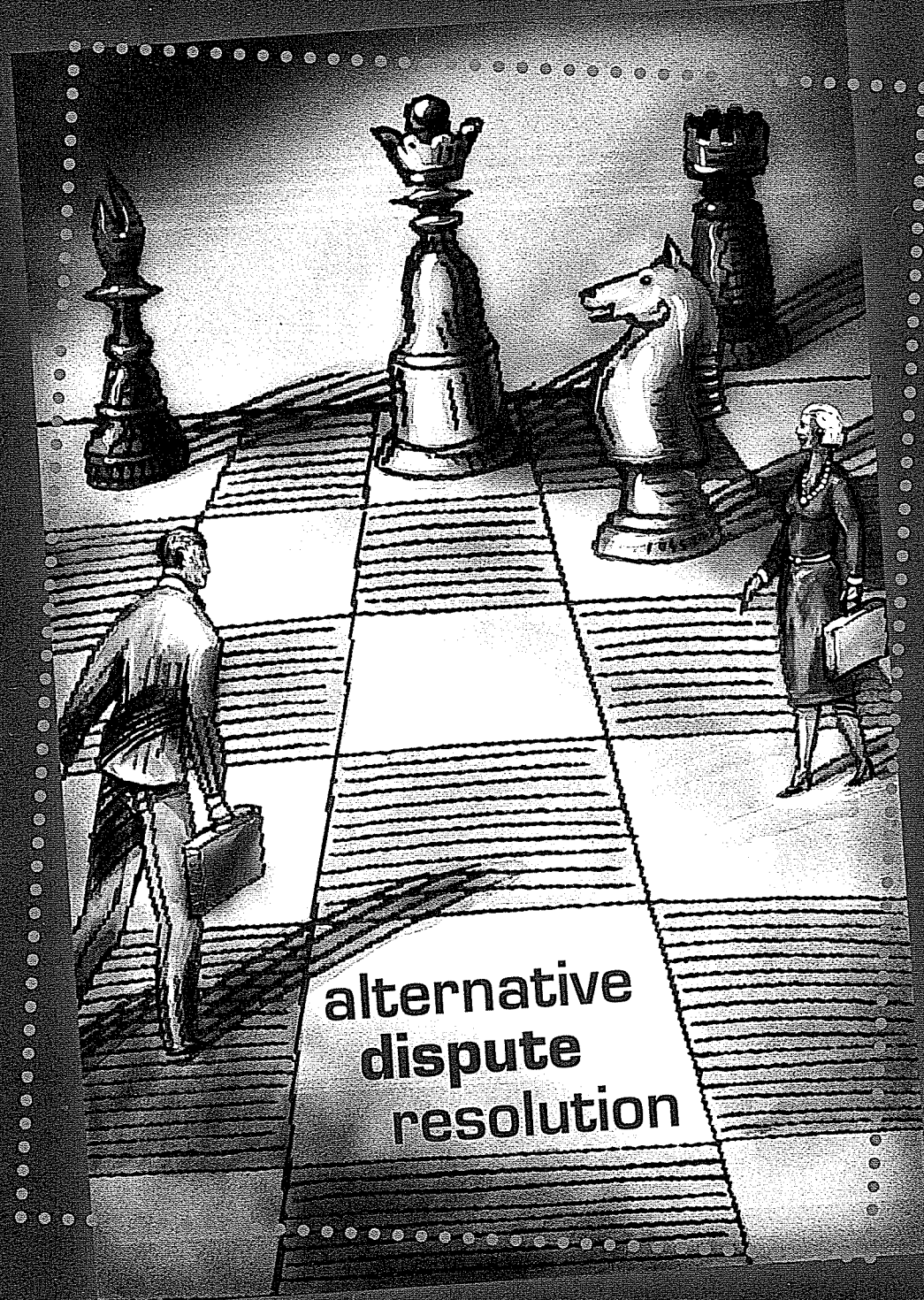


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Drafting the Contract or Settlement Agreement That Stays Out of Court

By James W. Martin

Welcome to the 21st century, where practicing law requires computers and the Internet and where litigation is as costly as ever. Lawyer bills of \$10,000 a month are not unusual in a hotly contested breach of contract lawsuit. With every word, phrase, and sentence carrying the potential for winning or losing, simple logic encourages cautious, thoughtful drafting.

