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Writing Contracts in the Client's Interest

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WRITING CONTRACTS IN THE CLIENT'S INTEREST

JAMES P. NEHF*

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I. INTRODUCTION

The writer's task in drafting a contract is, first and foremost, to ensure that the expectations of the client are met. The words of the contract must at a minimum accurately reflect the client's desires and memorialize the client's intentions. In peripheral areas where the client has no discernable preference, the contract should promote the client's general interests as the lawyer understands them. The lawyer must write with confidence that the chosen words will be construed by subsequent readers in a predictable way that coincides with those interests. Drafters cannot, of course, guarantee that the words will convey their intended meaning to all subsequent readers, but they should strive to be as confident as possible.

Black letter law holds that subsequent readers will attempt to construe the contract in a way that implements the intent of the parties.¹ We know that in practice, however, the intentionalist view is more fiction than fact.² Several circumstances can make an attempt to reconstruct contractual intent difficult or impossible. The parties may have attached different meanings to a word or phrase at the very outset when they signed the agreement, not saying anything or even knowing each other's divergent thoughts at the time. Therefore, there is no common intent to discover. Perhaps more likely, the parties and their counsel did not even think about the meaning of a particular word or phrase because they did not deem it important when the contract was written, only to discover later that a dispute has arisen involving that very language. On the other hand, the parties may actually have shared a common meaning of the language when the contract was made, but this knowledge has long been lost, forgotten, or so obscured by subsequent events that it is essentially unprovable. If a dispute has arisen, one party may now deny an asserted meaning, or at the very least, seek to recast the "mutual understanding" in a different light.

Despite the uncertainties inherent in the intentionalist model, someone (perhaps a judge or jury) may be in the position of deciding what the contract means at a time when something important is at stake. The contract reader will interpret the agreement's meaning by looking at the text, examining any related documents, listening to those who were involved in the contract's creation, and

1. See, e.g., SCOTT J. BURNHAM, *THE CONTRACT DRAFTING GUIDEBOOK* 151 (1992) (effectuating the intent of the parties).

2. Cf. James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 9-17 (1994) (discussing intentionalism in the context of statutory and contract interpretation).

consulting trade usages and other outside sources. In the end, the reader will proclaim the meaning of the agreement and hold the parties to the ensuing consequences. Although the decision maker will often use intentionalist rhetoric in resolving the dispute ("the parties' intent was . . ."),³ the proclaimed meaning may have little to do with the actual understanding of those who signed the document. Nevertheless, the parties will be bound by the proclaimed meaning as if they had actually intended it from the start. The lawyer's goal, in this sense, is to ensure that the ultimate declaration of meaning does not come as an unwelcome surprise. If it does, then the lawyer may wish that she had drafted the contract differently.

This paper provides guidance to the contract drafter who would like to avoid unwelcome surprises. A careful drafter should try to eliminate as many interpretive uncertainties as possible thereby limiting the range of interpretive choices for subsequent readers. Careful drafting requires the drafter to think about the contract from the perspective of all persons that may later be called upon to interpret it. They include the parties themselves, who may read the contract as a blueprint for governing their actions in an ongoing relationship; the parties' successors in interest, who may not be aware of the circumstances present when the contract was made and who will therefore look more closely at the words in isolation or in the context of contemporary conditions; judges, arbitrators, or other decision makers, who may be called upon to resolve a dispute by construing the agreement in light of the language, context, and pertinent legal rules; and government regulators or other oversight bodies, who may read the contract with public policy concerns in mind.

The contract will mean something different to each audience because each will have a different frame of reference and purpose for examining it. The parties themselves will be greatly influenced by the circumstances existing at the time it was made, probably more so than later assignees or a judge who learns of those circumstances only indirectly and long after they occurred. A court may be guided by rules of construction and legal precedents largely unknown to the parties when the contract is signed. Regulatory bodies may look at the agreement in light of policy objectives not envisioned when the contract was made. A careful drafter should anticipate the potential audiences and try to ensure that all readers will understand and apply the contract in the client's interest. This means drafting the contract with an imaginative eye that places the drafter in the position of each potential reader.

This is no simple task, and no formula for success exists. Good drafting takes care, practice, sound judgment, and a lot of effort. Many useful texts exist

3. According to the LEXIS research service (Combined Federal and State Case Law-U.S. Library and Federal and State case Law file), judges have referred to the "parties' intent" or "intent of the parties" in thousands of opinions.

that provide guidance, tips, and shortcuts.⁴ Form books and computer software can create efficiencies, though they can also introduce mistakes if relied upon carelessly. Most importantly, however, the drafter must train herself to be forward-thinking. For some, this skill comes naturally. For most, it requires a considerable amount of work and preparation.

This paper presents several guidelines that can help create this forward-thinking mindset and reduce uncertainty in contract drafting. In particular, writers of contracts should make a deliberate effort to do the following:

- Carefully consider the role of each structural component of the contract, especially the parts that are often hastily assembled but can later become outcome determinative. "Recital" clauses or "boilerplate" that get little attention in the drafting stage can generate unwelcome surprises later.
- Remember that style is important in conveying meaning. Using understandable, consistent language with clarity of terms and syntax can minimize the likelihood of future disputes and misunderstandings.
- Keep in mind the standard tools of contract construction courts will likely use if the contract results in litigation. Any literate person can draft a contract. A lawyer is hired in part because she has good writing skills and a background in the legal rules governing contract interpretation.
- Develop a routine for keeping current on relevant statutory mandates and case law precedent beyond the standard rules of construction. Many words and phrases are either required or prohibited by statute or have been construed by courts in published opinions, sometimes in counterintuitive ways. Using particular words and phrases without understanding their required usage or generally accepted meaning can lead to embarrassing and costly judgments down the road.

By keeping these guidelines in mind while writing a contract, the drafter can be more confident that the client's expectations will ultimately be fulfilled and that any unwelcome surprises in the future will be fewer and less costly.

II. THE IMPORTANCE OF RECITALS AND BOILERPLATE

Whether drafting a contract from scratch or marking one up from a pre-existing form, lawyers and their clients tend to focus intensely on the middle

4. See, e.g., BURNHAM, *supra* note 1; SCOTT J. BURNHAM, *DRAFTING CONTRACTS* (2d ed. 1993); BARBARA CHILD, *DRAFTING LEGAL DOCUMENTS: PRINCIPLES & PRACTICES* (2d ed. 1992); REED DICKERSON, *MATERIALS ON LEGAL DRAFTING* (1981); RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (4th ed. 1998).

or "operative" portions of the agreement and more casually on the introductory references and concluding terms. A cautious drafter realizes that all words in a contract are important because every word can be influential, even pivotal, in affecting the outcome of a dispute.

A. *Recitals*

A contract may begin with a series of recitals or statements setting forth the circumstances under which it is made (e.g., "Whereas the Lightning Electric Company is desirous of securing a reliable supply of coal . . ."). Such recitals can be used effectively to declare the motivations of the parties and the purposes of the contract. Because recitals seldom contain promissory language obligating a party to do something, they are often assembled without much thought and are unlikely to be the subject of extensive negotiation. However, they can be given great weight by a court as it tries to determine the intent of the parties or resolve ambiguities.⁵ A court might also use statements of the parties' desires and purposes as guideposts for assessing whether someone is performing the contract in good faith. Therefore, a careful drafting attorney will take time to ensure that the recitals not only accurately and completely state the intentions and purposes of the client, but also provide sufficient authority to support later interpretations in the client's favor on close issues where the operative language is unclear.

At the very least, recitals should be clear and consistent with the operative parts of the agreement. If there are inconsistencies and the operative language is clear, the operative language will govern construction.⁶ If the operative

5. See, e.g., *Schnitt v. McKellar*, 427 S.W.2d 202, 206-08 (Ark. 1968) (stating that contract as a whole, including the recital clauses, must be examined to determine the intention of the parties); *GGs Co. v. Masuda*, 919 P.2d 1008, 1015 (Haw. Ct. App. 1996) (stating that the recital evidenced the intent of the parties); *Stech v. Panel Mart, Inc.*, 434 N.E.2d 97, 101 (Ind. Ct. App. 1982) (stating that recital helped clarify ambiguities in the operative portions of the contract); *State v. City of Breezy Point*, 394 N.W.2d 592, 596 (Minn. Ct. App. 1986) (stating that recitals may be used to clarify ambiguous language); *In re Estate of Peterson*, 381 N.W.2d 109, 113 (Neb. 1986) (stating that recitals may be used to determine the intention of the parties); *Erickson Hardwood Co. v. North Pac. Lumber Co.*, 690 P.2d 1071, 1076 (Or. Ct. App. 1984) (stating that recitals may help determine the intent of the parties); *Levy v. Levy*, 388 N.W.2d 170, 175 (Wis. 1986) (stating that the recital may be examined to determine the parties' intentions); *Union Pac. Resources Co. v. Texaco, Inc.*, 882 P.2d 212, 222 (Wyo. 1994) (stating that the recital discloses the acknowledgment of certain facts by the parties in estoppel cases); cf. *Edward Pinckney Assocs. v. Carver*, 294 S.C. 351, 354, 364 S.E.2d 473, 474-75 (Ct. App. 1987) (holding that when a transaction is documented by several writings, recitals in one may be explained, amplified, or limited by those in another).

6. See *Fugate v. Town of Payson*, 791 P.2d 1092, 1093-94 (Ariz. Ct. App. 1990); *Stabler v. Ramsay*, 62 A.2d 464, 470 (Del. Ch. 1948), *modified on other grounds*, 88 A.2d 546 (Del. 1952); *Ohio Valley Gas, Inc. v. Blackburn*, 445 N.E.2d 1378, 1383 (Ind. Ct. App. 1983); *McKinnon v. Baker*, 370 N.W.2d 492, 494 (Neb. 1985); *Eisenhardt v. Schmidt*, 98 A.2d 698, 700 (N.J. Super. Ct. Ch. Div. 1953).

language is ambiguous, clearly written recitals will usually control.⁷ Even if the recitals address matters distinct from the operative provisions, however, they can create unintended consequences. For instance, a court could use them to support an estoppel claim in the future. If a recital states that the party is entering into the contract for the purpose of "securing a reliable supply of coal," the party may find it difficult to persuade a later reader that the other side knew of additional reasons when the parties made the contract. This difficulty could have significant legal consequences, for example, in a claim for consequential damages following breach.⁸

Because recitals can come back to haunt a contracting party, many lawyers deliberately limit their use. If the contract drafter does not expect to give the recitals extensive thought and planning, the better course is to use them sparingly or not at all. The benefits of using well-planned recitals, however, should exceed the risks. The drafting process permits many opportunities to set forth the intentions and expectations of the parties with few limitations. Since later contract readers will be searching for evidence of the parties' intent, the contract drafter should use recitals to make those intentions absolutely clear.

