Aspen Coursebook Series

Cynthia M. Adams • Peter K. Cramer

A Practical Guide to Drafting Contracts

From Concept to Closure

SECOND EDITION

Cynthia M. Adams, Clinical Professor of Law, Indiana University Robert H. McKinney School of Law
Peter K. Cramer, former Assistant Dean for Graduate Programs, Washington University School of Law; and former Associate Director of The Center for Global Legal English, Georgetown University Law Center

From concept to closure, **A Practical Guide to Drafting Contracts** provides detailed instruction for drafting contracts. Moreover, it teaches readers how to adapt *existing* contracts and forms to the specific needs of their client—as is frequently done by lawyers in legal practice. Step-by-step instruction and examples unpack the purpose of each provision for a wide range of (domestic) contracts, and integrate the basic principles that apply to both domestic and international transactions. Practice exercises further develop drafting skills and a working knowledge of the language and syntax of contract law.

Indispensable in law school and beyond, A Practical Guide to Drafting Contracts features:

- **Step-by-step instruction** through the entire drafting process
- **In-depth explanations and helpful examples**
- **Insights into the strategic decisions** behind drafting contracts
- **Hands-on exercises**
  - to raise awareness of commonly occurring contract provisions
  - to encourage use of phrasing appropriate to audience and purpose
  - to build familiarity with the legal principles of contracts
  - to practice modifying forms and contracts drafted by other parties
- **Discussion of U.S. law** regarding certain contract provisions and drafting issues
- **A companion website with numerous resources for teaching and learning,** including more exercises and drafting assignments.

Features that facilitate understanding for non-native speakers:

- **Examples, exercises and explanations** written for non-native speakers
- **Annotated definitions of business and legal terms**

New to the Second Edition:

- **Enhanced coverage** of negotiating and drafting contracts in the United States
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- **New contract simulations and drafting exercises**
- **Clear signposting of text and exercises specifically written for non-native speakers**

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For Alex, Zach, and Forrest.
CMA

For Cathy, Felix, Lena, and my parents.
PKC

Summary of Contents

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Preface

Years ago, as we sat in a coffeehouse having a friendly chat, the conversation turned to our shared professional passion—teaching law students—and we made the decision to apply our combined knowledge of law, linguistics, teaching, and transactional practice to the project of writing a book. The result, *Drafting Contracts in Legal English*, was widely read by foreign-trained lawyers and international law students, as we had intended, but we were pleased to discover that it was also being successfully used in mainstream law school courses.

For this reason, we have retitled the second edition, ***A Practical Guide to Drafting Contracts***. We have added more text and exercises geared toward American law students and lawyers, while continuing to include text and exercises (signposted with a globe icon) specifically written for ESL readers.

The reality of law practice is that lawyers must have the expertise to review contract drafts and their precedents. They must be able to identify issues and remove or modify problematic text for various types of contracts and transactions. They must be able to draft a contract that complies with the governing law, addresses the specific goals of contracting parties, and preserves the interests of their client.

A Practical Guide to Drafting Contracts, Second Edition, conveys all of these essential skills by focusing on the *process of drafting contracts* and on *phrasing contract provisions clearly and concisely*. Lucid text and helpful annotations define and explain the language of contracts, as well as business and legal terminology. Extensive end-of-chapter exercises give readers a working knowledge of contract provisions, drafting strategies, and contract law. Exercises that reference contracts (which can be found online at https://www.AspenPublishing.com/Adams-Contracts2) build the lawyering skills that are so necessary to legal practice: the ability to draft a contract from scratch, or to revise and adapt a precedent contract for a new purpose.

Peter K. Cramer & Cynthia M. Adams
November 2019

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Writing this book was a collaborative effort, but this book was not merely the creative product of two people. From formulating ideas for this book to its final draft, the authors relied on the wisdom and support of many people.

Cynthia is grateful to Indiana University Robert H. McKinney School of Law and Dean Andrew Klein for their continuous support. Also, special thanks to Clarissa Walstrom, a superb research assistant, and to Cynthia's professional colleagues in the law trenches everyday, who have shared openly their experiences and wisdom gleaned from many years of business law practice and who are key supporters of the law school's transactional skills program.

In the spirit of brief and concise communication promoted in this book, Peter would like to extend his gratitude to everyone who helped him launch this second edition.

We also would like to thank our fabulous editors: Jessica Barmack, Justin Billing, and Jasmine Kwityn.

A note of appreciation also goes to the Legal Writing Institute and its many members who have given the authors so much in sharing their wealth of teaching experience and deep friendships.

Last, but certainly not least, the authors thank their students over the years, both at home and abroad. Without you, this book simply could not have been written.

About the Authors

Cynthia M. Adams is a Clinical Professor of Law at Indiana University's Robert H. McKinney School of Law. Before joining the law faculty, she practiced corporate law and business transactions. Professor Adams teaches various theory and skills courses, including Contract Drafting, Negotiations, Integrated Contracts, and Secured Transactions. In addition to this book, Professor Adams coauthored *The Guide to U.S. Legal Analysis and Communication* (2d ed., Aspen, 2015). When not teaching, researching, or writing, Professor Adams explores the backcountry at home and abroad, on horseback and on foot.

Peter K. Cramer, Ph.D., MA.TESOL, and LLM., is the retired Assistant Dean for Graduate Programs at Washington University School of Law, and former Associate Director of the Center for Global Legal English at Georgetown University. In continuing to teach Legal Writing and Legal English courses at various law schools around the globe, Professor Cramer combines his expertise and training in common and civil law systems with his experience as a linguist and ESL specialist. In his semi-retirement, he enjoys the benefits of a flexible work and travel schedule, which include extended bike rides in his native Bavaria.

A Practical Guide to Drafting Contracts

Chapter 1

Introduction

HIGHLIGHTS

This chapter introduces you:

- To the concepts of
  - "Precedent," meaning model contract forms or contracts used in previous deals.
  - "Zero-based" drafting (also referred to as "drafting from scratch"), meaning drafting without the aid of a precedent.
- To developing and honing the skills of
  - Critically reviewing, evaluating, and modifying precedents.
  - Zero-based drafting.
- To recommendations for non-native English speakers (section 1.4).

1.1 Overview

Clear. Concise. Precise. These are the hallmarks of a well-drafted contract and are at the heart of the drafting principles discussed in this book. Our goal is to give you a practical guide to drafting contracts in plain English. Because this book primarily focuses on the mechanics of drafting, the drafting principles found in these pages can apply to drafting contracts in English in domestic as well as international transactions.

