

**A CALL TO ARMS TO IMPLEMENT
BETTER CONTRACT EDITING SKILLS**

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CHAPTER 6

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Kevin graduated from the University of Houston, Bates College of Law, in May, 1981, where he served as the Executive Editor of the *Houston Law Review*. Before law school, he graduated from University of Texas at Austin in December, 1977, graduating with honors and majoring in Finance.

ACTIVITIES

Past Chair, Real Estate Forms Committee, State Bar of Texas.

Past Chair (1993-1996), Dallas Bar Association, Real Property Section.

Member, Various Planning Committees for the State Bar of Texas and University of Houston.

Director, Advanced Real Estate Law Course (1994) (State Bar of Texas).

Moderator, Advanced Real Estate Law Course (1995) (State Bar of Texas).

Speaker/Author: Numerous articles written for real estate related legal topics, including the Dallas Bar Association Real Property Section, State Bar of Texas, South Texas College of Law, University of Texas Law School, University of Houston Law Center, and Southern Methodist University School of Law.

Former Member: City of Allen, Texas Planning and Zoning Commission

Former Member: Allen Independent School District Board of Trustees

Additional information and copies of CLE presentations are posted on my website: www.kkerrlaw.com.

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A CALL TO ARMS TO IMPLEMENT BETTER CONTRACT EDITING SKILLS

1. THIS ISN'T YOUR EVERYDAY CLE PRESENTATION.

We created the title with a very specific purpose in mind:

- a. Call to Arms: a summons to undertake a course of action, *Merriam-Webster*, online.
- b. Implement [verb]: to make something effective, *Merriam-Webster*, online.
- c. Better [adjective]: improved in performance, *Merriam-Webster*, online.
- d. Contract *Editing Skills*. Note that legal drafting encompasses a broad range of skills. To prepare a lease, an attorney has to know the law, the business conditions, the client's needs, the negotiations with the other side, and finally preparing the final document. This process does not lend itself to *editing*.

Editing has to take place at the calm level of reviewing or preparing your forms. You must have a set of editing rules. Either you (1) do nothing or (2) make a conscious decision to apply editing rules. Most attorneys choose the first option.

2. SBOT EVALUATION FORM.

Only 15% of participants fill out the bubble evaluation form for a seminar. Less than 10% of participants write a significant comment on the form.

We need your feedback on this topic. We need 90% of the evaluation forms completed – with a significant comment on this topic. The planning committee reviews these comments in selecting the next year's program topics and speakers. If you need help with a comment, please consider these:

- a. "If this topic is so important why don't the authors use editing rules in their forms?"
- b. "This topic is a waste of time and shouldn't be part of an advanced course."
- c. "If I want to learn about writing, I'll go to a writing seminar. Just stick to legal subjects that I can use in my practice."
- d. "I don't care what you say, I'm sticking with shall." [I actually got this text after the Mortgage Lending program.]
- e. "Our profession demands that we evolve and catch up with the times. Thanks for providing a starting point."

3. INTRODUCTION.

I have given a talk on legal editing 5 times in the past year. When Tommy Bastian asked for a reprise of the talk, I told him it was like talking to a room of committed smokers. Everyone politely listened but couldn't wait to get outside, in the rain, huddled next to the building – to smoke.

Nothing I could say about cancer, emphysema, or heart congestion, would convince them to change.

The Advanced Real Estate Drafting Courses have had many drafting articles. A short list is attached. There are hundreds of books, blogs, seminars, articles, on the subject of drafting/ editing. *The problem is getting traction in the real world.*

4. THE OPHTHALMOLOGIST.

When you have your eye prescription checked, the doctor swings a viewfinder in front of your face. With some spinning and clicking, she asks "which looks better, one or two?" You continue the process until at last you say, "I can't tell a difference." With the perfect lens of the machine, you have an absolute answer.

But legal editing is different. Nobody agrees on what legal editing means or what a well written legal document looks like. There is no machine that you can look though and say that is correct.

5. THE ORANGE STORY.

I heard this story from a speaker at a Dallas Bar presentation many years ago. I googled it and found numerous lawyer jokes sites repeating essentially the same story. So I assume this is now in the public domain and doesn't require a citation.

How do you give away an orange? Simply say, "here, take this orange."

How does a lawyer give away an orange?

