

A close-up, artistic photograph of several typewriter keys. The keys are metallic and have a warm, golden-brown patina. Some keys are in sharp focus, showing characters like 'R', 'G', and 'L', while others are blurred in the background. The lighting creates soft highlights and shadows, emphasizing the texture and shape of the keys.

ABA FUNDAMENTALS

Contract Drafting

POWERFUL PROSE IN TRANSACTIONAL PRACTICE

Lenné Eidson Espenschied

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To Erich and Leslie,
my finest compositions

and

To Dennis,
the wind beneath my wings

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Preface

Many great books have been written on the topic of legal drafting in recent years and the reader may wonder why I have chosen to write this one. I'd like to explain the specific objectives I've sought to accomplish in this book and how I believe this book is different.

1. Unity among Scholars. Most drafting books contain very few citations to case law and virtually no citations to the works of other drafting scholars. The lack of references to supporting authority means the recommendations of any author can be, and frequently are, dismissed by the bar as being merely that author's opinion. Consensus has been achieved on most of the techniques presented in this book among those of us who have studied drafting extensively. Because drafters rarely have time to consult multiple treatises to determine whether scholars agree, my first objective is to substantiate unity among drafting scholars with respect to the techniques recommended in this book by incorporating extensive references to the works of others. Another contention among practicing lawyers who continue to ignore recommended drafting practices is that "professors teach and lawyers do," yet this book joins the list of treatises written in the past five years by other authors who have extensive experience in transactional practice. My hope is that when the bar realizes the extent of scholarly authority supporting particular recommendations, it will make a more diligent effort to extinguish bad drafting habits.

2. Basic to Advanced. Several excellent drafting books published recently by other authors are intended to serve as reference materials on style for more experienced lawyers. This book is different because it is intended to serve as a "how to" guide for lawyers new to transactional practice. One broad objective of the book is to explain how the drafting process works: how transactional lawyers work from prior documents to produce effective and complete legal documents that protect the client's interests. The book also features advanced drafting techniques for avoiding ambiguity by making better word choices, drafting sentences well, and eliminating contextual ambiguity. After reading this book, a new drafter should be well equipped to create powerful prose in transactional practice.

3. Accurate Examples. Virtually all of the examples, case studies, and exercises included in this book are extracted from real documents used by national law firms and Fortune 500 companies, which helps to accomplish my objectives of familiarizing readers with the actual language of complex provisions they work with in transactional practice and showing readers how to think critically regarding the language they inherit.

4. Comprehensive Application. A few good drafting books approach the topics of how and why lawyers draft legal documents primarily from the perspective of structuring complicated corporate finance and merger transactions—however, in actual practice, drafting encompasses a much broader array of topics and projects. Since only a tiny fraction of all contracts actually relate to finance and merger transactions, the drafter's role as to “structuring the deal” is largely irrelevant in most drafting projects. The emphasis of this book is drafting *per se* rather than deal-making, and the techniques presented are applicable to all drafting projects whether in real estate; mergers and acquisitions; general corporate practice; business law; lending; corporate finance; or in litigation settlement agreements, waivers, and releases.

5. Practical Orientation. My objective in writing this book is to create a practical guide that is straightforward and straight to the point. While some books are organized around theoretical drafting concepts like “precision” and “concision,” this book is organized to emphasize practical techniques: this is the process; do this with words; do this with sentences; do this with context; etc. I practiced transactional law for almost 25 years and based on my experience, this book contains the information new lawyers need to be successful in transactional practice.

6. Use as a Textbook. In writing this book I've come to understand there is a great divide in publishing between “trade books” and “textbooks.” This is a trade book because it is designed for use by lawyers in practice. It seems to me, however, that when the objective is to teach transactional skills in a law school classroom, trade books and textbooks should be virtually identical. I have used this material with both audiences and the response has been consistently enthusiastic. An objective of mine in writing this book is to create a realistic resource that can be used to teach drafting skills to law students. Each of the 14 chapters contains about a week's worth of material, with allowances for classroom discussion of graded assignments and special research

projects. I've used this book successfully in my advanced drafting course at UGA, and teaching aides for this book including teaching notes, sample documents, drafting assignments, and grading rubrics are available to law school faculty at www.draftingpowerfulprose.com.

Table of Contents

Acknowledgements	xiv
Preface	xv
Lesson 1: Introduction to Legal Drafting	1
Introduction	
• Image repair	2
• What is “drafting?”	2
• What does a “transactional lawyer” do?	3
Exercise: Based on the following facts, what types of forms and documents will your client need?	3
• Current trends in drafting	4
• Focus of this book	5
• Ethical issues in legal drafting	6
1.1 Understand the differences between legal drafting and legal writing.	6
1.2 Understand the characteristics of excellent drafting.	9
Exercise: Identify which characteristic of excellent drafting is missing in each example.	10
1.3 Attend to appearance.	11
Case Study: What revisions should be made to correct the appearance of this contract?	12
Lesson 2: Drafting in Transactional Practice	17
2.1 Explore the status quo of drafting in the legal profession.	18
2.2 Understand the reasons for the status quo.	19
2.3 Realize potential costs of deficient drafting.	21
2.4 Examine how substantive law impacts the drafting process.	21
• Ethical requirements	21
• The UCC and other “gap fillers”	22
• Required disclosures	22
• Enforceability issues	23
2.5 Understand how third party contracts affect the drafting process.	23

