

Contract Drafting Dos and Don'ts

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When drafting and potentially enforcing a contract, what you negotiate and how you choose to memorialize the terms in writing can be critical. Some cases actually do turn on a strategically placed comma or semi-colon.

That's why it is always a good idea to work closely with an attorney when documenting your deal – before you sign on the dotted line.

The following are some time-tested dos and don'ts offered as a guide for drafting business agreements.

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 the parties have already agreed to do; it's a bad time to try to strike a deal as the lawyers jostle for position and advantage.
2. **Do think about how best to document the agreement:** Commercial transactions are often complex. Once the deal is made, but before the drafting begins, it's a good time to slow down and think about the best way to efficiently document the parties' agreement.
3. **Don't over rely upon forms:** Sample documents are an important source of tried and true, and reliable, language, but don't get too comfortable with repeatedly used boiler-plate language. Forms are not a substitute for a carefully-tailored document created to satisfy a client's stated needs.
4. **Don't fail to rely upon forms:** Once again, sample documents are an important source of tried and true, and reliable, language. Choosing to create documents or definitions from scratch is inefficient, ignores the lawyer's depth of experience and may also greatly complicate a court's task if asked to interpret the document using common terms, definitions or terms or art as the courts typically do.
5. **Don't ignore definitions:** Defining important terms in a contract 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 the document, just makes a mess.

6. **Don't draft around the deal:** Resist the temptation to draft transactional documents to either take advantage of someone else's oversight or to slip past an agreed upon term you don't like. It will prolong the negotiations or, worse, serve to tee-up a future lawsuit.
7. **Do capture the whole deal:** If a deal is being documented, then document the deal. Don't leave out terms to be agreed upon later or to be settled in a side deal.
8. **Don't be afraid of "lawyering up" the deal:** Choosing not to confront a point of dispute at the drafting stage for fear of losing the "deal," can almost ensure that the drafting weakness will be the focus of a later, and potentially very costly, dispute.
9. **Do be afraid of "lawyering up" the deal:** Just as it is critical to negotiate all of the important terms, and to completely document the deal, at some point the document has to stand on its own; you can't fight over everything.
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 as well as choice of law and forum provisions.
11. **Do plan for possible disputes:** 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 a carefully-drafted default provision addressing such things as notice, opportunity to cure, time limits to sue, alternative dispute resolution procedures, possibly arbitration, recoverable damages and fee shifting.
12. **Don't skip the proofread:** Drafting sophisticated transactional documents is difficult and, at times, exhausting. It is not enough to simply review the changes as they come. Changes may ripple through the agreement. When the document changes, you need to review the WHOLE document.
13. **Do ensure that you read and approve the documents:** Clients will sometime decide that given the amount lawyers are paid is enough to ensure that the final documents are correct. Bad assumption. Lawyers should always do their best, but in the end it is the client's deal. The client needs to read, understand and approve the final documents – before the closing.