PLAIN LANGUAGE THROUGH ORGANIZATION

Document Guideline: Divide, Classify and Sequence

The drafting literature sets out a three-step process for large-scale document organization: division, classification and sequencing. The process is not linear; in practice drafters discover new categories for division or a different sequencing pattern in the process of managing complex material.

Division is the process of gathering material into groupings to serve as sections. Division schemes should meet these tests:

1. The sections and their headings should be mutually exclusive, i.e. no overlap between sections.
2. Added together, the sections should equal the whole.
3. One consistently applied principle should govern the division.

Classification is the process of deciding which substance belongs under which heading or subheading. The main principle of classification is to group closely related provisions together. Where a provision could be placed in more than one section, Dickerson recommends placement where there is the greatest "logical pull".

Sequencing is the process of ordering the text. The controlling principle for sequencing (as for point 3 above) is who will use the document and how.

Common sequencing patterns include[1]:

1. Events in the chronological order in which they are expected to occur.
2. More important before less important.
3. Ordinary, expected events before extraordinary events
4. General before exceptions.
5. Substantive to procedural

Of course, custom often dictates overall document organization. For example, a typical asset purchase agreement might be organized as follows:

- Interpretation
- Sale and Purchase
- Representations and Warranties
- Covenants
- Conditions
- Closing Arrangements
- General

[1] The Legislative Drafting Convention Part III sets out the format for legislative drafting.

A typical consulting agreement might be organized as follows:

- General
- Remuneration of Consultant
- Covenants of Consultant
- Independent Contractor
- Termination
- Interpretation and Enforcement

Each organization scheme reflects the needs of the parties.

To illustrate, let's examine and reorganize the outline of a catering contract.

Definitions
Grant of Catering Rights
Term
Fees
Payment of Fees
Sponsorships
Service to the Public
Schedule of Prices
Quality of Food and Services
Purchasing
Caterer Equipment
Caterer Personnel
University Equipment
Drainage
Objectionable and Hazardous Materials
Fire Precautions
Advertising and Signs
Use of Outlets and Facilities
Indemnity
Insurance
Union Obligations
Books and Records
Bankruptcy
Operation of Electronic Games
Force Majeure
Major Construction
Non-Assignment
Compliance with Laws and University Policies
Taxes
Termination
Liens
Confidentiality
Selection of Responsibility Representatives
Operating Expenses – University's Responsibility

Operating Expenses – Caterer's Responsibility
Waiver
Prohibited Acts
Notice
Construction of Agreement

The first reorganization step is to create the major divisions:

Interpretation
Essence of the Agreement
Caterer Obligations
Institutional Obligations
General

The next reorganization step is to classify the terms within the divisions:

Interpretation	Definitions
Essence	Grant of Catering Licence Fees and Payment Term Termination
Caterer Obligations	Service to the Public Schedule of Prices Quality of Food and Services Purchasing Caterer Equipment Drainage Objectionable and Hazardous Material Fire Precautions Caterer Personnel Advertising and Signs Use of Outlets and Facilities Insurance Union Obligations Books and Records Bankruptcy Operation of Electronic Games Taxes Liens Confidentiality Selection of Responsibility Representatives Operating Expenses – Caterer's Responsibility Prohibited Acts
Institutional Obligations	Institutional Equipment Operating Expenses – Institutional Responsibility
General	Indemnity

	Force Majeure Non-Assignment Waiver Notice Compliance with Laws and Institutional Policies Construction of Agreement

At this point the drafter must consider whether to create different divisions that reflect the content of the sections rather than the obligations of the parties. So, for example, we could add a division entitled Operating Expenses, which would include the obligations of both the caterer and the institution. Our division scheme would then look like this:

Interpretation
Essence of the Agreement
Caterer Obligations
Institutional Obligations
Operating Expenses
General

Similarly, we could review the agreement and cluster parallel obligations together, creating content divisions where parallel obligations exist (a review of the actual document shows relatively few parallel obligations).

In making this change, we have changed our division principle, from parties to actions – a different analytical framework. For the purpose of this illustration, I will continue with the original division principle.

The next step is to categorize and sequence the long list of the caterer's obligations. Our sequence should take into account what the parties consider important and how they will use the document.

