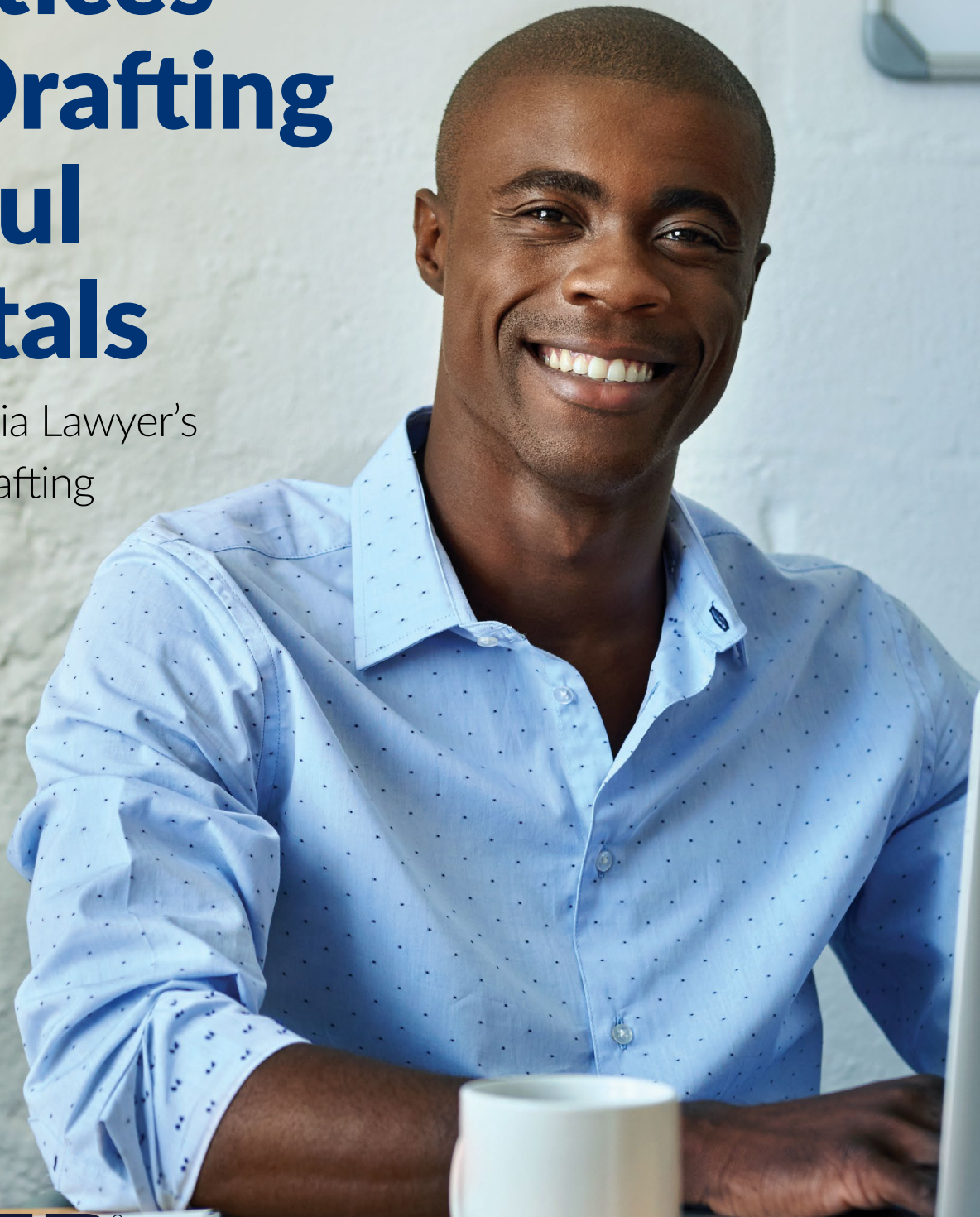


# 9 Best Practices for Drafting Useful Recitals

The California Lawyer's Guide to Drafting Agreements



# Introduction

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When lawyers draft an agreement for their clients, their job is to translate the parties' incomplete and imperfectly formed ideas, to fill in the gaps, and to create a comprehensive, legally binding document. Put simply, every agreement should answer the questions: Who? How? What? Where?