2.6	Explore the use of forms versus zero-based drafting.	24
Lesson 3: Draft to Fit the Transaction		27
3.1	Understand the audience.	27
	Exercise: How many potential users of this contract can you identify?	29
3.2	Eliminate archaic practices.	29
3.3	Select the contract format.	29
3.4	Identify the parts of a contract.	31
	• Name or title of the contract	31
	• Introduction	32
	• Statement of purpose	32
	• Statement of agreement	33
	• Definitions	34
	• Performance provisions	35
	• Boilerplate	35
	• Signature blocks	35
Lesson 4: Components of a Contract		41
4.1	Understand the purpose of common performance provisions.	41
	• Representations and warranties	42
	• Express warranties, limited warranties and disclaimers	43
	o Express warranties	44
	o Warranty of merchantability	44
	o Warranty of fitness for particular purpose	44
	o The limited warranty paradox	45
	o Exclusion v. disclaimer	45
	• Limitations of liability	46
	o Tort claims	47
	o Breach of contract claims	47
	• Indemnification clauses	48
	• Liquidated damages clauses	49
	• Term and termination provisions	51
4.2	Understand the consequences of typical boilerplate provisions.	54
	• Entire agreement/integration/merger	56
	• Severability/saving	56
	• Assignment	57

•	Governing law/choice of law	57
•	Notice	59
•	Force majeure	60
•	Amendment/modification	61
•	Waiver/no waiver	61
•	Survival	61
•	Captions and headings	62
•	Counterparts	63
	Exercise: Which of these boilerplate provisions from a limited liability company operating agreement would not be appropriate in a software license agreement?	63
	Lesson 5: Understand the Transaction	69
5.1	Have a complete understanding of the proposed transaction.	69
	Ethics discussion questions	71
5.2	Gather data effectively	73
•	who	74
•	what	75
•	when	75
•	where	76
•	how	76
•	why	76
	Exercise: What are some questions you would include in a checklist for a commercial lease agreement? A partnership agreement?	76
5.3	Divide, classify, arrange	76
	Exercise: Divide, classify, and arrange the following provisions in a merger agreement.	77
	Exercise: Divide, classify and arrange the following provisions in a services agreement.	79
5.4	Organize documents logically	80
	Case Study (demonstrates confusion created by poor organization)	82
	Lesson 6: Avoid Ambiguity	85
6.1	Strive for clarity; avoid ambiguity	85
•	Defining “clarity,” “ambiguity,” and “vagueness”	85

•	What happens when courts encounter ambiguity?	86
•	Who knew what, and when?	86
•	Types of ambiguity	88
	o Semantic	88
	o Syntactic	90
	o A special word about “only”	92
	o Contextual	93
•	Other ways to avoid ambiguity	93
	Ethical considerations in achieving the correct balance between clarity and vagueness	94
	Exercise: Underline the ambiguous language in the following sentences. Redraft to eliminate ambiguity.	95
	Ethics discussion questions	95
	Model Rules of Professional Conduct 1.2, 1.4, 1.5	96
6.2	Consider canons of construction	101
	• Be aware of the canons but not consumed by them	101
	• Noscitur a sociis	102
	• Ejusdem generis	102
	• Expressio unius est exclusio alterius	103
	• Contra Proferentem.	103
	• Reddendo singula singulis	104
	• In pari materia	104
	Lesson 7: Focus on Word Selection	109
7.1	Choose plain language	109
	• Is plain language at odds with professionalism?	109
	• Arguments against plain English drafting	110
	o Concepts are too complex	110
	o Terms of art	110
	o Clients demand and expect archaic jargon	110
	o More time required to explain	110
	o Harder to justify legal fees	111
	o Willful obscurity is a desirable objective	111
	o The meaning of litigated language is fixed and sure	111
	• How to draft in plain English	112

	Exercise: Suggest a plain language alternative to each word or phrase	113
7.2	Avoid these words in legal drafting	113
	• Ambiguous words	113
	o And/or: The Janus-faced monstrosity	113
	o Provided that; provided, however: Archaic leftovers	116
	o Herein, therein	119
	• Other words to avoid	120
	o Legalese	120
	o Legalese not used in normal conversation	120
	o Such, said, same	120
	o Foreign phrases	120
7.3	Use defined terms correctly	121
	• When and how to use a glossary	123
	Case Study: Observe the chronic and unnecessary overuse of defined terms in these excerpts.	125
7.4	Use “that” or “which” correctly	126
	Exercise: Write a “c” beside the sentences in which the word “that” or “which” is used correctly. Edit incorrect sentences.	127
	Lesson 8: Use Words Consistently	133
8.1	Use words consistently	133
8.2	Use the word “shall” consistently	136
	• The great debate	137
	Exercise: Correct the following sentences and phrases by replacing “shall.”	138
8.3	Choose the correct language for the intended consequence	138
	• Use “shall” to create duties	139
	• Use “is not required to” to negate duties	139
	• Use “is entitled to” to create rights	139
	• Use “is not entitled to” to negate rights	139
	• Use “may” to create a privilege	139
	• Use “may not” to negate a privilege	140
	• Use “shall not” to create a duty not to act	140