Draft: As used in transactional work, either (1) a noun meaning either (i) a suggested version of a document, or (ii) a written order by one party instructing another party to pay money from an account to a third party; or (2) a verb meaning to write a suggested version of a document.

Drafter is a person who writes a suggested version of a document.

1.2 Learning to draft from scratch and from precedents

In their busy day-to-day practice, lawyers are compelled to produce a quality work product in the most time-efficient, cost-effective way possible. Thus,

Deal, as used in transactional work, means an agreement between two or more parties, to transact business for their mutual benefit.

when faced with drafting a contract—for example, a construction loan agreement—a lawyer will likely use as a starting point a model form or a construction loan agreement used in a previous business deal rather than creating an entirely new contract. Using language from a model form or a prior contract (often referred to as **precedent**) as the basis for drafting another contract or, perhaps, merely for drafting a few provisions in a new contract is a reality of transactional law practice. Creating an entirely new contract without using precedents will likely take more time and cost the client more money. Drafting provisions without the aid of precedents is called **zero-based drafting** or *drafting from scratch*. Although lawyers will often use precedents when drafting a contract, no two business deals—or, using the earlier example, no two construction loan agreements—are identical. Inevitably, some provisions in the precedent and some provisions in the new contract will be unique to that business deal. Therefore, even when relying on precedent, lawyers will often draft at least some provisions from scratch.

This book places you in the position of a new associate or intern at a law firm tasked with drafting a contract. In practice, you would probably first note the key agreed terms of the deal and then consult the firm's archive, whether a collection of contracts of a similar nature drafted by other members of the firm or merely a collection of more generic forms. Using these sources as a point of departure and orientation, you would eventually modify or move away from these sources to produce your own version of a contract, often under the supervision of an experienced lawyer. This book will serve as your supervisor and provide realistic simulations of drafting tasks.

While you are mastering the contract drafting skills covered in this book, keep in mind that there is no such thing as a perfect contract. This book will provide model provisions, or your professor may give you model provisions or contracts. You will want to avoid simply "cutting and pasting" these offered precedents into your drafts. Rather, these precedents are intended as possible starting points in your drafting, just as would be the case in practice. Working through these precedents, you will learn to think critically (an invaluable skill when reviewing contracts) and gain confidence not only in identifying issues in precedents but in making appropriate revisions. You will gather ideas from these precedents—deleting, adding, or modifying language, as needed, applying the drafting principles in this book. Being able to critically read and revise precedents and contracts is an important skill whether you are authoring the first draft of a contract or you are reviewing a contract prepared by someone else.

1.3 Learning how to critically review contract provisions to create your own provision

Comparing precedents in many guided activities will give you the confidence to engage in zero-based drafting. Further, this book also includes exercises that ask you to draft contract provisions without using precedents because practicing zero-based drafting in this manner will quickly improve your drafting skills. By applying the drafting principles discussed in this book, you will be drafting provisions with a clarity and conciseness not found in most precedents.

Using selected precedents in end-of-chapter exercises, you often will be asked to evaluate the similarities and differences of related provisions across the selection, identifying weaknesses as well as strengths. Based on your evaluation, you may be asked to draft your own provision.

Clause is often used to refer to a particular type of contract provision (e.g., severability clause, non-compete clause).

These exercises will help you develop the invaluable skill of critically evaluating and modifying precedents and thus avoid common mistakes made by inexperienced contract drafters or non-native English speakers. In many ways, inexperienced drafters who are fluent in, say, English are similar to non-native English drafters who are drafting contracts in English. Inexperienced drafters are learning to master a new language—the language of contracts. Similar to non-native English drafters, inexperienced drafters, though fluent in English, may lack confidence in their own drafting abilities and thus often rely on a "cut and paste" approach to contract drafting: The drafter finds a provision from precedent that appears ideal for his or her purpose and, without appropriate critical reflection, wholly integrates it into the new contract.

The following example shows the problem of cutting and pasting without adequate reflection and demonstrates how a critical comparison of similar provisions can aid in drafting a clear and concise provision. Note that at the end of each clause there is a citation to "DA#," "CA#," or "APA#" followed by a numeral. These citations will be used throughout this book to refer to the collection of contracts on the companion website.[1] The letter combination *DA* stands for *Distribution Agreements*; the letter combination *CA* stands for *Consulting Agreements*; and the letter combination *APA* stands for *Asset Purchase Agreements*.

1. The three collections can be found in the "Contract Database" file on the book's companion website.

The drafters chose as the basis for their adaptation two "entire agreement" clauses.[2]

Two "Entire Agreement" Precedents

This Agreement constitutes the entire understanding of the Parties hereto and supersede all previous agreements between the Parties with respect to the matters contained herein. No modifications of this Agreement shall be binding upon either Party unless approved in writing by an authorized representative of each of the Parties. [DA#24]

This Agreement supersedes all proposals, oral or written, all negotiations, conversations or discussions between or among parties relating to the subject matter of this Agreement and all past dealing or industry custom. [DA#25]

Being able to compare several provisions can definitely facilitate drafting, but it also carries the danger of copying mistakes from the original precedents, as can be seen in the following example.

Entire Agreement Clause from Cutting and Pasting

This Agreement constitutes the entire understanding of the Parties hereto and supersede [DA#24] all proposals, oral or written, all negotiations, conversations or discussions between or among parties of this Agreement [C#25] and all past dealing or industry custom [DA#25]

In this cut and paste version of the entire agreement clause, the drafter copied the verb *supersede,* which was used incorrectly in DA#24. The correct form should be *supersedes* because a singular subject ("This Agreement") needs a verb that is in the singular form. The same grammar issue turns up when the drafter copied "all past dealing or industry custom," a phrase that lacks the plural version of the words *dealing* and possibly also *custom*. Further, the drafter copied the word *Parties* from one version, where the word is capitalized because it is a defined term,[3] and then used a non-capitalized

2. *Entire agreement* clauses are also commonly referred to as *merger* clauses or *integration* clauses.

3. See Chapter 4 for a discussion of defined terms.

form of *parties* from another provision, creating an inconsistency and possible confusion in the use of one term.[4]

Fortunately, this book offers enough activities and guidelines to train you in the critical analysis of precedents.

