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Peter Nash Swisher  
*University of Richmond*

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# TECHNIQUES OF LEGAL DRAFTING: A SURVIVAL MANUAL

*Peter Nash Swisher\**

## I. INTRODUCTION

The charge that we lawyers cannot write plain English is often supported by the quality of our legal documents.<sup>1</sup> Legal drafting has aspects of complexity and precision not found in the great bulk of writing with which pre-law students are familiar. Yet the traditional apprentice method for training competent legal draftsmen has failed "either because the typical young lawyer has been apprenticed to the wrong master or because the law schools have been unable to provide enough competent ones."<sup>2</sup> This lack of a proper emphasis on legal drafting skills in America is demonstrated by the fact that of the four authors of current treatises on legal drafting, only one is an American.<sup>3</sup>

The unfortunate result of this general neglect of legal drafting skills is that the typical legal practitioner must rely, to his or her detriment, on various commercial "form books" and other law office documents which frequently provide poor models for an aspiring legal draftsman. This reliance on "form books" and on other

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\* Associate Professor of Law, University of Richmond School of Law; Member, California and Virginia State Bars; B.A. Amherst College, 1966; M.A. Stanford University, 1967; J.D. University of California, Hastings College of the Law, 1973.

1. "We use eight words to say what could be said in two. We use old, arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose . . . . The result is a writing style that has . . . four outstanding characteristics. It is: "(1) wordy, (2) unclear, (3) pompous, and (4) dull." Wydick, *Plain English for Lawyers*, 66 CALIF. L. REV. 727 (1978) (quoting D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 24 (1963)).

2. F. DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 150 (1965).

3. R. DICK, *LEGAL DRAFTING* (1972) (The Carswell Co. Ltd. Toronto, Ontario); F. DICKERSON, *FUNDAMENTALS OF LEGAL DRAFTING* (1965) (Little, Brown & Co., Boston, Mass.); E. DRIEDGER, *THE CONSTRUCTION OF STATUTES* (1974) (Butterworth Co., Ltd., 2265 Midland Ave., Scarborough, Alp 4sl, Toronto, Canada); E. PIESSE, *THE ELEMENTS OF DRAFTING* (5th ed. 1976) (The Law Book Co., Ltd., 301-305 Kent St., Sydney, Australia). See also F. DICKERSON, *MATERIALS ON LEGAL DRAFTING* (1981).

legal instruments without a proper knowledge of legal drafting techniques may prove extremely dangerous.<sup>4</sup> Not only may these drafting mistakes greatly injure the client's interests, but they may also leave the draftsman liable in a legal malpractice suit.<sup>5</sup>

The purpose of this article, therefore, is to identify and demonstrate various legal drafting concepts and techniques in order to give the law student and legal practitioner a working knowledge of the fundamental principles of legal drafting. Although this article does not purport to be an exhaustive treatise on the subject, it is offered to law students and practitioners alike for what it is—a basic survival manual for the aspiring legal draftsman.

## II. WHAT IS LEGAL DRAFTING?

Legal drafting is the definitive written expression of a legal right, privilege, function, duty, or status.<sup>6</sup> Preparing private legal documents is like drafting a "private statute" between the parties, setting out relationships and ground rules in codified form.<sup>7</sup> These documents thus differ from court pleadings which attempt to *persuade*, but are not definitive legal instruments.

Good legal drafting is more a form of art than a science.<sup>8</sup> Yet important legal drafting principles can be learned, and proficiency acquired, by the novice and veteran practitioner alike. The legal profession is becoming increasingly aware of the need to sharpen the professional drafting skills needed daily by every lawyer. Reliance on the numerous form books, which range in quality from helpful to poor, is becoming increasingly less satisfactory. However, before discussing the elements of good legal drafting, we must first understand the various problems and dangers involved in fol-

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4. One study found that almost 25% of litigated contract cases involved problems of interpreting the language within the legal document itself. Blaustein, *On Legal Writing*, 18 CLEV.-MAR. L. REV. 237, 238 n.10 (1969).

5. See, e.g., *McCullough v. Sullivan*, 102 N.J. 381, 132 A. 102 (1926); *Schirmer v. Nethercutt*, 157 Wash. 172, 288 P. 265 (1930).

6. F. DICKERSON, *supra* note 2, at 4.

7. R. DICK, *supra* note 3, at 1. Examples of definitive private documents are deeds, leases, antenuptial and separation contracts, wills, trusts, partnership agreements, and conveyances. Examples of definitive public documents are constitutions, statutes, administrative regulations and ordinances.

8. R. DICK, *supra* note 3, at 2; F. DICKERSON, *supra* note 2, at 5.

lowing "legal drafting precedent."

