

LEGAL EDITING – A NEW LOOK AT AN OLD TOPIC

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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).

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TABLE OF CONTENTS

PART 1. INTRODUCTION..... 1

PART 2. A TALE OF TWO EDITORS..... 1

PART 3. SUMMARIES OF RECENTLY PUBLISHED WRITING, DRAFTING, AND EDITING ARTICLES..... 2

A. Tarver, Writing for the Times, Advanced Real Estate Drafting Course 2001..... 2

B. Schiess, Legal Writing Is Not What It Should Be, Southern University Law Review 2009..... 2

C. Reuler, Sharon, Drafting Documents to Create Planned Communities with Owner’s Associations, Advanced Real Estate Drafting Course 2006..... 3

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..... 4

E. Weller, Phil, Drafting 1.01, Advanced Real Estate Drafting Course 2002..... 4

F. Baruch, Chad, Hey! You Can’t Write That in Plain English! It’s a Real Estate Document!, Advanced Real Estate Drafting Course 2008..... 4

G. Haggard and Kuney, Legal Drafting (In a Nutshell), Thomson West Publishing 2007..... 4

H. Abraham Lincoln..... 5

PART 4. SURVEY RESULTS AND COMMENTS..... 5

PART 5. SHERRY’S GRAMMATICAL AND EDITING TIPS..... 5

A. Why plain English?..... 5

B. Editing is really three things..... 6

C. Editing is worth the time..... 6

D. Use style guides..... 6

E. In English, common nouns take the lower case..... 6

F. Apostrophes, like uppercase letters, are overused; or mind your p’s and q’s..... 6

PART 6. KEVIN’S SUGGESTIONS FOR EDITING..... 7

A. Don’t use shall..... 7

B. No passive voice (or, passive voice shall never be used by me)..... 7

C. Write in the present tense..... 8

D. No doublets (or triplets, quadruplets, etc.)..... 8

E. No legalisms..... 8

F. Use fewer words..... 8

G. Put a period in the middle..... 8

H. Limit use of a semicolon..... 9

I. Eliminate the words like “hereby” and “herein.”..... 9

J. Don’t use “except as otherwise expressly set forth herein.”..... 9

K. Don’t restate the law..... 9

L. Check defined terms and use them correctly..... 9

M. Severely restrict recitals..... 9

N. Be careful about a section you don’t understand..... 9

O. Organize “do’s and don’ts” together..... 9

P. Use plain English..... 9

PART 7. MISCELLANY..... 9

A. Growing importance..... 9

B. A good writer is a good reader..... 10

C. Kevin editing Kevin..... 10

D. Blogs..... 10

E. “All laws.”..... 10

F. Word Rake program..... 10

G. Limited liability company agreement..... 10

H. Know your audience..... 10

I.	TexasBarBooks’s Usage and Style Guide.	10
PART 8.	CONCLUSION.	10

LEGAL EDITING – A NEW LOOK AT AN OLD TOPIC

It was a dark and stormy night¹. Sam spent the entire night wrestling with his conscience. She was his first, but he was in love with another. Across town, Barbara was worried. She had acted impulsively and now she had no choice. Time was against her. But high atop the Acme Building sat a man who looked for the answers to life's persistent questions – Andy Agent, real estate broker². He knew he could solve these problems and pick up some coin for himself at the same time. Sam could sell his old shopping center and buy the new one he coveted. Barbara could designate Bill's center for her 1031 and close quickly. And everyone could live happily ever after.³

PART 1. INTRODUCTION.

For good reason, transactional attorneys aren't asked to write fiction or drama, just contracts. While this article will not help you in writing or drafting, we hope this will give you some tools to improve your legal editing skills.

The original title of this paper was “Legal *Writing* – a New Look at an Old Topic.” But as we began the research, it was evident that “writing” articles are focused more on persuasive writing. For example, pleadings, motions, and legal briefs; things that are prepared by attorneys who practice the dark arts.

Then we changed the title to “Legal *Drafting* – a New Look at an Old Topic.” But research again proved this was not the true focus of the article. Legal drafting is a much broader subject. In order to properly draft a contract, an attorney has to: (1) know the law, (2) know the client's business, (3) know the client's needs, (4) participate in the give and take of negotiations, and (5) advise the client of the final

* We acknowledge Stephanie Gilmore's and Brenda Harrison's assistance in proof-reading and providing a valuable set of fresh eyes on this article.

¹ This is the often mocked opening of Edward Bulwer-Lytton's novel, *Paul Clifford*. It is also universally known as Snoopy's constant attempt to write a book in Charles Shultz's beloved comic strip, *Peanuts*.

² With acknowledgement and apology to Garrison Keillor's radio detective, Guy Noir- Private Eye. If you haven't experienced the NPR broadcasts of the misadventures of Guy, Lefty, Dusty, and the other cast members, you can find them on your local public radio station, usually on the weekends.

³ Only in a Disney movie, of course.

terms. The drafting papers in this and similar courses will cover these issues.

So, why “Legal *Editing* – a New Look at an Old Topic?” We submit that in the business world of practicing law, transactional attorneys allocate the necessary billable time to the drafting phase. After all, you have to get that right. But when it comes to the editing phase, deadlines, commitments, and the urge to use the same tried and true form prevails and contracts go out without any real consideration of “editing.”

There really isn't anything in this article that hasn't been said before and by more qualified authors. In our research, we came across a quote from 1657, “[i]f I had more time, I would have written a shorter letter.” It seems contradictory that using fewer words takes more time. But this isn't a new phenomenon created by a digital world of smart phones, word processors, and emails. According to Quote Investigator⁴, Blaise Pascal, a French mathematician, wrote this comment in his collection of letters called “*Lettres Provinciales*.”

Despite hundreds of years of improving our language and intellect, our biggest problem is still a failure to edit. This article will assist you in the following ways:

- Provide summaries of recently published writing, drafting, and editing articles.
- Provide feedback from a survey of attorneys on the subject, with an inclusion of comments from you – the live-audience participants.
- Give you grammatical and editing tips from Sherry's twenty-five years of experience as the editor and committee liaison for the State Bar's Real Estate Forms Committee.
- Give you Kevin's suggestions for editing, which he readily admits are plagiarized from various sources over the years, hoping somehow those concepts are now part of the public domain.

PART 2. A TALE OF TWO EDITORS.

Kevin's years on the Real Estate Forms Committee taught him there are two types of lawyers when it comes to editing.

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

The other is 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 words in the

⁴ See <http://quoteinvestigator.com/2012/04/28/shorter-letter>.

form, the Open Palm Editor quietly replies, “we shouldn’t leave that language in unless it is necessary.”

Bottom line: you have to decide who you are - or, who you want to be. If you are content being a Clenched Fist Editor, then we have nothing to offer you. Enjoy the talk and get your CLE credit. But if you are a Clenched Fist Editor and you would like to explore the world of the Open Palm Editor, then we invite you on the journey. It is a journey because there isn’t an easy solution. We all have very bad editing habits, as attested to in the hundreds of critical articles on the internet about legal writing. You will also have to fight partners in your firm and the attorneys you negotiate with in this new endeavor.⁵

PART 3. SUMMARIES OF RECENTLY PUBLISHED WRITING, DRAFTING, AND EDITING ARTICLES.⁶

We offer these summaries to help you locate articles that will address your needs. These are not intended to be a replacement of the articles.

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

Mr. Tarver graduated from law school in 1952. We point that out to note that at the time of his article, he had almost 50 years of experience under his belt.

He summarizes Prof. Mellinkoff’s description of legal writing as wordy, vague, pompous, and dull. To see how much weight this statement carries, Google “Mellinkoff Language of the Law” and you will see Prof. Mellinkoff was an early pioneer in teaching legal writing.

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

⁵ Notice the informal style and contractions. There is a debate in the “online writing world” on the style. But those that lean toward plain English encourage it. Also, I hope you appreciate the pains taken to avoid the use of personal pronouns (he, she or the dreaded s/he). Apparently that mistake is offensive to many readers.

