

Drafting 1.01(With Real Estate Examples And Resources)

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Be brief, be clear, and get to the point.

THE PURPOSE of this article is to cover certain specific aspects of the basics of good legal drafting. The emphasis is on why clear and concise drafting can assist you in your practice. We will discuss some of the tools available to facilitate good drafting and we will also take a look at some of the common problems encountered in legal drafting. Attached are 11 drafting examples that are referenced in the text. Also attached are three Appendices: Mr. Blackwell's Drafting Rules (courtesy of Robert H. Bliss); David Weatherbie's Ten Rules on How to Write Like a Lawyer; and a bibliography of legal drafting resources. (Special thanks to Liz Petty of the Dallas Office of Vinson & Elkins LLP who compiled this bibliography.)

I. THE IMPORTANCE OF GOOD DRAFTING

A. Self Interest 1.

The simple and most cogent reason for clear, concise drafting is your own self-interest in avoiding potential liability. Clear, complete, unambiguous documents decrease the possibility that the parties will misunderstand the transaction and later sue one another. It is the lawyer's job as draftsman to clearly express the client's intentions, and the more clearly they can be set out, the less likelihood there will

be a misunderstanding or a dispute. In short, good drafting is clear and unambiguous, and covers all of the necessary issues, and a good draftsman strives to write language that, although read by a variety of people (some, perhaps, with differing intentions), can be understood in only one way. (See example 1).

B. Self Interest 2.

Clients will be much happier with you if they can actually read and understand the documents you create. While every attorney has clients who never read anything (or at least appear not to), most clients do read what their lawyers create, and they would like to be able to understand those documents without an interpreter. When clients are able to read and understand your drafting, and find the documents accessible, they will be more inclined to use you in the future and, following upon point II.A above, there is much less likelihood that there will be some sort of error or omission in the documented transaction, which also leads to long term client satisfaction.

C. Self Interest 3.

Finally, simple self-respect is a reason to draft clearly and concisely. While many lawyers appear not to reread what they have written from time to time, obviously everyone should do so every time. Poor drafting can make the draftsman look uninformed or inexperienced, and can impact negotiations. In a very real sense, the quality of your drafting is a signature that identifies you to opposing counsel, their client (and for that matter, your client) as someone who is well versed in the subject matter or one who is groping along, (see example 2).

II. TECHNIQUES FOR GOOD DRAFTING

A. Understand Your Subject Matter and What You Are Trying to Accomplish.

Much of bad drafting results from the draftsman not having a clear idea of what he or she is trying to accomplish or why. It is almost impossible to draft precisely if you are not sure where you are going or why something is important. Many lawyers, starting from a previous form, fall into the trap of leaving things in that they do not need, stating things improperly, or using the wrong technique to achieve their goal, because they have not thought through the real issue at hand. In this regard see Mr. Blackwell's Drafting Rules No. 2 and No. 7 (Appendix 1) and Example No. 3.

B. Focus on being consistent.

Internal consistency within a document aids readability and avoids fertile ground for misinterpretation and disagreement down the road. If you say the same thing in two different ways in the same document and a dispute subsequently arises, you can be sure that someone will try to make weight of the fact that concepts you thought were identical were treated differently in the specific language. This holds true not only within a specific document but from document to document when you are dealing with a transaction that requires multiple documents (think, for example, of the promissory note, loan agreement, deed of trust, assignment of leases and rents, etc., in a typical mortgage loan transaction). Lawyers should strive for consistency in capitalization, spelling, definitions ("means" or "shall mean"),

underscoring, punctuation, miscellaneous provisions, use of subdivisions, etc. Focus on parallel concepts when drafting—wherever possible use parallel phrasing because it emphasizes both the similarities and the differences in drafting, (see Example 4).

