

A REVIEW OF CHARLES M. FOX'S *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU*

ANGELA C. LEDFORD¹

Contract drafting is a very important function of lawyers. The ultimate goal is to memorialize the client's goals into a clear, concise, and legally enforceable document. For the experienced transactional lawyer, drafting contracts is often a mundane everyday activity. However, for new lawyers, the fine points that need to be included in contracts are not readily apparent or learned in law school and must be picked up along the way. Unfortunately, lack of practical experience also means that recent law school graduates can become lost and confused in the vast sea of contract drafting. Charles M. Fox's² book, *Working With Contracts: What Law School Doesn't Teach You*³ ("*Working With Contracts*"), attempts to cure this malady by offering a consolidated guide to contracts. This book covers many aspects of contracts, from the basic purposes of contracts and the lawyer's role in drafting them to specific provisions and the purpose of using them. The chapters are effectively titled to indicate what they cover, including: "Building Blocks: The Basics," "The Lawyer's Functions," "Principles of Effective Drafting," "Drafting Techniques," "Review and Interpretation of Contracts," "Amendments, Waivers and Consents," "Form and Formalities," "Building Blocks in Detail," and "Miscellaneous Provisions."

Working With Contracts has very practical and functional notions for beginning lawyers about how to approach certain transactional assignments. One of the most useful reference features of the book is the extensive section focused on performing due diligence when reviewing existing contracts and other legal documents. Fox approaches the different transactional situations where due diligence may be required from many angles including the seller's and target's position in both asset and stock acquisitions, the borrower's position of obtaining both secured and unsecured debt,

¹ B.A., University of Tennessee, Knoxville. Currently, Ms. Ledford is a third-year student at the University of Tennessee College of Law.

² B.A., Queens College; J.D., Rutgers Law School. Mr. Fox is a partner in the law firm of Skadden, Arps, Slate, Meagher & Flom LLP, where he concentrates in the areas of debt financings and restructurings.

³ CHARLES M. FOX, *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU* (PLI 2002).

and the position of an issuer of stock.⁴ Additionally, there are guidelines indicating where to begin and what actions to take when asked to review the accuracy of representations made within a contract.⁵

Fox also explores the “building blocks,” as he calls them, of contracts both generally and in detail.⁶ Much of the basic information centers on the role of standard provisions in a contract and the implications that come with them. The more detailed descriptions of specific clauses are in the largest chapter of the book called “Building Blocks in Detail.”⁷ This chapter discusses the enforceability and effectiveness of representation, credit-related and acquisition-related provisions, affirmative and negative covenants, and conditions precedent. The book covers the basics and then the details of the contracts and their provisions. This format allows the reader to acquire what he or she needs to know quickly and with as much detail as the particular situation requires.

In connection with the idea that the book may be easily tailored by the reader to provide the information needed in a certain situation is the fact that many of Fox’s basic details are consistently recurring throughout the text. One example of this is the recurrence of the explanation of “material adverse change”⁸ and the implications and importance of when to include a phrase within certain provisions that requires disclosure for information, specifically information that will have a ‘material adverse change’ on the other party’s position. The constant repetition of this idea initially seems redundant. However, this feature reinforces that a reader will not miss an important, pervasive aspect of contracts if he chooses to just look at one section. By including these important aspects of contract drafting in many places throughout the book, as opposed to cross-referencing the section, the reader is readily able to use the Table of Contents as a resource in choosing the appropriate type of transaction and contract provision offered within the separate chapters. In this light, *Working With Contracts* serves its readers not only as a beginning transactional lawyer’s guide to contracts, but also as a concise and useful reference book that could be kept close at hand. It is also notable that this book, although mostly geared toward recent law

⁴ *Id.* at 131-41.

⁵ *Id.* at 49-53.

⁶ *Id.* at 8 and 170.

⁷ *Id.* at 170.

⁸ *Id.* at 83, 183, 214, 222, and 225.

school graduates, does not take a law school textbook approach, but again uses practical and useful suggestions that are appropriate for the professional setting.

