

Real World Document Drafting®: A Dispute-Avoidance Approach

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This case affords another example of the occult science of drafting big contracts for big undertakings in which elaborate recitals, detailed descriptions and nice definitions, cautiously conjunctive and disjunctive statements and restatements, wondrously complex formulae, deftly balanced essential and nonessential, superior and subordinate stipulations, exceptions and exclusions and provisos, intricately interwoven references back and references forward, multicolored exhibits, and artistically arranged divisions and subdivisions, often crowd out the few plain words that would settle beyond argument the intent of the parties on some fundamental aspect of the agreement.¹

... language is something more than a tool of thought. It is part of the process of thinking.²

...courts give relief against actionable wrongs only and not against improprieties or unsportsmanlike conduct....³

A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used.⁴

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¹ District Judge J. Skelly Wright, *Illinois Cent. R.R. Co., et al. v. Gulf, Mobile & Ohio R.R. Co.*, 191 F.Supp. 275, 276 (E.D. La. 1961), *aff'd*, 308 F2d 374 (5th Cir. 1962), referring to a contract entered into between the City of New Orleans and various railroads for the construction, financing and operation of the Union Passenger Terminal at New Orleans. The issue that was not addressed directly in the 190-page agreement was whether a railroad was obligated to continue to pay its proportionate share of maintenance and operation expenses of the terminal for the 50-year term of the agreement. after it discontinued operations in the region .

² Arthur Littleton, *The Importance of Effective Legal Writing in Law Practice*, 9 Student Lawyer 6 (1963), quoted by Reed Dickerson in the forepage of *The Fundamentals of Legal Drafting* (Little, Brown & Co, 2d ed 1986).

³ District Judge Stanton, *Sharma v. Chemical Bank* , 723 F.Supp. 200, 201 (S.D.N.Y. 1989) *aff'd*, 916 F2d 820 (2d Cir. 1990), *cert. denied*, 499 U.S. 907 (1991). Cf. Item 4.4, Good Faith and Fair Dealing.

⁴ Justice Holmes, *Towne v. Eisner*, 245 U.S. 418, 425 38 S.Ct. 158, 62 L.Ed. 372 (1918). Cited in reporter's note comment b to Restatement Contracts (Second) § 201. See Robert Braucher,

2 Real World Document Drafting, Second Edition

1.0 Introduction

1.1 Description of Subject Matter

This book deals principally with drafting of “deal” documents. These include acquisition, merger and property settlement agreements⁵ and other transactional documents; employment agreements, product distribution, franchise, licensing, sales representative and agency agreements and other relational documents;⁶ wills and trust instruments; condominium and homeowner association declarations, master deeds and related by-laws; reciprocal easement agreements (REAs), easements,⁷ real estate sales, lease and development agreements and other real estate documents; and statutes and regulations. Other than for comparison purposes, this book will not deal directly with informative or persuasive writings such as briefs, legal memoranda and correspondence other than letter agreements.⁸ The documents considered in this book are often referred to as being “drafted” rather than merely being “written.”⁹ This book will not directly be concerned with pleadings, judicial opinions or other litigation-related documents except that settlement agreements may be considered as a subset of transactional documents.

A primary focus of this book is to sensitize lawyers to avoid interpretive uncertainties in drafting documents and to view the language being used from the

Interpretation and Legal Effect in the Second Restatement of Contracts, 81 Colum. L. Rev. 13, 14 (1981).

⁵ Current-day legal theorists have adopted a view that differentiates between the “contract” and the written memorial of the “contract,” i.e., the document that is intended to include the understandings of the parties that comprises the “contract” itself. See Melvin A. Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 Cal.L.Rev. 1127, 1133-35 (1994). This is one of the reasons this book has been titled “Document Drafting” and not “Contract Drafting.” The *Restatement of Contracts, Second* §1 (1981) defines a “contract” as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”

⁶ “Relational documents” deal with the relationship between parties. See Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. Legal Stud. 271 (1992).

