DRAFTING BUSINESS CONTRACTS:

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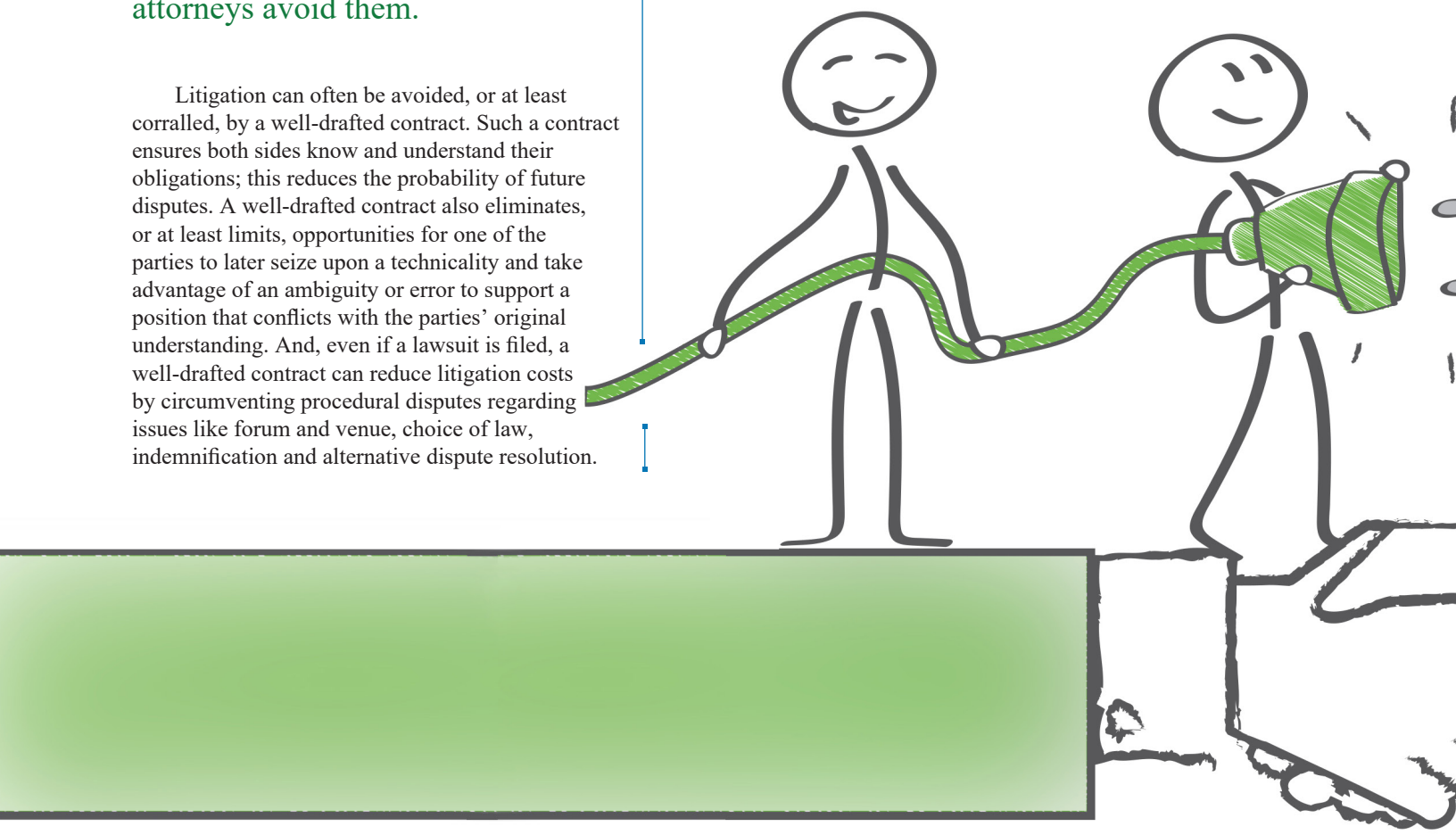
Contracts are important. Everyone knows that. Yet drafting mistakes are common and are often costly, particularly when those mistakes are later cited as the cause or basis for subsequent litigation. As commercial litigators, we consistently encounter legal disputes arising from errors, ambiguities and other drafting issues that could have been avoided. This article discusses some of those frequent mistakes and offers some suggestions to help attorneys avoid them.

