

Contract-Drafting Bulletin

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Does Quality Contract Drafting Matter?

Introduction

Does quality contract drafting matter? The short, and probably unsurprising, answer is “yes.” Contract drafting is “one of the most intellectually demanding of all legal disciplines”¹ and, as such, should be taken seriously. However, more interesting inquiries are why and to what extent quality contract drafting matters.

Why Does Quality Contract Drafting Matter?

So why does quality contract drafting matter? **One of the key reasons it matters to our clients is because poor contract drafting results in costly consequences.** In certain instances, it has even “determine[d] issues of life and death...of war and peace...and [resulted in] multibillion-dollar verdicts.”²

One example is *Martin Marietta Materials, Inc. v. Vulcan Materials Company*.³ In this case, the specific disputed provisions of two confidentiality agreements “were ambiguous and, therefore, [the court was] required [to] resort to extrinsic evidence to determine the parties’ intended meaning of those provisions.”⁴ The issue in the case was whether, in the absence of an explicit standstill provision, Martin Marietta Materials, Inc. (“**Marietta**”) was permitted to use confidential information of Vulcan Materials Company (“**Vulcan**”) in order to make an unsolicited bid for stock in Vulcan. The court ultimately held that Marietta was prohibited from doing this and had therefore breached the two

confidentiality agreements in question. As a result, Marietta was enjoined for four months from pursuing a \$5.5 billion hostile bid against Vulcan. The outcome might have differed or have been easily resolved if the confidentiality agreements contained explicit language regarding standstill provisions or unsolicited offers.

Courts, of course, also regularly address issues of contract interpretation on a smaller scale in terms of dollars, but which are of the utmost importance to the parties at issue.⁵

To What Extent Does Quality Contract Drafting Matter?

Though the consequences of poor contract drafting can be very serious, it’s not every day that the results are so life-altering. Sometimes the impact is subtle, hidden, or inchoate. Perhaps this is why quality contract drafting is all too often given short shrift.

In theory, the words on the page always matter. Much like computer code, if the drafter uses the wrong choice of words to express a given concept in a contract, then that concept might not “compile” when it comes time to interpret the provision of the contract that articulates that concept. However, unlike computer code, bad concept “compiling” doesn’t always cause the contract or applicable provision to “crash.” In fact, more often than not, the parties to a contract and their respective counsel can “get by” with suboptimal language when expressing a given concept.

This leads to another question: What does it mean to “get by” with suboptimal language in a contract? As mentioned above, courts regularly address issues of contract interpretation. But, like the known matter in our universe, these issues comprise the minority of contract-interpretation issues.

“Having a rigorous approach to contract drafting and a desire to constantly improve contract drafting will reduce costs over time by reducing costs associated with uncertainty, contract compliance, and contract dispute resolution.”

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Does Quality Contract Drafting Matter?

There is far more contract-interpretation “dark matter” out there, the magnitude of which is difficult to assess because it is hidden from the general public.

Instead, these obscure, but potentially significant, contract-interpretation issues manifest themselves in a number of other ways, such as:

- Disputes addressed through arbitration or mediation
- Disputes addressed through renegotiation of contract terms
- Disputes that are resolved more informally (e.g., through phone calls and emails)
- Disputes that are avoided because a party to a contract feels that the costs of raising an issue with a provision in that contract outweigh the benefits

In addition, not only are these issues often hidden, but in some cases, they also might just have not manifested themselves.

Parties to a contract might go along happily with a poorly drafted contract for years before a need arises for them to take a second look at that contract.

Knowing that millions of contracts are floating around in the world, it is unsettling to also know that there is no way to quantify the potential consequences of a poorly drafted contract.

Conclusion

All of this is to say that contract drafting affects lawyers and clients in a pervasive way. Just because a particular contract-interpretation issue is not the crux of a Supreme Court ruling does not mean it is not a significant or meaningful issue. Lawyers are often thought of as wordsmiths, tasked with the responsibility of thoughtfully and skillfully choosing the words to use and the way in which to use them. Those of us who deal with contracts face contract-interpretation issues every day (whether or not we realize it!), each

issue carrying some level of importance. And while it is true that the costs of shoddy contract drafting don't always manifest themselves, they can, and sometimes do, with dire consequences. Quality contract drafting is therefore critical to an attorney's craft. **Having a rigorous approach to contract drafting and a desire to constantly improve contract drafting will reduce costs over time by reducing costs associated with uncertainty, contract compliance, and contract dispute resolution.**

