



Chapter 2

THE NUTS AND BOLTS OF DRAFTING BOILERPLATE PROVISIONS

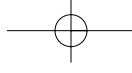
Tina L. Stark
Adjunct Professor of Law¹
Fordham University School of Law
New York, New York

Chapter Contents

- § 2.01 Introduction
- § 2.02 Declarations
 - [1] Declarations Defined
 - [2] Drafting Declarations
 - [a] The Problem with the Future Tense
 - [b] The Problem with the False Imperative

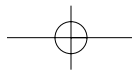
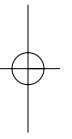
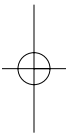
¹ Ms. Stark is also principal of In-house Legal Education, Inc., a New York City consulting firm that develops and conducts continuing legal education seminars.

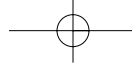




NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE

- § 2.03 Covenants
 - [1] Introduction
 - [2] Active vs. Passive
- § 2.04 Clarity Through Format





§ 2.01 Introduction

While many lawyers are inclined to take lightly what they regard as the non-substantive aspects of an agreement, that is a mistake for two reasons. First, one of the hallmarks of expertise, and one way to establish credibility, is a pervasive, constant attentiveness. Second, when drafting, it is not always possible to distinguish between what is important and what is not. Inevitably something that seemed too trivial to even think about turns into a deep pit with stakes at the bottom.

There is no special magic to drafting boilerplate provisions. The good drafting principles that apply elsewhere in an agreement also apply to boilerplate provisions. However, as boilerplate provisions are usually either declarations or covenants, Sections 2.02 and 2.03 focus on the drafting rules particularly applicable to these contract principles. In addition, Section 2.04 looks at how formatting can improve a provision's clarity.

§ 2.02 Declarations

[1]—Declarations Defined

A declaration is a statement of fact as to which the parties agree.² It is akin to a stipulated fact³ in a litigation. Some declarations have no substantive effect, except in conjunction with another provision; some have an effect on their own.

An example of a declaration outside the context of the boilerplate provisions is a definition. For instance:

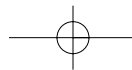
“Business Day” means any day other than a day on which the commercial banks in New York City are authorized or required to be closed.

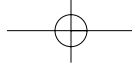
² That the parties agree as to the statement of fact derives from the contract's statement of consideration which is usually drafted along the following lines:

Accordingly, *the parties agree* as follows:

Thus, the parties have agreed to everything in the contract that follows this provision.

³ A stipulated fact is “[a]n agreement by the parties to an action on certain particular facts, thus avoiding the need to present evidence regarding them but not eliminating the court's function of drawing inferences from the stipulated facts and others shown by evidence.” *Ballentine's Law Dictionary* 1217 (3d ed. 1969).





§ 2.02[2]

NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE

Although the parties have declared a legal result, standing alone, the definition of Business Day has no substantive ramifications within the contract. It cannot be breached because neither party has any rights or duties with respect to the mere definition. Instead, the definition must be kicked into action by its inclusion in another provision—for example, a borrower’s promise to pay interest on the last Business Day of each calendar month. Only then does the borrower have a duty to pay on a timely basis, and the lender have the right to declare a breach upon the borrower’s failure to pay.

A declaration within a boilerplate provision works in almost exactly the same way. Again, the provision is a statement of fact as to which the parties have agreed. A classic example is the governing law provision. As with a definition standing on its own, the governing law provision neither imposes any duties nor grants any rights and, therefore, it cannot be breached.⁴ However, unlike definitions that must be kicked into action to serve a purpose within the contract, the governing law provision has a substantive effect by its mere inclusion in the contract.⁵

[2]—Drafting Declarations

Logically, because a declaration is a statement of what is, the boilerplate provision should be drafted in the present tense.⁶ Indeed, logic and the drafting texts⁷ even coincide. According to the texts, declarations should be drafted in the present tense because, when read, a contract provision should always apply to the current situation.⁸ The bugaboo is that many drafters eschew the present tense for the future tense⁹ or the false imperative.¹⁰

[a]—The Problem with the Future Tense

As previously noted, a contract’s provisions should be drafted in the present tense so that they apply whenever the contract is read. Imagine that a licensing agreement is executed with the following choice of law provision:

The laws of the State of Oregon will govern this Agreement.

⁴ “Third-Party ‘Closing’ Opinions: A Report of the TriBar Opinion Committee,” 53 Bus. Law. 605-606, 620 (1998). See also, Burnham, *The Contract Drafting Guidebook* 369, 386 (1992).

⁵ See Dickerson, *The Fundamentals of Legal Drafting* 126 (2d ed. 1986).

