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(with Forms)

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How To Write Contracts and Other Documents as a Professional in a Mechanistic World (with Forms)

James W. Martin

Lawyers are supposed to exercise independent judgment; mechanically copying clauses from other documents drafted for different situations is not exercising independent judgment.

UNLIKE OTHER VOCATIONS, being a lawyer requires the exercise of conscience. The lawyer's conscience is formed from many things: rules, ideas, and attitudes. The lawyer's conscience is directed by many things: teachings, hopes, dreams, and memories. The lawyer's conscience is the good part of the lawyer's soul. It's that part that says, "You did good today; you're all right." And it's the part that says "You messed up today; you can do better."

James W. Martin practices business, contracts, probate, and real estate law and handles related litigation as a sole practitioner in St. Petersburg, Florida.

Some would say that lawyers have no conscience. Lawyers might disagree and say their conscience is codified in the Canons of Ethics, known in my state as the Florida Rules of Professional Conduct ("FRPC"). The Preamble to those Rules supports this, but it goes further when it says:

"Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service."

Thus, the lawyer's conscience is embedded in a standard higher than the Rules of Professional Conduct—in the standard of professionalism.

All professionals, whether they are lawyers, doctors, plumbers, or artists, know more than laymen about their fields of endeavor, and they develop and use their knowledge and skills primarily to benefit their clients, their profession, and their community, not just to make money.

It is this quality of professionalism that is becoming more and more difficult to maintain in a mechanistic world where, in theory,

a computer can be told all the applicable facts and rules and pump out a document or diagnosis that accomplishes the bottom line result desired by the client without having to consider the emotional, historical, political, or human effects of that result.

We have lost sight of FRPC Rule 4-2.1:

"In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."

THE SIGNS OF MECHANISTIC WRITING • Instead of exercising independent professional judgment, we seem to be mechanically following the example of others, good or bad. Legal writing itself becomes mechanistic. This is especially true in the document-oriented realm of real estate law.

Have you noticed how every bank's promissory note form has a clause waiving jury trial? The Bill of Rights guaranteed every citizen the right to trial by jury, yet the waiver of this constitutional right is so mechanically written into every lender's forms that no loan officer dare delete it.

Have you noticed the mechanical inclusion of other clauses in loan documents that waive the substantive and procedural rights of borrowers? Clauses such as environmental indemnification, joint and several liability, and waiver of service of process?

Representing your client does not require oppressive writing. The Preamble to the Rules also says: "As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others."

The Signs of Mechanistic Clients

But lawyers are not alone in their mechanistic tendencies. It seems like the whole world is doing it. For example, everyone seems to want a living will because everyone else has one. Not long ago Florida Bar headquarters received thousands of phone calls from citizens responding to a public offer for free living will forms. These forms are not esoteric, magic, or secret. They appear word for word in the Florida Statutes. They state the signer's intent regarding the use of life-prolonging procedures in a terminal condition. Did those thousands really want to make that life or death decision without personal advice from their doctor or lawyer?

This mechanistic tendency is not limited to health care. It appears in

the financial world, as well. In the race to avoid probate, aging parents change the titles on their bank and brokerage accounts to be joint with their adult children, only to find out their life savings are subjected to claims of their children's creditors and spouses.

FOUR STEPS TO PROFESSIONALISM IN WRITING CONTRACTS • What can you do about professionalism in the 21st Century? Four things: Identify your client, listen to your client, think about what you heard, then write it down.

Identify Your Client

When you write a contract, the person who sits in your office and tells you what to write might not be your client. Your client could be a corporation and the person in your office just an employee. Or your client could be a partnership or a government entity or some other type of organization. Rule 4-1.13(a) says: "Representation of Organization. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

This means that your duties as a lawyer are owed not just to the person sitting in your office, but also, and more importantly, to the organization that is your client. This

means that you have a professional duty to communicate with the organization, to keep those communications confidential, and to represent that organization to the best of your ability.