1. Reed Dickerson, *Clear Legal Drafting: What's Holding Us Back?* 5 Est. & Tr. Q. 146, 149 (1979-1981), available at <http://www.heinonline.org/HOL/Page?collection=journals&handle=hein.journals/espjrl5&id=158>
2. Preston Torbert, *Contract Drafting: A Socratic Manifesto*, 14 Scribes J. Legal Writing 93, 101, 102 (July 1, 2010), available at <http://ssrn.com/abstract=2206576>
3. *Martin Marietta Materials, Inc. v. Vulcan Materials Company*, C.A. No. 7102-CS (Del. Ch. May 4, 2012).
4. *Id.* at 17.
5. See, e.g., Vincent R. Martorana, *A Guide to Contract Interpretation* (July 2014), available at http://www.reedsmith.com/files/uploads/miscellany/A_Guide_to_Contract_Interpretation__July_2014_.pdf.



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Shall I Dispense with ‘Shall’? Not Entirely

As a recent law-school graduate, I have quite a few contract-drafting textbooks lining my office bookshelves, each of which highlights the importance of modern legal drafting techniques. Why, then, do so many contracts that I see contain language from eons ago? One common offense is the use—or should I say overuse—of the word “shall.”

“Shall”

Ideally, “shall” should not be used in a contract other than to impose an obligation on a party to the agreement.

According to *Black’s Law Dictionary*, the only acceptable use of the term, under strict standards of contract drafting, is to impose an obligation on a party to the agreement, since “shall” means: “has a duty to; more broadly, is required to...”¹ Ken Adams, a prominent authority on contract drafting, echoes this sentiment,² as does Tina Stark.³

Yet many contract drafters use “shall”:

- to express futurity (for which “will” is more appropriate)
- to impose (or to try to impose) obligations on third parties (which is never appropriate), or
- to sound authoritative and lawyerly (which is also never appropriate)

“To avoid using ‘shall’ for rhetorical emphasis..., ask yourself whether a party to the contract precedes the word ‘shall.’”

“Will”

If you’d like to connote futurity, as opposed to an obligation, use “will.” By doing so, you avoid using the same term (“shall”) to convey both a duty to act and futurity. Moreover, using “will” to convey futurity (rather than “shall”) is more in line with our everyday use of the word “will.” So, for example, rather than

This Agreement shall terminate on December 31, 2015.

write

This Agreement will terminate on December 31, 2015.

“Must”

If an obligation exists, but the duty to act does not arise from the contract provision itself, the word “must” is a better choice than the word “shall.”

This is often the case when referencing obligations of third parties or conditions to be satisfied. For example:

*If the Company **must** create and deliver a report under the Company’s letter agreement with the Key Customer, then the Purchaser **shall** reimburse the Company for all costs that the Company incurs in connection with creating and delivering that report.*

In this example, this clause does not purport to obligate the Company; the Company’s obligation to create and deliver a report exists, if at all, in the the Company’s letter agreement with the Key Customer. However, this clause does place an obligation (albeit a conditional one) on the Purchaser, which is a party to the contract containing this clause.

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Do Not Use "Shall" For Rhetorical Emphasis

"Shall" is also often inappropriately used for rhetorical emphasis. This is particularly prevalent in "boilerplate" provisions. For example, contract drafters often incorrectly write

This Agreement shall be governed by New York law.

rather than

This Agreement is governed by New York law.

To avoid using "shall" for rhetorical emphasis (in the prior example, purporting to obligate the term "Agreement"), ask yourself whether a party to the contract precedes the word "shall." If not, as is the case in our example above, then using "shall" is wrong.

The Upshot

Use "shall" only if you want to create an affirmative or negative obligation. If your mission is to accomplish anything other

than to convey an obligation, do not use "shall." Use "will" (rather than "shall") to convey futurity. And use "must" to point to an obligation that exists outside of the clause in which "must" is used, or to reference a condition to be satisfied. By following these suggestions regarding the uses of "shall," "will," and "must," you'll streamline your drafting, use terms in a consistent manner, reduce ambiguity, avoid giving more than one meaning or function to a term, and increase the overall readability of your contract.

