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### Contracts Are Like Snowflakes

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# Contracts are Like Snowflakes

Let it Snow, Let it Snow, Let it Snow.

**T**his past semester, my three teaching worlds collided in my Family Law Litigation and Practice course: legal writing, family law, and contracts. The students completed a mediation simulation and needed to draft a custody agreement setting forth the agreed terms. As I discussed how to draft a family law contract, I wore all of my professor hats. In that moment, I enjoyed drawing on my knowledge of each discipline and found an idea for this column.

Each executed contract represents private legislation between the signing parties. Contracts, like statutes, seek to govern future conduct and should be drafted to stand the test of time. Particularly in custody cases, contracts must be ironclad because many of them govern relations between parties who will have to communicate with one another about their children for many years — if not forever. These so-called relational contracts are the most difficult to draft because they require a significant amount of planning ahead, hypothesizing about situations that may or may not arise, and contemplating solutions far before the problems even surface.

Contracts are like snowflakes: no two are alike. Each

contract represents a compromise between the priorities and goals of two or more parties; these goals can be significantly different. Accordingly, an attorney should recognize that the most effective contracts are tailored to the needs of the signing parties. Below are some tips that will help the contract drafter refine and improve the art of contract drafting. The most skilled drafting “artist” treats each contract like a snowflake, appreciating its uniqueness by giving significant analysis and thought to each provision. Let it snow, let it snow, let it snow.

## **CONSIDER THE AUDIENCE**

As with any other document, first consider the audience. With contracts, the primary audiences are the contracting parties themselves. The goal is to draft a contract that does not alienate the current audience (who is presumably in agreement with the terms), but that protects the client if the parties become more hostile. If contract litigation results, the now-larger audience will include the court, possibly a jury, and the litigating attorneys.

When drafting a contract, try to use a cooperative and neutral tone whenever possible; doing so maintains the goodwill

between the parties and counsel and prevents the deal from falling through before the agreement is signed.

Sometimes, a client wants a document that sounds so tough that the other party is intimidated and too scared not to comply with its terms. Remember, though, that a contract cannot sound so one-sided that the other party will not sign it.

### **FORMS HAVE THEIR PURPOSE**

Many past columns have belabored the point that a drafter should not paint by numbers, employ cookie-cutter lawyering, or rely overwhelmingly on forms. I will not bring out my soapbox. In fact, an attorney drafting a contract can and should draw on forms from many sources. A client might have previous contracts used for a similar transaction. Each law firm likely has form contracts for similar types of issues. There are also numerous formbooks available online or published by bar associations.

Forms are useful as a guide, particularly to determine the issues that a drafter should address in a certain kind of contract. Forms also can provide a skeletal format or organizational structure, suggesting headings and subheadings to the drafter. When using a form provision of any kind, however, take care to insert the client's specific terms, omit inappropriate boilerplate, and, of course, change the party names.

Also, remember to be especially careful to consider why a provision should be included when contemplating a form provision. All too often, lawyers "cut and paste" forms together without carefully thinking about the underlying purpose of either the particular provision or the contract as a whole. Never add a provision from a form unless you understand the provision and have a clear reason for including the language.

### **OFFER TO PREPARE THE FIRST DRAFT**

Even if you do not like legal writing (but who would feel that way?), volunteer to draft the contract on behalf of your client. Preparing the first draft is usually an advantage. First, you can control the way the terms and language are presented. Second, the reader might not be as careful in reviewing the language as she would have been had she been the initial drafter. Third, the reader might be less inclined to request changes to the draft if the words are acceptable, but not perfect (or not exactly what the reader would have drafted).

By preparing the first draft, you might be able to slip in some provisions that the parties did not discuss during negotiations but are arguably helpful to both parties. To achieve this goal, draft neutral-sounding provisions that appear mutual in their application. For example, suppose in custody case your client was concerned about the other parent drinking in front of the children, but she did not raise this "hot-button" issue during negotiation. The opposing party would never sign a provision

that says, "Husband shall not drink alcohol when he is with the children," because that provision is one-sided and seems to suggest that he has an alcohol problem. However, he would have a harder time fighting this provision: "Neither party shall drink alcohol to excess in the presence of the children." Even if your client does not drink, making the provision mutual often saves face for the other client and leads to an agreement without objection.

### **BE MORE THAN A SIMPLE SCRIVENER**

In family law cases, clients frequently are able to "settle" certain issues on their own. A client might hand you a list of terms and tell you to put them into a formal contract. These types of settlements, while they typically result in more client buy-in to the terms, raise certain practice considerations for an attorney.

When drafting a contract, the attorney's job is more than that of a simple scrivener. When a case settles, an attorney must think through the structure of the deal with the client, filling in gaps that the client might not have considered and suggesting additional provisions necessary to protect the client's interests. For example, if a client hands you a term sheet that says, "Husband shall have the children every other weekend," you need to ask numerous follow-up questions: When does the weekend start? When does it end? Where is the pick-up and drop-off point? What happens when a holiday or teacher workday comes before or after the weekend?

When drafting a contract, check for future problems that might befall the client — engage in "what ifs" and draft for as many foreseeable problems and risks as possible.

### **GIVE IT THE ONCE OVER — AGAIN**

With each successive draft, reread the contract to make sure it is clear, concise, and internally consistent. Check for ambiguities, omitted terms, and proper, consistent terms and definitions. If you make a change to a successive draft that changes the paragraph numbering, make sure that you change the internal cross-references, if necessary.

Negotiated agreements rarely resemble models of draftsmanship or garner pride of authorship. The typical contract is like a patchwork quilt with substitutions and additions cropping up in unlikely places, detracting from the careful organization embodied in the initial draft. Take the time for one more edit, if possible, to best serve audience and purpose.

As I sit here, looking outside as the temperature soars above 94, I think of snow; as you draft a contract, never forget the snowflakes. ■

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**As always, your comments and suggestions are welcomed at [dspratt@wcl.american.edu](mailto:dspratt@wcl.american.edu).**