⁶ The State Bar has CLE department has included these articles on the electronic disk.

for commas⁷, semicolons, colons, dashes, apostrophes, and quotations.

Mr. Tarver attaches a letter of credit example from a prior Advanced Real Estate Drafting Course as an example of really good drafting. But in the spirit of emphasizing the need to be ever vigilant on editing, we would point out that the letter starts off “We *hereby* open our Standby Letter of Credit” *Hereby* is on Mr. Tarver’s list of words to avoid.

B. Schiess, Legal Writing Is Not What Is Should Be, Southern University Law Review 2009.⁸

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. We selected this piece because it is a recent publication, although there are several similar variations of this article available on the internet.

Because of the author’s academic position, the article focuses on many societal issues that affect legal writing rather than offering drafting situations and solutions.

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.” We would also point out that Mr. Schiess’s article focuses more on the legal writing issues than legal drafting/ editing.

The problems inherent in the educational system are:

1. High school and college writing courses focus on self-expression writing. Good legal writing requires a writing style that is knowledge transforming. College students in technical degree programs (such as engineering and accounting) never write any papers.
2. Law school legal writing courses focus on research and legal analysis. There is very little time for grammar or style training. Mr. Schiess also laments that most law schools do not consider legal writing as a real law course so the faculty is not tenured or supported.

⁷ It is odd to footnote the word “comma.” But we point out the danger of false reliance on spell-check. Stephanie noticed that the sentence read, “rules for comas.” We suppose there are in fact rules for *comas* and spell-check and grammar-check both thought the sentence was correct, but there is no substitute for the human review.

⁸ Available at <http://ssrn.com/abstract=1661130>. Many other articles by Mr. Schiess are available on line and in CLE materials.

3. Law schools do not teach legal drafting. Bryan Garner says in his book, *Legal Writing in Plain English* that almost 80% of respondents to a survey said they received training in writing an appellate brief, but no training in drafting a contract.
4. Poor writing skills come from reading bad writing. While Mr. Schiess’s paper focuses on opinions and judicial writing, the principles apply to using the tried and true, time-tested forms.
5. Attorneys rely on poorly written forms. Forms are a necessary evil. Forms save time. Forms provide a sense of protection because they are inclusive of everything and every possibility. But the universal piling on, and adding to, creates Frankenstein’s monster. A Mellinkoff quotation is included in this section: “[forms] are a quick, cheap substitute for knowledge and independent thinking.” One particularly important suggestion is that lawyers should have a database of forms, with a goal to focus on the language in the forms and keep them up to date.
6. A superficial understanding of the transaction in drafting documents leads to sloppy drafting. The section focuses primarily on argumentative writing. Garner’s advice to a novice attorney is to make sure you fully understand a provision, and then find out what it means and why it’s there.
7. Time constraints do not allow time for revising and 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.
8. Our sense of professional style causes us to ignore the audience. This section 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. This section alone makes this a must read article for document drafting.
9. My writing is great; your writing is the problem. We are complacent in our drafting regimen. Old hands teach new ones, so nothing really changes.

Mr. Schiess makes several recommendations: (a) add drafting requirements to upper-division law classes, (b) add drafting and editing training for new hires, and (c) add State Bar level continuing education requirements in writing, drafting, and editing. He also recommends that lawyers open themselves up to continuing training.

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.

First, she cites Wayne Schiess’s 2004 article in the Advanced Real Estate Drafting Course. Make sure you understand everything in the form; have a “starting place form,” don’t just snag the last deal you did; and take time to thoroughly edit any form you use.

Ms. Reuler then addresses the need to know your writing style. Pay attention to it, get to know and, and develop it. This relates back to the comments above about the two types of legal editors. You need to know who you are. She is particularly sensitive to write in a style that homeowners reading the Declaration 15 years later will be able to understand.

Without copying her entire list, Ms. Reuler offers these drafting style comparisons:

Old Style	New Style
one-sided, protect your client on all points	consider a balanced approach, workable for all parties
serious tone	some humor
shall	will or must
serif font	san serif ⁹
no graphics	add graphics ¹⁰

⁹ There is a whole world out there on the topic of readability (fonts, font sizes, margins, bullets, spacing, kerning, even a debate about one or two spaces after a period). One guy wrote what appears to be a doctoral dissertation on the subject of font styles, sizes, and spacing. There isn’t a clear choice about whether one font is better than another. But one thing is clear, bad writing is not readable and no font, margin, or kerning will help.

¹⁰ I read a linen supply contract that used a simple graphics like topic headers (a cash register by the payment section). Another was a lease that inset a magnifying glass beside the indemnity waivers for emphasis.

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.

Lisa Dahm is an adjunct professor at the South Texas College of Law. She teaches the intermediate level contract drafting courses, “Contract Building Blocks” and “Contract Negotiation and Drafting.” She is also the Director of Continuing Legal Education at South Texas College of Law.

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. Prof. Dahm points out that it is not the purpose of contract drafting to persuade or entertain. Contracts document the agreement of the parties.

Of the three forms of writing: creative (stories, plays, poems), expository (letters, briefs, memos), and legal drafting, law students have little instruction in school to prepare them for drafting. Most drafting skills are learned on the job, rather than in a formal training program. She notes legal writing (petitions and briefs) deals with events that have occurred and you can’t go back and change them. But legal drafting must anticipate future events in an evolving situation.

Contract drafting requires an extensive collaborative process. An attorney typically consults many sources and examples to create a starting point form, such as a shopping center lease. The form is often reviewed by attorneys in the firm over many years. Then the client is involved to modify the form to the client’s requirements. Finally, another attorney will review the lease to add the attorney’s client’s changes.

Prof. Dahm also covers ethical rules in drafting. While the rules were written with zealous advocacy in mind, transactional attorneys must work in an environment that requires cooperation in order to complete the deal. She underscores the ethical requirements of competency, following client objectives, and avoiding fraud and dishonesty.

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: (1) short sentences; (2) arranged logically or progressively; (3) with subjects and active verbs (no passive verbs) in the beginning; and finally (4) eliminating the unnecessary words.

This is the most important point in Prof. Dahm’s paper. These points are not about law, or deadlines, or meeting with clients. This is the heart and soul of the editing process. As noted above, there isn’t really anything new in the field of editing. The problem is

understanding the need to commit to some basic rules and follow through.

E. Weller, Phil, Drafting 1.01, Advanced Real Estate Drafting Course 2002.

Mr. Weller has presented several papers on drafting and many more papers on real estate subjects.

This paper starts with a unique perspective, why is drafting important? He discusses three reasons based on self-interest: (1) clear drafting will avoid misunderstandings and reduce professional liability; (2) clients can read and understand your work; and (3) the quality of your drafting is your signature to others.

While the article focuses on drafting, there are editing points also. 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 internal consistencies between documents in the same transaction.

Mr. Weller has several exhibits with illustrations of editing, including his somewhat famous (or infamous) example of passive versus active voice [*You shall be _____ed! or _____ you!*].

Finally, for those who learn better from sarcasm, Mr. Weller includes the Blackwell and Weatherbie rules on “how to draft like a lawyer¹¹.”

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.

We will skip the detailed summary we provided in the prior articles, but want to comment on Mr. Baruch’s conclusion. 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.

We recommend this book because it focuses on drafting and editing. Other books with “writing” in the title tend to focus more on litigation documents. The authors have more than 60 years of collective

¹¹ Based on our experience in seeing legal drafting, too many attorneys have Dr. Sheldon Cooper’s trouble grasping the concept of sarcasm. For the record, these are joke lists and are not intended to serve as guidelines in your practice.

experience in teaching legal drafting. This book covers the entire process of drafting.

Chapter 4 covers 20 rules of contract construction. In our research, this topic was not addressed in this detail and provides a good refresher of the old law school subject.

Chapter 12 examines words and specific examples of syntax that can create ambiguity. For example, if a contract directs a trustee to distribute \$1,000 to Mary and Tom, does it mean \$500 or \$1,000 to each party?

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.