Drafting contracts is actually one of the simple pleasures of practicing law. If you disagree about the pleasure aspect, the following 50 tips for writing settlement agreements and contracts may help change your mind. You could end up writing a contract or settlement agreement that is so clear no one will want to litigate it!

The tips apply to writing all types of agreements: insurance policies, office leases, real estate contracts, sales agreements, employment contracts, equipment leases, and prenuptial agreements. They even apply to stipulations and settlements in litigation, which should be clear enough to short-circuit litigation in the future.

Before You Write the First Word

- 1. Ask your client to list the deal points.** This can be done as a list, outline, or narration and will help the client focus on the terms of the agreement.
- 2. Engage your client in what-if scenarios.** A good contract anticipates many possible factual situations and expresses the parties' understanding in the event those facts arise. Talking to your client about this will generate many issues you may not otherwise consider. In a breach of option contract case last year, a Florida court found that neither party had contemplated the possibility of cost overruns when signing the contract. As a result, parol evidence was properly admitted to assist the trial court in determining "what the parties would have included in the contract had they anticipated the possibility of cost overruns."¹ The appellate court cited another Florida case that also provides guidance to the contract drafter who wants to keep the contract out of court:

"[T]he function of the court is to ascertain, insofar as possible, the intent of the parties . . . Extrinsic evidence is not only admissible on that issue, but is frequently required where the instrument itself does not provide sufficient insight into intent."²

- 3. Ask your client for a similar contract.** Clients often have had similar transactions in the past or have access to contracts for similar transactions.

- 4. Search your office computer or the Internet for a similar form.** Many times you can find a similar form in your own files, possibly one you prepared for another client or negotiated with another lawyer. Starting with an existing form saves time and avoids retyping errors. (See Sidebar on page 52.)

- 5. Obtain forms from books or CD-ROMs.** Typical forms for contracts can be found in form books, such as *West's Legal Forms* (a nationwide set) and *Florida Jur Forms*, as well as in treatises and CLE publications. These can be used as the starting point for drafting the contract or as checklists of typical provisions and wording to include in the contract. Many treatises and form books now come on disk or CD-ROM.

- 6. Don't let your client sign a letter of intent without this wording.** Sometimes clients are eager to sign something to show good faith before the contract is prepared. A properly worded letter of intent is useful at such times, so long as it clearly states it is not a contract but merely an outline of possible terms for discussion.

The First Word

- 7. Start with a simple, generic contract form.** This provides a solid starting point for the structure of the contract. Like a house, a contract must have a good foundation.

- 8. State the full legal names of the parties in the first paragraph.** Obvious as this is, failing to do so is one of the most common problems with contracts. For indi-

viduals, include full first, last name, middle initial(s), and other identifying information such as professional degrees, etc. For corporations, check with the secretary of state where the company incorporated.

9. Identify the parties by “nicknames.” Referring to the party in a shortened form of the full name after the first reference will make the contract easier to read. For example, “James W. Martin” would be called “Martin” in subsequent references.

10. Be careful with shortened names that are also legal terms. Do not use “Contractor” as a party reference unless that party is legally a contractor. Similarly, “Agent” should be used only when you intend for that party to be an agent; if you do, specify the scope of authority and other agency issues to avoid future disagreements.

11. Include a blank for the date in the first paragraph. Putting the date in the first paragraph makes it easy to find after the contract is signed and to describe precisely in other documents (“the May 1, 2001, settlement agreement”).

12. Include recitals to provide background. Recitals are the “whereas” clauses that precede the body of a contract. They provide a simple way to bring the contract’s reader (party, judge, or jury) up to speed on what the contract is about, who the parties are, why they are signing a contract, etc. The first paragraph in the body of the contract can incorporate the recitals by reference and state that they are true and correct, which may avoid a later argument as to whether or not the recitals are a legally binding part of the contract.

13. Outline the contract by writing out and underlining paragraph headings in their logical order. The paragraphs should flow in a logical, organized fashion. It is not necessary to write them all at once; you can write them as you think of them. Try to group related concepts in the same paragraphs or in adjacent paragraphs. For example, outline an employment contract’s initial paragraph headings as follows:

1. Recitals
2. Employment
3. Duties
4. Term
5. Compensation

14. Complete each paragraph by writing the contract terms that apply to that paragraph. This is

simple. Explain, paragraph by paragraph, what the parties agree to do or not do.