1.4 Contract drafting for non-native English speakers

Words frequently appear in predictable groups and combinations referred to as *collocations*. For example, think of everyday English word combinations such as "take a picture" or "pay attention" (not "make a picture" or "provide attention"). As fixed expressions, these phrases often have very specific meanings. Similarly, in a contract it is much more common to see the combination "commercially reasonable" than the combination "commercially sensible."[5] Even though *sensible* is a synonym for *reasonable*, the phrase "commercially sensible" would not likely be used in a contract. If it were, it probably would have a different meaning and possibly change the legal effect of the provision. Thus, your approach to drafting a contract provision should not be that of translating word for word from your native language and randomly choosing a word from a list of synonyms.

Let's look at an example of word-by-word translation into English from German. The German contract heading *Vertragsgebiet* consists of a combination of the word *Vertrag*, which means *contract*, and *Gebiet*, which means *territory*. If you look up the corresponding English words in a dictionary, you might find *agreement* or *contract* for *Vertrag*; and *region*, *territory*, or *area* for *Gebiet*. An untrained drafter unfamiliar with the proper English translation of *territory* may choose the combination *area of agreement*, an expression that is somehow misleading. It might imply the terms that the parties agree on.

This book provides a convenient way for you to discover how words and even sentences typically combine in contract provisions. If you want to find out, for example, how the noun *subject* appears together with other words in a contract, simply use the FIND function in your word processing program and search for the word in the collection of contracts provided on the companion website. (For detailed instructions on how to use this function, read the document "Introduction to the Use of the Contract Database" in the Chapter 1 materials section of the companion website.)

4. The effect of misrepresenting legal requirements in a "cut and paste" provision is discussed in detail in Chapter 2.

5. There are 50 instances of the use of *commercially* in the 40 sample distribution agreements on the companion website. Forty-three times, *commercially* appears together with *reasonable* as *commercially reasonable*. There is no single instance of the use of *commercially sensible*. The combination *commercially reasonable efforts* is used 28 times.

In your search results, you will see that the combination *subject to* is much more often used than the combination *subject of* and that these two phrases have different meanings. *Subject to* is frequently used to express a condition.

> ***Example 1:***
> All orders for the Products by Distributor will be *subject to* acceptance by Supplier.
>
> ***Example 2:***
> Distributor's shipping instructions are *subject to* change upon written notice from Distributor.

Subject of is often used to mean *center* or *focus*:

> ***Example 1:***
> The results of these negotiations will be the *subject of* a separate agreement.
>
> ***Example 2:***
> If the Products, or any part of the Products, are the *subject of* any claim or lawsuit. . . .

The advantage of looking up words or phrases in the precedents on the companion website is that you can compile a list of commonly occurring words and combinations, and you can set up your own individual vocabulary list. It is easier to remember new words from their context. To help with memorization, you should enter new vocabulary together with examples of its use in context in a vocabulary list that you periodically update or modify. You can also add questions and notes and mark commonly occurring word combinations. When applicable, comment on the legal effects of the wording.

1.5 Final words of caution

Remember, there is no such thing as the perfect contract. In fact, the precedents found in the *Contract Database* on the companion website were chosen because they could be improved; reviewing and revising these precedents will develop your critical skills in evaluating and revising contract language. Also keep in mind that the model provisions that we, the authors, provide in this book reflect many of the principles of good drafting this book espouses, but even these model provisions should not be considered suitable for every contract. You must never thoughtlessly copy and paste examples from this

book—even those promoted as examples of good drafting—into your draft without considering appropriate modifications grounded in the context of your client's deal, governing law, your client's interests, and the parties' intent.

Exercises

NOTE: Exercises that are especially useful for non-native speakers are marked with a  in this book.

The following exercises give you a chance to familiarize yourself with the kind of activities you will find throughout the book. Before starting any of the exercises in the book, read the document "Introduction to the Use of the Contract Database" in the Chapter 1 materials section of the companion website. The files referred to in the following exercises are available on the companion website.

▶ Exercise 1-1 Finding headings in a contract

Using the FIND function in your word processing program, you can look for headings to search for similar provisions across contracts.[6] In the "Distribution Agreements" file on the companion website, find three provisions in three different contracts that have the provision heading *Governing Law.*

▶ Exercise 1-2 Drafting a provision

Imagine that you are drafting an agreement in which a professional golfer will be consulting with a golf club manufacturer on the design of a new line of golf clubs. The parties agree on an initial term of three years for the contract. The parties want the right to extend the contract for another three years in writing. How will this be expressed in the agreement? Draft a brief provision stating the initial term of the agreement and how the parties will extend the agreement for another three years. When you are done, use the FIND function of your word processing program and look for the use of the word *extend* in the "Consulting Agreements" file on the companion website. This will probably lead you to contract provisions that address contract extension. Compare your version with several other versions from the database. Is there a common heading you can find for passages that contain the word *extend*?

▶  Exercise 1-3 Finding words in a contract I

Write down a few examples of how you would use the word *incur* in a sentence. If you don't know the word, use the FIND function in your word

6. As described in the document "Introduction to the Use of the Contract Database" on the companion website.

processing program to look it up in the "Distribution Agreements" file on the companion website. What words does it commonly appear with? If you still do not know the meaning of the word *incur*, look it up in a legal dictionary.

Does it appear in one particular provision more than in others?

▶  Exercise 1-4 Finding words in a contract II

Using the FIND function in your word processing program, look for the word *mutual* in the same file. What words does it commonly combine with?

▶ Exercise 1-5 The new deal—phone call with Cynthia Adler

Listen to the phone conversation between Cynthia Adler, partner in Whitney & Adler, and Peter Craven, senior associate, about a meeting Cynthia had with one of the firm's clients regarding an upcoming business transaction. Assume that you are Peter and take notes and compose an email to Cynthia summarizing the content of this phone conversation. The audio recording and transcript can be found in the materials section of Chapter 1 on the companion website.

Chapter 2

Preliminary Drafting Concerns

HIGHLIGHTS

This chapter discusses:

- The benefits of authoring the first draft of a contract.
- The significance of ethical conduct when drafting.
- The importance of
  - Becoming familiar with the underlying business deal,
  - Drafting the contract for the intended audience, and
  - Understanding the law governing the contract.
- Choosing appropriate precedents as starting points for your draft.

