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# LEGAL DRAFTING

Second Edition

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Robert C. Dick, Q.C.

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A CARSWELL STUDENT EDITION



# LEGAL DRAFTING

Second Edition

by

Robert C. Dick, Q.C.

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# Preface

When this book was first published, I was genuinely surprised at the result. I thought few were interested in the subject of legal drafting, but I was wrong. First and most importantly, I received an extremely complimentary letter from Lord Denning. Next I received an astonishing number of telephone inquiries both at my home and office. After that, I received in fairly short order, requests from various bar associations and universities to lecture on legal drafting. For some years I became a travelling road show and visited Indianapolis, Washington, Bloomington (Indiana), Calgary, Edmonton and Halifax (invitations to Winnipeg, Canberra, London (England) and Hong Kong had to be declined). At the same time I became active in producing and participating in drafting programs for the Department of Continuing Education of the Law Society of Upper Canada and the Canadian Bar Association. Also, I recall a video taping session of an interview with L. R. MacTavish, Q.C. (former senior legislative counsel for Ontario), one radio program and two television interviews. Over the intervening years until the second edition, reporters have called me from time to time when preparing commentary on legal documents.

Despite all this, most law schools and many lawyers still ignore the discipline of legal drafting. It seems that executives of insurance companies and banks are the ones most interested in the discipline. The Royal Insurance Company of Canada has a householder's policy drafted in the style identified as "Plain English". In the Language Simplification program of The Bank of Nova Scotia, I participated as drafting counsel and assisted that Bank's legal staff in redrafting its residential mortgage documents. As well I have undertaken assignments as drafting counsel for the Insurance Bureau of Canada and the Canadian Surety Company. In preparing the

second edition, I therefore had a much larger experience to draw from apart from my 32 years' experience as a generalist in law.

In the preface to the first edition, I referred to the "word smog that pollutes the drafting landscape". The smog has dissipated to some extent both in Canada and the United States but there is still a lot of it to be dispersed.

ROBERT C. DICK, Q.C.,  
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# Contents

<i>Preface</i> .....	v
<i>Chapter 1 Drafting in General</i> .....	1
1. Legal Drafting—What is it? .....	1
2. Substance and Form .....	4
3. Drafting Reform .....	5
4. Drafting as Communication .....	8
5. Precedents .....	11
6. Meaning .....	11
7. Legal Jargon .....	12
8. Rules of Interpretation .....	13
9. Accuracy and Precision .....	14
10. Vagueness and Ambiguity .....	16
11. Generality .....	18
12. Brevity .....	19
<i>Chapter 2 The Drafting Framework</i> .....	23
1. Drafting Ethics .....	23
2. Guidelines .....	24
(1) Sensible arrangement .....	24
(2) Internal consistency .....	25
3. Canadian English .....	26
<i>Chapter 3 Stages in Drafting</i> .....	29
1. Thinking Stages .....	29
(1) Establish what client wants .....	29
(2) Relate documents to other documents and to the law in general .....	34
(3) Peruse form precedents, articles and cases .....	35
(4) Prepare outline .....	36
2. Composing Stages .....	37
(1) Dictate first draft .....	37
(2) Revise and polish .....	38
(3) Check segments in succession .....	39

(4) Make internal checks .....	39
(5) Examine flow of thought .....	39
(6) Invite comments .....	40
Addendum to Chapter 3: Check-list for Partnership Agreement .....	40
<b>Chapter 4 The Design of Legal Documents .....</b>	<b>47</b>
1. Arrangement .....	47
2. Choosing Principles of Division .....	47
3. Class Division .....	48
4. Sequence .....	49
<b>Chapter 5 Rules of Drafting .....</b>	<b>55</b>
1. Introduction .....	55
2. Syntactic Patterns .....	56
Legal subject .....	57
Legal action .....	57
Case .....	58
Conditions .....	58
3. Summary of the Rules of Drafting .....	61
<b>RULE 1. <i>Avoid contextual, semantic and syntactic ambiguity</i> .....</b>	<b>61</b>
(1) Contextual ambiguity .....	61
(2) Semantic ambiguity .....	63
(a) Multiple-meaning words .....	63
(b) Age and time .....	64
(c) Passive past participles .....	66
(d) Number .....	66
(e) Mood .....	67
(f) Provisos .....	67
(3) Syntactic ambiguity .....	68
(a) Misplaced modifier .....	68
(b) Series .....	68
(c) Uncertain pronominal reference .....	69
(d) Sphere of influence of modifiers .....	70
(e) Prepositional ambiguity .....	70
(f) Ambiguities surrounding participles and gerunds .....	71
(f) Final "because" clause .....	72

