CHAPTER 1

Introduction to Legal Drafting

Objective of this Chapter: To introduce the topic of legal drafting and identify characteristics of excellent drafting.

Key Techniques:
- Understand key differences between legal drafting and legal writing.
- Define the characteristics of excellent legal drafting.
- Attend to appearance.

Introduction

Legal drafting is a core competency for most lawyers yet it is the skill for which lawyers are least prepared. Although legal writing has traditionally been a required course at most law schools, legal drafting has not been widely offered until recently and is seldom required. Legal drafting is taught in most law schools either as a brief segment of a legal writing course or as an elective survey course where students tackle assignments like drafting a simple contract, a will, or a statute. That transactional lawyers need to develop competency as drafters is
obvious, and yet relatively few have taken the necessary steps to hone their drafting skills. Even though some lawyers are litigators, most cases are settled outside of court, and settlement usually entails a settlement agreement, which is a contract. Few law students preparing for a litigation practice realize that they will be contract drafters. Unfortunately, settlement agreements have a tendency to be particularly dangerous drafting projects because the parties are already litigious when the settlement drafting begins. Because drafting has not been widely taught, most lawyers need to take definitive steps to sharpen their drafting skills. This book offers an expansive approach to studying the transactional lawyer’s responsibilities as contract drafter.

Most practicing lawyers learned what they know about legal drafting from the lawyers who hired them out of law school. Their drafting styles evolved based on what they absorbed as a result of continual exposure to the good, bad, or indifferent works drafted by others. The lack of formal training in legal drafting for past generations is still evident in the contracts new transactional lawyers work with on a daily basis; in many cases, new lawyers simply mark up old contracts to reflect the business terms of the new deal without tinkering much with the language, thereby perpetuating poor drafting habits. Case law and statutes rarely proclaim a “right way” of drafting, which leads many practicing lawyers to conclude, mistakenly, that there is no “wrong way” of doing things, either. The result is that most lawyers have very poor drafting skills, and the standard-form contracts passed down to new lawyers often need significant revision.

What is Drafting?

“Drafting” refers to the objective legal writing used to create legislation, wills, documents, and agreements that seek to control future events.\footnote{Introduction to Legal Drafting} Objective information is fact-based, measurable, and observable. Drafted contracts should set out efficiently and clearly what a person or entity is expected or has agreed to do in the future. In this respect, drafting differs significantly from legal writing, which is subjective, meaning that the writing is based on interpretations, opinions, and judgments. The goal of subjective writing is to be persuasive. Drafting also differs from creative writing, where the goal is to entertain. Because the drafter’s goal is to be indisputably clear regarding future events, logic dictates that the style of legal drafting should be significantly different from the style used in legal writing. A lawyer...
who has not studied legal drafting as a distinct legal skill is not fully prepared for the demands of transactional practice.

**What Does a Transactional Lawyer Do?**

A transactional lawyer helps clients conduct business. Transactional practice involves representing clients in a wide array of matters related to managing a business or exchanging assets, goods, services, or any kind of property. Transactional lawyers are sometimes called “deal lawyers.” A transactional lawyer’s duties include advising the client as to how a deal should be structured; identifying legal issues; negotiating legal and, sometimes, business terms; and drafting contracts to memorialize the parties’ respective rights and duties in the transaction. Transactional practice involves representing the client throughout the entire life cycle of a business, from organization of the entity to its ultimate dissolution and every transaction in between.

A transactional lawyer drafts contracts and other legal documents that implement the client’s business deals and objectives. A contract drafter is primarily focused on three things: 1) control – the drafter wants to control the way the parties interact with each other in the future; 2) standards – the drafter wants to impose certain requirements for measuring the quality of performance; and 3) risk – the drafter wants to ensure that the risk the client assumes under the contract is appropriate given the benefit(s) the client will receive under it.