### A. *Traditional Forms of Legal Drafting*

Although adherence to legal precedent is of paramount importance in maintaining uniformity in the area of substantive law, reliance upon archaic legal documents as "legal drafting precedent" is a dangerous habit that can lead to vagueness and ambiguity.<sup>9</sup> Many of the problems with "legal drafting precedent" may be attributed to three factors. First, early practitioners did not appreciate that English is a language of short words and that its clearest expression is found in short sentences of those short words.<sup>10</sup> For example, the practice of using strings of synonyms<sup>11</sup> by today's legal draftsmen is said to date from the early English common law due to "uncertainty as to which of several English words accurately rendered a Latin or Norman French law term."<sup>12</sup>

[A]t several points in history, the English and their lawyers had two languages to choose from: first, a choice between the language of the Celts and that of their Anglo-Saxon conquerors; later, a choice between English and Latin; and later still, a choice between English and French. Lawyers started using a word from each language, joined in a pair, to express a single meaning. (For example, *free and clear* comes from the Old English *freo* and the Old French *cler*.) This redundant doubling was used sometimes for clarity, sometimes for emphasis, and sometimes just because it was the fashion. [These synonyms] became traditional in legal language and persisted long after any practical purpose was dead.<sup>13</sup>

A second feature contributing to problems with legal drafting precedent is that early legal draftsmen were ill-trained. Most legal

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9. "[Legal drafting] [p]recedents give clues as to what substantive concepts must be attended to. If they are blindly followed, however, there is a danger that the client's requirements may not be met. Unfortunately, precedents frequently perpetuate wordy drafting arrangements that hinder communication." R. DICK, *supra* note 3, at 11.

10. E. PIESSE, *supra* note 3, at 55.

11. "Release forms for automobile accidents are notorious for such verbiage as: remise, release, quitclaim, acquit and forever discharge. It is clear that 'release' alone would be sufficient." R. DICK, *supra* note 3, at 124.

12. D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 190-95 (1963); F. DICKERSON, *supra* note 2, at 51-52.

13. D. MELLINKOFF, *supra* note 12, at 38-39, 121-22.

documents were drafted by uneducated clerks or scribes, who were more concerned with form than with content.<sup>14</sup> Also, it was a common practice to pay early legal draftsmen by the length of their documents, rather than by their qualitative content. The longer the document, the greater the pay.<sup>15</sup>

The verbosity, redundancy, and uncertainty of early legal documents, therefore, were based upon a bilingual history, a lack of training, and a desire for greater remuneration, rather than on legal clarity and precedential necessity. These factors are compelling reasons for not adhering to past idiosyncrasies in modern legal drafting.

### B. *Modern Forms of Legal Drafting*

Modern legal drafting should be written in plain English, its clearest expression being found in short sentences of commonly used words.<sup>16</sup> Admittedly, short sentences cannot always be used in legal documents. Frequently long and intricate statements of legal circumstances, conditions, exceptions, or qualifications will be required. In such circumstances, the clarity still can be achieved by splitting long sentences into sub-paragraphs in the form of a "tabulation system."<sup>17</sup>

Modern legal drafting also should avoid unnecessary legal jargon or "legalese." Legalese consists of "[m]eaningless or irrelevant phrases, frequently containing repetitious synonyms, and perhaps a peculiar word order, result[ing] in pure gobbledygook,"<sup>18</sup> that obscures the legal concept. Traditionalists, however, continue to argue that clients prefer the "legal hocus-pocus"<sup>19</sup> of lengthy, ob-

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14. *Id.* at 29; F. DICKERSON, *supra* note 2, at 51.

15. "The old expressions are not inviolate. They were manufactured for the specific purpose of providing greater remuneration to the draftsman." R. DICK, *supra* note 3, at 20. See also F. DICKERSON, *supra* note 2, at 51.

16. Wydick, *supra* note 1, at 727.

17. E. PIESSE, *supra* note 3, at 55. See text accompanying notes 37-41 *infra*.

18. R. DICK, *supra* note 3, at 13.

19. *Id.* at 6:

Another argument advanced by the traditionalists is that clients in general are in love with legal hocus-pocus. There seems in some quarters to be a prevalent belief that a client comes to the [law] office to receive a lengthy, magic document of the deepest obscurity. Modern laymen reject this approach, and are no longer impressed with the hocus-pocus. The general level of education is a good deal higher than it has been in

scure documents and, unfortunately, legalese is still very much with us.<sup>20</sup>

The absurdity of legalese is demonstrated by the following statement describing only partially in jest the incident in which Jack and Jill went up a hill to fetch a pail of water:

The party of the first part hereinafter known as Jack . . . and . . . The party of the second part hereinafter known as Jill . . . Ascended or caused to be ascended an elevation of undetermined height and degree of slope, hereinafter referred to as "hill."

Whose purpose it was to obtain, attain, procure, secure, or otherwise, gain acquisition to, by any and/or all means available to them a receptacle or container, hereinafter known as "pail," suitable for the transport of a liquid whose chemical properties shall be limited to hydrogen and oxygen, the proportions of which shall not be less than or exceed two parts for the first mentioned element and one part for the latter. Such combination will hereinafter be called "water." On the occasion stated above, it has been established beyond reasonable doubt that Jack did plunge, tumble, topple, or otherwise be caused to lose his footing in a manner that caused his body to be thrust into a downward direction. As a direct result of these combined circumstaaces, Jack suffered fractures and contusions of his cranial regions. Jill, whether due to Jack's misfortune or not, was known to also tumble in similar fashion after Jack. (Whether the term, "after," shall be interpreted in a spatial or time passage sense, has not been determined.)<sup>21</sup>

Opponents of drafting reform might also argue that we should not disturb the sanctity of certain words found in old documents, because that wording has been steeped in time, and we change them only at our peril.<sup>22</sup> However, opponents confuse unnecessary *legal jargon* with *words of art*, as exemplified by the following:

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the past, and people feel they are entitled to understand the contents of a document. They should be able to read a contract or a will and have a reasonably good idea of whether their intentions are being carried out. It seems now that there is a certain resentment among clients if too much outdated drafting is used. Many lawyers are unaware how little impressed the average man is by abstract or obsolete words.

