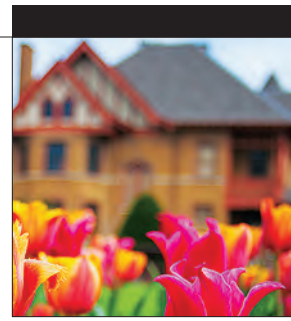

How to Avoid Common Sources of Drafting Errors

Estate planning documents should clearly state what is meant in order to carry out client wishes and not create future interpretative conflicts.

L. PAUL HOOD, JR.

Drafting errors unfortunately occur in all sorts of estate planning and closely held entity documents. This article reviews a selection of such drafting errors and provides explanations and tips for moving forward. It does not focus on any particular type of document (e.g., wills or trusts), but, rather, on errors found in all types of those documents.

These errors are easy to make if one is not careful or fails to respect the inherent difficulty of drafting. In this computerized age of "have form will travel," the author believes that people are using forms from someone else without having read the entire form and without understanding what is in the form. That can have devastating consequences to the client and concomitant subsequent liability exposure for the practitioner drafting the document.

Rushed drafting

Rushed drafting is a sin that is easy to commit. Many lawyers overcommit and fail to consider how much time every task that they accept can take. This inability to either say no or to give reasonable expectations about turnaround time is one of the author's character flaws. The vicissitudes of daily, harried lives often cause practitioners to put things off until a deadline approaches, or the client begins to complain. Generally, this is a bad idea. Not infrequently, "just-in-time" drafting causes a scrivener to make a mistake that he or she might not have made with more time to have thought and reflected upon the draft.

This type of drafting error tends to be of two general varieties. The first category is those rushed errors that arise to a great extent by the demands of a client (or others, such as law firm supervising attorneys) for quick turnaround. The second category arises predominantly because of procrastination by counsel.

With respect to the first category, which the author refers to as "part the Red Sea—now," several different examples come to mind.

Estate planning clients frequently ask counsel to "part the Red Sea—now" for an arbitrary reason outside of the fault or involvement of counsel, e.g., they need wills because the clients are going on a trip (never mind that they needed wills before going on the trip and that they usually are more actuarially likely to die on a road close to their home than on the trip) that they did not bother to tell counsel about until shortly before departure or gifts prior to year-end (the dreaded phone call at year-end even though counsel recommended the gifting plan several months before).

Equally sinister here is the assignment that languished on the assigning lawyer's desk until the client expresses displeasure about the

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delay. The assigning lawyer usually then leaps into action and assigns the matter to the scrivener and then passes on the client's pressure about getting the drafting done quickly, which is unfair to the scrivener.

Practice tip. Treat assigning lawyers as clients, and communicate with them regularly as such.

Another frequent cause for error that falls into the category of rushed drafting is "on-the-spot" additions, revisions, or even wholesale drafting of documents, which occurs frequently during "one fell swoop" meetings with clients where revisions are requested, and the clients desire to execute the documents that same day. This also happens in probate or trust litigation where a settlement is reached "on the courthouse steps," and everyone wants to read the details into the record. The types of errors that tend to crop up in this category can be subtle and sometimes superficially harmless yet counterintuitive (e.g., failure to make corresponding adjustments to other areas of the documents necessitated by the change).

Practice tip. Again, this type of error is committed often by an overconfident scrivener who failed to accord the drafting with sufficient respect. In these situations, resist the temptation to speed up; instead, pay careful attention to the effects of the changes on the remainder of the document.

Procrastination, which is the second category of the rushed drafting error, causes more drafting errors. This generally is attributable to one of two causes.

The first cause is where the lawyer just has too much going on, or the assignment brings up uncertainty on the part of the scrivener. While there are times where inaction actually is the correct course of conduct, its price is high, both psychologically (to the client and to scrivener) and financially (unpaid invoices, etc.).

Practice tip. There may be little advice for the lawyer who has too much on his or her plate except to either (1) manage engagement/acceptance more prudently or realistically, and learn to give clients reasonable expectations about when the work will be completed, or (2) learn to "just say no."