RULE 2.	<i>Use definitions sparingly</i> .....	73
	(1) Confining definitions .....	76
	(2) Restrictive definitions .....	76
	(3) Extending definitions .....	76
	(4) Forced definitions .....	77
	(5) Clarifying definitions .....	77
	(6) Delegating definitions .....	78
	(7) Labelling definitions .....	78
	(8) Useless definitions .....	79
	(9) One-time definitions .....	79
	(10) Confusing definitions .....	79
	(11) Loaded definitions .....	80
	(12) Gaping definitions .....	81
	(13) Proviso definitions .....	81
RULE 3.	<i>Do not use different words or expressions to denote the same thing</i> .....	82
RULE 4.	<i>Show clearly upon whom a privilege is conferred, in whom a power is vested, or upon whom a duty is imposed</i> .....	82
RULE 5.	<i>Use present tense in preference to future tense, active voice instead of passive voice and indicative mood instead of subjunctive mood</i> .....	83
	(1) Use present tense in preference to future tense .....	83
	(2) Use the active voice instead of the passive voice .....	87
	(3) Use the indicative mood instead of the subjunctive mood .....	88
RULE 6.	<i>Use the present indicative after the word "if"</i> .....	88
RULE 7.	<i>Use "shall" only for the imperative; use "may" as permissive</i> .....	89
RULE 8.	<i>Avoid the use of provisos</i> .....	92
	(1) If the clauses or paragraphs are completely separate rules then use "and" in place of "provided always" .....	95
	(2) If the clauses or paragraphs are alternatives	

## x CONTENTS

	then show them as alternatives .....	95
(3)	If one clause or paragraph is a qualification of the other then use the conjunction "but" to relate the one to the other .....	95
RULE 9.	<i>Use the connectives "and" and "or" with discrimination</i> .....	100
RULE 10.	<i>Never use "and/or"</i> .....	104
RULE 11.	<i>Use Canadian spelling</i> .....	108
RULE 12.	<i>To improve readability and understanding of documents:</i>	
	1. <i>Divide a long document into parts and number parts with large Roman numerals</i>	
	2. <i>Use a heading for each part</i>	
	3. <i>Divide each part into component sections</i>	
	4. <i>Use headings for sections</i>	
	5. <i>Divide sections into subsections where necessary to avoid undue length and complexity</i>	
	6. <i>Use capital letters sparingly</i>	
	7. <i>Use appropriate punctuation</i> .....	108
RULE 13.	<i>Decide on and adhere to a numbering and lettering pattern for consecutive sections and subsections, clauses and subclauses, paragraphs and subparagraphs</i> .....	112
RULE 14.	<i>Use paragraph sculpture for clarity</i> .....	116
4.	<i>Subsidiary Rules of Drafting</i> .....	123
RULE 15.	<i>Avoid unnecessary enumeration of particulars to observe the maxim expressio unius est exclusio alterius</i> .....	123
RULE 16.	<i>Avoid application of the ejusdem generis rule of construction</i> .....	124
RULE 17.	<i>Avoid strings of synonyms</i> .....	125
RULE 18.	<i>Avoid surplus words and sentences</i> .....	128

