

Table of Contents

	Page
PREFACE	v
TABLE OF CASES	xix
 Introduction: Legal Drafting: A Preview of the Course	1
I. Purpose of the Course	1
II. The Focuses of the Course	1
A. The Focus on Skills	1
1. Skills Involved in Drafting	1
2. The Skills as Elements of Strategy	2
B. The Focus on Audience	2
1. Drafting for Litigation and to Avoid It	2
2. Drafting for Users With Different Degrees of Understanding	3
3. Drafting for Different Uses	3
4. Drafting for Users With Different Points of View	3
5. Drafting for Reference Use	4
III. The Roles of the Lawyer and the Client in Making Policy	4
A. The Nature of "Policy"	4
B. The Stages of Collaboration	5
1. Investigating Stage	5
2. Thinking Stage	5
3. Writing Stage	5
 PART ONE. DRAFTING IN LITIGATION PRACTICE:	
INTRODUCTION TO THE DOCUMENTS	
I. Pleadings and Motions Distinguished	7
II. Pleadings Requesting Affirmative Relief	7
III. Defensive Pleadings	7
A. Answer	7
B. Reply	8
IV. Contents and Structure of the Body of Pleadings and Motions	8
V. Formalities Before and After the Body	8
A. Caption	8
B. Attorney's Signature	9
C. Certificate of Service	9
 Chapter 1. Complaints	10
I. Using Official and Unofficial Pleading Forms	10
A. Standardized Official Pleading Forms	10
B. Privately Published Form Books	14

	Page
I. Using Official and Unofficial Pleading Forms—Continued	
C. Court-Approved Model Forms	15
II. Annotated Sample Complaint	18
III. The Body of Pleadings Requesting Affirmative Relief	32
A. Required Elements of the Complaint or Other Initial Pleading	32
1. Jurisdiction	32
2. Cause of Action or Statement of Claim	32
3. Demand for Judgment for Relief	32
B. Pleading Special Matters	33
IV. Drafting Factual Allegations as a Matter of Strategy	33
A. Substantiating a Cause of Action, not Merely Telling a Story	33
1. Linking Facts to Elements	33
2. General Plan for Organizing Allegations	33
B. Using the Complaint as a Discovery Tool	34
1. Narrow and Precise Allegations	34
2. Facts One at a Time	35
3. Facts Rather Than Conclusions	37
4. Graphic Favorable Facts and Abstract Unfavorable Ones	37
C. Drafting Short and Plain Statements	38
1. Dismissal for Violation of Plain Statement Rules	38
2. The Preference for Plain Language	39
3. Examples of Conversion From Legalese to Plain Language	40
D. Tracking Language From Governing Law	41
V. Checklist for Drafting Complaints	42
VI. Drafting Assignments	48
Chapter 2. Motions	59
I. Motions as Applications for Orders	59
II. Responding to a Complaint by Motion	60
A. Required Elements	60
B. Defenses That May Be Made by Motion	60
III. Common Defense Motions Before Pleading	60
A. Motion to Dismiss	60
B. Motion for More Definite Statement	60
C. Motion to Strike	67
D. Motion for Summary Judgment	67
E. Motion for Summary Judgment Distinguished From Motion to Dismiss	69
IV. Motion Strategy	69
V. Drafting the Motion	70
VI. Annotated Sample Motion to Dismiss, for More Definite Statement, and to Strike	70

	Page
VII. Annotated Sample Motion for Summary Judgment With Supporting Affidavit	73
VIII. Checklist for Drafting Motions	80
IX. Drafting Assignments	82
Chapter 3. Answers	85
I. Responding to a Complaint by Answer	85
II. Complaint and Annotated Sample Answer With Counterclaim	85
III. Admissions, Denials, and Responses of "Without Knowledge"	92
A. The Defendant's Options	92
B. Alternative Structures for Responses	92
C. Troublesome Forms of Denial	95
1. Leaving the Plaintiff to Proofs	95
2. Presenting the Defendant's Version of an Allegation	95
3. Expressing a Negative Pregnant	96
D. Admitting in Part and Denying in Part	98
E. Special Problems	101
1. Responding to the Jurisdictional Statement	101
2. Responding to Allegations about a Different Defendant	101
3. Responding to Legal Conclusions	102
IV. Affirmative Defenses	102
A. The Wide Range of Possible Defenses	102
B. How Much Detail to Provide	103
C. Structure of Affirmative Defenses	103
D. Short and Plain Terms	104
V. Checklist for Drafting Answers	105
VI. Drafting Assignments	107