⁷ See Jesse S. Ishikawa, *A Checklist for Drafting Easements*, 21 Prac. Real Est. Law. 7 (Nov. 2005).

⁸ Good document drafting is similar to good persuasive legal writing in that both involve clarity, readability, positioning, knowledge of applicable law, avoidance of ambiguities and issue identification.

⁹ In the preface to *Legal Writing: Sense and Nonsense* (West 1982), David Mellinkoff notes that lawyers “draft” rather than “write” documents. Professor Mellinkoff then discards the analogy to the architectural drafter who uses a ruler and compass and concludes that in the context of legal documents “drafting” is the same as “writing,” although the term “drafting” is considered by some lawyers as an indication of the precision to be sought and by others as a license to ignore the rules of grammar and language that are for mere “writers.” In practice perhaps “drafting” is an appropriate term: one draft after another. Lawyers will refer to “writing” documents of lesser importance (perhaps in context letters, briefs, informal memos and similar materials) and to “drafting” more significant or less transient documents.

point of view of a variety of prospective readers, many of whom are not participating in the preparation of the document and several of whom may be highly motivated to find meaning at variance with what was actually intended by the parties to the negotiation and drafting of the document. As noted by Oliver Wendell Holmes, “Nothing is more certain than that parties may be bound by a contract to things which neither of them intended.”¹⁰

1.2 Authority References in this Book

This book is not intended to be an exhaustive treatise on any subject other than perhaps the author’s experiences in drafting legal documents for over 50 years. Case citations that are provided are included as illustrations with the hope that if a reader is interested in a more extensive consideration of an issue for which one or more cases are cited, the citations that are included will aid the reader in her further research. I have found that once I am able to locate a relevant citation on a particular issue, it is generally not too difficult to go on from there to uncover relevant cases in other jurisdictions. For this reason, I have attempted to refer to cases in various jurisdictions. My citation to a particular case is not to imply that that case is necessarily the lead case on the issue involved.

1.3 Perpetuation of Legal Form

Legal form perpetuates itself by the very nature of the process followed by most lawyers in writing (or is it “drafting”) documents. For a significant portion of each new document, lawyers typically start with a document of mixed ancestry copied either out of a form book or from a document the lawyer or perhaps a colleague used for a prior transaction. An assembly of words is not precise just because it has whiskers, i.e., has been used by generations of lawyers that have copied material written by other lawyers and so forth.

1.4 Adversarial Aspects of Transactional Document Drafting

Although articulate or “precision” writing generally requires the same language skills as persuasive writing, the techniques are quite different. In a transactional document, one generally seeks as clear, unambiguous and precise language as feasible to avoid controversies that might adversely impact upon the

¹⁰ “Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion, no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties’ having meant the same thing but on their having said the same thing.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 463-64 (1897).

FIDIC MDB Conference Brussels Putting Your Money Where Your Mouth Is OR Practising What Your Preach The Funding (or not) of DABs by International Banks Murray Armes 25 June 2012 ©2012 Murray Armes DISPUTE AVOIDANCE FIDIC Contracts are unique Provision for dispute avoidance The Dispute Board is the vehicle for dispute avoidance Dispute avoidance is worthwhile Disputes are costly in money, time, and reputations MDB Contract provides for a Standing Board The MDB Contract promotes dispute avoidance ©2012 Murray Armes WHY USE A DAB? You can add this document to your study collection(s). Sign in Available only to authorized users. Title. The document was about 300 paragraphs long and included sections on social, moral, religious, commercial and civil law. Owing to his reputation in modern times as an ancient law-giver, Hammurabi's portrait is in many government buildings throughout the world. He became the first king of the Babylonian Empire and extended Babylon's control over Mesopotamia by winning a series of wars against the neighboring kingdoms. All of the documented interactions of Hammurabi relate to his role as a king though: he led his armies, engaged in international relations and governed his state, forged clever alliances and practiced patient strategies. 13. As a result most of the scholars tend to regard him as the most dominant and strong personality of the age.