Preface to 2nd Edition

I’m deeply honored to have been invited to write a second edition of this book. I’m grateful to my wonderful ABA editor, Erin Nevius, and to all of my readers who prompted her invitation for this edition. If you liked the first edition, you’ll really enjoy this new and improved version. I teach much of the material contained in this book in continuing legal education seminars in cities throughout the United States and Canada, and most of the new material is spawned by questions from my audiences. Chances are, the new material reflects questions my readers have also had along the way. I’ve also added dozens of new case citations throughout the book.

Although I’ve added nearly 60 pages of text, I’ve tried to stick with one of my original objectives of organizing the book so it can be used as a law school textbook at the pace of about a chapter per week, allowing plenty of time for in-class drafting exercises. Because I’ve added a new Chapter 3 to delve into plain language drafting, Chapter 4 is now much longer, but Chapter 5 is shorter to compensate and catch up.

Here are some of the other additions:

Chapter 2 includes an expanded discussion of “gap fillers” to explain how “course of performance,” “course of dealing,” “trade customs,” and “industry jargon” influence judicial interpretation of contracts. Chapter 2 also includes a discussion of personal branding and accountability.

Chapter 3 pulls together several segments from the prior edition related to plain language drafting; it also expands the discussion of the Flesch Reading Ease Scale and gives clear recommendations for drafting at specific levels of understanding: graduate level, college level, high school level, and so on.

Chapter 4 includes many new topics and expanded discussions:

- The significance contracts signed under seal;
- E-Sign signatures;
- The effective date of a contract;
- The distinction between “execute” and “sign”;
• The distinction between “schedules” and “exhibits”;
• The potential risks and benefits of using virtual attachments;
• Strategies for drafting scope provisions; and
• Updates on drafting indemnification provisions, particularly with respect to “indemnify” and “hold harmless.”

Chapter 6 includes an expanded discussion on the correct pronouns to use with gender references and collective nouns.

Chapter 7 includes a discussion of whether articles should be used with defined terms, and provides an explanation of why all defined terms should be defined in the glossary.

Chapter 8 explores the differences between “best efforts” and “commercially reasonable efforts.” It also includes examples of “will” used in future tense without creating a promise or obligation, a discussion of “may” versus “might,” and how to create conditions.

Chapters 9 and 10 are reorganized a bit so that Chapter 9 now focuses on structuring sentences effectively and Chapter 10 focuses on eliminating sources of ambiguity in sentences. Chapter 10 also now includes a discussion of drafting effective mathematical formulas, ranges, and shifting rates.

Chapter 11 adds examples of specific words and concepts that can be used to shift risk allocation.

Chapter 12 adds a checklist for resolving insert integration issues.

Chapter 13 adds a discussion of INCOTERMS® for international transactions.

Chapter 14 adds a discussion of the practical and ethical aspects of exchanging documents with opposing counsel and other parties; namely, dealing with metadata and working in “the Cloud.”

As always, it is my great hope and my prayer that the information in this book will equip my readers with the drafting tools they need to draft with confidence and excellence! “Give instruction to a wise person, and he or she will be wiser still.” (Proverbs 9:9) Good luck!