

2003

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### Recommended Citation

Harold A. Segall, *Drafting: An Essential Skill*, 30 Fordham Urb. L.J. 751 (2002).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol30/iss2/10>

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# DRAFTING: AN ESSENTIAL SKILL

*Harold A. Segall\**

## INTRODUCTION

Needless to say, a good commercial lawyer must be skillful and facile in drafting. Frequently, speed in the preparation of legal papers is desirable, even if an early deadline has not been set.

### I. ARITHMETIC

While all elements of the draft should be impeccable, above all the arithmetic must be correct and make sense. A manufacturer and an independent sales agent or a salesman-employee after some discussion may agree that if sales in a given year are \$2 million or less, the commission will be four percent, and if sales in a given year exceed \$2 million, the commission will be five percent. If the sales in that year amount to \$2,001,000, is it the intent that the commissions on the extra \$1,000 in sales in effect will total \$20,050 (four percent of \$2,000,000 equals \$80,000, and five percent of \$2,001,000 equals \$100,050)? Unfortunately, contracts are frequently written with insufficient thought, and lawsuits follow because a manufacturer did not consider the arithmetical possibilities. A plateau should have been established for the basic rate of commission and a second and higher rate of commission should have been specified for the excess.

### II. CARE IN REVIEWING DRAFTS

When a lawyer prepares a draft, she should review it carefully and make appropriate revisions before it is sent out. It should be read as if it were written by someone else. What questions will a third person ask in trying to understand the meaning? Are there any ambiguities to be cured? Have provisions been made for contingencies that may arise?

It is not unusual for a lawyer to face a deadline in submitting a draft, but an early deadline is no excuse for making an error.

Consider the following advertisement:

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"FOR SALE: Great Dane. Eats anything. Especially fond of children."

It is amazing how people do not take the trouble to read what they have written and to think about the message the writing will convey or misconvey. Here are some other examples:

"Smith's Restaurant: This is the town's most famous restaurant; it has an international reputation and with good reason. The specialty is seafood, including lobsters you can pick out of a tank. They've been at the same address for 100 years."

"This book fills a much-needed gap."

"Thank you for sending me a copy of your book. I'll waste no time in reading it."

For your writing to be polished, you not only must be clear and definite, but also you should avoid gauche composition such as the use of mixed metaphors:

"The hand that rocked the cradle, kicked the bucket."

"Take the bit in your teeth and run with the ball."

"The virgin forest where the hand of man never set foot."

### III. WORD PROCESSING DOES NOT OBVIATE THE NEED FOR CARE

There is a tendency for lawyers not to be as careful in double-checking successive drafts when using word processing systems. A homonym can defeat spell-check. Proofreading is important, but copy-reading is even more important. Above all, you must concentrate on reading a final draft as if you were reading the document for the first time. We have all seen unbelievable bloopers over the years. There is no use in blaming mistakes on the secretary or typist. It is up to the draftsman to correct mistakes. Even so, absurd blunders seem to be occurring more frequently now than in prior years. Everyone has a favorite list. Here are some I have encountered:

- an anti-nuptial agreement
- an agreement of the same tenure
- the canines of ethics
- a smoke detective
- there will be no smoking in the pubic regions.

There is no question that the new word processing equipment is very helpful in making revisions with dispatch. Nevertheless, a lawyer must be as careful as ever. Needless to say, good work can be tarnished by the failure to spot errors. A large and well-re-

garded law firm prepared a certificate of incorporation that stated as the corporate purpose, “to engage in any unlawful act or activity for which corporations may be organized under the general corporation law of Delaware.”<sup>1</sup> Errors such as this come from sloppy proofreading and are seriously embarrassing.