1. *Black's Law Dictionary* 653 (3rd ed. 2006).
2. Ken Adams, *Revisiting Use of "Shall" in Contract Drafting*, Adams on Contract Drafting (Sept. 23, 2011), <http://www.adamsdrafting.com/revisiting-use-of-shall-in-contract-drafting/>.
3. Tina L. Stark, *Drafting Contracts – How and Why Lawyers Do What They Do* 183 (2nd ed. 2013).



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Interview with a Commercial Litigator

Below is a transcript of my December 18, 2014, interview with John B. Webb, who is a partner in our U.S. Commercial Litigation Group. John provides valuable insight on:

- Common drafting errors that he comes across in his practice
- Frequently invoked contract-interpretation principles
- His preference for New York law as the governing law of a contract
- Advice for transactional attorneys

VINCENT R. MARTORANA: What are the most common drafting errors that you come across?

JOHN B. WEBB: One problem that I typically come across is the issue of **inconsistent provisions**, where one provision says one thing and then, later on in the contract, there's a provision that either conflicts with the previous provision or renders the previous provision ambiguous.

When it gets to me, it's already a dispute. But in terms of preventing such drafting errors, I think it's really important that, as a transactional attorney, you should be thinking about the contract as a whole.

MARTORANA: This, I think, comes under the category of holistic interpretation: reading the contract as a whole rather than reading provisions in a vacuum.

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WEBB: Correct; so inconsistent provisions are a big problem.

Also, it's helpful to **think about foreseeable contingencies when you draft contracts**, although it requires a little foresight and effort. Many times, contracts don't address contingencies that are very much foreseeable – or they don't address the contingencies adequately. For example, the contract will reference the contingency, but then not provide a remedy if that contingency occurs or doesn't occur.

MARTORANA: Do you think that failing to adequately address foreseeable contingencies is predominantly intentional or an oversight?

WEBB: That's a fair question. Sometimes these contingencies are intentionally not addressed so that the parties can close the deal. But other times they are just not considered at all. You at least need to raise the issue with your client.

The other thing that I find to be a problem in contracts are **undefined material terms**. In the arbitration that I just completed, there was a contingency in the contract that said that, if one party became insolvent, then a free irrevocable license was granted. But the parties never defined the term "insolvent." The other side argued that "insolvent" has a sophisticated financial definition. We argued that a layman's understanding of insolvency applied: can the company pay its bills and operate? But this became a very heated issue in the case because no one took the time beforehand to define what the term meant.

MARTORANA: What are the most frequent principles of contract interpretation that you invoke (or that you see judges invoke) when resolving contract disputes?

WEBB: Courts generally focus on the text itself. **The text is the best reflection of the parties' intent.** So any time there's a contractual dispute, the first thing a court will ask is: "What does the language say?"

Another principle is that **the "specific" controls over the "general."** When there are specific provisions in a contract, they must have meaning. So you can't ignore those provisions. If there is a general reference to a subject matter and also a more-specific reference to that same subject matter, courts will generally give deference to the more-specific reference.

MARTORANA: When we put together our contract-drafting white paper, this was one of the principles that we found referenced in the cases we reviewed: the specific governs over the general.

WEBB: Additionally, I often encounter the principle that **contracts should not be interpreted to produce a result that is absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties.** Now even though that is a core tenet of contract interpretation, it's definitely heavily relied upon in case law, but it's not always applied. It depends upon the nature of the parties. If you have two sophisticated parties on each side of the equation, then a court is more likely to enforce the language of the contract, even if it ends up producing what some might consider an absurd result. The court might reason: you're sophisticated parties, you have to live with the language. However, if there is a disparity in the bargaining power of the parties, or one is more powerful or sophisticated than the other, then a court may review an interpretation that would lead to an absurd result in favor of the sophisticated party.

"I think that it's important for transactional attorneys to consider bringing in a litigator to look at a draft contract who has experience in the subject area covered by the contract and is familiar with the governing law that controls the contract."

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Interview with a Commercial Litigator



John B. Webb

John is a partner in Reed Smith's New York office and a member of the Commercial Litigation Group. He handles a wide variety of complex contract litigation, including pharmaceutical licensing disputes, financial services litigation, business related disputes, unfair competition, defamation claims, intellectual property claims and other commercial disputes. John has tried cases and argued appeals in both state and federal courts in New York.