A well-drafted contract should:

- 1 Set the rules.** Establish the negotiated rules that the parties have agreed will govern their future conduct and relationship. Your document should be a working document that the parties can refer to in order to answer questions or settle disagreements.
- 2 Protect the parties.** A well-written contract will protect your client's rights and remedies, even if the contract is subjected to hostile review by another lawyer during a future dispute.
- 3 Anticipate problems.** Lawyers must anticipate the likely risks and problems that will occur during the term of the contract in order to reduce the risk of disputes or litigation. Using precise and exact language will ensure that the parties know exactly where they stand, and what their remedies are.

To accomplish these goals, most lawyers focus on the operative terms of the agreement - namely, the covenants, conditions, representations & warranties, and events of default & remedies. But what about the recitals?

Although recitals aren't mandatory in modern contracts, many lawyers still prefer to include them. And because the recitals have a greater legal effect than you might think, the savvy lawyer will know how to use the recitals to the best possible strategic effect. The 9 best practices outlined in this article will help you draft clean, clear, unambiguous recitals that will benefit your clients.

“Don’t forget that recitals have binding legal effect. Courts may look to the recitals to aid contract interpretation in a dispute.”

## The Purpose & Legal Impact of Recitals

The recitals are part of the introductory section of a contract and set the stage for the substantive contractual provisions that follow. Recitals are paragraphs located directly after the preamble or introductory clause that can be used to:

- Identify the purpose of the agreement
- Explain the factual background of the agreement
- Describe the relationship of the parties
- Protect the operative provisions from misinterpretation by placing the agreement into an understandable context

Think of the recitals as an advocacy tool. An artful drafter can prepare recitals with a particular slant or bias, framing facts and issues to advance the client’s interests. In choosing which facts to include and which to omit, and in how to word and organize the recitals, counsel subtly affects how the agreement will be interpreted. However, excessive efforts to slant recitals may conflict with the recitals’ purposes of providing a thorough and accurate historical background and a statement of purposes for the agreement. That, and you’ll anger opposing counsel.

Don’t forget that recitals have binding legal effect. Courts may look to the recitals to aid contract interpretation in a dispute. Facts recited in a written agreement, other than recitals of consideration, are conclusively presumed to be true. (Evid. Code § 622.) Moreover, if the operative words of a grant are doubtful, recitals may be used to assist in its construction. (Civil Code § 1068.) What does that mean for you? Recitals should be drafted and carefully reviewed to ensure that they are not framed in a way that could be interpreted adversely to your client’s interests. Do your best to use precise language and avoid ambiguity.

## Recital Best Practices

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### TIP 1

### Don't Start from Scratch

It's almost never necessary to reinvent the wheel. Before you start drafting, review any recitals from similar past agreements. Consider using these documents as templates:

- **Your firm's files:** Does your supervisor or a colleague have a sample contract you could review?
- **Form books:** Several legal publishers and CLE providers have good sample documents from a variety of transactions.
- **The SEC:** The [SEC's EDGAR database](#) contains a variety of agreements, attached as exhibits to filings by public entities.



## TIP 2

“Use the recitals to create a straightforward summary of the undisputed facts serving as the relevant context for the agreement.”

## Provide Historical Background

The recitals can provide historical background for the transaction by describing previous agreements between the parties, the status of those agreements, and whether the current agreement is intended to supersede, supplement, or otherwise modify the earlier agreements. In addition, the recitals can introduce the major players and describe important events leading to the agreement. This background helps place the transaction in proper perspective and is useful to third parties (including judges or arbitrators) who must later interpret the agreement without having known the parties or the history of their relationship.

Use the recitals to create a straightforward summary of the undisputed facts serving as the relevant context for the agreement. In other words, remember to stick to the facts that everyone agrees on. Don't try to interpret the facts in a way the other parties to the contract might object to. Keep it simple and noncontroversial.

## TIP 3

“Recitals should not be viewed in isolation. The recitals, the body of the agreement, and the behavior of the parties all must be coordinated for an agreement to achieve its desired legal effect.”