B. Boilerplate

Most contracts end with standard terms and conditions ("boilerplate"),⁹ which are also not likely to be reviewed as closely as the operative contract terms. Although boilerplate terms do not usually become controversial, they can create unwelcome surprises if not carefully considered. For example, a typical choice-of-law provision might provide, "This Agreement will be governed by and construed under the law of the State of Georgia." If the contract has no connection to any other state, the provision adds nothing because Georgia law will govern anyway, but if it concerns multistate parties

7. *Ex Parte Dawes*, 17 Q.B.D. 275, 288 (1886); see SCOTT J. BURNHAM, DRAFTING CONTRACTS (TEACHER'S MANUAL) 65 (2d ed. 1993).

8. Courts will award consequential damages only if the loss is reasonably within the contemplation of the parties, at the time the contract was made, as a probable result of the breach. See *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. 1854); RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981); E. ALLAN FARNSWORTH, CONTRACTS § 12.14, at 822-29 (3d ed. 1999).

9. Legal historians have explored the origin of boilerplate used in this legal sense. Toward the end of the eighteenth century, the technology developed for manufacturing iron plates for steam engine boilers. After the Civil War, small town newspapers began supplementing their publications with releases from news syndicates, which they initially sent in printed form but later shipped in iron casts for ease in printing. Carol Bast, *A Short History of Boilerplate*, 5 SCRIBES J. LEGAL WRITING 156 (1994-1995). The casts became known as boilerplates throughout the country because the standardized process of duplicating the articles was associated with the process for making the plates for boilers. *Id.* at 156. Although the term was used in reference to standard contract provisions not long thereafter, the United States Supreme Court did not use the term "boilerplate" in a contractual sense until Justice Black's dissenting opinion in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 328 (1964). Bast, *supra* at 156-57.

or transactions, the provision could change the choice-of-law rules otherwise governing. This construction may or may not be good for the client. Unless the drafter understands how potentially important legal rules (e.g., statutes of limitation, implied duty of good faith, employment-at-will doctrine) will be affected by the change, she cannot know whether or not Georgia law is good for the client. Choice-of-law provisions are often inserted for the convenience of the drafting lawyer who would prefer to litigate in a familiar legal landscape without considering the effect on the client's interests.

A No-Oral-Modification (NOM) clause is a common provision designed to prevent the parties from later asserting that the written contract terms were modified by verbal agreement. A NOM clause may be useful in any contract because it allows parties to rely on the written document without worrying about an assertion that a critical provision (e.g., time when payment is due) was modified casually in a subsequent discussion or phone call.¹⁰ A careful drafter should consider whether the client is likely to assert an oral modification and whether the client is likely to abide by the requirement of getting a written modification when one does occur. If the client's goals are hindered by the NOM clause, it should not be included.

The same can be said of merger clauses. A clause stating that the entire agreement is embodied in the writing, and that there are no other agreements or understandings between the parties, oral or written, can prove helpful in disproving fraudulent claims or misguided assertions at a later date.¹¹ Merger clauses are therefore routinely inserted in contracts today. However, they can work against a party who is relying on unwritten representations as part of the motivation for entering into the agreement. It can be a time-consuming task to draft language covering every understanding between the parties. Usually, the written contract will embody the essential terms, leaving out other understandings that are either difficult to put into words or not deemed important enough to expend the effort. A merger clause makes it harder to bring those understandings to the attention of a decision maker later on. If this result poses a significant risk for the client, the best course is to include those understandings as part of the contract. If inclusion is impractical, the drafter should consider omitting a merger clause.

Another common boilerplate statement is that "time is of the essence" in performing the obligations of the agreement. Again, the thoughtful drafter will ask whether her client or the other party is more likely to have difficulty

10. The NOM clause by no means ensures that a court will ignore an alleged oral modification. The court could rule that the written requirement was waived by words or conduct or that the other party is estopped from asserting the benefits of the NOM. *See* U.C.C. § 2-209 (1987).

11. A merger clause is not foolproof, of course. A court is more likely to enforce it when it is part of a heavily negotiated contract, but less likely to enforce it in a contract of adhesion. *See, e.g.,* Robert Childres & Stephen J. Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1, 25 (1972) (stating that generally the parol evidence rule is not applicable in adhesion contracts).

performing on time. If the client is more likely to be the late performer, the provision will probably do more harm than good.

A drafting lawyer should also think hard about dispute resolution. Lawyers should know that standard arbitration clauses are not in every client's interest. These clauses tend to favor large, institutional clients that are repeat players in litigation and who may see little benefit from the uncertainties of judge or jury trials. Even if arbitration is thought to be appropriate, the language of the arbitration clause should be carefully scrutinized to ensure that the process and panel will fairly resolve any dispute. The agreement can set forth specific directions to the arbitrators, such as when arbitration is triggered, what issues will be arbitrated, how the panel will be chosen, how the results will be used by the parties, and any other procedural safeguards necessary to limit the scope of decision making.¹² Clarity is critical, however, because an arbitration clause is supposed to provide a quick and efficient method for determining controversies. Efficiencies will be lost if there is litigation over the meaning of a poorly drafted clause.¹³

III. STYLE IS MORE THAN A PERSONAL PREFERENCE

To the greatest extent possible, contracts should be written in clear, unambiguous language. Good writing skills and good contract drafting go hand in hand. Lawyers that write lucid briefs, letters, and memoranda should bring those same writing skills to the contract-drafting table. Awkward phrasing, confusing syntax, ambiguous terms, and "legalese" should not creep onto the page just because the word "Contract" appears at the top. Lawyers know this, of course. Yet for some reason, they often change style, either intentionally or through careless habit, and revert to poor writing when drafting "formal" agreements. A good drafter can guard against this by keeping the following basic points in mind during the writing process:

- ask whether any words or phrases can be considered ambiguous;
- use simple, straightforward language whenever it will do the job; and
- resist the temptation to abuse the drafting privilege by using

12. See BURNHAM, *supra* note 7, at 92.

13. See *id.* at 126-27. See also *Recognition Equip., Inc. v. NCR Corp.*, 532 F. Supp. 271, 273 (N.D. Tex. 1981) (holding that the dispute in question was properly referable to arbitration as set out in the arbitration clause of the parties' agreement); *F.J. Siller & Co. v. City of Hart*, 255 N.W.2d 347, 348 (Mich. 1977) (holding that "the parties intended the condition precedent language to preclude a court action regarding disputes within the scope of the arbitration clause independent of the award"); *Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 103-04, 333 S.E.2d 781, 784-85 (1985) (*per curiam*) (recognizing that the policy favoring the arbitration of disputes is well-established in South Carolina state law as well as by the Federal Arbitration Act, which is equally applicable in state or federal court).

words and phrases unreasonably unfavorable to the other party.

A. Avoiding Ambiguity

American contracts tend to be more elaborate than agreements drafted in other countries.¹⁴ We try to cover all the plausible contingencies, resolve all ambiguities, and spell out the parties' rights and obligations in excruciating detail. This approach is not necessarily wrong, but it has several consequences. Our contracts are generally longer. They are more difficult to read. More attention is paid to the precise language because it is presumed that the words were chosen carefully. Most importantly, because our judges are accustomed to construing detailed agreements, the rules governing contract interpretation have evolved in this context. For better or worse, a contract writer in this country must be aware of these expectations and draft accordingly.

Nearly all terms are vague to some degree, and some uncertainty will always exist about how a later reader might interpret a particular word or phrase. Moreover, many terms are vague for good reason. The law depends to a large extent on general principles like "good cause" and "gross negligence,"¹⁵ even though they cannot be clearly defined. Drafters have little incentive to attempt clarification, as the terms are useful precisely because their meanings are flexible. For example, when drafting a *force majeure* clause, the writer cannot list all possible events that will permit a discharge. Instead, the better approach is to make the contract flexible using general language and listing some examples preceded by the phrase "including but not limited to . . ."

Writers should be careful, however, to distinguish purposefully vague terms from ambiguous terms that create uncertainty in unintended ways.¹⁶ Ambiguous terms or phrases present a choice between alternative meanings. They are almost always unintended and preventable if the writer recognizes the ambiguity.¹⁷ Consider a clause in an employment contract that permits dismissal if the employee is "convicted of a felony or misdemeanor involving dishonesty or fraud."¹⁸ Do felonies have to involve dishonesty or fraud, or only misdemeanors? If the intent is to allow dismissal for any felony, simply

14. RICHARD WINCOR, *CONTRACTS IN PLAIN ENGLISH* 43-44 (1976).

15. See Joseph Kimble, *Answering the Critics of Plain Language*, 5 *SCRIBES J. LEGAL WRITING* 51, 79 (1994-1995).

16. On the difference between vagueness and ambiguity see REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 52 (1975).

17. Occasionally, lawyers will deliberately use ambiguous language. Using the technique of "calculated ambiguity" can avoid an impasse. The writer may decide that resolving the ambiguity would imperil negotiations by flagging an issue the parties would rather not address at the time. The ambiguous term may slip through unnoticed and may never become a problem if the parties perform the contract. If all goes well, the gamble pays off. If a dispute arises over the term, a forum beyond the lawyer's control will decide the ambiguity. See BURNHAM, *supra* note 7, at 29.

18. The example is modified from Kimble, *supra* note 15, at 79.

reversing the order of phrasing could remove the ambiguity: "convicted of a misdemeanor involving dishonesty or fraud or a felony."¹⁹

Recognizing and removing ambiguities takes patience, practice, and experience. It is not always easy to spot an ambiguous word. Most people would not think the word "chicken" is ambiguous, but the *Frigaliment* case teaches otherwise.²⁰ Few would imagine that a "crop" could include livestock, but the dictionary broadly defines the term.²¹ Cases have been litigated over the meaning of commonly used words like "indemnify,"²² which lawyers think they understand but later discover carry different meanings among those that use the term.

