PRACTICAL TIPS FOR DRAFTING CONTRACTS AND AVOIDING ETHICAL ISSUES

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I. INTRODUCTION

A newly licensed attorney responds to an ad for a "transactional attorney" believing she has a good chance to be the selected candidate given her prior experience. When she calls to inquire about the job, the first question the recruiter asks is, "What experience do you have negotiating transactions?" The newly licensed attorney replies, "My background in transactions is extensive. I negotiated numerous healthcare information technology contracts as a consultant before I started law school and since becoming licensed, I've drafted and/ negotiated all sorts of contracts – from Employment and Severance Agreements to License and Purchase Agreements." The recruiter replies, "All attorneys draft and negotiate contracts. What transactions experience do you have?"

Based on the recruiter's response, he evidently considered only company mergers and acquisitions to be worthy of being called "transactions;" any and all other "deals" belonged in some other (probably lesser) category. Without question however, the two things these other "deals" and the recruiter's "transactions" have in common is that (1) most, if not all of them ultimately wind up formalized in some sort of written agreement, and (2) all of them are transactions. Still, his claim that all attorneys draft and negotiate contracts is absolutely correct. Even attorneys who spend the majority of their time trying cases occasionally find themselves drafting contracts – they're just called "settlement agreements" in the litigation world.

Despite the fact that all attorneys wind up drafting contracts at some point in their careers, very few of them, even those who consider themselves transactional attorneys, learned ***how*** to draft them in law school. Unlike other types of writing – legal or otherwise – contracts "do not entertain, do not convey information or ideas, and do not try to persuade. "[1] Why then is it so difficult to draft them?

Mature law students, those who had some business experience prior to law school, might have been exposed to contract drafting in their prior career, but even they concede that being exposed to drafting contracts does not necessarily prepare them to ***competently*** draft them. More often than not, the best way to develop the skills and expertise they need to competently draft contracts is to actually draft them; in other words, obtain some "on the job" training.

The good news is, most attorneys will be exposed to all sorts of contracts regardless of whether they are part of a large law firm, in a mid-size or small law firm, a solo practitioner, or even an in-house counsel for a business. The bad news is that there are very few (if any) opportunities for new lawyers to find someone to train him/her to competently draft contracts, even within the new lawyer's own office.

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[1] Peter Siviglia, *Designs for Courses on Drafting Contracts*, 12 SCRIBES J. LEGAL WRITING 89, 89 (2008–2009).

No two businesses are the same, the client objectives associated with each deal vary widely (sometimes at different times in the same deal), and a provision that is acceptable to one client can be the source of a contentious dispute for another. Every contract is different – even though every contract uses the same contract concepts.[2] The process of creating a contract, too, is relatively straight-forward and simple, but with some clients, may actually be (or become) convoluted and complex. Achieving expertise in contract drafting is partly a function of the types, how many, how complex, and the length of contracts the attorney drafts, but it's also dependent on the training, skills, and knowledge the attorney obtains along the way and the clients the attorney represents. It's also important to recognize some of the traps and pitfalls that await even an experienced transactional attorney – so these problems can be resolved quickly or avoided if possible. This article describes why and how drafting contracts differs from drafting other legal documents, presents a few of the more common ethical traps an attorney drafting contracts might encounter, and provides practical tips designed to help attorneys who draft, review, and change contracts minimize the impact of or avoid making mistakes altogether.

II. DRAFTING CONTRACTS VS. DRAFTING OTHER LEGAL DOCUMENTS

There are at least three different forms of writing: (1) *creative writing*, which includes "novels, plays, and poetry;" (2) *expository writing*, which includes "treatises, letters, memorandums [sic], and briefs;"[3] and (3) *legal drafting*, the form that is used when drafting contracts. All three are used by attorneys, but only the last two are used by practicing attorneys.[4]

Expository writing, sometimes referred to as *legal writing*, is distinguishable from contract drafting, which is a specific subcategory of legal drafting.[5] Traditionally a required course at most law schools, legal writing classes teach law students to write letters, briefs, and legal memoranda;[6] writing that explains and persuades.[7] On the other hand, legal drafting, specifically contract drafting, is rarely taught – unless as a small component of a legal writing or survey

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[2] TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 9 (2nd ed. 2013). According to Professor Stark, there are seven "building blocks" that serve as the foundation of every contract: (1) Representations, (2) Warranties, (3) Covenants, (4) Rights, (5) Conditions, (6) Discretionary authority, and (7) Declarations. *Id.*

[3] Siviglia, *supra* note 1, at 89.