PART TWO. DRAFTING IN THE PRACTICE OF PREVENTIVE LAW: INTRODUCTION TO THE DOCUMENTS

I. Contracts, Legislation, and Wills as Planning Documents	109
II. The Parts of Planning Documents	109
A. Title	109
B. Introduction	109
C. Recitals	110
D. Definitions	110
E. Body of the Document	110
F. Housekeeping Provisions	110
G. Signatures and Dates	111
Chapter 4. Contracts	112
I. Relational Contracts Distinguished From Transactions	112

	Page
II. Annotated Sample Contract	114
III. The Introductory Paragraph.....	122
A. Former and Contemporary Approaches	122
B. Content	122
1. Parties.....	122
2. Nature of the Contract.....	123
3. Mutuality of Agreement	123
IV. Recitals.....	125
V. Definitions	127
VI. The Body of the Contract.....	127
A. Promises and Policies	127
B. The Drafter as Architect.....	130
C. Organizational Matters.....	131
1. Division	131
a. Testing Division Schemes.....	131
b. Headings.....	132
2. Classification.....	133
3. Sequence.....	134
D. Special Problems in Drafting Form Contracts	138
VII. Housekeeping Provisions	141
VIII. Checklist for Drafting Contracts.....	142
IX. Drafting Assignments	144
Chapter 5. Legislation	175
I. Public and Private Legislation	175
A. Varieties and Similarities.....	175
B. Legislative Drafting Distinguished From Other Legal Writing	177
C. The Profession of Legislative Drafting	178
D. Legislative Drafting in Private Practice	179
II. Theories and Strategies	179
A. A Three-Step Process	179
B. The Drafter's Role in Improving Legislative Substance	188
C. Drafting to Get the Legislation Passed	192
D. Drafting for the Administrator.....	194
E. Drafting for the Affected Citizen.....	195
F. Preparing a Legislative Plan.....	197
III. Introductory Formalities	197
A. Title.....	197
B. Enacting Clause.....	197
C. Short Title Section	198
D. Findings.....	198
E. Definitions.....	198
IV. Organizing the Body of Legislation	198
A. The Body as Part of the Whole	198
B. Division, Classification, and Sequence of Sections	199
1. Steps in the Drafting Process	199

	Page
IV. Organizing the Body of Legislation—Continued	
2. Recommendations about Sections.....	199
3. Concepts and Subject Groupings; the “Logical Pull”	200
C. Organizing Material Within Sections	201
V. Terms of Authority: A Special Concern About Word Choice	204
A. The Conventions for Using Terms of Authority	204
B. The Importance of Saving “Shall” for Orders	204
C. The False Imperative.....	205
VI. Housekeeping Provisions	207
VII. Annotated Sample Act of Congress	209
VIII. Annotated Sample State Act [Abridged].....	212
IX. Annotated Sample State Rule of Civil Procedure [Showing Amendments]	217
X. Annotated Sample Private Legislation: Declaration of Restrictions and Covenants for a Subdivision	219
XI. Checklist for Drafting Legislation.....	227
XII. Drafting Assignments	229
Chapter 6. Wills	244
I. A Will as a Creature of Statute	244
A. The Importance of Research.....	244
B. Statutory Terminology	245
C. The Value of Following the Strictest Rules	245
D. Default Statutes	245
II. Annotated Sample Will, Self-Proving Affidavit, and Codicil	246
A. Sample Will	246
B. Sample Self-Proving Affidavit	254
C. Sample Codicil.....	255
III. Organizing the Body of a Will.....	256
A. Organizing for Various Users.....	256
B. Some Conventions.....	257
1. Definitions	257
2. Family Relationships	257
3. Dispositive Provisions	258
4. Administration	258
IV. Drafting to Prevent Construction Problems.....	259
A. Solutions Outside the Will	259
B. Incorporating Statutes by Reference	259
C. The Role of Plain Language.....	259
1. “The Plain English Will”: The Real Thing or A Spoof?.....	259
2. A Will Form in Plain Language.....	260
3. Reducing Legalese to Plain Language	261
4. The Danger in Not Using Plain Language	261
5. Thoughtful Drafting and Boilerplate Clauses	262

