
keep
it
simple

Business Drafting Basics Every Lawyer Should Know

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I. Introductory Comments.

Regardless of where you practice law or the area of law that you practice, writing will be vital to your success. At its very core, the practice of law involves your ability to communicate your client's position to others.

Whether you are hired to communicate why your client is not responsible for an act or inaction, whether you are hired to convince others that your client was the victim of or in some way damaged by the act or inaction of others, or whether you are hired to ensure that the details of a transaction between your client and someone else is clear and uncomplicated so that anyone reading it can understand – you simply must be able to communicate, and even for litigators, that is done through your ability to write.

I. Well Drafted Contract versus the Poorly Drafted Contract.

The best advice I could provide to anyone trying to convey a client's position, is to *keep it simple and concise*. **Do not fall into the trap of trying to sound "lawyerly" or thinking that for the agreement to be legal it must be complicated or use complex terms or language. Contrary to popular opinion, a well drafted contract should not be over complex, wordy or too sophisticated. There are far too many contracts that take 20 pages to accomplish what could have been succinctly covered in 15 or even 10-12 pages. Your document should be well-organized, address the pertinent topics and terms, and describe clearly and succinctly what the parties have agreed to, using plain English.**

> *Practice Point:* Keep your audience in mind. As you are drafting, continuously ask yourself not only can your client read your work and will they understand what you have written, but will they ever actually pick it up to read at all? I hate to disappoint you but more times than any of us care to admit, our clients are not reading every single word of our work. I have found, that the odds improve significantly that the document will be read if it is no longer than it truly needs to be, is broken down by topic through the use of good outlining, and if the most important terms (usually the important business terms) are near the beginning of the document. Also, you cannot put a price on a good table of contents.

So while I just spoke of brevity, you do have to make certain you cover everything that needs to be covered within your document. The courts will look to the four-corners of the contract to determine the intent of the parties, so as the drafter, you want to make sure the intent is clearly stated within those corners. A good test to put any writing through is to ask yourself whether someone completely unrelated and unfamiliar with the matter could determine what the parties agreed to, relying solely on the words on the page.

In academic circles, there are many who encourage young drafters to avoid recitals. While it is true that those recital provisions are not part of the contract and are therefore not enforceable, as a practicing attorney, I have a different opinion. I believe that succinct recitals help a third-party understand the background and goal of the contract. As a result, especially in more complex contracts, I always include recitals as a way of describing background information and context to the agreement about to be described in the contract. Then, if the recitals provide something more than background, I simply include a reference in the body of the contract to incorporate the recitals into the agreement.

It is also common in larger transactions for other documents to be incorporated

into a contract by specific reference. While this is an efficient way to address what are often many different components of a transaction, be careful not to create either conflict or ambiguity. When utilizing multiple contracts to document a complex transaction, they should be evaluated both as separate contracts – meaning they must include the appropriate components to be capable of being found valid and enforceable standing alone, but they must also be prepared in such a way as to create a cohesive and complete body of terms that fully and completely address the parties' intent with respect to very different topics.

It is worth a reminder, going all the way back to your first year contracts class in law school that to be enforceable, a contract must consist of an offer, acceptance and consideration – without those three legal elements, there can be no enforceable contract.

II. Discussion of Topics Covered in Nearly Every Business Document.

In addition to the three fundamental elements necessary for a contract to be legally enforceable, to be a good contract, it should cover several other key areas

A. Who is doing what for whom?

Whether organized as an introduction, scope or purpose, your agreement should start by advising the reader what the expectations are between the parties. I wrote above about the use of recitals, and perhaps they addressed some of this, but remember the recitals are not part of the contract unless you incorporate them and cause them to be included. Depending on the purpose of the agreement you could use sub-headings to introduce a consulting arrangement, a buy/sale transaction, delivery of goods, development of software, etc. The point is, give an explanation of the subject-matter of the agreement.

