Good business lawyers have to be great drafters of agreements, and there are multitudes of ways to make mistakes when negotiating and drafting one. In this article, I caution against ten top agreement-drafting mistakes.

1. Not Drafting the First Draft

Always volunteer to create the first draft of a contract. Being first can give you a tremendous advantage in the negotiations. You can structure the deal initially on your own wish list with terms most beneficial to your client.

From a legal cost perspective, creating the first draft often is more cost effective than responding to the other lawyer's one-sided draft.

2. Not Reviewing Sample Agreements

A good business lawyer needs to review other sample forms and agreements before finalizing the preparation of an agreement. Undoubtedly, a number of issues will be addressed in those sample forms and agreements that may be directly relevant to the agreement in question.

A good sample form can be an enormous head start for drafting purposes, but be careful to determine the orientation of the sample agreement. If it’s an Employment Agreement, is it pro-employer or pro-
employee? If it’s a license agreement, was it one drafted by the licensor and thus more favorable to the licensor? It is extremely important to start out with the right form, with an orientation aligned with the agreement you want to draft.

Where can you get good forms and agreements? There are many resources, from legal treatises, to CLE course materials, to Web sites. Some of my favorites include:

- LawCommerce Forms & Agreements Center (www.LawCommerce.com)
- Edgar/SEC filings, including publicly available merger agreements, stock option plans, employment agreements, license agreements and more.
- The treatises from Law Journal Press and Matthew Bender.

3. Not Including Explicit Payment Terms

Almost everyone understands that payment terms are an essential part of an agreement and should not be omitted or left to be decided until after the agreement is signed.

Good drafting requires that the payment terms be clearly laid out in the agreement. Avoid ambiguity about the amount owed, or provide a clear formula for determining it. Include terms that explicitly state how much is owed and when it must be paid, and also state the repercussions if the other party doesn’t pay or pays late. And, make sure to determine who pays any taxes involved.

4. Not Including All Deal Terms in the Agreement

All ”deal terms” should be included in the agreement. This means that you should not only include all legal boilerplates, but also the key items upon which the client relied when it entered into the agreement.

Deal terms to consider including:

- What is the reason for entering into the agreement with the other party?
- Did the party state that he or she has been in business a long time or has a particular type of expertise in a particular field?
- What did the other person agree that he or she would do for the client and what did the client agree to do in return?
- When did the parties agree this would happen?
- Were special circumstances discussed in negotiating the agreement, which led the client to agreement with this particular company?
- Is there a critical deadline for receiving goods or services?
- Was there some key event or condition that was to happen before the client became fully obligated?

The answers to all of these questions can be included within the agreement so that if at any point the deal falls apart, it can be shown that the client relied on specific answers to these questions.

5. Making Assumptions

Don’t make any assumptions when drafting the agreement. Discuss with the client any assumptions you find yourself in danger of making. What this means is that you should spell out all the obligations and assumptions under the agreement within the agreement itself. For example:

- If the client is purchasing equipment, do not assume that the other party will know to deliver the equipment with any related software or attachments. Spell it out explicitly.
- Don’t assume the other party will know that if the client receives the goods it purchased late, the client will lose thousands of dollars. Put a “time is of the essence” clause in your agreement if this is true.
- If the parties agree to have goods shipped and delivered to a certain location, make sure that you both are in agreement about the location and who pays for shipping costs.

If you are unclear on any portion of the agreement, get an explanation. Conversely, if it appears that the other party is unclear on something you are talking about, explain it and spell it out in the agreement.
6. Not Paying Attention to Boilerplate Terms

Boilerplate terms are an essential part of any agreement and affect the rights under the agreement as much as any other terms. These terms can be negotiated in the same manner as all other terms in your agreement.

Key boilerplate terms to really focus on include:

- The prevailing party in any dispute will be awarded its attorney's fees.
- Amendments to the agreement can only be made in writing.
- The contract may not be assigned.
- The contract includes all representations, warranties and agreements of the parties (the "integration" clause).

7. Not Negotiating Everything

Everything is negotiable. Even the things the other party tells you are not negotiable are negotiable. Even preprinted forms and boilerplate terms are negotiable.

Some portions of the agreement will be more important to your client than others, but everything can be important in the event of a problem. There will be give and take in negotiating the agreement—it is important to you to decide in advance which things you can’t live without and which things you can live with. Negotiating everything means that you discuss, argue, deliberate, and ultimately agree upon all terms of the agreement. Not only are you allowed to do this, but also you are typically expected to do it.

8. Not Knowing When Enough Is Enough

In much the same way as it is important to negotiate everything (see above), it is also important to know when it is time to stop negotiating and just get the agreement signed. If you go one inch beyond enough, there is the possibility that the negotiations will fall apart and you will be left without an agreement.

The key in lots of negotiations is leverage—do you have more leverage or does the other side have more leverage? Knowing this can help you decide when enough is enough.

9. Not Including A Termination Clause

A termination clause can be important in many agreements. The termination clause states how your client will get out of the agreement if the agreement isn’t working. No one likes to plan in advance for ending of a relationship but it is much better to plan in advance than be caught without this plan if things turn sour.

In the termination clause, you establish the terms under which a party can end the relationship, the opportunity for a cure period, and the consequences of termination.

10. Not Stating the Jurisdiction Governing the Agreement

Don’t neglect to negotiate where any disputes relating to the agreement will take place. This is critical, particularly when parties to an agreement reside in or do business in two different states, different countries, or, in the case of large states like Texas or California, two different counties.

The typical choices for hearing disputes are where the client resides or does business, or where the other party resides or does business. Try to have the other party agree to come where the client is—if there is a dispute, you don’t want to be hauled into court or into an arbitrator’s office 3,000, or even 300 miles away. This clause is particularly important if you are dealing with companies in foreign countries.

You also need to think about whether binding arbitration in the event of a dispute might be in your client’s best interest.