

SOME THINGS EVERY LEGAL DRAFTER SHOULD KNOW

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Books

- *Drafting Legal Documents Nonlawyers Can Read and Understand* (ABA forthcoming)
- *Better Legal Writing* (Wm. S. Hein & Co. 2005).
- *Writing for the Legal Audience* (Carolina Academic Press 2003).

Articles

- *The Art of Consumer Drafting*, 11 *Scribes J. Legal Writing* __ (forthcoming 2007)
- *What Plain English Really Is*, 9 *Scribes J. Legal Writing* 43 (2004).
- *What Transactional Drafters Should Know About Plain English*, 39 *Tex. J. Bus. Law* 515 (2004).
- *Ethical Legal Writing*, 21 *Rev. Litig.* 527 (2002).
- *Writing to the Trial Judge: Part One—for Motions*, 83 *Mich. B.J.* 54 (Jan. 2004).
- *Writing to the Trial Judge: Part Two—for Affidavits*, 83 *Mich. B.J.* 44 (Feb. 2004).
- *The Five Principles of Legal Writing*, 49 *Prac. Law.* 11 (June 2003).
- *Writing for Your Audience: The Client*, 81 *Mich. B.J.* 50 (June 2002).
- *Write Effective Letters to Opposing Counsel*, *Trial* 70 (June 2002).
- *When Your Boss Wants it the Old Way*, 64 *Tex. B.J.* 124 (Feb. 2001).
- *The Bold Synopsis: A Way to Improve Your Motions*, 63 *Tex. B.J.* 1030 (Dec. 2000).

Online seminars hosted at <www.cleonline.com>

- *Legal Writing: Better Letters and Emails*
- *Legal Writing: Ethical Legal Writing*
- *Legal Writing: Myths About Plain English*
- *Legal Writing: Improving the Language of Jury Instructions*

Presentations

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- Texas Court of Criminal Appeals
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SOME THINGS EVERY LEGAL DRAFTER SHOULD KNOW

I. INTRODUCTION

The main theme underlying this paper is that legal drafting is a high-level skill that its practitioners should take more seriously. These quotations make my point well:

It is difficult to convince the profession in general that drafting is a special skill that requires intense application.

Robert C. Dick, *Legal Drafting* 4 (2d ed., Carswell Co., Ltd 1985).

[E]very lawyer occasionally gets involved in legal drafting of some sort—even if it’s only a settlement agreement—and every lawyer should become familiar with these principles.

Bryan A. Garner, *Legal Writing in Plain English* 89 (U. Chicago Press 2000).

In this paper I offer ten topics that every professional drafter should be aware of.

First off, though, let me clarify that I am using the term *drafting* in a narrow and specific way to refer to the writing of instruments, agreements, and rules. I do not use the term *drafting* to refer to the writing of letters, memos, briefs, or court documents. Drafting is a specialized type of legal writing—a field in itself.

II. TEN THINGS

1. Drafting education, original and continuing.

Many law schools do not offer training in legal drafting. Those that do offer it usually do so as a small part of the first-year course in legal research and writing. That course focuses on analytical and persuasive writing, as it should, so legal drafting often receives very little coverage. Only a few law schools offer a required course in legal drafting, and only a few more offer an optional course. Legal-writing expert Joseph Kimble labels the situation a “sickening failure.” Joseph Kimble, *The Many Misuses of Shall*, 3 Scribes J. Leg. Writing 61, 61 (1992).

Why don’t law schools teach drafting? One reason is that gaining expertise in legal drafting and then teaching it are tedious activities. The subject is a little dry. For most writing professors, given a choice between teaching an advanced course on persuasive writing or an advanced course on legal drafting, they’ll choose to teach persuasive writing. It’s more interesting; it allows for more literary-style creativity. Drafting, on the other hand, is dull.

Besides, isn’t legal drafting “just forms”? That’s what one of my students said when I asked why students

did not insist on legal-drafting courses. That perception is strong. Too many lawyers believe that legal drafting in practice means finding a form and changing the names and dates. But it’s not that easy.

Legal drafting is an academic subject like any other: torts, trial practice, mediation. It is a subject worthy of independent study and practice. It has a history, it has a literature, it has experts, and it has a future: yes, legal drafting changes. It evolves. And it’s evolving rapidly today.

Those who draft legal documents daily in their practice ought to make legal drafting a pursuit. They ought to stay current. They ought to know the best sources in the field and the names of the experts. They ought to commit to learning all they can about legal drafting. Those who draft only occasionally—and that’s nearly all lawyers—should learn about the field as well, though they might be excused from the same level of commitment.