This is also a good time to determine if the relationship formed by this agreement is intended to be exclusive. Are there any other limitations placed on either party to not do business with competitors? Does that limitation apply forever (unlikely) or can your concerns be addressed with a strong confidentiality agreement?

B. Time and Money.

Time. Every agreement should clearly state the time the agreement becomes effective, often defined by a specific date, but sometimes by the occurrence of another event. If this starting point is relevant to other actions or rights in the document, then it should be a defined term "Effective Date" for a shorthand reference. In addition to the start, you need to be clear on when the end occurs. This period between the start and the end is the Term. Once you define the length of that Term, you need to provide for whether the Term will or can be renewed, and if so how that is accomplished. Does it renew automatically unless one party takes an action to prevent that renewal (commonly referred to as an "Evergreen clause") and if so what type of action must be taken to prevent the renewal (typically, advance notice *always in writing* to the other party a minimum of "X" days). An alternative method for addressing the Term is to decide if it will not automatically renew but rather, one party or the other must take some action to request a renewal, and if so, what must that action involve? In larger contracts it is not uncommon for the parties to provide a mechanism whereby the contract terms (not the Term but the various terms) will be renegotiated prior to any renewal, and that process may begin as much as six to twelve months prior to the end of the current Term.

Practice Point: Speaking of notice, you should also make it as simple as possible for your client (and the other party) to understand how to calculate days whenever they come into play. Do "days" include every calendar day (Sunday through Saturday) or perhaps only Monday through Friday, excluding federal holidays, in which case you will need to include and define a "Business Day."

Don't forget to address if, how and by whom the agreement can be terminated before the Term expires. Does either party have a right to terminate for any reason or for no reason at all? (Commonly referred to as a termination for convenience.) If so, this is typically accomplished by the person desiring to terminate giving the other party X number of days' advance *written* notice. Can the parties mutually agree to terminate? What about a termination for Cause – meaning one party did not meet their obligations and as a remedy the other party is free to walk away. All of these situations and circumstances need to be thought through and then the logistical steps that a party must take to act on a termination should be spelled out in the document.

Money. In addition to a start and stop, every agreement must involve the exchange of adequate consideration, which is nearly always accomplished by one party paying money to the other party for their performance. Your agreement should clearly define what the payment

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obligations are – one lump sum payment, monthly payments, completion or progress payments? Unfortunately, parties do not always do what they are contractually supposed to do… so what happens if payment is late? Is there an added penalty or interest added to the amount due? If this happens often, what is the remedy to the injured party? Is termination of the agreement an available option? What about your costs to pursue legal remedies? Consider whether you should include language regarding collection activities and the right to recover expenses.

C. <u>What promises are being made about whatever is being done</u>?

Business Promises. At its core, the point of the agreement is to ensure that both parties are clear on their own rights and responsibilities, and conversely, the rights and responsibilities of the other party. So, your draft should clearly spell out those starting with the obligations around deliverables or performance. What is a party being paid to do, and how do you measure that performance? In other words, when has a party earned that payment? While a large part of your job drafting is to clearly provide for what is supposed to happen, it is equally important (and in fact maybe more important) that you provide for what happens when things do not occur as they were expected. When that happens, one party is said to have defaulted on a contractual provision. In that default situation, contracts typically provide for a right to cure or correct the problem. Your drafting should take into account the specific performance or deliverable expected, and provide for what would be an acceptable handling of a default – maybe that involves financial penalties, or a "do-over" opportunity. What if this agreement involves the performance of services that are merely one piece of an overall project, and the entire project is delayed or cannot be completed without this piece? Often the injured party can and does identify someone else to perform and then hold the original contractual party (who failed to perform) responsible.

While the tone thus far has been about performance in general, promises can also be made about the status, condition, or quality of the goods delivered (new, good working order, free and clear of liens), or the services to be performed and whether they meet or exceed industry standards and are performed timely. Your document should identify and describe any warranties being given, or to the contrary provide if no warranties are offered. You may also include service levels or quality assurances, perhaps delivery timelines. When drafting these provisions, ask yourself what problems are likely to arise, and how can you address them ahead of time, to provide both parties with the roadmap on how to overcome them.