[4] Erle Stanley Gardner, John Grisham, Scott Turow, Meg Gardiner, Sir John Clifford Mortimer, CBE, QC, Richard North Patterson, Wallace Stevens, John Buchan, Louis Auchincloss, and Henry Fielding are lawyers who specialize in creative writing. Richard Davies, *10 Lawyers Who Became Authors*, ABEBOOKS (Apr. 6, 2009), http://www.abebooks.com/books/john-grisham-perry-mason/authors-literary-lawyers.shtml.

[5] The other subcategories included in *legal drafting* are instruments, statutes, and regulations. *See* Wayne Schiess, *What Plain English Really Is*, 9 SCRIBES J. LEGAL WRITING 43, 44 (2003–2004).

[6] *See* Jane Scott & Charles Fox, *Contract Drafting in 90 Minutes*, 12 TRANSACTIONS: TENN. J. BUS. L. 7, 16-17 (2011); Schiess, *supra* note 5, at 44.

[7] Brian M. Kubicki, *The Practice of Writing*, RES GESTAE, Sept. 2008, at 40, 40.

class[8] – and results in documents that are "unmistakable [and] not interesting."[9] Legal writing focuses on historical events; legal drafting on future behavior.[10] Legal writing describes "a specific event that occurred and its known ramifications;"[11] legal drafting "must anticipate myriad circumstances that may arise as the future unfolds."[12] Statutes and cases are cited, quoted, and argued in briefs and pleadings; contracts may include citations to statutes, but neither quote nor argue them and almost never reference specific cases.[13] Another key difference between legal writing and legal drafting is that each word or provision in a contract may be subjected to greater scrutiny and challenge by opposing counsel whereas the meanings of words or phrases in a brief or pleading are rarely the primary target or focus of even the most zealous advocate.[14] But the most significant differences between legal writing and legal drafting are (1) the intended audience of each form of writing; and (2) the way each type of document is created and produced.

Memoranda, briefs, and pleadings are designed to be read by lawyers and judges; contracts should be written so they can be read, understood, and used by non-lawyers.[15] Contracts are simply a "set of instructions for a transaction. . ., or for a relationship. . ., or for a combination of the two."[16] Additionally, drafting contracts, unlike drafting documents that are designed to explain and persuade, is a much more collaborative process.[17] Rarely are contracts drafted from scratch.[18] Instead, lawyers look for similar contracts they or others have drafted in the past and then use these prior contracts as a starting point from which they create new and unique contracts that accurately describe a particular deal and the parties' relationship in that deal.[19] Similarly, during the process of contract negotiations, lawyers from both sides of the deal contribute the language that is ultimately included in the final contract.[20]

One author explains, "we have to learn different skills for different styles of writing. We have to set aside the habits developed under one style when we write in another. Otherwise, our briefs become unpersuasive and our contracts imprecise."[21] He further states that attorneys also

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[8] *See* LENNÉ EIDSON ESPENSCHIED, CONTRACT DRAFTING: POWERFUL PROSE IN TRANSACTIONAL PRACTICE 1 (2010) (explaining that law schools have only recently begun to offer legal drafting courses); Gregory M. Duhl, *Conscious Ambiguity: Slaying Cerebus in the Interpretation of Contractual Inconsistencies*, 71 U. PITT. L. REV. 71, 74-75 (2009) (hereinafter "Duhl-2009") (stating that law schools fail to train students in contract drafting); Siviglia, *supra* note 1, at 89 (suggesting that one of the reasons for not offering separate courses to teach legal drafting is because such courses are difficult to teach and labor-intensive).

[9] Kubicki, *supra* note 7, at 40.

[10] ESPENSCHIED, *supra* note 8, at 6.

[11] *Id.*

[12] *Id.*; *see also* Harold A. Segall, *Drafting: An Essential Skill*, 30 FORDHAM URB. L.J. 751, 753 (2003).

[13] ESPENSCHIED, *supra* note 8, at 7.

[14] *Id.*

[15] *Id.*

[16] Siviglia, *supra* note 8, at 90.

