



10

Common Contract Drafting Mistakes

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Intro

Introduction

You deal with contracts every day and you know what a bad contract looks like. It's complex, repetitive, and misses out on important details. When a drafter relies on copy/paste rather than specific goals, that's bound to happen. You need clear rules to avoid these common mistakes. With that in mind, let's define a few mistakes.

In this guide, we'll share ten common pitfalls that undermine good contract drafting. Avoid these and you'll create contracts that are simple, substantive, and succinct. Simple contracts avoid confusion, substantive contracts cover the risks, and succinct contracts prioritize the deal over the technicalities.

Great contracts happen when you strip away errors, so let's uncover 10 common drafting mistakes.





MISTAKE



Not doing adequate due diligence



Know the details of a deal before you get started, including inherent risks and client priorities.





MISTAKE 1: NOT DOING ADEQUATE DUE DILIGENCE



People are so keen to “do business” that they frequently overlook the importance of due diligence. This undermines the drafting process. Hasty due diligence frequently leads to conflicts over small concerns that could have been avoided if the finer points had been addressed. Due diligence lowers the chances of a dispute, saves time, and saves money. Parties that seem too good to be true require even more thorough research. Doing a risk analysis is a good place to start because it will help you understand the scope of due diligence required.

Due diligence is step zero when drafting contracts. Communicate this to clients and avoid rushing through a transaction.



QUESTION CHECKLIST

- ✓ What is the other party's story and what are their priorities?
- ✓ What types of companies have they worked with?
- ✓ How does their business paperwork appear?
- ✓ Do they have well-organized systems and procedures?
- ✓ What arrangements have they previously agreed upon with other parties? Are they abrasive or adaptable?
- ✓ Are they engaged with any competition?
- ✓ Do they have the appropriate permits, licences, and permissions to run a business?
- ✓ What is the state of their insurance and security systems?
- ✓ Have they ever been embroiled in a legal battle? What happened as a result?
- ✓ Are there any potential risks of this transaction?



MISTAKE



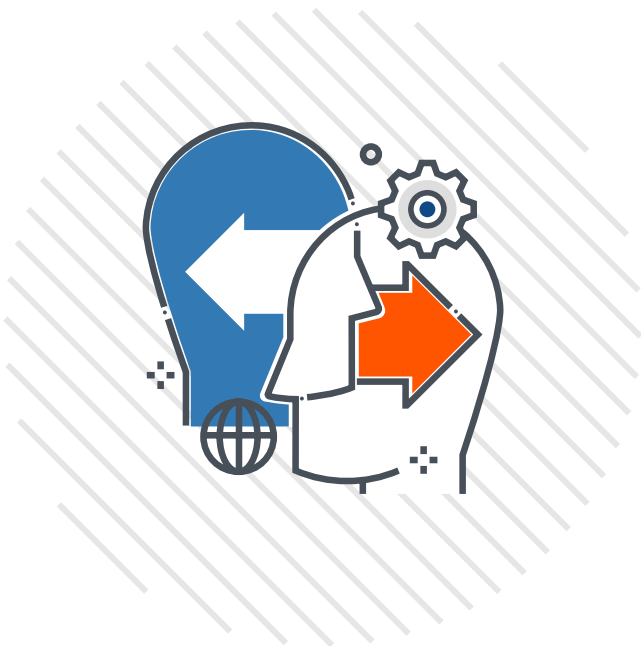
Not asking
the **right questions**
before drafting



MISTAKE 2: NOT ASKING THE RIGHT QUESTIONS BEFORE DRAFTING



We aren't taught all types of contracts and how to draft them in law school. We're taught broad principles of contract law. Though these principles are necessary foundations, they aren't enough to help you survive as a lawyer.



Preparation is the key to a robust contract. Being prepared involves asking the right questions.

- ✓ What contract am I drafting?
- ✓ Why is this contract important in this scenario?
- ✓ When does this contract come into play?
- ✓ What are the different parties to this contract?
- ✓ How will both sides be bound when they enter into this agreement?
- ✓ What happens if the parties don't enter into this agreement?
- ✓ What information do I need to know before the client meeting?
- ✓ How is my client in a better position by entering into this contract?
- ✓ What will be the priorities of the party that I'm representing?
- ✓ What are the different clauses I might need for each priority?

