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.

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.

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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