Identifying ambiguities is often a simple matter of reading through the document several times and thinking about how others might construe it. It may be helpful to have the document read by someone that is not intimately familiar with the circumstances surrounding the transaction. A disinterested reader is more likely to spot ambiguities that escape the eye of persons more closely involved. When time and money justify the effort, it may be desirable and feasible to test the document on several readers by asking them questions to see if the document clearly conveys its intended meaning. This tactic can be especially useful when drafting a form contract that will be used in numerous transactions with consumers. Ambiguities in such contracts will likely be construed against the drafter, thus giving rise to potential class action liability.

One good drafting habit is to define important words at the beginning of the contract. Whenever the word is used later, it will carry a precise meaning, assuming the definition itself is not ambiguous. Definitions achieve clarity and consistency, save space, and make the operative provisions easier to read. However, defined terms must be used precisely and without variation. If the writer intends a slightly different meaning, she should either not use the defined term or modify it to convey the intended meaning. A drafter should be careful to avoid meaningless or "Humpty Dumpty" definitions.²³ This result occurs when "a term is defined [so broadly that it means virtually] anything the parties want it to mean."²⁴ Another pitfall is the "one-shot definition, whereby a term

19. *Id.* at 79-80.

20. *Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (determining whether a contract for the sale of "chickens" included fryers and broilers or stewing chicken).

21. WEBSTER'S NEW COLLEGIATE DICTIONARY 271 (1974) (defining crop as "a plant or animal or plant or animal product that can be grown and harvested extensively for profit or subsistence.").

22. See *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 643 (Cal. 1968) and cases discussed therein that interpret whether the term "indemnify" covers injury only to third parties or whether it also covers injury to one of the contracting parties; cf. *Carolina Veneer & Lumber Co. v. American Mut. Liab. Ins. Co.*, 202 S.C. 103, 109-12, 24 S.E.2d 153, 155-57 (1943) (discussing the meaning of insurance indemnification clause).

23. BURNHAM, *supra* note 7, at 62.

24. *Id.*

is defined to be used only once.”²⁵

Using the active, rather than passive, voice can also eliminate ambiguities. In most cases it is clearer to say, “If a Shareholder transfers one or more Shares to a Non-shareholder . . .” than to say, “If any Shares are transferred to a Non-shareholder . . .” Contemporary writers prefer gender-neutral language over masculine or feminine if the author intends to cover both—a contract would refer to the transfer of “shares” rather than “his shares” or “his or her shares.” In most cases, it is better to use singular nouns and verbs rather than plural: “If a Shareholder transfers . . .” rather than “If Shareholders transfer . . .” None of these rules are absolute, of course. The passive voice may be better when the writer does not want to limit who the actor will be. A masculine or feminine form may best reflect the parties’ intent. Sometimes the plural may be necessary. The careful drafter will think about these differences and use terms best suited for the occasion.

Another way to limit ambiguities is to ensure that terms are used consistently. A basic drafting rule is: “Never change your language unless you wish to change your meaning, and always change your language if you wish to change your meaning.”²⁶ In one celebrated case, a crop insurance contract imposed several obligations on the insured, a tobacco farmer.²⁷ Some of the obligations stated, “[i]t shall be a condition precedent to . . .” or similar language, but other obligations did not use the word “condition.”²⁸ One obligation of the latter type required that the farmer preserve his damaged crop and not plow it under before an adjuster could inspect the property.²⁹ When the farmer attempted to collect on the policy after plowing the field under, the insurer denied coverage.³⁰ The court found for the farmer, concluding that the no-plowing obligation was not a condition to the insurer’s obligation to pay, but rather it was a promise, the breach of which might give rise to damages alone.³¹ In the opinion of the appellate court, because other provisions used the word “condition,” the company must have intended this particular provision to be only a promise.³² While it seems unlikely that the insurer actually so intended (and the insured may not have even read this part of the agreement), the court seized upon the inconsistency to validate its declaration of the parties’ intent.

Finally, although it should be obvious, the contract writer should never use words casually without fully understanding their meaning. Volumes of reporters are filled with litigation over jargon that contract drafters casually inserted into their documents, often with no purpose other than to sound

25. *Id.*

26. *Id.* at 169.

27. *Howard v. Federal Crop Ins. Corp.*, 540 F.2d 695, 696 (4th Cir. 1976).

28. *Id.* at 696.

29. *Id.*

30. *Id.*

31. *Id.* at 698.

32. *Id.*

"lawyerly." Seemingly innocuous words like "aforesaid," "and/or," "herein," "whereas," "any and all,"³³ and "shall"³⁴ have been the subject of disputes.³⁵ In one study of contract cases, researchers found that about 25% of the disputes involved interpretation problems, with many traceable to incomplete negotiation or ambiguous drafting.³⁶ The cautious drafter should strive not to be counted in that number.

B. Using "Plain Language" Without Sacrificing Precision

Plain language means clear and effective communication—nothing more or less. Anyone can take provisions from form books,³⁷ add a few customizing sections, throw in an occasional "whereas" or "herein," and call it a contract. Simplifying ideas is more difficult than complicating them. While technical terms of art are sometimes necessary, they account for only a small part of any contract.³⁸ Using plain language to convey complex ideas can be time-consuming, but it will pay off with greater comprehension by subsequent readers.³⁹ The effort can reduce litigation risk and provide for better relations between the parties as they try to live within the terms of the agreement throughout the life of the contract.

Most states have enacted laws that require the use of plain language in certain types of contracts, particularly those with consumers.⁴⁰ Even without a

33. Kimble, *supra* note 15, at 80.

34. One publication identifies more than 625 cases involving the word "shall" by the middle of this century. See 39 WORDS AND PHRASES 111-65 (1953).

35. See DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 305-10, 315, 321-25 (1963).

36. Kimble, *supra* note 15, at 80 (citing Harold Shepherd, Book Review, 1 J. LEGAL EDUC. 151, 154 (1948)).

37. The advantages of using forms are obvious: convenience and efficiency. Forms that are written by experts in the field will give the drafter confidence that the important provisions have been included. However, using forms can be dangerous. The legal framework may have changed since the form was published. The form may not constitute the complete legal framework for the client's situation. Or the form may simply not be a good fit for the relationship being created. See Ian R. Macneil, *A Primer of Contract Planning*, 48 S. CAL. L. REV. 627, 655 (1975).

38. One study suggests that technical terms of art account for less than 3% of any given contract. Kimble, *supra* note 15, at 54 (citing Benson Barr et al., *Legalese and the Myth of Case Precedent*, 64 MICH. B.J. 1136, 1137 (1985)).

39. Researchers have studied the effects of plain language on comprehension. In one study of legal documents, plain language improved understanding by 140%—in another by 106%. See Kimble, *supra* note 15, at 64 (citing Michael E.J. Masson & Mary Anne Waldron, *Comprehension of Legal Contracts by Non-Experts: Effectiveness of Plain Language Redrafting*, 8 APPLIED COGNITIVE PSYCHOL. 67, 75, 77 (1994)).

40. See, e.g., ARK. CODE ANN. § 23-80-201 (Michie 1992) (life and disability insurance language simplification); IND. CODE ANN. § 27-1-26 (Michie 1994) (insurance policy language simplification); MD. CODE ANN., Insurance § 15-103 (1997) (health insurance language simplification); OR. REV. STAT. § 743.350 (1989) (health and life insurance policy simplification); S.C. CODE ANN. § 38-71-510 (Law. Co-op. 1976 & Supp. 1998) (insurance policy language simplification); W. VA. CODE § 33-29-1 (1996) (accident and sickness insurance policy

statutory mandate, however, plain language contracts are worth the effort because, if carefully drafted, they reduce the likelihood of misinterpretation by parties, judges, and other contract readers down the road.⁴¹

Plain language advocates have been criticized through the years as being naive and unsophisticated, though largely because they have been misunderstood. Plain language does not mean using only small words and short sentences. It does not mean oversimplifying difficult concepts, discarding technical language, and distorting meaning in the process. The goal is to make writing clearer by restructuring awkward phrasing, reorganizing needlessly complex passages, and eliminating wordy, meaningless language. Its basic tenets in the context of contract drafting can be illustrated by the following common examples:

- “It is further mutually understood and agreed by and between the parties to this agreement”⁴² In most cases this entire clause can be struck. A contract by definition is an agreement by and between the parties; there is no need to repeat the obvious.
- “In the case of the failure of the said Purchasers to” The writer can replace the passive voice with, “If Purchasers fail”
- “Should the said contingency come to pass” Replace with, “If the contingency occurs”
- “[S]ubject and conditioned upon”⁴³ Because it is hard to imagine a difference between the two, either “subject to” or “conditioned upon” should suffice.

An equally common problem is the long, complex passage in which the drafter tries to fit too much into a single paragraph, using an occasional semicolon or comma in a feeble attempt to separate thoughts. The result is inevitably a passage that might be deciphered, but only with a great deal of patience and a keen eye for detail. Consider the following example:

The CONSULTANT agrees to fully complete the described assignment and furnish same to the DEPARTMENT [within 30] calendar days after notification of Approval, it being fully

language simplification).

41. Sources on plain language include CARL FELSENFELD & ALAN SIEGEL, *WRITING CONTRACTS IN PLAIN ENGLISH* (1981); DAVID MELLINKOFF, *LEGAL WRITING: SENSE & NONSENSE* (1982); Symposium, *Plain English in the Law*, 62 MICH. B.J. 942 (1983).