The second cause is where the lawyer procrastinates, quite frequently because the lawyer does not know how to draft for the desired result. This often is a professional competency/experience issue.[1] Where the inexperienced lawyer is subject to the supervision of another lawyer, the supervising lawyer should see the procrastination as a possible manifestation of uncertainty. Too often, it is taken as a sign of failing to do the work. There is a fine line between making a new lawyer make mistakes while putting them through significant "learning bruises" and letting the scrivener dangle out on the vine of uncertainty.

Failure to accurately reflect the client's intentions or requirements

One could persuasively argue that this is the gravest drafting sin of

[1] Rule 1.1, Model Rules of Professional Conduct.

all, because the client's intentions or requirements usually are the *raison d'etre* for why the client hired the scrivener in the first place.

This class of drafting error falls into three general categories:

1. Failure to take adequate notes during the interview or discussion.
2. Failure to explain the draft to the client.
3. Outright purposeful disregard for the client's desires ("legal paternalism").

Quite often, the lawyer can reduce the error of failing to take adequate notes by reviewing and supplementing the meeting/phone call notes contemporaneously or within a short period after the event, yet most simply rely on memories to fill in the gaps, which, in the author's opinion, is a mistake. The fault for failure to adequately explain the draft to the client can be attributable to either client or scrivener. Some clients, for whatever reason, just are not capable of sitting through or handling the explanation, which is unfair to the scrivener. However, the business models of some lawyers factor out time for explanation to keep the costs down, which the author believes is ill-advised because the document ultimately belongs to the client, who should understand the material parts of the document to make sure that it comports with the client's wishes.

It is a dangerous thing to go against the express instructions of the client, but some lawyers who feel that they understand the client's situation better than the client and know best do exactly that. In the author's opinion, this class of drafting error is on the decline.

Practice tip. There is no substitute for contemporaneously reviewing meeting notes and making a list of follow-up items where the lawyer did not receive either necessary information or requested documents.

Disconnect between "wordsmithing" and "real life"

Sometimes, lawyers can write grammatically perfect sentences or paragraphs that make little practical sense or that are ambiguous. This is an easy error to make, because this error usually involves perfect or near perfect use of the language, quite often in the creation of a triggering event that might not happen or a procedure that is insusceptible of being followed in "real life." Examples of this type of error include:

- "Springing powers of attorney" or buy-sell agreement triggering events that "spring" into existence on "certification of two physicians who shall have certified after personal examination that the person is incapable." What happens if "the person" does not submit to a physical examination? What if no physician will so certify?
- Valuation formula that bear no relation to actual fair market value. In the author's opin-

ion, it is a fool's errand to try to draft a valuation formula without the assistance of qualified valuation professionals because a formula can be manipulated down the road once the issue is joined. Even if a formula can be safely drafted, it should have an expiration date and a backup appraisal method in place.
- Procedures that call for data that either does not exist or cannot be obtained without significant expense when compared to the actual value of the data.
- Procedures that are incredibly expensive given the benefit and possible alternatives, e.g., the old "three appraiser" game (i.e., you pay an appraiser, I pay an appraiser, and we split the cost of a third appraiser, and the conclusions of value are averaged) where entity valuation is concerned.
- Procedures that require a response before the sequence of events that are necessitated prior to the response reasonably can be completed.

Practice tip. The easiest way to attempt to minimize this error is by walking through an imaginary occurrence of a triggering event in detail, step-by-step, to see if the clause is susceptible of being understood and is workable.

"Your forms runneth over"[2]

This type of drafting error usually occurs where the lawyer imports a clause from another type of document that had specific considerations in that document type or for the parties involved without adequate consideration of the necessary modifications to the remainder of the document for the parties and situation at hand. This type of error often is related to the "intradocument clause conflicts" error discussed below. Examples of this error include:

There's no substitute to contemporaneously reviewing meeting notes and making a list of follow-up items where the lawyer did not receive either necessary information or requested documents.