H. Abraham Lincoln.

In this 150th anniversary of the Gettysburg Address, we would do well to learn from that famous speech. Lincoln was not the main speaker that day. Another unremembered orator rambled for more than two hours before Lincoln stood up at the podium. There is no official photograph, because the photographer assumed he had time to set up and take many pictures during the speech. There isn't an official transcript, because the wire service reporter was so caught up in the moment and the words that he stopped writing and just listened. But with ten sentences, 270 words, and just a few minutes, Lincoln conveyed a message that all Americans have heard and most can recite, at least in part, from memory.

PART 4. SURVEY RESULTS AND COMMENTS.

As a part of this presentation, Kevin circulated a Legal Writing Survey to several groups of real estate attorneys. The most significant result is that most lawyers don't respond to surveys. But the non-scientific results validate the conclusions of the experts on writing. Here are some of the questions and a summary of the responses:

A. Describe your writing style. Responses: Plain English, to the point. Less is more – winnow down the verbiage to say it clearly and succinctly. Succinct. Tight; attention to detail. Readily understandable to non-lawyers. Clear and concise sentences.

Point 1: Another speaker in this program (after hearing the overwhelming responses above) told me an old axiom: 90% of all drivers consider their driving skills to be above average.

Point 2: If the foregoing is true, I did not have a proper sampling pool or on a day-to-day basis I never see these lawyers' work product.

B. Can you recommend a book or article? Responses: State bar seminars. Bryan Garner's articles. Hemmingway. Bryan Garner. Bryan Garner's book with Scalia. No response. Bryan Garner and Prof Bromberg at SMU. No. Eats, Shoots, and Leaves, by Lynne Truss.

Point 1: If we use words for a living, why don't we have more resources to improve our writing, drafting, and editing skills?

Point 2: A writing coach noted that when he coaches lawyers and asks this question, there is a minimal response. But when he coaches a journalism group, the response and variety is over-whelming. Since both groups make their living with words, why don't lawyers have more resources for writing?

Point 3: We wonder how Bryan Garner feels seeing how many people are such dedicated followers, but "shall" is so pervasive?

C. Do you have a set of rules for your documents? Responses: Don't have written rules. Not really. KISS –keep it simple stupid/ this takes a lot of work. Chicago Manual of Style. Write to the audience (judge, attorney, or client). No response. Draft so it is readily understandable. Plain English and avoid long sentences.

Point 1: This one was a shocker. For the most part, the respondents can't really say, "this is how I edit/draft."

Point 2: Hopefully with this paper, you will now be able to answer this with very specific rules to edit a document.

PART 5. SHERRY'S GRAMMATICAL AND EDITING TIPS.

A. Why plain English?

The most important point I would make about any writing has been made many times. Know why you are writing, what you are writing, and write accordingly. A love letter and a pre-nup are both about one's vision of a romantic future but even the best pre-nup makes a lousy love letter. And vice versa.

Here are some examples.

- I am not the grammar police. I won't say, "never use the passive voice." I have used it in memos and letters to obscure responsibility or avoid confrontation. Use it if it serves the purpose of your writing, but not if it doesn't.
- I have an opinion, I am pro-serial comma. However when I'm editing something, if the author doesn't use a comma before the final "and"

but the writing is clear without it, I won't add one unless called for by an applicable style guide.

- I use "he" as the generic pronoun but I write around it when I can do so gracefully, as I did in the last sentence. The primary purpose of most writing is not to advance social change around gender and random pronouns are a distraction.
- Most of us were educated to produce writing that demonstrated how much we knew and how smart we were. For many, this is a deeply ingrained way of thinking about writing we are barely aware of. (My first draft of this paragraph included the word "erudition.") But the purpose of drafting a sales contract or a lease is very seldom to prove how smart you are. That's really the message of plain English in legal writing. Unless the purpose of your writing is to get an A on your paper, you don't have much reason to use overly complex sentences or uncommon words.

B. Editing is really three things.

What is called editing usually includes fact checking, proofreading, and editing. All three are important and are best done in three steps.

- Fact checking in transactional documents is mostly about making sure volume and page numbers, property descriptions, dates, names, and such are right. I prefer to do this in a single review focusing just on this.
- Checking headings has more in common with fact checking than the other editorial steps in that it benefits from a single, focused review. Headings are a common place for typos because they tend to get skimmed over. (By the way, ending a sentence with a preposition is OK most of the time.)
- A first run at basic proofreading can be done using spellcheck and the like. (Kevin discusses some of these tools elsewhere in the article.) I can't type or spell worth a darn so I spellcheck everything. But please do not skip having a human proofread your draft. I recently saw a webpage for a school board candidate that used the word "Untied" in the place of "United" in multiple places. Other things to check at this stage include punctuation, noun-verb agreement, and use of the proper verb tense.
- Finally, editing encompasses reviewing for clarity, precision, and conciseness. This is the focus of most of our article.

C. Editing is worth the time.

Clear communication is worth the time. Sloppy writing will cost you sooner or later. Editing is like cleaning house. If you don't do it, eventually things will get sticky.

D. Use style guides.

My department uses the *Chicago Manual of Style*, The Blue Book and Green Book, *Black's Law Dictionary*, a department style sheet, and an individualized style sheet for each project. You probably don't need all of that. However, you will save time if you make the decision once that the default answer to grammar and usage questions will come from the Chicago Manual; or Bryan Garner's The Redbook; A Manual on Legal Style; or the US Government Printing Office Style Manual; or any of the many other possibilities. I am attaching an excerpt from TexasBarBooks style sheets as Exhibit E as an example. These are working documents, not treatises on usage.

E. In English, common nouns take the lower case.

To quote Wikipedia, "questionable capitalization of words is not uncommon . . ." If you start a word with an upper-case letter, you should be able to articulate a good reason. "It's important" is not a good reason. Randomly capitalizing common nouns is raw legalese. If you clearly define a word, like "seller" in a legal document, that word becomes the equivalent of a proper noun, like a name, and can be capitalized. If a word starts a sentence, it should be capitalized. There are a few specific words that get capitalized that are not names or titles but not many. At the barest minimum, be consistent what you capitalize within documents.

F. Apostrophes, like uppercase letters, are overused; or mind your p's and q's.

I was asked to do a quick review of one of the most abused of all punctuation marks, the apostrophe. The Urban Dictionary defines the apostrophe as a "particularly useful piece of English punctuations for making yourself look stupid." <http://www.urbandictionary.com/define.php?term=apostrophe>

There are two main functions of the apostrophe. One is to stand in for missing letters, for example in the word "isn't." The other is to indicate the possessive case, as in the phrase "the puppy's water bowl." Contractions (isn't, he'll, I'm) are discouraged in legal writing so the focus in this section is on possessives.

Possessives are easy as long as the noun involved doesn't end in the letter S. Just stick the apostrophe at the end of the word and add the S. Luckily this covers the majority of words. If you have a singular word that ends in S, (goddess, class) you still usually add an apostrophe and an S (goddess's chariot, class's behavior). This rule is also applied to proper nouns (Camus's novels).

If you have a noun that has been made plural, and so ends in S (kittens, puppies) it usually is made

possessive by adding just an apostrophe (the puppies' water bowl). This includes most proper nouns (the Kennedys' marriage).

These two rules cover almost everything. If you follow these rules and the word looks wrong to you, write around it (the behavior of the class, the bowl for the puppies). Or look it up. The easiest way is to put it in your favorite Internet search engine. In other words, Google it. I promise professional editors do this all the time.

Apostrophes are occasionally used to form plurals but the style guides vary widely on this point. For example some guides use "PhD's" and some use "PhDs" for the plural of PhD. "Mind your P's and Q's" usually appears with apostrophes but sometimes does not. I could not find an example of "X's and O's" without an apostrophe. Luckily, these phrases are not used often in legal writing so you can just put this out of your head for now.

On the other hand, there is one tricky thing about the apostrophe you shouldn't put out of your head. Two words that trip everyone up on occasion are "its" and "it's." The word "it's" looks like it could be the possessive of "it." But it is not. It is the contraction of "it is." The word "its" is a possessive pronoun, like his or her (his age, her age, its age). Make one quick pass through a document using the find feature looking for "it's" because it is probably wrong.