To succeed in the pursuit of legal-drafting expertise, a lawyer will need to do these things.

A. Know the names in the field

Once you make the commitment to study up on legal drafting, you’ll begin to recognize the names of the experts in the field. I’m taking a bold stance here, but I say that anyone who drafts legal documents for a living ought to at least know who these people are. The first three are dead, but their influence survives:

Thomas Haggard

This law professor is the author of five books on legal writing, three of them devoted to legal drafting. His *Legal Drafting in a Nutshell* is an excellent book that, despite the simple-sounding title, will benefit any legal drafter, no matter how experienced.

David Mellinkoff

The author of *The Language of the Law* devoted much of his career to the history of legal words and provided great insights for legal drafters. If you run across a troubling legal word, Mellinkoff probably has a history of it in his book. His views on forms and litigation-tested legal language were ahead of their time and are still not known widely enough.

Rudolf Flesch

The guru of readability had a lot to say to lawyers who must draft for nonlawyers, and most of it is not kind. If you draft legal documents that nonlawyers must read and understand, whether website disclaimers, hospital regulations, or insurance policies, Flesch will help. Get his book *How to Write Plain English*.

These next three legal-drafting experts are working today:

Ken Adams

Probably the most informed and experienced legal-drafting expert working today. I think every lawyer who drafts should have his book, *A Manual of Style for Contract Drafting*.

Joseph Kimble

Professor Kimble is the leading expert on plain English in the United States. He has published a dozen articles on the subject and is the Editor-in-Chief of the *Scribes Journal of Legal Writing*. He has also served as a drafting consultant on several projects, most notably the re-draft of the Federal Rules of Civil Procedure. Professor Kimble always backs up what he says with research and reliable authorities, so any one of his articles is like a primer on good legal drafting. For starters, I recommend these:

- *Answering the Critics of Plain Language*, 5 *Scribes J. Leg. Writing* 51 (1994–1995).
- *Plain English: A Charter for Clear Writing*, 9 *Cooley L. Rev.* 1 (1992).
- *The Great Myth that Plain Language is not Precise*, 7 *Scribes J. Leg. Writing* 109 (1998–2000).
- *Writing for Dollars, Writing to Please*, 6 *Scribes J. Leg. Writing* 1 (1996–1997).

Bryan Garner

A leading expert on legal writing, legal drafting, and legal usage, Garner's name is one to know in legal-writing circles. His *Dictionary of Modern Legal Usage* contains more good legal-drafting advice than many books devoted entirely to legal drafting.

B. Know the sources

Besides knowing the experts, you should know and study the best sources. There are not a lot of great books on legal drafting, but here are a handful I recommend:

- Barbara Child, *Drafting Legal Documents: Principles and Practices* (2d ed., West 1992).
- Bryan A. Garner, *Guidelines for Drafting & Editing Court Rules*, 169 *F.R.D.* 176 (1996).
- Howard Darmstadter, *Hereof, Thereof, and Everywhereof: A Contrarian Guide to Legal Drafting* (ABA 2002).
- Kenneth A. Adams, *A Manual of Style for Contract Drafting* (ABA 2004).
- Thomas R. Haggard, *Legal Drafting in a Nutshell* (2d ed., West 2002).

- *Negotiating and Drafting Contract Boilerplate* (Tina L. Stark, ed., ALM Pblg. 2003).

I urge you to treat legal drafting as a crucial professional skill.

2. Forms: consistency, accretion, and style.

Should legal drafters even use forms?

Yes. They're a necessity. No legal drafter can get by in a typical practice today without using forms. The time and expense of drafting everything from scratch would be enormous. That's why better legal drafters know that it's not *whether* you use forms, but *how*. Forms have at least four drawbacks.

First, forms foster haste and laziness because they can be used so easily. David Mellinkoff said that "[t]hey are a quick, cheap substitute for knowledge and independent thinking." David Mellinkoff, *Legal Writing: Sense and Nonsense* 101 (West 1982). For example, if the current transaction seems the same as a previous transaction, the "form" from the earlier transaction can be converted into a draft for this transaction very quickly. It really is just a matter of changing the names and the dates. But just because it can be done quickly does not mean it should be. The belief that any form can be adapted to a new transaction quickly isn't wrong, but it produces a sense of ease—often a false one. That sense of ease is one of the biggest drawbacks of forms.

