Drafting Contracts for Rural Clients

BY GIAN ("JOHN") BROWN, ESQ.

As a Las Vegas-based transactional lawyer, most of my practice focuses on clients in metropolitan areas. So, I typically deal with coastal firms representing counterparties. I've had the great good fortune, however, to represent a client in Lincoln County for several years. This representation entails drafting contracts for parties based in rural areas and, occasionally, working with rural attorneys. I've consistently enjoyed the experience, and my practice is far richer and more thoughtful as a result. I fully acknowledge that what follows here is more art and subjective judgment than science, but I thought I would share some drafting changes I undertake for these projects.

First Principles. I've found that rural parties invariably have a more "midwestern" approach to transactions, in that relationships usually pre-exist the transaction, and they mean something to these parties. Also, less is more, and lengthy contracts are not only thought to be unnecessary but frankly mistrusted. A contract that is too long, overly formal, or laden with the legalese that paranoid drafters have a hard time shedding will risk harming the business relationship or, worse, prompt the parties just to move forward without a written contract at all. Lest I leave a misimpression, however, rural parties (and the rural attorneys I've worked with) are as sophisticated as parties in metropolitan areas. They are just more comfortable with extracontractual relationships guiding business interactions.

Scoping the Contract. Whether due to time pressures or deference to my role, I frequently provide clients with an initial draft contract that we use to discuss questions and positions. With rural parties, however, I do the opposite. I just use simple bullet points to guide an initial discussion covering the who, what (usually how much for what activity or product), for how long (and under what circumstances that timing might be cut short), and what could go wrong. That conversation also teases out any expectations – i.e., what else is understood about this arrangement or lurking around the corner.

Drafting the Contract. Putting pen to paper (or fingers to keyboard), I employ the following drafting choices:

Use Recitals. I find recitals are one of the few parts of the contract that rural parties don't object to – in part because they just factually confirm what has led to this contract and what the parties intend for the contract. It helps, too, that Nevada courts conclusively presume the truth of the facts recited (other than those concerning consideration). See NRS 47.240(2).

Excise Redundancy. Any devotee of Ken Adams[1] will find unsurprising that I excise from precedent – my own or that of others – as many surplus words as possible. So …

- "By and between [or among]" becomes "between;"
- "Sell, assign, transfer and deliver" becomes "sells;"
- "In the event that" becomes "if;" and
- "Shall have the unequivocal right to" becomes "may."

You get the idea. I also prune as many defined terms as I can (rarely do you need "Agreement" as a defined term since "this agreement" suffices, and context usually eliminates the need for "each, a 'Party' and collectively, the 'Parties'").

Limit Boilerplate. Evaluating the customary provisions in any contract requires the most subjectivity. I tend to always keep the following:

- **Entire Agreement**. This agreement is the parties' sole and entire agreement for the subject matter contained herein, and replaces all prior and contemporaneous understandings [, both written and oral,] with respect to this subject matter. [*Why? I like to impose some discipline on the parties to include <u>all</u> arrangements they have discussed in their written contract.*]

- **Further Assurances**. Upon any party's [written] request, each party shall provide the requesting party, or sign for the requesting party, any additional documents [reasonably] required to consummate the transactions contemplated by this agreement. [*Why? As a tradeoff for excising several customary provisions, this provision just obligates folks to do what they are likely to do anyway.*]

But depending on the facts, I often exclude several boilerplate provisions that routinely appear in my commercial contracts. These include:

- **Notice** [*Why? A thoughtful provision on this topic is lengthy, and the parties have in the past wondered why we need to spell out what they would do anyway. I do, however, draft to require "written" notice to avoid misrecollections about oral communications*.]

- **Governing Law; Consent to Venue** [*Why? I'm comfortable that Nevada courts will apply Nevada law when Nevadans negotiate contracts that are performed within Nevada. If the parties decide to use alternative dispute resolution or Clark County courts, however, I'll insert an appropriate provision.*]

- **Amendment** [*Why? For rural clients who are disciplined to run contracts and changes by me, I view this as another provision that spells out what they would do anyway.*]

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Acknowledge and Automate. Whenever possible, I incorporate the notion that events have occurred at the time of the contract or automate the effectiveness of a post-signing event to minimize subsequent paperwork. So, for example, a purchase agreement typically acknowledges receipt of payment, and a release may become automatically effective upon receipt of a final installment payment.

Previewing the Contract. As I noted above, the rural-based attorneys who I've worked with are as thoughtful and sharp as any other location. Often, however, they have been generalists. I've almost always set up an "ice breaking" discussion to introduce myself and find out a bit more about their practice. Usually, 10-15 minutes suffices for that. Then, upon sending over the contract, I typically offer to have a "preview" conversation focused not on negotiating but instead explaining the drafting choices I made and the thinking behind why I made them.

Memorializing the Process. If the drafting process results in any discomfort for me, I recommend certain provisions that my client decides they can do without – then I don't hesitate to explain that I will send a confirmatory email to just ensure that if questions arise in the future, we understand why certain drafting decisions were reached. Though I'm not a fan of "covering yourself" communications, I have found this is helpful for me (and sometimes the client) to refresh our recollection for the factual underpinnings of these decisions.

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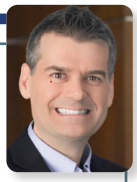
And what if this work results in a written contract that, for one reason or another, the parties just never sign? I would never encourage that, of course. But my litigation colleagues have told me that if the parties pursued a course of performance that matches the written document, then our unsigned writing greatly aids an argument under the Uniform Commercial Code if the transaction involves goods (see NRS 104.1303) and otherwise strengthens the case for a binding agreement for services.

ENDNOTE:

1. I have long been a fanboy of Ken Adams's approach to contract drafting, and find his treatise, *A Manual of Style for Contract Drafting, Fifth Edition* (ABA Publishing) utterly indispensable to all areas of my practice.



GIAN ("JOHN") BROWN provides legal services and corporate development advice to clients of varying sizes and maturity, and in diverse industries, on a wide range of business and transactional matters. This ranges from startup activity, through acquisitions by and of the company, and the corporate governance and "run the company" commercial activity in between.