[17] *See* ESPENSCHIED, *supra* note 8, at 7.

[18] *See id.*

[19] *See id.* at 7-8.

[20] *See id.* at 8.

[21] Kubicki, *supra* note 7, at 40 (2008).

"have an ethical obligation to write well."[22] This obligation is expressed in the ABA Model Rules of Professional Conduct (the Model Rules),[23] albeit "only tangentially or by analogy"[24] as the Model Rules are biased towards and "primarily address ethical issues that arise in litigation."[25]

III. COMMON ETHICAL ISSUES IN CONTRACT DRAFTING

The Model Rules were designed to meet the specific challenges that arise in an adversarial system. "[T]hey presume adverse parties, zealous advocates, and a neutral tribunal."[26] By contrast, much of a transactional attorney's work is cooperative, not competitive.[27] Drafting a contract that is fair to both parties is paramount, as is ensuring that the contract accurately reflects the intent of each of the parties to it.[28] "Litigation is audible, visible, and takes place in a public forum where the proceedings are recorded. Transactions are generally negotiated in the privacy of a conference room, and contracts drafted in the privacy of an office. Because no record is made, disciplining a lawyer becomes much more difficult."[29] Still, the Model Rules provide some guidance to the transactional attorney in three specific areas: competence, division of responsibilities, and avoiding fraud.

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[22] *Id.*

[23] All citations to the Model Rules are to the 2012 American Bar Association Model Rules of Professional Conduct, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html (last visited August 8, 2014). For the remainder of this article, however, references will be to the Texas Disciplinary Rules of Professional Conduct.

[24] STARK, *supra* note 2, at 455.

[25] *Id.; see also* Scott J Burnham, Larry A DiMatteo, Kenneth A. Adams, & J. Lyn Entrikin Goering, *Transactional Skills Training: Contract Drafting – Beyond The Basics*, 2009 TRANSACTIONS: TENN. J. BUS. L. 253, 282 (2009); Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 LEWIS & CLARK L. REV. 989, 995 (2010) (hereinafter "Duhl-2010"); Tina L. Stark, *Ethics of Drafting Agreements*, 205 PLI/CRIM 127, 127 (July 2006); Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 BRANDEIS L.J. 779, 806 (2003). Professor Stark comments that transactional attorneys who encounter ethical problems are provided only a "paucity of rules" that is exacerbated by the "paucity of case law and ethical opinions." STARK, *supra* note 2, at 456.

[26] Duhl-2010, *supra* note 25, at 995.

[27] *Id.* at 994; s*ee also* Siviglia, *supra* note 1, at 97 (2008-2009) (describing the goal of contract drafting as not winning, but rather making a deal between two or more parties that reflects the intent of each). The competitive aspect arises when each client's attorney is trying to achieve the best possible outcome for his/her particular client. While the ultimate goal (of reaching an agreement) is the same for both sides, each side strives to "win" just a little bit more than the other side or one attorney strives to protect his/her client from all possible risk.

[28] Siviglia, *supra* note 1, at 96-97. According to Mr. Siviglia, the reasons for drafting a fair contract are obvious and simple:

A one-sided contract will invariably be negotiated back to the middle.

An evenhanded contract will result in minimal, non-confrontational negotiation and a quick conclusion of the deal.

An evenhanded contract, raising few issues, will cost the client less in legal fees.

Id. at 97.

[29] STARK, *supra* note 2, at 456. The reasons for the difficulty in disciplining attorneys for poor contract drafting is that it's the attorney's client who ultimately suffers. *See* ESPENSCHIED, *supra* note 8, at 21. Incorrectly drafted or incomprehensible provisions in a contract can result in unwanted and unintended liability to the client, failure to achieve a desired benefit, and even higher legal fees. *Id.* Most importantly, however, if a contract dispute cannot be resolved without litigation, the business and working relationship between the parties is likely to be irreparably damaged. *Id.*

A. Competence

Many attorneys in transactional practices are reluctant to agree to represent a client whose business is unfamiliar to the attorney, or to draft contracts where the subject matter is new to them. More likely than not, the underlying concern they have is that they do not have the requisite competence required by the appropriate disciplinary rules to effectively represent clients whose business they know little or nothing about or draft contracts they've never previously drafted. While this concern is admirable, it is also misplaced.

