



10 SUGGESTIONS FOR DRAFTING BETTER REAL ESTATE DOCUMENTS

William Hof, Partner
Real Estate, Development & Construction
Husch Blackwell LLP

William.Hof@huschblackwell.com

Contents

1. Use the document’s layout to guide the reader.	2
2. Use automatically updating cross-references.	2
3. Choose defined terms to maximize understanding.	2
4. Set off defined terms.	2
5. Be specific about where referenced items can be found.	3
6. Question whether a separate glossary is necessary.	3
7. Anticipate execution.	3
8. Number exhibits according to section of origin.	3
9. Do not use color in exhibits.	4
10. Prevent unintended execution of exhibits.	4

Contact the Author:

William.Hof@huschblackwell.com

www.huschblackwell.com/professionals/william-hof



While the primary focus

in drafting real estate documents is to ensure that the substance of the document captures the intent of the parties, this should not be the drafter's only focus. For example, details often considered "minor" could affect the substance of the document, frustrating the parties' intent. However, even items that can properly be considered "style" or "formatting" play an important part in the process of drafting, negotiating and implementing real estate documents. Practitioners can — and should — improve the quality of all of their documents by keeping this in mind throughout the drafting process. While there can be no definitive list of do's and don'ts for these style and formatting issues, the 10 simple suggestions that follow address many of the most commonly occurring style and formatting issues found in commercial real estate documents and serve as useful examples of how careful style and formatting choices can improve the overall quality of a document, thereby improving its efficiency and effectiveness.

10 SUGGESTIONS FOR DRAFTING BETTER REAL ESTATE DOCUMENTS

1. Use the document's layout to guide the reader.

Break long grammatical paragraphs into shorter, visually manageable portions, providing the reader a break as well as a useful fingerpost for later reference. For documents more than a page or two long, include headings describing the contents of each section and subsections (along with appropriate boilerplate language to eliminate any possible substantive effect of these headings). For longer documents, provide an index or table of contents with page references that automatically update (and be sure that your word processing program updates such references before circulating a draft or printing it for execution).

As a counter-consideration, guard against overuse of headings in short documents, where anything more than a few headings might interfere with the goals of efficiency and effectiveness.

2. Use automatically updating cross-references.

Most documents will be significantly revised after their initial draft, often including adding and deleting sections, resulting in changes to section numbers throughout the document. Anticipate this and use automatically updating cross-references in the initial draft, so that when Section 10 of a document refers to "the easement granted pursuant to Section 8 above," the reference to "Section 8" will automatically become "Section 7" when Section 5 is deleted. This avoids the need to search for and update each individual cross-reference manually, thereby saving time and reducing the risk that some cross-references will be overlooked. This also eliminates the need to clutter a document with distracting references to deleted sections as "intentionally omitted." (Of course, judicious use of "intentionally omitted" may be appropriate in some instances, such as for clients with large real estate portfolios, such as institutional landlords and lenders, that value consistency in numbering across their documents for different sites.)

3. Choose defined terms to maximize understanding.

Where possible, defined terms should be short, impactful and consistent with people's common experience. For example, consider using "Buyer" instead of "Purchaser." Avoid use of pairs differentiated only by suffixes, so that rather than "Mortgagor" and "Mortgagee," use "Borrower" and "Lender," and rather than "Lessor" and "Lessee," use "Landlord" and "Tenant." Not only will this help all readers instantly understand the defined party's role, it will be far less likely for the drafter to conflate the defined terms when drafting.

4. Set off defined terms.

Use formatting features to make it easy for a reader to find the definition for a certain defined term. For a reader trying to determine exactly what property is being sold under a purchase and sale agreement, which definition do you suppose the reader would locate first: (the "Property") or (the "Property")?

5. Be specific about where referenced items can be found.

Do not force the reader to search throughout an entire document for a referenced concept. For example, when using defined terms before they are defined, refer specifically to the section that contains the defined term — e.g., “prorated as of the Closing Date (as defined in Section 5 below)” — rather than simply stating “defined herein.” Similarly, rather than simply referring to “the insurance that Tenant is obligated to carry hereunder,” provide the section number where such insurance is addressed so the reader can turn to that section for a complete understanding. In all instances, use automatically updating cross-references.

6. Question whether a separate glossary is necessary.

In theory, it may seem useful to have all the defined terms and their definitions collected in one section, in practice this is often not the case. Typically, defined terms can most succinctly defined in context, which often leads to the glossary definitions stating that a term “has the meaning given such term in Section _____,” defeating the point of the glossary. Implementing the suggestions in numbers 4 and 5 above may eliminate the need for a glossary. If not, a simple index identifying where defined terms are defined may be sufficient. For those instances where a full glossary is needed, either place the glossary at the beginning of the document or otherwise indicate the location of the glossary at the beginning of the document to avoid confusing the reader.

7. Anticipate execution.

Most sophisticated commercial documents are signed in counterparts. Unless there is a particular reason to have all signatures on one page, separate the signature blocks (including notary blocks therefor) onto separate pages in the initial draft to make the execution process smoother.

8. Number exhibits according to section of origin.

For documents with more than just a couple of exhibits, label exhibits according to the sections of the document in which they initially appear, rather than simply labeling them “Exhibit A,” “Exhibit B,” etc. So if the initial exhibit first appears in Section 2(b), label that exhibit as “Exhibit 2(b)” (rather than “Exhibit A”). Naturally, you should use automatically updating cross-references for this label. Not only does this provide a handy cross-reference between an exhibit and its location within a document, allows for additions and deletions of exhibits to the document without renumbering numerous other exhibits. If the same section contains multiple references to exhibits, can then adopt a differentiating convention, e.g. “Exhibit 2(b) – A” and “Exhibit 2(b) – B.”

9. Do not use color in exhibits.

While the use of color in exhibits (e.g. “the Property is shown outlined in red on Exhibit 2(b)”) may seem like a nice way to take advantage of modern technology to make the intent clear, the opposite is often true. This color will not reproduce when copied unless special attention is given — which, most frequently, it will not be — leaving a copy that cannot stand alone. Instead, use some method that will easily reproduce when copied in black and white, such as hatchuring (////) or dashed lines.

10. Prevent unintended execution of exhibits.

Often other agreements may be attached as exhibits to a primary agreement (e.g. a form of deed attached to a purchase and sale agreement). These exhibits — as stand-alone documents themselves — usually have signature blocks, and, despite the practitioner’s best efforts and clear guidance, clients not infrequently sign these exhibits before they should. Avoid this either by removing the signature blocks from these exhibit documents or by typing “NOT FOR EXECUTION” on the signature line for such signature blocks.



It is unlikely that

any of the items discussed above will make or break a document. However, keeping these and other style and formatting issues in mind throughout the drafting process will contribute to the overall quality of the documents, helping the process of drafting, negotiating, and implementing the terms of the parties' agreement.



About Our Real Estate, Development & Construction Practice

As one of the country's largest real estate legal practices, we represent developers, investors, REITs, construction/design firms and companies focused on cost-efficient solutions to managing their real estate assets. Whether your project requires local government connections, proficiency with financing and tax credits, efficient document analysis and drafting, or experienced litigators to push through an acquisition or development, our deep understanding of your industry can help you seize opportunities and overcome obstacles.

About Our Firm

Husch Blackwell is an industry-focused litigation and business law firm with offices in 18 cities across the United States. We represent clients around the world in major industries including energy and natural resources; financial services and capital markets; food and agribusiness; healthcare, life sciences and education; real estate, development and construction; and technology, manufacturing and transportation.

huschblackwell.com