

Debunking Urban Legends

BY KENNETH A. ADAMS

Many of the deficiencies in contract language can be attributed to unthinking regurgitation of model contracts rather than any particular conviction on the part of the drafter. For example, the archaism "witnesseth" still precedes many a set of recitals, even though you would be hard pressed to find anyone willing to argue that this usage makes any sense.

By contrast, practitioners and even commentators on contract drafting are under the illusion that other time-honored but counterproductive usages serve a useful function.

"Urban legend" is a phrase that refers to how folk narratives—usually false ones—are generated and transmitted. Given that drafters seem to rely inordinately on lore picked up casually from colleagues and model contracts, it seems apt to apply the phrase to contract drafting.

Following are some of the more prevalent urban legends regarding contract language:

- That a party under an obligation to use "best efforts" to accomplish a goal must do everything in its power to do so.

Drafters use a variety of "efforts" phrases: best efforts, reasonable efforts, commercially reasonable efforts, and so forth. The conventional wisdom among corporate lawyers is that best efforts is the most onerous of the "efforts" standards—that the promisor is required to do everything in its power to accomplish the goal, even if it bankrupts itself in the process.

Case law, however, paints a different picture. Courts have not required that a party under a duty to use best efforts to accomplish a given goal make every conceivable effort to do so. Instead, courts have variously held that the standard is one of good faith, diligence or reasonableness. Furthermore, case law suggests that instead of representing different standards, other "efforts" standards mean the same thing as best efforts.

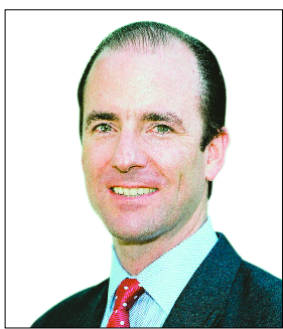
To avoid confusion on this score, use the defined term "reasonable efforts" to convey a level of effort comparable to that recognized by case law, and to define it as follows: "Reasonable Efforts" means, with respect to a given goal, the efforts that a reasonable person in the position of [the promisor] would use so as to achieve that goal as expeditiously as possible."

- That it matters whether you describe an agreement as being "between" or "among" the parties.

Some lawyers voice strong opinions on whether one should use "between" or "among" in a given contract introductory clause. More specifically, it is commonly held that whereas one speaks of an agreement "between" two parties, the correct preposition to use in the case of an agreement with more than two parties is "among."

According to the Oxford English Dictio-

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nary, not only can you use "between" with more than two parties, it is in fact preferable that you use "between" instead of "among." But more to the point, whether you use "between" or "among" in an introductory clause can have no effect on meaning. Given all the problems with the prose of the average contract, worrying about "between" versus "among" would seem a particularly sterile form of nitpicking.

- That there is some benefit to be derived from referring to "representations and warranties" rather than just "representations."

The vast majority of drafters refer to "representations and warranties" and have contract parties "represent and warrant," and commentators on contract drafting appear to ascribe significance to the distinction.

But whereas an action for misrepresentation might differ in significant respects from an action for breach of warranty, that does not mean a statement of fact has to be referred to in a contract as a warranty in order for a party to bring a claim for breach of warranty based on that statement of fact. That much is clear from the case law.

In addition, U.C.C. §2-313(2) states: "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty."

By the same token, there is no basis for thinking that if a party "warrants" as to a given fact, rather than "represents" or "represents and warrants," the party to whom that assertion was made would not be entitled to bring a claim for misrepresentation as to that assertion.

Instead of adding to clutter by using the couplets in question repeatedly throughout a contract, drafters would be better off using just "representation" (and "represent"). It can be used with all assertions of fact, whereas "warranty" has a narrower meaning.

- That a contract provision somehow is not enforceable if it does not contain the word "shall."

"Shall" means "has [or have] a duty to" and is used to impose a duty on the subject of a sentence. Unfortunately, most drafters do not stop there, and in many contracts it seems as though the drafter was under the impression that no provision would be enforceable unless it contained at least one "shall." One example: Acme shall not be [read is not] required to reimburse Consul-

tant. Another example: If Acme shall exercise [read exercises] the Option, the Tax Liens shall be [read will be] excluded from the Doe Assets.

This rampant overuse of "shall" violates the basic principle of legal drafting that one should not use any given word or term to convey more than one meaning. The result is awkward and turgid prose that has the potential to create confusion leading to a dispute. Before using "shall" in a contract, ask yourself whether substituting "has [or have] a duty to" conveys the meaning sought.

- That "joint and several" is a concept that applies to anything other than liability.

The phrase "joint and several" means, with respect to liability, that the liability can be apportioned equally among the members of a group or instead laid, to a greater extent or entirely, at the door of one or more select members of the group, at the discretion of whoever is apportioning the liability.

By slipshod extension, the phrase has come to be used in other contexts. For instance, one often sees contracts in which two or more parties "jointly and severally represent" as to various matters. And a drafting treatise recommends, for purposes of indemnification provisions, that when there is more than one indemnifying party make sure to provide that all the indemnifying parties' promises are joint and several. Both usages accomplish nothing that would not be accomplished by simply stating that the two or more parties in question are jointly and severally liable.

- That the traditional recital of consideration serves any purpose.

In many contracts, the lead-in—that which follows the recitals and serves to introduce the body of the contract—reads something like this: "NOW, THEREFORE, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows."

Such "recitals of consideration" are intended to render enforceable a contract that would otherwise be held unenforceable. Courts give some weight to recitals when determining whether a promise is supported by consideration, but the traditional recital of consideration is no help in this regard—a recital cannot transform into valid consideration something that cannot be consideration, and a false recital of consideration cannot create consideration where there was none.

Craft recitals that address the issue explicitly if there is any question whether a contract might be found to lack consideration.

- That the defined term "this Agreement" serves a useful function.

It is common practice to create in the introductory clause the defined term "this Agreement." This defined term is, however, unnecessary: the definite article "this" in references to "this agreement" obviates the need for a defined term, because there could be no question which agreement is being referred to. And just as one should use lowercase letters when referring to any agreement—as in "the asset purchase agreement between Acme and Widgetco"—it is preferable not to use a capital A in references to "this agreement": the more initial capitals there are in any given piece of prose, the harder it is to read.

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