Good luck!

PART 6. KEVIN'S SUGGESTIONS FOR EDITING.

There are two general approaches to legal editing articles: the academic and the hands-on. During the course of my service on the Real Estate Forms Committee, I went from being a "tall building lawyer" to a "one riot, one Ranger" lawyer. This caused me to ask, "what will I do for forms?" In building my forms library, I knew I would be representing smaller clients, usually just one owner. I decided to set up my library in the style of the Forms Manual, plain English and readable.

I readily admit these rules are plagiarized from various sources over the years and hope that somehow the concepts are now part of the unprotected public domain.

How do you use these rules? Simple – start with a form you want to clean up. Then use the "find feature" in Word. This helps you stay in editing mode, i.e. looking for problems and not getting sucked into the vortex of the document.¹²

¹² I remember a high school teacher's trick to proof read a document (yes, for me that was pre-computers and no spell check). Turn the page upside and read it from right to left.

A. Don't use shall.

How simple is this one? Bryan Garner has written extensively on the evils of shall¹³. Practically everyone who's anyone in the field of legal writing condemns the word "shall." Shall has two meanings that can be difficult to distinguish by context. Shall can express future tense and it can express a directive. Lots of words have more than one meaning but the meaning is usually clear from the context. This is not the case with the word "shall." If your goal is precision, then don't use this imprecise word. If your goal is plain English, then don't use this word. If you are trying to emulate Garner, then don't use it.

As the cursor stops (and stops, and stops, and stops) on "shall" consider alternate words for precision: may, will, and must. If the concept requires a duty on the part of the actor, then say that. Here is an example from a contract followed by a revision:

Original: Closing shall occur on the Date of Closing by mail (as set forth in Section 8.4) at the offices of the Title Company, or at such other time and place as may be agreed to in writing by Seller and Purchaser.

Revision: Closing will occur on the Date of Closing.¹⁴

If you still need a reason to eliminate shall from your written vocabulary, the Nutshell Legal Drafting book (cited earlier in this article) cites a study that found over 1,100 cases interpreting the word.

B. No passive voice (or, passive voice shall never be used by me).

Okay, there are some grammatical exceptions for passive voice, and it won't kill a document to have a couple, but start with the rule that you will not use

You have to focus on the words as you cannot start thinking about the substance of the paper.

¹³ Seriously, Google the phrase "Bryan Garner use of shall" and the first entry is an ABA Journal article entitled "Shall we Abandon Shall?"

¹⁴ Several changes are going on here. "Shall" is replaced with "will." The phrase "by mail (as set forth in Section 8.4) at the offices of the Title Company was dropped. As Section 8.4 says that (trust me, it does) why repeat it here? The final phrase "or at such other time and place as may be agreed to in writing by Seller and Purchaser" was dropped. I believe the parties have a God-given right to change any term whenever and however they choose. You don't need contractual permission to change a contract by the agreement of the parties. Or, if you need it here, then do you need it everywhere?

passive voice. The real problem with passive voice is we never speak it, but for all of our bad training (or lack of training) it is the natural way lawyers write.

To eliminate it, use the search feature for “by.” Now turn the sentence around and use an active verb. For example, here is a sentence from a contract followed by a revision:

Original: The Deposit shall be paid by the Title Company to Seller at Closing and credited against the Purchase Price.

Revised: The Title Company will apply the Deposit to the Purchase Price at Closing.

C. Write in the present tense.

I think I picked this up from Garner along my journey. Instead of phrasing a default clause, “Tenant shall be in default if ...” say “Tenant is in default when....” When you are writing it the event may or may not happen in the future. But when a client calls and needs to enforce the clause, you are in the present tense.

D. No doublets (or triplets, quadruplets, etc.).

Legal writing scholars trace our use of these word strings to medieval Europe. Scribes dealt with a community of Anglo-Saxon, French, and Germanic influences. So they would use an accepted legal term from each culture to express the idea. Another explanation is the fear that something might fall between the cracks if you don’t keep adding words. My explanation is the Clenched Fist Editor rule. Here’s an example with the questionable phrases highlighted:

Purchaser *acknowledges, understands and agrees* that the Property Documents may have been prepared by parties other than Seller and that Seller makes no *representation or warranty whatsoever*, express or implied, as to the *completeness, content or accuracy* of the Property Documents.¹⁵

E. No legalisms.

Be on the lookout for phrases that scream **LAWYER!**

1. A Promissory Note in the original principal sum of One Million and No/100 Dollars USD (\$1,000,000.00) Isn’t it just a \$1,000,000 Promissory Note? I am a firm believer that when referring to an amount, just use numerals. In the case of the promissory note, I now use numerals only. Some legal scholars attribute the word/numeral couplet to the fraud potential in hand-written documents.
2. **NOW, THEREFORE**, in consideration TEN and NO/100 Dollars, in 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.... Do we need any consideration recital at all? Either a contract has it or it doesn’t. The mere recital will not win the day. A written contract is presumed to have consideration. *Nolana Development Association v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984). But consideration can be challenged. *Fourticq v. Fireman's Fund Ins. Co.*, 679 S.W.2d 562, 566 (Tex. App.- Dallas 1984, no writ).
Is it time to just identify the parties and start into the agreement?
3. Know All Men (or Persons) By These Presents.... This one is a favorite. Years ago while visiting Oxford, I went to a small museum with dinosaur bones, original settlers in diorama settings, and a charter document on sheepskin, written in Latin. There was a translation on the wall that went something like this¹⁶:

“Be it known to all those present and future that...”

How is it that we have taken a beautiful phrase (probably in the plain English terminology of the day) that proclaims “now and forever more” and bastardized it to the meaningless heading we carry over in this enlightened age?

F. Use fewer words.

Enough said.

G. Put a period in the middle.

Or as Sherry likes to say, “punctuation is free, use it.” I confess that rules F and G come from a writing book I purchased years ago when I was on the Forms Committee. It started with a preface saying there are only two rules for lawyers. Use fewer words. Put a

¹⁵ Side bar question: what about property documents prepared by seller? Why is this qualified by “may have been prepared by parties other than Seller”? Does this mean even a property document that seller prepared is still without warranty?

¹⁶ I searched the internet for the actual King’s charter of Oxford, but could not find it. But this phrase comes from a document confirming a land gift to the church in Oxford.

period in the middle. I have lost the book and cannot cite the source for proper credit. Googling didn't help.

Why do we feel compelled to keep a sentence going on and on? Has Mr. Weatherbie reported a case where a judge said, "gosh I have to stop interpreting the meaning at the period, I can't consider the words in the next sentence?"

Microsoft Word will let you check the readability of your document. In my version, I click "review", then "spelling and grammar". At the end of the process it shows (1) average sentences per paragraph, (2) average words per sentence, and (3) average characters per word. If (1) is too high, try to find separate thoughts in a paragraph and split up. If (2) is too high, try to find the surplus words and cut. If (3) is too high, try to use smaller words (car instead of automobile or motor vehicle, unless you mean "motor vehicle as defined in the Texas Transportation Code" or such because that is relevant to your particular contract). The Word chart also shows the percentage of passive-voice sentences and a Flesch-Kincaid Grade Level score for readability¹⁷.

H. Limit use of a semicolon.

While they have a valid place and are necessary from time to time; lawyers seem to use them as an excuse to keep a sentence going; the better style would be to use periods; and get over your fear that stopping a sentence will somehow cause the entire document; to fail.

I. Eliminate the words like "hereby" and "herein."

There are many word lists that tell us to eliminate long phrase in Column A phrases and use Column B words instead. These words are just old habits that keep turning up. By the way, if you feel the need to say "the Parties hereby agree..." Do you also feel compelled to add "expressly"?

J. Don't use "except as otherwise expressly set forth herein."

If there is a conflict, fix it.

K. Don't restate the law.

This rule comes from the Forms Committee. There isn't a good reason (other than adding length to a deed of trust) to recite the foreclosure steps from the Texas Property Code. Besides, laws do change sometimes.