When parties decide to enter into a contract, they must determine who will create the first draft of the document. Hopefully, for reasons discussed below, you will be the author of that draft. But even before creating the first draft, the parties can expend much time and effort in discussing proposals and settling issues. The extent of your role as legal counsel to your client in this pre-drafting process will vary from deal to deal. Your client, and sometimes even you on behalf of your client, will be negotiating issues with the other party. A basic understanding of the business purpose underlying the deal and knowledge of the law governing the contract is crucial to advising your client effectively during negotiations.

This book focuses on the technical skill of drafting, but creating a clear, concise, and precise contract cannot be accomplished without (1) understanding the underlying business deal, (2) knowing the governing law, and (3) recognizing the audience. The first two of these three concerns play a crucial role from the moment the parties begin deliberations. But, even if you are not involved in the negotiation stage of the deal, you must still understand the business side of the deal and know the governing law before you can create a draft of the contract or review someone else's draft. Another important drafting concern is recognizing the contract's audience, particularly those who will be reading, implementing, or enforcing the provisions. You must draft the contract so that it is understandable to the contract's intended audience. The

importance of understanding the business deal, knowing the governing law, and recognizing the audience will be often emphasized throughout this book.

Still another preliminary drafting concern is whether you will draft a provision from scratch or whether you will use precedent to assist you in drafting. If you use precedent, you must be careful to review it critically and, if necessary, revise it to express the parties' intent clearly, protect your client's interests adequately, and comply with governing law.

2.1 Authoring the draft and ethical drafting

The American Bar Association, the professional organization for U.S. lawyers, has adopted Model Rules of Professional Conduct (Model R. Prof. Conduct), which serve as a basis for rules of lawyer conduct in most states. See footnote 1 in this chapter for cites to some relevant rules. The MRPC addresses, among other things, representing clients, advising clients, and discussing misconduct. For links to the text of the MRPC, go to https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

The party responsible for drafting the contract might be predetermined by the nature of the business transaction. For example, lenders typically create loan documents for their borrowers, and landlords typically create leases for their tenants. But in transactions where the drafter is not predetermined, you should always insist on authoring the first draft. Your client may have to pay a little more for the time spent creating the draft, but the benefits gained by your client will outweigh the cost. Savvy business clients understand this. For less experienced clients, you may have to explain the benefits to them.

The first draft sets the tone for revisions and further negotiations. As the original author of the draft, you will carefully decide on words, sentence structure, and placement of the provisions, all to ensure that the parties' intent is clearly expressed and your client's interests are adequately protected. While the other party will have an opportunity to review your draft and make suggestions or changes, you, as creator of the draft, will be intimately familiar with every line of the document and how the various provisions relate to each other. Certainly, all is not lost if another party creates the first draft. By methodically and critically reviewing someone else's draft, you will be able to grasp the details and identify issues of concern. And you can still advocate on behalf of your client to make important revisions, but you might never become as familiar with a contract as when you are the original author. Further, you might find that another person's draft lacks in quality and content; if this happens, you might spend extensive time negotiating and making revisions to it. For these reasons, always offer to create the first draft if given the opportunity to do so.

Whether you are the original drafter or revising someone else's draft, you must create provisions that fairly and accurately state the parties' negotiated

terms of agreement. While you want to ensure that your client's interests are adequately protected, never change terms already agreed upon by the parties and never draft provisions on important issues that still need to be settled. In both instances, you must discuss these matters with your client, and if required by good business and legal ethics, you must discuss these matters with the other party. If you foresee problems for your client on any points already agreed upon or anticipate problems with issues that have yet to be settled between the parties, contact your client to discuss these problems and decide on an honest, open, and fair way to resolve them.

Drafting a document that does not accurately reflect the parties' agreed terms or purposely creates ambiguities can lead to serious problems. Here are some examples of what could happen: First, you risk upsetting your client. Second, the other party could lose trust in your client and in you. Third, working on revisions and negotiating other unsettled issues could take longer and become unnecessarily difficult. Fourth, communication between the parties might entirely break down, and the deal could be killed. Fifth, even if the parties sign the document with defective provisions, disputes could arise later, leading to costly proceedings to resolve them and perhaps ultimately result in unenforceable provisions. Sixth, your professional and personal reputation could be called into question. A damaged reputation is extremely difficult to repair. And last, but equally important, in serious cases you could lose your license to practice law.

While working on the exercises and drafting assignments in this book, conduct yourself as if you were actually engaged in a real business deal. Practicing ethical behavior now will reinforce right action in the future. Along the way, issues will undoubtedly arise and you will have questions as to how to properly resolve them. Your professor will discuss common professional ethics issues that arise in transactional practice and work with you on resolutions.[1] Be mindful of applicable rules of professional conduct and follow them. Beyond this, always conduct yourself in a reputable and fair manner. By doing so, you will be respected by your peers, your clients, and other parties. It can open the door to other opportunities.

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1. The American Bar Association's Model Rules of Professional Conduct relevant to representing and advising clients in transactional work include the following: Rule 1.1 (Lawyer Competence); Rule 1.2(d) (Engaging in Criminal, Fraudulent, or Prohibited Transactions); Rule 1.3 (Exercising Reasonable Diligence); Rule 1.4 (Communicating with the Client); Rule 1.5 (Fees); Rule 1.6 (Revealing Confidential Information); Rules 1.7, 1.8, 1.9, and 1.10 (Conflict of Interest in Representing Different Clients); Rule 13 (Representing an Organization as a Client); Rule 1.15 (Safekeeping Property of Others); Rule 1.16 (Declining or Terminating Representation); Rule 2.1 (Acting as Advisor to a Client); Rule 4.1 (Making Truthful Statements to Others); Rule 4.2 (Communicating with Persons Represented by Legal Counsel); Rule 4.3 (Dealing with Persons Not Represented by Legal Counsel); Rule 4.4(b) (Transactions with Persons Other than Clients); Rule 5.1 (Responsibilities of a Partner or Supervising Attorney); Rule 5.2 (Responsibilities of a Subordinate Lawyer); Rule 5.5 (Unauthorized Practice of Law and Multijurisdictional Practice of Law); Rule 8.4 (Misconduct); and Rule 8.5 (Disciplinary Authority; Choice of Law).