The person sitting in your office might not understand this and might think you represent him or her. It is your professional duty to educate the person so it is clear from the beginning who you represent and to whom your duties flow.

If it is a new client, the person in your office might want you to represent him or her individually rather than the organization. If this is not made clear in the first meeting, an unintentional representation of the organization may result.

For this reason, identifying your client includes sending a letter to your client and to the person with whom you met confirming your understanding of who is your client and what you are to do for that client. This is usually handled by a simple form of engagement letter. See Appendix A.

Listen To Your Client

Before you can write anything for your client, you need to talk to your client. The client should tell you the five Ws: who, what, when, where, and why. These will become the outline of the contract: The parties to the contract are the "who,"

the recitals are the "why," the subject matter is the "what," the term is the "when," and the applicable law is the "where."

It helps if the client writes this as an outline of contract points before you even meet with the client. This will focus the client's thoughts about the contract and give you a written memo to use in drafting.

When you meet, engage your client in "what if" scenarios. Map out results intended from various factual circumstances that may arise during contract performance.

Ask your client to show you contracts it has used in the past, and quiz the client on its various clauses. Were they included intentionally to meet the client's objectives, or were they mechanically repeated from prior contracts?

Listen to your client's words to determine what hopes and fears, what goals and risks, surround the transaction. Ask your client about them.

Think About It

Think about what your client said and the way it was said. Think about ways to help your client reach its goals and reduce its risks. Think about what laws might apply to the contract in various factual situations. Research those laws.

Think about the historical, political, and economic context within which the transaction will take place. Is this a transaction that must take place to avoid a bankruptcy? Is it critical to an industry? Is it critical to an individual? Will the inclusion of clauses helpful to this client have a damaging effect on third persons?

What does your conscience tell you about this transaction? Are you comfortable with your side of it and your role in it? Or are you doing it just for the money? Talk to your client about any aspects with which you are not comfortable.

Write It All Down

After you have identified your client, listened to your client, and thought about your client, the facts, the law, and society, you are ready to write. But you must write two documents: not just the contract, but also a cover letter to the client. See Appendix B.

The cover letter will explain why you included some clauses and omitted others. It will confirm what your client told you, what your legal research found, and what your conscience requires. It will persuade your client that the contract you have written is the only one you could write under the circumstances: a contract that describes the transaction in a manner which will promote the client's success and

limit the client's risk while dealing honestly with the other parties; a contract that will not offend citizens of a free society who have fought long and hard for justice and the procedural safeguards it requires.

TEN TIPS FOR WRITING •

How do you write such a contract? See my article *Fifty Tips for Writing the Contract That Stays Out of Court*, 14 *The Practical Real Estate Lawyer* 55 (May 1998). Here are 10 of the tips:

- Start the contract or will with a simple, generic form. See Appendices C and D.
- State the correct legal names of every party, and use nicknames like "contractor," "corporation," and "Jones." But be sure to be consistent.
- Write the contract's recitals (whereas clauses) to provide the background facts the judge or jury will need to construe the contract.
- Begin to write the body of the contract using the contract deal points from your client's outline. Add to that clauses to cover the matters raised in your own thinking. Remember to listen to your conscience as you write.
- Use words that have a quick and certain meaning. Write so clearly that a nonlawyer can understand it. In technical contracts where jargon is necessary, explain it in words lay people can comprehend.

- Write in short sentences using active tense. Long sentences written in passive tense are boring.
- Be consistent, not creative, in terminology. There is nothing wrong with a contract using the word "goods" 100 times if it is a contract for the sale of goods. Maybe an English teacher would grade this down for a short story and call it repetitive, but in contract writing it is called consistent.
- Make it easy to navigate the document. Give each paragraph a heading and underline it. Group paragraphs logically. Sometimes this means chronologically in the order work is to be done, some-

times this means by subject matter such as scope of work, compensation, term, and miscellaneous.