20. See, e.g., *Waging War on Legalese*, TIME, Jan. 16, 1978, at 60; *The Plain Truth: Legalese Still Prevails*, STUDENT LAWYER, Dec. 1980, at 21-22.

21. D. SANDBURG, THE LEGAL GUIDE TO MOTHER GOOSE 7-11 (1979).

22. R. DICK, *supra* note 3, at 7.

Ask a . . . lawyer why he or she uses a term like *suffer* or *permit* in a simple real estate lease. The first answer likely will be: "for precision." True, there is a small difference in meaning between *suffer* and its companion *permit*. But *suffer* in this sense is now rare in ordinary usage, and *permit* would do the job if it were used alone.

The lawyer might then tell you that *suffer* or *permit* is better because it is a traditional legal term of art. Traditional it may be, but a term of art it is not. *A term of art is a short expression that (a) conveys a fairly well-agreed meaning, and (b) saves the many words that would otherwise be needed to convey that meaning.* *Suffer* or *permit* fails to satisfy the second condition, and perhaps the first as well. The word *hearsay* is an example of a true term of art. First, its core meaning is fairly well-agreed in modern evidence law. . . . Second, *hearsay* enables a lawyer to use one word instead of many to say that a statement is being offered into evidence to prove that what it asserts is true, and that the statement is not one made by the declarant while testifying at the trial or hearing. Any word that can say all that deserves our praise and deference. But *suffer* or *permit* does not.<sup>23</sup>

To prevent such unnecessary legal jargon, the modern legal draftsman should avoid such unnecessary repetitions and regard them as pure gobbledygook.<sup>24</sup>

The modern legal draftsman must realize that each legal document is a form of communication between the lawyer and the client—and between the client and other people. Thus, if the substantive legal concepts are not drafted properly, there is no hope of

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23. Wydick, *supra* note 1, at 735 (emphasis added).

24. Examples of redundancies that should be avoided are:

alter and change; assumes and agrees; authorize and empower; by and between; by and with; cease, desist, and come to an end; kind and character; made and entered into; null and void; order and direct; shall and will; convey, transfer, and set over; covenant and agree; deemed and considered; each and every; for and in behalf of; free and clear; full force and effect; suffer or permit; true and correct; understood and agreed; when and as; will and testament; and within and under the terms of.

The following expressions should also be avoided:

above (as an adjective); abovementioned; aforegranted; aforementioned; aforesaid; same (as a substitute for "it," "he," "she," etc.); thereunto; therewith; to wit; henceforward; hereinafter; hereunto; notwithstanding (to mean "despite"); said (as a substitute for "the"); undermentioned; whereof; within-named; and witnesseth.

See F. DICKERSON, *supra* note 2, at 125-26. For a comprehensive listing of preferred legal drafting expressions, see *id.* at 126-30. See also R. DICK, *supra* note 3, at 150-55.

communicating them to the client, or to anyone else.<sup>25</sup> A modern legal draftsman, therefore, should be aware that much of the excess verbiage used in legal instruments, including obscure and archaic "legalese," greatly detracts from the clarity of these documents and should be avoided whenever possible.

### III. THE INITIAL STEPS IN DRAFTING A LEGAL DOCUMENT

There are five initial steps in drafting any legal document:

(1) *Find Out What the Client Wants*

The draftsman must find out what the client intends to accomplish, and what specific problems this involves. He or she must explore the various possibilities with the client, and help the client think the problems through.<sup>26</sup> The emphasis here is on analyzing the particular legal problem, and getting the relevant facts:

At this stage, the draftsman pumps the client for information. He finds out specifically what the client wants and how much the client wants to leave to the draftsman's discretion. He points out any substantive inconsistencies that he thinks he sees in the idea, including in the case of legislation any constitutional problems that occur to him. He also mentions any administrative or other practical problems, and any drafting problems, that he thinks the client ought to know about.<sup>27</sup>

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25. See R. DICK, *supra* note 3, at 9-11; F. DICKERSON, *supra* note 2, at 18-35; E. PIESSE, *supra* note 3, at 16-17. See also J. REDISH, *HOW TO DRAFT MORE UNDERSTANDABLE LEGAL DOCUMENTS* 3 (1979):

People without legal training have to read and understand many legal documents. Consumers must be able to read contracts, leases, bank notices, insurances policies, tax instructions, etc. The people in government agencies who implement the regulations on [a] Freedom of Information Act request, for example, are not lawyers. They are mid-level clerks, but they have to be able to read *and understand* regulations written by lawyers.

26. For example, "[t]he draftsman must help the testator develop the latter's all-too-often vague and sketchy wishes and translate them into provisions which will be fully thought out and integrated." H. SCHWARZBURG AND J. STOCKER, *DRAWING WILLS* 3 (1956).