Texas Rule 1.01(a) provides, "A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence representation to a client."[30] Competence is defined as "possession of the legal knowledge, skill and training reasonably necessary for the representation."[31] To meet that definition, the attorney must have an understanding of how to study and analyze both the law and facts,[32] how such understanding is to be applied on behalf of the client,[33] and a thorough grounding in contract law.[34] He or she does not necessarily need to have special training or prior experience to handle legal problems of a type with which he or she is unfamiliar in order to be considered competent[35] as many specific legal skills are common in all legal problems.[36] Determining what legal problems exist alone is "a skill that necessarily transcends any particular specialized knowledge."[37] A competent attorney can provide adequate representation through additional study and investigation provided such additional study and investigation does not unusually delay the attorney's providing services to the client or cost the client more for the representation.[38] Failure to have or to gain the requisite expertise, however, may result not only in disciplinary action against the attorney, but also liability for malpractice.[39]

B. Division of Responsibilities

Many transactional attorneys are more comfortable arguing about the meaning of an individual word, the placement of a comma, or whether a single provision (out of a total of fifty or more in the entire contract) should be included in or deleted from a contract than they are about understanding the reasons for or negotiating the contract as a whole. After all, law school

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[30] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, subchap. A, app. (2013) (TEX. STATE BAR R. art. X, § 9). TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a).

[31] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a) cmt. 1.

[32] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a) cmt. 1.

[33] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a) cmt. 1.

[34] STARK, *supra* note 2, at 379. "Thorough grounding in contract law" in this context means the attorney would know why a provision should be drafted as a covenant, not as a condition. *Id.*

[35] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a) cmt. 3.

[36] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a) cmt. 3.

[37] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a) cmt. 3. Having subject matter expertise in a field of law or industry and/or understanding the business concepts implicated in a particular transaction are also extremely valuable to the client. TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 379 (2007).

[38] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a) cmt. 4. An attorney should not charge his or her client for the hours the attorney spends "learning" what's necessary to provide "adequate representation." *Id.*

[39] STARK, *supra* note 2, at 457.

rewards students for being detail-oriented and for being able to take a position and argue it from numerous perspectives. Thus, it is not surprising that a transactional attorney might fail to inquire about or take the time to discover his/her client's objectives for entering into a contractual relationship. According to Comment 1 of Texas Rule 1.02, however, the client is responsible for establishing the representation's objectives; the attorney is responsible for determining the "means by which the client's objectives are best achieved."[40] In other words, understanding the client's business objectives in making the deal is critical to ensuring that the final contract protects and advances the client's interests.[41]

Beyond understanding the client's business objectives, however, the attorney may need to understand the particulars about the transaction itself so that individual provisions within the final contract support and ensure the client's achieving its goals.[42] Becoming knowledgeable about the particulars of the transaction will help the attorney's focus his/her research for applicable laws, understanding the industry's customs and jargon will help the attorney identify likely issues that might impact the client or the transaction, and finding similar contracts from which critical provisions can be obtained will enable the attorney to draft a contract that advances the client's interests.[43] When transactional attorneys refuse to leave their own comfort zone (because they choose to argue only minute details or to draft provisions that completely shield a client from any possible risk), they jeopardize the successful completion of the contract process and ultimately prevent the client from ever achieving its objectives.

C. Avoiding Fraud

While the majority of transactional attorneys' work is non-adversarial and collaborative, they must insert themselves into the contract process and "explore inconsistencies, challenge positions, battle ambiguities, and raise uncomfortable issues."[44] When they do, they are more than just advocates for their clients; they become educators, wordsmiths, and scriveners as well.[45] This combination of roles "presents unique ethical challenges for the transactional [attorney];"[46] thus, it may cause the transactional attorney to inadvertently engage in professional misconduct.

When a transactional attorney is instructed by his/her client to include fraudulent representations in a contract and then knowingly drafts them, the transactional attorney violates Texas Rule 1.02(d) which requires an attorney to "make reasonable efforts under the circumstances to dissuade the client from committing. . .fraud."[47] If, instead of being instructed

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[40] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a) cmt. 1.

[41] *See* Ronald B. Risdon, *Drafting Corporate Agreements 2000-2001: Universal Issues*, 1219 PLI/CORP 9, 11 (2000) (hereinafter "Risdon-2000"); s*ee also* ESPENSCHIED, *supra* note 8, at 69.