KNOW ALL MEN BY THESE PRESENTS that I, Kevin M. Kerr, P.C. (hereinafter referred to as the "Givor" for all purposes) do hereby give, grant, bargain, sell, release, convey, transfer, and quitclaim all my right, title, interest, benefit, and use whatever in, of, and concerning this orange, together with all the appurtenances thereunto including but not limited to, that is by way of example and not limitation, the skin, pulp, pip, rind, seeds, and juice (hereinafter referred to as the "Orange" for all purposes), to have and to hold the said Orange together with said appurtenances set forth above and incorporated herein as though set forth in full, to _____ (hereinafter referred to as the "Givee" for all purposes) and Givee's heirs, successors, and assigns, in fee simple forever.

6. A TALE OF TWO EDITORS.

My years on the Real Estate Forms Committee taught me there are two types of lawyers when it comes to editing.

The Clenched Fist Editor. The Clenched Fist Editor has a stern demeanor, a furrowed brow, and bulging neck veins. When asked to remove words from the document, she shouts, “those words will stay in my tried and tested form unless you can convince me that they are wrong!”

The Open Palm Editor. This editor is characterized with a calm, peaceful, maybe even angelic countenance. Serenity pours from the Open Palm Editor’s voice. When asked about a word in the form, he quietly replies, “we shouldn’t leave that language in unless it is necessary.”

7. A FAMILIAR STORY.

Bryan Garner wrote a preface for Matthew Butterick’s book, *Typography for Lawyers*. It is a story of a partner critiquing an associate’s memorandum. The partner complains that the associate:

- a. Underlines case names instead of using italics.
- b. Uses two spaces instead of one after a period.
- c. The font is ghastly.

She said the associate should have followed Butterick’s rules in preparing the memorandum. The memorandum had to be re-written in order to be presentable.

This same scene played out at a law firm in my past. The associates knew the style of different partners. One liked underlined definitions [(the “Contract”) the other didn’t. Even though we had IBM mag-card typewriters and such editing changes were tedious, that was the rule.

How much time is wasted with silly changes just to suit the whim of each supervising attorney? Why wasn’t the associate trained on the required style upfront, rather than being presented with Butterick after the fact?

To see the full article, go to <http://typographyforlawyers.com/about.html>, click on the Forward by Bryan Garner button.

8. THE SOLUTION.

To break from the established forms, attorneys must agree on basic editing rules. Then put them into practice.

9. TOP-DOWN.

To implement the editing rules, senior attorneys have to agree and use the rules. If the senior team isn’t behind them, then the rules will never be implemented.

An associate can’t tell the partner to rewrite passive voice sentences.

The editing rules have to be developed in a collaborative process. The purpose is to make sure that all documents reflect a singular style.

10. DESIGN GUIDE.

The editing rules are different from a design guide.

- a. Firms need to agree on the formatting basics: margins, font, font size, title, and footer. There shouldn’t be a reason to have these being set and reset depending on the author’s preferences.
- b. Adopt uniform conventions so all documents have a consistent look.

Words: Seller; Buyer [not Purchaser]; Landlord [not Lessor]; Tenant [not Lessee].

Underline defined terms (“Seller”), or not.

Have a standard clause incorporating exhibits and never add incorporating language in the document [“attached hereto and made a part hereof for all purposes as though set forth in full”].

Never use “the” in front of a defined term for a proper name (or always use it).

Numbers: use numeral only. Example “a \$10,000 Note”.

Check defined terms and use them correctly.

Restrict recitals.

Be careful about a section you don’t understand.

Consider the white space on the page and the overall look of the document.

11. ADOPT EDITING RULES.

The goal of this presentation is to strip away the complexity of legal editing. I asked several attorneys to consider a list of editing rules and rank them in order of importance. Not surprisingly, there was a very diverse response, but in the end we have a consensus on five simple rules¹.

¹ I gratefully acknowledge the assistance of Wayne Schiess, Phil Weller, Marilyn Maloney, Maria Trottier, Brian Rider, Sharon Reuler,

- a. Avoid using passive voice.
- b. Limit shall to situations where it means “must” or “has a duty to.”
- c. Do not use legalisms.
- d. Use fewer words.
- e. Use shorter sentences.