**Exercise:**

A couple of years ago, Richard and Bobby, two highly intelligent techno-geeks, left the company they had been working for and started their own business in Bobby’s garage. They have been developing a new technology for harnessing the power of positive thinking using software imbedded in a micro-chip they call the “Lilypad.” They’ve come into your office today because they are ready to begin marketing their product and have heard that there is a way to limit their personal liability by forming a partnership or some sort of corporate entity they want to call “Tadpole.” They have arranged to have their product manufactured at a nearby plant.

The next year, Richard and Bobby realize that their backgrounds as techno-geeks provided them with little sales and marketing experience. They want to hire a sales manager but don’t want that person to steal their technology. (In the next year or two, the pair will also realize that they need a CEO and a CFO.)
A few years after hiring their sales manager, Tadpole has long outgrown Bobby’s garage and Richard and Bobby call you to say they are looking for office/warehouse space. They also are talking with a bank about getting “real” financing. Soon, Tadpole needs outside help from consultants to tweak its technology and design its own plant for manufacturing Lilypads. Tadpole has begun purchasing silicon and other items necessary to manufacture the chips.

Five years after your initial meeting with Richard and Bobby, regional sales are off the charts and Tadpole wants to hire subcontractors to install the Lilypads for customers. Tadpole also wants to figure out a way to sell its product nationally. One of Tadpole’s biggest customers has asked for the right to use the underlying technology in another manner.

What types of contracts will Tadpole need?

Current Trends in Drafting

In 1978, President Jimmy Carter issued Executive Order 12044 requiring that a government regulation must be “written in Plain English and understandable to those who must comply with it.”1 In 1998, President Bill Clinton issued a memorandum to the heads of executive departments and agencies reinforcing the requirement for plain language in government writing.2 Many state legislatures have also passed statutes requiring that certain consumer contracts be written in Plain English,3 and the Securities and Exchange Commission requires that disclosure contracts must be written in Plain English. Virtually all of today’s drafting authorities recommend that, to the extent possible, contracts should be phrased in common, everyday language.4

The quest for Plain English is actually quite ancient, dating back to the 14th century, when in 1360, the English Parliament enacted the Statute of Pleading, requiring that lawsuits be tried in English. Ironically, the Statute of Pleading was itself written in French, which had been the custom of the gentry as well as the bench and bar since the Norman invasion in 1066. Despite the Statute of Pleading, it took Parliament nearly 400 years to rid itself of French legal customs and some traces still remain in common law today, in words like voir dire, demurrer, affidavit, desist, and residue. These words illustrate one characteristic of legalese: it is surprisingly impervious to change.

Some lawyers do not embrace the goal of drafting contracts in Plain English, as discussed in Chapter 3. The transition towards Plain
English drafting is more an “evolution” than a “revolution”; some people view it as an inevitable development in the accessibility and relevance of the law, while others see it as a trend and a choice to be made by individual lawyers. Either way, the process seems to have begun to accelerate in recent years.

Drafting in Plain English is not easy; it requires discipline and effort. Drafting language that is clear, concise, and understandable to the contract’s audience is a much more difficult endeavor and therefore a higher accomplishment than perpetuating the convoluted language replete in transactional practice today.

Focus of this Book
The drafting techniques presented in this book are not just about words and sentence structure, although language is key in excellent drafting. The purpose of this book is to equip lawyers new to transactional practice with the skills needed to start and finish drafting projects with excellence and confidence. The focus is on explaining the responsibilities and objectives of drafters and on recommending techniques that will help achieve them. Excellent drafting involves the following:

- Understanding the legal framework of contract drafting;
- Planning, designing, and organizing contracts;
- Choosing the best words to express the concepts addressed in the contract;
- Drafting efficient, clear sentences; and
- Understanding how to allocate risk among the parties to achieve the appropriate level of risk for the client.

Language is more than a tool for communicating; it is an essential component of the process of thinking. Concepts become clarified as lawyers select appropriate language to express them. Thus, where the language is improved, the substance of a contract is invariably improved as well.