27. F. DICKERSON, *supra* note 2, at 36-37. See also E. PIESSE, *supra* note 3, at 11-12.



(2) *Apply the Proposed Document to Other Documents, and to the Law in General*

The second step is to select the correct legal concepts for the document, and develop a concrete plan for its organization and arrangement. Existing documents and "form books" may be used as guidelines, but these precedents should not be regarded as inflexible directives.<sup>28</sup> Rather, the draftsman should strive to understand the legal principle underlying the precedent used. Moreover, the draftsman must determine whether the document fits the legal setting,<sup>29</sup> and whether additional legal research is required to update substantive law within the document.

(3) *Prepare a First Draft of the Document*

Next, the draftsman must prepare an initial outline of the conceptual arrangement and a first draft of the legal document.<sup>30</sup> The draftsman need not be concerned over details at this point, but should emphasize the broad essentials and substance of the document.

(4) *Revise and Polish the Initial Draft*

The draftsman must revise the document as many times as necessary to produce the desired result. "Across the board checks" must be made for internal consistency and clarity. This stage is necessary to produce a coherent unified document.<sup>31</sup> Cross-checking the document with other attorneys, and inviting constructive suggestions from them will avoid errors and omissions in the document.<sup>32</sup>

Ideally, the document should be revised as many times as necessary, without regard to such factors as time, pride and economics. As one writer observes:

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28. E. PIESSE, *supra* note 3, at 17.

29. R. DICK, *supra* note 3, at 50.

30. *Id.* at 36-38; F. DICKERSON, *supra* note 2, at 41-44; E. PIESSE, *supra* note 3, at 14-16.

31. F. DICKERSON, *supra* note 2, at 44-47; R. DICK, *supra* note 3, at 38-39.

32. R. DICK, *supra* note 3, at 40.

It is no disgrace to revise a draft a dozen times. Somehow the idea has gone around that if a draftsman does not have a satisfactory draft by the third attempt, either he is beyond his depth or it is the best that could be done. Nonsense! A good draftsman may make as many as fifteen to twenty revisions to iron out an extremely difficult provision. The important thing to remember is that, ideally, he should keep on revising, until he feels that the draft is 99 percent right, unless, of course, the economics of the situation make some compromise necessary.<sup>33</sup>

(5) *Check for "Loop Holes"*

A final check of the legal document should be made. If the draftsman can find any "loop holes" in the document that might sustain a challenge in court, the provision must be redrafted. The document must therefore be reviewed from three perspectives:

- a) how the draftsman and the client will *understand* and *use* the document;
- b) how an opposing attorney might interpret the document; and
- c) how a reasonable judge, of ordinary prudence, might interpret the document.

#### IV. THE ARCHITECTURE OF A LEGAL DOCUMENT

The arrangement and structure of a legal document, its overall "architecture," should always make the final document as clear, simple, and useful as possible. The subjects covered in the document should be arranged so that they can be found, understood, and referred to with the least possible effort. Using either the traditional outline format with its numerical and marginal arrangements or a tabulation system can help achieve this end.

When using the outline format, the document should exhibit an underlying structure with main divisions of primary importance.<sup>34</sup>

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33. F. DICKERSON, *supra* note 2, at 44-45. As a "rule of thumb," Professor Dickerson further states: "For myself, I have found that five or six drafts are enough for most provisions and that three or four are adequate for the mine-run relatively simple drafting problems." *Id.* at 45.

34. Two arrangements are widely used in both private and public documents:

Each subdivision should represent a principle that is less important than the primary division. The aims at all times are clarity, utility, simplicity, and economy.<sup>35</sup> There are no set rules for the arrangement of a legal document. The specific numerical sequence will be largely determined by the context of the document. Statutes or ordinances may have "sections" (§§) as a major category, where simple private documents will probably use only an arabic numeral classification. Whatever arrangement is used, however, the draftsman should be consistent in the proper use of margins for each of the various grades of division.<sup>36</sup>

Another form of document arrangement which helps break down long, complicated sentences is called a "tabulation" or "enumeration" system.<sup>37</sup> This technique is both an aid to analysis and a device for avoiding syntactic ambiguity. This form of "tabulation" arrangement is based on the use of: a colon; semi-colons; the words "and" or "or"; and a period.<sup>38</sup>

The conventional rules for tabulation are as follows:

- (1) all items in a tabulated enumeration must belong to the same class;
- (2) each item in the tabulated enumeration must be responsive to

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<u>Example #1</u>	<u>Example #2</u>
1.	I.
(a)	A.
	B.
(1)	1.
(2)	2.
(i)	
(ii)	a.
	b.
(b)	
(c)	3.
	II.
2.	

For other examples of numerical arrangements, see F. DICKERSON, *supra* note 2, at 57-58. See also E. PIESSE, *supra* note 3, at 32-35.

35. R. DICK, *supra* note 3, at 47.

36. E. PIESSE, *supra* note 3, at 35.

37. F. DICKERSON, *supra* note 2, at 85-92. Piesse refers to this technique as "drafting in paragraphs." E. PIESSE, *supra* note 3, at 31-38.

38. This sentence exemplifies the "tabulated" form.

the introductory language of the enumeration (the material immediately preceding the colon);

(3) a tabulated enumeration must be entirely indented from the material immediately preceding or following the enumeration;

(4) the second last item of a tabulated enumeration usually ends with "and" or "or"; and

(5) if the tabulated enumeration is a single list that is otherwise complete, no "and" or "or" will follow the second last enumerated item, and semi-colons may not be used.