We could, for example, sequence as follows:

- service issues
- equipment and facilities issues
- labor issues
- safety issues
- finance and business obligation issues
- miscellaneous issues
- extraordinary event issues

And our outline for the Caterer's Obligations section will look like this:

Service Issues	Service to the Public Schedule of Prices Quality of Food and Service Selection of Responsibility Representatives
Equipment and Facilities Issues	Caterer Equipment Use of Outlets and Facilities Operation of Electronic Games Advertising and Signs
Labor Issues	Caterer Personnel Union Obligations
Safety Issues	Objectionable and Hazardous Materials Drainage Prohibited Acts Fire Precautions
Finance and Business Operation Issues	Operating Expenses Insurance Books and Records Taxes Liens
Miscellaneous Issues	Confidentiality
Extraordinary Event Issues	Bankruptcy Major Construction

In reviewing the outline, the drafter may decide to re-organize based on the "logical pull". For example, items listed under Safety could also be organized under Facilities and Equipment. Alternatively, the drafter might re-sequence based on what's more important to the parties, for example, the finance and business obligation issues.

Our final outline could look like this:

Definitions
Grant of Catering Licence
Fees and Payment
Term
Termination
Caterer Obligations

- Service
- Equipment and Facilities
- Labour and Employment
- Safety
- Finance and Business Operation
- Confidentiality
- Bankruptcy
- Major Construction

Institutional Obligations

- Equipment
- Operating Expenses

General

- Indemnity
- Force Majeure
- Non-Assignment
- Waiver
- Notice
- Compliance with Laws and Institutional Policies
- Construction of Agreement

Paragraph Guideline: Use Tabulated Structure

Tabulated structure (also known as “paragraph sculpting”) is a device to present complex ideas in a list format. Apart from being easier to read, tabulated structure is an essential device to manage modifiers in a list.

Wydick[2] recommends that drafters follow these conventions:

1. Each item in the list must be of the same class.
   Don’t make a list like this:
   a. bread;
   b. eggs; and
   c. Czar Nicholas II.
2. Each item must fit, in substance and grammar, with the material in front of the colon and the material following the list. Don’t make a list like this:
   a. jurisdiction;
   b. venue; and
   c. preparing charts for Dr. Sullivan’s testimony.
3. After each item in the list, except the last, put a semi-colon followed by *or* (if the list is disjunctive) or *and* (if the list is conjunctive). If both the list and the items are short, and if the reader will not become confused, you can omit the *and* or *or* after all except the next-to-last item.

Child[3] describes the differences between tabulated structure and lists as follows: lists are used to provide examples; “the point of the sentence with the list is clear before the list begins, and the items in the list function almost as various possible ways to fill a blank.” Items in list format are presented as independent units beginning with a capital letter and ending with a period rather than a comma or semi-colon. List items are neither conjunctive nor disjunctive, and therefore do not include *and* or *or*.

Tabulated structure is used to divide up a sentence to show the relationship among its parts; list structure is used to give examples, or where the reader might look up just one item on the list rather than having an equal interest in all the listed items.

Wydick’s second point above is a useful reminder of the value of parallelism in legal writing and drafting. Parallel structure is the use of the same grammatical structure for elements that are logically parallel. In a long sentence or paragraph, items or clauses that have the same relationship to a major idea should have parallel structure. In other words, the subordinate ideas should all have the same grammatical construction - all nouns or all infinitives, or all active voice verb clauses, or all questions, etc.

> Original: The Resident is capable of appointing a representative if he or she has the ability to understand that the proposed representative has a genuine concern for his or her welfare and will have access to confidential information about the Resident

[2] Wydick at 47-48.
[3] Child, at 351-2

and if he or she is able to appreciate the reasonably foreseeable consequences of granting a third party access to his or her confidential records and information.

Revised: The Resident is capable of appointing a representative if he or she has the ability::

a. to understand that the proposed representative has a genuine concern for his or her welfare;
b. to understand that the proposed representative has access to confidential information about the Resident; and
c. to appreciate that there may be reasonably foreseeable consequences of granting a third party access to confidential records.

Original: Subject to Section 2.03 the Corporation shall reimburse the Consultant for all reasonable expenses actually and properly incurred by the Consultant, in the performance of the Services, for project materials and travel expenses at Consultant's direct cost when supported by proper receipts, provided that such expenses shall be paid in accordance with the normal practices of the Corporation in force from time to time.

Revised:

Subject to Section 2.03 the Corporation shall reimburse the Consultant: for:

1) all reasonable expenses actually and properly incurred in the performance of the Services; and
2) project materials and travel expenses at Consultant's direct cost when supported by proper receipts.

These expenses are paid in accordance with the normal practices of the Corporation.

OR (depending on what's meant by the original section)

Revised:

Subject to Section 2.03 the Corporation shall reimburse the Consultant for:

1) all reasonable expenses actually and properly incurred in the performance of the Services; and
2) project materials and travel expenses at Consultant's direct cost

when supported by proper receipts.