⁶ “Tense refers to the form of the verb that indicates time.” Hodges, Horner, Webb & Miller, *Harbrace College Handbook* 76 (12th ed. 1994).

⁷ See the texts cited in N.8 *infra*.

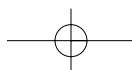
⁸ “[T]he draftsman should stay with the present tense. A provision of continuing effect . . . speaks as of the time it is being read, not merely as of the time” it [was drafted]. See Dickerson, *The Fundamentals of Legal Drafting* 185 (2d ed. 1986).

See also Child, *Drafting Legal Documents* 383 (2d ed. 1992).

“The present tense is [also] often used to express a general truth, something which is true at all times.” Warriner and Griffith, *English Grammar and Composition* 147 (rev. ed. 1969).

⁹ “The *future tense* is used to express action (or to help make a statement about something) occurring at some time in the future.” Warriner and Griffith, *English Grammar and Composition* 148 (rev. ed. 1969).

¹⁰ See § 2.02[2][b] *infra*.





Now assume that it is two years after the agreement was executed and that a dispute has arisen. The parties turn to the agreement to resolve the question as to which law governs. Technically, as drafted, the contract provides that Ohio laws will govern at some unstated time in the future.¹¹ Logically, however, it makes no sense that Ohio laws govern in the future but not now when the parties need to know what law governs. Thus, to continue with the example, a better provision¹² is as follows:

The laws of the State of Oregon govern this Agreement.

Bottom line: Use present tense over future tense in declarations.

[b]—The Problem with the False Imperative

The false imperative acquired its name because it is a misuse of the imperative.¹³ Briefly, the imperative is used for commands and obligations; in other words, for covenants:¹⁴

Seller *shall* maintain all its property, plant, and equipment in good repair, subject to ordinary wear and tear.

Licensee *shall* pay the Royalty Fee to Licensor on the last Business Day of each fiscal quarter.

Borrower *shall* not declare or pay any dividends without the prior written consent of the Bank.

When the imperative is used, a party promises to do or not to do something. The grammatical signal of the imperative is the use of the word *shall*.¹⁵

¹¹ The use of “will” expresses the future tense, not the present tense. See Warriner and Griffith, *English Grammar and Composition* 148 (rev. ed. 1969).

¹² For details as to how this provision should be changed substantively, please refer to Chapter 6 *infra*.

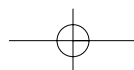
¹³ Technically, the imperative is not a tense but a mood reflecting a command or request of the speaker. Hodges, Horner, Webb & Miller, *Harbrace College Handbook* 80 (12th ed. 1994).

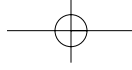
¹⁴ See Dickerson, *The Fundamentals of Legal Drafting* 213-214 (2d ed. 1986).

¹⁵ There is a hearty debate among academicians as to whether the imperative should be signaled by *shall* or *will*. Reed Dickerson, considered the dean of drafting, opts for *shall*. *Id.* See also, Burnham, *The Contract Drafting Guidebook* 382-383 (1992). Others urge that *will* is the true language of promise and that it should supplant *shall*. Haggard, *Legal Drafting in a Nutshell* 232-233 (1996).

This author prefers to use *shall* for covenants and to reserve *will* for appropriate uses of the future tense. For example, in an acquisition agreement the seller generally represents and warrants “that the consummation of the transaction will not violate Seller’s certificate of incorporation.” Typically, representations with respect to the future are not enforceable as they are, at best, opinions rather than statements of known fact. The quoted representation is enforceable, however, because its accuracy as to the state of the “future facts” can be determined at the time the representation is made by examining the seller’s certificate of incorporation. Although appropriate uses of the future tense are limited, creating and maintaining bright line delineations between the tenses makes defending one’s choice of tense easier if necessary in a litigation.

This author’s preference for *shall* assumes that the contracting parties are sophisticated business entities or individuals. If, however, the transaction is one with a consumer, then the well-established principles of plain English drafting should apply, and *will* should replace *shall*.





§ 2.02[2]

NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE

As stated, the false imperative is a misuse of the imperative.¹⁶ Instead of a party being obligated to do or not to do something, some inanimate thing is subjected to an obligation. For example:

This Agreement shall inure to, and be binding upon, the parties and their respective successors and assigns.

Obviously, the Agreement is not obligated to do anything.¹⁷ Accordingly, inserting *shall* adds nothing substantive to a provision that would otherwise have been drafted in the present tense.

Nonetheless, the use of the false imperative is rampant. The reasons are three-fold. First, only a stalwart drafter mucks with precedent. It is so much easier to take refuge in a form blessed by the powers that be. The second and related reason is that *shall* has been used so often for so long that it sounds right to drafters. Few lawyers have had specialized drafting training,¹⁸ and lawyers become accustomed to that which they have done over and over again.