Ethical Issues in Legal Drafting
Many ethical issues arise for a transactional lawyer in the context of drafting contracts. For example, how much is “enough” legal advice to a client regarding the risks undertaken in a particular transaction? Should the lawyer attempt to restructure the agreed-upon business terms of a transaction if the lawyer believes the terms are disadvantageous to the
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client? If a lawyer observes that opposing counsel has not provided competent representation to a client with respect to a particular transaction, what is the lawyer’s obligation under the Model Rules of Professional Conduct? How should the lawyer handle situations where the client’s budget does not permit the scope of representation necessary for effective representation in a transaction? Are a lawyer’s ethical duties fulfilled if the client does not understand the key provisions of a contract before signing? This treatise will address each of these ethical issues.

1.1 Understand the Differences between Legal Drafting and Legal Writing.

Although the goals of legal writing and legal drafting are completely different, the terms are often used interchangeably, even by drafting authors. This book distinguishes between “legal writing” and “legal drafting.” “Legal drafting” (statutes, wills, and contracts) deals with future behavior, while “legal writing” (pleadings and briefs) typically focuses on historical events. Legal drafting may have a very long shelf life and must anticipate myriad circumstances that may arise as the future unfolds. Statutes may be in effect for hundreds of years, wills may control the transfer of wealth through generations, and contracts often govern relations between parties for decades. For example, given recent technological advancements in payment systems, consider the challenge of drafting payment terms that will stand the test of time in a land lease for a term of 50 years. By contrast, legal writing is historical in the sense that briefs and pleadings typically describe a specific event that occurred and its known ramifications. Most cases are resolved within a few years and briefs and pleadings are quickly forgotten. Briefs and pleadings typically cite, quote, and argue relevant statutes and case law. Contracts occasionally cite statutes but do not quote or argue them, and virtually never reference case law.

Mistakes in legal drafting can be crucial, and each word may have great significance (e.g., “One month” or “30 days?” “No later than” or “within?”). Case law abounds with million dollar matters decided on the basis of nothing more than the placement of a single comma.8 Mistakes in contracts can be cured by amendments, but the other party

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would have to agree to amend. In pleadings, individual words are less important, and amendments can be filed to correct errors without approval of the other party.

A notable difference between legal drafting and legal writing is that legal drafting may ultimately be subjected to an adversarial reading. Although opposing counsel may disagree with certain words that are used to characterize people or events, or with the arguments presented, opposing counsel is usually not obsessed with tearing apart the meaning of words in a brief or pleadings. In contract litigation, however, a highly-trained adversary may seek to unravel the provisions in dispute.

The most significant difference between legal drafting and legal writing is the intended audience. Briefs and pleadings are generally intended to be read by judges and other lawyers from start to finish; most contracts are written for business people who consult specific provisions sporadically throughout the term of agreement when they need information.

The format of briefs and pleadings, the time frame for filing, style, number of pages, type size, margins, and even the size of paper are dictated by statutes and court rules. Very little about drafting a contract is “required.” One interesting quirk of drafting is that the form and format of a contract are almost completely unregulated by statute or case law; the same contract could be documented in three sentences or in 100 pages and it is up to the drafter to decide what level of detail is suitable under the circumstances. Contracts are not even “required to be clear, or even legible, and too many of them are neither.”

Another significant difference between legal drafting and legal writing is that legal drafting is a collaborative process in at least two major respects. First, lawyers rarely draft contracts completely from scratch. In drafting a new contract, the lawyer starts with a form from a prior transaction, cuts and pastes language from other sources, adds, deletes, and revises until the form fits the current transaction. Specific language in most forms is compiled over time through the edits of many lawyers in a chain of those who have worked with earlier variations and permutations of the forms. The genealogy of any provision in a “standard form,” and the purpose for which it was originally drafted are seldom known. Second, legal drafting is a collaborative process in the sense that during the course of negotiation, all involved parties
typically contribute language to be included in the contract. The terms of most contracts evolve as the parties jockey to edit and refine the language to suit their respective objectives. Because drafting is a collaborative effort, many contracts suffer from poor organization, lack of consistency, misuse or even conflicting use of defined terms, and redundant language.