[42] *See* Scott J. Burnham, *Transactional Skills Training: Contract Drafting – Beyond The Basics*, 2009 TRANSACTIONS: TENN. J. BUS. L. 253, 255 (2009). *See also* Noric Dilanchian, *6 principles for drafting good contracts*, http://enterprisehub.com/articles/legal/255-6-principles-for-drafting-good-contracts/ (last visited Aug. 8, 2014).

[43] ESPENSCHIED, *supra* note 8, at 70.

[44] CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU 66-67 (2002).

[45] Duhl-2010, *supra* note 25, at 991.

[46] *Id.*

[47] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(d).

to draft fraudulent representations in the contract, the representations are true when they are initially drafted but become false before the contract is executed, Texas Rule 4.01(b) requires that the transactional attorney counsel the client to disclose the resulting misrepresentations or disclose them to the opposing party himself/herself.[48]

A transactional attorney might be in violation of Texas Rule 8.04(a)(3) if he/she engages in "conduct involving dishonesty, fraud, deceit or misrepresentation."[49] When a transactional attorney discovers a scrivener's error and fails to disclose it to his/her client, allowing his/her client to capitalize on the error, or when a transactional attorney knowingly includes terms in a contract that differ from those agreed to by the parties, or when he/she fails to include terms that have been agreed upon, he/she might be found to have engaged in fraud under Texas Rule 8.04(a)(3).[50] If the transactional attorney drafts an invalid or unenforceable provision, one that is ambiguous, or one that the attorney believes, but does not know with any certainty, is lawful, he/she could be found to be acting dishonestly under Texas Rule 8.04(a)(3).[51]

With an understanding of the difference between legal writing and contract drafting and the ethical issues and problems to avoid, the remainder of this article provides practical tips that are designed to help attorneys draft complete and ethical contracts.

IV. PRACTICAL TIPS

A. Practical Tip #1: Understand the Deal and the Contract Process

Successful transactional attorneys will always determine the actual reason (or reasons) their client wants to enter into a contract. They will meet and talk with their client to understand what objectives the client is trying to achieve and to prioritize those objectives in order of importance.[52] They will also discuss whether entering into *this* contractual relationship will enable the client to achieve those objectives, whether the client will be able to achieve all of them, or whether one or more of the client's objectives will have to be sacrificed.

The contract process typically begins with an interview with or a memorandum from a client in which the client explains the terms of the deal.[53] It is easier to discuss and identify the deal objectives face-to-face or over the telephone, but if a personal conversation is impossible or impractical, reviewing the terms may provide some insight into the desired objectives – which

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[48] Texas Rule 4.01(b) prohibits an attorney from "knowingly assisting a fraudulent act perpetrated by a client." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.01(b).

[49] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(a)(3).

[50] *See* Duhl-2010, *supra* note 25, at 1001-04; Duhl-2009, *supra* note 8, at 109-110. *See also* ABA INFORMAL OP. 86-1518.

[51] Duhl-2010, *supra* note 25, at 1009-15.

[52] *See* Risdon-2000, *supra* note 41, at 9 (stating that the key to drafting successful agreements is understanding the business objectives of the client and the other parties to the deal); Ronald B. Risdon, *Drafting Corporate Agreements 1999: Converting the Deal into an Effective Contract a Satellite Program. Drafting Corporate Agreements: Universal Issues*, 1139 PLI/CORP 7, 9 (1999) (hereinafter "Risdon-1999") (understanding the client's objectives in a business deal is necessary to ensure that the client's interests are protected and advanced).

[53] James W. Martin, *50 Tips for Writing the Contract That Stays Out of Court (with Forms)*, 14 No. 3 PRAC. REAL EST. LAW. 55, 56 (May 1998).

can be confirmed with the client at a later point in the contract process.

As soon as possible, the attorney should "engage [the] client in 'what if' scenarios"[54] and explore the various factual situations that might arise during the term of the contract. This will help identify issues that the client or the attorney might not have anticipated. Unresolved issues will also become apparent in the activities that take place between the beginning and the end of the contract process – developing or crafting the deal, drafting the initial contractual language, engaging in back-and-forth communications with the other side's attorney as terms and issues are raised, discussed, and a mutually beneficial compromise is reached. During the process of reviewing, redlining, refining, and redrafting the contract so the client's needs are addressed and properly articulated, and, most importantly, prior to obtaining signatures from the parties on the executed contract that accurately depicts the agreement between the parties, all these issues should be resolved.