12. RULE #1: AVOID USING PASSIVE VOICE.

- a. Passive voice means the subject of the sentence receives the action expressed by the verb. A typical example is “the boy was bitten by the dog.” The subject is “the boy” the verb is “bitten” but it is the dog that takes the action (“the bite”).
- b. Passive voice sentences always have a version of the be-verb, such as **am, is, by, was, were, are, or been.**
- c. The easy fix is to turn the sentence around: the dog bit the boy.
- d. Common legal sentence: The earnest money shall be released by the title company to the buyer. The fix: The title company [must/will/shall] release the earnest money to buyer.
- e. The Spell/Grammar Check will tell you the percentage of passive voice sentences in your document.
- f. Hint: use word search for “by” and look at the sentence. Not every use of “by” means passive voice, but in legal writing it usually does.

13. RULE #2: LIMIT SHALL TO SITUATIONS WHERE IT MEANS “MUST” OR “HAS A DUTY TO.”

- a. Some writing experts condemn shall and recommend never using it. I am one of those converts. Google “Bryan Garner shall” and you will find numerous posts calling for the elimination of the word from legal documents.
- b. The problem with shall is it has multiple meanings. It can mean must, should, may, and will- depending on the context. Another problem is the overuse in legal documents.

- c. Under this rule, lawyers should limit the word to situations that impose a duty. For example, “Tenant shall pay rent.”
- d. Never: The purchase price shall be \$1,000,000. Instead: The purchase price is \$1,000,000.
- e. Never: The term “Interest Rate” shall mean 10%. Instead: The term “Interest Rate” means 10%.
- f. From bylaws for a condominium: The President of the Association shall call a special meeting of the Association if so directed by resolution of the Board of Directors or upon a petition signed and presented to the Secretary by any Unit Owner. The notice of any Special Meeting shall state the time, place and purpose thereof. No business shall be transacted at a Special Meeting except as stated in the notice.

After: The President of the Association must call a special meeting of the Association if so directed by resolution of the Board of Directors or upon a petition signed and presented to the Secretary by any Unit Owner. The notice of any Special Meeting will state the time, place and purpose thereof. No business may be transacted at a Special Meeting except as stated in the notice.

- g. Hint: use word search for “shall” and see if the context means an imperative duty, or you are just using it superfluously.

14. RULE #3: DO NOT USE LEGALISMS.

This rule is very difficult to define.

- a. From Justice Potter Stewart, “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [“hard-core pornography”], and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that.” Jacobellis v. Ohio, 378 U.S. at 197 (Stewart, J., concurring) (emphasis added).
- b. Maybe David Weatherbie comes close to defining legalisms: “If you can tell it was written by a lawyer, then it needs to be completely rewritten.”
- c. Before: a Promissory Note in the original principal sum of One Million and No/100 Dollars USD (\$1,000,000.00). After: a \$1,000,000 Promissory Note.
- d. Before: **NOW, THEREFORE**, in consideration TEN and NO/100 Dollars, in

Stephanie Gilmore, Tim Hardin, David Tomek, Harriet [one “t”] Tabb, Tommy Bastian, David Weatherbie, and Bryan Dunklin for contributing to this Article.

hand paid, together with the mutual agreements and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Purchaser agree as follows. After: For valuable consideration, the parties agree as follows.

- e. Before: **Know All Men (or Persons) By These Presents.** After: Just drop it.
- f. That certain. Where did this phrase come from and why is it used? Every CMBS loan opinion I give recites that I have reviewed “that certain Mortgage” and “that certain Guaranty” and so on.
- g. “**IN WITNESS WHEREOF,** this Agreement has been executed...” Again, just drop it. Or use old English font: **In Witness Whereof,** this Agreement has been executed...”
- h. This may be a legalism or just a personal pet peeve [after all I wrote the paper why can’t I use a soap box?] – contracts being entered into by Acme Acquisitions, LLC, and/or assigns. What law school or case says that a presently signed instrument is actually being executed by some future assignee? It also looks odd on the signature block.

15. RULE #4: USE FEWER WORDS.

This rule is a judgment call, but here are some concrete examples.

- a. Eliminate “hereby” and “herein.” Never: The parties hereto hereby agree as follows. Instead: The parties agree as follows.
- b. Restrict doublets (or triplets, quadruplets, etc.). There may be times when case law requires the extra words, but usually it is just tradition.

Example: Subject to the terms and conditions of this Agreement, and for the consideration set forth herein, Seller hereby agrees to sell, assign and convey, and Purchaser hereby agrees to purchase and acquire, all of Seller’s right, title and interest, if any, in and to the following (collectively, the “**Property**”).