Second, forms often contain outdated language and formats. A cardinal rule: you might trust the form to be right on the law or the necessary terms, but you shouldn't trust the form to be well drafted. According to Thomas Haggard, "[t]he best thing about [form] books is often not the language they suggest for specific provisions (which is usually atrocious), but rather the factual checklists they contain." Thomas R. Haggard, *Contract Law From a Drafting Perspective* 10–11 (West 2003). In truth, forms are notorious for wordy, archaic usage and for excessive formality.

Third, forms often contain language and provisions created by several different drafters. The result is a patchwork of legal-drafting styles. That may not seem such a terrible thing in a genre of writing that Kimble says is supposed to be "devoid of any writer's voice." Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, 8 *Scribes J. Legal Writing* 39, 52 (2002). But the problems run deeper than voice: "[V]erbatim inclusion of a clause lifted from someone else's document can and will create anomalies of style that not only offend the artistic sensibilities . . . but frequently lead to confusion and ambiguity." Sidney F. Parham, Jr., *The Fundamentals of Legal Writing* 16–17 (Michie Co. 1967). The original drafter of a term or provision in your form may have been representing a completely different type of client or may have been working under now-

unknown constraints. A form might contain language from different stages of a transaction or from different stages of several transactions.

Fourth, forms often contain unnecessary terms, irrelevant language, and problems of accretion. In other words, as Howard Darmstadter says, lawyers never seem to cut language from a form; they only add: “Forms tend to grow by accretion, with many persons adding paragraphs and clauses without much understanding of what has gone before. The result is frequently a form whose numerous intricacies and subtleties are invisible to all sides.” Howard Darmstadter, *Hereof, Thereof, and Everywhereof* 28 (ABA 2002). Besides, it gets longer and longer and looks worse and worse. Consider this example from *Working with Contracts* by Charles M. Fox; he calls it “accretive drafting”:

[2a] Issuer shall not pay any dividends or make any distributions in respect of Capital Stock, or repurchase, redeem or otherwise acquire for value any Capital Stock.

First a parenthetical is added (accretions are italicized):

Issuer shall not pay any dividends or make any distributions in respect of Capital Stock (*except for dividends paid in additional Capital Stock*), or repurchase, redeem or otherwise acquire for value any Capital Stock.

Then a proviso is used to tack on more language:

Issuer shall not pay any dividends or make any distributions in respect of Capital Stock (except for dividends paid in additional Capital Stock), or repurchase, redeem or otherwise acquire for value any Capital Stock, *provided, however, that Issuer may repurchase Capital Stock from members of management in an amount not to exceed \$1 million in any year.*

And a second proviso is added. The paragraph is now much more difficult to digest:

Issuer shall not pay any dividends or make any distributions in respect of Capital Stock (except for dividends paid in additional Capital Stock), or repurchase, redeem or otherwise acquire for value any Capital Stock, *provided, however, that Issuer may repurchase Capital Stock from members of management in an amount not to exceed \$1 million in any year, and provided further, that such repurchases shall not be permitted at any time an Event of Default has occurred and is continuing.*

Charles M. Fox, *Working with Contracts* 77 (Practising L. Inst. 2002).

Despite the risks, drafters will continue to use forms and use them a lot. So whether you are using a commercial formbook or a previous draft from a colleague, here are four recommendations for using forms.

A. *Never include language you don’t understand.*

It may seem like common sense, but it’s common sense many young lawyers ignore. Certainly, the drafter thinks, this language is in there for a reason—a good reason. So find the reason, whether it means researching the law, researching the drafting guides, or asking your supervisor. As Bryan Garner advises, if you don’t understand what certain language in the form means or why it is there, you’d better gain the understanding or leave it out. See Bryan A. Garner, *Legal Writing in Plain English* 117–119 (U. Chicago Press 2000).

B. *Edit and revise thoroughly.*

Naturally you will edit and revise the forms you use. But my point is that you should edit and revise not just to adapt the form to the current transaction, but also to adapt the form to your own drafting approach. Make the document your own. Master it. Eliminate the inconsistencies and the irrelevant provisions. Integrate the accretions into the draft coherently.

C. *Preserve a “starting place” form.*

What form should you use to begin the negotiations for a transaction? Too often, lawyers use a form from a previous transaction, in the form it was signed. That may not be the best form to start with. A form that was actually used to close a transaction is the product of negotiation, of give and take, and—most likely—of a power struggle. It may not be a good starting place.