Transactional attorneys should recognize that just because a document is a contract, it does not necessarily follow that they (as attorneys) are the only individuals necessary or critical to the company's decision to proceed with or withdraw from the contract process. It is very likely that others within the company need to and/or will be involved in helping to ensure that the business deal is formally drafted and properly documented. The more regulated an industry, the more likely it is that one word in a contract will trigger the involvement of non-attorneys in the contract process. In addition, heightened scrutiny of and enforcement actions taken against businesses often result in the need to include "trigger words" in contracts and other business documents. Trigger words help the company minimize the risk of an enforcement agency examining the business's records and operations to determine if enforcement actions are necessary. In addition, trigger words help the company identify those contracts that have to be reviewed in excruciating detail and approved not only by the company's attorneys, but also by non-lawyer executives prior to their execution.

For example, a company might require that its internal or external auditors sign-off on a contract before it is executed if the provision that describes the right of one party to examine or review the books and records of the other party uses "audit" instead of either "examine" or "review." Likewise, referring to regulations or regulatory requirements might mean that the company's compliance officer as well as its general counsel needs to become involved in and approve the execution of the final contract.

B. Practical Tip #2: Template Contracts vs. Contracts Drafted From Scratch

With apologies to Frank Zappa and The Mothers of Invention, "One size does not fit all." Attorneys commonly use standard contracts that were previously drafted for other clients, they research form books for standard contracts, and they search the Internet for contracts that have been drafted by other attorneys for clients with similar transactions.[55] This "precedent-based

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[54] *Id.*

[55] *See* ESPENSCHIED, *supra* note 8, at 24 (recommends developing a "portfolio of 'standard' forms for transactions that are similar in nature"); Scott J. Burnham, Larry A. DiMatteo, Kenneth A. Adams & J. Lyn Entrikin Goering, *Transactional Skills Training: Contract Drafting – Beyond The Basics*, 10 TRANSACTIONS: TENN. J. BUS. L. 253, 263

drafting" approach to drafting a new contract for a new client makes sense. Not only does modifying a previously drafted contract require significantly less time than drafting a contract from scratch, but a standard contract available over the Internet might be generally accepted within the industry.[56]

However, attorneys should not use standard or form contracts to memorialize different transactions. In fact, it may be unwise to use standard or form contracts to memorialize transactions even if the transactions are somewhat similar or involve the same subject matter. The previously drafted contract might involve significantly different deal points, it will only be as good as the initial drafter, it could be outdated, and it might have been written to favor the party on the other side of the transaction.[57]

If a standard or form contract is chosen as a starting point, it should not be used blindly.[58] There is no reason to include provisions from a standard or form contract in a different and subsequently drafted contract if the provisions do not apply to the transaction or they will never be triggered. For example, a contract used to purchase shovels does not need to include a "work for hire" provision. Similarly, a contract used to license software does not need to include a provision requiring the licensee to purchase insurance coverage to protect the licensor from any liability arising from the licensee's use of the software.

Finally, attorneys should also recognize that contracts and pleadings are two very different documents. The "style of the case" from a pleading should never be substituted for the introductory paragraph and recitals in a contract.[59]

C. Practical Tip #3: Be Clear and Precise

"A well-written contract provision is one that provides no traction for either party or [its] counsel to argue that something else was intended."[60] Well-written provisions contain no ambiguities and clearly articulate the parties' original intent. A well-written contract includes what's necessary to ensure complete performance by each party, and "[u]sing plain, modern English. . .will ensure that the parties' intent is accurately expressed."[61]

(2009) (previously drafted contracts are often used as templates); Schiess, *supra* note 5, at 46 (attorneys should use standard forms); Risdon-1999, *supra* note 52, at 12 (experienced contract drafters should have sample contracts); Martin, *supra* note 53, at 56 (recommends asking the client for sample contracts, checking form books, and buying forms on CD ROM); *Nine Tips to Create Better Contracts*, http://allbusiness.com/legal/contracts-agreements/1532-1.html (last visited Aug. 8, 2014) (sample forms can alert the attorney to issues and can provide "strong, standard language" for the contract, but should be used only as a starting point).