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The following provision is an example of a *sentence* form of tabulation:

Any person guaranteeing a signature of an endorser of a security warrants that at the time of signing:

(a) the signature was genuine;

(b) the signer was an appropriate person to endorse; and

(c) the signer had the legal capacity to sign.<sup>40</sup>

The following provision is an example of a *list* form of tabulation:

The Trustee may buy any of the following:

(1) United States Government bonds.

(2) State bonds.

(3) Municipal bonds.

(4) Preferred Stock.

(5) Common Stock listed on the New York Stock Exchange.<sup>41</sup>

By using these numerical and marginal arrangements in a legal document and by using a "tabulation system" as an analytical tool to break down complicated legal sentences and paragraphs into simpler component parts, the modern draftsman may create a document that is clearer and more useful than the obscure legal instruments of traditional legal draftsmen.

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39. See R. DICK, *supra* note 3, at 116-22; F. DICKERSON, *supra* note 2, at 85-86; E. PIESSE, *supra* note 3, at 38-41.

40. R. DICK, *supra* note 3, at 117.

41. F. DICKERSON, *supra* note 2, at 86.

## V. A SEQUENTIAL LEGAL DRAFTING CHECK LIST

The following "check list" approach for drafting a private or public legal document may be changed to fit the circumstances.<sup>42</sup> The draftsman should begin with an initial "breakdown" of the major elements of the document including: (1) Why ("Purpose"); (2) Who ("Parties"); (3) What ("Terms of Agreement"); and (4) When ("Effective Date").<sup>43</sup> These and other concepts, if applicable, should then be put into the following sequence in the document:

- (1) Short Title of the Document;<sup>44</sup>
- (2) Statement of Purpose or Policy;<sup>45</sup>
- (3) To Whom or What the Document Applies;<sup>46</sup>
- (4) Definitions, if any;<sup>47</sup>

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42. This "check list" approach is adapted from R. DICK, *supra* note 3, at 49-53; F. DICKERSON, *supra* note 2, at 63-65; and E. PIESSE, *supra* note 3, at 19-30.

43. F. DICKERSON, *supra* note 2, at 59.

44. In private legal documents the short title might be, for example: Will of Gregory A. Brown, or Contract for the Sale of a 1908 LaSalle Fire Engine, or Separation Agreement.

The statutory title of a public legal document might read: This article shall be known and may be cited as the Life, Accident and Sickness Insurance Guaranty Association Act. For an example of good statutory drafting, see VA. CODE ANN. § 38.1-482.17 (1976).

45. The purpose of a public document might read: The purpose of this article is to protect policyholders, insureds, beneficiaries, annuitants, payees and assignees of life insurance policies, accident and sickness insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations, against failure in the performance of contractual obligations due to the impairment of insolvency of the insurers issuing such policies or contracts.

In a private legal document the purpose might be stated this way: I, Gregory A. Brown, declare this to be my last will. I revoke all other wills and codicils that I have previously made.

46. The parties must be identified. A private document might begin: This Contract is made this twenty-second day of January, 1981, between John A. Anderson, Blackacre Farms, Rural Route 3, Goochland, Virginia (the Seller); and Mr. Samuel Jones, Whiteacre Farm, Rural Route 2, Goochland, Virginia (the Buyer); for the sale of a 1908 La Salle Fire Engine, Serial # X113.

In a public legal document, the statute might state: This article shall apply to direct life insurance policies, accident and sickness policies, annuity contracts . . . See, e.g., VA. CODE ANN. § 38.1-482.18 (1976).

47. Definitions add precision and clarity to complicated legal documents. Definitions used in state codes are helpful. A good example is found at VA. CODE ANN. § 38.1-482.19 (1976):

As used in this article:

- (1) "Account" means either of the accounts created under § 38.1-482.20.
- (2) "Association" means the . . . Insurance Guaranty Association created under § 38.1-482.20.
- (3) "Commission" means the State Corporation Commission.

- (5) Each Provision or General Rule with:
  - (a) Subordinate provisions or rules, if any, and
  - (b) Exceptions, if any, to each provision;
- (6) General Exceptions Related to the Entire Document;
- (7) Sanctions or Penalties (which may also be incorporated under the individual provisions);<sup>48</sup>
- (8) Temporary Provisions;
- (9) Whether or Not the Document is Assignable, in Whole or in Part, or is Binding Upon Other Parties;<sup>49</sup>
- (10) Choice of Law that Governs the Document;<sup>50</sup>
- (11) Entire Agreement Clause;<sup>51</sup>
- (12) Modification of Agreement Clause;<sup>52</sup>
- (13) Effective Date, Duration, and Expiration of the Document;
- (14) Severability Clause;<sup>53</sup>

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48. Unfortunately, few draftsmen plan for the possibility of a breach of the agreement, or nonperformance of the contract. The draftsman should clearly state the penalties for non-compliance with the document.

49. A sample provision here might read: This Agreement shall enure to the benefit of, and shall be binding upon, the parties, their heirs, their legal representatives, and assigns.

The term "legal representatives" encompasses without limitation both "executors" and "administrators." Some draftsmen also add the word "successors."

