

_____ **Template** **for a** _____ **Template:**

a Checklist To Prepare or Improve any Model Document

Joshua Stein

*Model documents will save you time and trouble—especially if they're good.
Here are four dozen suggestions to help you
make good model documents.*

ONLY A FEW business transactions are totally unique. For the rest of them, a transactional lawyer will usually prepare and negotiate documents based on similar documents for similar transactions the lawyer has previously closed. The lawyer will tailor and edit those previous documents as appropriate to reflect today's transaction.

To simplify, streamline, and speed up that process, while producing the highest quality

work product, any transactional lawyer will want to use, and regularly improve upon, a collection of reliable model documents or "templates." People sometimes call these documents "forms."

This article summarizes many of the steps you will want to take when you develop or improve any template or model document, whether you start from someone else's tem-

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plate, a final document from a transaction that you recently closed, or an existing template of your own that you want to improve and update. Many of the measures suggested here also amount to a good description of what transactional lawyers are supposed to do all the time in all their work and in every document they prepare, but that is not the purpose of this article.

Not all of these measures are necessarily a wise investment of time and effort for a document that you will use only once. Moreover, for any deal-specific document, you will want to take some further steps not mentioned here.

Some of the steps in this checklist will help you simplify and shorten your documents and translate them from legalese into typical business English. Stylistic improvements like these will often help the user of a document get the substance right later, and help your client understand and respond to your work. This will make it easier for your client to give you useful comments that will help you accurately capture "the deal" in your papers—the first job of any transactional lawyer. But when you prepare a model document, you should focus above all on substantive legal issues. Don't overdo the stylistic improvements.

This article lists only some of the substantive legal issues and concerns that might affect your document. Any particular document or relationship will always raise its own substantive concerns based on the precise requirements and legal context of the particular document, and the drafter's experiences with similar transactions.

Each item on this list applies only where relevant and appropriate. Nothing here constitutes a mandatory command or a "bright-line" requirement for a better document. As in so many other areas, good judgment and an understanding of context—i.e., thinking—dictates everything.

SUBSTANTIVE IMPROVEMENTS • As you review the substance and the legal implications of your document, you may want to consider at least the following issues, and answer the following questions for yourself.

1. Legal Issues and Context

What are the legal implications of the relationship and obligations that your document is creating? What legal principles apply? Given those principles, what does your document need to say? What label will the law attach to this relationship, and what issues travel with that relationship? How should your document deal with them?

2. Risks

In previous similar transactions, what were the pressure points and disputes? How does this document address those issues? How else can this document benefit from your experience? What have you learned from prior similar transactions? Use that knowledge to mitigate any risks or exposures that this document or relationship might create.

3. Inconsistencies, Etc.

Look for inconsistencies, gaps, vagueness, and possible ambiguities. Fix them. Try to make each point only once—and related points in close proximity—to make it easier for you or any future user to identify inconsistencies and accurately communicate the business deal.

4. General Issues

Consider the short list of themes and issues common to all transactions of the type for which you are preparing your template. In any real estate transaction, for example, you would want to think about at least the following issues that arise again and again:

- Administration, monitoring, and reporting;
- Assignability and exit strategy;
- Control over major decisions;
- Flexibility and effect of possible future changes in circumstances (including the possibility of casualty or condemnation);
- Nonrecourse and limitation of risk;
- Tax implications and characterization; and
- Title insurance.

5. What's Not There

What's missing from your document? Given the relationship between the parties, what topics would you expect the document to address? Does it address them?

6. Problem Areas

How is this transaction or relationship likely to go wrong? If so, what provisions in your document will help improve your client's position, rights, and remedies? What is the worst thing that can happen in this transaction and legal relationship, and how does this document handle it?

7. Prenegotiation

Any model document will reflect the business and legal agenda of whichever party you expect to represent in the transaction. But, depending on the context, you may want to build into your document certain concessions that you know your clients will probably make to the other side in transactions of the particular type. Whether to do so is partly a business decision.

If the other side is "going to ask for these changes anyway," you might decide that you and your client will benefit if you carefully think through the concessions and include in your template document standard "middle-of-the-road" language in your first draft. You can at least offer such language as an option in your

template document. See Joshua Stein, *Cures for the (Sometimes) Needless Complexity of Real Estate Documents*, *Real Estate Review*, Fall 1995.

8. Formulas

If your document contains any formula or other numerical interaction, play through some sample cases and see how they turn out. Do your formulas produce the right answer? Did you say numerator when you meant denominator? Did you say percentage but your formula is wrong by a factor of 100? Apply your numerical formulas mindlessly, as if you had never seen them before—and forget your expectations.

9. Conditions to Rights

Wherever your document grants "the other side" any right, privilege, or benefit, think about what conditions should apply to those rights. For example, should your document require that the other party not be in default?

10. Boilerplate

Check for typical boilerplate (e.g., jury trial waiver, successors and assigns, counterparts, broad attorneys' fees clause if appropriate, include means "without limitation" but only once). For consistency across all your documents, you might want to maintain one model document that consists solely of well-written and complete boilerplate clauses of these types, so you can quickly copy them, as appropriate, to every future model document that you prepare or update.