Fox does not contribute much space to the idea of making contracts understandable in light of the movement towards plain English. Fox also does not address the potential need for plain English to aid a non-specialist judge or other adjudicator in construing the document. However, he does point out that within the style of a “well drafted contract provision,” “every word serves a precise purpose.”⁹ One subsection, titled “Legalese,”¹⁰ includes a page of words that should be justified, not shunned, because of their specific legal significance.¹¹ Fox further asserts that “the notion that commercial contracts should be written in plain English so as to be understood by people who would never be expected to read them is an unreasonable extension of the plain English movement, which is aimed at helping consumers and other unsophisticated parties.”¹² However, proponents of the plain English style of writing¹³ do not seem to focus their criticism on particular terms of art that are specific to the legal profession, but are more concerned with unnecessary or multiple usage of words that have a more simplistic and reader-friendly alternative.¹⁴

One contract provision cited in the book is an example of a requirement for annual financial reporting. This provision is as follows:

Within 90 days after the end of each fiscal year of the Debtor, the consolidated and consolidating balance sheets of the Debtor and its subsidiaries as at the end of such fiscal year and the related consolidated and consolidating statements of income and retained earnings and of cash flows for such fiscal year, setting forth comparative figures for the preceding fiscal year and (in the case of such consolidated financial statements) accompanied by a report by

⁹ *Id.* at 66.

¹⁰ *Id.* at 72-73.

¹¹ *Id.*

¹² *Id.* at 71.

¹³ BRYAN A. GARNER, JEFF NEWMAN, AND TIGER JACKSON, *THE REDBOOK: A MANUAL ON LEGAL STYLE* (West 2002) and HOWARD DARMSTADLER, *HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING* (ABA 2002).

¹⁴ *THE REDBOOK*, at 123-79.

independent certified public accountants of recognized national standing as shall be reasonably acceptable to the Creditor, which report shall contain no going-concern or similar qualification and shall state that such statements fairly present in all material respects the financial condition of the Debtor and its subsidiaries as of the dates indicated and the results of their operations and changes in their financial position for the periods indicated in conformity with GAAP applied on a basis consistent with prior years.

According to the suggestions of Howard Darmstadter, author of *Hereof, Thereof, and Everywhereof: A Contrarian Guide to Legal Drafting*, this provision could be improved if the long, 155-word sentence was broken up into shorter sentences to promote easier readability.¹⁵ Proponents of the transition to plain English within the legal field are concerned not only with the choice of words and their understandability to anyone who picks up the contract, but also the format of the provision, including shorter sentences and tabular format of itemized points of a provision. The following is a proposed revision based upon these suggestions. Although this formation of the provision does not actually make it any shorter or use less words, it is visually more organized and may promote better interpretation of the provision.

Within 90 days after the end of each fiscal year of the Debtor, the Debtor shall deliver to the Creditor the following:

- (a) the consolidated and consolidating balance sheets and statements of income, retained earnings, and cash flows for such fiscal year,
- (b) comparative figures for the preceding fiscal year, and
- (c) a report by an independent certified public accountant of recognized national standing who is reasonably acceptable to the Creditor. This report:
 - (i) shall not contain any going-concern or similar qualification;
 - (ii) shall state that such statements fairly present, in all material respects, the financial condition of the Debtor and its subsidiaries as of the dates indicated on the report; and

¹⁵ HEREOF, THEREOF, AND EVERYWHEREOF at 17, "Sentences That Run Too Long."

- (iii) shall state that such statements fairly present, in all material respects, the results of their operations and changes in their financial position for the periods indicated and in conformity with GAAP, applied with a basis consistent with prior years.

Overall, *Working With Contracts* is useful as both an overview and for specific suggestions to use while learning the ins and outs of contract drafting. For many non-experienced lawyers, the information in *Working With Contracts* could be a bright spark in a dark room and shed light where and when it's needed the most. However, for the transactional attorney, some changes may need to be made to example provisions in the book to address the particular audience's preference for plain English.