RULE 19.	<i>Use "that" in preference to "which" .....</i>	131
RULE 20.	<i>Use tables to portray technical data and use sample computations to show the steps leading to a result .....</i>	132
RULE 21.	<i>Do not use "such where an article may be used" .....</i>	137
RULE 22.	<i>Do not use "said" but instead use "the", "that", or "those" .....</i>	140
RULE 23.	<i>Do not use "same" but instead use "it", "he", "him" or other suitable references .....</i>	142
RULE 24.	<i>Do not use the words "any", "each" or "every" where the indefinite article may be used .....</i>	143
RULE 25.	<i>Be precise in the use of "where" and "when" .....</i>	144
RULE 26.	<i>Avoid using "whereas" .....</i>	145
RULE 27.	<i>Be precise in the use of "between" and "among" .....</i>	146
RULE 28.	<i>Avoid:</i>	
	(1) <i>"It shall be lawful", "it is the duty", "it is declared" and similar expressions .....</i>	148
	(2) <i>"Whatever", "whatsoever" and "wheresoever" ...</i>	148
	(3) <i>"Aforesaid", "hereinbefore mentioned", and "herein provided" .....</i>	149
	(4) <i>"Means and includes" .....</i>	151
RULE 29.	<i>Do not use the terms listed .....</i>	153
RULE 30.	<i>Use the words and phrases in column two in preference to their counterparts in column one .....</i>	153
RULE 31.	<i>Avoid unusual or foreign word order .....</i>	158
RULE 32.	<i>Avoid stating negatives .....</i>	160
RULE 33.	<i>Use short words instead of long ones; use familiar words instead of less familiar words .....</i>	161

<i>Chapter 6</i>	<b>Sex and Gender</b>	163
<i>Chapter 7</i>	<b>Legal Drafting Styles</b>	171
	1. Introduction	171
	2. "Common Law" Style	172
	3. Modern Canadian or Modern North American Style	174
	4. "Plain English" Style	175
	Addendum to Chapter 7: Samples of Different Drafting Styles	181
	(1.) Confidentiality	181
	(a) Common Law Style	181
	(b) Modern North American Style	181
	(c) Plain English Style	182
	(2.) Partial Discharges (in a charge)	183
	(a) Common Law Style	183
	(b) Modern North American Style	183
	(c) Plain English Style	184
	(3.) Name of Tenant's Business (in a lease)	184
	(a) Common Law Style	184
	(b) Modern North American Style	185
	(c) Plain English Style	185
	(4.) Expropriation (in an asset purchase corporate agreement)	185
	(a) Common Law Style	185
	(b) Modern North American Style	186
	(c) Plain English Style	186
<i>Chapter 8</i>	<b>Current Documents</b>	187
	1. General Criticisms	187
	2. Headings	188
	3. Parties and Description	190
	4. Recitals	191
	5. Consideration	191
	6. Body of Documents	192
	7. Terminal Wording	193
<i>Chapter 9</i>	<b>Reasons for Judgment</b>	195
	1. Drafting Reasons for Judgment	195
	(1) General	195
	(2) Stating the issue	195
	(3) Facts and law	196
	(4) Procedure	197
	(5) Length of reasons	197

(6) Writing styles .....	197
(7) Subdivision and organization .....	198
2. The judgments of Lord Denning .....	201
The Intriguing Opener .....	204
The Historical Opener .....	206
The Fatal and Deadly Opener .....	206
"This is the case" Opener .....	206
The Editorial Opener .....	206
"This is an interesting case" Opener .....	207
The Whimsical Opener .....	208
The Picturesque Opener .....	209
 <i>Chapter 10</i> <b>Teaching Legal Drafting</b> .....	211
Teaching Materials .....	213
 <i>Chapter 11</i> <b>Trends in Drafting</b> .....	215
1. Introduction .....	215
2. Instruction in Drafting .....	215
3. Drafting Counsel .....	216
4. Influence of the Computer .....	217
5. Symbolic Logic .....	218
 <i>Chapter 12</i> <b>Closing Remarks</b> .....	225
 <b>Source Materials</b> .....	227
 <i>Index</i> .....	231