These bring clarity and highlight gaps that can be filled through client meetings.



MISTAKE 2: NOT ASKING THE RIGHT QUESTIONS BEFORE DRAFTING



Steps to a robust contract:

Use preliminary information given by the client before meetings to prepare the right questions.

1

Take notes about client requirements, facts discussed, and necessary details and data that will be included in the contract.

2

After the meeting, request from the client a summary of all relevant facts, figures, and data, including expenses, timelines, duties, and responsibilities.

3

Match these outlines and ask questions if there are inconsistencies.

4

Keep clients in the loop to know if they need changes.

5

After your first draft is done, create a handy list of items you need information on from your client.

6



3

MISTAKE



Copy-pasting
from templates
so that you can
“finish it off”

—
*Sample clauses
are great, but not a
great substitute for
a lawyer’s touch.*



MISTAKE 3: COPY-PASTING FROM TEMPLATES SO THAT YOU CAN “FINISH IT OFF” ///

Understanding specific client needs is at the core of what lawyers do. Copy-pasting goes completely against that—and it could cost your client millions.

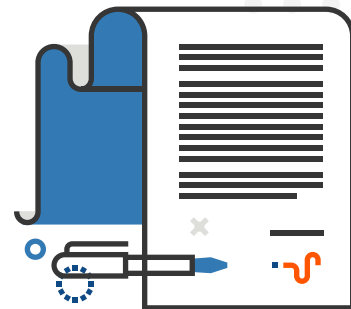
We’ve all been tempted to simply copy and paste sample clauses from several previously drafted contracts and call it a day. But these sample clauses may be utterly irrelevant or even contradict the intentions of the parties in the current agreement. Aim to address the client-specific questions when drafting a contract. Utilize sample contracts or clauses as a source of inspiration, or to revisit aspects when things become unclear.

Imagine this. You’ve lifted some text from an indemnity clause and you are confused about what it means because you have no clue about the background of the contract you pulled it from.

Instead of copy-pasting:

- ➔ Consider approaching a senior attorney for advice.
- ➔ Consider learning more about what an indemnification clause is and what it normally entails.
- ➔ Understand the background of the contract as well as the requirements of the parties.
- ➔ Make a list of everything you think is important.
- ➔ Draft a clause that includes all of the above.

It’s always best to put yourself in the shoes of the client, but that means blindly copy-pasting simply will not do. When you start with your client’s perspective rather than form language from another context, you’ll create a tightly knit clause that’s relevant, reliable, and realistic.





MISTAKE



Ignoring boilerplate clauses because 'they're always the same'



Boilerplate clauses can make or break a contract.



MISTAKE 3: IGNORING BOILERPLATE CLAUSES BECAUSE 'THEY'RE ALWAYS THE SAME'



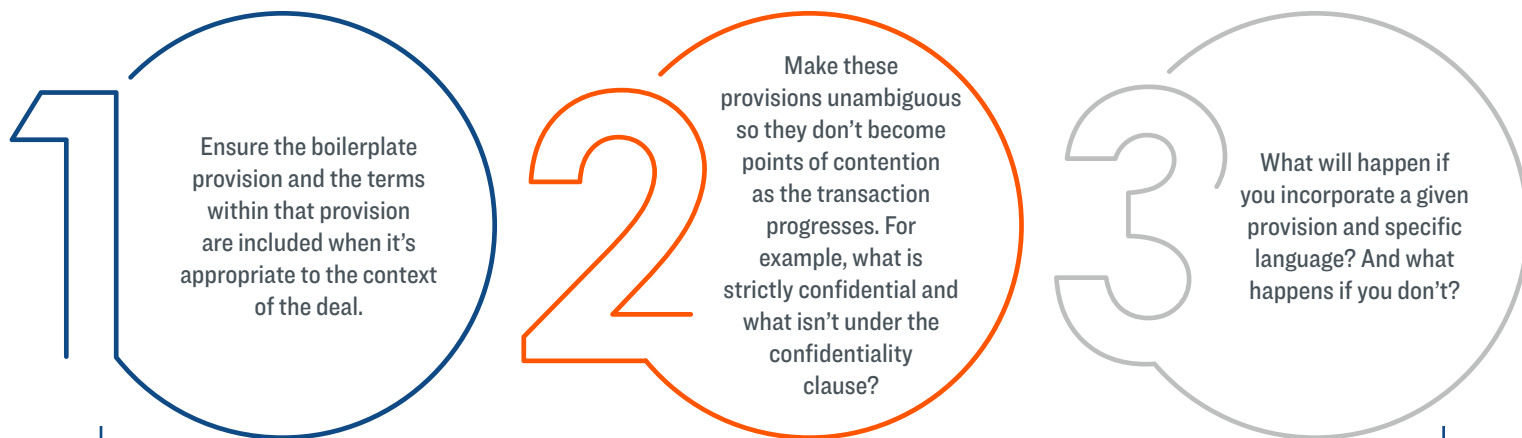
Boilerplates may be standard clauses, but they are not one-size-fits-all.