## State the Agreement's Purpose

There are two useful reasons to include a statement of purpose in the recitals:

- It forces the drafter, and also the parties, to focus on **why the parties are entering into the agreement and what they hope to achieve.** Once the parties' motivations and goals have been identified, it's easier to prepare an agreement that meets their needs.
- It serves as **a summary of the agreement for the reader.** Remember that any agreement you draft is intended to be a working document for the parties, not for the parties' attorneys. Providing a clear statement of purpose will help orient the parties to the scope of the contract when they refer back to it.

**Practice Tip:** Recitals should not be viewed in isolation. The recitals, the body of the agreement, and the behavior of the parties all must be coordinated for an agreement to achieve its desired legal effect. For example, a partnership agreement might recite the intent of the parties to act as partners, discussing why they believe a partnership relationship will be mutually beneficial. The agreement then would elaborate on the various actions the parties will take, and their respective rights and obligations, confirming the creation of a partnership. Finally, the parties need to follow through in performing those actions.

## TIP 4

# Clearly Communicate The Parties' Intent

Recitals can serve as important evidence in any subsequent litigation or arbitration proceeding of the parties' intent in entering into the agreement. For example, did the parties intend the document to be a true lease or a financing lease? Is the other party intended to be an employee or an independent contractor? What's stated in the recitals may not carry the day, but recitals can establish an important initial reference point, so draft carefully and accurately.

## RECITALS

1. Licensor is the sole owner of all rights, title, and interest in and to the proprietary software product generally known as LearningPro LMS (the "Licensed Software"), as well as any and all related documentation, user manuals, and related material (collectively, the "Licensed Documentation").
2. The parties have entered into a nonexclusive licensing agreement to the Licensed Software and the Licensed Documentation so that Licensee will have the right to use and distribute the Licensed Software and Licensed Documentation to third parties for the purpose of developing digital math and science educational programs for K-5 grade students in the State of California.



Modern recitals don't start with WHEREAS and simply and cleanly communicate the purpose of the contract and intent of the parties.

## TIP 5

### Cross-Reference Other Relevant Documents

In transactions involving more than one document, such as asset acquisitions, real estate financings, and secured commercial loans, recitals can cross-reference the other documents in the transaction and thus help the parties keep track of them and ensure that nothing is omitted.

## TIP 6

### Use Simple, Modern Language

Get rid of outdated terminology to simplify and clarify your contracts. Traditionally, recitals were introduced by archaic legal terms such as “Witnesseth” or “Whereas.” Although these old-fashioned terms are still used, they serve no functional purpose in the recitals and will only serve to confuse the parties and make the contract more difficult to review without the assistance of a lawyer. Your goal is to create a useful, living document for your non-lawyer clients.

## TIP 7

### Double-Check Your Formatting

Lettering or numbering the recitals is helpful for purposes of reference, especially if there are many. It will be much easier for the contracting parties to refer to “Recital C” rather than “the third recital from the bottom on page 3.”

## TIP 8

### Don't Include Any Binding Contract Terms

Because courts typically analyze the recitals to determine the parties' intent in entering into the contract, you don't want to address parties' specific rights and obligations in great detail. Moreover, repeating the terms of the contract in more than one place increases your chances of inadvertent mistakes and inconsistency. Stick to the general, background context of the contract. Remember that good recitals should protect the operative terms from misinterpretation by providing important context but should not duplicate or overlap with those operative terms.


“Good recitals should protect the operative terms from misinterpretation by providing important context.”


## TIP 9

# Introduce the Main Body of the Contract

At the end of the recitals, draft a simple statement transitioning from the recitals to the binding terms of the agreement. Basic language might be: “The parties therefore agree as follows.” If there are no recitals in the contract, you can instead state: “The parties agree as follows” without the “therefore.”

Note that a boilerplate recital of consideration, as in the paragraph above, will not make a contract enforceable if there is a lack of consideration in the remainder of the agreement. A false recital of consideration does not create consideration where none exists.

 ~~NOW, THEREFORE, in consideration of the mutual promises set forth in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows.~~

 The parties therefore agree as follows.



Unless your jurisdiction has some specific technical requirements, or your supervisor has specific preferences, keep the lead-in as short and simple as possible.

## Conclusion

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Because the recitals have legal effect and impact the later interpretation of the agreement during disputes, lawyers must draft the recitals with the same care and attention given to the operative terms. By keeping these 9 best practices in mind, you can draft recitals that clearly articulate the purpose of the contract and intent of the parties, and will do a better job protecting your client's interests.

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