Revision: ~~Subject to the terms and conditions of this Agreement, and For valuable consideration set forth herein, Seller hereby agrees to sell, assign and convey, and Purchaser hereby agrees to purchase and acquire, all of Seller’s right, title and interest, if any, in and to the following (collectively, the “Property”).~~

- c. Don’t use “except as otherwise expressly set forth herein.” This is a signal that means “my document is so long and confusing, I

don’t really understand what it means and I’m afraid that maybe somewhere it says Tenant doesn’t have to pay rent.”

- d. Be very careful with “of the” in your document. In looking for an example, I used a recent 5 page document an attorney sent. There were 47 hits for the search. Example: “**IN WITNESS WHEREOF,** this Agreement has been executed by each of the Members to be effective as of *, 2015.” Here’s an edited version: “The parties have executed this Agreement as of *, 2015.” Note, the passive voice was also reversed.
- e. Before: “In the event that ...”. After: “If”.

16. RULE #5: USE SHORTER SENTENCES.

- a. Following the Mortgage Lending program, Tim Hardin sent an email saying he just read a sentence with 274 words and the expression *mutatis mutandis*.
- b. David Weatherbie sent me this story: I once looked over a deed of trust drafted by one of my partners. I started looking for a period in one provision. I found it two pages after the sentence started.
- c. If you run the Spell/Grammar Check feature, you will see the average sentences per paragraph, average words per sentence, and characters per word. Your document should have less than 20 words per sentence as an average.
- d. I used Spell/Grammar Check on a Wells Fargo Note. The average sentence length is 34.4. It also had 64 “shalls” on 5 pages, an average of 12.8 per page. Here is the winning sentence from the Note:

If the applicable law is ever judicially interpreted so as to render usurious any amount (i) contracted for, charged, taken, reserved or received pursuant to this Note, any of the other Loan Documents or any other communication or writing by or between Borrower and Lender related to the transaction or transactions that are the subject matter of the Loan Documents, (ii) contracted for, charged or received by reason of Lender's exercise of the option to accelerate the maturity of this Note and/or the Related Indebtedness, or (iii) Borrower will have paid or Lender will have received by reason of any voluntary prepayment by Borrower of this Note and/or the Related Indebtedness, then it is Borrower's and Lender's express intent that all amounts charged in excess of the Maximum Lawful

Rate (as defined herein) shall be automatically cancelled, ab initio, and all amounts in excess of the Maximum Lawful Rate theretofore collected by Lender shall be credited on the principal balance of this Note and/or the Related Indebtedness (or, if this Note and all Related Indebtedness have been or would thereby be paid in full, refunded to Borrower), and the provisions of this Note and the other Loan Documents immediately be deemed reformed and the amounts thereafter collectible hereunder and thereunder reduced, without the necessity of the execution of any new document, so as to comply with the applicable law, but so as to permit the recovery of the fullest amount otherwise called for hereunder and thereunder; provided, however, if this Note has been paid in full before the end of the stated term of this Note, then Borrower and Lender agree that Lender shall, with reasonable promptness after Lender discovers or is advised by Borrower that interest was received in an amount in excess of the Maximum Lawful Rate, either refund such excess interest to Borrower and/or credit such excess interest against this Note and/or any Related Indebtedness then owing by Borrower to Lender.

This sentence has 324 words and is nominated for the **2015 Sentence of Shame Award**. If you see a longer sentence, please send me an example. Note, to count words, use Search for “.” and the screen will highlight all periods. When you see a long block without a period, use the mouse to highlight the sentence. Then under the Review Tab there is an icon called Word Count. It will count the number of highlighted words for you.

17. SUMMARY OF PRIOR ARTICLES.

For those looking for a real article, Exhibit A is a summary of legal writing articles. The articles were selected from a diverse source of authors: academia and practicing lawyers.

18. ONE MORE REASON.

Tommy Bastian sent me a paper at the last minute, called *The Year of Living with Real Estate*, by Steven K. Hayes, published in the Real Estate, Probate and Trust Law Reporter, Vol. 53, No. 2. Mr. Hayes is an appellate lawyer and was asked to speak on appellate cases affecting real estate documents. His first point is “make your documents clean, simple, direct, and self-explanatory.” Maybe that’s all I needed to say.

19. HOW DID I DO?

The average sentence length is 15.4 [but remember, that includes the Sentence of Shame], passive sentence ratio is 7%, the reading ease score is 55.9, and the reading grade level is 9.1 [meaning 9th grade].