- Be consistent in grammar and punctuation. Watch where you place ending quote marks, whether you place commas after years and states, and similar variations in style.
- Check spelling. It counts.

CONCLUSION • Lawyers can be more than the mechanics of contract writing. We can be the artisans who use technology as our tools to create beautiful and effective words to live by, and then to die by.

APPENDIX A

Sample Form of Engagement Letter

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

John Doe
100 Main Street
Anywhere, Florida 00000
Re: Legal Representation

Dear Mr. Doe:

This will confirm that you have retained me to represent your interest in connection with the following matter: Contract of employment with ABC Corporation. The scope of my representation is as follows: Meet with you and ABC Corporation, negotiate contract, prepare contract, and supervise signing contract. You are going to furnish me copies of the following documents before I start working: Your contract of employment with your previous employer.

I will begin work as soon as I receive a fee retainer of \$_____ from you. The retainer will be deposited to my trust account and will be applied toward fees and costs as earned and incurred. As that retainer is used up, additional retainers will be billed to continue the work.

As we discussed, my legal fees are based on the amount of time spent at hourly rates of \$_____ for me and \$_____ for my paralegal. You will also pay for such costs as copies, postage, long distance, recording and filing fees, faxes, Federal Express, courier, etc. Enclosed is my resume, which I gave you at the initial conference and which explains how I bill for my services. If you have any questions, please do not hesitate to call.

The range of fees for this work will vary with the amount of time it takes. I estimate that fees will be a minimum of \$_____. It is not possible at this time to estimate how much more they may be, but I will keep you informed by sending you bills on the first and fifteenth of each month.

Please note that the scope of my representation does not include advice or services regarding the following: accounting, tax, financial, business, management, and related non-legal matters and advice (I advise that you engage a CPA, tax attorney, or business consultant to advise you regarding these matters); title searches, surveys, inspections and other non-legal work relating to real estate (I advise that you engage a title insurance company, abstractor, surveyor or other licensed professional to provide you these services); securities, labor, and other legal matters not handled by this firm (I advise that you engage a lawyer who specializes in these matters if you need such advice). I would be happy to refer you to others who may provide you these services.

I appreciate your trust and confidence in asking me to assist you. I will endeavor to do my best for you at all times.

Very truly yours,

APPENDIX B

Sample Form of Cover Letter

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

John Doe
100 Main Street
Anywhere, Florida 00000

viously made by me, and make, publish, and declare this to be my Last Will and Testament.

1. *Debts and Expenses.* I direct that any debts for which my estate becomes legally obligated to pay, including funeral expenses and costs of administration, be paid as soon as practicable after my death.

2. *Confirmation of Joint Bank Accounts.* I confirm that I own certain bank accounts as a joint tenant with full rights of survivorship with other persons and that it is my intention that the funds in those accounts at my death automatically pass by operation of law to the person or persons, if living, in whose name or names the same may stand together with mine. If any passbook, certificate, or other document evidencing such an account is found among my effects, I direct my Personal Representative to deliver the same to the joint owners named in that account. If any joint owner predeceases me, then this gift shall lapse.

3. *Memorandum of Tangible Personal Property.* I give, devise, and bequeath those certain items of my tangible personal property listed in the last dated writing signed by me and in existence at the time of my death to the persons listed in that writing. That writing shall have no significance apart from its effect on the disposition of my property by this Will. If no such writing is found and properly identified by my Personal Representative within thirty (30) days after my Personal Representative is appointed by the court, it shall be conclusively presumed that no such writing exists. If any person named in such writing predeceases me, then the gift to that person shall lapse and pass as part of the Tangible Personal Property Residue below, unless otherwise stated in the writing.

