

WHY? WHAT? WHEN? WHO? WHERE? HOW?

Much of contract drafting can be reduced to five basic questions -- the drafter must:

- Thoroughly understand not only his clients' *objectives* but those of the other side as well. (Why is this?)
- Know *what* is to be done and by *whom*.
- Express *time* limitations clearly
- Focus on *location* of performance.
- Provide a clear roadmap to the commercial finish-line.



WHY?

- What is bringing the parties together?
- What is driving your client? What does our side need.
- It is always good to have a *discussion* with the client early on about the objectives and not just wait for client's first draft to review.
- What is driving the other side? What are their bottom line needs?
- Preambles generally set for the “why’s”

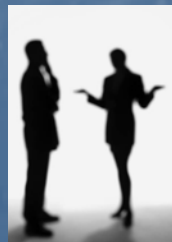


Caveat: A well-written document may not necessarily meet the clients' needs, in which case, it will either have to be re-written or will not serve its purpose.

WHAT?

- Contracts involve the exchange of *consideration* (something of value) – *quid pro quo*. (At common law, contracts can fail for lack of consideration).
- Well written contracts will clearly set forth the *consideration* as well as the parties' respective rights and obligations.

TIP: Generally include the “what’s” within the main body of the contract, and not the preambles, definitions and exhibits).



WHEN?

In many instances, time of performance is as critical as the performance itself.

“Hey, do you want speed or accuracy?” - very often the answer is “both.”

Make sure all material obligations have an associated time limit.

Failure to perform on time should have clear consequences (ability to substitute, liquidated damages, penalties, termination, etc.)

“Time is of the Essence” - beware of this clause.



WHO?

- Know your *audience* – i.e., the people who may eventually read your contract.
- The audience is not just those who are negotiating the contract.
- *Other possible readers* include: judges, arbitrators, prosecutors, newspapers, third-party beneficiaries, auditors, shareholders.



TIP: The sign of a good contract is the ability of a reasonably educated person to understand it. The fact that both sides' negotiators understand a particular clause is generally *irrelevant*.

WHERE?

Often said in real estate that the three most important factors are location, location and location.

Not true in contracts, but still important.

Often place of performance is crucial (local content rules and choice of law, for instance).

Also need to clearly specify governing law and situs of dispute resolution.



HOW?

- The Contract must clearly stipulate *how* parties are to carry out their obligations – not just what those obligations are.
- Many of the “how” specifics are contained in the contract exhibits.
- Express and implied *warranties* are also a large part of the “how” of a contract.
- “How” issues are often the subject of litigation, possibly because they are given less thought in contract documents than the other “questions.”

FIVE COMMANDMENTS OF DRAFTING

- Understand the subject matter and the client's objectives.
- Write clearly and unambiguously.
- Be consistent in style, terminology and definitions.
- Know and properly reflect applicable law.
- Create contracts that achieve your side's objectives in a fair manner .



ANATOMY OF A CONTRACT

- Introduction
- Recital
- Definitions
- Substantive Provisions
- General Provisions
- Date and Signatures
- Exhibits

INTRODUCTORY PARAGRAPH

Most contracts have an introduction, containing the names, countries of incorporation and physical addresses of the parties.

Develop your own style and be consistent about what you say about each party.



Avoid indicating that the contract “belongs” to one party or the other.

Contracts governed by common law sometimes confirm the existence of adequate *consideration* for the contract.

RECITALS

- State the purpose for entering into the contract (discuss).
- May serve to enhance the understanding of someone unfamiliar with the history of the transaction.
- Indicate why the contract was important to a party, thus helping to establish or calculate damages.
- Provide an eventual judge or arbitrator with background that might justify the existence of certain provisions, that might otherwise appear unfair.



DEFINITIONS

Definitions provide clarity of key terminology and avoid repetition.

Virtually all contracts contain definitions of one sort or another.



Drafter needs to decide between using parenthetical or listed definitions.



Definitions can constitute the first article or the first exhibit of a contract.

Definitions are discussed in greater detail in later parts of this course.

SUBSTANTIVE PROVISIONS

- These are the *meat* of agreements, and thus the ones most focused on.
- *Avoid* including *contractual substance* in introduction, recitals, definitions and (with some exceptions) exhibits.
- Try to arrange in a logical sequence – some drafters like chronological order.
- Consolidation of articles is advisable.



GENERAL PROVISIONS

These deal with the administration and enforcement of the contract, and include:

- Modifications/amendments
- Survivability
- Force Majeure
- Choice of Law/Dispute Resolution
- Entirety of the Agreement
- Waivers

Caveat: Clever lawyers often gain significant advantages when other side concentrates solely on the substantive provisions.

SIGNATURES AND DATES

- Vital section of contracts, as an unsigned contract may be an unenforceable one.
- Make sure to indicate the *name* of the signer; most signatures are illegible.
- Date: typically this is the date of signature and *not* date of effectiveness, which should be *clearly* established elsewhere.

Caveat: make sure you know and follow local laws regarding: witnesses, notarization and authority to contract, as this varies widely among jurisdictions (failure in this area can be catastrophic, and amount to legal malpractice).

REVISION

“The first draft of anything is shit.” - Ernest Hemingway

Probably true of literature, not necessarily true of contract drafting.

Nonetheless, good editing is an essential part of good drafting.

Subsequent session will address editing.

TIP: Smart drafters have *someone else* review final draft, knowing they are too tired or jaded or pressured by that point.



USE OF FORMS

- Form contracts can be a powerful weapon in the right hands, but can also be a two-edged sword.
- Like a cannon, they can blow-up in the wrong hands and wound the user.
- Beware and resist use of one-sided forms.
- This course will extensively use the Model Form Contracts created by the Association of International Petroleum Negotiators (AIPN).



TAKE-AWAYS

- The contract drafter plays a prominent role in increasingly complex oil and gas transactions.
- The drafter must understand both her industry and the subject matter of agreements.
- Writing simply, clearly and precisely is key.
- Contracts are a matter of *WHY? WHAT? WHEN? WHO? WHERE? HOW?*
- Careful editing is a *sine qua non* of good drafting.
- Form contracts are valuable tools, but dangerous in the wrong hands.