2.2 Understanding the business deal

In order to draft the contract, you will need to understand the parties' agreed deal and, in particular, the agreed terms. You may gather this information from the client through a telephone call, a face-to-face meeting, or by written communication.[2] If you are a subordinate attorney in your law firm, you may receive this information through your supervising attorney via notes, memos, files, or conversation. In the case of a telephone conversation or a personal meeting with the client or supervising attorney, prepare ahead of time, if possible, a checklist or list of questions to ask the client or supervising attorney about the deal. Sometimes your employer may have already prepared a checklist or list of questions for more common transactions. For example, if your office routinely works on mergers and acquisitions, it may have a checklist of questions to ask the client, a list of documents to prepare, a process for completing due diligence, and a proposed timeline for completing pre-closing[3] tasks and for completing tasks post-closing. Practice manuals and published articles, especially those related to the subject matter of the transaction on which you are working, can offer helpful checklists or lists of questions.

In transactional work, **due diligence** means conducting an investigation of the target company, property, or security to evaluate it for purposes of whether to move forward with the acquisition.

While it might be unnecessary to understand every detail of the business underlying the transaction, you should strive to have a basic understanding of the business aspects of the deal in order to identify issues or spot gaps in the parties' agreement. For example, if your party wants to buy land on which to build a shopping center, you will want to be familiar with the zoning for that land to ensure this type of improvement is permitted or, if the land is not zoned for this type of use, you will need to know the process for rezoning the property and the likelihood of success. In the event the land is not zoned for this type of use, you will want to include in the purchase agreement a condition that closing on the transaction is conditioned on successful rezoning of the property to permit the building of a shopping center.

In your research, consider reviewing precedent for transactions similar to the current deal. Research any relevant documents previously prepared for this client. For example, if your office has handled a number of hospital acquisitions for this client, you will want to review those files and note any issues or features that might be relevant to the current deal. Talk with colleagues who have experience in drafting these transactions.

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2. If you are working with a new client, consider practice tips for interviewing a client discussed in the following article: Clay Abbott & Charles Bubaney, "The Anatomy of a Client Interview (with Resources and Sample Questions)," 8 Prac. Law. 61 (1996).

3. For a definition of *closing*, see the discussion in Chapter 3, section 3.1.2 a.

Based on your research, add to the list of questions and items that you have already compiled. As you draft the contract, you may discover additional questions need to be answered. Make a list of questions to ask your client or supervising attorney the next time you communicate with them.

Finally, when the contract has been signed and the transaction completed, save your compiled checklists and questions for future projects. Over time you will refine these checklists and questions, thus making the drafting process for future projects go more smoothly and quickly.

2.3 The contract's audience

When drafting a contract, you must also anticipate who will be the audience for the contract. Naturally, the immediate audience is the contracting parties. Therefore, you will draft provisions that effectively carry out the intent and goals of the contracting parties.

Also, though, you should consider those who will be responsible for implementing the contract provisions. These persons are often not those who negotiated the deal or signed the contract. People responsible for implementing the contract might be employees of the contracting parties, such as bookkeepers, accountants, salespersons, marketing personnel, and financial officers. Therefore, you will want to draft provisions that not only give adequate direction to personnel but also ensure that the performance requirements are compatible with the day-to-day operation of the business. For example, if a provision requires a company to pay royalties to a party based on product sales in the previous year, it would be unrealistic to require the company to pay the royalty on the first business day of the new year. The provision should allow for reasonable time before payment is made in order to settle accounts, verify records, and otherwise process the disbursement.

Third parties, those who are not the contracting parties, or employees or agents of the contracting parties, also may have an interest in the contract. For example, if a contracting party is purchasing assets of a business with borrowed money, the lender of that money will want to review the purchase agreement along with any other important documents connected with the sale to ensure its interest in the purchased assets is protected.

Finally, in the event a dispute later arises between the parties in the performance of the contract, arbitral judges or court judges may be called on to interpret the contract. You will want to draft provisions that protect your client's interest and express the parties' agreement as clearly, concisely, and precisely as possible. By doing so, you will reduce the likelihood that a costly dispute will arise. But even if a dispute does arise and it is submitted to a judge for resolution, your well-drafted provisions will hopefully bring about a quick resolution to the dispute that best protects your client.

2.4 The importance of governing law

A contract creates a private set of obligations and rights between the contracting parties. Even so, sometimes disputes occur because the contract fails to address a situation that later arises when the parties are performing the contract, or the parties disagree about the application of or performance required by a contract provision. In these instances, applicable law will (1) fill gaps in the contract with default rules, (2) provide standards for interpreting contract provisions, and (3) in some instances, override provisions that are found to be unreasonable. You must be familiar with the governing law in order to provide your client with accurate advice during the contracting process. If you are not familiar with the governing law, then you may want to research the law or obtain the services of legal counsel who is familiar with the law. Be aware that rules prohibit lawyers from practicing law in jurisdictions where they are not authorized to practice, which includes offering legal service or advice.[4]

2.4.1 Contract law in the United States

In the United States, contract law is mostly a matter of state law. Each state has its own body of law for contracts. In each state, some contract laws are found in the state's codified statutes, and others are found in the state's common law. Many states base their contract laws on model rules. All 50 states have enacted versions of the Uniform Commercial Code (UCC).[5] The UCC is a series of rules, drafted by lawyers and legal scholars, governing different types of business transactions. Article 2 of the UCC, for example, focuses on rules for transactions involving the sale of goods. Also, because the United States is a signatory to the Convention on Contracts for the International Sale of Goods (CISG),[6] the CISG is law in all 50 states[7] and, except in certain limited circumstances, will supersede any state-adopted UCC rules when a transaction involves the international sale of goods. A series of contract rules that are not binding on any court but can be used by a court as a basis for making common law is the ***Restatement of the Law of Contracts***. There are two series of these Restatements: The first treatise was published in 1929, and a second edition, called the *Restatement (Second) of the Law of Contracts* (R2d), was completed in 1979. Both Restatements were prepared by the American Law Institute, an organization of lawyers, law professors, and judges. The rules are intended to provide general principles of contract law, which state courts widely use to create common law.

4. *See, e.g.*, ABA Model R. Prof. Conduct 5.5.
5. For links to the text of the UCC, see http://www.law.cornell.edu/ucc.
6. For links to the text of the CISG, see https://uncitral.un.org/en/texts/salegoods.
7. As mandated by the Supremacy Clause of the U.S. Constitution. *See* U.S. Const. art. VI, § 2.

