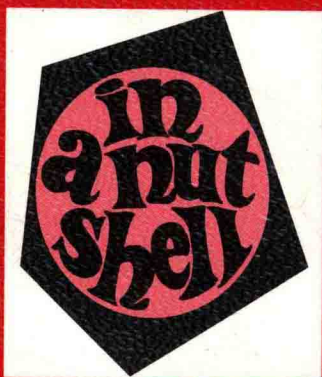


Legal Drafting



THOMAS R. HAGGARD
GEORGE W. KUNEY

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LEGAL DRAFTING IN A NUTSHELL

THIRD EDITION

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In Memory of My Father
George W. Haggard
(1908–1951)
Teacher, Journalist, and Public Servant

and

In Honor of My Mother
Laytha Johnston Haggard
In Appreciation For Her Love and Support

—Thomas R. Haggard

To my students.

—George W. Kuney

*

PREFACE

Many new lawyers are daunted by the prospect of drafting their first contract. "What do I say first?"—as if the document will fail unless the prefatory chant has a particular pitch and intonation.

Every lawyer is forced to draft something eventually. And when that document, no matter how poor it is in form or substance, does not precipitate an immediate end to the world, the pendulum often swings to the opposite extreme. Unnecessary fear is replaced by dangerous indifference and unwarranted confidence. Drafting is regarded either as an inherent ability or merely a mechanical function that can be performed by emulating what is contained in form books or the yellowing files of the long-departed founders of the firm.

Discard both misconceptions. Drafting contracts, instruments, or legislation is neither a secret order into which one must be initiated by long and painful steps nor a skill acquired by osmosis from the label "attorney-at-law" on your stationery; and it is certainly not a matter of mindless imitation of the past. Drafting is, perhaps, *the* critical lawyering skill. Like other lawyering skills, drafting can be done well or poorly. Doing it well is something that can be taught, learned, and ingrained into one's habits.

Legal writing, including drafting, has enjoyed a rebirth of emphasis. Legal drafting courses are com-

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monplace covering both transactional documents and various forms of litigation. The skill is also increasingly taught across the curriculum in conjunction with contracts, property, trusts and estates, business associations, real estate, legislation, administrative law, and other courses involving transactional documents and instruments.

The practicing bar has awakened as well, realizing that the drafting habits and style of yesterday are inadequate in the new millennium. Clients appreciate and even demand documents that are clearly and simply written, that are captioned and organized with the user in mind, and that are free of hoary and obscure legalese.

The courts grow increasingly impatient with the unnecessary litigation that follows the trail of a badly drafted document. Courts are especially critical of statutes and regulations that are so obscure—and often intentionally so—that what they mean and the impact that they have on the citizenry remains unknown until they have undergone judicial interpretation. And in response to after-the-fact and somewhat far-fetched claims about the meaning of a contract, courts are not hesitant to point out, testily, “Well, if you had meant that, why didn’t you say so?”

Even the legislatures and regulators have stepped in, passing laws that require certain kinds of documents to be written in plain English or satisfy some readability formula. Indeed, some legislatures have required that their own legislation and administrative regulations be drafted according to specific readability criteria.

PREFACE

This book deals with the process, techniques, and forms of expression used in drafted documents. It focuses on how one drafts private-law documents and legislation, not on the details of the substantive law that the drafter must deal with. Exactly what should be contained in a will, lease, partnership agreement, construction contract, contract for the sale of residential property, landlord-tenant statute, or any other type of drafted document is determined by substantive law of the jurisdiction, the subject-area expertise of the drafter, and the desires of the client. Texts that focus on substance rather than form exist for drafting these specialized documents.

The objective of this book is to enable the reader to produce documents that serve the needs of the client, that solve existing problems efficiently, that foresee and forestall future problems, that make for efficient governance, and that ease the tensions and uncertainties that are inherent in all forms of human social and economic intercourse. The accomplishment of those goals is the lawyer's highest calling.

This book reflects the drafting insights we have gained from our collective experience of approximately 60 years of practice and teaching legal drafting, both as a stand-alone course and as integrated into substantive courses like contracts, employment law, property, bankruptcy, and workouts and reorganizations. But in a greater sense, it also attempts to carry forward to a new generation the collective wisdom of the legal drafting community. Over the years, we have taught from or consulted many texts

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and articles, and those that have contributed the most to our courses and our books include those listed in the acknowledgments at the end of this book, before the index.

We thank the many students, practitioners, and teachers we have worked with over the years and whose comments and suggestions contributed enormously to this book. We also thank Joshua Ganz, Elizabeth Karb, Stacie Odeneal, and Peter Ripley, students at the University of Tennessee College of Law, and attorney and Adjunct Professor Donna C. Looper of The University of Tennessee College of Law for their research and editorial assistance with this third edition. Professor Carl A. Pierce's comments on ethical issues were also greatly appreciated.

This book contains the full text of our *Legal Drafting—Process, Techniques, and Exercises*, 2d Edition (West 2007), but with the exercises omitted. It also contains material drawn from Kuney's *The Elements of Contract Drafting with Questions and Clauses for Consideration* (2d Ed. West 2006), omitting the cases, clauses, and exercises. Students may find a benefit in these separate titles, which contain additional materials for training in contract drafting, transactional practice, and legislation.

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June 2007

**LEGAL
DRAFTING
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THIRD EDITION

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