The second revision illustrates the use of tabulated structure to manage the modifier "when supported by proper receipts."

Sentence Guideline 1: Draft in the active voice.

The actor is the subject of a sentence written in the active voice. The actor the object of the sentence written in the passive voice.

In drafting, use the active voice to ensure it is clear who is obligated to do something.[4]

> Original (Passive): All of the Consultant's rights in and to Products, shall be assigned by the Consultant to the Company….
>
> Revised (Active): The Consultant shall assign all his rights in the Products to the Company…
>
> Original (Passive): Shipping dates will be established upon receipt of orders from Customer.
>
> Revised (Active): XYZ will establish shipping dates after receiving the Customer's order.

Use the passive voice if you are stating a policy – a statement about how the agreement operates - rather than expressly obligating someone to do something.[5]

> If any provision of this agreement is deemed void or invalid by a court of competent jurisdiction…
>
> Any use, misappropriation or disclosure of Confidential Information without the Company's prior written consent is a breach of trust and will cause irreparable harm to the Company.

Sentence Guideline 2: Draft in the present tense.

Documents are considered to be "always speaking". Sentences that use the "shall" or "will" construction may be ambiguous– it's not clear whether the drafter intended to signal a legal obligation or a future event. As well, using "shall" instead of the present tense frequently leads to the "false imperative" — to declare a legal result.

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[4] It's useful to develop the habit of writing in the active voice for other reasons. First, your sentences will be shorter and easier to read. Second, you're less likely to make grammatical errors if you keep to the S-V-O sentence structure.

[5] In other forms of legal writing, you might use the passive voice if the object is more important than the actor, if the actor is unknown, or if you want to de-emphasize the actor.

Original: In the event that any provision of this agreement or part thereof shall be deemed void or invalid by a court of competent jurisdiction, the remaining provisions or parts thereof shall be and remain in full force and effect.

Revised: If a court of competent jurisdiction deems any provision of this agreement to be void, the remaining provisions or parts remain in full force and effect.

Use the future tense to signal future events.

XYZ will establish shipping dates after receiving the Customer's order.

Sentence Guideline 3: Use "shall" only for legal entities.[6]

Shall is frequently and inappropriately used to command inanimate objects or to indicate that the object has a legal obligation. If you develop the habit of writing in the present tense, you are less likely to draft these "false imperatives" (which often seem to show up in definitions).

Original: This Agreement shall be for a term of six months.

Revised: This Agreement is for a term of six months.

Original: The term "Products" shall mean…

Revised: The term Products" means…

Sentence Guideline 4: Pay attention to the placement of modifiers.

Improper modifier placement can create an ambiguous provision. In particular, watch for these types of modifiers:

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[6] I am not, in this guideline, stepping into the debate about whether drafters should use "shall", "must", "will" or whatever to indicate a duty or a promise. That debate is well set out in various articles, some of which are in the bibliography. Any term used should be addressed to a legal entity able to provide a promise or fulfill an obligation.
My own preference is to follow Reed Dickerson's formula:

1. To create a right, say "is entitled to."
2. To create a discretionary authority, say "may."
3. To create a duty, say "shall."
4. To create a mere condition precedent, say "must."
5. To negate a right, say "is not entitled to."
6. To negate a discretionary authority, say "may not."
7. To negate a duty or mere condition precedent, say "is not required to."
8. To create a duty not to act (i.e. a prohibition), say "shall not."

From R. Dickerson, The Fundamentals of Legal Drafting 214 (2nd. Ed.)

Squinting modifiers

Original: Overtaxing oneself in physical activity too frequently results in injury.

Revised: Overtaxing oneself too frequently in physical activity results in injury.

OR

Revised: Overtaxing oneself in physical activity results too frequently in injury.

Dangling modifiers

Original: To argue contributory negligence, all elements of negligence must be shown.

Revised: To argue contributory negligence, the defence must show all elements of negligence.

Modifiers in a sequence.

Original: Employees are entitled to be reimbursed for the costs of travel, professional memberships, and professional conferences that have been approved.

Revised using tabulated structure:

Employees are entitled to be reimbursed for the costs of:

1. travel;
2. professional memberships; and
3. professional conferences that have been approved.

OR

Employees are entitled to be reimbursed for the costs of;

1. travel;
2. professional memberships; and
3. professional conferences

that have been approved.

The drafting texts offer useful chapters on identifying and managing ambiguities, including ambiguities in the use of "and", "or", time and dates, etc. See, for example, Haggard Chapter 8 and 9, Dick Chapter 6, or Child, Chapter 9.