42. BURNHAM, *supra* note 7, at 10.

43. *Id.* One of the classics is from *Baldwin v. Stuber*, 597 P.2d 1135, 1136 (Mo. 1979). The agreement began: “On this date 3-8-77, I, Terry L. Baldwin, here-to-fore known as seller, and Alan D. Stuber, here-to-fore known as sellee, enter into a selling agreement, which is here-to-fore known as The Natural Look Barber Salon” BURNHAM, *supra* note 7, at 57.

understood and agreed by the parties hereto that in the event the CONSULTANT shall fail to do so as aforesaid, the DEPARTMENT shall, without the necessity of notice, terminate the services of said CONSULTANT without incurring any liability for payment for services submitted after said due date or shall deduct, as a liquidation of damages, a sum of money equal to one-third of one percent (1/3 of 1%) per calendar day of the total fee if the performance of the entire contract is delayed beyond the due date. Upon written request by the CONSULTANT an extension of time may be granted by the DEPARTMENT in writing, in the event the CONSULTANT has not received from the DEPARTMENT proper information needed to complete the assignment or, in the event other extenuating circumstances occur, the time may be similarly extended. It is further agreed that if a liquidation of damages is imposed pursuant to the aforesaid provisions, any money due and payable to the DEPARTMENT thereby may be retained out of any money earned by the CONSULTANT under the terms of this contract.⁴⁴

This provision can be simplified by eliminating some awkward phrasing and by a process known as tabulation, a drafting technique common in statutory drafting. Although used less frequently in contract writing, the following example shows the value of tabulation in that setting:

The Consultant must complete and deliver the work [within 30] calendar days after receiving notice that the Department has approved this contract. The Consultant may ask in writing for more time, and the Department may grant it in writing, if

- (a) the Consultant does not receive from the Department the information needed to complete the work; or
- (b) there are other extenuating circumstances.

If the Consultant fails to deliver the work by the due date, the Department may—without having to give notice—choose either one of the following:

- (a) terminate the Consultant's services, and not pay for services that are submitted after the due date; or
- (b) claim liquidated damages of 1/3 of 1% of the total contract payment for each calendar day late, and subtract this amount from the total payment.⁴⁵

44. Kimble, *supra* note 15, at 84.

45. *Id.* at 84-85.

Writing a contract in straightforward, simplified language requires careful thought about the logical structure of each provision and careful attention to language and syntax. The rewards are clarity of content and greater confidence that the provision will not be misconstrued by the parties, nor by subsequent readers. Many lawyers make the mistake of assuming that if the contract is grammatically correct and perfectly understandable, it need not be revised. They can explain it to the client or other interested parties that make inquiries. A careful drafter will write with an ear toward others that may read the words outside the drafter's presence, especially those that are not familiar with the original transaction.

C. Resist Overreaching

Given the opportunity to draft a contract, a lawyer will want to write it in a way that favors the client. She is ethically obligated to try. Even if the lawyer's duty is to serve the client's interest exclusively, however, it is not necessarily in the client's interest to draft provisions as one-sided as possible. This is especially true with consumer contracts in which a court may declare unreasonable provisions unconscionable. The risk here is not only that the provision will be held void, but that the client may end up paying for the consumer's attorney's fees in any litigation over the issue.⁴⁶ Punitive damages might even be assessed if the court feels the consumer was induced by fraud to enter into the unconscionable contract. Even in nonconsumer contracts, a contract written in terms unreasonably favorable to one party is likely to be viewed with a cautious eye in court or arbitration. This suspicion can color the decision maker's perception of the fairness and equitable concerns affecting the dispute.

As a precaution, a forward-thinking contract drafter will, at the very least, ensure that any potentially onerous clauses are written in clear, concise language. The cross-collateralization clause in *Williams v. Walker-Thomas Furniture Co.*⁴⁷ was unconscionable largely because it was written in obscure language that most law students have a difficult time explaining. Clear, plain language will make it harder for a contesting party to claim fundamental

46. See, e.g., IND. CODE ANN. § 24-5-0.5-10(b)(1) (Michie 1996 & Supp. 1998) (treating deceptive acts of supplier as harsh or one-sided contracts that are also unconscionable); MASS. GEN. LAWS ANN. ch. 93A, § 11 (West 1997) (creating causes of action for unfair trade practices); MICH. COMP. LAWS ANN. § 445.903(3)(1) (West 1989 & Supp. 1999) (stating that "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful"); S.C. CODE ANN. § 39-5-140(a) (Law. Co-op. 1976) (stating that attorney's fees and treble damages are available for unfair trade practices); TEX. BUS. & COM. CODE ANN. § 17.50(a) (West 1987 & Supp. 1999) (stating that consumer may maintain action for economic damages or mental anguish as the result of any unconscionable action); see generally Debra T. Landis, Annotation, *What Constitutes "Fraudulent" or "Unconscionable" Agreement or Conduct Within Meaning of State Consumer Credit Protection Act*, 42 A.L.R.4TH 293 (1985).

47. 350 F.2d 445 (D.C. Cir. 1965).

unfairness or surprise.⁴⁸

If strong client-favorable clauses are essential to the contract, they should be conspicuous, especially in consumer contracts. Even in commercial agreements, it is unwise to bury them in the fine print.⁴⁹ In some cases, it is advisable to include a space for initialing particular provisions indicating express acknowledgment. Courts will find it difficult to set aside a provision initialed by a party, even a consumer, except in the most egregious circumstances.

Lawyers should also be careful when drafting provisions that waive the other party's rights. Waivers in many circumstances are unenforceable by statute or court decision.⁵⁰ Lawyers often think that there is no harm in writing strong waiver provisions, especially if qualified by the words "except as otherwise provided by law." They figure that the provision will either be enforceable or that the other party will not contest its validity. This judgment can be a grave error in consumer contracts because the provision could violate a consumer protection statute, subjecting the client to claims for damages and attorney's fees.⁵¹ In nonconsumer cases, even if no direct liability results from

48. Suggestions for drafting to prevent unconscionability can be found at 5 Forms and Procedures Under the U.C.C. (MB) ¶ 21.03, at 2-30, 2-32 to 2-33, 2-36 (1987). Indicia courts frequently examine to determine unconscionable practices may be found in *Wille v. Southwestern Bell Telephone Co.*, 549 P.2d 903, 906-07 (Kan. 1976).

49. See David Mellinkoff, *How to Make Contracts Illegible*, 5 STAN. L. REV. 418, 430-31 (1953).

50. See, e.g., ALA. CODE § 8-25-3(3) (1993) (prohibiting waiver of any consumer defense, counterclaim, or right); IND. CODE § 24-4.5-1-107(1) (1996) (stating that a party cannot waive any rights provided in the consumer credit code); IND. CODE § 24-4.5-2-415 (1996) (stating that a consumer credit contract cannot confess judgment); KY. REV. STAT. ANN. § 367.979 (Michie 1996) (stating that a rental purchase agreement shall not contain a provision requiring confession of judgment or waiver of defenses, counterclaims, or rights of action against lessor in collection of payment); ME. REV. STAT. ANN. tit. 9-A, § 11-109(1) & (5) (West 1964) (stating that rental purchase agreement may not contain a confession of judgment or consumer's waiver of claims or defenses); NEB. REV. STAT. § 69-2107 (1996) (stating that consumer rental purchase agreement may not contain a provision requiring confession of judgment or waiver of any defense, counterclaim, or right of action against the lessor in collecting payment); N.C. GEN. STAT. § 53-181(c) (1999) (stating that confession of judgment by borrower or power of attorney to confess judgment is absolutely void); cf. U.C.C. § 9-505 (1987) (implying that security agreement cannot waive debtor's right to insist on disposal of collateral after repossession). For examples of rights unwaivable by contract, see *infra* text accompanying notes 54-61.

51. See, e.g., IDAHO CODE § 28-45-201(8) (1999) (stating that debtor is awarded attorney's fees for creditor's violation of act); IND. CODE ANN. § 24-4.5-5-202(8) (Michie 1996) (stating that attorney's fees are payable for violating consumer credit act); IOWA CODE ANN. § 537.5201(8) (West 1997) (providing for payment of attorney's fees for violation of act); ME. REV. STAT. ANN. tit. 9-A, § 5-201(a) (West 1964) (entitling consumer to costs of the action together with reasonable attorney's fee for creditor's violation of the consumer credit code); S.C. CODE ANN. § 37-5-108(6) (Law. Co-op. 1989 & Supp. 1998) (entitling consumer to attorney's fees for creditor's unconscionable conduct); TEX. BUS. & COM. CODE ANN. § 17.50(d) (West 1987 & Supp. 1999) (awarding costs and attorney's fees to consumers who prevail in deceptive trade practices actions); Annotation, *Right to Private Action Under State Consumer Protection Act*, 62 A.L.R.3d 169, 178-82 (1975) (discussing state consumer protection legislation and case

including an unenforceable provision, the provision may nonetheless encourage a judge or arbitrator to view the party unfavorably. This view could lead to unwelcome interpretations and rulings, or support a claim that the party acted in bad faith.

While it is impossible to list all unwaivable rights, "particularly since enforceability may depend on the circumstances,"⁵² one scholar has noted the following likely suspects:⁵³

- a. Waiver of constitutional rights;⁵⁴
- b. Waiver of all remedies;⁵⁵
- c. Limitation of consequential damages for personal injuries in the case of consumer goods;⁵⁶
- d. Agreement of purchaser of consumer goods not to assert defenses against assignees;⁵⁷
- e. Agreement that a contract shall be incontestable for fraud or duress;
- f. Waiver of statute of limitations;
- g. Waiver of defenses created by usury laws;
- h. Waiver of statutory exemptions of property from execution for debt;
- i. Waiver of discharge of a debt in bankruptcy;
- j. Waiver of all rights to counterclaim or set-off;
- k. Agreement that creditor may settle claims against debtor's insurer;⁵⁸
- l. Agreement that creditor may treat collateral as it pleases;⁵⁹
- m. Agreement that creditor has an unlimited right to retain collateral;⁶⁰ and
- n. Agreement that creditor has an unlimited right of entry to repossess collateral.⁶¹

The drafting lawyer is put in a difficult position if the client insists on including a provision that is likely to be unenforceable. Guidance on the subject

law).

52. BURNHAM, *supra* note 7, at 39.

53. *Id.* at 39-40.

54. *See* Fuentes v. Shevin, 407 U.S. 67, 94-96 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 186-88 (1972).

55. *See* U.C.C. § 2-719(2) (1987).

56. *See id.* § 2-719(3).

57. *See id.* § 9-206 cmt. 2; FTC Holder in Due Course Rule, 16 C.F.R. § 433.1-3 (1999).

58. *See id.* § 9-501(3)(a).

59. *See id.* § 9-207.

60. *See id.* § 9-505(2).