So experts recommend that you use a “starting place” form. Kenneth Adams suggests using “whenever possible, the first draft of an agreement.” Kenneth A. Adams, *Legal Usage in Drafting Corporate Agreements* 132 (Quorum Books 2001). He suggests that the best document to work with might be the first version that was sent to the other side in a previous transaction. *Id.* By starting with that form, you might be spared reading, comprehending, and editing the myriad changes that certainly occurred during the last transaction’s negotiations.

D. *Learn to draft from scratch when you have to.*

Take advantage of your chances to draft without a form. Contrary to conventional wisdom, there is *not* a form for everything. When you don’t have a form, apply

the knowledge you have gained from studying legal drafting to create modern, professional-level drafts.

Even when you're using a form, question it. See Bryan A. Garner, *Securities Disclosure in Plain English* 25 (CCH 1999). If you see form language that seems outdated, poor, or wrong, fix it. A great way to improve your drafting is to identify the problems in forms and fix them. Apply the drafting knowledge you are gaining by improving every form you use.

3. Legal-drafting myths.

Legal drafting has its own mythology, and two myths more than any others have contributed to the style of legal drafting. These are the myths that legalese is more precise than other types of writing and that legalese eliminates ambiguity. Depending on how you look at it, these myths either (1) support the precise and unambiguous legal drafting we see today or (2) prevent legal drafting from becoming clear and functional. I'm behind number 2.

No language, let alone legal language, can ever be perfectly precise or perfectly unambiguous. Numerous authorities have suggested this truth for years. I address both myths below.

A. Ambiguity

Consider these quotations from the experts:

Ambiguity, despite what many lawyers seem to believe, inheres in all writing.

Bryan A. Garner, *A Dictionary of Modern Legal Usage* 48 (2d ed., Oxford U. Press 1995).

Elaboration in drafting does not result in reduced ambiguity. Each elaboration introduced to meet one problem of interpretation imports with it new problems of interpretation.

Bayless Manning, *Hyperlexis and the Law of Conservation of Ambiguity*, 36 Tax Law. 9 (1982), cited in Howard Darmstadter, *Hereof, Thereof, and Everywhereof* 29 (ABA 2002).

Unfortunately, every text, no matter how carefully constructed, is inherently ambiguous. We always depend upon a reasonable reader to make a reasonable interpretation, supplementing from context and common sense where necessary.

Ronald L. Goldfarb & James C. Raymond, *Clear Understandings* 91 (West 1982).

Ambiguity means that a single word, phrase, or provision is capable of two different meanings. Ambiguity is different from vagueness, which means a lack of specificity. Ambiguity is highly undesirable in legal drafting and should never be intentionally included. Vagueness, on the other hand, may be desirable or necessary.

Ambiguity: The buyer must pay the contract price by 12:00. (Noon or midnight?)

Vagueness: The buyer must pay all reasonable shipping costs. (What is reasonable?)

Given that ambiguity is likely to arise despite the efforts of the legal drafter, what should we do about it? Two things:

First, keep trying to be as clear as possible. Read and re-read your draft to find ambiguities. Where possible, eliminate them. Avoid excessive elaboration, which invites ambiguity.

Second, be aware of some common types of ambiguities. Two common types involving modifying words and phrases are discussed in section II.7 of this paper. For a thorough discussion of ambiguities, see Haggard's *Legal Drafting in a Nutshell*, pages 105–152. Of particular note are these:

and/or

Often criticized by judges, this phrase has caused many headaches. Experts recommend deciding which you mean—*and* or *or*—or using “A or B or both.”

not . . . because

A negative construction followed by *because* can be ambiguous. For example: “Buyer cannot reject goods because of prior contractual obligations.” This could mean either (1) because of prior contractual obligations, Buyer cannot reject the goods, or (2) Buyer cannot reject the goods despite contract prior contractual obligations. Choose one.

provided that; provided, however that

Experts have criticized provisos because they can create exceptions, additions, or conditions. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 710 (2d ed., Oxford U. Press 1995). Be precise about which you mean.

until

In a provision that “buyer has until January 15, 2004, to reject the goods,” may the buyer reject on January 15? Courts are not uniform in their responses. Better to say “before January 16” or “on or before January 15.”

B. Precision

Here the myth is that legalese is more precise than everyday English. Often, this myth rests on the idea that many legal words are terms of art. That's not true; terms of art are fairly rare, according to Mellinkoff. David Mellinkoff, *Legal Writing: Sense and Nonsense* 7, 201–203 (West 1982). Sometimes the myth rests on the idea that legal words have been construed by a court and given clear meanings. Mellinkoff debunks that myth effectively, too. In *The Language of the Law*, he refers to *Words and Phrases*, where judicial definitions of words are collected, as an “impressive demonstration of lack of precision in the language of the law.” David Mellinkoff, *The Language of the Law* 375 (Little, Brown & Co. 1963).