One of the most costly mistakes in many years occurred in the preparation of a mortgage for the Prudential Insurance Company on eight container ships owned by the United States Lines.<sup>2</sup> The mortgage was supposed to have been in the amount of \$92,885,000.<sup>3</sup> When the mortgage was prepared, the final three zeros were inadvertently dropped.<sup>4</sup> Three years later, Prudential lost millions of dollars when the ship company filed for bankruptcy.<sup>5</sup> As a result, Prudential filed a \$31,000,000 lawsuit against the three law firms that helped prepare the document.<sup>6</sup>

#### IV. VISUALIZING FUTURE POSSIBILITIES AND PROBABILITIES

##### A. Bridge on the River Kwai

The ability to draft well is founded on the ability to think clearly and to visualize future possibilities. Many of you will remember the exciting motion picture, *Bridge on the River Kwai*.<sup>7</sup> The star, William Holden, entered into a contract pursuant to which he was to receive ten percent of the gross of the film’s earnings.<sup>8</sup> In view of Holden’s high earnings and tax situation, the request was made on his behalf, and incorporated in the contract, that there be a limit of \$50,000 to be paid in any one year, with the excess to be deferred.<sup>9</sup> What happened, however, was that in a few years the picture made between \$20 and \$30 million, and Holden’s accrued share at that time was between \$2 and \$3 million.<sup>10</sup> As the account stood, it would have taken Holden at least forty years to receive all

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1. The referenced certificate of incorporation was drafted in 1981 by a well-known Pittsburgh law firm for an affiliate of Oneida Knitting Mills, namely, Oneida Holdings, Inc.

2. *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318, 319 (N.Y. 1992).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*; see David Margolick, *At the Bar; How Three Missing Zeros Brought Red Faces and Cost Millions of Dollars*, N.Y. TIMES, Oct. 4, 1991, at B16.

7. *BRIDGE ON THE RIVER KWAI* (Columbia 1957).

8. See TIME, Jan. 19, 1959, at 66.

9. *Id.*

10. *Id.*

of his money.<sup>11</sup> In the meantime, Columbia Pictures was able to invest the proceeds that eventually were slated to go to Holden and make well over \$50,000 a year, thus, in effect, paying Holden nothing for the profit participation.<sup>12</sup> It would have been easy enough to have provided on Holden's behalf that the star would receive not more than \$50,000 a year or, if greater, a specified percentage of his balance. Holden's contract for the *Bridge on the River Kwai* illustrates how important it is to think of all possibilities when negotiating a contract.<sup>13</sup>

### B. World Chess Match

Another example of failure to visualize possibilities and even probabilities occurred when a world chess match between Anatoly Karpov and Gary Kasparov was planned. According to the agreed upon terms, the match would go on until one of the contestants won six games.<sup>14</sup> There was no provision for a limit on the number of games that would facilitate the declaration of a winner when the number of games reached that limit.<sup>15</sup> The match went on for forty-eight games, including forty draws.<sup>16</sup> Karpov was leading five games to three when the president of the International Chess Federation halted the championship match.<sup>17</sup> This is a clear example not of a poor statement of the conditions, but rather of a failure to visualize the possibility of a very protracted match between two even contestants resulting in a great number of draws.<sup>18</sup>

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11. *Id.*

12. *Id.*

13. *Id.* For more information on this situation, see Harold A. Segall, *The Lawyer's Role in the Client-Lawyer Team* (2000) (unpublished course materials, Fordham University School of Law).

14. Robert Byrne, *Chess Title Match Begins Today*, N.Y. TIMES, Sept. 10, 1984, at C22; *Five Month Chess Championship Ended*, FACTS ON FILE WORLD NEWS DIGEST, Jan. 22, 1985, at 126; Jane Leavy, *Rooked! Chess Fans Cry Foul; Official Checkmate Causes Dismay and Bewilderment*, WASH. POST, Feb. 16, 1985, at C1.

15. Byrne, *supra* note 14, at C22; *Five Month Chess Championship Ended*, *supra* note 14, at 126; Leavy, *supra* note 14, at C1.

16. Byrne, *supra* note 14, at C22; *Five Month Chess Championship Ended*, *supra* note 14, at 126; Leavy, *supra* note 14, at C1.

17. Byrne, *supra* note 14, at C22; *Five Month Chess Championship Ended*, *supra* note 14, at 126; Leavy, *supra* note 14, at C1.