Legal Drafting vs. Legal Writing

<table>
<thead>
<tr>
<th>Future behavior</th>
<th>Historical events</th>
</tr>
</thead>
<tbody>
<tr>
<td>Must anticipate</td>
<td>Known effect</td>
</tr>
<tr>
<td>Long shelf life</td>
<td>Quickly forgotten</td>
</tr>
<tr>
<td>Mistakes very damaging</td>
<td>Mistakes less important</td>
</tr>
<tr>
<td>May be subject to adversarial reading</td>
<td>Writing to persuade</td>
</tr>
<tr>
<td>Consulted sporadically</td>
<td>Read start to finish</td>
</tr>
<tr>
<td>Read by business exec’s</td>
<td>Read by judges and other lawyers</td>
</tr>
<tr>
<td>Format is unregulated</td>
<td>Format dictated by courts</td>
</tr>
<tr>
<td>Rarely references statutes</td>
<td>Cites statutes and caselaw</td>
</tr>
<tr>
<td>Collaborative process</td>
<td>Singular effort</td>
</tr>
</tbody>
</table>

### 1.2 Understand the Characteristics of Excellent Drafting.

The starting point for improving drafting skills is a good understanding of what “excellence” means in legal drafting. Lawyers often recognize excellent drafting when they see it without necessarily being cognizant of what makes it “excellent.” Excellent drafting achieves the following five characteristics.

1. **Accuracy.** The contract reflects the entire agreement of the parties; it is substantively accurate and complete. Lewis Carroll understood that saying what one means is not always as easy as it seems, as Alice learned the hard way at a mad tea party in Wonderland:
“Then you should say what you mean,” the March Hare went on. “I do,” Alice hastily replied; “at least—at least I mean what I say—that’s the same thing, you know.” “Not the same thing a bit!” said the Hatter. “Why, you might just as well say that I see what I eat is the same thing as I eat what I see!” “You might just as well say,” added the March Hare, “that I like what I get is the same thing as I get what I like!” “You might just as well say,” added the Dormouse, which seemed to be talking in its sleep, “that I breathe when I sleep is the same thing as I sleep when I breathe!”

Similarly, in contracts, the drafter must ensure that the contract says what the parties mean, and means what the parties say, which are two different things.

2. **Clarity.** The contract is understandable to the reader. Clarity is the opposite of ambiguity; it means that the provisions are drafted so their meaning is clear, and capable of only one plausible interpretation—that being the one both parties intended. Clarity is achieved by structuring sentences properly, choosing words carefully, and ensuring that the terms are internally consistent and complete.

3. **Efficiency.** The contract is “long enough and not one word longer.” Efficiency means that each word included in the contract serves a clear purpose. Efficiency also means that each concept is expressed only once so the contract is free of clutter and repetition. Although few lawyers would argue that meaningless words should be included in a contract, the challenge for new drafters is to identify inefficient words and phrases. Efficiency also means that drafters should prefer the shortest words and sentences that successfully convey the intended meaning. “The briefest words and forms of expression, provided they convey the meaning intended, are to be preferred to the longer words and forms of expression.”

4. **Simplicity.** The contract is simple to read and comprehend. Simplicity in legal drafting means the concepts are expressed in simple sentences using the simplest possible words. In drafting, “the simplest word, that is the word most commonly understood, should in general be preferred.”

5. **Resonance.** The contract resonates with its audience like mama bear’s porridge in Goldilocks and the Three Bears. The language is not too pompous and not too casual; it is written at an appropriate readability level for the audience while utilizing professional language and proper grammar.
Exercise 1.2:
Identify which characteristic of excellent drafting is missing from each example.
(Hint: several may apply.)

1. Consultant acknowledges and agrees that the payment of monies hereunder constitutes monies to which Consultant was not previously entitled and, further, that the payment of monies hereunder constitutes fair and adequate consideration for Consultant’s execution of this Agreement.

2. In exchange for the promises and/or covenants of Employer contained herein, subject to the provisions of this Agreement, Employee will provide the following to Employee:

3. Company’s maximum liability to Service Provider under this GPA (regardless of cause or form of action, whether in contract, tort, or otherwise) shall be limited to the total amount owed Service Provider in payment for Service Provider’s fulfillment of its obligations under this Agreement.