11. Comparisons

Compare this document against other similar documents for possible omissions or improvements. Find at least three good comparable precedents and read through them thoroughly, seeing whether each can add something to your document. In the author's experience, every

comparison of one document against another always produces at least a small improvement.

12. Review by Others

If the document justifies it, ask your colleagues to review your draft and make any comments they wish. A second pair of eyes and a second set of experiences always adds value to any document.

STRUCTURE AND ORGANIZATION • The logical structure of your model document will help make it easy or difficult to use.

13. Document Title

Give your document a good title—one that describes this particular document, lets everyone easily identify and refer to this document later, and distinguishes this document from all others. But keep your title as short and simple as you reasonably can.

14. Blanks and Variables

Collect all the deal-specific “blanks” and variable terms near the beginning of your document, and in signature blocks and exhibits, to make your document easier to use. Set up and then consistently use appropriate defined terms (see below), to try to spare the user of your document from ever needing to fill in any piece of variable information more than once.

15. Order of Paragraphs

Reorder the paragraphs or sections in your document as necessary to conform to one or more of the following:

- Typical industry expectations; or
- The logical and chronological structure of the relationship as actual users of your document would perceive, understand, and talk about it; or

- An “inverted pyramid” structure, where you start with the most important concept, then the second most important, and continue downwards.

Cover related concepts together, in a logical order, reorganizing as needed. Break your document into logical “Articles” or other pieces.

16. Headings

Add a heading and a section number to every section or paragraph.

17. Other Documents

When you use this document for a transaction, what other documents will the parties also sign or use at the same time? How does this document interact with them? Can you simplify their interaction, such as by addressing each substantive issue only once, thus avoiding any need to make “conforming changes” between documents when you actually use them? Can you combine related documents?

18. Acknowledgments

Add acknowledgments if necessary, or at least a reminder that the user of your document should attach them.

19. Cover Notes

If the user of your document may benefit from comments about the document, consider adding a set of explanatory cover notes at the beginning of your document. Here you could describe:

- The document and its orientation (which party’s interests it is primarily intended to protect);
- The substantive legal and other issues it raises;
- Warnings about possible problems or concerns;

- Any provisions of the document that have been “pre-negotiated” in favor of other parties;
- Optional clauses tailored to the particular document;
- Other documents the lawyer will probably want to prepare at the same time; and
- Optional provisions that the document should include only in particular circumstances (in a mortgage, for example, leasehold or subordination provisions).

DEFINED TERMS • If properly used, defined terms can dramatically improve any model document, by making it easier to prepare and easier to understand. The following are some quick pointers on defined terms. For more, see Joshua Stein, *How To Use Defined Terms To Make Transactional Documents Work Better*, *The Practical Lawyer*, October 1997.

20. Flotation

Float all your defined terms to recitals or a dictionary early in the document, or collect them in an exhibit.

21. Improve Definitions

Fine-tune the definitions so they combine all relevant concepts originally expressed in the document, and as otherwise appropriate.

22. Clarification

Fix any nonintuitive or confusing terms.

23. Interacting Terms

When multiple defined terms interact and work together, structure your word choices so your defined terms internalize that interaction. For example, if you have the “License Agreements” and the “Sales Agreements” and the “Property-Related Agreements,” call them collectively the “Agreements” rather than the

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“Contracts.” And when you later need to deal with some telecommunications agreements, don’t start calling those new agreements the “Licenses.” If you do that, you are just asking for mistakes and confusion.

24. Other Documents

Check that the defined terms in this document track those in other related documents that will be used at the same time.

25. Use Defined Terms

Once you’ve set up a defined term, use it whenever you can. Replace descriptive text with defined terms wherever such terms have already been established or should be. If the descriptive text you are replacing adds any useful new concepts for your defined term, move them into the appropriate definition.

TEXT GENERALLY • A model document should be reasonably well written and reasonably comprehensible to any intelligent businessperson who knows the area but has no legal training. The following suggestions will help achieve that goal. See Joshua Stein, *Writing Clearly and Effectively: How to Keep the Reader’s Attention*, *New York State Bar Association Journal*, July/August 1999 and *Secured Lender*,

November/December 1999. (An earlier version of the same article appeared as *Good Writing*, *The Practical Litigator*, September 1998.)

26. General Editing

Line-edit the entire document, to improve the clarity and accessibility of your writing; to correct grammatical errors; and to translate any needlessly legalistic words into ordinary but absolutely unambiguous business English. At the same time, preserve any "magic language" and legal terms of art that the courts have repeatedly interpreted in similar documents.

27. Passive vs. Active

Try to replace the passive voice with the active voice.

28. Restrictive vs. Nonrestrictive

Search for the word "which." Replace it with "that" whenever you see circumstances that justify such replacement, which is most of the time.

29. Deletions

Remove unnecessary verbosity, Latin, laundry lists, legalisms, and redundancies.