18. Byrne, *supra* note 14, at C22; *Five Month Chess Championship Ended*, *supra* note 14, at 126; Leavy, *supra* note 14, at C1.

### C. Malpractice Suit Against the Homestake Accountants

An insurance company furnished a malpractice policy to the accountants who served Home-Stake Mining Company.<sup>19</sup> The policy provided a modest cap for liability with respect to any one claim.<sup>20</sup> When the Home-Stake Mining Company's extensive fraudulent activities came to light, however, hundreds of claimants asserted a cause of action against the accountants.<sup>21</sup> The insurance company suffered an enormous loss because the policy did not contain an overall limitation of liability for all claims in the aggregate.<sup>22</sup>

## V. A COLLOQUY ON THE LENGTH OF A CONTRACT

A client sometimes expresses a request for a contract to be drafted that is short and simple.

Of course it usually turns out that the client has in mind a number of contingencies.

Furthermore, the client then decides that the lawyer should include certain options suggested by the lawyer.

After discussion, it turns out that the client wants to be fully protected in certain events.

Etc., etc.

But make it short and simple!

### A. Binding Contract or Non-binding Proposal

It is surprising how much controversy and resultant litigation have centered on whether or not there was, on the one hand, a legally enforceable binding contract, or, on the other hand, only a proposal constituting a non-binding preliminary agreement, or an "agreement in principle." Few things can be as devastating to a business as finding out that it is bound to a contract unintentionally, or, conversely, finding out that it did not have a contract when it thought it did. In November 1985, a Houston jury awarded Pennzoil \$10.53 billion in its complaint against Texaco.<sup>23</sup> The gravamen of the complaint was the accusation that Texaco had induced Getty Oil to breach an "agreement in principle" for Pennzoil to purchase almost forty-three percent of Getty common

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19. See *In re Home-Stake Prod. Co. Sec. Litig.*, 76 F.R.D. 337, 341-43 (N.D. Okla. 1975).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 784 (Tex. App. 1987), *rev'd and remanded*, 481 U.S. 1 (1987).

stock for \$2.6 billion.<sup>24</sup> The opinion of the majority of learned scholars was that the award was incredibly erroneous.<sup>25</sup> More relevant to our topic is the point that the outcome hinged largely on whether or not Pennzoil and Getty had entered into a binding contract.<sup>26</sup>

It is essential for the client to decide whether a proposal to a customer is preliminary or whether a binding contract is to be submitted that, upon acceptance, will govern the future legal relationship between the parties.

Let us assume that a middle-level executive in the construction business sends a proposal to a manufacturing company to erect on the land owned by the manufacturing company a building in accordance with the submitted plans and specifications at a named price. Let us further assume that the following week the executive receives a letter that says:

“Done. We agree. Start construction.”

To the embarrassment of the executive, she realizes that final approval has not been received from the superior who has to coordinate the timetable for the construction projects the company agrees to take on, and the legal department has not been called upon to supply all of the boilerplate that should be included in a construction contract. What happens now? Does the executive get in touch with the customer to state that the proposal was not a binding contract? Should she say that she was just waiting for a response, with the thought that if the proposal was satisfactory a mutually acceptable agreement would be hammered out? How will the executive look in the eyes of management if the customer insists that there is a binding contract and threatens suit if the company does not perform in accordance with the proposal?

The executive would not be in this predicament if the submission to the customer was clearly designated as a non-binding proposal for discussion purposes. A non-binding proposal for the situation outlined above would be couched in the following terms:

“This will confirm our interest in constructing a building for you. Our proposal is contained in the attached outline. If the proposal is agreeable to you, we will be happy to meet to discuss the proposal and to work out a mutually satisfactory contract.

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24. *Id.* at 785-87.

25. *Id.*

26. *Id.* at 784.

It is understood and agreed that neither party is bound unless and until a formal agreement is signed by both parties.”

On the other hand, if it is desired that the letter will constitute a binding contract, it should contain the following conclusion:

“If the foregoing correctly sets forth our agreement, will you please sign both copies of this letter and return one executed copy to us.”

