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Transactional Matter Files

K Drafting- Exemplars

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N. Exemplar Considerations.¹³

To save time and expense, maintain exemplars from prior deals, or exemplars that otherwise cross your desk or desktop so that they can be accessed and tailored for a new transaction quickly. This is most easily accomplished by maintaining files in word processing format in separate folders in your computer system along with an index listing file names, document title, and comments (e.g. "LeaseLL.wpd, Lease of Real Property, Landlord Oriented"). When a similar matter arises, you will be able to consult the index, pull up the exemplar, and proceed to tailor the document to the specifics of the new deal. This technique will greatly speed your revision of the document if your agreements use generic defined terms for parties and other deal specifics, and you can then change these items in the preamble and definitions sections, and proceed to review and modify the substantive provisions. Remember, laws and practices change; exemplars do not. Always understand what substantive provisions and legal phrases mean. Don't simply parrot a document. It may be outdated. See, e.g., Howard Darmstadter, *Legal-ease: In the Petrified Forest*, BUSINESS LAW TODAY 40, 41 (ABA, March/April 2002) (reflecting on form guaranty featuring outdated "waiver of notice, presentment and demand" rather than post-1990 UCC Article 3 "waiver of defenses based on suretyship or impairment of collateral" and observing "there have been a few developments in commercial law since 1980").

Finally, remember that an exemplar from a prior transaction was, at best, right for that transaction, not the current one. It represents a negotiated compromise of issues that were in play in that prior deal. Said another way, it represents an allocation of risk and reward, benefit and burden, between those parties at that time. This being the case, it is best to view the exemplar with a critical, not an accepting, eye and "reset" the provisions to a neutral position or one that favors your client before proposing the document to the other side. Another way to address this situation is to start with an exemplar from a deal in which the party on your client's side of the current deal had the most leverage. In such a situation, most of the provisions should be slanted in favor of your client from the beginning.

¹³The term "exemplar" rather than the word "form" is used in the heading of this section because, except for the most basic documents, there are no real forms in the sense of "fill in the blanks and it is done." Most true forms will be more cost-effectively prepared by counsel's assistant or paralegal. Counsel should think of the documents used as precedent for new documents as examples or models of what was done in the last, similar deal and proceed to modify the *entire* document to fit the new transaction. Thus, exemplar. You may also describe exemplars as "precedent documents"—a formulation that highlights their use in prior, somewhat analogous transactions, and the need to apply precedent to the new and different matter at hand. When using an exemplar, analyze each provision and whether it is appropriate for the current transaction. Do not include unnecessary provisions or ones that you do not understand just because they are in the exemplar.