4. Whereas, the party of the first part has heretofore conveyed unto the party of the second part that certain part, parcel, and tract of real property whereupon the premises reside, it behooves the aforementioned party of the first part to bequeath the premises to the party of the second part.

5. The foundation may grant funds to educational institutions and corporations assisting physically impaired individuals.

6. Buyer shall remit payment by wire transfer to an account designated by Seller within five days after Closing.

1.3 Attend to Appearance.

Regardless of how perfect the language is, if the contract does not have a professional appearance, the audience is going to be suspicious of it. New lawyers may not have all the skills required to draft a complex contract, but they certainly can, and will be expected to, make any contract look “pretty.” Appearance includes all of the following:

- Readable typeface and font size;
- Plenty of “white space” on the page;
- Effective numbering system;
- Headings and subheadings;
- Ragged right margin, but above all, consistent margins;
• Tabulations to set off lists;
• Single-spaced text, double-spacing between paragraphs;
• Consistent formatting;
• Correct spelling;
• Correct grammar; and
• Correct cross references.

Case Study

What revisions should be made to correct the appearance of this contract?

MANUFACTURING AGREEMENT

This Manufacturing Agreement (“Agreement”) is entered on this ___ day of June, 2015 between ABC, Inc., a corporation organized and existing under the laws of the State of Georgia, having its principal place of business at 2210 Busy Street, Suite 700, Atlanta, Georgia 30339 (“Buyer”), and Peach State Manufacturing, Inc., a corporation organized and existing under the laws of Georgia, having its principal place of business at 1492 Crowded Parkway, Austell, Georgia (“Manufacturer”).

Witnesseth:

WHEREAS, Buyer have designed, owns, and continues to develop for industrial application the specifications for one or more fiberglass vaults (the “Products”); and
WHEREAS, Buyer desires to engage Manufacturer to manufacture its Products upon the terms and conditions of this Agreement.

NOW, THEREFORE, it shall be agreed between the parties as follows:

1. Scope of Agreement. Manufacturer owns and operates a manufacturing facility located at 1492 Crowded Parkway. Manufacturer is in the business of manufacturing products designed and owned by others upon their specifications. Buyer have designed, developed and desires to manufacture and sell certain fiberglass vault Products related to backflow testing. Such development efforts are ongoing and remain incomplete as of the date of this Agreement. Upon completion of development, the specifications for Buyer’s first Product, Model #___, will be attached to and incorporated into this Agreement as Exhibit A. Pursuant to the terms of this Agreement, Buyer engages Manufacturer, and Manufacturer accept such engagement, too manufacture Buyer’s Products upon Buyer’s specifications for sale and distribution to Buyer’s industrial customers.
2. **Purchase Orders and Time of Completion.** From time to time during the term of this Agreement, Buyer may submit their Purchase Order for the manufacture of a specified quantity of one or more of its Products. All orders placed by Buyer shall be subject to the terms and conditions of this Agreement and, to the extent that they specify quantities, destinations, and delivery dates, to Buyer’s Purchase Orders. Manufacturer shall acknowledge Buyer’s Purchase Order within 24 business hours of receipt. No term, condition or provision off this Agreement may be altered, amended, or modified by the terms, conditions, or provisions of any bid, confirmation, invoice, or other business form of Manufacturer unless otherwise specifically agreed in writing signed by both parties containing an express reference to this Paragraph 2 of this Agreement. Timely completion and delivery of the Products is of the essence of this Agreement. In the event that Manufacturer fails to deliver Products by the date specified in the Purchase Order, Buyer may offset against the purchase price a $300.00 penalty for each day that the shipment is late.

3. **PRICE AND PAYMENT.** Buyer shall remit to Manufacturer the per unit price of $_________ for each Model # _____ Product manufactured and delivered in accordance with Buyer’s specifications and in accordance with the terms of this Agreement, free from defects, satisfactory to Buyer and free and clear of all liens and claims of any kind. Buyer shall be entitled to deduct from any payment any outstanding penalties for late delivery. Payment shall be made provided that Manufacturer is not then in default under any terms of this Agreement, within thirty (30) days of Buyer’s receipt of payment for the Product from the end-user.