	Page
IV. Drafting to Prevent Construction Problems—Continued	
6. Plain Language Approach in Law School Wills	
Textbooks	263
D. Attending to Particulars	264
1. The Value of General Language	264
2. The Importance of Accuracy About Specifics	264
3. Future Circumstances to Be Anticipated	265
a. Property no Longer in the Estate	265
b. Gift to Beneficiary During Testator's Lifetime	265
c. Beneficiary Who Does Not Survive Testator ...	265
V. Drafting to Discourage a Will Contest	266
A. Recitals	266
1. Recital of the Testator's Sound Mind	266
2. Revocation of Prior Wills and Codicils	266
3. Reasons for Bequests	267
B. Declarations	267
1. Testimonium	267
2. Attestation	267
3. "Self-Proving" Affidavit	268
C. The <i>in Terrorem</i> Provision	268
VI. Checklist for Drafting Wills and Codicils	272
VII. Drafting Assignments	275

PART THREE. A PROCESS MANUAL: INTRODUCTION TO THE PROCESSES

I. Using Clients and Documents as Resources	285
II. Choosing Flexible Language	285
III. Achieving Clarity and Avoiding Ambiguity	286
IV. Defining Terms and Naming Concepts	286
V. Making Stylistic Choices	286
Chapter 7. Using Clients and Documents as Resources	287
I. Drafting as a Process	287
II. Some Continuing Concerns	288
A. Legal Context	288
B. Circumstantial Context	288
C. Negotiating Context	288
III. Getting Information From the Client	288
A. Generating Questions to Ask the Client	288
B. Questionnaires Using Computer Programs	292
C. Areas of Focus for a Checklist	293
1. Questions About Client's Purposes	293
2. Trouble-Shooting Questions	293
3. Questions to Assess the Client	294
D. The Lawyer as Trouble Shooter and the Client as Policy Maker	294
IV. Working From a "Model" Document	295

	Page
V. Explication: The Testing Process	295
VI. Explication Techniques	295
A. The Roadmap	295
B. The Sentence Diagram	296
C. Complete Tabulation	296
1. Tabulation as an Explication Device Distinguished From Presenting Material in Tabulated Sentence Structure	296
2. An Example of Complete Tabulation Used to Test Dense Material	297
a. The Dense Material	297
b. The Dense Material Completely Tabulated	297
c. Questions Raised About the Dense Material	298
VII. Continuing Explication in Later Stages of Drafting	302
Chapter 8. Choosing Flexible Language: Vagueness and Generality vs. Precision and Particularity	303
I. Flexibility Through Vagueness and Generality	303
A. Precision as an Undesirable Goal	303
B. Vagueness Distinguished From Ambiguity	304
C. Vagueness Associated With Generality	305
D. Tightening and Loosening Language	306
II. The Dangers of Vagueness and Generality	307
III. The Dangers of Precision and Particularity	309
A. Listing Particulars	309
B. Expressio Unius Est Exclusio Alterius	309
C. Ejusdem Generis	311
Chapter 9. Achieving Clarity and Avoiding Ambiguity	315
I. The Nature of Ambiguity	315
II. The Forms of Ambiguity	319
A. Semantic Ambiguity	319
1. Double- and Multi-meaning Words	319
2. Saying the Same Thing the Same Way and Differ- ent Things Differently	319
3. Some Special Problems	320
a. Dates	320
b. Other Periods of Time	321
c. Ages	321
d. Number	322
e. Provisos	322
B. Syntactic Ambiguity	323
1. Conjunctions and Other Verbal Glue	323
a. The Ambiguous "Or"	323
b. The Ambiguous "And"	324
c. The Ambiguous Hybrid, "And/Or"	327
2. Modifiers	329
a. Squinting Modifiers	329