15. Keep a pad at hand for notes. It is normal to think of additional clauses, wording, and issues while writing a contract. Jot these down as you write, because they can be easily forgotten. Also keep your client’s outline and other forms in front of you as you write, and check off items as they’re covered.

16. Use repetition only for clarity. Saying the same thing more than once creates ambiguity. Write something in more than one way only if the concept is exceedingly difficult to grasp. If you use an example, consider all possible meanings of the words.

The Writing Process

17. Title the document “contract” or “agreement.” If your client wants a contract, call it a contract. A judge now sitting on the federal bench once ruled that a document entitled “Proposal” was not a contract even though signed by both parties. Say what you mean.

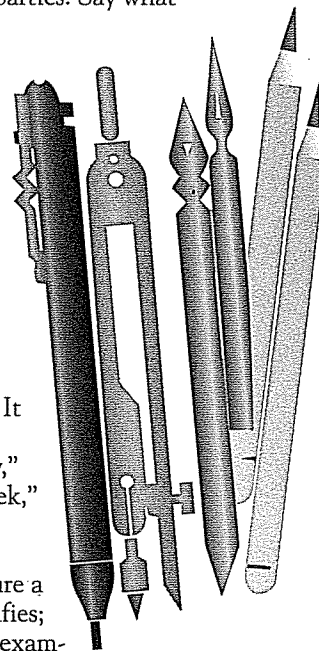
18. Use short sentences. They are easier to understand.

19. Write in active rather than passive voice. Active sentences are usually short and clear. For example: “Sellers shall sell the Property to Buyer” instead of “The Property shall be sold to Buyer by Seller.”

20. Avoid terms like “biweekly.” It can mean both twice a week and every other week (also “bimonthly,” etc.). Instead, use “every other week,” “twice a week,” “semimonthly.”

21. Use modifiers carefully. Be sure a modifier refers to the word it modifies; if it should refer to two nouns, for example, use it twice: “active termites and active organisms” as opposed to “organisms and active termites.”

22. Avoid terms like “lessor” and “lessee.” They are easily reversed or mistyped. Use “landlord” and “tenant” instead. The same applies for lienor and lie-nee, mortgagor and mortgagee, grantor and grantee, licensor and licensee. Instead of saying “Party A” and “Party B,” use your creativity to come up with a



term for a party and use it consistently throughout the contract.

23. Clarify “herein.” Does “wherever used herein” mean anywhere in the contract or anywhere in the paragraph? Clarify when it matters.

24. Enter numbers in words and numerals: ten (10). This reduces errors.

25. When you write “including” consider adding “but not limited to.” Unless you intend the list to be all inclusive, this clarifies that it is merely an example.

26. Don’t rely on the rules of grammar. The rules of grammar you learned in school are not universal, and the judge or jury interpreting the meaning of your contract may have learned different rules. Write a contract so that it is clear and unambiguous.

27. Don’t be creative. Contract writing is not creative writing. Use simple words and common meanings. Write for the nonexpert.

28. Be consistent in using words. If you refer to the subject matter of a sales contract as “goods,” use that term throughout the contract; do not alternately call them “goods” and “items.”

29. Be consistent with grammar and punctuation. Even though the rules you learned may differ from others’, use them consistently. Maintain a style for commas, quotes, and so forth.

30. Consider including choice of law, venue selection, and attorneys’ fee clauses. If your contract is litigated, you might as well give your client some “ammunition” for the fight.

Write for the Judge and Jury

31. Assume the reader is a knowledgeable layperson. If your writing is clear enough for a layperson to understand, it is less likely to end up in court.

32. Define a word by capitalizing it and putting it in quotes. Capitalizing a word indicates that you intend it to have a special meaning. The following are two sample clauses for defining terms: Wherever used in this contract, the word “Goods” shall mean the goods that Buyer has agreed to purchase from Seller under this contract.

Buyer hereby agrees to purchase from Seller ten (10) frying pans, hereinafter called the “Goods.”

33. Define words at first use. Instead of writing a section of definitions at the beginning or end of a contract, define terms and concepts when they first appear. This makes the document easier for the reader to follow.

