

A REVIEW OF HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING

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Eliminating legalese in and improving clarity of form documents occasionally is an arduous task, but tools are available to assist lawyers in this particular task. Specifically, a new book, *Hereof, Thereof, and Everywhereof – A Contrarian Guide to Legal Drafting* (“*Hereof Thereof*”),² provides comprehensive and insightful legal drafting techniques to business lawyers with a particular emphasis on drafting in “plain English.” *Hereof Thereof*, authored by Howard Darmstadter,³ maintains the central theme that business lawyers should draft legal documents that their clients can easily understand. Darmstadter uses humorous, specific examples to reinforce the principles he covers in the book.

Hereof Thereof is organized into two main sections: “Legal Drafting Generally” and “Legal Documents.” The first section, “Legal Drafting Generally,” is organized into three subsections: “Words,” “Untangling the Legal Sentence,” and “The Look of the Document.” The first subsection, “Words,” is not written to be a comprehensive guide to word choice or usage; it merely presents suggestions for legal drafters. This subsection is useful in that it identifies commonly used legalese, an impediment to a layperson’s comprehension, and the subsection suggests more plain language alternatives. For example, the word “thereof” as it is used to describe the companies and its officers can be replaced with “the company and its officers.”

The second subsection, “Untangling the Legal Sentence,” provides strategies to simplify the sentence structure of legal documents. Operating from the premise that the wording in most legal documents is necessary, Darmstadter focuses his suggestions on organizing these sentences into sections and subsections so that they may be easily understood. The last subsection, “The Look of the Document,” compares and contrasts the effectiveness of using fonts, capitalization, and

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² HOWARD DARMSTADTER, *HEREOF, THEREOF, AND EVERYWHEREOF – A CONTRARIAN GUIDE TO LEGAL DRAFTING* (ABA 2002).

³ Darmstadter, Ph.D. Princeton University, J.D. Harvard University, was a college professor before beginning his legal career and has been published in *Business Law Today*, *The Business Lawyer*, and *The Uniform Commercial Code Law Journal*. Darmstadter currently is employed by Citigroup, Inc.

justification. Perhaps his most radical suggestion involves the use of capitalization. For example, he suggests that legal drafters not use capital letters or words in the definitional section of agreements because capitalized words impair readability by overemphasizing words that are unimportant.⁴ To bolster his argument, Darmstadter points out that the Uniform Commercial Code does not capitalize definition terms.⁵

The second section, “Legal Documents,” offers suggestions on how common legal documents can be better organized or drafted. The section is organized into six subsections: “Agreements,” “Boilerplate,” “Explaining with Examples,” “Fun (and Grief) with Algebra,” “The Securities Prospectus,” and “Supporting Players.” The first subsection, “Agreements” suggests that agreements be organized “like news articles—the most important stuff is at the beginning, the least important stuff at the end.”⁶ Darmstadter believes that agreements should be structured according to the interests of the client and that the organization of the deal need not be static. He suggests the definitions section should always be last because it is the least important to the client.

The subsection on boilerplate provisions provides strategies for editing standard provisions. Darmstadter argues that eliminating legalese and simplifying sentence structure improve boilerplate provisions. However, he cautions lawyers not to tamper with provisions that they do not understand. Rather, as a professor of contract drafting at the University of Tennessee College of Law states: “We never have [language] in a provision because we do not understand its purpose, and we never take out [or modify] a provision because we do not understand its purpose. First, ... figure out its purpose. Then determine whether it should be retained, deleted, or modified.”⁷

The subsection that deals with examples suggests that lawyers include examples to explain how provisions within an agreement operate. Darmstadter compares the legal drafter to a computer programmer, who takes a stated goal and uses computer language to instruct a computer to meet that goal. Likewise, business lawyers take suggestions from clients and place these suggestions in legal documents to instruct, for example, parties to an agreement to perform certain obligations, and

⁴ *Id.* at 58-61.

⁵ *Id.* at 59.

⁶ *Id.* at 77.

⁷ GEORGE W. KUNEY, *THE ELEMENTS OF CONTRACT DRAFTING* 48 (West 2003).

Darmstadter suggests that specific examples be included to illustrate those obligations.

However, I disagree with this particular suggestion, and to demonstrate, I use the following example. Client approaches Lawyer to consummate a deal in a contract after Client already has negotiated the major deal points with the other party. In this case, the use of examples to illustrate how the transaction will work is unnecessary for three reasons. First, Client already understands why it seeks a given agreement. Second, Client always can contact its lawyer if it does not understand how a certain provision operates. Third, even well-crafted examples may be unable to accurately represent all party obligations contained in a complicated provision, thus creating, at best, unnecessary document length and, at worst, confusion regarding obligations. Therefore, Darmstadter's section on examples is probably the least compelling section of *Hereof Thereof*.

The subsection on algebra suggests that equations should be used instead of verbally describing the mechanics of a transaction. Darmstadter argues that unlike verbal descriptions about transactions, arithmetical notation is familiar to the end users of legal documents, but he concedes that even equations must be well drafted to achieve their desired effect. He uses several examples of how arithmetic notation should be drafted. For example, common financial terms should be used in equations to simplify the meaning of the calculation.

The subsection on prospectuses pulls together some of Darmstadter's comments on legal drafting using the Securities and Exchange Commission's disclosure handbook.⁸ He provides three guidelines for drafting securities prospectuses: “[t]he deal isn’t the documents;” “[p]recision isn’t everything”; and “[b]e blunt.”⁹ He also uses examples of how lawyers can better provide disclosure in security documents. For example, the term “The Board of Governors of the Federal Reserve” should be changed to “The Federal Reserve Board.”¹⁰ The key, Darmstadter argues, is to make prospectuses clear and non-confusing to the average investor.

⁸ Securities & Exchange Commission, *A PLAIN ENGLISH HANDBOOK: HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS*, <http://www.sec.gov/news/extra/handbook.htm>.

⁹ DARMSTADTER, *supra* note 2, at 139.

¹⁰ *Id.* at 141.

Darmstadter suggests that all supporting documents be drafted to reflect the original, which eliminates the need for the reader to struggle to understand the meaning of the changes. For example, a deletion should be clearly noted with a ~~strikeout~~, inclusions should be noted with double underlined language, and unchanged portions of a provision should be used as an ellipsis (“...”).¹¹ The subsection on supporting players (amendments, promissory notes and guarantees) also emphasizes clarity.

Darmstadter uses theories, suggestions, and examples to show transactional lawyers how to better draft legal documents for the benefit of clients. I highly recommend his book for any transactional lawyer, for there are few books on legal transaction drafting. I do not agree, however, with all of Darmstadter’s suggestions. For example, I believe it is better to capitalize definitions in the context of legal documents, even if it may impair readability to some. In addition, some employers may not allow attorneys to change legal form documents because of the risks involved. Consequently, attorneys who choose to follow Darmstadter’s advice should proceed with caution.

¹¹ *Id.* at 152.