50. Americans are a mobile people, and their legal documents often move with them. A California court may well interpret and modify a separation agreement under laws different from those a Virginia court would apply. Thus, in order to ensure a more predictable result, a document might read: This Agreement shall be construed and governed according to the laws of the State of Virginia.

The forum state law, however, must have some significant relationship with the document. *See, e.g.*, RESTATEMENT OF CONFLICT OF LAWS §§ 200, 312-15, 355 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187-88 (1971).

51. To avoid possible misunderstandings, especially regarding the parole evidence rule, the draftsman might state: This Agreement contains the entire understanding of the parties, and they shall not be bound by any understandings other than those expressly set forth in this document.

52. Due to unforeseen circumstances, it might be necessary subsequently to modify the terms of the document. The draftsman might therefore add this provision: The parties may modify the terms of this Agreement, but any modification shall not be effective unless in writing, signed by both parties, with the same formality as this Agreement.

53. Each major provision in a legal document should be numbered, with an appropriate heading to aid in clarification, to ensure document divisibility. In the absence of divisibility, the entire contract will usually fail if one part fails. Therefore, to avoid the possibility that a questionable provision might defeat the *entire* agreement, a careful legal draftsman will provide a severability clause which might read: If any provision of this Agreement shall be deemed invalid by a court of competent jurisdiction, the rest of this Agreement shall nevertheless remain in effect.

Alternatively, if the entire document is intended to stand or fall as an *indivisible* legal instrument, then a *severability* clause should *not* be utilized.

- (15) Advice of Counsel Clause;<sup>54</sup>
- (16) Signatures of the Parties;<sup>55</sup>
- (17) Notarization, if any;

## VI. SEVENTEEN RULES OF LEGAL DRAFTING

The following rules are generally accepted principles of legal drafting, and should be carefully followed by the draftsman.

### (1) *Use Familiar Words and Short Sentences.*

Do not use long, uncommon words, and rambling sentences. Avoid "legalese," redundant synonyms, and verbosity. For example, "covenants, agreements, conditions, obligations and stipulations" can as easily be stated as "agreements." Words of art,<sup>56</sup> however, may be used effectively. If a long, complicated sentence is necessary, use the "tabulation system"<sup>57</sup> to avoid possible ambiguity or vagueness.

### (2) *Do Not Use Different Words or Expressions to Denote the Same Thing.*

"Elegant variation" may be taught in the literary arts, but it has no place in legal drafting:

In a document there may be a reference to a "car," then to a "motor vehicle," and finally a reference to an "automobile." There is a real danger in using such variation since court interpretation may attribute to these different terms meanings that may be contrary to the

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54. Certain private legal documents, such as antenuptial agreements and separation agreements, are often overturned by the court due to alleged fraud, duress, or misunderstanding by one of the parties. A careful legal draftsman should avoid this possibility by drafting an Advice of Counsel provision such as: The parties hereby declare that each has read and fully understands everything set forth in this Agreement; that each has obtained independent legal counsel of his or her choice, and has been fully informed of all legal rights and liabilities in this Agreement; that after such advice and knowledge each party believes this Agreement to be fair; and that each party signs this Agreement voluntarily.

55. The names of the parties should be typed under the lines for their signatures. Some documents end with the final flourish: In witness whereof, the parties have set their hands and seals to this Agreement as of the date first above written.

A less archaic format is: Witness the following signatures and seals.

56. See text accompanying note 21 *supra*.

57. See notes 37-41 *supra* and accompanying text.

intention of both parties.<sup>58</sup>

The reverse of this rule must also be heeded: Do not use the same word or expression to denote different things.

*(3) Use the Present Tense Rather Than the Future Tense, and the Active Voice Rather Than the Passive Voice.*

The preferred use of the present tense is apparent in many statutes and private legal documents. Likewise, verbs expressing the legal action should be in the active voice in order to identify who must perform. Note the clarity in "shall give notice," as contrasted with "Notice shall be given." The latter leaves in doubt who is to give notice.<sup>59</sup>

*(4) Use "Shall" for the Imperative and "May" for the Permissive.*

The imperative "shall" should be used only when someone is being compelled to do something, as in declaring the agreement of the parties as to what shall or shall not be done.<sup>60</sup> The draftsman should use "may" in bestowing a right, privilege, or power which may or may not be exercised.<sup>61</sup>

*(5) Never Use Provisos.*

At best, provisos constitute archaic and ambiguous legalisms and should be avoided. For example, "provided that" defies grammatical analysis; it has been interpreted to mean "if," "or," "but," "and," "except that," and "however."<sup>62</sup> To avoid ambiguity, these alternate words should be used instead of "provided that."

*(6) Do Not Use "Said" or "Aforesaid;" Instead Use "The," "This," or "Those."*

Common sense suggests that, if a person [or thing] is referred

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58. R. DICK, *supra* note 3, at 81. The "draftsman's golden rule" is *never change your language unless you wish to change your meaning*. E. PIESSE, *supra* note 3, at 43.

59. E. PIESSE, *supra* note 3, at 66.

60. *Id.* at 79; R. DICK, *supra* note 3, at 88.