# Chapter 1

## Drafting in General

### 1. LEGAL DRAFTING—WHAT IS IT?

Legal drafting is legal thinking made visible. This visible legal thinking is to precipitate legal rights, duties, privileges and functions in definitive form. It is the formulation and preparation of legal documents such as deeds, contracts, leases, wills and trust agreements. In effect, preparing legal documents is like drafting statutes between the parties, setting out relationships and ground rules in a codified form. Pleadings, however, in contrast with documents, are not definitive legal documents. A court pleading attempts to persuade, but a contract, will, lease, or even a statute, does not. For instance, in a negligence action, the statement of claim may state that the defendant's car "careened across the highway and violently struck the plaintiff's car". The elements of emotion and persuasion are only too obvious.

In the planning of a client's affairs the lawyer who drafts the documents is practising preventive law since one aim is to prevent the client from having to litigate. In one study, about one quarter of litigated contract cases involved problems of interpretation of language.<sup>1</sup> The difficulties were attributed largely to poor drafting. As most clients show little enthusiasm for prolonged litigation in the courts, the drafter can serve the public well if he tries, within the confines of the client's instructions, to anticipate and settle any controversial points before a legal document is executed.

New legal situations demand a fresh approach; unusual documentation, innovation and originality of a high order are called for in an increasingly complex legal environment. Sky leases over subways and condominium conveyancing are examples of this.

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<sup>1</sup> Blaustein, "On Legal Writing" (1969), 18 Clev.-Mar. L.R. 238, footnote 10.

The courts have a role to play in drafting. It may be only after years of use that a new type of document has to be litigated. The court's interpretation may discourage or promote the use of it. A form of release on the back of a cheque signed by the endorser may be held not to be binding and the form may be abandoned. A "pour-over" trust will may be upheld in a jurisdiction, despite the fact that the trust was amended after the making of the will and this may lead to a greater use of the device. The courts in this way have a secondary or supervisory role.

The process of legal drafting begins with a subconscious reaction to the client's problem. At some point we start formulating inwardly what we are going to write. The actual draft evolves from this mental draft.

Good drafting has a deceptive simplicity. What is rejected is probably just as important for the document as what is included. What is included is refined and rearranged so that the legal concepts flow easily. This is not necessarily an easy job for the drafter; simplicity is not arrived at effortlessly, and is occasionally impossible to achieve. The draft itself may contain some complexities which cannot be simplified. A lawyer who is a wills and trusts specialist may find difficulty in explaining to a testator wording restricting the testator's wishes, but designed to avoid the rule against perpetuities. One objective in drafting is to achieve as much clarity and simplicity as possible, working within the limits of any given legal concepts.

Drafting is a blend of art and science. Certain principles can be learned and proficiency in drafting acquired in varying degrees. Although most lawyers consider themselves gifted in the discipline of drafting, few acquire the necessary ease and facility no matter how many years they have been practising law. There is some comfort in the remarks of one humourist who said that it took him fifteen years to discover that he had no talent for writing, but he could not give it up because by then he was famous.

Rules of drafting sometimes violate rules of English composition. A good drafter never changes language unless there is a change of meaning. Elegant variation required by normal

rules of writing is absent since one could be led into inaccuracy in the legal context. Where there is reference to "real property" in an agreement of purchase and sale, the drafter should not refer to it farther on in the agreement as "lands and premises" and end up calling it a "house and lot."

All those engaged in drafting experience days when words and concepts flow together in a good amalgam. On other days they have to "dig" for every expression and go through draft after draft. Some blame lack of facility in drafting on the language itself and allege that English has a certain recalcitrance that seems inherent, but it is probably the recalcitrance of the individual lawyer rather than of the language that presents the problem. Once a lawyer's drafting style has evolved and been preserved in office precedents, it is unlikely that the lawyer's knowledge of drafting will be extended over the duration of his or her entire legal career.

A good legal drafter is learning constantly. He is aware of the shifting currents of meanings of words, legal and otherwise. Most lawyers weigh opinions and reputations of persons as well as the veracity and reliability of witnesses. A drafter must weigh the subtle nuances and shades of meaning of words cast in different ways.