- Importation of a clause from a corporate document into an LLC or partnership document. For instance, an annual meeting clause is erroneously inserted where no annual meeting is required by statute for an LLC or partnership—but an annual meeting may be required in such a setting if the governing documents call for one. *This type of error is on the rise, due in part to the use of "cut and paste" on the computer.*
- Importation of a clause from a testamentary trust into an inter vivos trust, or vice versa.

Practice tip. The importation of a clause from another document can be a positive or a negative depending on how careful the scrivener is with respect to its addition. The first thing to assess is whether the imported clause has any defined terms in it, whether from its original source or in the new location, which require coordination in the current instrument. Second, the procedures or substantive provisions must be carefully melded into the document.

Blank spaces in documents that get executed

Leaving blank spaces in executed documents can be quite embarrassing, especially if the error is not discovered until later because execution did not necessitate a review of the page with the blank spaces. Examples of this type of error include:

- Backup executors, trustees, or guardians.
- Number of directors, either maximum or minimum.
- Reference to another document that the lawyer did not have sufficient information to describe at the time of drafting the document.
- Failure to complete a thought while drafting.

Practice tip. Immediately prior to execution, review every page of the document with an eye toward looking for this type of error. If the lawyer is unable to complete his or her thought at that moment, use the color coding in most word processing programs to highlight it so that it will be revisited.

Failure to coordinate documents with one another

The draftsperson must examine documents that already are in place that could affect the documents in place. Probably the most common example of this drafting error is in the area of buy-sell agreements where the draftsperson has failed to consult the entity governing instruments (e.g., articles, by-laws, or operating agreements) or other documents like franchise and loan agreements. In this instance, the preceding documents may take precedence over the subsequent

[2] Hat tip to one of my excellent drafting teachers, Jerome J. Reso, Jr., Esq., of Baldwin Haspel Burke & Mayer, LLC, who actually wrote that phrase on one of the drafts that he marked up.

document and indeed negate the subsequent document or, just as bad, cause an event of default in some other agreement.

Practice tip. Insist on seeing copies of all documents that possibly could have a bearing on the efficacy of the current instrument. If the client objects or balks at providing these documents, the prudent estate planner will treat this as a red flag and decline the matter.

Inflexibility

Estate planning documents often exist for years (indeed, possibly forever in some jurisdictions), and these documents must be made, to the extent foreseeable, as flexible as they can be. Areas where inflexibility can hinder an estate plan include:

- Failure to consider the impact of changes in the laws or even the repeal of a law.
- Failure to consider contingent outcomes.
- Failure to consider the level of reasonably foreseeable physical or mental states of the parties.
- Limitation on a trustee to certain types of investments, e.g., "only in AAA-rated tax-exempt bonds." What happens when none are available?
- Failure to provide for a back-up method of determining something where it is to be initially determined by reference to an index (e.g., AFR, CPI or, "prime rate") if the index is no longer available.
- Preventing "self-dealing" in a trust where self-dealing is what is contemplated at some point (e.g., purchase or sale in a buy-sell agreement).

Practice tip. It is true that in many jurisdictions decanting of an existing trust can solve problems that were not reasonably foreseeable when the document was drafted and executed. However, what the author means are failures to include reasonably foreseeable items. In any event, all documents should be drafted flexibly because, despite its growing ease, decanting involves additional expense and often the loss of some privacy.

Insist on seeing copies of all documents that possibly could have a bearing on the efficacy of the current instrument.

Intradocument clause conflicts

Although a kissing cousin of the "your forms runneth over" error, the cause for the "intradocument clause conflicts" drafting error is one of the most common. It arises principally through four possibilities:

1. Failure to carefully review the entire document prior to its execution.
2. Drafting different parts of the document at different times (including subsequent revisions of the entire agreement).
3. Revising a portion of the document without a careful and complete analysis of the impact of the revised language on the remainder of the document.
4. Using someone else's work without fully understanding it (which may be prompted by having documents on the computer and the ease or unease of "cut and paste").