C. Use of Definitions

Modern legal drafting, especially in more complex transactions, makes extensive use of defined terms — the reason is obvious - imbedded within the definitions are sophisticated concepts that can be brought down to a single “nugget” which can then be easily manipulated in an operative provision, (see Example 5 Part 1) The use of definitions can greatly aid readability, since, as the example reflects, within the body of the text you can deal with a single concept (for example, how will cash flow be distributed to the members of a limited liability company) without having to simultaneously write about the related and complex subject of what comprises cash flow. A word of caution though — many lawyers tend to over-define. In that regard, see David Weatherbie's Rules No. 10 (Appendix 2). Finally, use definitions that are representative of the concept being defined. While it is, strictly speaking, entirely possible within the confines of a legal document to say that the term “dog” shall mean “elephant” it does not add to readability and should be avoided. Readability is greatly enhanced when definitions carry with them some idea of the concept being defined as, for example, in a loan transaction with a number of guarantees, the “general partner guarantee”, the “sponsor guarantee”, etc. (see Example 5 Part 2).

D. Use the Organizational Structure of the Document to Your Benefit

Subheadings, indentations, section references, and similar structural devices can all greatly help the clarity and readability of a legal document. Legal drafting can be dense even under the best of circumstances, but dividing like subjects into outline-type subheadings helps people organize their thinking about where concepts fall and helps them more easily read and understand specific concepts, (see Example 6).

E. Formulae and Examples

Some extremely complicated concepts are far better dealt with by formula and example than words. Many common mathematical formulae are almost impossible to put into the written word, yet often times in drafting legal documents the draftsman is faced with that type of challenge. Simply put, in many cases a single example is well worth a thousand words (see Example 7).

F. Clean Up Your Forms

In the age of the computer there is no reason for any lawyer not to have an extensive and workable set of forms from which to quickly create drafts of documents. However, many lawyers fall into the trap of using “the last deal” set of documents and the problem is that there have been negotiations and many provisions will have crept in (or will have been taken out) which might be beneficial to your side of the transaction in a particular transaction. Accordingly, the author recommends that you spend some time and create form documents for transactions representing the desired form from a particular point of view (for example, seller and purchaser forms of purchase and sale agreements) and work from these

rather than working from the last draft. As you gain experience and new ideas from documents negotiated with other counsel, update your forms — it will help in the efficiency of your practice.

III. SOME COMMON LEGAL DRAFTING PROBLEMS

A. Fear of the Unknown (AKA “Too Many Words”)

No one can help you avoid that which you are afraid of but cannot define. This ties in to the point made above about knowing the relevant subject matter. Much legal drafting seems to be a desperate attempt to cover every possibility in the hope that nothing will go wrong (and you won’t be liable). In this regard, see Mr. Blackstone’s Rule No. 6 and David Weatherbie’s Rules Nos. 3 and 5. (see Example 8)

B. Failure to Keep Track of the Subject You’re Writing About

Lawyers often get caught in the trap of trying to cover every particular aspect of a particular action or matter in a single sentence. The classic example starts when the lawyer drafts “seller shall give notice to the buyer” the lawyer begins to think how to give notice the sentence becomes “the seller shall give notice in writing to the buyer” — the lawyer thinks some more as to how should the notice be given in writing — the sentence grows “the seller shall give written notice to buyer which shall be delivered by a nationally recognized delivery service.” You can easily see that failure to focus on the main line of thought in a particular provision or covenant can lead to a long rambling sentence, which though accomplishing everything, is unreadable, (see Example 9).

C. Don’t Change the Form

Prior precedent is great — every lawyer needs to make use of prior knowledge. On the other hand, precedent forms must be applied with some thought. Not everything in the prior form was necessary to what you are doing now and some of the content may be entirely inappropriate. This is a subheading of the “Know What You Are Doing” comment discussed above, and it is one that often is breached by many lawyers who are able draftsmen do not be afraid to question the form. (See Mr. Blackwell’s Rules No. 2 and No. 7)

D. Avoid Overkill

Another common fault with legal drafting is the tendency to try to overreach the other side with the initial drafting. In addition to drafting things that may be unacceptable, you may also inadvertently set a tone of hostility for your negotiations that will make it more difficult for your client to ultimately achieve what they want to accomplish, (see Mr. Blackwell’s Rules No. 5 and Example 10).

E. The Passive Voice

The greatest single reason for the lengthy, dull, and impenetrable nature of most legal documents is the overwhelming tendency to use the passive voice in every case. The next time you find yourself writing “the seller shall be deemed to have done X,” scratch it out and write “the seller did X” — you will be surprised how much clarity and conciseness you will add to your legal documents, (see