L. Check defined terms and use them correctly.

This is also a word search feature exercise. With all of the editors and cutting and pasting, it is very easy to get inconsistent definitions. Or worse, the defined term that is used only once. I object to the style that creates a defined term, then cross-references back to the definition section every time it is used.

M. Severely restrict recitals.

If they are really, truly helpful to orient the reader to relevant history, then use them. I recently had a contract go on for many extensions and the seller's lawyers kept adding a new recital for each extension. By the time we got to the 18th extension, the agreement had two pages of recitals for a one paragraph agreement.

N. Be careful about a section you don't understand.

Chances are it is just in the form and nobody else knows why.

O. Organize "do's and don'ts" together.

This is another Real Estate Forms Committee rule. When you have a long list on covenants, for example a lease where the tenant will and will not do things, put all of the affirmative covenants first, then the negative ones.

P. Use plain English.

By that I mean English as used in 2014, not 1950, or 1890, or 1492 when Columbus sailed the ocean blue. According to Wikipedia, plain language means communication that emphasizes clarity, brevity, and avoids technical language. It should be easily understood and appropriate to the reader's reading skills and knowledge.

But why strive to write in plain English? I decided to commit to the style so my clients could read the document and tell me if it really matched their understanding of the deal.

PART 7. MISCELLANY¹⁸.

A. Growing importance.

How important is writing, drafting, and editing as a discipline of study? For years, Bryan Garner and Law Prose had a monopoly on teaching legal writing in

¹⁷ The Flesch-Kincaid score for this article, including the forms is 60.6. That puts us in a readability range of a 15 to 16 year old. I tested some random documents and found scores in the 30's. Unlike golf, lower is not better. The major factors in the score are number of syllables and words per sentence. Mr. Flesch was a lawyer and a pioneer in the plain English movement. He first published his formula in *Applied Psychology* in 1948. This test has become the standard for children's books, government publications and statutes that require a readability level, such as insurance contracts.

¹⁸ These are stray thoughts, war stories, and vignettes. We just didn't know where to put them.

Texas. However, the State Bar now offers the “Exceptional Legal Writing” seminar and the UT law school has a seminar on “Legal Writing: Precision and Persuasion.” The January “Monthly Practice” e-newsletter from the ABA had as its lead article: “Need help expressing yourself clearly and incisively? The ABA offers a variety of writing resources to help you better serve your client and win the esteem of colleagues and adversaries alike. And many of these books are on sale through February 15.”

B. A good writer is a good reader.

This point came from several blogs or articles. We believe it was intended to refer to litigation writers, to develop creativity. But if the research is true and we have learned our bad habits from all of the old forms, maybe we need to find examples of good contract editing.

C. Kevin editing Kevin.

Exhibit A is Kevin’s critique of Kevin’s Earnest Money Contract form. After reading the articles and preparing this article, I looked at my simple, streamlined, plain English form. I found plenty of room for improvement.

D. Blogs.

Blogs are another source of help or support in your journey to improve your writing, drafting, and editing skills. We’ve listed several blog sites on Exhibit B but there are many more, and growing all the time. A warning, most of the blog posts deal with litigation writing, but several are very helpful in drafting. I’ve set a recurring Outlook calendar entry to remind me to peruse blogs. I hope that creating the monthly habit will also reinforce my commitment to better editing habits.

E. “All laws.”

When the Real Estate Forms Committee undertook the task of adding the chapter on leases, Phil Weller and Bob Bliss served as the co-chairs of the project. The sub-committee met for more than a year starting with a traditional 20-page, legal size, 9-point font landlord form. When Bob and Phil presented the pared down lease to the full committee, a member was concerned about the section on compliance with law. He asked to expand it to include a reference to ADA and environmental laws. An argument ensued about the language with the perceived need to specifically list all statutes in the lease. The current clause in the Basic Lease is:

Obey (a) all applicable laws relating to the use, condition, and occupancy of the Premises and Building and (b) any requirements imposed by utility companies

serving or insurance companies covering the Premises.

Bad habits are hard to recognize and then even harder to over-come.

F. Word Rake program.

Our computers offer many features to assist in editing documents: spell check, grammar check, auto-correct, auto-replace, and auto-format. I have turned the auto change features off, as I do not want the machine making changes. But I don’t mind it making suggestions with red and green underlining.

Kevin used the trial download of Word Rake, the new editing software. After running it on several documents, he was not impressed with the results. It did show basic replacement suggestions, but didn’t show changes for shall or passive voice. As a disclaimer, I might not have correctly used the program or possibly it will improve in a learning mode as you work with it.

G. Limited liability company agreement.

I recently received the updated Business Organizations Manual from the State Bar of Texas. As another example of looking at old habits and trying to follow new rules, I have offered some suggestions for your consideration. See Exhibit C.

H. Know your audience.

What does this mean in the real world? My client uses a modified State Bar Form Tenant Estoppel Certificate. Recently, a lender added a paragraph for several loan issues. Paragraphs 1 – 9 on the attached Exhibit D are the buyer’s terms. Look at paragraph 10, the lender’s insert. Most tenants that will sign a landlord’s form are small businesses and may not use an attorney on a regular basis. Consider the impact paragraph 10 might have on a busy manager/ owner. I revised the insert and removed about half of the words, to make it easier for the tenant to understand.

I. TexasBarBooks’s Usage and Style Guide.

Exhibit E is an abbreviated version of the State Bar of Texas’s Usage and Style Guide. As noted in Sherry’s section, the publication department uses several style books and writing references. But, the department developed this list as a ready guide to capture all of the agreed usages for all publications. Imagine what could happen if the transactional side of a law firm would start a process to establish uniform margins, footers, title, and similar style conventions.

PART 8. CONCLUSION.

Several years ago, I (Kevin) found myself to be 50 pounds overweight. After deciding to do something, I read articles, talked to my doctor, and settled on three

rules to lose weight: eat better, eat less, and exercise more - for the rest of my life. I also asked my wife to be my accountability partner to help me change my bad habits. It worked.

The same advice applies to editing. Develop rules, use fewer words, and edit ruthlessly - for the rest of your life.

But you need an accountability partner. The Real Estate Forms Committee was my accountability partner in changing my editing habits. You can create your own editing committee with like-minded friends that agree to develop rules and apply them to forms. But be careful, once you convert from the Clenched Fist to the Open Palm philosophy, you won't be able to stop.

EXHIBIT A
KEVIN’S EARNEST MONEY CONTRACT

Rather than criticize another attorney’s work for this article, I decided to review my starting form Contract. I thought I had whittled down to the essentials and eliminated surplus words, passive voice, shall, etc. But after reading the articles and preparing this outline, here’s what I found:

EARNEST MONEY CONTRACT

This Earnest Money Contract (“Contract”) is ~~made and~~ entered into by ~~and between~~¹⁹ * (“Seller”) and * (“Buyer”). ~~For valuable consideration,~~²⁰ The parties agree as follows:

Article 1
Sale and Purchase

1.1 Sale and Purchase. Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller; the * Shopping Center, located at *, *, Texas as described on Exhibit “A” (the “LandReal Property²¹”); the Improvements and fixtures thereon the Land (the “Improvements”); any personal property Seller owned by Seller²² and located on the LandReal Property; Seller’s all right, title and interest of Seller, if any, ~~in and~~ to any ~~and all~~ roads or easements, ~~streets and ways~~ bounding the LandReal Property; and anyall rights of ingress and egress, ~~appurtenances, fixtures~~ (collectively, the “Property”).²³

1.2 Purchase Price. The Purchase Price (herein so called) is \$*.00.

1.3 Independent Consideration. If Buyer exercises a right to terminates this Contract ~~pursuant to the provisions hereof~~, other than Seller’s default, ~~the~~ Title Company will release \$*100.00 of the Earnest Money (the “Independent Consideration”) to Seller ~~as an independent consideration fee~~.

1.4 Earnest Money. Within * business days after the Effective Date, Buyer will deliver \$*.00 (the “Earnest Money”) to the Title Company. The Earnest Money will be applied to the Purchase Price at Closing. If this Contract is not closed, then the Title Company will disburse the Earnest Money as set forth in this contract. The Title Company will invest the Earnest Money and the interest will be ~~deemed a~~ part of the Earnest Money.