[56] *See* ESPENSCHIED, *supra* note 8, at 24-25 (borrowing language from prior contracts simplifies the drafting process); Burnham, *supra* note 55, at 263 (the industry might have developed a model contract and starting from a model contract is more cost effective).

[57] *See id.*

[58] *See* Schiess, *supra* note 5, at 46.

[59] *See* Gisela M. Munoz, *Writing Tips for the Transactional Attorney*, 21 PRAC. REAL EST. LAW. 33, 33-35 (2005). *See also* James W. Martin, *50 Tips for Writing the Contract That Stays Out of Court (with Forms)*, 14 PRAC. REAL EST. LAW. 55, 57 (1998).

[60] FOX, *supra* note 44, at 67.

[61] Gisela M. Munoz, *Writing Tips for the Transactional Attorney*, 21 PRAC. REAL EST. LAW. 33, 36 (2005). *See*

As important as it is to draft contracts so that they clearly communicate the parties' original intent, it is just as critical to be aware of statutory requirements (and prohibitions) that might make the contract unenforceable if it contains such provisions. For example, in a Texas construction contract, a contractor cannot indemnify an architect from liability for the architect's own negligence.[62] In addition, a provision that establishes a limitations period of shorter than two years to file a suit on a contract is void in Texas.[63]

Part of being clear and precise requires shorter, not longer sentences.[64] William Faulkner's writings should not be used as templates for drafting contract language. The shorter the sentences, the more clear and precise they will be, especially if they are structured logically – with subjects and verbs together and at the beginning of the sentence.[65] Further, using active voice (rather than passive voice) to draft provisions will facilitate using the correct contract concept to convey the parties' intent.[66] Finally, deleting unnecessary (or archaic) words will streamline the contract and make it easier to understand.[67]

D. Practical Tip #4: Read Every Word of a Contract Before the Client Signs It

Attorneys have a tendency to be less careful checking successive drafts of a contract than they are when they first review it.[68] Without casting aspersions, a transaction attorney "must concentrate on reading a final draft as if [he/she] were reading the document for the first time."[69] Given the ease of creating and reviewing contracts electronically, it's important to print and review a hard copy of the contract even if it's been reviewed numerous times on the computer; "[the attorney] will find substantive errors and glitches when reviewing a hard copy that [he/she] will not find looking at the contract on a computer screen."[70] "There is no use in blaming mistakes on the secretary or typist. It is up to the draftsman to correct mistakes."[71]

One contract this author recently reviewed contained a provision (in the Covenants of the

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also ESPENSCHIED, *supra* note 8, at 109-113 (presents pros and cons of using plain English); STARK, *supra* note 2, at 201 (defines plain English).

62 TEX. GOV'T CODE ANN. Tit.10, subtit. F, § 2252.902(b)(2) (2005).

63 TEX. CIV. PRAC. & REM. CODE § 16.070 (1999).

64 *See* ESPENSCHIED, *supra* note 8, at 143-44 (recommends using short sentences); Martin, *supra* note 53, at 58 (short sentences are easier to understand); Johnny Miller, *60 Practical Contract-Drafting Tips*, http://www.contracts.com/id29.html (last visited Aug. 8, 2014) (sentences should be no more than 25 words long).

65 *See* STARK, *supra* note 2, at 287-90.

66 *See id.* at 117-18 (discussing active versus passive voice); Duke A. McDonald, *The Ten Worst Faults in Drafting Contracts*, 63 J. MO. B. 173, 173 (2007) (avoid writing in passive voice); Martin, *supra* note 53, at 58 (recommends active tense); Miller, *supra* note 64.

67 FOX, *supra* note 44, at 73-77. Difficult to keep things simple – advances in technology mean transactions are done "faster." *Id.* at 74. Transactions are increasingly more complex. *Id.* Identifying creative solutions may create problems. *Id. See also* STARK, *supra* note 2, at 256-60 (lists common archaic words and phrases); McDonald, *supra* note 66, at 173 (avoid using words "that were once the 'coin of the realm' but have no modern currency").

68 *See* Segall, *supra* note 12, at 752.