John regularly counsels pharmaceutical clients on how best to draft liability provisions contained in licensing agreements in order to avoid or reduce the risk of potential litigation. In the same context, John routinely counsels life sciences clients by preparing risk assessment memoranda when the threat of litigation arises.

John also has experience trying cases before the American Arbitration Association and handling FINRA arbitrations.

John is chair of Reed Smith's New York Summer Associate Recruitment Committee.

One more common contract-interpretation principle: **all terms have to be given meaning to avoid rendering a term nugatory.** In other words, you can't just ignore provisions in a contract. And courts regularly talk about this principle.

MARTORANA: This is one of those principles that we transactional attorneys tend to think about when drafting.

Moving on, is there a particular state's laws that you prefer to apply when interpreting a contract?

WEBB: I think that **New York is terrific for contract interpretation.** New York is the hub of commerce. A lot of business transactions take place here in New York and disputes relating to those transactions are often handled by New York courts. So there's an abundance of case law addressing contract interpretation in New York. And courts are less inclined to question the words that are used in the contract and to impose their own will. So when I have an opportunity to select or propose the governing law of the contract, I'll often advise that we select New York law.

MARTORANA: And I think that New York tends to respect freedom-of-contract principles. My sense is that a court construing a contract under New York law would err on the side of not putting its own gloss on the contract in the face of clear language.

WEBB: Correct.

MARTORANA: And as contract drafters, this gives us great comfort.

The last question that I have: As a litigator, what advice do you have for transactional attorneys drafting contracts?

WEBB: I think it's important for transactional attorneys to **consider bringing in a litigator to look at a draft contract who has experience in the**

subject area covered by the contract and is familiar with the governing law that controls the contract. For example, I've suggested to clients in the life sciences space that they have their contracts reviewed by one of our life sciences litigation attorneys to avoid disputes beforehand. And clients have taken me up on the suggestion and have asked us to review agreements ahead of time to make sure that those agreements are clear, and that they protect the client's business interests.

MARTORANA: I think that's unique and would say that approach is more the exception than the norm, particularly given a client's sensitivity to cost and time—although, in an ideal world, I would love to have a litigator review all my drafts before they go out.

WEBB: I agree. But when there is a litigation, that's a great time to approach a client about revisiting and revising their form contracts, because the client is then keenly aware of the benefits of that approach.

MARTORANA: What's the takeaway for transactional attorneys? When do we say: "Before we sign, let me call John"?

WEBB: I think when you know that this has been a disputed area. You learn about your client's history. And when there is a particular area that you know is typically disputed – either in the industry or if it's a hot-button issue for the client – that's when you might want to run the contract past a litigator ahead of time just to avoid having a headache later on.

MARTORANA: John, this has been great. I want to thank you for your time and for the insight that you've given us on the transactional side of the practice.

WEBB: No problem. Feel free to give me a ring on contract-interpretation issues, either before or after a deal is signed up.



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World of Boxing LLC v. King

*World of Boxing LLC v. King*¹ provides insight on the **extent to which a party to a contract can be held accountable for breaching that party's obligation to "cause" an individual to take or not take certain actions.**

Facts

Boxing promoter Don King ("**King**") entered into an agreement in principle (the "**Agreement**") with Russian boxing promoters World of Boxing ("**WOB**") to create a rematch between King's fighter, Guillermo Jones ("**Jones**"), and WOB's fighter, Denis Lebedev ("**Lebedev**"). The prior fight between the parties' respective boxers had to be vacated because it was discovered in post-match tests that Jones tested positive for banned substance furosemide. The terms of the Agreement are the subject of the dispute in the case.

In particular, the Agreement contemplated the mandatory pre-bout drug testing of Jones. Specifically, the Agreement provided that Jones "undertakes to be subjected to drug testing before and after the fight, in compliance with the rules of the [World Boxing Association]." Additionally, in the Agreement, King promised to "cause Jones ... to participate" in the rematch. The purpose of this provision, as King had explained by affidavit, was to "preclude another ... positive drug test [from Jones]."

Nonetheless, despite knowing he would be tested, Jones tested positive for the furosemide again on the day of the rematch. Therefore, as the court affirms, Jones could not participate in the rematch under World Boxing Association ("**WBA**") rules.

King Breached the Agreement By Failing to "cause Jones to participate"

WOB sued King, arguing that, by failing to "cause Jones to participate" in the bout, King breached the terms of the Agreement.