Boilerplate provisions are the “what-if’s” in contracts. They primarily govern what happens if x happens. It might seem like these should be ignored but remember, following that advice can land you in legal soup.

Boilerplates must be acutely scrutinized and altered for each contract and case scenario. It is not necessary, for example, to add a “time is of the essence” provision in a contract that covers a performance where time is irrelevant.

Quick note: Every boilerplate clause should not necessarily be included in every contract.

3 CONSIDERATIONS WHEN DRAFTING A BOILERPLATE CLAUSE:



Quick tip: Create a checklist of items that are standard across all agreements for each party in a transaction. You can refer to these when dealing with a particular agreement.



MISTAKE



Not considering the client's perspective

*Probably the most harmful thing for your client is to blindly prioritize your process over a client's needs.. Don't be adamant. **Listen.***



MISTAKE 5: NOT CONSIDERING THE CLIENT'S PERSPECTIVE



Client perspective matters. Don't try to impose your opinion on clients. They know what they "need" better than you do. Lawyers are facilitators and committing this mistake can work against you.

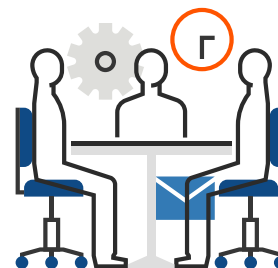
Keep an eye on whether clients are asking questions or not and when they seem uncomfortable about something. This opens doors to understanding what's going in the client's mind. Observe, then ask.

What understanding client perspective means:

- ➔ Listening to their concerns about a particular clause in the agreement.
- ➔ Explaining the "why" behind your opinion on the client's request.
- ➔ Creating communication touchpoints during the transaction to understand their needs from time to time.
- ➔ Conducting meetings before and after negotiations to learn more about their expectations.

Tips for better client understanding:

- ✔ Explain what an agreement can do for the client and request a rough outline of "terms" from them. This tells you what's going on in their mind and helps you focus on their priorities.
- ✔ Request that clients review your first draft and list their concerns. Have a meeting to get clarifications on these concerns.
- ✔ Make the client aware of all contingencies to help them prepare in advance.



The contracts you draft are like your business tool. Make your client feel heard and see how it goes for them and for you.



MISTAKE



Ignoring
formatting &
proofreading



MISTAKE 6: IGNORING FORMATTING & PROOFREADING



This could make all the difference for you. A single comma can alter the meaning of a sentence, resulting in future disputes and repeated court hearings. It's vital to check over the contract several times to eliminate these formatting and grammatical errors.

While online software can be useful, a lawyer's eye is required because software can detect errors but not their context.

Quick tips:

- ✓ The more you look at it, the more mistakes you're likely to find. Even when you do all the right prep, you aren't a machine. Mistakes happen and bias often creeps in. Having another lawyer or competent editor take a look is a great idea.
- ✓ Make a checklist of the most common formatting and proofreading issues you encounter.
- ✓ Keep the contract styling simple: basic fonts, sizes, spacing, and numbering. The key is to stay consistent throughout. Often, these tweaks do nothing to the substance of the contract but improve readability and presentation.
- ✓ Go over the revisions you've made during the drafting process. That might affect referencing and numbering which should be updated.
- ✓ Read the contract backwards or in a different font to break up the monotony of your thoughts.