Article 2
Survey and Title Policy

2.1 Delivery of Survey and Commitment. ~~Within five days after the Effective Date,~~ Seller will deliver ~~to Buyer (a)~~ its existing survey (the “Existing Survey”) ~~of the Real Property and (b) as soon as possible, and~~ a current title commitment ~~, together with legible copies of all exception documents constituting exceptions to Seller’s title~~ (the “Title Commitment”) from * Title, Inc. (the “Title Company”) within ten days after the Effective Date. Buyer may, at Buyer’s expense, obtain an updated Survey ~~(the “Survey”).~~ *Seller agrees to reimburse Buyer at Closing for the cost for the Survey, not to exceed \$*.00.

2.2 Review. ~~Buyer will have~~ Within *thirty days after the Effective Date, Buyer must ~~to~~ review the Survey and Title Commitment and deliver to Seller ~~in writing any~~ objections to anything in the Survey and Title Commitment (“Title Objections”). ~~Any All other items on the survey and title commitment to which Buyer does not~~

¹⁹ Where do these doublets come from?

²⁰ No need for this recital, I am satisfied that my contract has valid consideration.

²¹ One word, not two.

²² Passive voice turned around

²³ General cleanups, eliminating extra words.

~~timely object will be deemed to be~~ are “Permitted Exceptions” ~~;~~ ~~provided, however, that no~~ Any liens shown on Schedule C of the Title Commitment will ~~not be deemed to~~ be Permitted Exceptions.

2.3 Cure. ~~If Buyer timely objects to any item contained in the Title Commitment or Survey (“Title Objections”), Buyer must give Seller~~ may ~~the option to~~ remedy the Title Objections ~~within five days (the “Cure Deadline”).~~ Seller will have no obligation to incur any cost to remedy the defects, except for liens. If Seller ~~is unwilling or unable to~~ does not remedy the Title Objections, then Buyer must either waive the Title Objections or terminate this Contract by the ~~end of the Inspection Period~~ Cure Deadline. If Buyer terminates the Contract pursuant to this Section, then the Title Company must release the Earnest Money ~~will be delivered~~ to Buyer and the Independent Consideration ~~will be delivered~~ to Seller.

EXHIBIT B
BLOGS AND ONLINE SOURCES

Google Search	Blog Site Comments
Legal Writing Prof Blog	This is a collection of cites to other postings, but the third one the day I looked was Bryan Garner. It has a lot of university news also.
Top Ten Legal Writing Blogs	This is an interesting collection of writing sites with reviews. Good source to quickly jump around sites.
Law Prose	This is Garner's site. A lot of his attention is directed to the litigation side but he has some grammar/ word articles.
Write to the Point	This is the Word Rake site, written by Gary Kinder. You can sign up for a weekly e-newsletter for tips/ anecdotes.
The (new) legal writer	Mostly a source of book reviews/ recommendations.
Legalwriting.net Wayne Schiess	Wayne Schiess is the senior writing lecturer at UT Law School. Some helpful points, a lot of updates on his seminars and activities. Good book reviews.
Adams on Contract Drafting	This is an interesting site that focuses more on drafting issues, less on litigation.
A Brief Grammar for Lawyers	Not a true blog, but good material on grammar rules.
Lady (Legal) Writer	Highly rated by ABA, but mostly litigation oriented.

EXHIBIT C
STATE BAR FORM SINGLE MEMBER LLC AGREEMENT

The following is part of the single member limited liability company agreement from the Business Organizations Manual published by the State Bar of Texas. The following redline notes apply the editing rules for shall, passive voice, present tense, and unnecessary words.

Company Agreement of [name of single-member limited liability company]

This Company Agreement (“Agreement”) of [name of limited liability company], a Texas limited liability company (“Company”), is entered into effective [date] (“Effective Date”), by ~~and between~~²⁴ [name of member] (the “Member”) ~~and the Company.~~²⁵

Article 1

Formation

1.1 *Formation.* ~~Subject to the provisions of this Agreement, t~~²⁶The Member filed the certificate of formation (“Certificate”) ~~has organized the Company~~ pursuant to the ~~provisions of the~~ Texas Business Organizations Code (“Code”) ~~by filing a certificate of formation (“Certificate”) with the Texas secretary of state~~ on the Effective Date.

1.2 *Purpose.* The Company’s purpose ~~and business of the Company shall be~~ is to [list company’s purpose] and ~~all related activities and the transaction of~~ any other business ~~or activity~~ allowed under the Code ~~as determined by the Member~~²⁷. The Company ~~shall~~ hasve the authority to do all things necessary ~~or convenient~~ to accomplish its purpose ~~and operate its business as described in this section 1.2.~~

1.3 *Term.* The Company ~~shall~~ will continue in existence perpetually or until ~~the termination of the Company~~ in accordance with the provisions of ~~section 6.1 of~~²⁸ this Agreement or the Code.

²⁴ “by and between” is such a natural phrase, like Abbott and Costello. It is hard to imagine one without the other.

²⁵ I’m stepping out a little here. I don’t believe the Company is really a party to this Agreement.

²⁶ Question, if this phrase is necessary, should it go in front of every sentence, of just the ones that are in fact subject to the terms of the agreement?

²⁷ Of course the Member determines the Company’s business.

²⁸ This is a pet peeve on mine. If sections change, the cross reference can be dangling. I prefer to use a defined term, but this is a short document so I drop cross references or limit them to Article 6.

1.4 *Registered Agent and Office.* The registered agent ~~for the service of process~~²⁹ is [name], and the address is [address]. The principal office of the Company ~~is shall be located at~~ [address]. ~~The Member may designate The Company may have other offices and places of business at such locations,~~ both within and without the state of Texas; ~~as the Member may from time to time determine or as the business and affairs of the Company may require.~~

1.5 *Membership Interest.* The Member ~~has owns one hundred percent (100%) of the Company's~~ membership interests (“Membership Interests”) ~~in the Company.~~ The Membership Interests include all of the rights of the Member³⁰; ~~such as the right to share in profits, losses, and distributions, and the right to participate in the management in the Company.~~

Article 2

Capital Contributions

2.1 *Capital Contributions.* The Member has contributed to the Company [**select one of the following:** the property listed on Schedule 1/cash and other property]. ~~The Member may contribute a~~Additional capital ~~contributions may be made by the Member.~~ The Member ~~is shall not be~~ obligated to make any additional contributions.

2.2 *Ownership of Assets.* ~~All The Company owns its~~ assets ~~and property of the Company shall be owned by the Company, subject to the terms and provisions of this Agreement,~~ and ~~the~~ Member³¹; ~~individually, shall does~~ not have any ownership of ~~such the~~ assets ~~or property.~~ Legal title to all assets and property of the Company shall be held and ~~conveyed in the name of the Company.~~

²⁹ The Code provides that the registered agent may be served, it isn't needed here.

³⁰ I'm not really sure this sentence needs to be included.

³¹ I prefer the not use “the” in front of a defined term name. But use word search to ensure consistency.