Courses on U.S. contract law use the UCC, CISG, and R2d to teach general concepts in contract law, rather than addressing the specific laws of each of the 50 states. This book will do the same whenever generally referencing U.S. contract law. Nevertheless, remember that although states share similar contract laws (by codifying a version of the UCC, enforcing the CISG, and adopting rules based on R2d), there can also be some significant differences in contract law from state to state. An example of this is demonstrated in the severability clause problem in section 2.5.

2.4.2 Canons of contract interpretation

Language is **ambiguous** when it is capable of two or more reasonable but contradictory meanings.

When interpreting a contract provision in dispute, a court may use a variety of canons of interpretation to help determine the provision's meaning. These canons do not take the place of governing statutes or common law precedent. They are merely persuasive guidelines or principles that courts may use to help them interpret the meaning of ambiguous language in a contract. There are many different canons of construction, some of which contradict each other. To further complicate matters, you can never be certain which canons a court will use to help resolve a dispute. Each contract and each dispute raises a unique set of circumstances. Sometimes the contracting parties will include preferred canons of interpretation in the contract to give the court some guidance on the parties' intent and to encourage the court to apply the canons if a dispute arises. Even so, only the court has the power to decide whether to use a canon of interpretation.

The following is a sampling of commonly used canons of construction.

(1) Ambiguous words or phrases are construed against the drafter (also referred to as *contra proferentem*).[8] Based on this canon, you might conclude that being the author of a contract provision is not so beneficial after all, if a court applies this canon and interprets a provision against you. But you can sidestep this problem by writing a clear and concise provision.

(2) Words are given their ordinary and common meaning, unless otherwise specifically defined in the contract. For example, *product* can refer to all types of goods produced by various businesses. But within the context of a contract the meaning of *product* might be explicitly limited to specific goods produced by one of the contracting parties.

(3) Contract provisions should be read so that their meaning is consistent with other provisions in the contract. Thus, if a contract provision

8. Here, "it is incumbent on the dominant party to make terms clear." *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1150 (Del. 1997), *quoted in* Michelle E. Boardman, "Contra Proferentem: The Allure of Ambiguous Boilerplate," 104 Mich. L. Rev. 1105, 1121 (2006).

stated, "The term of this agreement is for two years," and another provision in the contract provided, "Either party may terminate this contract at any time in the event of the other party's failure to perform as promised," then the provision stating the term would be interpreted to mean that the duration of the contract is two years, unless terminated earlier because of a failure of one of the parties to perform as promised.

(4) General words following specifically listed words include only those items similar in nature to the listed words (also referred to as *ejusdem generis*). If a contract provision referenced the distribution of corn, melon, beans, and peas, then *produce* would not include eggs because this is produced by an animal, not a plant.

(5) The meaning of a word or phrase may be known from the words surrounding it (also referred to as *noscitur a sociis*). In a lease for office space, for example, if the landlord promised to keep all floors, stairs, and hallways free of obstruction, then a floor used exclusively for storage is not included because stairs and hallways refer to passageways.

2.4.3 "Governing law" clauses

Because the law plays such an important role in contract enforcement and interpretation, the parties should decide on the law that they want to govern the contract before they begin negotiations. In the contract, state the law that should be applied to resolve any disputes. Keep in mind, however, that including a "governing law" clause in the contract does not necessarily mean a court will apply it. For example, a court may decide not to enforce a "governing law" clause if the law chosen by the parties bears no relationship to the parties or the transaction. Considerations for drafting this provision are discussed in Chapter 13.

2.5 Using precedent

Ideally, you will draft a contract from scratch without relying on precedents. Nevertheless, as mentioned in Chapter 1, using a precedent as a beginning point for your draft can save time that would otherwise be spent creating a completely new contract. Reviewing precedents can also help you spot possible issues or important points or provisions that the parties might want to address in their ongoing negotiations. You might also review precedents to identify provisions that are essential or beneficial to use in specific types of transactions. This is especially helpful if you have had no previous experience drafting a particular type of contract, such as, for example, an asset purchase agreement. Reviewing precedents for deals similar to your current deal can jump-start the drafting process, saving you time and, consequently, saving your client money. Nevertheless, precedents should be used cautiously.

Form precedents covering a wide range of transactions are available on the Internet as well as in books. Some are offered for purchase while others are available at no cost. The quality of these forms, whether purchased or free, varies widely. Another resource for precedents might be found in contracts from previous business deals drafted by colleagues in your office.[9] No matter if you use a form precedent or a precedent from a previous deal, they are both limited in their usefulness. A precedent often includes provisions that are unique to that business deal. Also, a precedent might have been drafted in favor of one party over another. For instance, if you are drafting an asset purchase agreement, you may use as a starting point a contract drafted by a colleague for another asset purchase. Perhaps in that previous deal your colleague represented the buyer, so the provisions favored the buyer. If you are representing the seller in the current deal, you will not use provisions from the precedent that unnecessarily favor the buyer. Or, perhaps that precedent included a provision that is inapplicable to your business deal, such as a provision stating the parties will comply with state law that requires notice to seller's creditors of the purchase.[10] If that law has since been repealed so that notice is no longer necessary, or if your client's transaction takes place in another state where there is no such law, you will need to omit that compliance provision from your draft. Even if the precedent includes provisions appropriate for the present deal, you should still use the precedent cautiously. For instance, provisions in the precedent could be poorly written. By applying the drafting guidelines provided in this book, you can create contract provisions that are clearer, more concise, and more precise than those found in most precedents. Therefore, whenever using precedent, be prepared to make deletions, additions, and revisions to address the unique circumstances of the present business deal adequately and to protect your client's interests.

By far the best resource for precedent is a collection of contracts that you have drafted. As the author, you will be intimately familiar with the precedent. You will have organized the provisions and carefully chosen words and structured sentences so that they are clear and concise. You will know which provisions were specially drafted to reflect the parties' agreement in that deal and why some provisions, which in other deals might be included, were omitted. Thus, consider collecting contracts that you have drafted to create your own collection of precedent for future deals.

In section 1.3 of Chapter 1, you were cautioned against merely "cutting and pasting" precedent into your draft without adequate reflection. One of the biggest mistakes made by drafters is using words, passages, or formatting from a precedent without thinking about how governing law will affect the current contract's interpretation. The following scenario demonstrates this,

9. Be careful, however, in using contracts drafted for use in other business deals.

10. This law is commonly referred to as the *law on bulk sales*, addressed in Article 6 of the UCC.

but it also shows how you can critically compare similar provisions across precedents to create a provision that adequately protects the interests of the parties in your draft.