Practice tip. Intradocu ment clause conflicts seem to be on the rise. The only way to attempt to prevent this error is to be very careful in the importation of a clause or even the use of a document from a prior matter in the current one. The author suggests highlighting the imported clause in color during the drafting process because the color should cause the scrivener to focus more attention on that section.

Improper or insufficient incorporation by reference

Drafting errors arising from improper or insufficient incorporation by reference may occur for any of several reasons: laziness, a desire for "shorthand" by the draftsperson, ignorance of the proper methods of incorporation by reference and when it can be done, and failure to appreciate or carefully consider the implications of importing language from another document into the subject document (the imported language or document may have some language that itself creates ambiguity or outright conflict). Examples of this sort of error include:

- Reference to a document that is supposed to be attached that may not exist, e.g., an annex or exhibit.
- Reference to a document that may exist in differing versions.
- Reference to a document, including a statute, which may be amended or replaced in the future without prescribing the effects of such.
- Reference to a trust that is not in existence at the time of execution of the document which makes the reference.

Practice tip. The scrivener needs to make certain that incorporation by reference may legally be done in the current instance before doing so. In the author's opinion, while incorporation by reference may save time and paper (although, in the elec-

tronic documents world, this will not be true), it requires serious thought prior to doing so and should only be done after other alternatives are explored. Moreover, if the scrivener chooses to proceed with incorporation by reference in the instant document, the scrivener must consider the effect of subsequent changes in the incorporated clause/document and even its extinction.

Ambiguity

Ambiguity can be part and parcel of other drafting errors. Poor usage of words or syntax, however, can create significant interpretational problems. Sloppy usage of modifiers can be troublesome. Use of words or terms that may have multiple meanings without clarifying which meaning is intended also is problematic.

Practice tip. If possible, have someone else read the draft to see if he or she gets the same meanings as were intended.

Overreliance on software in the proofreading phase

This error is of somewhat recent vintage and is a product of technology. As wonderful and amazing as they are, spell check and find-and-replace have their limitations, and, therefore, cannot be safely relied on as a proofreading function.

Practice tip. Despite technological advancements, in the author's opinion, no substitute exists for letting the document get "old and cold" before giving it a final proofread.

Defined terms

There actually are several problems in this category of drafting error, including:

- Inconsistent use of defined terms.
- Failure to define certain terms.
- Overuse of defined terms.
- Failure to use terms that are defined in the document. (This is a particular pet peeve of the author).

Despite technological advancements, in the author's opinion, there remains no substitute for letting the document get "old and cold" before giving it a final proofread.

The use of defined terms is a tried-and-true drafting technique, but it must be thoughtfully used. It is easy to miss, and it is an easy error to make.

Practice tip. Outline the key parts of the document before drafting it. At that time, also make a list of terms that will require definition.

Neglecting to specify intended default rule

Drafting errors can stem from failing to negate a legal default rule if a result other than that provided in the default rule is intended.

A significant part of the laws that estate planners encounter are laws that contain default rules that can be altered (e.g., trust law, LLC law, etc.). Scriveners must know these default rules so that the proper alterations can be made. In the author's opinion, the failure to negate a default rule when the client's situation requires negation or alteration is professional negligence.

Practice tip. When he was in practice, the author maintained a list of the statutory default rules for LLCs, partnerships, and trusts, which he found very helpful.

Failure to include provisions that tax law mandates

Various tax-related trusts have governing instrument requirements that mandate certain provisions in a qualified instrument (e.g., charitable trust language, QDOT, QPRT, GRAT, etc.) Failure to include this language can cost the qualification of the trust for tax purposes, which, in the author's opinion, is professional negligence.

Practice tip. There is no substitute for reading the regulations and using the required language.

Conclusion

Drafting is hard, takes skill, and requires much more than having a clause or form to use. Failure to give drafting its due respect often lies at the heart of a drafting error. There is no substitute or short cut for a practitioner to understand the meaning of every word in a document that he or she drafts and backs. ■