	• Use a present tense verb to perform an action	140
	• Use a present tense verb to state a policy	140
	• Use “must” to create an obligation on an unnamed party	140
Lesson 9: Focus on Sentence Structure		143
9.1	Shorten average sentence length	144
	• Flesch Test of Reading Ease	145
9.2	Draft most performance provisions in active voice	146
	• Whenever possible, use active voice rather than passive in drafting performance provisions	146
	• Passive voice is usually preferable in boilerplate	147
	• Passive voice may be preferable in representations and warranties	147
	• Passive voice is preferable in uncertainty	147
	• Avoid beginning sentences or phrases with “there is,” “there are,” or, even worse, “there shall be.”	148
	Exercise: Redraft these sentences using active voice.	148
9.3	Convert hidden verbs	148
	Exercise: Redraft these sentences to convert the hidden verbs	149
9.4	Structure sentences logically	150
	• Where a party has a duty to act, the sentence should identify the actor by using active voice	150
	• The actor should be the grammatical subject of the sentence as well as the topic of it	150
	• The subject, verb, and object should be close together at the beginning of the sentence	150
	• Modifiers should be located next to the word they are intended to modify	151
	• Find a logical basis for arranging information in a sentence	151
9.5	Structure complicated provisions AFTER the verb	151
9.6	Draft in parallel structure	152
9.7	Use tabulations to eliminate ambiguity	153
	Exercise: Redraft in parallel structure, using tabulations to eliminate clutter and ambiguity	154

Case Study 9A (demonstrates the effect of structuring complicated provisions after the verb)	155
Case Study 9B (demonstrates the use of tabulations to resolve ambiguity caused by long, convoluted sentence structure, uncertain modifiers, and redundant language)	158
Lesson 10: Identify common sources of syntactic ambiguity	161
10.1 Eliminate clutter and redundant language	161
• Get to the point	162
• Eliminate repetitive statements of agreement and understanding	162
• Eliminate unnecessary strings of words	163
• Eliminate common doublets and triplets	164
Exercise: revise these sentences to eliminate unnecessary words	165
10.2 Avoid intrusive phrases and clauses	166
Case Study (demonstrates use of techniques presented in lessons 9 and 10 to simplify a complex provision)	167
10.3 Avoid ambiguous phrasing	169
• between ... and	169
• after ... before	169
• from ... to	170
• until	170
• by	170
• starting	170
• through	171
• within	171
Lesson 11: Start from a Winning Position	173
11.1 Understand whether provisions are required, essential, strongly recommended, or optional	174
Exercise: Determine whether the following provisions are required, essential, strongly recommended, or optional.	176
11.2 Start with provisions that favor your client	177
11.3 Draft to allocate risk	178
Case Studies: Warranties	180

	Conditions of transfer	181
	Grant of a license	181
	Assignment	182
11.4	Identify the range of risk	182
	Exercise: Identify the range of allocating risk between a buyer and seller with respect to an indemnification clause.	183
Lesson 12: Eliminate Contextual Ambiguity		187
12.1	Organize documents properly to avoid contextual ambiguity	188
12.2	Keep related documents consistent	188
12.3	Track money and alternative outcomes	190
	Exercise: Flow-chart the flow of funds described in this provision. Have all possible outcomes been addressed?	192
12.4	Proofread strategically to ensure schedules, exhibits, and appendices are attached.	193
Lesson 13: Consider These Issues		195
13.1	Consider alternative dispute resolution clauses	195
	• Step negotiation	196
	• Mediation	197
	• Arbitration	198
	• Standing neutral	198
13.2	Draft gender free	199
	• Plural nouns	200
	• Second person	200
	• Articles	200
	• Repeat the noun	200
	• Omit it	201
	• Indefinite pronouns	201
	• Avoid gender specific titles	201
13.3	Use numbering conventions consistently	201
13.4	Omit consideration recitals	203
13.5	Consider contracts under seal	204
13.6	Amend with care	206
	Case Study (demonstrates form of amendment)	208

Lesson 14: Edit or Review Effectively	211
14.1 Edit documents effectively	211
• Substantive edit	212
• Mechanical edit	212
• Semantic edit	213
• Syntactic edit	214
14.2 Review contracts prepared by opposing counsel effectively	214
• Prepare	216
• Familiarize	216
• Confirm key business terms	217
• Identify legal issues	217
• Identify ambiguous language	218
• Discuss key issues with the client	218
• Revise	218
• Proofread	219
Case Study (demonstrates revisions made by special stipulation and by red-lining)	220
Appendix A: Traditional Form Contract	231
Appendix B: Schedule Agreement	237
Appendix C: Letter Agreement	245
Appendix D: Suggested Answers to Exercises	251
Glossary	259
Index	305