By following the indicated procedure and clearly stating that the letter proposal is to be binding or non-binding, the possibility of having a costly lawsuit can be avoided.

Suppose that your client is a television motion picture producer who has produced a pilot film for a series of television motion pictures. A contract is being negotiated under a deadline to license a network broadcast of the thirty-nine picture series (the other thirty-eight pictures are to be produced on the same theme as the pilot film, and in accordance with agreed specifications) for \$40,000,000. It is impossible to turn out a comprehensive contract in a day or two in view of the inherent complexities with respect to renewal options, commercial appearances, merchandising tie-ins, options on successive series, etc.

The lawyer for the agency prepares a complete but comparatively short agreement to be signed by the parties, with the following concluding paragraph:

“It is understood that a formal and detailed contract which we shall prepare after the execution of this letter agreement shall be executed between us incorporating the basic terms and provisions set forth above and such other provisions as are usually included in agreements of this nature executed by us.”

The quoted paragraph is too one-sided to accept. Although your client is anxious for a binding agreement, what change would you propose in the final paragraph?

Here are two possibilities:

“It is agreed that the foregoing shall constitute the contract between us unless and until a more definitive agreement is executed.”

or

“It is understood that a formal and detailed contract, to be prepared by us after the execution of this letter agreement, shall be executed between us incorporating the basic terms and provisions set forth above and such other provisions as are mutually agreed upon between us.”

Would a bank executive regard the letter as changed with either version of a concluding paragraph as constituting a binding commitment on the part of the sponsor to serve as the foundation for a very substantial loan to the producer?

It is obviously essential that in the heat of negotiations the lawyer must clearly think through what the client is trying to achieve and strive to get the necessary wording in the contract.

### **B. Knicks vs. Nets**

In 1977, the New York Knicks and the New Jersey Nets were engaged in a negotiation that would permit the Nets to play basketball games without interfering with the Knicks' franchise.<sup>27</sup> A contract was entered into that resulted in a very important legal battle. The pivotal clause in the contract that gave rise to the dispute was as follows:

"The Nets shall have the right, without further approval of Madison Square Garden Center, to play their home games at any location within the Nets' home territory in New York other than in the counties of New York, Bronx, Queens, Kings and Westchester or at any location in the State of New Jersey."

If you were a judge, how would you decide whether the clause permitted the Nets to play in New Jersey? If you had been given the assignment of drafting the clause on behalf of the Knicks, how would you have worded the permission granted by the Knicks to the Nets?

To answer the latter question, you could have added the word "State" after "New York" and put a period after Westchester. The following sentence could also have been added:

"In no event shall the Nets play their home games anywhere in the State of New Jersey."

As so changed, the clause would have read as follows:

"The Nets shall have the right, without further approval of Madison Square Garden Center, to play their home games at any location within the Nets' home territory in New York State other than in the counties of New York, Bronx, Queens, Kings and Westchester. In no event shall the Nets play their home games anywhere in the State of New Jersey."

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27. For more information about this situation, see Rick Wolff, *Nets Battle in a New Court*, N.Y. TIMES, Jul. 12, 1977, at A39.

If the clause had been drafted as indicated, the Nets would not have had the slightest basis for contending that the contract permitted them to play in New Jersey.

Here is another version that would have eliminated any possibility of a problem for the Knicks:

“The Nets shall not have the right to play their home games, and they agree not to play their home games, at any location in any of the following places:

- (1) The counties of New York, Bronx, Queens, Kings and Westchester in New York State:
- (2) The State of New Jersey.”

No report of a court decision is available in the legal fight between the Nets and Knicks. The controversy was probably settled on undisclosed terms. It is hard to believe that an organization like Madison Square Garden could have been so sloppy as to enter into a contract with a glaring ambiguity. Currently, the Nets play at the Continental Airlines Area at the Meadowlands in New Jersey. Presumably, the settlement terms reflected the Knicks' poor drafting disadvantage.