So get it out of your head that legalese is more precise than everyday English. Usually, it's not. And question the archaic legalisms in your documents. Here's what the experts say:

Modern, plain English is as capable of precision as traditional legal English.

Peter Butt & Richard Castle, *Modern Legal Drafting* 95 (Cambridge Univ. Press 2001).

The truth is that many people, lawyers included, buy into the fallacy that there must be a great deal of precision in legalese.

Bryan A. Garner, *A Dictionary of Modern Legal Usage* 580 (2d ed., Oxford U. Press 1995).

Legal drafters tend to use portentous language that smacks of spurious accuracy. Most of this language could easily be replaced with more familiar words. It gives a document the appearance of a special or technical meaning that it does not, in fact, have. Even among lawyers themselves, ponderous language may create an illusion of precision.

Carl Felsenfeld & Alan Siegel, *Writing Contracts in Plain English* 144 (West Publ. Co. 1981).

4. Sentence length and density.

Legal drafters create too-long and too-dense sentences for two reasons.

First, some legal drafters believe the ancient myth that all the qualifiers to a single idea must be in the same sentence as that idea. You don't have to take my word for the falsity of this notion; the experts know better:

When a general statement is subject to an exception or two, why do drafters feel that the

exceptions must be packed into the same sentence as the general statement?

Howard Darmstadter, *Hereof, Thereof, and Everywhereof* 41 (ABA 2002).

They think that in order to achieve clear understandings, they must stuff every related idea into a single sentence between an initial capital letter and a final period. They are, of course, wrong.

Ronald L. Goldfarb & James C. Raymond, *Clear Understandings* 47 (West 1982).

Often, overlong sentences are the result of the drafter attempting to address, in one fell swoop, all facets of a given provision by stringing together clauses that could constitute sentences in their own right and piling on exceptions, qualifications, and conditions. Breaking such sentences down into their constituent components often makes them easier to read and does not affect meaning.

Kenneth A. Adams, *Legal Usage in Drafting Corporate Agreements* 123-124 (Quorum Books 2001).

Second, many lawyers are simply in the habit of drafting long sentences. They are used to seeing them in other agreements and in judicial opinions. They are used to reading sentences packed with too much information. And they are used to writing long sentences—not least through accretive drafting in forms.

The best way to fix long sentences is to break them up. Decide on a sentence-length goal—25 to 30 words per sentence is great for legal drafting—and then use your word processor to calculate the average sentence length of your draft. If it comes in at 35 or 40, get to work breaking up the longest sentences.

Another way to fix both sentence length and sentence density is to keep ideas parallel or to number or tabulate them. That way, even if the grammatical sentence is long, the reader still has a chance of following it. For example:

If gas produced from the leased premises is processed in a hydrocarbon recovery plant for the recovery of liquid hydrocarbons, and if such plant is not owned in whole or in part by lessee or by any subsidiary or affiliate of lessee, and if lessee receives plant products or revenue attributable thereto or other benefits therefrom, then lessor shall receive the applicable royalty percentage of the market

value of all such plant products, revenue and other benefits received by lessee or any subsidiary or affiliate of lessee attributable to gas produced from the leased premises, and, in addition thereto, the applicable royalty percentage of the market value of all residue gas at the point of sale.

This provision has 116 words per sentence. That is, it is a single sentence of 116 words. Look what happens when we break it up (and re-order it):

1. If gas produced from the lease premises is processed in a hydrocarbon-recovery plant for the recovery of liquid hydrocarbons, then—
 - (a) the lessee must pay the applicable royalty percentage of the market value of all plant products, revenue, and other benefits received by lessee—or any subsidiary or affiliate of lessee—attributable to gas produced from the leased premises, and
 - (b) the lessee must also pay the applicable royalty percentage of the market value of all residue gas at the point of sale.
2. But lessee must pay the amounts in 1(a) and 1(b) only if—
 - (a) the lessee receives plant products or revenue attributable to the hydrocarbon-recovery plant or other benefits from the hydrocarbon-recovery plant,
 - (b) the hydrocarbon-recovery plant is not owned in whole or in part by lessee or by any subsidiary or affiliate of lessee, and
 - (c) the lessee receives plant products or revenue attributable to the hydrocarbon-recovery plant or other benefits from the hydrocarbon-recovery plant.

