Drafting legal instruments

This organization is, in the main, focused on litigation, but litigation experience teaches us that good drafting can save clients a lot of heartache. A legal instrument must reduce the parties' agreement to certain terms. These terms must be clear to the individuals who negotiated and drafted the agreement; they must also be inescapably clear to those who later read the agreement without this benefit.

To this end, as a firm policy, we subscribe to and preach the gospel of plain language drafting. Where possible, we also correct other counsel's errors by introducing plain language drafting to existing agreements.

Drafting is a collaborative process. If possible, another person should always check your work before it is released to the client. Lawyers are responsible for ensuring that work is checked; if someone other than a lawyer drafts a document, a lawyer will (as a matter of course) check the document. If a lawyer drafts a document, the lawyer should arrange for someone to review it.

Plain language drafting

This practice aims to create straightforward texts that the target audience will understand. You will be best served using short sentences (although not all sentences must be short). Avoid inserting long qualifications as sentence modifiers or prepositional phrases.

Drafting may be broken into two parts:

1. Logical structure; and
2. Appropriate style.

The below resources provide detailed observations regarding these parts. We only gloss things here to note particular points of interest to the firm.

Structure

A legal instrument's structure moves from the general to the particular.

The standard parts of legal instruments drafted by this firm are:

1. Divisions (for long texts);
2. Parts;
3. Sections;
4. Sub-sections;
5. Paragraphs;
6. Sub-paragraphs; and
7. Items.

These parts are not always required. Sections are the basic unit in any legal instrument. They may be organized into parts, and parts may be organized into divisions. This organization is only necessary

when agreements are very long or deal with technical matters.

Sections may contain sub-sections, paragraphs, sub-paragraphs, and items–all of these smaller units retain the section number and are numbered as follows:

- Sub-sections, as a number between parentheses, *e.g.* (1);
- Paragraphs, as a miniscule letter followed by a period, *e.g.* a.;
- Sub-paragraphs, as miniscule roman numerals followed by a period, *e.g.* i.; and
- Items, as a miniscule letter between parentheses, *e.g.* (a).

Sub-paragraphs and items are rarely necessary. Where possible, restrict units within sections to sub-sections and paragraphs.

Typically, the text begins with an interpretation section. This section may be a single section without sub-sections.

Standard logic

The structure of an agreement must move from the most general rules needed to read the agreement to the details particular to the parties, with a final, general, part that details the general rules for termination and dispute resolution. This movement must also work chronologically. A reader must be able to understand

1. how the agreement needs to be read;
2. the obligations established by the agreement;
3. the manner in which decisions relating to the obligations are made;
4. the kind and amount of information shared between the parties;
5. the method or means of exchange between the parties;
6. the manner in which the agreement is administered;
7. the method of dispute resolution (if any) required between the parties;
8. the means of terminating the agreement;
9. default of the agreement; and
10. general administration of the agreement.

This structure is similar to the hourglass structure of many essays.

Style

The most important stylistic element in plain-language drafting is use of a basic sentence structure: subject-verb-object (SOV). That is the appropriate structure for sentences that create obligations. It is a natural form of speech that English-speakers intuitively understand. The actor, a subject, acts by means of a verb upon the object. Use this sentence structure to create most if not all clauses in a legal instrument.

“Style” in this context also refers to the use of appropriate grammatical conventions, some of which are detailed in this wiki.

Drafting conventions

Definitions

Definitions are used sparingly to avoid altering the common meaning of words or phrases used in a contract.

This rule cuts against the grain of typical contract drafting but accords with the principles of legislative drafting. A typical contract will include extraneous and wholly unnecessary definitions that either provide the common meaning of words or phrases or define words and phrases that refer to the subject of the agreement.

The purpose of a definition is set out by the Uniform Law Conference of Canada in its *Drafting Conventions*:

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18. (1) Definitions should be used sparingly since they alter the meaning of terms that may be inadvertently read without appreciating the definitions. They should be used only for the following purposes:

a. to avoid doubts about the application of a term or to delimit its application;

b. to avoid excessive repetition;

c. to allow the use of an abbreviation;

d. to signal the use of an unusual or novel term.
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These guidelines apply as much to contract drafting as to legislative drafting. They limit the use of definitions to cases of clear ambiguity or altering the common meaning of a word or phrase such that it bears a meaning specific to the contract.

Definitions do not create substantive rules.

Definitions cannot cross-reference the use of a term or a definition in a section. If a section requires a specific definition that will not apply to the entire agreement, that definition should appear in the section.

Definitions are located in either a general or specific definitions section.

- A general definitions section appears in Part I, section 1 of the contract. This section will set out any definition that applies to the entire agreement or that may affect the entire agreement.
- Specific definitions are appear as interpretation sections that begin parts of the contract or as sub-sections in sections. These definitions will, as their name suggests, relate only to parts or sections of the agreement.
- The decision to create specific definitions may be made when a limited part of the contract requires a departure from a word or phrase's common meaning. In such cases, the reader will benefit from a definition that appears close to the rule that requires the definition.

Common sections

Agreements will often require similar language one between the other. Language carried over between agreements helps the drafter by lessening the workload and allowing the drafter to focus on the more thorny parts of a text.

Interpretation

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[X] In this agreement,
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The following lines will be unnumbered and will detail definitions using the following phrase:

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“[word or phrase to be defined]” means
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the definition of the word or phrase is then provided.

Interpretation sections should only include terms that are being used in a technical or peculiar sense that requires definition. The tendency to define every term is not useful and only distracts from the substance of the agreement.

A further, quite useful, interpretation provision arises when a statute controls the subject matter of the contract. This case often arises when dealing with corporations and, in such cases, the status already supercedes the contract–there is no point in fighting it. Instead of defining terms that may otherwise be defined in the statute, a clause may simply read:

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[X] The definitions found in section [X] of the [INSERT STATUTE TITLE], as amended from time-to-time, are incorporated into this agreement.
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This provision will cause all the definitions from the referenced section to become incorporated by reference in the agreement. A drafter should take care not to unwittingly incorporate definitions that are at odds with the intended meaning of a word or phrase in the agreement. Blanket incorporation by reference must only be used when the drafter has reviewed the definitions and made sure that the agreement and statute properly use each defined term.

Sections that probably don't need to exist

Amendments

An agreement may only be amended with both parties' consent, and this rule is the general rule of contract. Parties cannot unilaterally amend agreements once these are made. Most contracts do not require detailed sections regarding the power and method of amendment. Our standard amendment section principally deals with how the amendment is recorded:

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This agreement is amended when the parties provide their written consent to the text of an amendment, whereupon the text of the amendment will be scheduled to all copies of this agreement.
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Additional resources

This article is a useful introduction to plain language drafting: https://www.cba.org/Publications-Resources/CBA-Practice-Link/Young-Lawyers/2014/Plain-Language-Legal-Writing-Part-I-%E2%80%93-Writing-as-a.

The Justice Department has an excellent resource for legislative language that you can use while drafting any legal instrument: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/toc-tdm.html.

The Unifom Law Conference of Canada also has a resource for legisative drafters that can be applied to drafting other legal instruments: https://www.ulcc-chlc.ca/Civil-Section/Drafting/Drafting-Conventions.

The Department of Canadian Heritage has also produced The Canadian Style, which is a good grammar guide when drafting: https://publications.gc.ca/site/fra/9.889618/publication.html.

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