Finally, some drafters almost reflexively write the word *shall* into any provision they think is important. The reasoning, however flawed, is that the absence of the magic word *shall* limits the enforceability or scope of the provision. The word *shall* becomes an outward manifestation of the drafter's desire to make certain that the parties and the courts know that this provision means what it says. However, the purported magic of *shall* is illusory. If anything, *shall* creates ambiguity. For example, since *shall* can also denote the future tense,¹⁹ the drafter must once again confront the question of whether *shall*, in this context, means that Oregon's law applies not now but in the future.²⁰

An easy trick to weed out the false imperative is to check if an inanimate object precedes *shall*; if so, then the sentence contains a false imperative. In the successors and assigns provision

¹⁶ Dickerson, *The Fundamentals of Legal Drafting* 126 (2d ed. 1986).

"When *shall* is used other than to issue a command, it is called a *false imperative*." Haggard, *Legal Drafting in a Nutshell* 232 (1996).

¹⁷ "The imperative 'shall' should only be used where someone is being compelled to do something . . . [I]f no person is mentioned, the imperative form is incorrect." Dick, *Legal Drafting in Plain Language* 93 (3d ed. 1995).

¹⁸ "[T]here is little training in draftsmanship; of that, little is being provided by the law schools." Dickerson, *The Fundamentals of Legal Drafting* 1 (2d ed. 1986).

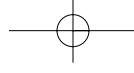
"For most of the history of legal education, law schools virtually ignored teaching the important skill of legal drafting." Brill, Brody *et al.*, *Source Book on Legal Writing Programs* 124 (1997).

"[P]rofessional skills instruction tends to focus primarily on litigative skills, devoting relatively little attention to the skills needed for transactional and other non-litigation settings. For example, instruction in legal writing tends to concentrate on the litigation context. Even in those schools that offer courses in drafting in a transactional setting, those courses generally are electives rather than part of the mandatory first-year curriculum." Report of the Professional Education Project, *Legal Education and Professional Development in New York State* 7 (1996).

¹⁹ See Strunk and White, *The Elements of Style* 45 (1959).

²⁰ Burnham, *The Contract Drafting Guidebook* 386 (1992).





used as an example, “Agreement” is an inanimate object and precedes *shall*; therefore, it is a false imperative. The preferred way to draft this provision follows:²¹

This Agreement inures to the benefit of, and is binding upon, the parties and their respective successors and assigns.

§ 2.03 Covenants

[1]—Introduction

As previously stated, covenants are promises and are properly drafted using *shall* along with the verb.²² Covenants can be complex and heavily negotiated provisions. The chapters in this book detail the substance of many of these provisions and the issues that can be negotiated. This section examines the merits of drafting in the active rather than the passive voice.

[2]—Active vs. Passive

One of the cardinal principles of good writing is to draft in the active rather than the passive voice.²³ A sentence is usually more concise and readable in the active voice.²⁴ A quick refresher: A sentence is in the active voice if the actor does the action to the object. For example:

The Borrower shall pay the interest to the Lender.

The Borrower is the actor, and the action is paying.²⁵

The alternative way to draft the provision is in the passive voice.²⁶ A sentence is in the passive voice if the subject of the sentence is being acted upon by something else. For example:

The interest shall be paid by the Borrower to the Lender.

²¹ An even better version is: “This Agreement binds and benefits the parties and their respective successors and assigns.” For details as to how this provision should be drafted substantively, please refer to Chapter 4 *infra*.

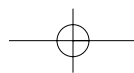
²² “To create a duty, [use] shall.” Dickerson, *The Fundamentals of Legal Drafting* 214 (2d ed. 1986).

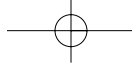
²³ “Voice indicates the relationship between the action of the verb and the subject of the verb. Two kinds of relationship are possible: active and passive.” Hodges, Horner, Webb & Miller, *Harbrace College Handbook* 79 (12th ed. 1994). See Strunk and White, *The Elements of Style* 13 (1959).

²⁴ See: Dickerson, *The Fundamentals of Legal Drafting* 186 (2d ed. 1986); Haggard, *Legal Drafting in a Nutshell* 181-182 (1996).

²⁵ “When drafters use the active voice, the name of the actor is clear.” Burnham, *The Contract Drafting Guidebook* 378 (1992).

²⁶ Although some texts suggest that sentences should always be crafted in the active rather than the passive voice, one text takes a more subtle approach. In *Thinking Like a Writer*, the authors suggest that the passive may be the better choice occasionally for several reasons, including disguising or softening bad news. See Armstrong and Terrell, *Thinking Like a Writer* 1-7 (1992).