This provision now has 23 words per sentence. As you can see, if you reduce sentence length and density, you'll get three benefits:

First, you and the other lawyers working on the document will be better able to read and understand it.

Second, the nonlawyers who must operate under the document or carry it out will be better able to read and understand it.

Third, by breaking up sentences, you'll naturally eliminate some ambiguity and confusion, and you'll probably notice and be able to cut some inconsistencies and irrelevancies. Besides, as writing expert Steven Stark says, "The more complicated your information is, the shorter your sentences should be." Steven D. Stark, *Writing to Win: The Legal Writer* 33 (Main Street Books 1999).

5. Words of obligation.

When drafters want to impose obligations on a party, they have many options. That's one of the main problems with words of obligation: too many options. Because there are so many options, adequate legal drafters create inconsistency and confusion in words of obligation.

A. Consistency

For example, all of the following words and phrases were used to impose contractual obligations on the parties in a contract I recently reviewed.

Party agrees . . .

Party shall . . .

Party promises . . .

Party will . . .

Party shall be paid . . .

It is expressly agreed that . . .

It is understood and agreed by the Parties that . . .

This inconsistency is surprising once it's pointed out. It invites questions:

- Why use a different term for the same action—imposing an obligation on a party?
- What is the difference between "agreeing" and "expressly agreeing"?
- What is the difference between saying that a party "will" and a party "shall"?
- Is there an argument that the different terms imply different types of obligations—some stronger than others?

Despite these obvious questions, inconsistencies like this are present in many drafted documents. To avoid inconsistencies like these, better drafters select a single word or phrase to use when imposing obligations. You then have two options.

(1) Find every place that an obligation is imposed and replace inconsistent language with your preferred term.

(2) Reorganize the document so that all the obligations of one party are in one place and then lead-in to those obligations with your preferred term. It might look like this.

1. Buyer's obligations . . . buyer agrees to—

(a) Pay the purchase price . . .

2. Seller's obligations . . . seller agrees to—

(a) Deliver the goods . . .

Most agreements are organized by topic or subject matter and not by party obligations. Organization by

topic makes sense for the drafter, who must make sure that all the topics are covered. But it may not make sense for the users, who are probably most interested in what their obligations are.

B. *Shall*

The other problem that arises because drafters have so many choices for words of obligation is that some drafters choose to use *shall*. But most of them use it incorrectly.

Did you know that *shall* is the most misused word in all of legal language? It is. In the current edition of *Words and Phrases*, *shall* itself is followed by 109 pages of case squibs, and *shall* phrases cover 45 more pages. *Words & Phrases* vol. 39, 111–196 (West 1953); *Words & Phrases* vol. 39 108–168 (West Supp. 2003). This ought to tell us that there are problems with the word, yet its misuse is one of the most heavily repeated errors in all of law.

When *shall* is used to describe a status, to describe future actions, or to seemingly impose an obligation on an inanimate object, it's being used incorrectly. For example:

Status: "Full capacity" shall have the meaning . . .

Future action: If . . . then the contract price shall be increased . . .

Faulty imposing of obligation: The remaining oil shall be sold by lessee . . .

To correctly use *shall*, confine it to the meaning "has a duty to" and use it to impose a duty on a capable actor. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 940–941 (2d ed., Oxford U. Press 1995). These examples show how:

Lessee shall sell the remaining oil . . .

Lessee [an actor capable of carrying out an obligation] shall [has a duty to] sell the remaining oil . . .

Meticulous use of *shall* may not seem worth it. After all, we know what we mean when we use it, right? It imposes an obligation on the lessee to sell the remaining oil. But consider this provision, which was litigated in a child-support case:

The Respondent shall pay 26% of his monthly net income to the Petitioner as child support. Beginning in the year 2000, Petitioner shall receive 26% of all bonus checks.

Does the Respondent have an obligation to pay 26% of the bonus checks to the Petitioner? The language, taken literally, does not impose that obligation. Instead, it strangely imposes an obligation on the Petitioner to *receive* the money. Naturally, the court ruled that the Respondent had to pay 26% of the bonus checks.

The drafting error here may seem to be a misplaced obligation, but I believe that the misplaced obligation resulted partly because of a misunderstanding of *shall*.

Also, note two other things. To reach its ruling, the court had to disregard the literal language of the provision—much to the relief of the drafter. And the Petitioner had to spend time and money litigating the issue—much to the chagrin of the drafter.

6. Poor sentence structure.

Two common sentence weaknesses merit special attention here.