The three severability clauses in the box below were taken from different precedents on the companion website for this book.

> In case any one or more provisions contained in this Agreement or any application thereof shall be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein and other applications thereof shall not be in any way affected or impaired. [DA#1]
>
> ---
>
> Whenever possible, each provision of this Agreement and all related documents shall be interpreted in such a manner as to be valid under applicable law, but if any such provision is invalid or prohibited under said applicable law, such provision shall be in effect up to the extent of such invalidity or prohibition without invalidating the remainder of such provision or the remaining provisions of this Agreement. [DA#6]
>
> ---
>
> To the extent any provision or term of this Agreement is or becomes unenforceable or invalid by operation of Law, such unenforceability or invalidity shall not affect the remaining provisions of this Agreement. The Parties agree to renegotiate in good faith a substitute provision that to the extent possible accomplishes the original business purpose of the provision held to be unenforceable. [DA#15]

All three examples state that if a provision in the contract is found unenforceable, the other provisions of the contract will remain in force between the parties. The severability clauses make clear the parties' intent that the entire contract should not be declared unenforceable merely because of an unenforceable provision.

A closer look at DA#1's provision, however, reveals that it differs from the other two severability clauses. Unlike the clauses in DA#6 and DA#15, the DA#1 provision does not address what happens to the matter covered by the unenforceable provision. As previously mentioned, when a contract is silent, the governing law of the contract will step in to fill the gap. In the United States, each state has its own law for contracts. Although states may have similar laws, there also can be some significant differences. The situation raised by DA#1's severability provision is a case on point. To illustrate, let's say an executive working for a company promises in an employment agreement not to compete with the company's business in the United States during the term of the contract and for three years after the contract ends. A dispute later arises between the parties over whether the non-competition clause is unreasonable because it covers far more territory than where the company actually

does business. The court deciding the dispute finds that the geographical area is unreasonable. If DA#1's severability clause was used in that contract, the question of whether the non-competition clause survives in some form depends on the state law governing the contract. Here are three possible alternative resolutions depending on the law of the applicable state:

(1) Despite the severability clause in the employment agreement, the court will refuse to enforce the entire non-competition clause.[11] The company will find this outcome unsatisfactory, especially if the unenforceable provision was an essential part of the contract. Undoubtedly, the company would consider the non-competition clause an essential part of the contract.
(2) The court will delete the unreasonable words if they are grammatically separable from the rest of the clause and enforce the remaining words in the clause (commonly referred to as **the blue pencil doctrine**). In this instance, whether a part of the original non-competition clause can be enforced depends on the wording of the geographical restriction in the original non-competition clause. If the geographical restriction in the non-competition clause of the employment agreement had stated "anywhere in the United States," striking this phrase would result in no geographical area at all; thus, the entire non-compete could not be enforced.[12] But if the geographical restriction listed each of the 50 states, then the court could strike those states where the company did not conduct business and enforce the non-compete for the remaining states.[13] Therefore, in states following the blue pencil doctrine, you must be extremely careful how you word the clause.
(3) The court might strike the unenforceable parts of the clause and rewrite it to make it reasonable under the circumstances and enforce the provision as reformed.[14] Here, the court—not the parties—has the power to reform the provision.

The company would not be satisfied with resolutions 1 or 2. And either or both parties might not be satisfied with the court reforming the non-competition clause under resolution 3. Using the non-competition clause in DA#6 does not increase the likelihood of a satisfactory outcome. The clause in this

11. *See, e.g.*, Wis. Stat. § 103.465 (2019) (mandating no enforcement of an entire non-competition clause if any part of the restriction is found unreasonable); *Bendinger v. Marshalltown Trowell Co.*, 994 S.W.2d 468 (Ark. 1999). Some states simply will not enforce a non-competition clause in an employment agreement, even if it is reasonable, because it is considered an unreasonable restraint of trade. *See, e.g.*, Cal. Bus. & Prof. Code § 16600 (2019); N.D. Cent. Code § 9-08-06 (effective Aug. 1, 2019).

12. *See, e.g.*, *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723 (Ariz. 2006); *Dicen v. New Sesco, Inc.*, 839 N.E.2d 684 (Ind. 2005).

13. *See, e.g.*, *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905 (Ind. Ct. App. 2011).

14. *See, e.g.*, *Brignull v. Albert*, 666 A.2d 82 (Me. 1995); *Cobb v. Kayne Publ'g Group, Inc.*, 322 S.W.3d 780 (Tex. App.–Fort Worth 2010).

contract states that the unenforceable provision will be given "effect up to the extent of such invalidity or prohibition." Despite the parties' intent to direct the court to enforce the non-competition clause to the broadest extent possible, the court's ability to enforce the provision is still limited by the governing law. In application, the general added language in DA#6's clause has probably not changed the outcome from that under DA#1's clause.

The provision in DA#15 appears to be the most satisfactory of the three. Here, the parties will conduct good faith negotiations for a replacement provision that will "to the extent possible accomplish[] the original business purpose of the provision held to be unenforceable." Thus, the parties, not the court, determine the replacement provision. While DA#15 may be the most preferable, substantively, of the three precedents, you will want to edit the words so that they match those used in your contract. Also, because you want as clear and concise a provision as possible, you will further edit the provision so that it is expressed in plain English according to the principles discussed in this book. The following is an edited version of DA#15 stated in plain English. Note that the provision in DA#1 was not dismissed entirely! The drafter borrowed some of the wording from DA#1 for the clause stating that provisions, excepting the unenforceable provision, remain enforceable.

> If any provision in this agreement is held unenforceable or invalid, the validity and enforceability of the remaining provisions will not be affected or impaired in any way. Additionally, the parties shall negotiate in good faith a substitute provision that to the extent possible is (1) valid and enforceable and (2) accomplishes the original business purpose, as intended by the parties, of the unenforceable or invalid provision.

Therefore, when reviewing precedent to gather ideas for your draft, consider looking at several different sources. Note similarities and distinctions between the precedents. Ensure that any precedent used in your draft is revised to (1) clearly express the parties' intent, (2) adequately protect your client's interests, and (3) comply with governing law. Many of the exercises in this book will help you gain confidence and skill to critically review precedents and make important revisions to accomplish these goals.

Exercises

▶ Exercise 2-1 Drafting provisions that comply with governing law

Review the following sections from a state statute requiring that disclaimers of implied warranties must appear conspicuously in the contract. Then read the contract provision following it. The governing law for the contract is the law of this state.

