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Transactional Matter Files

K Drafting- Recitals

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The introduction paragraph is not numbered. It should be in the form:²

This [Agreement, Lease, etc. as appropriate] ("Defined Term") dated [as of], 20xx, is between, [a Corporation, Limited Liability Company, General Partnership, an Individual, etc., as appropriate] ("Defined Term")² and, [a Corporation, Limited Liability Company, General Partnership, an Individual, etc., as appropriate] ("Defined Term") [add additional parties as needed].

For example:

This asset purchase agreement ("APA") dated September 21, 2003, is between Mayfield & Associates, LLC, a Delaware limited liability company ("Buyer"), and Bronson Construction, Inc., a California Corporation ("Seller").

The first paragraph of the agreement identifies the parties and the type of transaction they are documenting, establishes defined terms for the parties, and provides a reference date for the document. Ensure that all parties' names and other information (such as state of incorporation) are correct—using defined terms means they will not come up again until the signature blocks. Beyond these items there is no need for further detail. Leave that for the recitals and the body of the contract.

D. Preambles; Recitals; Transitioning Into the Agreement.

Preambles or recitals set the context for the agreement and are useful in later interpretation. They also provide a place to list related transactional documents and other things that may be part of the transaction as a whole but are otherwise not referenced in the particular agreement itself. Preambles or recitals do not need to be preceded by the word "whereas" and it is not necessary to title the section "Recitals," although you will no doubt run into those forms (and those who aggressively adhere to them) in practice.

Each recital should be written in plain English and should be preceded by a capital letter numbering or ordinal system (just like this section of this text). In the recitals, include facts that will help a later reader grasp the nature, purpose and basis for the agreement.

Examples of appropriate facts for recitals include: (i) the relationship and goals of the

² Bracketed—[]—text in examples is optional language or language needing replacement when drafting a specific provision. Brackets should be deleted when using these provisions.

²Note the form used to define a term. It should be used consistently throughout the document. For ease of future use of this agreement as an exemplar for future transactions, choose generic defined terms like "Buyer," "Seller," "Landlord," "Tenant," etc. This allows a change of party name in the first paragraph to ripple or flow through the document automatically when the document is used as an exemplar in a subsequent matter.

parties, (ii) the nature of the transaction, and (iii) other transactional documents and things associated with the transaction. Take care to be accurate and not to include unnecessary facts in the recitals—they may be used later in litigation to prove that which they state.³ When in doubt be more general than specific in the recitals. Avoid the temptation to recite everything.

Immediately after the recitals, you will want to draft a transition to begin the substantive portions of the agreement. One useful formulation is:

The parties agree [as follows]:

It is not necessary or desirable to draft a lengthy transition using archaic phrases, such as:

Know all men by these presents: Now, THEREFORE, and in consideration of the premises and the mutual promises, terms and conditions stated herein, the parties do now AGREE as follows:

If your recitals are stated prior to a section of the document that is labeled "agreement" or could be construed as the real agreement, as distinct from the mere recitals, then the accuracy of the recitals should be addressed in the real agreement section. This can be done by including a provision stating that the parties represent and warrant to one another that the recitals are accurate, perhaps with a "to the best of their knowledge" limitation. Alternatively, the parties may desire to disclaim any implication that they are representing or warranting that the recitals are accurate. This can be accomplished by introducing the subject recital with "[specify party] asserts that [state recital]." In either case, a provision regarding the accuracy of the recitals should be expressed clearly in the main "agreement" section of the document to avoid any implication that the recitals are not part of the agreement.

E. Definitions and Defined Terms: A Powerful Technique to Enhance Meaning and Readability.

When an agreement's definitions are numerous or complicated, the defined terms should be set out alphabetically in a separate section located near the beginning or end of the agreement. If the document is a short one, if definitions are not numerous, or if it makes sense for some other reason, definitions can be introduced the first time they occur, including in the preamble, the introductory paragraph, or the recitals. For example:

This ASSET PURCHASE AGREEMENT AND ESCROW INSTRUCTIONS (the "Agreement") is entered into and effective as of [date], at [city], [state], by and between _____ (the "Seller"), and _____ (the "Buyer"), on the basis of the following facts and constitutes (i) a contract of purchase and sale between the parties and (ii) escrow instructions to _____ (the "Escrow Agent"), the consent of whom appears at the end of the

³BARBARA CHILD, DRAFTING LEGAL DOCUMENTS, PRINCIPLES AND PRACTICES 125 (West 1992); see also Fed. R. Evid. 801(d) (defining as non-hearsay both prior statements by a witness and admissions of party-opponents).