A. *Passive voice*

First is the passive-voice construction. Its main drawback in other writing appears in drafting, too: it can obscure the actor in a sentence. When a drafted document seeks to impose obligations, obscuring the actor is unwise. In the following examples, we may be able to figure out who bears the obligations, but we shouldn't have to.

The oil and gas royalties shall *be paid* to lessor in accordance with the requirements of section 2.3(a) . . . [paid by whom?]

Before any work is commenced, permits shall *be secured* for all swimming pools and for the safety barriers . . . [who must secure them?]

I consider this shoddy drafting.

Sometimes, when naming the actor or actors would be superfluous or would require a long list, the passive voice might be acceptable.

All speech and assembly activities must *be conducted* in accordance with the provisions of this Chapter . . .

This is acceptable because revising to name the actor would be difficult:

Students, faculty, staff, and anyone subject to these regulations must conduct all speech and assembly activities in accordance with the provisions of this Chapter . . .

But try this:

This Chapter governs all speech and assembly activities . . .

B. *Nominalizations*

The second problem that infects sentences in legal drafting is the nominalization. By using a long noun instead of a shorter verb form of the same word, drafters create not only longer sentences and drier text, but they also sometimes obscure the actor. Kenneth A. Adams, *Legal Usage in Drafting Corporate Agreements* 125 (Quorum Books 2001). Again, obscuring the actor is rarely desirable in legal drafting.

Nominalized: Upon release of the Confidential Information . . .

Better: If Recipient releases the Confidential Information . . .

Nominalized and passive: If payment of the Deferred Amount is requested . . .

Better: If First Bank requests that Borrower pay the Deferred Amount . . .

7. **Misplaced modifiers and the doctrine of the last antecedent.**

Ambiguously placed modifying words and phrases cause much litigation of drafted documents. Avoiding two modifying errors will save your drafts from the most common problems.

A. *Modifier after list*

The first problem is listing two or more items and then adding a modifying phrase after the list, like this:

Officers and directors who are minority shareholders must . . .

- Does the phrase “who are minority shareholders” modify both *directors* and *officers*? In other words, must the officers also be minority shareholders?

Corporations and partnerships with offices in Texas may . . .

- Does the phrase “with offices in Texas” modify both *partnerships* and *corporations*? In other words, must the corporations also have offices in Texas?

My informal surveys of lawyers tell me that most of us instinctively think the modifying phrase applies to both antecedents. But the law has a canon of construction

called the doctrine of the last antecedent; it holds that the modifying phrase relates only to the last or immediately preceding item. Under that doctrine, these examples would be construed this way:

Officers must . . . [and]

Directors who are minority shareholders must . . .

Corporations may . . . and

Partnerships with offices in Texas may . . .

The better practice is to clarify what you mean. Separate the phrases if the modifier applies only to the last antecedent. Repeat or tabulate if the modifier applies to all the items listed.

Repeat: Officers who are minority shareholders and directors who are minority shareholders must . . .

Repeat: Corporations with offices in Texas and partnerships with offices in Texas may . . .

Tabulate: Any of the following who are also minority shareholders must . . .

- (a) officers, and
- (b) directors.

Tabulate: Any of the following with offices in Texas may . . .

- (a) corporations, and
- (b) partnerships.

Better drafters should not rely on the doctrine of the last antecedent to resolve their poorly placed modifiers.

In fact, legal drafters should not rely on the canons of construction much at all. The truth is that the canons of construction are not binding law; they are merely suggestions or guidelines. Judges may employ them or not, depending on the result they want to reach. Besides, for every canon of construction, there is a countervailing canon. For example:

If language is unambiguous, its plain meaning should be applied *unless doing so would be unjust*.

Better legal drafters create clear and careful documents without paying great heed to the canons.

B. *Modifier before list*

The second problem that arises from modifiers is the opposite: the placement of a modifier before a list of items.

The trustee may distribute funds to nonprofit corporations and associations.

- Must the associations also be nonprofit? Or may the trustee distribute funds to any association?

As with the other modifying problem, this one can be fixed easily. Decide what you mean and then repeat or tabulate.

Repeat: The trustee may distribute funds to nonprofit corporations and nonprofit associations.

Tabulate: The trustee may distribute funds to nonprofit—

- (a) corporations, and
- (b) associations.

Tabulate: The trustee may distribute funds to—

- (a) nonprofit corporations, and
- (b) associations.

8. Synonym strings.

In many drafted documents you'll find synonym strings, either in pairs or in longer groups. Most of them are unnecessary. They not only impair reading but also invite problems of construction: if you used four different words, you must have meant four different things. And experts agree that including synonym strings without a good reason—just in case—is lazy drafting.