Sentence Guideline 5: Craft conditionals with care.

A conditional is an event that either triggers a legal consequence (a condition precedent) or extinguishes a legal consequence (a condition subsequent). Conditionals are signaled by the use of "if", "when", or "after."

The SEC Plain Language Guidelines provide four "rules of thumb" for drafting conditionals[7]:

- One "if", one "then" When there is only one *if* and one *then*, starting with the *if* may spare some of your readers from having to read the rest of the sentence. In these cases, the *if* clause defines who or what the "then" clause applies to.
- One "if", multiple "thens" When there is only one *if* and more than one *then*, start with the *if* and tabulate the *thens*.
- Multiple "ifs", one "then" When there is only one *then* and more than one *if*, start with the *then* and tabulate the *ifs*.
- Multiple "ifs" and "thens" when there is more than one *if* and more than one *then,* you'll probably need to break it down into more than one sentence, taking care to specify which *ifs* apply to which *thens*. If the information is still unclear, consider presenting the information in a table.

Original: Upon the determination by the President of the Company that the Consultant has been guilty of legally justifiable cause, he shall, at the option of the President, be subject to instant dismissal. Notwithstanding the foregoing, in such event, the issue of whether the Consultant was validly terminated for legally justifiable cause shall be determined by an arbitrator in accordance with the provisions hereinafter set forth.

Revised: If the President determines that the Consultant is guilty of legally justifiable cause, then the President may instantly dismiss the Consultant. An arbitrator shall decide the issue of whether the Consultant was validly terminated for legally justifiable cause. [or, The Consultant is entitled to an arbitration, in accordance with this provision, to decide whether the Consultant was validly terminated for legally justifiable cause.]

Original: If at any time prior to complete delivery of the Commercial(s) to Agency hereunder: (i) there shall be filed by or against the Producer a petition in bankruptcy, insolvency, reorganization or for the appointment of a receiver or trustee for all or part of the Producer's property; or (ii) Producer shall make an assignment for the benefit of creditors; or (iii) Producer in any manner subjects the results or products of its services hereunder, including (without limitation) the Commercial(s) and the above-mentioned sound tracks and other elements and negative and positive films and tapes, to a lien in favour of any third party; or (iv) Producer's financial stability becomes so impaired as to endanger its ability to produce and deliver the Commercial(s) free and clear of all liens, claims or encumbrances, then Agency shall have the option to terminate this agreement by written notice to Producer, whereupon Producer shall immediately deliver all the results or products of its services hereunder as directed by Agency.

[7] P. 33.

Revised: The Agency may terminate this agreement by written notice to the Producer, and direct the Producer to immediately deliver all the results or products of its services, if:

i. a petition in bankruptcy, insolvency, or reorganization is filed against the Producer;
ii. a receiver or trustee is appointed for all or part of the Producer's property;
iii. the Producer makes an assignment for the benefit of creditors;
iv. the Producer subjects the results or products of its services, including without limitation, the Commercial(s), the sound tracks, other elements, and negative and positive films and tapes, to a lien in favour of any third party;
v. the Producer's financial stability becomes so impaired as to endanger its ability to produce and deliver the Commercial(s) free and clear of all liens, claims and encumbrances.

Zero-Base Drafting (or, putting it all together)

Burnham advocates a process he calls "zero-based" drafting, or building an agreement from the principles rather than from a model or precedent. Beginning with the precedent, the applicable case law and legislation, and considering the particular business, he sets out a four-step procedure:

1. Outline the document based on the contents of the original.
2. Evaluate the rights and responsibilities of both parties as stated in the legal authorities.
3. Assess the issues involving business risk, based on provisions from the original document and an evaluation of business records. This assessment may show the need for new provisions or even whole new categories of information.
4. Draft the document using plain language techniques.[8]

Original:

