THE ELEMENTS OF

CONTRACT DRAFTING

WITH QUESTIONS AND

CLAUSES FOR CONSIDERATION

THIRD EDITION

GEORGE W. KUNEY



THE ELEMENTS OF CONTRACT DRAFTING WITH QUESTIONS AND CLAUSES FOR CONSIDERATION

Third Edition

By

George W. Kuney

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George W. Kuney is the W.P. Toms Distinguished Professor of Law and the Director of the Clayton Center for Entrepreneurial Law at The University of Tennessee College of Law. Prior to joining the faculty in 2000, he was in private practice with California-based firms where he concentrated on business law and reorganization under chapter 11 of the bankruptcy code nationwide.

The thoughts and material in this book were developed during the author's practice with the Morrison & Foerster and Howard, Rice firms in San Francisco and the Allen, Matkins firm in San Diego, while teaching as an adjunct professor at Hastings College of Law and California Western School of Law during that time, and as a faculty member at The University of Tennessee College of Law, in Knoxville, Tennessee. As such, they contain many points absorbed from others at these institutions. Additionally, the bibliography at the close of the text lists books and other sources of authority that the author has worked with or thinks highly of, and which have unquestionably influenced the content of this book to one extent or another. Where specific attribution to a source was possible, it has been made in the text. Any omissions are unintentional.



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Third Edition

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INTRODUCTION

This book provides an overview of the issues and processes involved in drafting contracts and transactional documents. This should enable students to analyze the basic structure of contracts and other deal documents and develop the macro and micro techniques used to efficiently create those documents with precision and clarity. This book does not cover every single form of contract or transactional document. It does, however, provide the principles necessary for an understanding of the common structures of transactional documents and their provisions that can then be applied to specific transactions.

Beyond structural drafting, this book also covers some of the substantive laws that may affect contracts. Contracts often govern on-going relationships. It is therefore important to understand how applicable law affects the parties' private dealings and what can be done to limit or expand this relationship. You should verify that the substantive laws referred to in the text are applicable in your jurisdiction and, if not, tailor your documents accordingly.

I have tried to be brief and to the point. These materials largely consist of declaratory statements, rules, and examples. A few noteworthy cases are included to illustrate the real world implications of good and bad drafting. Also included throughout the text are footnotes identifying or questioning various clauses, techniques, and statements. The book has been greatly influenced by my practice experience and scholarly focus, which center on the restructuring of contracts and businesses faced with insolvency and failure. The result is an emphasis on "defensive" contract drafting and a critical evaluation of remedies and other contract provisions intended to protect one or more parties from downside risk. This emphasis on defensive drafting seeks to avoid unintended consequences. It also shows that commercial transactional practice and commercial litigation practice are interrelated. The deal should be documented to govern the possible future for the parties, both the upside and the downside. The deal of today is the litigation of tomorrow.

Transactional documents are an opportunity to structure a relationship and prevent and plan for future litigation. You should think about how to integrate concepts from other courses and experiences into contracts. Transactional lawyers draft to fall within or to avoid the ambit of particular statutory or case law. What contract remedies would be available under the law if the contract makes no provision for them? How can this result be altered in the contract? What is the evidentiary significance of various parts of the contract in later litigation? What can be done to render these portions admissible evidence? How can they be drafted so that they are favorable evidence for either party? Contract drafting provides an opportunity to use and reinforce a full range of substantive legal skills.

One critical point must be made here, at the outset. Contracts, good contracts, are not solely the product of legal knowledge and skill. They are also the product of business and practical knowledge. This business and practical knowledge will be used to interpret the contracts, especially in jurisdictions where a weak form of the parol evidence rule is in force; as a result, this knowledge is needed in order to initially draft a good contract. As a result, it is critical that counsel understands the client's business, its goals, and the forces and events that drive the enterprise and its industry in order to produce practical, precise documentation of a deal that will properly allocate risk between the parties, provide a legal mechanism for exchange and redress for short falls in performance, and stand up to interpretation and enforcement in the litigation or other dispute resolution process when everything has broken down.

The cases included in the text have been edited and not all omissions have been indicated with ellipses or other marks.

Finally, every rule stated in this book is subject to exceptions. Legal drafting, like so many things, is subject to the whims of fashion. Reasonable minds may differ on many of these matters. As with all legal writing and drafting, the point is communication. Remember, it is easier to tailor the form of your message to your audience than to try to force your audience to enjoy the form of your message. Use the rules, principles, and methods in this book as a default guide to contract drafting—but modify them to fit your audience and surroundings. It is best to remain flexible at all times.

In this, the third edition of this book, in addition to reworking and expanding upon much of the text to promote clarity and increase coverage, and supplying a number of new or revised exercises, I have included the following additional material and discussion over that presented in the second edition:

Chapter 2—Additional material on headings has been included.

Chapter 4—Addition of A Cautionary Tale—Depository Extortion: A Poorly Drafted Contract Leads to a Lawsuit, by David Weil.

Chapter 7—Substantial changes to the discussion of representations and warranties to expand upon the prior edition's treatment of this issue; addition of *Linden Partners v. Wilshire Linden Associates*, CBS v. Ziff-Davis Publishing, and a note on time limitations.

Chapter 8—Addition of the *Great American Cookie Company* cases regarding events of default and their enforcement.

Chapter 9—Addition of a note on the difference between certified and registered mail.

Those contributing to the discussion and work that gave rise to this book and its third edition are too numerous to thank individually. They do, however, importantly include the Adjunct Professors of Law teaching at The University of Tennessee, without whose work this endeavor would not be possible, but the contributions of Mark Jendrek and Brian Krumm, Adjunct Professors at The University of Tennessee College of Law, and David Greenspan have been immense.