	Page
II. The Forms of Ambiguity—Continued	
b. Modifiers Preceding or Following Compounds	329
3. Pronoun Reference	330
4. Punctuation	330
a. Comma	330
b. Semi-colon	336
C. Contextual Ambiguity	338
III. Canons of Construction	342
IV. Tabulated Sentence Structure	346
A. A Device for Resolving Ambiguity	346
B. A Device for Emphasizing Alternative and Cumulative Items	347
C. Testing Tabulated Material for Coherence	348
D. Tabulated Sentence Structure Distinguished From Out- line	349
V. Lists Distinguished From Tabulated Sentence Structure ...	350
VI. Versatility of the Tabulation Process	351
VII. Choosing Tabulated Sentence Structure or List Structure	352
A. Tabulated Sentence Structure	352
B. List Structure	352
VIII. Checklist for Using Tabulation	352
Chapter 10. Defining Terms and Naming Concepts	355
I. Drafting Definitions: A Late Stage in the Drafting Process	355
II. Purposes and Types of Definitions	356
A. Lexical Definition	356
1. Lexical Definition as Full Definition, Using "Means"	356
2. Appropriate Lexical Definitions in Legal Docu- ments	356
3. Inappropriate Lexical Definitions in Legal Docu- ments	356
B. Stipulative Definition	357
1. Stipulative Definition as Full Definition, Using "Means"	357
a. Stipulating One of Several Lexical Definitions	357
b. Naming Concepts: Creating the Defined Term Instead of the Definition	358
2. Partial Definitions	361
a. Enlarging Definitions	361
b. Confining Definitions	364
3. Choosing Between Full and Partial Definition	364
4. Combining Full and Partial Definition	364
a. Acceptable Practice: "Means" Definition Fol- lowed by "Includes" or "Does Not Include" Definition	364
b. Unacceptable Practice: "Means and Includes"	365

	Page
III. Methods of Defining	365
A. More Particular or Familiar Terms	365
B. Divisions	366
C. Larger Categories	366
D. List of Referents	366
IV. Conventions Regarding the Form of Definitions	367
A. Introducing Definitions	367
B. Order	367
C. Form for Defined Term	367
V. Rules Buried in Definitions	367
A. Resulting Problems	367
B. Examples	368
1. Definition of "Wine"	368
2. Definition of "Retail Sale"	368
VI. Checklist for Drafting Definitions	373
Chapter 11. Making Stylistic Choices	375
I. The Challenge to Remain Incognito	375
II. Consistency	376
A. The Cumulative Effect of Many Particulars	376
B. Parallel Structure	376
1. Parallel Sentence Structure	376
2. Normalized Form	377
3. The Decision Tree	378
4. The Graph of Logical Structure	380
C. Tense	383
1. Present Tense	383
2. Past and Present Perfect Tenses	383
3. Future Tense	383
D. Singular and Plural	384
E. Numbers	384
III. Brevity	385
A. Needless Elaboration	385
B. Needless Synonyms	389
C. Legalese	391
IV. Nouns and Verbs	392
A. Nominalizations	392
B. Active and Passive Verbs	393
V. Gender-Neutral Language	394
A. Problems Caused by Gender-Specific Language	394
B. Avoiding Sexist Language Gracefully	395
1. Expressions Implying Value Judgments	396
2. Sex-neutral Terms	396
3. Parallel Construction	396
4. Sex-based Pronouns	396
C. Critics of Gender-Neutral Language	397

	Page
VI. Punctuation.....	398
A. Trend Towards Less Punctuation.....	398
B. Comma Before Last Item in Series.....	398
VII. Graphics	399
A. Graphics and Readability	399
B. Graphic Elements of Style	399
1. White Space.....	399
2. Headings.....	400
3. Readable Type	400
VIII. The Plain Language Movement: Some Historical Notes...	401
A. Legislation: The First Wave	401
B. Critiques of the Plain Language Movement	402
1. Critique by Affected Parties and Their Lawyers ..	402
2. Critique by Linguists.....	402
a. Readability Formulas.....	402
b. Mechanical Revisions.....	403
c. Personalization.....	403
3. Critique by Reformers of Consumer Law.....	404
4. Critique by Critical Legal Scholars	404
C. Putting the Critiques in Perspective	404
D. Expanding Reform	405
IX. Checklist for Drafting in Plain Language	406

Appendices

Bibliography.....	416
I. Books.....	416
II. Articles.....	419
III. Comments	421
INDEX OF SUBJECTS	423
INDEX OF DOCUMENTS	431