Intellectual Property. A few words unique to intellectual property. If IP is involved with or is the main focus of the agreement you are drafting, consider engaging someone experienced in that area of law. There are unique principles in this area of law that can be tricky and ultimately very costly for the client if not handled in the correct way with proper wording. For example, and I've had clients fall victim to this (prior to engaging a lawyer…), just because you paid for something that was created for you, does not mean you automatically own it and you certainly do not own it exclusively. You need to be certain that you address such principles as "*works made for hire*" and that your document includes the appropriate language regarding ownership being transferred to the proper party both at the time of delivery and coupled with a commitment to cooperate in the future with any challenges to that ownership. Any project that involves joint collaboration is filled with ownership related issues that need to be thought through carefully, and again, I encourage you to seek out experienced IP counsel to assist or perhaps for the referral. If you are on the receiving end of an IP related contract, you will also want to be careful to address any infringement claims that come your way. Be sure to get an iron clad representation and warranty from the developer or selling party that the deliverable does not infringe anyone else's IP, and provide specific IP remedies if it does.

Authority and Performance. In addition to the business or project related promises, well drafted agreements will also address certain broader promises. For example, each party's authority to enter into the agreement and to perform, and statements that the agreement creates

a binding legal obligation of each party.

D. What happens when someone doesn't do what they promised to do?

Dispute Resolution. When someone doesn't do something at all or up to the standard that was agreed upon, the injured party is entitled to seek a remedy. In the vast majority of times, that comes as a result of the parties speaking with one another about the situation and then crafting a remedy that fits the situation. We have already mentioned several such remedies including, a financial penalty being assessed (or in the reverse, a modification to the consideration due from the injured party), an opportunity to cure the problem or sometimes a complete do-over. Escalating from internal discussions, the parties could seek to have their matter heard by an objective third-party in the form of mediation or arbitration. When drafting your agreement and with input from your client, you should determine whether such informal resolution methods should be mandatory before a lawsuit is filed. And of course, filing a lawsuit is the most-escalated method for addressing a dispute. The agreement should already prescribe the law that will govern and the proper venue for any such action. Generally the courts will look to the body of the agreement and will utilize the state law agreed upon by the parties, however it is prudent that there be some causal connection between the state law selected and the site of performance.

Damages. Unless prescribed in the agreement, typically the determination of damages will rest on those that can be actually proven. Given the subject-matter of the agreement, you may include that incidental damages are appropriate. You should also discuss whether those damages should be limited in any way, whether to a dollar cap or to exclude all consequential or punitive damages.

Insurance. When thinking about damages, always be mindful of whether a party could actually pay the damages your client is likely to demand. It is always a good idea to include a requirement that the parties carry adequate insurance, with the adequacy being defined in the agreement based on the project. Again, depending on the size and scope, your agreement may require additional language concerning the rating of the insurance provider, and notice to you of any changes to the policy, or whether you should be formally added as an additional insured to the policy.

Indemnification. It is sometimes easier to think of indemnity as the right of one person to seek reimbursement or refund from another party, because of something that happened to the party seeking the reimbursement or refund, that really should have happened to (or been covered financially) by someone else. Black's Law Dictionary describes indemnity as "a duty to make good any loss, damage, or liability incurred by another." You might also hear indemnity obligations referred to as "hold harmless" obligations, since one party is obligated to hold another harmless. This type of protection is typically included as a section of an agreement, but in some cases can be the subject of a stand-alone agreement.

The parties are typically referred to as the Indemnitee or the Indemnified Party – referring to the person wanting protection, or the Indemnifier or Indemnifying Party – referring to the person promising (warranting) to minimize harm to the indemnitee.