Litigation can often be avoided, or at least corralled, by a well-drafted contract. Such a contract ensures both sides know and understand their obligations; this reduces the probability of future disputes. A well-drafted contract also eliminates, or at least limits, opportunities for one of the parties to later seize upon a technicality and take advantage of an ambiguity or error to support a position that conflicts with the parties' original understanding. And, even if a lawsuit is filed, a well-drafted contract can reduce litigation costs by circumventing procedural disputes regarding issues like forum and venue, choice of law, indemnification and alternative dispute resolution.

There is usually no need to start from scratch, but don't rely too much on borrowed language.

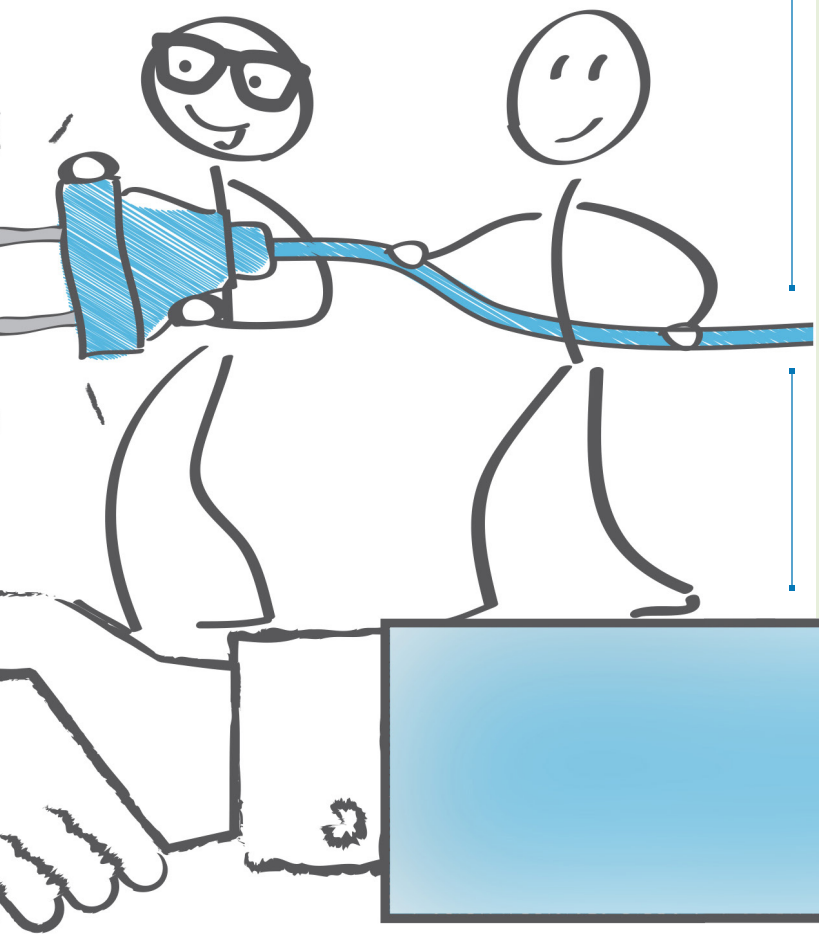
The drafting of most contracts involves the use of terms and clauses borrowed from prior deals or form books. And that's fine, as there is no need to re-invent the wheel. The need for custom language does not mean lawyers should create clauses and definitions from whole cloth. Drafting entire clauses without a reference can lead to inconsistencies, ambiguities, enforceability issues, unreliable/untested language, etc. Chances are, the clause you want is out there — it just needs to be



PRACTICAL POINTERS FOR PROTECTING YOURSELF AND YOUR CLIENTS

tweaked. Some good resources for business contracts include Westlaw, Onecle, Rocketlawyer and Lectlaw.com.