The better approach is to look at the string and ask yourself if the words are redundant (consult a dictionary if you need to). If they are redundant, cut all but the one you want. If they are not redundant, ask yourself if you need them all. If not, cut. But if you do need them, ask yourself one more question: is there a single word that would cover all the meanings you need? If so, use it.

Common redundant synonym strings:

[Instead of this phrase]

- use this word]

above and foregoing

- above, or name the specific location

any and all

- pick one

by and between

- between

ordered, adjudged, and decreed

- ordered

true and correct

- accurate

understood and agreed

- If you mean that the party both understands and agrees, fine. Usually you just mean *agrees*.

will and testament

- will

Four more from drafting-expert Kenneth Adams (*Legal Usage in Drafting Corporate Agreements* 100–102.)

interpreted, construed, and governed by

- governed by

power and authority

- power

right, title, and interest

- interest

sell, convey, assign, and transfer

- sell

9. Archaisms.

Elizabethan English (that's the 1500s) survives in today's drafted documents. Usually it has been carried along in a form through generations of drafters either afraid to remove it or believing that it serves some vital legal purpose. Generally, archaisms impair understanding and create problems of ambiguity or vagueness. Here are my comments on the worst.

aforesaid, aforementioned, foregoing

Old and imprecise. If you are referring to something that has gone before, name it specifically or describe exactly where to find it.

herein, therein, and the like

Old and vague. For example, *herein* has 22 case squibs in *Words and Phrases*, and they bear out the opinions of the experts that *herein* is vague. *Herein* has been held to refer to a whole will, a provision in a will, a covenant in a deed, two granting clauses in a deed, a whole statutory act, a chapter of an act, an article of an act, and particular paragraphs of an act. 19A *Words & Phrases* 24–25 (West 1970 & Supp. 2003).

know all men by these presents

Should not be used in professional legal drafting.

to wit

Usually, you can replace this archaism with a colon.

whereas in recitals

All the experts are against *whereas* recitals. Just state what you have to state and call it *background*, or even *recitals*. Do not string together a series of paragraphs beginning with *whereas*.

wherefore premises considered

Unnecessary. Better drafters have eliminated this from their drafts for decades.

witnesseth

It is “archaic and inane” according to Kenneth Adams (*Legal Usage in Drafting Corporate Agreements* 11-12).

10. Numbers.

Here are a few suggestions specifically for legal drafting.

A. Doubling numerals and text.

Many drafters duplicate numbers by using both numerals and text, like this:

The board has a quorum if five (5) members are at the meeting.

- This sentence came from a letter, not a binding document. The doubling is pointless. How does it help the document?

Applicants must file the request within sixty (60) days.

- This sentence came from a government regulation. The doubling seems more appropriate here, though I can’t say why. I wouldn’t do it.

The purchase price is three hundred ten and 76/100s dollars (\$310.76).

- This sentence came from a contract. In contracts, doubling probably arose from a desire to prevent forgery. Forgery is unlikely in a printed document, though, so the experts recommend against doubling.

Don’t double the numbers in an effort to force yourself to double-check all the numbers. Do the double-checking anyway, but don’t double the numbers: you’re giving yourself twice as many chances to make a mistake.

B. Numbering.

I prefer to use strictly Arabic numbers and to avoid Roman numerals (XIX) and romanettes (viii).

Decimal-point numbering systems are a common and excellent approach. Here is one possible system:

- Section 1 (section—should also contain title)
- 1.1 (subsection—may also contain heading)
- (a) (paragraph—may also contain heading)
- (1) (subparagraph)
- (A) (clause)

Finally, better drafters avoid leaving unnumbered text, often called “dangling” or “flush-left” text.

1.1 Royalties.

- (a) The Publisher will pay the Author a royalty on all net sales of the book or any revision done by the Author. The royalties are
 - (1) payable semi-annually based on the date of this contract;
 - (2) paid at 10% for 1–500 copies sold, 15% for 501–1000 copies sold, and 20% for 1001+ copies sold.

The Publisher may deduct from royalties the cost of any Author’s alterations or corrections in the galleys and page proofs that exceed 10% of the cost of setting the type.

To refer to the last paragraph, you must say “the paragraph after 1.1(a)(2).” That’s awkward, so don’t leave unnumbered text dangling in this way.

III. CONCLUSION

Keep these ten ideas in mind on every drafting project, and you’ll distinguish yourself among legal drafters.