61. *See* U.C.C. §§ 9-503, -504(3).

is sparse because drafting problems are largely ignored in professional ethics studies. The lawyer can always withdraw if she finds the client's insistence particularly repugnant, although this option is not realistic in most circumstances. The better course will usually be to explain to the client the legal principles involved and the potential ramifications for both lawyer and client if an unenforceable provision is included. Explanation of the exposure risks often persuades the client that the provision is not in her best interest.⁶²

IV. UNDERSTAND THE COMMON-LAW RULES OF CONTRACT INTERPRETATION

The common-law rules of contract interpretation, sometimes referred to as rules or canons of construction, developed as proxies for determining the intent of the parties when their actual intentions are unknown or disputed. The rules purport to restate commonly held perceptions about how people understand language. Although the rules often sound like uncontroversial observations, it is amazing how often they are litigated. Controversies arise in part because the rules are riddled with exceptions and are not entirely consistent. A drafting attorney thus cannot rely on their application with guaranteed results.⁶³ Nevertheless, a good drafter should keep the rules in mind as an important part of the legal landscape that courts and other decision makers will consider when deciding what a contract means. The rules are best understood as guidelines, rather than strict rules, that can help the writer minimize uncertainty in predicting how an agreement will be applied.

The following discussion illustrates some of the more often-cited guidelines.

*A. Words Should Be Given Their Plain and Ordinary Meaning*⁶⁴

This canon is often used to disarm a party's contention that a word has some special meaning in the context of the agreement under review.⁶⁵ The judge will apply the "plain" meaning, that is, his or her own understanding of

62. See Justin Sweet, *The Lawyer's Role in Contract Drafting*, 43 CAL. ST. B.J. 362, 365 (1968).

63. Karl Llewellyn wrote the seminal work on interpretive canons, which demonstrates how judges use the rules selectively in statutory cases. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396-400 (1950).

64. *Thurman v. Tafoya*, 895 P.2d 1050, 1055 (Colo. 1995); *American Family Life Assur. Co. v. Russell*, 700 N.E. 2d 1174, 1177 (Ind. Ct. App. 1998); *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. 1993); *Oklahoma Ass'n for Equitable Taxation v. City of Oklahoma City*, 901 P.2d 800, 803 (Okla. 1995); *Ellis v. Rhode Island Pub. Transit Auth.*, 586 A.2d 1055, 1057 (R.I. 1991); *C.A.N. Enters., Inc. v. South Carolina Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988); cf. *Nehf*, *supra* note 2, at 54-63 (discussing "plain meaning" problems in statutory interpretation).

65. *Eskimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F. Supp. 987, 994-95 (S.D.N.Y. 1968) (discussing evidence that when the parties used "non-exclusive" they meant "exclusive").

the common usage of the words. This understanding will, of course, be colored by the reader's education, cultural background, and other life experiences. The canon may nevertheless be helpful to a drafting attorney, as long as the lawyer's understanding of plain meaning coincides with that of later readers.

However, the canon can usually be countered by other rules. For example, the rule "trade usage may vary the ordinary meaning of words" indicates that common understanding will be superseded by specialized meaning within a particular trade or sector of commerce.⁶⁶ Likewise, the rule "technical words will be given their technical meaning"⁶⁷ allows courts to give words the meaning that best effectuates the parties' intention,⁶⁸ rather than the ordinary meaning, when the court is convinced (1) that an ambiguity exists, and (2) that the technical meaning is the parties' actual understanding. These exceptions to the plain meaning rule inject uncertainty into the drafting process, but they can also create efficiencies. Because of these exceptions, trade usages and technical words with clear meaning to the parties need not be defined in the contract. If there is any doubt about the widespread acceptance of the special meaning, however, the term should be expressly defined in the agreement.

*B. Every Part of a Contract Should Be Interpreted, If Possible, to Carry Out the Agreement's General Purpose*⁶⁹

66. C-Thru Container Corp. v. Midland Mfg. Co., 533 N.W.2d 542, 544-45 (Iowa 1995); Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., 626 N.E.2d 878, 881-82 (Mass. 1994); Hurst v. W.J. Lake & Co., 16 P.2d 627, 631 (Or. 1932) (containing examples of several trade usages); Weisz Graphics v. Peck Indus., 304 S.C. 101, 107, 403 S.E.2d 146, 149 (Ct. App. 1991) (noting that trade usage and prior course of dealing supplement contract). *But see* Autrey v. Bell, 114 S.C. 370, 374-75, 103 S.E. 749, 750 (1920) (finding custom or usage cannot vary unambiguous express terms).

67. Robin v. Sun Oil Co., 548 F.2d 554, 557 (5th Cir. 1977); Thompson v. Arnold, 147 N.E. 2d 903, 908 (Ind. 1958); K & E Drilling, Inc. v. Warren, 340 P.2d 919, 923 (Kan. 1959); Montana-Dakota Utils. Co. v. Lower Yellowstone Rural Elec., 585 P.2d 626, 631 (Mont. 1978); Estate of Hatch by Ruzow v. Nyco Minerals Inc., 666 N.Y.S.2d 296, 298 (N.Y. App. Div. 1997); White v. White, 241 S.C. 181, 188, 127 S.E.2d 627, 631 (1962); Placid Oil Co. v. Louisiana Gas Intrastate, Inc., 734 S.W.2d 1, 3 (Tex. App. 1987, writ ref'd n.r.e.).

68. Reed v. Merchants' Mut. Ins. Co., 95 U.S. 23, 30 (1877) (noting that "rigid adherence to [literal construction] often leads to erroneous results, and misinterprets the meaning of the parties."); Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 398 (Ariz. 1984); McCool v. Ayres, 192 N.E.2d 636, 645 (Ind. App. 1963); Goldsmith v. Knapp, 637 N.Y.S.2d 434, 436 (N.Y. App. Div. 1996); Tanner Elec. Coop. v. Puget Sound Power & Light Co., 911 P.2d 1301, 1310 (Wash. 1996); *cf. In re Estate of Fabian*, 326 S.C. 349, 352, 483 S.E.2d 474, 475 (Ct. App. 1997) (noting that "[i]n construing a will, courts should strive to discover and give effect to the testator's intent.").

69. O'Sullivan v. Bergenty, 573 A.2d 729, 734 (Conn. 1990); E.I. du Pont de Nemours & Co. v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985); McCarthy v. U.S.I. Corp., 678 A.2d 48, 52 (Me. 1996); Spaulding v. Morse, 76 N.E.2d 137, 139 (Mass. 1947); Columbia East Assocs. v. Bi-Lo, Inc., 299 S.C. 515, 520-21, 386 S.E.2d 259, 262 (Ct. App. 1989); Patterson v. Bixby, 364 P.2d 10, 12 (Wash. 1961); Kuehne v. Samedan Oil Corp., 626 P.2d 1035, 1040 (Wyo. 1981).

This means the words will be construed in the context of the entire agreement. The drafter can take comfort in knowing that language will be construed in a way that promotes, rather than frustrates, the overall purpose of the agreement. This approach to contract interpretation is an extension of the "intentionalist view." Rather than discerning the actual intentions of the parties, however, a court looks to the document itself to identify the contract's essential purpose. The court then construes words in light of that purpose.

*C. Obvious Mistakes of Writing, Grammar, or Punctuation Will Be Corrected*⁷⁰

Courts will overlook obvious mistakes, either ignoring them or reforming the contract to correct the problem. This general rule can save the careless drafter from embarrassment and possible malpractice liability, but it is not very useful as a planning tool, nor as a substitute for careful proofreading.

*D. General Terms Will Be Restricted in Meaning by the More Specific*⁷¹

Judges invoke this rule to resolve internal inconsistencies in the contract. The more specific terms will control. A related doctrine is the rule of *ejusdem generis*: when particular words are followed by general terms (or vice versa), the general refer to things of a like class with those particularly described.⁷² For example, if a requirements contract for a janitorial service states that the service will buy "all of its cleaning supplies (waxes, solvents, glass cleaners, ammonia-based products, etc.)" from a particular supplier, the rule of *ejusdem generis* construes "cleaning supplies" to include other similar cleaning fluids but not hardware cleaning supplies like buffers, mop buckets, and vacuums. If a broader meaning is intended, the drafter should expressly so provide.

70. *Modern Constr., Inc. v. Barce, Inc.*, 556 P.2d 528, 530 n.5 (Alaska 1976); *Ultimate Computer Servs., Inc. v. Biltmore Realty Co.*, 443 A.2d 723, 725-26 (N.J. Super. Ct. App. Div. 1982); *Newbern Banking & Trust Co. v. Duffy*, 68 S.E. 915, 916 (N.C. 1910); *Schauerman v. Haag*, 416 P.2d 88, 91 (Wash. 1966); *cf. Marksill Specialties, Inc. v. Barger*, 428 N.E.2d 65, 69 (Ind. Ct. App. 1981) (finding sufficient testimony from which the trial court could ascertain the terms, even though the contract contained blank spaces); *Central Ice Cream & Candy Co. v. Home Ins. Co.*, 171 S.C. 162, 164-65, 171 S.E. 797, 798 (1933) (reforming a contract containing an obvious mutual mistake to express the real intention of the parties).

71. *United States v. The Agioi Victores*, 227 F.2d 571, 573 (9th Cir. 1955); *South Florida Beverage Corp. v. Figueredo*, 409 So. 2d 490, 495 (Fla. Dist. Ct. App. 1981); *Arnold v. Burton*, 651 N.E.2d 1202, 1205 (Ind. Ct. App. 1995); *Phillips v. Authorized Investors Group, Inc.*, 625 S.W.2d 917, 921 (Mo. Ct. App. 1981); *State v. Greger*, 559 N.W.2d 854, 864 (S.D. 1997); *cf. Rhea v. Maxwell*, 116 S.C. 184, 189, 107 S.E. 248, 250 (1920) (asserting that "general terms are always restricted to the subject-matter of which they treat").

72. *Chugach Elec. Ass'n v. Calais Co.*, 410 P.2d 508, 509-10 (Alaska 1966); *BOC Group, Inc. v. Lummus Crest, Inc.*, 597 A.2d 1109, 1113 (N.J. Super. Ct. Law Div. 1990).