4. *Tangible Personal Property Residue.* I give, devise, and bequeath all of the rest of my tangible personal property, which is not disposed of under the Memorandum of Tangible Personal Property, which tangible personal property may include automobiles, jewelry, clothing, household goods, and personal effects, and insurance policies on those items of tangible personal property, and the insurance proceeds from those policies, to my children MARY DOE and BOB DOE, who survive me; but if either predeceases me, then to the other who survives me; but if both predecease me, then this gift shall lapse and pass under paragraph 5 (Residue) below. The cost of delivery of each item shall be paid by the donee of each item.

5. *Residue.* I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal or mixed, as follows:

a. *Children.* I give, devise and bequeath all of my residuary estate in equal shares to my children MARY DOE and BOB DOE. If either child predeceases me, then his or her share shall pass, per stirpes, to his or her lineal descendants, if any, who survive me; but if there are none, his or her share shall lapse and pass as part of the share of my other named child. If neither of my named children survives me or leaves a lineal descendant who survives me, then this gift shall lapse.

b. *Intestate Heirs.* But if the above residue provision fails, my Personal Representative shall distribute all of the residuary estate, according to the order of intestate succession in the State of Florida, to those persons who would have been my heirs if I had died intestate and distributed in the same shares such persons would have received in such case.

6. *Powers of Appointment Not Exercised.* If, at the time of my death, I have the right to exercise any power of appointment by will or otherwise, I declare that nothing in this Will shall be deemed to be an exercise of that power.

7. *Estate Tax Apportionment.* I direct that estate taxes shall be apportioned in accordance with Florida law.

8. *Personal Representative.* I appoint my daughter MARY DOE as my Personal Representative and my son BOB DOE as my alternate Personal Representative, each to serve in the order indicated upon the death, resignation, incapacity of, or failure to qualify and serve as to the prior Personal Representative or alternate. I direct that my Personal Representative or named alternate shall serve without bond and shall have general power of sale of all property at both public and private sale in any jurisdiction.

IN WITNESS WHEREOF, I have hereunto set my hand and seal to this, my Last Will and Testament, on this ____ day of _____, 19 ____, at _____, _____ County, Florida.

_____(Seal)
JOHN DOE

WE, the undersigned, certify that JOHN DOE signed and sealed the above and foregoing instrument in our presence and at the time published and declared the same to be his Last Will and Testament, and that we, in his presence and at his request, and in the presence of each other, have

below subscribed our names as attesting witnesses, at _____,
 _____ County, Florida, on this ____ day of _____, 19____.
 Sign _____ Address _____
 Sign _____ Address _____

STATE OF FLORIDA
 COUNTY OF _____
 WE, JOHN DOE,

_____ and _____,
 the testator and the witnesses, respectively, whose names are signed to the
 attached or foregoing instrument, having been sworn, declared to the
 undersigned officer that the testator, in the presence of witnesses, signed
 the instrument as his last will, that he signed, and that each of the witness-
 es, in the presence of the testator and in the presence of each other, signed
 the will as a witness.

_____(Seal)
 JOHN DOE

 Witness

 Witness

SUBSCRIBED and sworn to before me by JOHN DOE, the testator
 who is personally known to me or who has produced a Florida driver's
 license as identification, and by _____,
 a witness who is personally known to me or who has produced a Florida
 driver's license as identification, and _____,
 a witness who is personally known to me or who has produced a Florida
 driver's license as identification, on _____, 19____.

NOTARY PUBLIC-State of Florida:
 sign _____
 print _____
 My Commission Expires:

**PRACTICE CHECKLIST FOR
 How To Write Contracts and Other Documents as a Professional
 in a Mechanistic World (with Forms)**

- What can you do about professionalism in the 21st Century? Four things:
 Identify your client, listen to your client, think about what you heard, then
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 "what if" scenarios.
 - Think about what your client said and the way it was said. Think about
 ways to help your client reach its goals and reduce its risks. Think about
 what laws might apply to the contract in various factual situations.
 Research those laws. Think about the broad context of the transaction.
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 comfortable with your side of it and your role in it? Or are you doing it
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