FROM DEAL TO DISPUTE: WHY CONTRACT CLARITY MATTERS

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In the world of business transactions, good drafting can make or break a deal. Your authors are former law firm colleagues with substantial business litigation and transactional experience. Robyn is now a mediator who frequently works with parties entangled in business and contract disputes, and sees firsthand how ambiguity, assumptions, and overlooked details in written agreements evolve into lawsuits. April, a former securities and transactional attorney, is a Dean and full-time law professor who teaches Contracts and Transactional Drafting, focusing on the front end of legal practice. While transactional attorneys aim to prevent problems before they arise, certain recurring drafting mistakes continue to lead parties into litigation.

This article explores common contract drafting pitfalls, using real-life examples from our professional experiences to underscore the importance of precision.[01] It also offers tips for attorneys seeking to avoid contracting missteps based on law and practice. Lastly, we take a brief look at how mediation can step in as a valuable safety net when contract drafting misses the mark, helping parties resolve disputes without litigation.

I. AMBIGUITY IN TERMS AND SPECIFICATIONS

Case Example: A homeowner purchased cabinets and hardware to redo her kitchen. She believed she was ordering custom cabinets with a high-gloss finish and raised paneling. When the cabinets arrived, they were matte and flat panel. The cabinet company insisted it had delivered exactly what was specified in the contract. The issue? The contract signed by the homeowner did not provide the details about the finish or panel style. Rather, the details were in a cad drawing allegedly reviewed by the homeowner but never agreed to in writing.

This seemingly small oversight led to a contract dispute that required mediation. The homeowner felt misled. The cabinet company felt unfairly blamed for the homeowner not paying attention to what she was ordering for her price point. In the absence of clear written specifications, both parties had different assumptions about what was agreed upon.

Law: The courts will use extrinsic evidence to interpret ambiguous terms.[02] Whether extrinsic evidence comes in, however, is often a topic of dispute between the parties. The issue is, were the terms truly ambiguous?

Tip for lawyers: Spell out exact terms, especially product features, specifications, and deliverables, and have both parties sign the contract that contains these specific terms. Visual exhibits (like photos or product numbers) can also be helpful.

II. FAILURE TO REFLECT VERBAL PROMISES IN THE WRITTEN AGREEMENT

Case Example: In a startup financing dispute, the plaintiff invested substantial money in exchange for equity in the company. He also believed he would be offered a senior executive position; a promise allegedly made during negotiations. The employment term, however, never made it into the final agreement. Plaintiff signed the agreement, believing that the representations made

during the discussions were still part of the deal. When no job materialized, he sued for fraud.

The defendant company argued that the written agreement was fully integrated and did not include an employment provision. The plaintiff claimed he was intentionally misled into investing in the company, which was aware he needed to obtain employment. The resulting litigation was expensive (nearly put the company into bankruptcy and prevented other potential investors from moving forward) and emotionally charged.

Law: In general, the parol evidence does not allow the admission of prior contradictory or supplementary discussions or writings to a fully integrated agreement.[03] However, there are exceptions to the parol evidence rule, including instances involving allegations of fraud or misrepresentation, as illustrated in this case example. Under the Restatement (Second) of Contracts, parol evidence is admissible to establish that a contract is void or voidable due to fraud, misrepresentation, duress, or other invalidating cause.[04]

Tip: If it's important, include it in the contract. Verbal understandings should be documented in the contract or explicitly disclaimed.

III. LACK OF DEFINED PERFORMANCE METRICS OR DEADLINES

Case Example: In a distribution agreement between a manufacturer and a regional distributor, the contract stated that the distributor would make "best efforts" to promote and sell the product. However, it did not include sales targets, deadlines, or marketing benchmarks. A year later, the manufacturer was disappointed by low sales and terminated the contract, prompting a breach of contract lawsuit.

The parties had very different views of what "best efforts" meant. The manufacturer assumed aggressive marketing; the distributor felt it had met reasonable expectations.

Law: *See Supra* section 1 "Law."

Tip: Avoid vague performance language. Define "best efforts" or substitute measurable performance standards that both parties understand and accept. Indeed, there have been several cases dealing with the phrase "best efforts," opening the door to dispute and litigation if not clearly defined.[05]

IV. POORLY DRAFTED ARBITRATION CLAUSES

Arbitration agreements in the employment context are a frequent source of post-hiring litigation, especially when they're poorly drafted or fail to meet California's legal requirements. Consider a scenario where a company hires a highly sought-after executive for a lucrative position. As part of the onboarding package, the employee is asked to and does sign an arbitration agreement. Months later, the relationship sours, and the employee brings claims for wrongful termination, discrimination, and unpaid bonuses. The company seeks to compel arbitration, but the employee challenges the agreement's enforceability. Why? Because the agreement fails to satisfy the standards outlined in *Armendariz v. Foundation Health Psychcare Services, Inc.*,[06] one of the leading California cases on employment arbitration. Specifically, the agreement does not clearly provide for all remedies available in court or for adequate discovery, and it requires the employee to split the arbitration costs.