This is how you stand out—by doing the simple stuff, flawlessly.



MISTAKE



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Using too much
legal jargon





MISTAKE 7: USING TOO MUCH LEGAL JARGON



Using long and intricate words that can be easily misconstrued is an often overlooked blunder.

6 WAYS TO AVOID LEGAL JARGON:

1

Keeping language 'singular' is best. Once I wrote, "all contractors would not be allowed to visit the premises after 7 pm," but this could be interpreted collectively. Is the rule that a group of contractors is excluded but a given contractor could still enter, or does the rule apply to each individual contractor? Avoid the confusion that comes with plural nouns.

2

Maintain overall consistency in the document. If you use a particular way of defining terms or starting a clause, preferably use the same style overall. Define parties by separate names instead of using the same prefix and changing the suffix to "-or" or "-ee". For example, avoid using obligor and obligee. It's a small change that has a huge impact on readability.

3

The shall vs will vs may debate. 'Shall' implies "obligation" and should be used with a party's name. 'Will' denotes a "future action" but it may imply "discretion" and not be an obligation. The word 'may' also implies discretion so make sure you understand the differences and use them accordingly.

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MISTAKE 7: USING TOO MUCH LEGAL JARGON



6 WAYS TO AVOID LEGAL JARGON (CONTINUED):

4

Avoid using words that convey the same meaning or create ambiguity. Saying, “in consideration of and subject to, the mutual covenants, agreements, terms, and conditions herein contained...” isn’t necessary when you can convey the same using one of these. Phrases such as “notwithstanding anything mentioned in this agreement” or “unless the context implies otherwise” or “except to the extent necessary...” create scope for misinterpretation. These can often become points of contention and the other party might be banking on it.

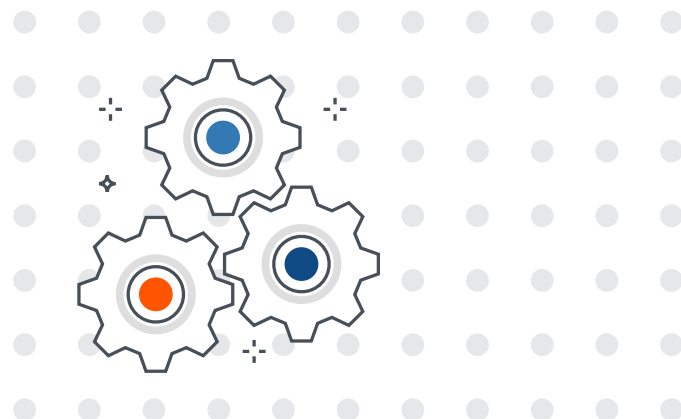
Avoid verbosity and adopt clarity—that should be a lawyer’s mantra.

5

Don’t use language where you contradict yourself in the same contract. Always keep a strict eye on requirements and stick to them.

6

Active voice is almost always better than passive voice. It’s easy to read and understand. Don’t break the sentence midway to convey some other point. Rather keep everything you want to say together. Active voice also helps keep sentences short.





MISTAKE



Not looking for tips or resources to draft better contracts



MISTAKE 8: NOT LOOKING FOR TIPS OR RESOURCES TO DRAFT BETTER CONTRACTS

If you're reading this, you're already fighting mistake 8. It's beneficial to have some assistance early in your career, and even after you've progressed. There are numerous internet resources, such as this one, that can help you save time and effort. Experiment with some suggestions. Make contact with senior associates or lead counsels. To get support, write about your concerns online, but don't be stuck.



How you can feel “unstuck” with resources:

- ✓ Don't rely on them completely. Apply knowledge from your study as well as experience.
- ✓ Look out for similar resources on the same topic and consider the similarities and differences.
- ✓ Weigh out the pros and cons of using a particular tip and apply that with care to your specific contract situation.
- ✓ Use 'client meeting' notes as checklists of their requirements and goals.

Type of resources:

- ➔ Webinars
- ➔ Offline/ online events
- ➔ Ebooks
- ➔ Guides
- ➔ Articles/blog posts
- ➔ LinkedIn posts from experts
- ➔ Online training
- ➔ Information communicated by resource banks or organizations that are in the contracting industry.