61. R. DICK, *supra* note 3, at 88.

62. *Id.* at 93; F. DICKERSON, *supra* note 2, at 95.



to in a document by name, a subsequent mention of that name, unqualified by "said" or "aforesaid" will be understood as referring to the person [or thing], unless a contrary intent appears, and this view is now widely accepted. Nevertheless "said" still bespatters legal documents . . . it is absurd . . . to pretend to distinguish a person or thing when no confusion is possible.<sup>63</sup>

(7) *Do Not Use "Same;" Instead Use "It," "He," or "She."*

Four hundred years ago it was proper to use the phrase "the same" as a pronoun in place of "it," "he" or "she," "his" or "her," or "they" or "them." Although that use has long since vanished from ordinary conversation, it has been needlessly preserved by many lawyers in modern documents.<sup>64</sup>

(8) *Do Not Use the Archaic "th" or "do."*

There is no need to keep the antique form of "th" for the third person singular, or constructions with "do" . . . . "Hath agreed," [or] "do hereby grant" can be written "has agreed," and "hereby grant." "The A.B. Company doth hereby give notice" should be rejected in favour of "The A.B. Company gives notice." In spite of the common practice of using the word "witnesseth" in deeds, the word "witnesses" would be just as effective.<sup>65</sup>

(9) *Avoid Unusual or Foreign Word Orders.*

In many legal documents, unusual word patterns sometimes appear which vary from the normal English word order. One authority suggests that these unusual word patterns may have evolved from a Middle English sentence structure that was similar to German. For example: "I revoke all former wills and codicils *by me heretofore made.*" The placing of the past participle of the verb at the end of the sentence is acceptable Germanic construction . . . '*bei mir hierzuvoor gemacht.*'"<sup>66</sup> Like archaic legal jargon, there is

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63. E. PIESSE, *supra* note 3, at 63-64.

64. R. DICK, *supra* note 3, at 140.

65. E. PIESSE, *supra* note 3, at 66.

66. R. DICK, *supra* note 3, at 155-56 (emphasis added).

no compelling reason to maintain these archaic word patterns and obsolete constructions in any modern legal document.

(10) *Avoid Stating Negatives in a Legal Document*

When a statement can be expressed either in a positive or a negative way, it should be expressed positively. However, the negative form is appropriate when the provisions are intended to be mandatory.<sup>67</sup>

(11) *Avoid Misplaced Modifiers.*

A common form of ambiguity is the uncertainty in determining the scope of a modifier and the thing to be modified.<sup>68</sup> Does a "Green Bay tree" mean a tree in Green Bay or a Bay tree that is green? In the provision "Every member of a chapter in Virginia," does "in Virginia" refer to the word "chapter," or to the phrase "member of a chapter"? Sometimes the context of the words will resolve this ambiguity, but it does no credit to a draftsman to write: "He looked at Mount St. Helen sitting in his office."

(12) *Be Careful With Time and Age Provisions.*

Provisions relating to time and age may cause unnecessary ambiguities if they are not drafted correctly. For example, when used to fix the beginning or end of a time period, the word "time" will often be read as referring to the exact time during the day or night when an event occurs. So if the draftsman wants the period measured in whole days only, he or she should state "day" instead of "time."<sup>69</sup> Thus, instead of saying "60 days after the time when . . ." the draftsman should state "60 days after the day on which . . . ." Also when specifying a time period, the draftsman should clarify what the first and the last days are to be. Avoid saying "from June 1, 1981 to (until or by) December 20, 1981;" instead

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67. *Id.* at 157. See also E. PIESSE, *supra* note 3, at 140-41 (cautions against use of cumulative negatives in successive phrases).

68. F. DICKERSON, *supra* note 2, at 74-75; R. DICK, *supra* note 3, at 68.

69. F. DICKERSON, *supra* note 2, at 93-94; R. DICK, *supra* note 3, at 64-65.

say "after June 30, 1981 and before December 21, 1981."<sup>70</sup>

Similarly, with problems of age the draftsman should avoid saying "between the ages of 17 and 45" in favor of "17 years old or older and under 46" to avoid ambiguity. Such phrases as "more than 17 years old" should also be avoided:

Although the phrase "less than 46 years old" is clear (it means anyone who has not reached his 46th birthday), the phrase "more than 17 years old" is ambiguous because it is not clear whether a person becomes "more than 17" on the day after his 17th birthday or on his 18th birth.<sup>71</sup>

(13) *Avoid Syntactic and Contextual Ambiguities.*

Probably the greatest source of uncertainty of meaning in legal documents, as well as in other writings, is the unclear use of modifiers and other reference words which is technically known as *syntactic ambiguity*.

The position of the words in a sentence is the principle means of showing their relationship [to other words in the sentence] . . . . The writer must, therefore, so far as possible, bring together the words, and groups of words, that are related in thought, and keep apart those that are not so related.<sup>72</sup>

If a draftsman needs to split an infinitive in order to avoid possible ambiguity (such as "to promptly pay"), he or she should do so to clarify the document even though this procedure may be offensive to many English teachers.<sup>73</sup>

An "interest" in an estate is different from "interest" in a mortgage, and the context in which each is used should show the difference in meaning. Similarly, if there is a will with two *inter vivos*

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70. R. DICK, *supra* note 3, at 65. See also F. DICKERSON, *supra* note 2, at 94; E. PIESSE, *supra* note 3, at 149-56.

