

DRAFTING CONTRACT CHANGES

Although the form contract keeps getting longer and more complex in an attempt to cover all possible points and scenarios, agents still are routinely called upon to draft and insert language and clauses to modify it.

Current regulations provide that it is not the unauthorized practice of law for “a real estate agent, or his regular employee, involved in the negotiation of a transaction and incident to the regular course of conducting his licensed business, [to] prepare a contract of sale, exchange, option or lease with respect to such transaction, for which no separate charge shall be made.” Accordingly, I think you are safe from the Virginia State Bar when you do draft these clauses or changes. You may not be so safe from your client or your broker, however, if you do so poorly. In my experience most drafting problems arise because agents are careless, in a hurry, or simply do not have the requisite skill or experience to draft changes or additions to boilerplate contracts.

Do not reinvent the wheel. Think you have a unique situation? Think again. The members of your association have been selling real estate for quite some time, and the extensive collective experience and wisdom of the group that comprise it has gone into a clause booklet VPAR makes available for purchase at a nominal cost. Likewise, many firms and experienced agents maintain their own clause booklets and resources. So, consult with your broker and seek help.

Take your time and think. I understand buyer’s brokers need to get the contract presented quickly in this market, and I understand you may be drafting the contract at a client’s kitchen table with the family pet gnawing at your leg, but you will have done your client a disservice if you write in paragraph 12 that the “buyer desires roof to be repaired.” What does that mean? And yes, I have seen that clause on a contract -- you might as well write that the buyer desires to win the lottery.

Be honest. Are you skilled and experienced enough? Not just as an agent -- do you know enough about the subject matter of the clause? If there is no pre-existing clause – either outright or as a template to modify -- and you have to draft one from scratch, then try to follow these drafting rules: First, state the expectation of your client (or the parties) as precisely, clearly and concisely as you can, and consult with someone, e.g. a home inspector, if you are not sure what the expectation should be. Second, anticipate potential areas of disagreement or interpretation and close them. Last, make sure there are no unintended consequences or conflict with the main contract.

Never hesitate to consult with your lawyer, broker, or mentor.