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“Top 10” Contract Drafting Dos and Don’ts

Presented by
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Today’s Presenter



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“Top 10” Contract Drafting Dos & Don’ts
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1. Don’t try to Draft the Deal Before you Have a Deal

- The contract drafting stage works best when lawyers are reducing to writing what parties have already agreed to do.
- Drafting is bad time to try to strike deal as lawyers jostle for position and advantage.
- Work from term sheet or letter of intent.

Continued

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1. Don't try to Draft the Deal Before you Have a Deal

- Drafting final agreement while terms remain open is:
 - Speculative – why draft without knowing if an agreement can be reached?
 - Inefficient – inevitably the initial draft will require reworking.
 - Self-defeating – drafting while negotiating will invariably cause tangents and can result in undue attention being paid to matters not truly in dispute.

Continued



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1. Don't try to Draft the Deal Before you Have a Deal

- Take care that your term sheet or letter of intent is not enforceable as the parties' agreement.



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2. Do Think About how Best to Document the Agreement

- Once deal is made, but before drafting begins, it's a good time to slow down and think about best way to efficiently document parties' agreement.
- Use flow charts.

Continued



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2. Do Think About how Best to Document the Agreement

- Many deals will have mandatory documentation, but some do not.
- Make sure you see how documents work together before you start.
- This will help with consistency.



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3. Don't Over-Rely Upon Forms

- Sample documents are important source of tried and true, reliable language.
- Don't get too comfortable with repeatedly used boiler-plate language.
- Forms are no substitute for carefully-tailored documents created to satisfy client's stated needs.



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4. Don't Fail to Rely Upon Forms

- Choosing to create documents or definitions from scratch is inefficient, ignores the lawyer's depth of experience and may also greatly complicate the court's task if asked to interpret the documents using common terms, definitions or terms or art, as courts typically do.



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5. Don't Ignore Definitions

- Defining important terms in contracts can go a long way toward capturing the parties' intentions when the contract was made.
- However, defining terms, and not using those terms consistently through document, just makes a mess.



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6. Don't Draft Around the Deal

- Resist the temptation to draft documents to take advantage of someone else's oversight.
- If the deal has issues, confront them up front.
- Failing to do so will only prolong the negotiations or, worse, serve to tee-up future lawsuit.
- Commercial litigation exists, in part, to clean up what the deal left out.



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7. Do Capture the Whole Deal

- When the deal is being documented, document the whole deal.
- Don't leave out terms to be agreed upon later or to be settled in side deal.
- Again, this is where commercial litigation lives and flourishes.



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8. Don't be Afraid of 'Lawyering up' the Deal

- Choosing not to confront a point of dispute during the drafting stage for fear of losing "deal" can almost ensure that drafting weaknesses will be the focus of a later, and potentially very costly, dispute.
- However, adding layers of complexity is not necessarily the answer.
- Confront and deal with the issues – as they arise. If you cannot, sometimes it's better to walk away.



9. Do be Afraid of 'Lawyering up' the Deal

- Just as it is critical to negotiate all important terms, and to completely document the deal, at some point the document has to stand on its own; you can't negotiate over everything.
- Over-negotiation can often result in needless complexity, ambiguity or inconsistency – all of which must be avoided.



10. Do Prepare for the Dispute

- No one wants to contract for a lawsuit, but lawsuits do happen despite everyone's best efforts.
- Careful consideration should be given to drafting integration language.

Continued



10. Do Prepare for the Dispute

- When disputes happen, the law will often tell parties what their rights and duties are.
- It's better to agree what should happen in a dispute.
- Do this through carefully-drafted default provisions addressing such things as notice, opportunity to cure, time limits to sue, alternative dispute resolution procedures, arbitration, recoverable damages, fee shifting, choice of law and choice of venue provisions.



11. Don't Skip the Proofread

- Drafting sophisticated transactional documents is difficult and, at times, exhausting.
- However, it is not enough to simply review changes as they come.
- Changes may ripple through an agreement, and across multiple documents.
- When a document changes, you need to review WHOLE document.



12. Do Ensure That Client Read & Approve the Documents

- Clients will sometime decide that given amount lawyers are paid it is enough for the lawyers to decide that the final documents are correct.
- Bad assumption
- Lawyers should always do their best, but in the end it is the client's deal. Clients need to read, understand and approve all final documents – before the closing.



Questions?



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Date: June 6, 2019
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Contrary to popular belief, the business landscape is littered with failed deals. Sure, some are high profile and make headlines, but most happen quietly, anonymously like a steady drip of water down the nation's economic drain.

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