30. Consolidation

If some concept arises more than once in your document, try to restructure your document so you address that concept only once, with general application. Minimize the possibility that anyone will ever need to make "conforming changes" because your document discusses the same topic at two or more locations. If the document deals with several related concepts at various locations, fix it. Don't force your reader to jump back and forth if they want to understand your document. This will block comprehension. Instead, collect all the related provisions in one place in a logical order, making each point only once.

31. Short and Simple

Shorten your sentences and paragraphs. But remember that clarity beats brevity. Simplify where you can, even if it means more words.

32. Cross-References

Minimize or eliminate any internal section cross-references. They often impede comprehension. You can almost always substitute defined terms or other navigational aids.

33. Lists

Wherever your document provides for multiple conditions, requirements, deliveries, criteria, etc., reorganize as necessary to create a single integrated list. Collect all the multiple items in one place. Make them parallel and readable. Set up your list as multiple separate paragraphs where the number of items justifies it.

34. Articles

Consistently use (or don't use) the definite article ("the") before defined terms referring to parties, e.g., "the Lender" vs. "Lender."

35. Numbers

Spell out numbers up to ten. For higher numbers, use only numerals. Don't do both. (This reflects the author's personal stylistic preference. It is usually more important to reflect your own organization's stylistic preference, if there is such a preference, and to do so consistently.)

36. Here ...

Search for every occurrence of the character string "here." Those four letters will often signal the unnecessary use of a pompous word, such as "hereinunder." Where you can, replace that unnecessary pompous word with ordinary English.

37. Legalisms

Search for and edit down common legalisms, such as "in order to," "prior to," "applicable,"

"inter alia," "covenant and agree," "without limitation," "with respect to," and "pursuant to." Translate these words into ordinary business English.

38. User's Manual

Think of your document as a "manual" or "guide" for a relationship. Edit it so someone can read it and use it in precisely that way. A table of contents and index of defined terms will often help.

39. Master List

Make sure your "master list" of model documents includes the one you have just created or improved.

PHYSICAL CHARACTERISTICS (WORD PROCESSING) • Whenever you develop or improve any model document, also ask whether you can simplify or otherwise improve the physical format of the document, to make it easier for your word processing personnel (or your secretary) to use and modify when you copy it for particular transactions. Although an attorney should initiate the reformatting process, doing the actual work is not the attorney's job. For more on the use of computers in legal practice and how attorneys can avoid becoming high-paid secretaries, see Joshua Stein, *Laying the Groundwork for the Real Estate Closing: Documents, Cover Letters, and Memos*, *The Practical Lawyer*, July 1999; *When CP/M Powered Real Estate Practices: It All Began with a Kaypro II* (interview regarding use of computers in law practice since 1983), *The Lawyer's PC Newsletter*, May 15, 1998.

If you make sure that someone runs those formatting changes in your master document, you and your colleagues will save time later. You won't need to explain (and then proofread and explain again) complicated corrections to the format of the document when you use it in ac-

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tual transactions and are in no mood to spend time dealing with formatting. As part of the process of updating any model document, you may therefore want to instruct your secretary, assistant, or word processing department to take the following steps.

40. Formatting, Numbering

Check all the formatting in your document, particularly its use of automatic section numbering. Follow consistent formatting conventions within the document, complying with any firmwide formatting standards. Generally improve the use of formatting techniques as necessary to simplify future editing, use, and modification of the document.

41. Jerry-Rigged Formatting

Where the document uses tabs, spaces, and carriage returns as a substitute for correct formatting, replace those sloppy techniques with the correct formatting commands.

42. Footers

Add a proper and complete "footer" to your document, consistent with your firm's standards for document identification. When you have a choice, include more identifying information rather than less (ideally, at least the document number, DOS filename, page number, and "floating"—automatically updating—date and time).

43. Defined Terms

Highlight each defined term (the "*Defined Term*") wherever your document first defines it. This way, any user will be able to find it quickly. Consistently use the same highlighting format—e.g., underlined, bold, or italic—across all your documents.

44. Margins

Use ragged right margins for your text, rather than right-justified text. Ragged margins are easier to read. But, above all, comply with your organization's formatting requirements, and do so consistently.

45. Signature Pages

Break the text of your document just a few lines before the signature, to have a short page with only a few lines of text followed by the signature blocks. On the signature page, remove the footer and page number to facilitate transactions where the parties sign first, then negotiate. Reformat the signature block to

make it easy to modify for various common entity structures. (You can set up a complex signature block structure as a table to make it incredibly easy to use later, without having to laboriously reformat every time something changes.) Add the statement "No Further Text on This Page" at the bottom of the page preceding the signature page.

46. Index and Table of Contents

For any substantial document, mark all the defined terms for an index. Then insert an index and a table of contents. Check that both reformat correctly when regenerated.

47. Attachments

Add a list of attachments, right after the signatures. Include every exhibit. If the document will be recordable, mention acknowledgments in the list of attachments.

48. Security Controls

Set up security controls for your document so most users will be able to view or copy your model document, but will not be able to edit it. Determine exactly who should have edit rights, and set them up correctly.

CONCLUSION • If you follow the suggestions in this article, you will produce a model document that saves time and trouble later and helps you deliver top quality for your client at a reasonable cost.