34. Explain technical terms and concepts. Remember that the parties might understand technical jargon, but the judge and jury who interpret and apply the contract may not. Explain the contract’s terms and concepts within the contract itself.

Keep Your Client Informed

35. Always use a cover letter. This gives you a way to instruct your client on how to use and sign the document.

36. Tell your client the ideas that come as you write. Many ideas will occur to you as you write: what might go wrong with the deal, what might happen in the future, things that happened in the past, ways to better structure the issues. Write these in your letter to the client.

37. Inform your client of the risks. Taking notes for the client as you write the contract will help you draft a letter about the risks and rewards of entering into the contract. Frequently, problems do not

Form Sources

Check the following websites to find copies of a wide variety of forms.

www.flcourts.org:
Self-Help Center, Florida Supreme Court

www.flbar.org/library.html:
Florida Bar Association

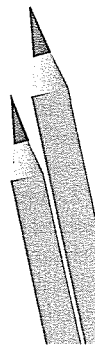
www.gate.net/~wyman/flo.html:
Florida Law Online

www.westgroup.com: West Publishing

www.lexis.com: LEXIS

www.jamesmartinpa.com/pubs.htm:
James W. Martin

www.secst.com: Secretaries of State



become apparent until your focus shifts to wording the contract.

The First Draft

38. Check spelling, paragraph numbering, and cross-references—electronically and by proofing the document. This goes almost without saying today, especially since Microsoft Word now checks spelling and grammar as you type. (Unfortunately, it also changes “per stirpes” to “per stupid” if you fail to watch it closely.) Computer programs also are available that check contract documents for undefined terms. DealProof is packaged with Corel WordPerfect for law offices, and DocProofReader is available for downloading for MS Word 97 and 2000.

39. Have your assistant or paralegal proof the document. Not only will your staff frequently find spelling and grammar errors missed by the automatic spell check, they also can alert you to inconsistencies and confusing sections.

40. Track the drafts. Avoid confusion from the beginning by numbering and dating all drafts at the top of the first page. You might also write “DRAFT” across the face of each page to preclude the possibility of an impatient client’s signing a draft rather than waiting for the final version.

41. Get the client’s opinion. Let the client read the first draft to ensure your drafting is in tune with the client’s wishes.

42. Save all drafts as multiple files on your computer. If you save the first draft on your computer as two files, you will have one file identified as the first draft and the other identified as the current version. This can be done by naming the current version “contract” and the first draft as “contract.d1.” Then, subsequent versions can be named “contract.d2,” “contract.d3,” etc., where the “d” in the extension indicates draft. (Of course, if you’re not using WordPerfect 5.1 for DOS, as I do, you can use long file names to show the contract name, draft number and draft date, such as “Contract Smith Jones draft 2 dtd 6 22 2000.”)

43. Compare subsequent drafts. Saving draft versions makes it easy to compare one version to another, using the computer’s “compare” feature or using the CompareRite computer program. When you compare “contract.d1” to “contract.d2,” save the comparison as

“contract.c21” and print it to show the client what changes were made.

The Final Draft

44. Print the contract on 24-pound bond paper instead of 20-pound copier paper. The heavier bond paper makes it easy to tell the original contract from copies—and will also last longer.

45. Use the same paper for all copies, including amended pages. This can avoid an argument that pages were substituted after the contract was signed.

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

47. Have the parties initial every page. Doing this makes it less likely someone could claim a page was changed after the contract was signed.

48. Have parties and witnesses include addresses with their signatures. This can help locate the witnesses if the contract is contested. (Remember to include two witnesses for commercial leases.)

49. Be sure corporate officers include titles, corporation name, and the word “as.” Failure to do this can result in personal liability of the officer. The proper way to sign in a representative capacity is as follows:

ABC Corporation, a Florida corporation
By: _____

John Jones, as its President

50. Add a notary clause that complies with the notary law of the signing location. ■

Notes

1. Centennial Mortgage, Inc. v. SG/SC, Ltd., 772 So. 2d 564 (Fla. 1st DCA 2000).
2. Hunt v. First National Bank of Tampa, 381 So. 2d 1194 (Fla. 2d DCA 1980).

James W. Martin has practiced law in St. Petersburg, Florida, since 1974. He has written forms books for West Publishing and numerous legal and technology articles. More information appears on his website at www.jamesmartinpa.com.