State Code § 216:

(2) To exclude or modify the implied warranty of merchantability or any part of it, the exclusion must mention "merchantability" and, in case of a writing, must be conspicuous.

(3) To exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, "There are no warranties that extend beyond the description on the face of this document."

State Code § 201:

(10) "Conspicuous" means written, displayed, or presented so that a reasonable person against whom it is to operate ought to have noticed it. Conspicuous terms include the following:

(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) language in the body in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

Contract provision:

PRODUCT WARRANTY. MANUFACTURER warrants to DISTRIBUTOR that the Products sold to DISTRIBUTOR (i) are fit for the purpose of use as an intraoral camera system by trained personnel and (ii) shall be free from defects in materials and workmanship for a period of one (1) year from the date the Products are received by the actual end user thereof, provided however, that this warranty shall in no event extend beyond the close of the eighteenth (18th) full calendar month following the date of shipment by MANUFACTURER. EXCEPT AS JUST PROVIDED, MANUFACTURER GIVES NO WARRANTY AS TO MERCHANTIBILITY, FITNESS FOR PARTICULAR PURPOSE, OR ANY OTHER WARRANTY, EXPRESS OR IMPLIED, CONCERNING THE PRODUCTS. DISTRIBUTOR shall not make any other warranty, guarantee, or representation with respect to the Products or their use except at its own risk and expense. If DISTRIBUTOR or its customers are made parties to any claim or action involving the Products, including claims relating to the manufacture or use of the Products, DISTRIBUTOR shall immediately notify MANUFACTURER in writing. This paragraph (ii) sets forth the sole and entire warranty obligation of MANUFACTURER with respect to Products. [DA#6]

Did the drafter satisfy the law? Explain the reason for your answer by noting the relevant statutory requirements and how each has been satisfied by the language.

▶ Exercise 2-2 The new deal—second phone call with Cynthia Adler

Listen to another phone conversation between Cynthia A. from Whitney & Adler and Peter C., senior associate at the same firm, about a follow-up meeting Cynthia had with the firm's client. Assume that you are Peter and take notes and compose an email to Cynthia summarizing the content of this phone conversation. The audio recording and transcript can be found in the materials section of Chapter 2 on the companion website.

▶ Exercise 2-3 The new deal—making a list of questions

Now that you have a list of notes that you turned into emails from Exercise 1-5 in Chapter 1 and Exercise 2-2 in this chapter, make a list of questions that you would want to ask the client or the other party.

Chapter 3

Contract Structure and Formatting

HIGHLIGHTS

This chapter discusses:

- The beginning, middle, and end parts of a contract and components that may be included in each part.
- Substantive contract provisions that compose the middle part of a contract that may include any or all of the following:
  - Core provisions.
  - Exit provisions.
  - Alternative dispute resolution provisions.
  - Miscellaneous provisions.
- Headings for contract provisions.
- Numbering formats for contract provisions.
- The importance of choosing an appropriate font and allowing for white space.

Before discussing the details of a contract in the following chapters, we begin here with an overview of contract structure. This chapter introduces you to the basic parts of a contract, contract provision headings, and numbering formats.

The legal definition of a joint venture varies from state to state. Generally, though, a **joint venture** is a for-profit business enterprise conducted by a group of people, entities, or both. A joint venture is of limited duration and is created for a specific purpose.

3.1 Basic parts of a contract

A written contract tells the story of the relationship between the contracting parties. And, just like a |story, a formal written contract has a beginning, a middle, and an end. Each part serves a particular purpose and is made up of distinct components. See Figure 3-1 on the next page.

3.1.1 The beginning of a contract

The beginning of a contract introduces the reader to the nature of the agreement and identifies the contracting parties. See Figure 3-2 for an example

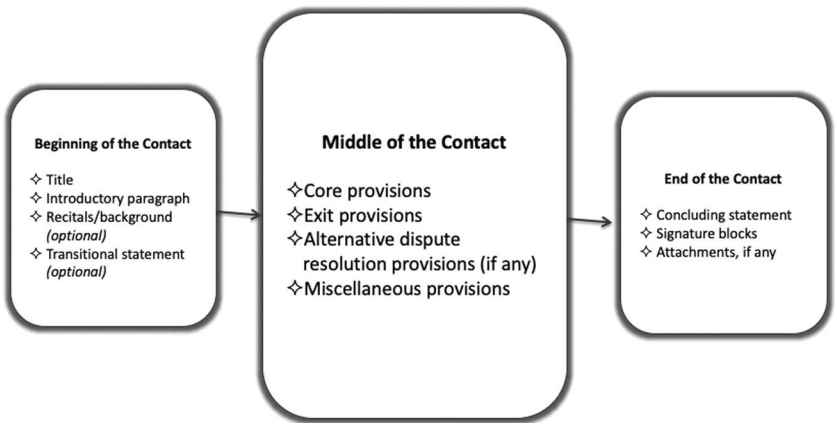

Figure 3-1 Basic parts of a contract

of the beginning of a joint venture agreement. This part of a contract opens with the *title of the document*. Typically, an *introductory statement* follows. The **introductory statement** is a paragraph identifying the contracting parties. The introductory statement might also provide the date of the contract. Sometimes the beginning of a contract also includes **recitals**, which are statements about background history or the contract's purpose. These statements are not substantive provisions, such as those creating obligations, rights, or conditions, which are found in the middle part of the contract. Finally, a *transitional clause*, while unnecessary, is often included in a formal written agreement. If included, the **transitional clause** merely serves to signal to the reader a shift from the contract's beginning to the

Joint Venture Agreement — *Title*

This agreement, dated May 1, 20XX, is between Go-Go Scooter Company, Inc., an Illinois corporation (**"Go-Go"**), and Tong Corp., a California corporation (**"Tong"**). — *Introductory Paragraph*

Go-Go engages in the business of developing, manufacturing, and marketing scooters (the **"Product"**).

Tong is a leading manufacturer of lightweight solar rechargeable batteries and has access to distribution markets throughout the United States and Canada (the **"Territory"**).

The parties desire to enter into this joint venture for the purpose of developing, manufacturing, and distributing solar-powered electric scooters for sale in the Territory. — *Recitals*

Therefore, the parties agree as follows: — *Transitional Clause*

Figure 3-2 Example of the beginning of a joint venture contract