69 *Id.*

70 STARK, *supra* note 2, at 419.

71 Segall, *supra* note 12, at 752.

Client section) that created an employer-employee relationship between the author's client and the other party. Only by reading the entire contract (including the Miscellaneous Provisions section), did this author discover that the contract also contained an Independent Contractors provision – disclaiming any employer-employer relationship between the parties. The other party conceded that it had simply cut and pasted the Miscellaneous Provisions section from a contract between its client and an independent contractor that the other party's client had engaged – but had failed to read the entire Miscellaneous Provisions section again before presenting the author's client with the contract.

A different Miscellaneous Provisions error in a contract, this one between a hospital and a vendor, could have resulted in excessive liability on the part of the hospital had the error not been identified and corrected before the contract was executed. In this particular Vendor Supply Agreement, the vendor had buried an indemnification provision in the middle of the Miscellaneous Provisions section, and the hospital's attorney failed to notice the provision until right before the Agreement was presented to the hospital for signature.

Finally, in an employment contract, counsel for a group of employees drafted detailed provisions describing how bonuses were to be determined and when they were to be paid using a presentation the employer had made to the group of employees during the initial discussions as the basis for her language. The draft was circulated to all employees in the group. Several of the employees in the group made recommendations and suggestions, all of which counsel for the group of employees incorporated into the draft contract. A redline version of the contract (clearly delineating the additions) was presented to the employer, but the changes to the bonus compensation were not addressed until just before the employer printed copies for each member of the group to execute. Only then did the employer recognize the level of detail that had been provided and revise the language.

E. Practical Tip #5: "Murphy's Law"[72] Always Applies

When drafting contracts, attorneys should always keep the worst case scenario in mind so that the final contract addresses virtually every possible situation that might arise – even if it never does. By incorporating all available remedies into the contract to prevent (as much as possible) his/her client's falling victim to Murphy's Law after the conclusion of the attorney's representation, the attorney can help to ensure that the client is as protected as possible.

However, attorneys should not necessarily provide their client with a detailed explanation of everything that might go wrong in or with a particular transaction. Instead, attorneys should remember what objectives their clients have established and present the information in a manner designed to educate – not scare – their clients. Doing so will enable the attorney to successfully manage his/her client's expectations, and to respond promptly to the client's inquiries[73] even

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[72] Murphy's Law provides, "If anything can go wrong, it will." *Murphy's Law Site*, http://www.murphys-laws.com/murphy/murphy-true.html (last visited Aug. 8, 2014). Murphy's Law originated at Edwards Air Force Base in 1949 when Captain Edward A. Murphy, an engineer working on a project to determine the amount of sudden deceleration a person could stand in a crash, got mad at a technician who had wired a transducer needed in the project incorrectly. *Id.* The project manager in charge of the project kept a list of "laws," and added Murphy's comment about the technician to that list, calling it "Murphy's Law." *Id.*

[73] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03.

when (or if) it is personally inconvenient for the attorney to do so.[74]

V. CONCLUSION

A transactional attorney must do more than simply draft clear and unambiguous contracts to be successful.[75] He/She must understand every transaction from the client's perspective, at least to the extent that he/she recognizes what goals and objectives the client wants to achieve and what risks the client wants to avoid.[76] A successful transactional attorney will also add value to the deal[77] and "act with competence, commitment and dedication to the interest of the client . . . upon the client's behalf."[78]

The successful transactional attorney will also be sensitive to and understand what makes drafting contracts different from drafting other types of legal documents and will anticipate and avoid some of the more common ethical issues that might arise during the contract process. He/She will be an integral part of the contract process but will recognize and use the contributions others within the client's organization can bring to the table. As a contract drafter, the successful transactional attorney will have numerous form contracts on which he/she can rely, but will use them only with caution and only as a starting point to create unique contracts for each client and transaction. In each contract, the successful transactional attorney will draft language that is clear, precise, and tailored to meet the client's expressed objectives. And regardless of the number of times the attorney has commented on or reviewed a draft contract, he/she will read every draft or revision of the contract presented during the contract process as if it was for the first time. Finally, and remembering that Murphy's Law always applies, the successful transactional attorney will anticipate future possibilities and probabilities that could arise and include remedies and language the client can apply in the remote possibility that the business deal goes awry.

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74 TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(b) cmt. 6.

75 STARK, *supra* note 2, at 369.

76 *Id.*

77 *Id.*

78 TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(b) cmt. 6.