There seem to be no shortage of high profile drafting disasters in the legal press. Perhaps the most famous is the ownership dispute over the Los Angeles Dodgers. In court, Frank McCourt produced a copy of a post-nuptial agreement showing he would retain Dodgers’ ownership if the couple divorced. Ex-wife Jamie McCourt, the Dodgers’ former CEO, produced a nearly identical copy of the post-nuptial agreement that showed Jamie would retain ownership of the Dodgers. According to press reports, the attorney Lawrence Silverstein had created these signed copies on separate occasions and when he realized the copies differed materially, he swapped out the page containing the difference without informing Frank or Jamie.

While the Dodgers case is an extreme example, many drafting disasters can be traced to simple mistakes. For example, Bell Atlantic pension plan participants recently sued Verizon claiming that cash payments were too little by half, arguing that a certain multiplier should have been applied twice rather than once. An in-house Verizon lawyer testified that this $1.67 billion drafting snafu resulted from his failure to delete a sentence after inserting the same phrase elsewhere in a contract.

Below are ten frequent ways that contract drafters get into trouble, as well as some tips to steer clear of disasters.

1. **Drafting a clause or section from scratch.**

Lesson number one for most transactional lawyers is never start from scratch. Yet, inevitably the need for custom language arises. Many lawyers find themselves making up whole clauses and definitions, or pulling unreliable forms from search engines that do not reflect current law or market standards. Instead, drafters should turn to the vast archives of sample agreements and sample clauses now available from all major legal research providers. (Look to Sample Agreements on WestlawNext for tested contract language.) Using these resources, it is increasingly easy to find language
from tested contracts that addresses your circumstances. Using reliable language will provide the best chance of having the parties’ intent carried out. If a court must resort to common interpretations of terms of art, defined terms, and consistent phrases, your contract won’t stand alone.

2. Inconsistently defining terms and phrases.
As contracts grow longer, it becomes tempting to define some terms within a section or clause, rather than in the upfront definitions section of the contract. However, this practice can result in ambiguity when such terms appear elsewhere in the contract — or even when such terms appear within the same section but are not capitalized. An over-eager adversary can easily seize on these drafting ambiguities to argue that an exclusion is broader than intended.

As a best practice, it is a good idea to make a final pass of the contract to ensure that all terms that are defined are moved into the definitions section. Reviewing all references to the defined terms can be tedious, and some drafters will want to consider draft-checking software to help with this task. Tools are available that can not only find misplaced cross references but also can identify undefined terms, terms defined more than once, and inconsistent use of phrases surrounding a defined term. (For example, Thomson Reuters’ Drafting Assistant-Transactional includes a feature called Deal Proof that uncovers such discrepancies within contracts.)

3. Misusing conjunctions and plural nouns.
In his book “A Manual of Style for Contract Drafting,” drafting expert Kenneth Adams cautions against using terms that might lead to ambiguity — in fact, he devotes an entire chapter to the “ambiguity of the part versus the whole.” Adams is referring to words like and, or, every, each and any, as well as plural nouns. Using these terms in contracts raises the question of whether the drafter is referring to an entire group or just a single member of the group. These ambiguities can open the door to legal challenges.

4. Leaving out key details.
A contract must accomplish the objectives of the parties even while it protects the client’s interests. Occasionally, clients want to omit material information from the contract and rely on vague descriptions to be determined later. For example, it’s not uncommon to see contracts for “consulting services” that do not specify the nature and type of services. Unfortunately, these contracts leave the door open to disputes. To ensure precision and completeness, review a checklist with your client to flesh out the material terms. For example, to add precision to the broad term “consulting services,” it is a good idea to attach an annex that lists the specific consulting activities, service levels, and other details. Clients will appreciate the clarity that results from this process, and the contract will better reflect the parties’ bargain.

5. Not spending enough time on choice of law, forum, dispute resolution, damages, and limitation of liability.
Litigators frequently scrutinize choice of law, forum, and other selection provisions to find potential advantages in a contract dispute. It is worth investing time to develop a solid standard form covering these provisions – and sticking to it as much as possible. These provisions can give your client significant leverage and are worth extra time and care.

6. Relying on Word’s Track Changes feature.
While quick and easy to use, Word’s Track Changes feature is not a great tool for negotiating legal documents with opposing counsel. After several rounds of revisions, it may be difficult to read the contract and ensure the intended meaning is captured. Instead, draft fresh and use redlining software at the end of the turn. When your document is complete, redlining the final version against the original confirms the parties’ understandings and serves as a safety net before the parties sign.
7. Running out of time to review.
Many drafting stumbles occur simply because the drafter did not or could not allow enough time for review. Consider the recent “printer’s error” that wiped about 10 percent from Google’s market value in a few hours. Google’s financial printer accidentally sent an unfinished third quarter earnings release to the Securities and Exchange Commission several hours before schedule. The early release was obviously an accident as the filing, which revealed a serious miss on Google’s earnings expectations, began with “PENDING LARRY QUOTE,” a reference to Google’s CEO Larry Page. Despite suspended trading, shares ended the trading day down about eight percent or approximately $20 billion.

It is a lot of work to keep track of defined terms, references to other sections, exhibits and documents, variations from standard terms, formulas and the like. Whether through internal reviews by trusted associates, draft-checking software, or other tools, drafters do not have to play the hero. Avoid high-profile snafus by clearly marking unfinished contracts as “DRAFT” until you are ready to sign.

8. Assuming that outside counsel provided perfect work product.
While you may hire outside counsel to draft contracts and agreements for your corporate legal department, you cannot assume you will receive perfect work product every time. Even outside counsel are pressured for time and a seasoned drafter can forget to update a cross-reference or commit any number of other drafting mistakes. Review your outside counsel’s work product using draft-checking software or an old-fashioned red pen to make sure that it is ready to distribute to opposing parties and counsel, and for your forms library, if you keep one.

When a standard form has been modified several times, it can be tricky to keep track of which modifications were made to each signed contract. This is not just a contract administration challenge; less experienced drafters may not realize the reasons for the variations in standard terms. Many experienced drafters will draft cover sheets that outline the key negotiable terms and record any variations for each of the contracts they draft. Over time, these cover sheets become valuable reference material for drafting new contracts and can form the basis for understanding what’s “standard” and what’s not. Larger legal departments will want to invest in contract management software.

10. Forgetting what version you sent and to whom.
The biggest lesson to be gleaned from Lawrence Silverstein’s nightmare is that contracts counsel need to keep control of the signed copies they produce, along with the attached exhibits. According to Josh Fisher, the blogger behind dodger divorce.com who gave play-by-play on the McCourt trial, Silverstein admitted he couldn’t remember the course of events that led to his production of six copies of the McCourts’ agreement, three of which contained an exhibit that directly contradicted a material provision in the exhibit attached to the other three copies. He had to reconstruct what happened through computer evidence of the versions, notes on telephone calls and handwritten notes.

While the contract drafting process is clearly fluid and frequently chaotic, we hope these tips can help you draw a line in the sand so you develop your own process and checklist. You can use the tools at your disposal to build an efficient and organized drafting process that will save time, money, and mitigate the risks inherent in contract drafting.

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