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News for Associates and Young Lawyers

Legal Writing

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Drafting Matters

In the considerable body of literature devoted to legal writing, it is usually taken as a given that most lawyers write poorly. Since drafting is simply a form of writing used in legal instruments that seek to regulate conduct (principally statutes, regulations, wills and contracts), it should come as no surprise that many commentators think that most lawyers *draft* poorly.

I, too, have come to the conclusion, based on my experience drafting, reviewing and negotiating contracts as a corporate lawyer in private practice, that many contracts are in fact inexpertly drafted and that almost all show room for improvement. I mean by this that many contracts use language that is less precise and efficient than it might be and are structured in a way that makes them less accessible to the reader. Common drafting inefficiencies include gratuitous archaisms (such as the *WITNESSETH* that often precedes recitals); unhelpful use of verbs (in particular rampant overuse of *shall*); redundant synonyms (instead of having Jones *sell* shares to Smith, the typical drafter might have Jones *sell, convey, assign, transfer and deliver* them); inefficient typography (for instance, use of Courier typefaces and full justification); and inefficient layout.

Does it matter that many contracts are indifferently drafted? I suggest that it does, for three reasons. First, a party to a contract could discover, after signing, that because of a modest drafting flaw, such as a defined term that is ambiguous or unthinking reliance on legalese, a given provision does not in fact mean what that party thought it meant. This mishap could deprive that party of an anticipated benefit under the contract or could result in a dispute leading to litigation.

Second, the more a contract is riddled with legalese and burdened with a clumsy structure, the more time-consuming and therefore expensive it will be to read, negotiate, and interpret.

Third, a poorly drafted contract risks alienating the lay reader: as contract language strays from everyday English to legalese, the drafter becomes less the professional and more the occultist, muttering incantations over chicken entrails.

A factor that helps perpetuate indifferent drafting is that its harmful effects are generally more subtle than mistaken interpretations of law or problems relating to the structure of a transaction. As a result, many corporate lawyers are quick to dismiss questions of legal usage as going to form rather than substance and are complacent about their own drafting abilities. One consequence of this is that junior corporate lawyers often receive little training in drafting and rely on flawed form contracts, leading them to unwittingly perpetuate poor drafting techniques.

A symptom of the profession's general indifference is the lack of a comprehensive guide to the conventions of language and structure used in drafting contracts. This lack has also contributed to that indifference, as corporate lawyers have had little in the way of standards against which to measure their drafting.

While writing my book, *Legal Usage in Drafting Corporate Agreements*, I considered the arguments that could be offered to counter my assertion that many lawyers are indifferent drafters and that poor drafting can have damaging consequences. These counterarguments can be summarized as follows: that current standards of drafting are entirely adequate, as legal documents reflecting those standards facilitate the countless transactions that are accomplished daily; that while much contract language might seem wordy and archaic, that is the price you pay for precision; that case law has settled the meaning of much legal vocabulary, leaving the drafter with little discretion; and that

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since the law is inherently complex, so too, inevitably, are contracts.

I acknowledge that these arguments remain popular, but I have not attempted to rebut them. For one thing, others have done so and shown them to be myths or irrelevant. More to the point, however, I find it unhelpful to deal in generalities. I prefer instead to assess the various ways of addressing any given drafting issue and then advocate the approach that seems the clearest or most efficient, my guiding principle being that unless there are cogent reasons to do otherwise, one should use standard English.

That said, I hesitate to call myself an advocate of "plain English" or "plain language." My principal reservation is that while many of the issues that arise in contract drafting fall within the orbit of plain-English principles as broadly conceived, many others do not. For example, the question of whether the traditional recital of consideration included in most contracts serves any useful purpose (it does not) is primarily a matter of contract law rather than plain English.

Legal English

Less well-known than plain English is the concept of "legal usage." It is commonplace to refer to "English usage" in connection with studies of different forms of speech. This term has spawned the variant "legal usage," which applies to legal speech. "Legal usage" describes better the scope of my concerns than does "plain English," and it also has the advantage of being not as loaded a term. Perhaps wider awareness of the concept of legal usage will help convey the message that if instead of blindly following flawed precedent you aim for optimal grammar, syntax, word selection, and document design, the contracts you draft will be significantly more efficient and readable.

And once lawyers recognize that there is an alternative to current drafting standards, there are significant incentives, in the form of a carrot and a stick, that should encourage them to adopt modern and efficient drafting usages. The language and structure of contracts is inherently more limited and stylized than that of, say, an appellate brief, and so can be more readily mastered, given suitable reference sources. At the same time, the incentives to master drafting are greater than in general legal writing: every provision of a contract carries weight and must stand or fall on its own, whereas in other forms of legal writing a poorly crafted sentence is more likely to be borne along by the narrative.

An Illustration

To illustrate my approach, consider *notwithstanding*. It is a regular fixture in corporate agreements: "Notwithstanding any provision of Section 3.2, Acme may own 1 percent or less of a publicly traded company." In this sentence, *notwithstanding* means "in spite of" or "despite" and serves to indicate that while the subject matter of Section 3.2 overlaps with that of the quoted sentence, the quoted sentence should be read and interpreted as if Section 3.2 did not exist.

Similarly, you can subordinate an entire agreement to a given provision by placing before that provision the old chestnut *notwithstanding anything herein to the contrary*, while *notwithstanding the foregoing* allows you to subordinate the preceding text.

You should, however, avoid *notwithstanding*, because the one or more provisions that it subverts could be at a remove from it. A reader could blithely accept at face value a given contract provision, unaware that it is undercut by a *notwithstanding* several pages later.

Furthermore, while a *notwithstanding* clause that refers to a particular section at least warns the careful reader what is being undercut, one that encompasses the entire agreement leaves to the reader the often awkward task of determining which provisions are affected. Often enough, the answer is none: lazy or harried drafters tend to throw in *notwithstanding anything herein to the contrary* to inoculate particularly significant provisions against conflicting provisions, whether or not there are any.

By the same token, *notwithstanding the foregoing* might seem relatively benign in that the undercut provision is specified and close at hand, but the *foregoing* could conceivably refer to the previous sentence, to entire contract up to that point, or to something in between.

There is an alternative to *notwithstanding*. A contract provision, call it Section 4, requires that Acme pay the Purchase Price to Jones, and another, Section 5, requires that Acme pay $10,000 of the Purchase Price to Smith if the Closing occurs after a given date. Instead of prefacing the latter provision with *Notwithstanding Section 4*, qualify the former provision with *Subject to Section 5*. Using *subject* to allows you to signal the reader that a given provision is undercut by another provision; you do not have to hope that the reader spots a *notwithstanding* elsewhere in the contract.

Note, however, that when you are proposing a change to the other side's draft that would undercut one or more other provisions, using *notwithstanding* rather than *subject to* would allow that change to be self-contained and, in all likelihood, more discreet. Consequently, even drafters who normally use *subject* to sometimes have use for *notwithstanding*.