Otherwise the rule of *ejusdem generis* could lead to unintended consequences.⁷³

*E. A Court Must Construe a Contract as a Whole and Give Effect to Each Part if Reasonably Possible*⁷⁴

Judges will presume that the contract is internally consistent and not redundant. They will shun a construction that would render language contradictory or inoperative.⁷⁵ Related rules provide that courts should attempt to harmonize conflicting provisions to give meaning to each,⁷⁶ and that a court "will not construe words in a contract in such a manner as to render them meaningless."⁷⁷ Because the court will assume the drafter intended each word to have meaning, a careful drafter should ensure that each word serves a purpose and is consistent with other language in the document. If not, application of the rule can produce surprising results.

*F. Whenever Possible, Courts Should Construe Agreements as Being Valid Rather Than Void*⁷⁸

A court will presume that the parties intended the document as a whole, and all of its parts, to have legal effect. Under a related but somewhat conflicting rule, courts will construe a contract so as to avoid forfeiture.⁷⁹ The interplay of these rules can have important consequences. For instance, when faced with a provision dictating that a general contractor will not pay a

73. Cf. *Wolf v. Wolf*, 259 N.E.2d 89, 92 (Ind. App. 1970) (observing that "[t]he doctrine of *ejusdem generis* is not mandatory and is ignored as frequently as it is applied.").

74. *Lempa v. Finkel*, 663 N.E.2d 158, 166 (Ill. App. Ct. 1996); *Wiltse v. Cornell*, 256 N.E.2d 572, 576 (Ind. App. 1970); *Thigpen v. Rothwell*, 464 P.2d 896, 898 (N.M. 1970); *Carosone v. Carosone*, 688 A.2d 733, 735 (Pa. Super. Ct. 1997); *Brockway v. Brockway*, 921 P.2d 1104, 1106 (Wyo. 1996).

75. *Evansville-Vanderburgh School Corp. v. Moll*, 344 N.E.2d 831, 837 (Ind. 1976); *George S. May Int'l Co. v. King*, 629 N.E.2d 257, 261 (Ind. Ct. App. 1994).

76. *First Nat'l Bank of Crossett v. Griffin*, 832 S.W.2d 816, 819 (Ark. 1992); *Central Bank of Denver v. Deloitte & Touche*, 928 P.2d 754, 755 (Colo. Ct. App. 1996); *Evansville-Vanderburgh School Corp.*, 344 N.E.2d at 837; *George S. May Int'l Co.*, 629 N.E.2d at 261; *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990); *Christe v. GMS Mgmt. Co.*, 705 N.E.2d 691, 693 (Ohio Ct. App. 1997); *G.G.A., Inc. v. Leventis*, 773 P.2d 841, 845 (Utah Ct. App. 1989).

77. *University Casework Sys., Inc. v. Bahre*, 362 N.E.2d 155, 160 (Ind. Ct. App. 1977); *accord Estate of Savage v. Golub*, 392 N.E.2d 263, 266 (Ill. App. Ct. 1979); *Gibbes Mach. Co. v. Johnson*, 8 S.C. 10, 13, 61 S.E. 1027, 1028 (1908); *Richfood, Inc. v. Jennings*, 499 S.E.2d 272, 276 (Va. 1998); *Moore v. Johnson Serv. Co.*, 219 S.E.2d 315, 321 (W. Va. 1975).

78. *Bassett v. Desmond*, 101 A.2d 294, 296 (Conn. 1953); *Glasgo v. Glasgo*, 410 N.E.2d 1325, 1331 (Ind. Ct. App. 1980); *Garfinkel v. Schwartzman*, 254 A.2d 667, 673 (Md. 1969); *Berger v. Victory Realty Trust*, 106 N.E.2d 429, 431 (Mass. 1952); *Duncan v. Brookview House, Inc.*, 262 S.C. 449, 457, 205 S.E.2d 707, 711 (1974); *Conquistador Petroleum, Inc. v. Chatham*, 899 S.W.2d 439, 442 (Tex. App. 1995, writ denied).

79. *Dickenson v. Board of Trustees of Chico Indep. School Dist.*, 204 S.W.2d 418, 423 (Tex. Civ. App. 1947, writ ref'd).

subcontractor "until five (5) days after Owner shall have paid General Contractor," a court may not construe this provision as discharging the general contractor from payment liability if Owner has declared bankruptcy before paying.⁸⁰ Thus, even though the court will presume the parties intended the provision to have legal effect, the court may nevertheless make the general contractor pay the subcontractor out of its own pocket in order to avoid forfeiture. If the general contractor wishes to shift the risk of owner's insolvency to the subcontractor, explicit language is required.⁸¹

*G. Ambiguities Will Be Construed Against the Drafter*⁸²

This frequently used canon places a special burden on the drafting party, particularly with adhesion contracts or other documents that the other party will not carefully review or negotiate. Without such a review, ambiguous terms may go undetected. While the drafter has the power to use language favoring a client's interests, ambiguities will be construed against the client. The court will have no sympathy for the party that could have prevented the ambiguity.

*H. A Court Will Not Presume That the Parties Undertook to Perform Impossible Acts*⁸³

Contractual obligations will be construed as limited to acts that appeared feasible at the time the agreement was made.

*I. If There Is a Conflict, "Writing Prevails Over Printing, Handwriting Over Typewriting, and Typewriting Over Printing"*⁸⁴

80. *Thos. J. Dyer Co. v. Bishop Int'l Eng'g Co.*, 303 F.2d 655, 661 (6th Cir. 1962); *Peacock Constr. Co. v. Modern Air Conditioning, Inc.*, 353 So. 2d 840, 841-42 (Fla. 1977).

81. *See, e.g., DEC Elec., Inc. v. Raphael Constr. Corp.*, 558 So. 2d 427, 428-29 (Fla. 1990) (holding against subcontractor whose contract provided: "No funds will be owed to the subcontractor unless the General Contractor is paid by the owner . . ."); *Elk & Jacobs Drywall v. Town Contractors, Inc.*, 267 S.C. 412, 417, 229 S.E.2d 260, 262 (1976) (holding absent clear expression that general contractor intended to shift credit risk to suppliers and subcontractors, contracts should not be so construed).

82. *Sturgis v. Skokos*, 977 S.W.2d 217, 222 (Ark. 1998); *American Bldg. Maintenance Co. v. L'Enfant Plaza Properties, Inc.*, 655 A.2d 858, 862 (D.C. 1995); *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1132 (Ind. 1995); *Lacy v. White*, 288 N.E.2d 178, 183 (Ind. Ct. App. 1972); *Specialty Restaurants Corp. v. Gaebler*, 956 S.W.2d 391, 395 (Mo. Ct. App. 1997); *Gallagher v. Fidelcor, Inc.*, 657 A.2d 31, 34 (Pa. Super. Ct. 1995); *General Accident Ins. Co. v. Safeco Ins. Cos.*, 314 S.C. 63, 72, 443 S.E.2d 813, 818 (Ct. App. 1994); *Singpiel v. Morris*, 582 N.W.2d 715, 720 (S.D. 1998).

83. *Knox v. Knox*, 59 N.W.2d 108, 113 (Mich. 1953); *Car Wash Sys. of Tex., Inc. v. Brigrance*, 856 S.W.2d 853, 858 (Tex. App. 1993, no writ); *Taylor v. Taylor*, 11 S.E.2d 587, 591 (Va. 1940); *Schaffer v. Standard Timber Co.*, 331 P.2d 611, 616 (Wyo. 1958).

84. *Scott v. Anderson Newspapers, Inc.*, 477 N.E.2d 553, 562 (Ind. Ct. App. 1985); *accord Industrial Mach., Inc. v. Creative Displays, Inc.*, 344 So.2d 743, 749 (Ala. 1977); *How v. Fulkerson*, 528 P.2d 853, 856 (Ariz. Ct. App. 1974); *ETA Trust v. Recht*, 574 N.E.2d 4, 9 (Ill.

In the modern era of word processing, courts should not have to resort to this canon very often. However, conflicts do still arise, particularly with pre-printed forms that are marked up by the parties before signing.

J. Avoiding the Canons Altogether

The application of most of the canons can and should be avoided by careful drafting. They are essentially default rules courts use to determine meaning when more direct tools for ascertaining the parties' intentions fail. While some of the canons relate to ascertaining contractual intent (e.g., handwriting prevails over typewriting), others are simply rules courts use to justify difficult decisions that must be made (e.g., construe ambiguities against the drafter). Litigators know that for every rule of construction, a contradictory rule probably exists that supports a different interpretation. Therefore, while drafting lawyers should be aware of the canons, they should not rely on them as an essential part of their drafting strategy. During litigation, the courts' application of the rules is uncertain. Moreover, during the operational years of the agreement, the parties or their successors will probably be unaware of these rules as they attempt to construe the contract. The contract should be written so that all likely readers will understand it in the same way, regardless of their knowledge of the law.

V. WORK WITHIN THE RELEVANT STATUTES AND CASE-LAW PRECEDENT

An experienced lawyer should be familiar with the statutory and case-law precedents governing the particular type of contract being written, and draft within the boundaries of those rules.

A. Statutory Guidelines

Many statutes require the use of particular language and carry penalties for failure to comply. For example, the Uniform Commercial Code provides that a copy of a warehouse receipt must include the word "duplicate."⁸⁵ Most states require a limited partnership to include either the words "limited partnership" or the abbreviation "Ltd." in their company name.⁸⁶ Likewise, a consumer contract may require certain disclosures, drafted in a particular way.⁸⁷

Statutes may also prohibit the use of certain terms. Such restrictions often

App. Ct. 1991); *Coble Sys., Inc. v. Gifford Co.*, 627 S.W.2d 359, 363 (Tenn. Ct. App. 1981).

85. U.C.C. § 7-402 cmt. 1 (1987).

86. *See, e.g.*, ALA. CODE § 10-9B-102 (Supp. 1998); HAW. REV. STAT. ANN. § 415-8 (Michie 1997 & Supp. 1998); IND. CODE ANN. § 23-16-2-1(a)(1) (Michie 1999); MISS. CODE ANN. § 79-14-102 (1996); S.C. CODE ANN. § 33-42-30 (Law. Co-op. 1976); W. VA. CODE § 31-1-11 (1996 & Supp. 1999).