EXHIBIT A

A. Tarver, *Writing for the Times*, Advanced Real Estate Drafting Course 2001.

Mr. Tarver makes the case that we stay with the old way of writing because we think if it's another lawyer's form, it must be great. Also, laziness, pride in long documents, and the "daunting task of writing well" discourage concise writing. The article challenges the Bar to climb out of the hole of bad documents by setting simplicity, clarity, precision, economy, accuracy, and style as drafting goals. These remain cornerstones of editing principles today.

Mr. Tarver covers many practical issues in drafting and offers clear suggestions and examples. He includes six pages of lists to help you recognize superfluous words and offers the shorter replacement. There is an outstanding summary of punctuation rules for commas, semicolons, colons, dashes, apostrophes, and quotations.

B. Schiess, *Legal Writing Is Not What It Should Be*, Southern University Law Review 2009.

Mr. Schiess is the senior lecturer at the University of Texas Law School and the director of the David J. Beck Center for Legal Research, Writing, and Appellate Advocacy.

After opening with four damning quotations from published authorities on the abysmal state of legal writing, Mr. Schiess opines that "significant improvement in legal writing will be difficult if not impossible to achieve."

Mr. Schiess points out that:

a. Time constraints do not allow time for editing. Essentially there are numerous quotes to support the principle that editing has been edited out of the drafting process in today's legal environment.

b. Our sense of professional style causes us to ignore the audience. The article covers the pervasive legalese in our documents; the use of Latin and archaic words, big words rather than small ones, passive voice, and wordy sentences. The advice of the experts here is: do not write like a lawyer, write to communicate.

C. Reuler, Sharon, *Drafting Documents to Create Planned Communities with Owner's Associations*, Advanced Real Estate Drafting Course 2006. Ms. Reuler is a leader in Texas property owner association laws and a frequent speaker for many years. In this article, she shares her insight into the art of drafting for her audience, rather than documenting the legal issues. While the topic is dated because of legal changes, it is worth reading for the drafting concepts that transcend planned communities and permeate every document we write.

D. Dahm, Lisa L., *Drafting Contracts: Practical Tips for Writing Them and for Avoiding Ethical Issues*, 28th Annual Real Estate Law Conference, South Texas College of Law 2013.

The article focuses on the drafting issues of contracts, as opposed to the editing side. It is an excellent reminder of the process of drafting legal contracts. Ms. Dahm points out that it is not the purpose of contract drafting to persuade or entertain. Contracts document the agreement of the parties.

The article discusses several practical drafting tip scenarios. For our purposes, Practical Tip #3 is very important. Prof. Dahm explores the need to be "clear and precise" in contract drafting. Citing several academic publications, she notes this requires shorter rather than longer sentences. One footnoted source says twenty-five is the magic number for words in a sentence. The advice is: (a) short sentences; (b)

arranged logically or progressively; (c) with subjects and active verbs (no passive verbs) in the beginning; and finally (d) eliminating the unnecessary words.

This is the most important point in the paper is that the heart and soul of the drafting process is editing.

E. Weller, Phil, *Drafting 1.01*, Advanced Real Estate Drafting Course 2002. Mr. Weller has presented several papers on drafting.

This paper starts with a unique perspective, why is drafting important? He discusses three reasons based on self-interest: (a) clear drafting will avoid misunderstandings and reduce professional liability; (b) clients can read and understand your work; and (c) the quality of your drafting is your signature to others.

Mr. Weller notes the need to retain internal consistencies in phrases throughout the document to avoid a later claim of interpretation against your client. Also, be careful to maintain the same consistencies between documents in the same transaction.

Finally, for those who learn better from sarcasm, Mr. Weller includes the Blackwell and Weatherbie rules on “how to draft like a lawyer.”

F. Baruch, Chad, *Hey! You Can't Write That in Plain English! It's a Real Estate Document!*, Advanced Real Estate Drafting Course 2008. Despite the limitation in the title for real estate documents, this is a very comprehensive article on legal writing and drafting. Mr. Baruch has a very strong background in education and has published many articles and books on writing.

His final section is called “Ruthless Editing.” Mr. Baruch writes “[t]o call someone a great legal writer really is to say that person is a great legal editor. Great writing results from sustained and thorough editing.”

G. Haggard and Kuney, *Legal Drafting (In a Nutshell)*, Thomson West Publishing 2007. The second half of the book covers all of the drafting and editing rules that the previous authors touch on. It is an excellent source of rules with illustrations in a convenient package.