On the opposite side of the spectrum, sometimes too much reliance is placed upon a prior draft from a previous deal, which can lead to an updated contract that omits material information. Additionally, form contracts are appropriate for some types of transactions, but can be problematic when used in inappropriate circumstances. As a result, key terms may not be discussed in sufficient detail. Another common mistake is the inclusion of information or terms in the new contract from a separate, prior transaction that do not apply to (or worse, contradict), the terms of the current transaction.



FAMOUS EXAMPLE:

After artist and pop-culture icon Andy Warhol's death, his estate sold one of its assets: *Interview Magazine*. The sale was secured by a promissory note and personal guaranty, payable not to the estate but to a company called Andy Warhol Enterprises, Inc. Warhol's attorney had dissolved that company a week before the promissory note was drafted. The promissory note was appropriately revised, but the personal guaranty was not. Due entirely to that error, the guaranty required payment be made to a nonexistent company. In the ensuing litigation, the Warhol estate argued this was just a typing error, but the court struck the promissory note and held that it was unenforceable. As a result, the $7 million balance owed to the estate was lost.

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Spend time proofreading and make sure critical terms are unambiguous.

In litigation, drafting mistakes can be fatal. Lawsuits have been decided based upon the erroneous identification of parties or key terms, as well as the failure to eliminate ambiguous terms. Be wary of run-on sentences and legalese. Make sure important terms are clear and concise. Also, ensure that terms and phrases are consistently defined and that grammatical ambiguities are eliminated.

A contract should plainly state the duties and responsibilities of the parties. For instance, a contract that merely states one party will provide consulting services for a stated sum invites future disputes. The contract should describe, with specificity, the services to be provided — and sometimes it is prudent to also identify the services or products that are *not* included.

In addition to understanding the key terms of the transaction, the person drafting the contract must also understand the most important deal points and the possible reasons or scenarios that could cause future disputes between the parties. Those critical points should be a primary focus during the drafting process.

FAMOUS EXAMPLE:

The recent and much-publicized Canadian lawsuit between Rogers Communications Inc. and Bell Aliant Regional Communications LP, known as the "Million Dollar Comma" case, demonstrates the need to ensure that both parties agree on important terms and that the contract reflects those terms in clear and concise language. The contract at issue contained the following clause:

"This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party."

Bell Aliant interpreted this as a right to terminate at any time upon one year's notice to Rogers. But Rogers interpreted it as a right to terminate only at the end of the current or renewed five-year term. The answer depended on whether the phrase "unless and until terminated by one year prior notice…" modified both of the preceding clauses or just the immediately preceding clause. Bell Aliant won the first round, but Rogers ultimately prevailed on appeal based on a comparison to a companion French-language version of the contract.

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Sign only the final version — not working drafts.

Parties sometimes mistakenly execute a draft that contains redlined edits, or execute numerous drafts of the same agreement. This can create ambiguities in future litigation even when the mistake is corrected through the execution of a final draft. Be careful when using tracked changes, and implement a system to ensure you can easily keep track of which version you have sent, and to whom. After a few rounds, circulate a copy that does not include the markup and re-start the change-tracking process. When the contract is complete, redline the final version and check it against the original to make sure it conforms to the parties' understandings and expectations.

FAMOUS EXAMPLE:

The high-stakes divorce between Frank and Jamie McCourt made national news for numerous reasons. Marital assets were valued at over $1 billion and included ownership of the Los Angeles Dodgers. Early in the divorce proceeding, the trial court ruled that the couple's postnuptial agreement was unenforceable. The McCourts had both signed a postnuptial agreement in 2004, but their attorney had inundated them with various drafts, and the McCourts ended up signing two conflicting "final" versions — one draft said Frank retained ownership of the Dodgers, while the other copy said Jamie would own the team. NL

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