not only will your staff frequently find spelling and grammar errors missed by your word processor's spell checker, but they will find inconsistencies and confusing areas that you missed when drafting.

40. Stamp "Draft #1 6/21/97" on it. This may be the first of many drafts, so avoid confusion early by numbering and dating all drafts at the top of the first page. It is also a good idea to write "DRAFT" across the face 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.

42. Save the drafts as multiple files on your computer. If you save the first draft on your computer as two files, you will have one file identified as the first draft and the other identified as the current version. This can be done by naming the current version "contract" and the first draft as "contract.d1." Then, subsequent versions can be named "contract.d2," "contract.d3," etc.

43. Compare the current version to prior versions. If you save draft versions, it is very easy to compare one version to another using the word processor's compare feature or using the CompareRite computer program. When you compare "contract.d1" to "contract.d2," save the comparison as "contract.c21" and print it to show the client what changes were made.

How to Print and Sign the Final Draft

44. Print the contract on 24 pound bond paper instead of 20 pound copier paper. Using a heavy bond paper will make it easy to tell the original contract from copies. It will also last longer.

45. 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.

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

47. 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.

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.

Appendix C
Sample Letter of Intent Form

**LETTER OF INTENT FOR POSSIBLE
CONTRACT FOR SALE OF ASSETS**

Possible Seller: _____

Possible Buyer: _____

Business: _____

Date: _____ 19____

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 contract. This is merely an outline of possible contract terms for discussion purposes only. This is being signed to enable the potential 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 Buyer. The terms of the transaction being discussed are attached to this letter of intent, but the terms (and the possible sale itself) are not binding unless and until they are set forth in a written contract signed by Seller and 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.

_____ (Seal)

Witnesses

_____ (Seal)

Witnesses