Third Party Claims: In the case of a Third Party Claim, the Indemnifying Party shall have the right, at its expense, to participate in or assume control of the negotiation, settlement or defence of the Claim. If the Indemnifying Party elects to assume such control, the Indemnifying Party shall reimburse the Indemnified Party for all of the Indemnified Party's out-of-pocket expenses incurred as a result of such participation or assumption. The Indemnified Party shall have the right to participate in the negotiation, settlement or defence of such Third Party Claim and to retain counsel to act on its behalf, provided that the fees and disbursements of such counsel shall be paid by the Indemnified Party unless the Indemnified Party consents to the retention of such counsel at its expense or unless the named parties to any action or proceeding include both the Indemnifying Party and the Indemnified Party and a representation of both the Indemnifying Party and the Indemnified Party by the same counsel would be inappropriate sue to the actual or potential differing interests between them (such as the availability of different defences). The Indemnified Party shall cooperate with the Indemnifying Party so as to permit the Indemnifying Party to conduct such negotiation, settlement and defence and for this purpose shall preserve all relevant documents in relation to the Third Party Claim, allow the Indemnifying Party access on reasonable notice to inspect and take copies of all such documents and require its personnel to provide such statements as the Indemnifying Party may reasonably require and to attend and give evidence at any trial or hearing in respect of the Third Party Claim. If, having elected to assume control of the negotiation, settlement or defence of the Third Party Claim, the Indemnifying Party thereafter fails to conduct such negotiation, settlement or defence with reasonable diligence, then the Indemnified party shall be entitled to assume such control and the Indemnifying Party shall be bound by the results obtained by the Indemnified Party with respect to such Third Party Claim. If any Third Party Claim is of a nature such that (i) the Indemnified Party is required by Applicable Law or the order of any court, tribunal or regulatory body having jurisdiction, or (ii) it is necessary in the reasonable

[8] Burnham, p. 340.

view of the Indemnified Party acting in good faith and in a manner consistent with reasonable commercial practices, in respect of (A) a Third Party Claim by a customer relating to products or services supplied by the Business or (B) a Third Party Claim relating to any Contract which is necessary to the ongoing operations of the Business or any material part thereof in order to avoid material damage to the relationship between the Indemnified Party and any of its major customers or to preserve the rights of the Indemnified Party under such an essential Contract, to make a payment to any person (a "Third Party") with respect to the Third Party Claim before the completion of settlement negotiations or related legal proceedings, as the case may be, then the Indemnified Party may make such payment and the Indemnifying Party shall, promptly after demand by the Indemnified Party, reimburse the Indemnified Party for such payment. If the amount of any liability of the Indemnified Party under the Third Party Claim in respect of which such a payment was made, as finally determined, is less than the amount which was paid by the Indemnifying Party to the Indemnified Party, the Indemnified Party shall, promptly after receipt of the difference from the Third Party, pay the amount of such difference to the Indemnifying Party. If such a payment, by resulting in settlement of the Third Party Claim, precludes a final determination of the merits of the Third Party Claim and the Indemnified Party and the Indemnifying Party are unable to agree whether such payment was unreasonable in the circumstances having regard to the amount and merits of the Third Party Claim, then such dispute shall be referred to and finally settled by binding arbitration from which there shall be no appeal.

Revised:

Third Party Claims

The Indemnifying Party is entitled, at its expense, to participate in or assume control of the negotiation, settlement or defence of the Claim.

If the Indemnifying Party assumes control, it shall reimburse the Indemnified Party for any out-of-pocket expenses that result from its participation or assumption.

The Indemnified Party is entitled to participate in the negotiation, settlement or defence of the Third Party Claim, and to retain counsel to act on its behalf.

The Indemnified Party shall pay counsel fees and disbursements, unless:

i. the Indemnifing Party consents to retain counsel at its expense; or
ii. both the Indemnifying Party and the Indemnified Party are named parties and joint representation would be inappropriate due to actual or potential differences.

The Indemnified Party shall cooperate with the Indemnifying Party by:

i. preserving all relevant documents in relation to the Third Party C.laim;
ii. allowing the Indemnifying Party access on reasonable notice to inspect and take copies of the documents;
iii. requiring personnel to provide statements to the Indemnifying Party; and

iv. requiring personnel to to attend and give evidence at a trial or hearing of the Third Party Claim.

If the Indemnifying Party fails to conduct the negotiation, settlement or defence with reasonable diligence, then the Indemnified Party is entitled to assume control. The Indemnifying Party is bound by the results obtained by the Indemnified Party.

The Indemnified Party may pay a Third Party before the completion of settlement negotiations, if:

i. the Indemnified Party is required to do so by Applicable Law or the Order of any court, tribunal or regulatory body having jurisdiction; or
ii. the Indemnified Party, acting in good faith and consistent with reasonable business practice, considers it necessary, if the Third Party Claim:
    a. has been brought by a customer relating to products or services supplied by the Business; or
    b. relates to any Contract or material part that is necessary to the ongoing operations of the Business and to avoid material damange to the relationship between the Indemnified Party and any of its major customers, or
    c. preserve the rights of the Indemnified Party under an essential Contract.

On demand, the Indemnifying Party shall reinburse the Indemnified Party for this payment.

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