9

MISTAKE



Hasty and inadequate contract review



Good drafting didn't make great lawyers, great reviewing did.



MISTAKE 9: HASTY AND INADEQUATE CONTRACT REVIEW



The goal of contract review is to create a fair contract by identifying and eliminating loopholes. Contract review should be done extensively to ensure that no unnecessary provisions exist. Giving documents a hasty run-through for faster execution may impact the transaction as a whole. During the review phase, it's vital to look over the contract terms, ensure they are legally sound, and identify and reduce any risks associated with the agreement.



Consequences of hasty contract review:

- ✓ Negotiated discussions might not have been incorporated
- ✓ Might lead to last-minute inclusions causing even more chaos
- ✓ Reflects a disrespectful behavior toward the work
- ✓ Waste of time, and resources in litigation
- ✓ Affects how your work is perceived in the future
- ✓ Contracts that are rigid and unfair
- ✓ Triggers risks, delays, and compliance-related issues for clients
- ✓ Increases inefficiency and lowers reputation
- ✓ Higher chances of discrepancies and misinterpretation
- ✓ Contradictory elements in the document

Tips for contract review:

- ✓ Use a checklist to ensure that all facts, revised timeframes, terms, and relevant documents are included.
- ✓ Request someone else to review the contract to identify aspects you might have missed.



MISTAKE

10



Failure to
take future
consequences
into
consideration



*Consider everything
that could go
wrong, even if you
think nothing will.*



MISTAKE 10: FAILURE TO TAKE FUTURE CONSEQUENCES INTO CONSIDERATION



Parties frequently decline these discussions as they fear that their business associates might reconsider the deal. Clauses that merely safeguard immediate client interests are of no use and instead having “consequence-based” clauses can help.

3 WAYS TO INCORPORATE CONSEQUENCES:

→ Defaults

What triggers a default or a material breach under the scope of the contract? How much will be paid in damages? Will the other party be given a second chance? Disputes can be resolved collaboratively rather than through litigation which avoids creating a rift between the parties.

→ Termination

What options do parties have if they are unhappy with the performance? How will parties be notified? What constitutes termination? Will opportunities to cure be given? Is there a renewal option? Undesirable circumstances call for clear answers to these questions.

→ Disputes

Details in this clause can be negotiated according to the party preferences. Litigation or alternative methods such as arbitration are available to the parties. Parties should agree on where disputes will be resolved considering the virtual setup.

A better approach is to look into how disputes can be prevented in the first place. Is it possible to improve the processes in place to ensure compliance? Are there procedures in place to successfully adapt to changes? Is it possible to better inform all employees and supervisors of their duties and responsibilities? Is it possible for businesses to improve their internal machinery?

Agreements should fully reflect party expectations and use language that creates a fool-proof contract.

Final note: Good contract drafting is as much about avoiding mistakes as it is building good habits. This list of 10 common drafting errors should help you create better quality control processes. But don't stop here.

You know that legal professionals should think through consequences and make decisions in the best interests of their clients. Still, if you don't create and update systems that ensure quality, these aims are just wishes.

From adequate due diligence to a careful contract review, it's all about the right mindset. The mistakes discussed here are intended to develop a user-friendly mindset to help you achieve the three core goals of drafting simple, substantive, and succinct contracts. Best wishes as you implement better processes, and let me know if I can help.



ABOUT

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Samridhi Jain is a legal content writer and contracts enthusiast. She helps law firms, lawyers, and legal SaaS companies with their content requirements.

She is inclined towards legal design, commercial and business laws, business development, entrepreneurship, writing, and content marketing. Samridhi loves learning about different areas and uses that to her advantage by cross-applying her skills. Having started early and jumped into freelancing, she now works with numerous clients from various jurisdictions including the US, UK, and India.

Her clients jobs include help with law firm website copy, eBooks, guides, blogs, articles, newsletters, brochure content, white papers, infographics, and social media posts. And she loves connecting with legal design, legal tech, and contract enthusiasts.

Samridhi interviews lawyers from around the world on her Instagram page and shares her law school journey as well. She also loves simplifying contracts and legal concepts through digestible designs. You can reach out to her on LinkedIn: <https://www.linkedin.com/in/samridhi-writes-legally/>

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