To be addressing what on its face is a fairly simple concept, indemnification provisions are notoriously complex and must be prepared with great caution. While not always, many times a contract will include a mirrored-type indemnity obligation between the parties, such that Party A agrees to indemnify Party B for certain losses or damages, and in return Party B agrees to indemnify Party A for certain other losses or damages. It is also common for there to be exclusions to the losses or damages that will be addressed by indemnification. Perhaps the most common exclusion is for negligence or fault of the party seeking indemnification. The theory is that a party bearing all or partial responsibility for the loss (due to negligence or fault) should not benefit at the expense of another (what would be the Indemnifying Party).

Indemnification provisions often include very methodical steps to follow when a

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loss is experienced, so that the other party is immediately notified and given the opportunity to step in and take control of the process. It is also quite common, especially in business sales transactions for there to be caps and baskets on the amount an Indemnifying Party can be required to pay. As the name suggests, a cap places an upper limit on the amount that can be recovered by an Indemnified Party from an Indemnifying Party; a basket should be thought of as a deductible – the out-of-pocket amount the Indemnified Party must spend before it can seek any indemnification from an Indemnifying Party.

E. That long, section at the end of the document.

READ IT! While you may think that large section near the end all reads the same, and by and large it usually will be similar, things can be slipped in that come back to haunt you. Below is a list of topics typically included in the Boilerplate section and things for you to consider as you draft your agreement:

- Notice: to whom, how and when is it provided? Think about technology – is email acceptable now, what will the future view as acceptable.
- Counterparts: Signatures on multiple pages have been the norm for years, now expect to receive faxed, or more likely PDF or possibly even electronic signatures.
- Headings: He/she/it designations, significance of headings
- Construction; Counsel: Did one party take the lead in drafting? If so, should that party be held to a higher standard? Was each party afforded an opportunity to engage counsel of their choosing?
- Assignment: Never allowed, sometimes if certain steps are first taken, by one or both parties? What about to an affiliate or a buyer of substantially all the assets or control of a party?
- Entirety of Agreement: Does the four corners of the agreement include all of the terms? Or are there side letters that should be included, or perhaps a previously signed NDA? These should be incorporated by specific reference to continue their validity and enforceability. What about subsequent orders or addendums? (such as with a Master Agreement and orders submitted afterwards)
- Severability: what happens if a court determines any provision is invalid or otherwise unenforceable? Should the entire contract be tossed? Should the court "blue line" the agreement to make the necessary edits to make the provision enforceable to the fullest extent of the law?
- Survival: Are there any provisions that should continue to be valid and in effect even after a termination? Confidentiality and non-compete obligations for example.
- Further Assurances: are any subsequent documents or certificates likely to be necessary to fully accomplish what is intended by the agreement?
- Waiver: If one party lets the other "slide" in one instance, is that party now obligated to allow the slide again?
- Remedies Cumulative & not exclusive: provides clearly that either party may pursue any remedy specifically provided for in the agreement, but also seek any others that exist elsewhere (statutory, equity, etc.)

IV. Tips for Drafting Common Business Documents:

A. Settlement Agreements and Releases.

While all contracts are important, additional caution should be taken when drafting a settlement agreement and release. As the title suggests, parties are agreeing to settle a dispute, thereby giving up potential legal remedies they might otherwise be entitled to pursue, in exchange for an agreed upon resolution. It is critical that as the drafter, you ensure that you have a very clear understanding of the

agreement and that nothing is left open to interpretation.

To do this, the settlement must address the parties involved, describe the claims stated by one against the other, and how the parties have agreed to resolve their differences. This typically means one party agreeing to do (or not do) something in exchange for the release of the claim; or one party is willing to give up and another to receive something in return for releasing a claim. The typical two-party settlement is usually quite easy to understand and therefore to draft; what becomes particularly challenging is when there are multiple parties, with claims and counterclaims against one another. In these situations, it is important that the drafting party takes the time to slowly and methodically walk through each step of the settlement, being sure to recite each step in the settlement to ensure that no expectation or obligation is unintentionally omitted from the settlement. In both the two-party and multi-party situations, you will want to be sure you provide that the settlement is binding as to any spouses, successors, heirs, and assigns, where applicable.