87. *See, e.g.*, FTC Holder in Due Course Rule, 16 C.F.R. § 433.2 (1999).

apply to consumer contracts and landlord tenant agreements.⁸⁸ Other statutes imply mandatory terms if nothing on the subject is discussed in the agreement. For example, gap-filling provisions in the Uniform Commercial Code may supply terms relating to price, place of delivery, time of delivery, and time of payment.⁸⁹ For sales of goods, warranties will be implied unless expressly disclaimed, and the disclaimers may have to be written in a particular manner to be effective.⁹⁰ Type size, format, and contract design may also be regulated by statute, especially in credit contracts and insurance agreements.⁹¹

For all these reasons, contract drafters are usually more comfortable using form books and software, hoping they were written with the relevant statutory mandates in mind. However, unless a form was produced for use in a particular state and is kept current with changes in the law, it may not be reliable. Most legislative mandates on contract issues are found in state rather than federal codes, and there is little uniformity among the states outside uniform laws like the U.C.C. State disclosure laws can be amended frequently, and changes often receive little, if any, press in local bar journals. Unfortunately, there is no easy way to be sure that a form has been drafted in compliance with the relevant law. A careful drafter will do the required research; others will pray that no major mistakes are made, or, at least, that none ever come to light.

B. Case-Law Guidance

A less obvious problem, but one more difficult to manage, is keeping track of relevant case law rulings on specific contract language. Every day judges construe contract terms in published opinions. If a later case arises involving the same or similar terms, a court may use a prior decision as precedent. It is virtually impossible to monitor the case law continually and draft contracts in accordance with all of these constructions—nor is it worth the effort. Fortunately lawyers can take comfort in knowing that each case will be decided in its own context, and that a court will not blindly follow a previous construction if the facts are materially different. Nevertheless, a good drafting attorney should have a good feel for the types of provisions that have been construed in litigation.

88. See, e.g., IND. CODE ANN. §§ 24-4.5-2-401 to -415 (Michie 1996) (covering consumer credit and leases); MASS. GEN. LAWS ANN. Ch. 255D, § 9 (West 1988) (addressing form and content of retail installment agreements); N.Y. BANKING LAW § 567 (McKinney 1990) (mandating the form and content of premium finance agreements); S.C. CODE ANN. § 27-40-330 (Law. Co-op. 1976) (listing prohibited provisions in residential leases); VT. STAT. ANN. tit. 8, § 4254 (Supp. 1998) (listing prohibited terms in service contracts); see generally Donald M. Zupanec, Annotation, *Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts*, 89 A.L.R.3d 449 (1979 & Supp. 1999).

89. U.C.C. §§ 2-305 to -311 (1987).

90. U.C.C. §§ 2-312 to -316 (1987).

91. The regulations accompanying the Federal Truth in Lending Act, for example, have very precise disclosure mandates. See, e.g., Truth in Lending (Regulation Z), 12 C.F.R. § 226 (1999).

There is case-law precedent, for example, construing the following words and phrases that are commonly used in contracts: "at any time,"⁹² "accident,"⁹³ "and/or,"⁹⁴ "immediate,"⁹⁵ "forthwith,"⁹⁶ "first day of the year,"⁹⁷ "free and clear of all liens,"⁹⁸ "subject to,"⁹⁹ "gross,"¹⁰⁰ "forfeit,"¹⁰¹ "may,"¹⁰²

92. *Haworth v. Hubbard*, 44 N.E.2d 967, 970 (Ind. 1942) (stating that "at any time" is "a relative and flexible term not susceptible of precise definition"); *Edwards v. Johnson*, 90 S.C. 90, 96, 72 S.E. 638, 641 (1911) (describing "at any time" as an "indefinite phrase").

93. *Supreme Council of the Order of Chosen Friends v. Garrigus*, 3 N.E. 818, 822 (Ind. 1885) (stating that an "accident" is an event that takes place "without one's foresight or expectation"); *Manufacturers & Merchants Mut. Ins. Co. v. Harvey*, 330 S.C. 152, 161, 498 S.E.2d 222, 227 (Ct. App. 1998) (observing that "[t]he intent to act, coupled with the intent to produce the consequences is not an accident as defined by the Supreme Court of South Carolina."). *But cf.* *State Farm Mut. Auto. Ins. Co. v. Moorner*, 330 S.C. 46, 58, 496 S.E.2d 875, 882 (Ct. App. 1998) (noting that an auto insurance policy can include intentional acts within its definition of "accident").

94. *Jones v. Servel, Inc.*, 186 N.E.2d 689, 691, 693 (Ind. App. 1962) (stating that in a contract providing for a consultant to be paid for "obligations assumed and/or . . . services rendered," "and/or" should be interpreted as a conjunction and not as an alternative); *Newlon v. Newlon*, 220 S.W.2d 961, 963 (Ky. Ct. App. 1949) (stating that the interpretation of "and/or" "depends upon the circumstances, and it must be construed to express the intention of the parties"); *Herrick Motor Co. v. Fischer Oldsmobile Co.*, 421 S.W.2d 58, 66 (Mo. Ct. App. 1967) (noting that "or" may be construed as "and" where such a construction "is necessary to effectuate the intention of the parties as gathered from the four corners of the instrument"); *Wood v. Wood*, 132 S.C. 120, 125-27, 128 S.E. 837, 839 (1925) (stating that "or" can mean "and" in the construction of a will if necessary to carry out the testator's intention); *Gibbes Mach. Co. v. Johnson*, 81 S.C. 10, 13, 61 S.E. 1027, 1028 (1908) (stating that "and" may be construed as "or" if demanded by the context and the parties' intention); *Victory v. Victory*, 399 S.W.2d 332, 338 (Tenn. Ct. App. 1965) (holding that "when 'and/or' is used in a contract, the court may select the word that fits."). *See also* Reed Dickerson, *The Difficult Choice Between "And" and "Or,"* 46 A.B.A. J. 310 (1960) (discussing the uses of "and" and "or" in legal drafting).

95. *Gross Income Tax Dep't of Treasury v. Harbison-Walker Refractories Co.*, 48 N.E.2d 834, 836 (Ind. App. 1943) (interpreting "immediate" to mean that "the act referred to shall be completed within such convenient time as is reasonably requisite"); *cf.* *Barkley v. International Mut. Ins. Co.*, 227 S.C. 38, 44, 86 S.E.2d 602, 604 (1955) (interpreting the meaning of "immediate family" as used in an automobile insurance policy).

96. *King v. Texacally Joint Venture*, 690 S.W.2d 618, 620 (Tex. App. 1985, writ ref'd n.r.e.) (noting that "forthwith" has been held to mean "as soon as the required task may reasonably be performed with diligent exertion").

97. *Bojarski v. Ballard*, 44 N.E.2d 200, 201 (Ind. App. 1942) (assuming that "the first day of each year" referred to January 1).

98. *Smith v. Toth*, 111 N.E. 442, 443 (Ind. App. 1916) (construing "subject to all liens" in real estate contract to mean that seller must pay full agreed-upon price without subtracting the cost of discharging liens); *Robeson-Marion Dev. Co. v. Powers Co.*, 256 S.C. 583, 585-86, 183 S.E.2d 454, 455 (1971) (stating that as long as sellers are prepared to use purchase money to clear liens, closing can take place despite contract requiring clean title prior to closing).

99. *Rourke v. Garza*, 511 S.W.2d 331, 343 (Tex. Civ. App. 1974, writ granted) (stating that "'subject to' are words of limitation and do not create any affirmative contractual obligations").

100. *Toth*, 111 N.E. at 443 (stating that "gross" characterizes a specified sum of money "before diminution"); *Marlton Operating Corp. v. Local Textile Mills, Inc.*, 137 N.Y.S.2d 438, 440 (N.Y. Sup. Ct. 1954) (stating that the term "gross income" should be defined in keeping

“stipulate,”¹⁰³ “without recourse,”¹⁰⁴ “as is,”¹⁰⁵ “activity or event,”¹⁰⁶ “proceeds,”¹⁰⁷ “due and payable,”¹⁰⁸ “book value,”¹⁰⁹ “more or less,”¹¹⁰ “indebtedness,”¹¹¹ “cancel,”¹¹² “to wit,”¹¹³ “about,”¹¹⁴ “permanent,”¹¹⁵ and “sudden.”¹¹⁶ Lawyers who draft contracts regularly should make a habit of reading through advance sheets or case digests periodically to see current

with the intent of the parties when the document was drafted); *Moore v. Berkeley County School Dist.*, 326 S.C. 584, 591, 486 S.E.2d 9, 13 (Ct. App. 1997) (defining “gross negligence” as an intentional “failure to exercise a slight degree of care”).

101. *Zenor v. Pryor*, 106 N.E. 746, 748 (Ind. App. 1914) (stating that the term “forfeit” implies a penalty).

102. *Nalle v. Taco Bell Corp.*, 914 S.W.2d 685, 687 (Tex. App. 1996, writ denied) (stating that “[t]he word ‘may’ . . . does not indicate mandatory requirement.”).

103. *Beck v. Budd*, 88 N.E. 785, 786 (Ind. App. 1909) (defining “to stipulate” as “to make an agreement, to bargain, to contract, to settle terms, etc.”).

104. *Shehadi v. Northeastern Nat’l Bank*, 378 A.2d 304, 306 (Pa. 1977) (holding that the phrase “without recourse” must be construed as intended by the parties in light of other contract terms specifically explaining the phrase); *Hall v. James T. Latimer & Son*, 81 S.C. 90, 97-98, 61 S.E. 1057, 1059-60 (1908) (holding that inclusion of the phrase “without recourse” in an agreement will not prevent a party from enforcing its rights under that agreement).

105. *Western Ohio Pizza, Inc. v. Clark Oil & Refining Corp.*, 704 N.E.2d 1086, 1091 (Ind. Ct. App. 1999) (stating that a purchaser of “as is” property assumes liability for whatever underground storage tanks and lines may contain, including contaminants).

106. *American Family Life Assur. Co. v. Russell*, 700 N.E.2d 1174, 1178 (Ind. Ct. App. 1998) (holding that insured was not “participating in any activity or event” when he was struck by a train after passing out on the tracks from intoxication).

107. *Remsen v. Midway Liquors, Inc.*, 174 N.E.2d 7, 15 (Ill. App. Ct. 1961) (construing “proceeds” to mean “what the litigant would actually receive after the reasonable costs of the proceeding including attorneys’ fees.”).