EXHIBIT D
TENNANT ESTOPPEL EXAMPLE

Tenant Estoppel Certificate

Tenant: * (current tenant)

Landlord: *

Lease: * ____, between _____ (original landlord) and _____ (original tenant) for the Premises

Center: *

Premises: Suite/Unit _____ in the Center, containing approximately _____ square feet

Buyer: * _____

Buyer has a contract to purchase the Center. As a condition of the closing, Buyer request² this Tenant Estoppel Certificate from Tenant. Tenant affirms to Buyer and Landlord the following in connection with the Lease:

1. To the best of Tenant's knowledge, Landlord and Tenant are not in default under the Lease. No event has occurred which, with the passage of time or giving of notice, would constitute a default by Tenant or Landlord under the Lease.
2. The current monthly base rental is \$ _____. Landlord is holding a security deposit in the amount of \$ _____.
3. Tenant has not transferred or sublet any interest in the Lease.
4. A complete copy of the Lease is attached as Exhibit "A".
5. The Lease is in full force and effect.
6. There are no offsets against the rentals payable under the Lease. Tenant is not aware of any discrepancies in connection with any prior year's reconciliation charges.
7. Tenant does not have any right to renew the term of the Lease or any option to purchase all or any part of the Premises or the Center.
8. Tenant currently occupies the Premises and operates its business on the Premises.
9. Tenant has received all tenant improvement money under the Lease.
10. Tenant hereby agrees:
 - (1) To send a copy of any notice or demand given or made to Buyer, as successor Landlord, pursuant to the provisions of the Lease, by certified mail, to Goldman Sachs Bank USA ("Lender"), 100 Crescent Court, Suite 1000, Dallas, TX 75201 Attn: Greg Furness, who is or will be the owner and holder of a mortgage on the Premises, or its assignee upon being notified in writing of such assignee's name and address;
 - (2) To give to a reasonable period of time, but in no event less than thirty (30) days, to cure any default complained of in said notice or demand;
 - (3) No rent (other than monthly common area expense reimbursements) shall be prepaid under the Lease for more than one (1) month in advance during the term thereof without Lender's prior written consent;

- (4) the Lease shall not be modified in any manner (except for "administrative amendments") or surrendered, cancelled, or terminated (except for a breach by Buyer, as successor Landlord,) without Lender's prior written consent (for purposes of this estoppel certificate, an "administrative amendment" to the Lease shall mean any amendment or modification which is executed by Tenant and Buyer, as successor Landlord, for the purpose of clarifying the terms of the Lease without material modification to the economic terms or obligations of Buyer, as successor Landlord, thereunder);
- (5) If Lender shall notify Tenant that a default has occurred under the mortgage encumbering the Premises and shall demand that Tenant pay rentals and other amounts due under the Lease to Lender, Tenant will honor such demand notwithstanding any contrary instructions from Buyer, as successor Landlord, provided that any such payments made to Tenant to Lender will be applied against any payments owed by Tenant under the Lease;
- (6) That in the event that Lender acquires title to the property encumbered by the mortgage, Lender will not be liable for any security deposit that Tenant may have given to any previous landlord (including Buyer and Landlord) which has not, as such, been transferred to Lender;
- (7) The Lease does not contain any options to purchase and/or rights of first refusal to purchase the Premises or any portion of the project of which the Premises is a part; and
- (8) Tenant understands that Lender will rely upon the certifications and agreements in this Tenant Estoppel Certificate in making a loan to Buyer.

EXHIBIT E

Excerpts from TexasBarBooks Usage and Style Guide

DOUBLETS, TRIPLETS, AND SIMPLIFICATIONS

These appear in the general usage style guide but are worth repeating:

any and all = all

each/every month = per month

fixed and imposed = imposed

shall have and recover judgment = is awarded a judgment of \$[**amount**] against

recover of and from = is awarded a judgment of \$[**amount**] against

over and above = exceeding

per annum = per year

prior to = before

pursuant to = in accordance with or under (unless it is a statutory reference)

separate(ly) and apart = separate(ly)

such (pron.) = the, this, that, etc.

DEFINED TERMS

If the following are defined terms, they are always capitalized when used as replacements for proper names in petitions, notes, contracts, etc. *But* within a form, terms such as “note,” “agreement,” “contract,” “affidavit,” etc. are lowercased when they are *not* defined terms but are just used in reference to the form title itself (e.g., “this note”).

Applicant

Buyer

Deed

Deed of Trust

Defendant

Guardian

Lease

Maker

Matured, Unpaid Amounts

Maturity Date

Note

Owner

Payee

Petitioner

Place for Payment

Plaintiff

Principal Amount

Secured Party

Seller

Terms of Payment

Ward; Proposed Ward

A

above-captioned clause (use *this cause*)

above-mentioned (adj.)

abstract of title company

accompanied by (use with persons); accompanied with (use with things)

accrue (a person cannot accrue, only acquire; interest accrues)

add-on interest

ad litem (capped in title)

advise (do not use for *tell*, *inform*, or *notify*); adviser

affect (to have an effect on; compare with *effect*)

after-acquired (adj.)

alter ego (n., adj.)

alternate (one after another, substitute); alternative (a choice)

A.M. / P.M. (set small caps with periods; *see also* time)

anti-holder-in-due-course rule

any and all (use *all*)

appointed . . . (*not* appointed as)

arm's-length (adj.)

“AS IS” (all caps, roman, with quotes)

assumed name certificate

assure (person) (compare with *ensure*, *insure*)

as long as, as far as (*not* so long as)

as to whether (omit *as to* or change to *on* or *about*)

attorney at law

attorney-client privilege, relationship

attorney-in-fact

attorney's fees; attorneys' fees (*not* attorney fees or attorney's fee)

attorneys general (pl.)

attributed to (*not* attributed as)

B

bad-faith (adj.)

best-evidence rule

beyond-a-reasonable-doubt (adj.)

boilerplate (adj. & n.)

breach-of-contract suit

breakdown (n.); break down (v.)

break-even (adj.); break even (v.)

building-loan agreement

buildup (n.)

buy-sell (adj.)

bylaws

C

capital gains treatment

cardholder (*but* credit card holder)

carryover basis (n.); carryover-basis (adj.)

cash-only sale

change-of-address (adj.)

Chapter 11 bankruptcy (capped)

choice-of-law (adj.)

cleanup costs

client-controlled business

closed-end (adj.) (when referring to credit accounts)

closely held business

coastal-area property

cochair; coexecutor; comaker; cotenant; coworker; *but* co-owner; co-employee (use coworker)

collection agency; collection letters

commissioners court

common area maintenance (CAM)

community-property (adj.)

condominium owners association

conflict-of-interest (adj.)

consumer-goods transaction; nonconsumer-goods transaction

consumer price index

contract-for-deed transaction

contract-market differential

contract-price-minus-market-price (adj.)

co-op (*but* cooperative)

cost-plus contract

counsel (can be sing. or pl.); prefer *attorney*

county clerk

county court at law

courts of appeals' (pl. pos.; *but* ten court of appeals districts; pl. courts of appeals) (Note for possessive forms: Garner says better to change to “. . . of the court of appeals”)

court of appeals' jurisdiction (sing. pos.; *but* court of appeals review (attrib. adj.))

credited to (*not* on)

creditor-bank (noun combination, use hyphen)

criminal record background check

cross-action; cross-claim

cul-de-sac; culs-de-sac

cutoff (n. and adj.); cut off (v.)

D

day's notice; three days' notice

deed-of-trust (adj.)

deed-of-trust-to-secure-assumption (adj.)

depository (person or entity receiving a deposit); depository (place of deposit)

deter (applies to people, not things)

direct-mail (adj.)

disc (anatomy); disk (computer)

dollar amounts: \$4, \$25, *but* \$1.05, \$2.00, \$0.25 in same paragraph; \$10 million, \$10,000, \$2.5 million; isolated amounts—thirty cents

down payment

driver's license number

due to (do not use with adverbial phrases; change to *because of*, *attributable to*; e.g., They had an accident because of bad weather; *but* The accident was due to bad weather; *due to* being a causal phrase in that construction)

due-on-sale (adj.); due-on-transfer (adj.)