A settlement agreement will often recite only a basic level of background facts. In many settlements the party accused of wrong-doing will specifically state that it denies liability for the act/inaction it is accused of but to avoid prolonged litigation, is willing to settle the matter. Accordingly, some but often not many background facts will be recited in a settlement agreement, as the parties may not be in complete agreement on those "facts."

Included with all settlement agreements is language pertaining to the release. A release can be mutual or one-sided, and may be general or specific. The party giving a release will want the scope to be very narrow, whereas the party benefiting from a release will want the scope to be very broad. The scope of the release will depend on your client's particular position in the situation, and will often turn on which party has the upper hand in negotiation of the settlement.

As with all contracts, a settlement agreement should address the typical boilerplate provisions, such as governing law, dispute resolution, severability, a recitation that the settlement is the entire agreement on the matter, how the settlement may be signed and delivered. If the settlement includes payment of money, then those terms need to be very clearly defined in the settlement. Is a certified check or wire of funds to be made by a certain time? Does the paying party have clear instruction on how to deliver payment?

If the settlement is in connection with a matter pending before a Court, be sure to include language in the settlement addressing dismissal of the matter, with prejudice so that the matter cannot be reopened. Likewise the settlement should discuss payment of any Court-related fees or expenses.

B. Real Property Leases

There is a list of basic issues that should be addressed in every lease, regardless of whether the lease addresses a single or multiple parcels. First and foremost, like every contract, the lease must identify the parties. Residential leases typically define the parties as landlord and tenant whereas commercial leases typically use lessor and lessee, although these are not absolute rules. As we covered earlier, the use of shorthand or defined terms for the parties is to avoid anyone becoming confused, so you may be better served by using more identifying terms.

Every lease should define the property at issue. The best way to do this is with both a street address (which may include an apartment or office number and a building name) but also a legal description (such as in the case of unimproved real property). In Mississippi neither the lease itself nor a memorandum of lease is required to be filed in the real property records of the chancery court where the property is located, but it could be, and if that is the case then the actual legal description of the property will be required. The obvious key is to avoid any misunderstanding as to exactly what is being leased.

The term of the lease is also critical. While this may seem like a simple concept, care should be taken to clearly define when the lease term begins and ends, and also exactly what happens as the term comes to an end. Does the lease renew automatically or does it have a definite end date? Speaking of renewal, must notice be given to renew (or to avoid auto-renew)? If so, you must be very clear on exactly when, how and to whom such notice must be given. As is the case with every contract, notice should be given in writing, and the lease should specify whether an electronic mail or fax is acceptable.

Besides the property description and term, the provisions dealing with money must be clear and concise. A well-drafted lease will clearly state the amount of rent, when rent is due, and where it should be paid, and when/if the landlord/lessee may alter the rent amount. The lease should clearly set the expectations of both parties, and prescribe the mechanism for addressing disputes and seeking remedies for defaults.

Additionally, the lease should specify if any prepayments or deposits are required at the inception of the lease term, and if so, where those funds must be held. It is important to know at the beginning of the relationship if interest can be earned on any held funds, and if so, to whom does the interest belong. At the end of the term

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it is important to have been clear in the lease, how deposited funds may be used (repairs, damages, cleaning, etc.) and how quickly deposits must be released.

A lease should also specify how the parties expect the property to be used, and it is quite common for a landlord/lessee to place restrictions on that use. There may be restrictions on assignment or subleasing, as well as provisions that address a party's use of common areas and parking. Additionally, most leases will allow the landlord/lessee to access the premises under certain circumstances, which may include routine inspection or repairs, but may also include the right to show the party to prospective new tenants if notice to terminate has been delivered.