108. *Beiger Heritage Corp. v. Montandon*, 691 N.E.2d 1334, 1337 (Ind. Ct. App. 1998) (finding that “due and payable” means the amount of the claim or debt is certain but the day set for payment has not passed); *Grier v. City Council*, 203 S.C. 203, 209-10, 26 S.E.2d 690, 693 (1943) (limiting the meaning of “due and payable” to the context of a particular transaction).

109. *Lambert v. Fishermen’s Dock Coop., Inc.*, 297 A.2d 566, 571 (N.J. 1972) (stating that no single definition of “book value” is applicable in all cases).

110. *Moore v. Harmon*, 41 N.E. 599, 600 (Ind. 1895) (stating that when the phrase “more or less” is not the essence of the contract, but instead is merely used descriptively, “the buyer assumes the risk of quantity”).

111. *Halm v. Hincer Mfg. Co.*, 115 N.E.2d 731, 734 (Ind. App. 1953) (finding that contractual obligation of business seller to “pay and discharge any and all indebtedness” did not include employees’ vacation pay, which did not become due until after sale).

112. *Klitzke v. Smith*, 91 N.E. 748, 749 (Ind. App. 1910) (holding that “the contract to cancel the suit [implies the plaintiff’s] payment of costs up to that time.”).

113. *Sawyer v. Churchill*, 59 A. 1014, 1015 (Vt. 1905) (stating that the phrase “to wit” did not have the same meaning when used in a contract as when used in a pleading).

114. *Kirwan v. Van Camp Packing Co.*, 39 N.E. 536, 538 (Ind. App. 1895) (construing ambiguous term “about” against the drafter).

115. *McCutchen v. Pacific Mut. Life Ins. Co.*, 153 S.C. 401, 413, 151 S.E. 67, 71-72 (1929) (holding “permanent” does not always mean “forever” and should be construed “according to its nature and in its relation to the subject-matter of the contract”).

116. *Greenville County v. Insurance Reserve Fund*, 311 S.C. 169, 176, 427 S.E.2d 913, 917 (Ct. App. 1993) (holding “sudden” means “‘abrupt’ or ‘precipitant,’ as well as ‘accidental’”).

constructions of typical contract terms. Having this knowledge during the drafting stage is considerably more valuable than learning about it in the course of litigation.

Finally, and most importantly, lawyers should be aware of important decisions in which courts have attached grave legal significance to seemingly insignificant words or omissions in contract drafting. Mistakes in this area can be made easily and can be costly. Usually these decisions are sector-specific, and experienced lawyers will be aware of the important ones in their specialty. Lawyers working in secured financing, for instance, should understand that words describing the collateral in a security agreement may be specifically defined in the U.C.C. and in case law.

Many other general rulings cut across subject areas. Three examples worth mentioning are cases dealing with contract assignments, exculpatory clauses, and the avoidance doctrine of impracticability. Precedent in each area can surprise an unwary drafter or delight a party who either knew the rules beforehand or benefits from them fortuitously.

Dealing with the assignability issue in contract drafting can be simple. The contract can expressly state that it is assignable in whole, in part, not at all, or only under certain conditions. Difficulties arise, however, when the contract is silent on the issue. The general rule is that contracts are assignable unless the assignment will materially alter the rights or obligations of the nonassigning party.¹¹⁷ In deciding whether the assignment will change the contract materially, contract language can be critical.

The typical scenario involves the nonassigning party complaining that the assignment will substitute an inferior actor for the original contracting party, now the assignor. In one often-cited case, an owner of several pizza shops contracted with a vending machine company to stock and service its vending machines.¹¹⁸ This particular vending company was chosen because its president personally tended to the maintenance, paid commissions in cash, and allowed the shops to keep a key to the machines, making minor adjustments fast and easy.¹¹⁹ When the vending company sold its assets and assigned all its contracts, the pizza shops terminated the agreement.¹²⁰ The court held that the contract was assignable.¹²¹ There would not be a material change in service even though the new company did not pay cash commissions or allow the shops to keep a key on hand.¹²² A deciding factor was that the contract did not mention these benefits which the non-assigning party now claimed were so

117. RESTATEMENT (SECOND) OF CONTRACTS §§ 317-18 (1981); *cf.* Sally Beauty Co. v. Nexxus Prods. Co., 801 F.2d 1001, 1007 (7th Cir. 1986) (holding that a distributorship could not be assigned without the manufacturer's consent, where the intended assignee was a wholly-owned subsidiary of the manufacturer's competitor).

118. *Macke Co. v. Pizza of Gaithersburg, Inc.*, 270 A.2d 645 (Md. 1970).

119. *Id.* at 647.

120. *Id.* at 646.

121. *Id.* at 649.

122. *Id.* at 648.

important.¹²³ The lesson for contract drafters is that all important expectations should be spelled out in the contract; otherwise, it may be difficult to contend later that they were material parts of the bargain that would be altered through an assignment.

Seemingly minor omissions in indemnification or exculpatory clauses can have disastrous consequences as well. Courts strictly construe these clauses and have frequently held that if a party is attempting to insulate itself from liability for its own negligence, the clause must explicitly refer to negligence.¹²⁴ Omitting the word can be fatal. Thus, in one recent case involving injuries sustained at a health club, the court held it was not sufficient to state broadly that the member

expressly agrees that the Club will not be liable for any damages arising from personal injuries sustained by Member or his guest(s) in, on, or about the Club, or as a result of using the Club's facilities and equipment. Member assumes full responsibility for any injuries, damages, or losses which may occur¹²⁵

Since the word "negligence" was not included, the member's negligence action was not dismissed.

Impracticability cases provide another example. In a recurring pattern of cases, a seller who has failed to deliver goods asserts that the breach is excused because the originating source of supply failed to produce them. Several of these cases involve farmers who agreed to sell a fixed amount of an agricultural crop. If the crop is damaged or destroyed by drought, disease, or some other uncontrollable event, the farmer may assert an impracticability defense. Holdings in these cases are divided, but they often turn on contract language. If the contract mentioned the specific farm that would be growing the crops, the farmers tend to prevail. However, if the contract did not mention a particular

123. *Id.* at 647-48.

124. *See Powell v. American Health Fitness Ctr.*, 694 N.E.2d 757, 761-62 (Ind. Ct. App. 1998); *Indiana State Highway Comm'n v. Thomas*, 346 N.E.2d 252, 259-60 (Ind. Ct. App. 1976); *Paro v. Pennsylvania R.R. Co.*, 348 S.W.2d 613, 616 (Mo. Ct. App. 1961); *Longi v. Raymond-Commerce Corp.*, 113 A.2d 69, 74 (N.J. Super. Ct. App. Div. 1955); *Faulk Mgmt. Servs. v. Lufkin Indus., Inc.*, 905 S.W.2d 476, 478 (Tex. App. 1995, writ denied).

125. *Powell*, 694 N.E.2d at 759 (quoting the contract at issue). In holding the exculpatory clause void, the court applied the more general rule that language must be clear and unequivocal to obtain indemnification against one's own misconduct. *Id.* at 761-62; *accord Dow Chem. Fin. Corp. v. Marana Assocs.*, 623 P.2d 836, 838 (Ariz. Ct. App. 1980); *Snowwhite Dust Control Servs., Inc. v. Becker*, 568 So.2d 110, 111 (Fla. Dist. Ct. App. 1990); *Dohm & Nelke v. Wilson Foods Corp.*, 531 N.E.2d 512, 514 (Ind. Ct. App. 1988); *National Hydro Sys. v. M.A. Mortenson Co.*, 529 N.W.2d 690, 694 (Minn. 1995); *Robert H. Smith, Inc. v. Tennessee Tile, Inc.*, 719 S.W.2d 385, 388 (Tex. App. 1986, no writ).

source, farmers tend to lose.¹²⁶ The rationale is this: if a specific farm was mentioned, then adequate production from that farm was a basic assumption upon which the contract was made. If no source was mentioned, no such assumption arose. Thus a casual drafting decision about whether or not to reference the farm location can determine the outcome.

A similar division among courts has developed in so-called "middleman" cases, in which a seller agrees to supply a good to a buyer but then contracts with another party to manufacture the good. If the manufacturer fails to produce the good because of bankruptcy or some other circumstance, the middleman often asserts an impracticability defense. Courts have been more inclined to bind the middleman to the contract if the contract is silent on the source of supply, and to release him if the source is referenced in the agreement.¹²⁷ Again, a casual reference to the primary source can be critical in deciding the case. The lesson for lawyers drafting agreements for middlemen is to mention the originating source whenever possible. The lesson for the ultimate purchaser is to omit any specific reference to the originating manufacturer, unless a particular manufacturer is essential to contract performance.

VI. CONCLUSION

Lawyers who draft contracts naturally want to write the agreement in a way that serves the client's interests. However, those interests may change significantly over time. At the time the agreement is being written, the client's primary objective may be to make sure that the other party agrees to its basic terms without significant change or objection. As the agreement is being performed in the following months or years, the client (or its successors) may become more concerned with how the contract determines the parties' ongoing relationship and shapes the resolution of any performance issues that may arise. When a relationship-ending dispute has occurred, the client will look to the contract as the source of its enforcement rights and obligations. If the dispute culminates in litigation, the client will want to know how a decision maker is likely to interpret the agreement as a blueprint for resolving the matters now contested.

A cautious contract drafter will write the agreement with all of these interests in mind, looking beyond the exigencies of the moment and the client's immediate desires to anticipate how later readers will understand the chosen language, because the contract serves different functions over time. To do this work successfully, the drafter will need to (1) structure the agreement using

126. LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* 755 (6th ed. 1996) (citing cases holding either way).

127. See *Selland Pontiac—GMC, Inc. v. King*, 384 N.W.2d 490, 492-93 (Minn. Ct. App. 1986) (distinguishing *Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc.*, 265 N.W.2d 655 (Minn. 1978)).

words that convey precise meaning to all potential readers, (2) plan carefully for the multitude of potential interpretive issues that might arise, (3) understand and apply the standard tools of contract interpretation, and (4) research the relevant legal rules and precedents that may dictate how subsequent readers will construe the contract. In accomplishing these goals, there is no substitute for hard work and experience. Having the proper forward-thinking mindset throughout the process, however, can go a long way toward ensuring the contract's successful life during all of its phases, and reducing the chances of disappointing interpretations down the road.