71. F. DICKERSON, *supra* note 2, at 95.

72. W. STRUNK & E. WHITE, *THE ELEMENTS OF STYLE* 22 (1959).

73. F. DICKERSON, *supra* note 2, at 73. See also E. PIESSE, *THE ELEMENTS OF DRAFTING* 5 (2d ed. 1958): "Your first duty is to be exact and clear and brief [in your legal document], and if that requires you to split an infinitive, or to do anything else that the [English] books frown on, do so, and leave any one who pleases to bruise himself against your work."

trusts, one called "the wife's trust" and the other called "the wife and children's trust," there may be a *contextual ambiguity* as to which trust is meant if the draftsman refers to "the trust for my wife."<sup>74</sup> The initial "Definitions" section of a legal document should make these concepts clear to the reader. In short, "the draftsman's highest responsibility is to see that the final text, when read in its proper context, contains no unresolved ambiguity."<sup>75</sup>

(14) *Avoid Legal "Humpty Dumptyisms."*

Humpty Dumpty [from *Alice in Wonderland*] stipulates a new meaning and uses it once only. He is like a man who, wishing to say that the sky is overcast, says instead: "By 'soda' I shall mean that the sky is overcast. Soda." He uses eleven words to say what four would say better, and these four are included in his eleven.<sup>76</sup>

(15) *Avoid Being Either Too General or Too Precise in Legal Documents.*

Does "residence" mean legal home or domicile? How "near" is "near"? What constitutes a "vehicle"? On the other hand, if a draftsman is too precise, he or she might miss something. For example, the provision "If either trustee is at any time unable to act *by reason of death, disability, or absence from the country*, the other shall act alone" appears to be very precise, but there is no reference to what happens if a trustee should resign. This omission may be resolved by deleting the italicized words in that provision.<sup>77</sup> So being too precise in a legal document is just as dangerous as being too general.

(16) *When Using Definitions in a Legal Document, the Word "Means" Should Be Used in a Total Context; the Word "Includes" Should Only Be Used in a Partial Context.*

(17) *Use the Connectives "and" and "or" Carefully; Never use "and/or."*

The word "and" is generally inclusive and conjunctive, uniting

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74. R. DICK, *supra* note 3, at 61-62.

75. F. DICKERSON, *supra* note 2, at 27.

76. *See id.* at 101-09.

77. F. DICKERSON, *supra* note 2, at 14-15.

things or ideas; whereas "or" is disjunctive and presents alternatives. However, in various legal documents "or" has been used as either inclusive or exclusive. It is inclusive where the phrase "X or Y" means: (1) X; (2) Y; or (3) both X and Y. It is exclusive where "X or Y" means only: (1) X; or (2) Y.<sup>78</sup>

A similar difficulty arises with the use of "and." If a right or duty extends to "wives and mothers," does it extend to two classes of persons, namely, to wives and to mothers, or does it extend to one class, to wives who are mothers? The exact meaning can be specified, when it is meant, in this way: "Each person who is *both* a wife *and* a mother."<sup>79</sup>

As one writer states the problem:

Observation of legal usage suggests that in most cases "or" is used in the inclusive rather than the exclusive sense, while "and" is used in the several rather than the joint sense. If true, this is significant for legal draftsmen and other writers, because it means that in the absence of special circumstances they can rely on simple "or's" and "and's" to carry these respective meanings.<sup>80</sup>

In addition, the draftsman should never use the term "and/or" since it is both archaic and ambiguous. One authority quotes Viscount Simon's discussion of "and/or" in a 1944 English case as "the repeated use of that bastard conjunction 'and/or' which has, I fear, become the commercial court's contribution to basic English," and remarks that one justice threatened to order court costs against anyone using it.<sup>81</sup> The phrase "and/or" has been described as "one of those inexcusable barbarisms which was sired to indolence and damned by indifference."<sup>82</sup>

Because there are no less than ten possible ambiguities in the

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78. E. PIESSE, *supra* note 3, at 97-117; R. DICK, *supra* note 3, at 98-105; F. DICKERSON, *supra* note 2, at 76-79. See also Dickerson, *The Difficult Choice Between "And" and "Or,"* 46 A.B.A.J. 310 (1960).

79. See R. DICK, *supra* note 3, at 98-99.

80. F. DICKERSON, *supra* note 2, at 77-78.

81. E. PIESSE, *supra* note 3, at 108.

82. R. DICK, *supra* note 3, at 103. See also F. COOPER, *WRITING IN LAW PRACTICE* 29 (1963).

use of "and/or,"<sup>83</sup> it should never be used; rather, "A or B or both" might be used in its place. Therefore, "'and/or' is best discarded. It does not significantly improve brevity. It makes a passage less easy to follow and it can . . . cause doubt and confusion. It is not correct English. The courts have not regarded the expression favourably and this is another reason for avoiding it."<sup>84</sup>

## VII. CONCLUSION

Reasonable lawyers and draftsmen may differ regarding specific techniques of arrangement, structure, sequence, and content of a legal document. What is generally accepted by most legal draftsmen, however, is that there *are* important legal drafting principles which avoid the dangerous problems of ambiguity, vagueness, and archaic legalese and which allow a legal document to become, once again, a modern form of communication. It is hoped that the concepts and techniques in this article will help both the aspiring student and the veteran practitioner to become more able, and more competent, legal draftsmen.

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83. E. PIESSE, *supra* note 3, at 108-17.

84. *Id.* at 117.



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