Law: If contract or term is unconscionable at the time it is made, the court may decline to enforce the contract or any unconscionable part of the contract.[07]

Tip: These omissions can render the agreement unconscionable and unenforceable. Drafting errors like these create immediate threshold litigation, often in the form of a motion to compel arbitration, that can delay resolution and rack up legal fees before the merits of the case are even addressed. For employers, investing in a compliant, carefully drafted arbitration agreement on the front end can prevent costly and embarrassing missteps down the road. Early recognition of such issues can help steer parties toward practical resolution, avoiding unnecessary procedural fights.

V. OVERUSE OF BOILERPLATE LANGUAGE WITHOUT CUSTOMIZATION

Boilerplate clauses are often overlooked or copy-pasted without adjustment. Sometimes, they are even discounted or agreed to by a sales team to get business, without any realization of their legal ramifications down the road. However, terms like indemnity or limitation of liability clauses can have significant consequences if not specifically tailored and the costs and benefits are thoroughly analyzed.

Law: Duty of competence: A lawyer should represent a client with legal knowledge, skill, thoroughness, and preparation necessary for representation.[08]

Case Example: A personal care beauty product manufacturer contracted with an employment staffing agency to provide temporary staffing workers during peak demands. The staffing agency agreed to the manufacturer's "standard" agreement, which included the staffing company defending and indemnifying the manufacturer for any employment-

related claim that involved a staffing agency employee, even though there was no staffing agency representative onsite at the manufacturer's facility. When one of the staffing agency's employees filed a wage and hour class action lawsuit, the manufacturer demanded the staffing agency defend and indemnify it in the lawsuit. The staffing agency filed a declaratory relief action, seeking a determination that it had no obligation to defend and indemnify the manufacturer because it had no control over the alleged wage and hour violations at issue. Not only did the parties have to defend against the class action lawsuit, they also had to litigate the defense and indemnity obligations for the underlying lawsuit. Essentially, the parties were fighting a two-front war at the same time—greatly increasing costs, emotional toll, and destroying the parties' business relationship.

Tip: Review "standard" provisions critically. Make sure your client understands what the terms mean; even if the "deal points" seem good, is the contract as a whole something they really want? (i.e., do the benefits outweigh the potential risks). Boilerplate isn't one-size-fits-all.

FROM PREVENTION TO RESOLUTION

Even the most well-intentioned agreements can turn adversarial when expectations aren't aligned on paper. As a mediator, Robyn is often brought in to help parties unwind these disputes, but by then, they've already spent time, money, and emotional energy.

For transactional attorneys, avoiding litigation starts with precise drafting. It also includes managing client expectations and documenting the full scope of the deal. Contracts are more than just a formality; they can govern the parties' relationship for years to come.

When disputes do arise, however, mediation offers a confidential, cost-effective path forward. For instance, early mediation can be a highly effective tool in contract disputes, particularly when engaged before significant litigation costs are incurred. By intervening early, before depositions are taken, discovery battles begin, or expert fees accumulate, parties preserve both financial and emotional resources. Transactional attorneys may want to consider including mediation clauses into their contracts so that the parties can explore this option prior to litigation. Attorneys can also consider including provisions that penalize the parties for not pursuing alternative dispute resolution forums prior to litigation. For instance, many commercial and real estate contracts in California also contain attorney's fees provisions that require the parties to mediate before filing suit. Failing to do so can result in a waiver of the right to recover fees, even if the party ultimately prevails. Early mediation offers a low-risk opportunity to assess the strength of each side's position, clarify the real issues in dispute, and explore creative resolutions—often avoiding the expense, delay, and uncertainty of protracted litigation.

In sum, even well-drafted contracts can give rise to disputes when language is unclear or expectations diverge. Mediation offers a focused, flexible forum to help parties resolve those issues privately and constructively, and often before litigation escalates.

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01 To preserve confidentiality, all situations have been generalized and identifying details have been altered.

02 *See* Restatement (Second) of Contracts § 212 (1)-(2); Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33 (1968).

03 *See* Restatement (Second) of Contracts § 213(2); U.C.C. § 2-202 (for contracts for the sale of goods); Cal. Civ. Proc. Code § 1856(a).

04 Restatement (Second) of Contracts § 214(d).

05 *See, e.g.*, Cal. Pines Prop. Owners Ass'n v. Pedotti, 206 Cal. App. 4th 384, 395 (2012) (contract required rancher to use best efforts to maintain water level in reservoir; held promisor must use diligence of a reasonable person under comparable circumstances, not the diligence required of a fiduciary); ***see also*** Samica Enters., LLC v. Mail Boxes Etc. USA, Inc., 637 F. Supp. 2d 712, 717-718 (C.D. Cal. 2008) (when franchisor agreed to use "best efforts" to ensure its affiliate gave franchisee discounts and incentives on franchisee's wholesale cost of services, dispute arose over whether franchisor met the "best efforts" standard; court granted summary adjudication on breach of contract claim when franchisee could not prove affiliate would have extended greater incentives had franchisor not allegedly breached their obligation).

06 Armendariz v. Foundation Health Psychcare Servs., Inc., 24 Cal. 4th 83 (2000).

07 Restatement (Second) of Contracts § 208 (Unconscionable Contract or Term); U.C.C. § 2-302; Cal. Civ. Code § 1670.5.

08 Model Rules of Pro. Conduct r. 1.1 (Competence); "A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence." Cal. Rules of Pro. Conduct r. 1.1(a).