Finally, most leases will include a provision that waives the obligation on the landlord to give notice of things like when the rent is due, placing the burden of knowing that date on the tenant. And while it may be obvious given the location of the property, it is always best to include a provision addressing governing law and venue.

One closing word of caution, real estate leases, as the name suggests, address matters of real estate that are very state-specific matters. If you are called upon to review a lease involving property in another state, first make sure you are familiar with that state's specific laws regarding real estate matters and consider whether the prudent course is to retain local counsel.

C. Intellectual Property

We discussed some of the nuances around ownership in an earlier section, but in addition, you should take care to address issues of control and confidentiality. Can the developer use anything they learned while working with you, in future projects unrelated to you? Your confidentiality provisions (or separate agreement) should be very clear on what, if anything, can be used. Likewise you might consider tying your payment obligations to a deliverable structure. Be careful not to get to the end of a contract, having paid everything due to the developer, only to learn (a) there is a problem with the final product or (b) the developer simply refuses to deliver the product to you. It seems implausible that anyone would behave in such a way, but it does happen. For this reason, you should consider an escrow arrangement (especially on larger and more costly projects) where components of a development are deposited with a neutral third-party as they become available (and, as you pay for them). This way, you will always be able to get access to what is yours, without the fear of being held hostage.

D. Covenants Not to Sue

Earlier I discussed settlement agreements and releases, and the covenant not to sue is certainly a related concept. Suppose that one party has a claim against another party, but has not yet filed a complaint with a Court; the parties reach an understanding on how they will resolve the claim. The parties will enter into a settlement agreement and release of the claim at issue, but since there is no pending litigation, adding a covenant not to sue provides an additional layer of protection for the released party, in that the party with the claim promises to not pursue additional relief from the court. The covenant not to sue protects a party from future lawsuits.

E. Joint Venture Agreements

You may be called upon to draft a Joint Venture Agreement when two or more business entities or individuals decide they want to enter into a temporary business relationship, often to pursue a particular project. This is viewed as a way to share the risk and reward associated with a business opportunity. The joint venture model also allows parties to gain access to larger opportunities that a party acting alone might not be fully competent or capable of pursuing. This model is often utilized by businesses wanting to share resources and/or contacts, to gain access to projects, such as government contracts – many of which have specifically defined participation.

These parties like having the ability to work together under a contractually negotiated set of terms, but without long-term commitment. Joint Ventures are typically structured as either pure contractual creatures or the parties may formally organize a partnership.

1. Contractual. Just as the name suggests, the parties retain their separate identify and merely enter into a contract to set out the terms under which they will work together on a particular project. This contract will address such topics as decision-making by the parties, roles, obligations and expectations by and among the parties – often parties enter into a joint venture to bring together parties with compatible strengths and weaknesses. The contract will also address how profits and losses are allocated among the parties. While the parties are often working very closely with one another, each retains its own legal identity, separate from the other, maintains separate accounting records, and possesses no decision-making authority over the other. You see this more informal structure used to pursue business endeavors related to research and product development.

2. General Partnership. If the project being pursued is of a significant enough size and opportunity, the parties may decide to enter into a more formal arrangement as a general partnership,

which today can also be accomplished via the limited liability company entity. In this structure, a partnership or operating agreement will be entered into by the parties, which will address how decisions are made for the new entity, roles, obligations and expectations by and among the parties and with the new entity, but this time with respect to financial matters, all funds will flow through the entity and then out to the partners/members as distributions. You see this more formal structure in real estate or government contracting opportunities.

A typical Joint Venture Agreement will address the type of venture details, such as its name, address, purpose, etc., a specified term of the venture, names of the parties to the venture and details around each party's contribution to the venture, the roles, expectations and obligations, voting rights, details on management of the venture, details on the financial structure of the venture and how/when distributions will be made, how and when the venture may be dissolved and if/when a party's interest may be assigned to a third-party, as well as confidentiality, non-disclosure, non-solicit and other like restrictive provisions.