King, on the other hand, claimed that this interpretation leads to "unreasonable and illogical" results; it would require of King "nothing less than ... personal supervision of Jones's every action between the execution of the Agreement and the scheduled date of the bout against Lebedev."

The court said King could be right that, under the circumstances, it is possible that his contractual obligations were too onerous to be enforceable. Nonetheless, King agreed to them, and thus "Jones's disqualification plainly put King in breach."

Impossibility Does Not Excuse King's Breach

The court then turned to the question of whether the defense of impossibility excused King's breach.

A contract breach can be excused for impossibility if the breaching party can show that performance was impossible on account of a "supervening event" that was "unanticipated" by the parties.

If the supervening event is foreseeable, then allocation of the risk associated with the occurrence of that event should be expressly addressed in the contract; "the absence of such a provision gives rise to the inference that the risk was assumed" by the party whose performance was frustrated." In other words, an impossibility defense only excuses non-performance if the "unanticipated event ... could not have been foreseen or guarded against in the contract."

King argued that his situation was similar to that of a case involving a singing group manager who signed a contract with a theater owner, promising that the group would play for two weeks, only to have the lead singer fall ill on the eve of the first show. When the theater owner sued for breach, the New York Court of Appeals

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excused the manager’s non-performance on the grounds that “contracts for personal services”—contracts that require action by a specific person—“are subject to the implied condition that ... if the person dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform is extinguished.” King contended that, by ingesting banned substances, Jones “disabled” himself from participating in a WBA-sponsored bout, thereby “extinguishing” King’s obligation to perform.

The court was unsympathetic to King’s plight. New York law is clear that performance can be excused based upon an impossibility defense only if the frustration of performance was “produced by an unanticipated event that could not have been foreseen or guarded against in the contract.” In this case, two key facts compelled the court’s conclusion that Jones’s ingestion of furosemide was not “unanticipated.” First, Jones had a history of testing positive for furosemide. Second, the Agreement provided for mandatory pre-bout drug testing, as required by the WBA, in light of the prior positive test.

Thus, while King was understandably frustrated, his argument misconstrued the term “unanticipated event.” **It is not a matter of how likely it is that an event will occur, but whether the event is not something that a reasonable person would plan for.** Even if King was correct that it was unlikely that Jones would test positive a second time in light of the language in the Agreement, the event was not “unanticipated.”

In fact, the court concluded that, based upon King’s testimony, King had anticipated the possibility of a second positive test and, having anticipated it, believed that “the threat of a mandatory drug test would ward it off.” But King’s mistaken belief is no basis for relieving him of his contractual obligations.

In essence, King argued that he should not be held liable because, short of “imprisoning Jones,” there was no way for King to control Jones’s actions and to make him perform. But this argument ignores what was in King’s control: **the decision not to bargain for more protective contract terms.**

Key Takeaways

Agreeing to personally cause a third party to perform contains risk factors outside of the promisor’s control. If you make such an agreement, you should evaluate and address the anticipated risk factors, negotiate specific remedies in case those risks materialize, and, if possible, obtain your own indemnification from the third party, the performance of which you are guaranteeing.

The court in *World of Boxing* reaches the following key conclusions under New York law regarding what is an awkwardly drafted obligation:

- **A party can be in breach of contract for failing to comply with an obligation to “cause” an individual to take or not take certain actions.**
- **A breach of that obligation will not be excused under the doctrine of impossibility unless the unanticipated event that renders performance impossible could not have been foreseen or guarded against in the contract.**

“A party can be in breach of contract for failing to comply with an obligation to ‘cause’ an individual to take or not take certain actions.”

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Note that including this type of obligation in a contract is a clumsy way of holding a party accountable for the actions or inactions of others. **A more straightforward approach would be, for example, to provide that one party must indemnify the other party for losses arising out of or relating to the occurrence of certain events or the existence of certain circumstances.**

In this negotiation, it is assumed that WOB would only agree to the rematch if King would guarantee Jones's participation. King, therefore, faced the risk that Jones would not perform. However, King could

have acknowledged and addressed this risk better. For example, King could have negotiated a specific, limited recovery amount (or other contractual remedy) if Jones failed to participate. Moreover, King could have tried to procure indemnification directly from Jones as both extra financial security and as an additional incentive for Jones to avoid furosemide.