Most of us are aware that we speak and draft in different languages. In speaking, we have the support of facial expression, gesture and intonation. Also, we speak in much shorter sentences—sometimes in half-sentences. Knowledge of another's background further reduces the necessity for explicit language. On the other hand, drafting must be more elaborate because it lacks all these incidental supports. Because it must be more elaborate, we go to the other extreme and stuff too much into our legal documents.

Unfortunately, most clients and lawyers do not appreciate good drafting. A client is sometimes quite inconsiderate and insists on instant drafting. After a document is drafted a client is not impressed with the fact that the lawyer may have spent a good deal of time in formulating something that now looks transparently understandable. This is especially true for the finished draft of a will. The client simply has no idea of the points that needed checking and he is usually not enlightened

by any public relations program of a law society, or by the lawyer engaged in the drafting. Lawyers, on the other hand, are "from Missouri". It is difficult to convince the profession in general that drafting is a special skill that requires intense application. Although legal departments of large corporations frequently advertise for a lawyer to draft and inspect commercial documents, the type of person who performs this work in private practice is frequently not accorded very high status. Drafting is considered a mere literary exercise that is not very relevant or significant in daily practice. It seldom seems to cross a lawyer's mind that difficulties in identifying and solving a client's problem arise from the faulty drafting of documents produced for inspection. In short, the problems of drafting do not loom large in the minds of practitioners. Hope for the recognition and solution of drafting problems rests in future generations of lawyers.

## 2. SUBSTANCE AND FORM

Lawyers tend to segregate "form" and "substance" into two related notions. Drafting is primarily concerned with substance but it cannot be separated from form.

If a legal idea is improperly expounded in the form of the document, it has no impact and perishes. It has not been given the proper setting. If lawyers make a false dichotomy between substance and form, then it is not surprising that they will treat drafting with some disdain. There is a false notion that substance is like a cake standing in splendid isolation that the drafter makes acceptable by coating with the icing of form. Drafting is more than a finishing process.

Substance shapes the form. Once the substantive concepts in a document have been separated, the drafter has probably arrived at the division into sections. A further subdivision of substance in a section will dictate how many component segments there should be in the form of that particular section.

Also, form shapes substance. If a modifier is misplaced, the meaning of the substance may be ambiguous. By way of a simple illustration, the form of the sentence, "Brian saw the

doctor looking out the window" leaves the substance uncertain. Who was looking out the window—Brian or the doctor?

Form and substance affect each other especially in the birth of a draft and even after the drafting is embalmed in the signed document. In drafting, words may be trimmed off the form by eliminating synonyms without affecting substance. In this way the substance is more clearly exhibited and the document shortened, putting less of a cumulative strain on the lawyer who is trying to interpret the document. The same effect can be achieved with short sentences. There is a swifter grasp of substance. Parts of the document that seemed dark are bathed in light.

It is still convenient in books on drafting to speak of form and substance as separate concepts, to permit the parcelling of comments under one heading or the other, but we should realize that they are not isolated but impinge on each other.

### 3. DRAFTING REFORM

One of the arguments raised again changing drafting in modern documents is that the language in our documents is "tried and true" and therefore should be preserved. "Tried" is assumed to mean tried in a court of law. If the language in a document has been "tried", this is like attaching to it a certificate with a brilliant red seal, certifying that there is something wrong with the language or it would not have required court interpretation.

It is difficult to ascribe a meaning to the word "true" in that couplet. Perhaps it means that the words or expressions have been judicially upheld, but in what context? Words are interpreted in the setting in which they are found in a document but in another setting or context the judicial interpretation might be vastly different. For example, take the short innocent-looking word "free" that warms the hearts of civil rights lawyers. When we speak of a school providing free lunches, this is a proper meaning in context. Change this to free love in the school and you have radically altered the meaning. Neither expression, in these contexts, has much to do with civil rights.