F. Employment Agreements

Mississippi is an "at will" state meaning an employment agreement is not a requirement, however in certain factual situations, having an agreement in place is prudent. When that is the case, there are several concepts that should be fully considered and included in the agreement.

> *Practice Point:* Employment law, like Intellectual Property, is another area where you should consider engaging someone who practices in this area on a regular basis.

The name of the parties, including address; the start date; the title and description; the location where the employee will be expected to appear for work; the hours of work that are expected, including any regulations associated with the employment; if the employee starts on a probation or trial period, that should be spelled out in the agreement; salary, stated as a gross figure before taxes and applicable deductions; benefits (if any) as well as any related expenses to the employee and the handling of those employee paid expenses (paycheck deduct or paid by the employee); handling of work related expenses; vacation or personal leave and the handling of same (i.e. all earned in January or earned over the course of the year, can unused time be rolled over from year to year) and holiday time; issue around long-term sickness or disability (doctor's note, release to work, etc.); confidentiality, non-compete, non-solicit provisions; dispute, grievance and disciplinary procedures; applicability of handbook or other company policies.

In addition to the employment-specific terms identified above, the employment agreement should include customary boilerplate provisions such as governing law, venue, notice provisions, entire agreement, how and when the document may be signed and accepted by the employer.

G. Purchase and Sale Agreements

The first thing I would offer is that there are entire seminars, some lasting for multiple days, dedicated solely to the topic of drafting Purchase and Sale Agreements. Building off of what I have already covered in the more general contract drafting sense, below are a few new areas or areas that take on greater importance in the case of agreements related to buying and selling substantially all of a party's assets, stock or membership, etc. To simplify this discussion, I have approached this in terms of an asset acquisition.

- Purchased Assets: Be clear on the outset what is and is not being purchased. Schedules are typically used to specify assets being purchased.
- Assumed Liabilities: What liabilities, if any, are being assumed?
- Due Diligence: Due diligence will be a new area addressed in the sale agreement setting. How, when, with whom and at whose expense will it be conducted?
- Purchase Price; Adjustments: How will the purchase price be calculated? Unlike standard purchase agreements for goods, many times a calculation is involved and/or the final price cannot be determined until only days prior to closing. What is the process for making that calculation, and then reviewing and reaching agreement on

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it? What happens if the parties are unable to agree?

- Escrow: Will there be an escrow or a holdback of a portion of the purchase price? Were their particularly troubling matters revealed during due diligence? Litigation or environmental issues?
- Representations and Warranties: Extreme care and consideration must be paid to the representations being made. It is within these representation provisions that the average lawyer is separated from the extraordinary. You need to spend time with your client, make sure you understand their business, and any unique or unusual risks or practices (environmental, medical).
- Intellectual Property: As with contracts addressing IP matters, confidentiality is of utmost importance in this setting. Will there be non-compete and/or non-solicit obligations owed by the selling entity and perhaps its principals after the closing?
- Prerequisites to Closing: What other events must (or must not) occur before either party is obligated to close?
- Closing; Covenants: Will the parties sign and close simultaneously, or will there be a period between signing and closing? If the latter, as the purchaser you may want to include covenants setting forth what the seller can and cannot do with the assets during that window. Is permission required before taking or not taking certain steps?
- Employees: Beyond typical assets, are there particular employees that are critical to the transition and ongoing success of the business after the close? Should agreements with those individuals be a condition to closing?
- Termination: Can, or under what circumstances may either party terminate the purchase discussions or a previously signed agreement? Is the non-terminating party entitled to damages to cover costs incurred in good faith?
- Remedies; Indemnification: Contractual provisions addressing a party's right to seek particular remedies (specific performance?) or damages if performance is not feasible should be carefully considered and drafted. Indemnification provisions are quite standard in such agreements. Should there be a "basket" or perhaps a "cap" for some or all indemnifiable events?

To recap, a well written contract is concise, clear, unambiguous, and addresses all of the issues that need to be covered within your document. ■