4. **Shipment**

   (a.) **Destination.** Manufacturer shall ship the Products Delivered Duty Paid Atlanta (DDP Destination), via mutually agreed upon carriers.

   (b.) **Risk of Loss.** Manufacturer shall assume the risk of loss or damage to all Products until delivery to their Destination.

5. **Miscellaneous Provisions**

   a. **Relationship of Parties.** Nothing contained in this Agreement shall be deemed or construed as creating a joint venture or partnership between Buyer and Manufacturer. Neither party shall have any power or authority to control the activities and operations of the other and their status is, and at all times will continue to be, that
of independent contractor with respect to each other. Neither party shall have any power or authority to bind or commit the other.

b. Governing Laws. This Agreement shall be construed and enforced in accordance with the laws of the State of Georgia, United States of America.

c. Entire Understanding. This Confidentiality Agreement constitutes the entire understanding of the parties hereto and may not be modified or amended except in writing signed by both parties. No person not a party hereto shall have any interest herein or be deemed a third party beneficiary hereof.

NOTES


3. The memorandum required that by October 1, 1998, plain language be used in all new documents, other than regulations, that explain how to obtain a benefit or service or how to comply with an administrative requirement. The memorandum further required that by January 1, 1999, plain language be used in all proposed and final rulemakings published in the Federal Register.

4. Almost all states have some form of plain language requirement, although they vary widely from state to state. Some statutes apply only to insurance contracts (see, e.g., Florida Statutes §627.4145), others apply to consumer contracts, generally (see, e.g., Connecticut General Statutes § 42-152), and still others apply to contracts involving residential real estate (see, e.g., N.Y. Gen. Oblig. § 5-702). Some states that don’t yet have plain language statutes impose similar requirements through regulations. The following states have some form of plain language requirement, but this list may not be exhaustive because the terminology and language requirements vary so widely from state to state: Arizona, Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin. Some statutes reference the Flesch Test of Reading Ease specifically (see section 9.1); others reference language at a fourth or sixth grade reading level.

5. The term “drafting authorities” as used throughout this book references books and articles specifically on the topic of legal drafting as a distinct
genre of legal writing, written by Bryan A. Garner, Reed Dickerson, Kenneth A. Adams, George W. Kuney, Thomas R. Haggard, David Mellinkoff, Scott Burnham, Richard C. Wydick, Tina Stark, and others cited in this book. I’m honored that so many consider this book a “drafting authority” as well.

6. DICKERSON, supra note 1, at 14.
8. For example, the October 2006 dispute between Rogers Communications of Toronto, Canada’s largest cable television provider, and Bell Aliant, a telephone company in Atlantic Canada, was over the phone company’s attempt to cancel a contract governing Rogers’ use of telephone poles. The argument turned on a single comma in the 14-page contract but the decision was worth one million Canadian dollars ($888,000). Citing the “rules of punctuation,” Canada’s telecommunications regulator recently ruled that the comma allowed Bell Aliant to end its five-year agreement with Rogers at any time with notice. The dispute was over this sentence: This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party. The regulator concluded that the second comma meant that the part of the sentence describing the one-year notice for cancellation applied to both the five-year term as well as its renewal. Therefore, the regulator found that the phone company could escape the contract after as little as one year. Rogers Communications Decision 2006-45. Note that the Canadian Radio-television and Telecommunications Commission later determined in August 2007 that there was substantial doubt as to the correctness of the Rogers Communications Decision, and reversed the initial finding. Regardless of the ultimate outcome, the case emphatically demonstrates the importance of accuracy in legal drafting.

10. LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND, excerpt from Chapter 7: A Mad Tea-Party (1865).
11. DICKERSON, supra note 1, at 44.
13. Id.
14. Research has shown that a jagged right margin is easier to read than a justified right margin. The most important thing, however, is to be sure the margins are handled consistently throughout the contract. Inconsistent margins are usually caused when provisions are cut and pasted from other contracts.