§ 2.04

NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE

The interest is the subject being acted upon, and the actor, as the object, is no longer the focus of the sentence.

The change to the passive voice does several things. First, it increases the number of words in the covenant from nine to eleven. Although fewer words are not always preferable,²⁷ one is hard put to argue the merits of verbosity.²⁸ Contracts have audiences just as briefs and memos do.²⁹ At first, the audience may only be the lawyer's client. That universe, however, quickly expands to include the other party and its lawyers and other advisers. Unfortunately, that universe sometimes also expands to include a judge and his clerk.

The second result of switching from the active to the passive is that it focuses the reader's attention on the interest, rather the Borrower's obligation to pay the interest. Changing to the passive voice de-emphasizes the responsibility of the actor.

Although there are situations when it is preferable to make the actor disappear from the sentence, in many situations the actor's absence obscures the business issues that the parties should address.³⁰ When the actor is not mentioned, the question "who does the act?" is unanswered. For example:

Advertisements shall be inserted into monthly circulars.

Who is responsible for arranging to insert the advertisements into the circulars? It could be either party to the contract. It is far better to resolve this ambiguity when drafting as opposed to addressing it in the future during litigation.

§ 2.04 Clarity Through Format

One of the most useful techniques for improving a contract's clarity is tabulation.³¹ Tabulation uses subsections, indentations, and white space to establish the relationship between the

²⁷ "Tight compression of language does not insure clarity and simplicity. The draftsman should condense his language only so far as it helps rather than hinders understanding." Dickerson, *The Fundamentals of Legal Drafting* 181-182 (2d ed. 1986). See also Child, *Drafting Legal Documents* 385 (2d ed. 1992).

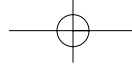
²⁸ "Brevity does not necessarily breed clarity, although lean, terse language usually does clarify the contents of a document. . . . Nothing superfluous should be added and nothing essential omitted." Dick, *Legal Drafting in Plain Language* 23-24 (3d ed. 1995).

²⁹ See Dickerson, *The Fundamentals of Legal Drafting* 26 (2d ed. 1986).

³⁰ "In sections conferring powers or privileges or imposing duties, using the active voice will help to avoid vagueness by forcing the draftsman to name, as the subject of the sentence, the person in whom the power or privilege is vested or upon whom the duty is imposed." Dickerson, *The Fundamentals of Legal Drafting* 186 (2d ed. 1986).

³¹ "Instead of counting on some canon of construction to clarify meaning, it is worth taking care to avoid ambiguity. The single most useful device for avoiding syntactic ambiguity is tabulated sentence structure. . . ." Child, *Drafting Legal Documents* 346 (2d ed. 1992). See also, Dick, *Legal Drafting in Plain Language* 118-119 (3d ed. 1995). See Felsenfeld and Siegel, *Writing Contracts in Plain English* 102-105 (1981), for a discussion of formatting in plain English documents.





different parts of a provision. This technique is not new, just underused. Consider the following provision without tabulation:

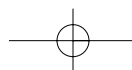
“Confidential Information” means all information relating in any manner to the Company or its business (including, but not limited to, financial statements, budgets and projections, customer identities, potential customers, employees, suppliers, servicing methods, equipment, programs, strategies, analyses, profit margins and other proprietary information), however documented, that has been, or may subsequently be provided or shown to the Recipient or any of its Representatives by or on behalf of the Company; or obtained from review of documents or property of, or communications with, the Company by the Recipient or its Representatives and any and all notes, analyses, compilations, studies, summaries, and other material, however documented, based, in whole or in part, on any information included in subsection (a) (collectively, the “Derivative Materials”).

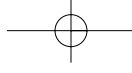
Now, look at the provision redrafted using tabulation:

“Confidential Information” means

- (a) all information relating in any manner to the Company or its business (including, but not limited to, financial statements, budgets and projections, customer identities, potential customers, employees, suppliers, servicing methods, equipment, programs, strategies, analyses, profit margins and other proprietary information), however documented, that has been, or may subsequently be
 - (i) provided or shown to the Recipient or any of its Representatives by or on behalf of the Company; or
 - (ii) obtained from review of documents or property of, or communications with, the Company by the Recipient or its Representatives;
- and
- (b) any and all notes, analyses, compilations, studies, summaries, and other material, however documented, based in whole or in part, on any information included in the foregoing (collectively, the “Derivative Materials”).

It is still a complex provision that needs editing, but it is far less daunting and certainly easier to comprehend.





§ 2.04

NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE

Using tabulation is not hard. Most word processing applications have the capability built into their programs. The drafter may even be able to improve the provision's substance once he or she sees more clearly how its parts interrelate. This technique makes it easier to digest the information and clarifies how the various parts of the provision interrelate.