1. No. 14-03791, 2014 WL 4953605 (S.D.N.Y. October 1, 2014).
2. Although it is not relevant to the outcome of the case, the court does not address whether Jones signed the Agreement or, if not, how the Agreement imposed the testing requirement upon Jones.



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Comments to a Basic Confidentiality Obligation

Below is an example of a basic confidentiality and non-use provision from a sample employment agreement (1) as originally drafted, (2) showing comments, together with annotated explanations of those comments, and (3) as revised to reflect those comments. The comments on the provision are limited to comments on the manner of expressing the concepts in the provision and not on the substance of the provision.

As Originally Drafted

Confidentiality. Employee agrees that at all times during and after Employee's employment, whether for cause or otherwise, Employee will hold in strictest confidence and not disclose Confidential Information (as defined below) to anyone who is not also employed by the Company or to any employee of the Company who does not also have access to such Confidential Information, without express written consent of the President of the Company. Additionally, Employee is prohibited from using any Confidential Information for Employee's own benefit or to the detriment of the Company during Employee's employment or thereafter.

With Comments

Confidentiality. ~~Without the express written consent of the Company's President,¹ the² Employee agrees that at all times during and after Employee's employment, whether for cause or otherwise,³ Employee will hold in strictest confidence⁴ and shall⁵ not directly or indirectly disclose any Confidential Information (as defined below)⁶ to any of the following individuals:⁷ (1) anyone who is not an employee of also employed by the Company at the time of that disclosure or (2) anyone who, at the time of that disclosure, both (x) is an employee of the Company and who (y) does not also know, does not possess, and does not have the ability to reasonably obtain access⁸ to such that Confidential Information- without express written consent of the President of the Company.⁹ Additionally¹⁰, The Employee is prohibited from using shall¹¹ not directly or indirectly use any Confidential Information for Employee's own benefit¹² or to the Company's detriment of the Company¹³ during Employee's employment or thereafter.¹⁴~~

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Confidentiality Obligation

1. This language, as placed in the original draft, created ambiguity: it was unclear what text the language modified. Also, in the interest of being concise, write “the Company’s President” rather than “President of the Company.”
2. Precede references to the defined term “Employee” with the word “the.” Doing so improves readability and is consistent with the usage “the Company.”
3. If this obligation is to continue forever, then address that point in the termination provision (which should specify which provisions survive termination of the contract). Absent a provision that expressly or impliedly terminates an obligation, the obligation continues for so long as the contract is in force.
4. “will hold in strictest confidence” is rhetoric, which has no place in contracts.
5. To express an obligation, use “shall” consistently throughout a contract.
6. There is no need to reference where in the contract a defined term is defined. If the contract is sufficiently long enough, then include an index provision that cross references all definitions used in the contract.
7. Make this change to avoid the potential interpretation that the “or” in “to anyone who is not also employed by the Company or to any employee of the Company” is an “exclusive or.”
8. It is unclear what having “access” to information means. The standard has been changed to employees that do not know, do not possess, and do not have the reasonable ability to obtain the Confidential Information being disclosed. Of course, whether an individual already knows or possesses information, and whether an individual can reasonably obtain information, is a question of fact.
9. See footnote 1.
10. “Additionally” is rhetoric, which has no place in contracts.
11. To express an obligation, use “shall” consistently throughout a contract.
12. The Employee will likely need to use Confidential Information in connection with the Employee’s employment with the Company, which would likely be for the Employee’s benefit. The Company might wish to retain this prohibition and more-narrowly tailor the circumstances under which the Employee is permitted to use Confidential Information for the Employee’s benefit. The Company might also wish to simply prohibit the Employee from using Confidential Information altogether (whether that use is to the Company’s detriment or otherwise), except as specifically described in the contract.
13. Note that “to the Company’s detriment” is vague. Also, in the interest of being concise, write “the Company’s detriment” rather than “the detriment of the Company.”
14. See footnote 3.

As Revised

Confidentiality. Without the express written consent of the Company’s President, the Employee shall not directly or indirectly disclose any Confidential Information to any of the following individuals: (1) anyone who is not an employee of the Company at the time of that disclosure or (2) anyone who, at the time of that disclosure, both (x) is an employee of the Company and (y) does not know, does not possess, and does not have the ability to reasonably obtain that Confidential Information. The Employee shall not directly or indirectly use any Confidential Information to the Company’s detriment.

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