E

earnest-money contract

effect (v., to bring about; e.g., affirmative action will effect new hiring policies; n., e.g., the effect of affirmative action on hiring) (compare with *affect* (v., to have an effect on, e.g., affirmative action will affect previous hiring policies))

effectuate (to give effect to; e.g., instituting affirmative action will effectuate the board's directives)

e-mail; electronic mail

endorse; endorser; endorsement

ensure (things) (compare with *assure*, *insure*)

estopped from (*not* estopped to)

ex officio

extrahazardous

F

fair housing laws

farther (distance); further (time or degree)

fast food; fast-food corporation

federal income tax

federally regulated mortgage loan

fee simple (n., adj.)

fewer (for number); less (for quantity) (fewer people, *but* smallest number of people; less floor space; less than thirty years; earn less than \$10,000)

finalize (avoid it; use *make final* or *conclude*)

final account (*not* accounting)

final-judgment rule (*but* final judgment)

financer (a financing agent); financier (a person)

first-class mail, return receipt requested

first-come-first-served basis

first-lien, second-lien (adj.)

first in time, first in right; first-in-time-first-in-right (adj.)

fit (not past tense, use *fitted*)

five-year limitations

fixed and imposed (use *imposed*)

fixed-rate (adj.)

flood insurance policy

floodplain; flood-prone, flood-related (adj.)

forbear (v.); forbearance (n., a refraining from enforcement); forebear (n., ancestor)

forcible-entry-and-detainer action

forego (precede); forgo (do without)

foreign-country judgment

former employee (*not* ex-employee)

401(k) (note lowercase *k*)

full faith and credit clause

future advance clause, future advances

future advance interest

G

garnishee; garnisher (*not* garnishor) (Webster's)

generation-skipping (adj.)

gift tax (adj.)

good-faith (adj.)

goodwill

grantee-grantor index

guarantee (v.) (also n. when meaning creditor under contract of guaranty) (Ballentine's)

guaranty (n.); guaranties (pl.)

H

heirs at law

holder-in-due-course (adj.)

homeowner; homeowner's insurance

homestead loan documents

homestead-exempt property

I

impact (n., meaning great force; don't use as verb; don't use for *effect* or *influence*)

imputed to (*not* on)

incapacitated person

inception of title state

in the event that (change to *if*)

innocent-landowner defense

in order to (change to *to*)

in regard to (or regarding; *not* in regards to)

installment lien note

insurance adjuster

insure (insurance) (compare with *assure*, *ensure*)

inter alia (comma before and after)

interest-bearing (adj.)

Internet; the Net (note initial caps)

"I.O.U." (note quotation marks)

J

joint-interest (adj.)

joint-management (adj.)

joint-reciprocal (adj.)

joint-stock company

jurisdiction of

K

L

landlord-tenant relationship; landlord-tenant related provisions
lawyer (prefer *attorney*)
lead-based paint
legislature (*but* Sixty-seventh Legislature; 67th Legislature in note); Texas legislature
lesser included (adj.) (Garner says *not* hyphenated)
letters of administration; letters of guardianship; letters testamentary
lienholder (*but* mechanic's lien holder, vendor's lien holder)
lien-theory state
line-of-credit note
list-price-minus-cost (adj.)
loan-commitment agreement
long-arm jurisdiction
long form certificate
low-interest-bearing notes
lump-sum (adj.)

M

manufactured-home community; manufactured-home lease
marketplace
market-price (adj.)
mechanic's and worker's lien (*not* materialman's)
members meeting(s) (no apostrophe)
metes-and-bounds description
miles per hour (in text)
moneys (pl.)
monthly-pay loans
mortgage loan transaction
motion in limine; motions in limine

N

need for (*not* need of)
Net, the (the Internet)
non-interest-bearing (adj.) (*non* as prefix with one word, closed up)
nonnegotiable
nonprofit
non–pro rata (note en dash)

non–purchase money (note en dash)

note holder

now pending (omit *now*)

O

offset (n., adj., v.) (note three forms of *set off*)

on behalf of

online (adj., adv.); on line (prep. phrase)

open-end (adj.) (when referring to credit accounts); open-ended questions

open-space land, open-space tax rollback

orphans' exclusion

outside of (delete *of*)

over and above (change to *exceeding*)

owelty; owelty of partition

Owner Policy of Title Insurance

P

pass-through (adj.)

payor

payout (n., adj.); pay out (v.)

per annum (use *per year*)

percent (with figures in text, *but* one full percent; 1.5 percent; one-half percent; % (in footnotes and some form text))

period of time (*period* or *time* sufficient)

per month, per year (*not* per annum)

per-page filing fee

pleaded (*not* pled or plead)

plurals of proper names and numbers: add *s* only; if name ends in *s* add *es*; plural of abbreviations and capital letters, add *'s*, e.g., too many I's (*see* Chicago)

possessives: Davis's; testatrix's; pl. poss.: Hendrickeses'

preregister

prerequisite of (n.); prerequisite to (adj.)

president (*but* the President (U.S.))

principal-agent (adj.)

prior to (change to *before*)

profit à prendre (note accent grave)

pro forma (adj.)

property owners association

proved (past & perfect tenses); proven (okay as adj.)

punch list

purchase-money lien, purchase-money security interest

pursuant to (use *in accordance with* or *under*); *but*: “. . . pursuant to section 5.30 of the Texas Family Code . . .”

Q

question as to whether (omit *as to*)
quitclaim

R

ready-made (n. & adj.)
regulation; Regulation Z
reverse mortgage (n.)
right-of-way, rights-of-way
rollback taxes

S

safe-deposit box (*not* safety-deposit box)
a saving of . . . (*not* a savings of)
savings and loan association
second hand (n.); secondhand (adj., adv.)
secretary of state; secretary of state's office
securities laws
security-for-payment clause
self-addressed, stamped envelope
self-insured
self-proved (term in probate law, e.g., made self-proved, *but* self-proving affidavit)
separate(ly) and apart (change to *separate(ly)*)
separate-property (adj.)
servicemember setback (n., adj.)
setoff (n.); set off (v.); set-off (adj.)
short form certificate
simple-interest (adj.)
since (covers past time to present; requires simple past tense, but introductory clause requires present perfect; e.g., He *has not slept* since he *came* home.); avoid using for *because*
single-family (adj.)
sister state (n.); sister-state (adj.) (*but* sister state's judgment)
-size (with noun, e.g., life-size, letter-size); -sized (with adj., e.g., large-sized)
social security (general term)
Social Security number; Social Security officer (Administration implied); Social Security tax
social-service (adj.)
sole-management community property
so long as; so far as (change to *as long as*; *as far as*)
special land use

special-use tax rollback
statute of frauds
statute of limitations; statutes of limitation
stockbroker; stockbrokerage
stormwater
strips and gores; strips and gores doctrine; *but* strips-and-gores provision
strong-arm clause (provision in Bankruptcy Act)
sua sponte (comma before & after)
subchapter S corporation
“subject to” (when not syntactic part of sentence; *see* “AS IS”)
such (pron.) (change to *the, this, that*, etc., unless used as adjective)
sufficient (*to or for*—not *as* or *so that*)
“Sunday Closing Laws”
Supersede; supersedeas
supplemental security income (SSI)
sworn account procedure

T

tax-exempt property
tax-shelter (adj.)
terminable-interest-rule exception
that (no comma when used before restrictive clause) (*but note* “that cause which” and “doing that which” to avoid repetition of *that*)
third party (n.); third-party (adj.)
time: two o’clock; 2:30 P.M. (in running text); [**time**] or __. M. (in forms); use small caps when typeset; do not use A.M. or P.M. with *o’clock*
time-price differential
timetable
titled-goods inventory
titleholder
totaling
toward (*not* towards)
toxic-waste concerns
trademark
trade name (n.); trade-name (adj.)
trade-secret constraints (adj.)
traveler’s check *or* checks
trespass-to-try-title (adj.)
truth-in-lending statutes (*but* Truth in Lending Act)
turnkey

U

upon (in most cases change to *on*)

up-to-date (adj., before or after noun); up to date (adv.)

utilize (change to *use*)

V

verbally (wrong use for *orally*; e.g., “verbal and written instructions” would be redundant)

vice president

voidable-option contract

W

watercourse (n.)

when (use *if* if condition, e.g., when this case goes to trial (emphasis on time); if this case goes to trial (meaning “in the event”))

where (use *when* or *if* unless place is meant; do not use as relative pronoun; use *in which*, e.g., The case (or the county) in which . . .)

whether . . . or not (place *or not* at end of clause unless unwieldy to do so)

which (comma before when used before nonrestrictive clause)

while (a temporal adv.; better to use *and*, *but*, *although*, or *whereas* unless meaning is “during the time that”)

wholly owned business

wraparound

X

Xerox (use *photocopy* for general term)

X ray (n.); X-ray (v. & adj.)

