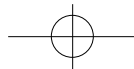
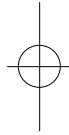
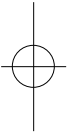
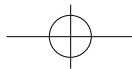
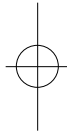
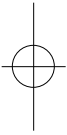


Writing Contracts

A Distinct Discipline





Writing Contracts

A Distinct Discipline

Peter Siviglia

CAROLINA ACADEMIC PRESS
Durham, North Carolina

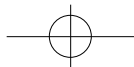
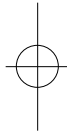
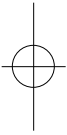
Copyright © 1996 by Peter Siviglia
All Rights Reserved

ISBN 0-89089-933-9
LCCN 96-83449

Printed in the United States of America

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668

for anne



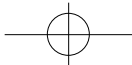
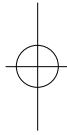
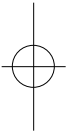
On Travel

*With her she would have me go
to Byzantium, the Isles of Greece,
Rome and the Orient,
where treasures from the intellect flow
to cure the spirit
and the mind to grow.*

*Where once that Poet sought to be,
she would now visit
to indulge in beauty and the magnificent
and bathe her soul in all exquisite.*

*Yet that journey I need not,
nor (do I think) did He,
for by the chariot of his mind,
in verse He traversed the darkened sea.*

*By that vessel travel lies
to the edges of creation,
but if more than thought the spirit cries...
nor art nor artifact in foreign lands
my soul bestirs,
for all I need is turn my eyes toward hers.*



Contents

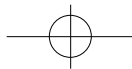
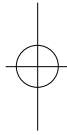
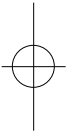
Acknowledgments	xi
Prelude	xiii
Chapter 1 The Contract	1
§1:1 What is a Contract?	1
§1:2 Form of the Contract	2
§1:3 Content of the Contract	5
Chapter 2 Drafting the Contract	11
§2:1 Introduction	11
§2:2 The Prime Directive	13
§2:3 Techniques and Rules to Implement the Prime Directive	14
§2:4 Summary	29
Appendix to Chapter 2: Phantom Stock Agreement	31
Chapter 3 Building Agreements—Outlines and Term Sheets	41
Appendix 1 to Chapter 3	44
Appendix 2 to Chapter 3	46
Chapter 4 There Is No Shame in Drafting a Fair Agreement	51
Chapter 5 Themes and Variations—Additional Suggestions	55
§5:1 It Is Not Treacherous to Help the Other Guy	55
§5:2 Be Aware of Your Limitations	56
§5:3 Do Not Wither within Your Area of Expertise	56
§5:4 Proofread Meticulously	58
§5:5 Respond Appropriately to the Other Party's Draft	59
§5:6 Be Efficient in Preparing the Documentation	61

x	Contents	
§5:7	Understand the Difference between the Active and Passive Voices; Know When to Use the Passive Voice	62
§5:8	Additional Tools	65
	Appendix to Chapter 5	66
Chapter 6	Amending Contracts; Using Forms	69
Chapter 7	The Quest for Simplicity	73
§7:1	Introduction	73
§7:2	Structure	73
§7:3	Text	75
§7:4	Coda	83
Chapter 8	Commencement	85

Acknowledgments

No book is a work unto its author alone. Thus, I acknowledge and appreciate the contributions of

Victoria L. Cristiano
Anne K. Siviglia
Cathleen Scanlan



Prelude

What laws are to society, contracts are to business. The contract establishes the rules of conduct for a business relationship. Thus, contracts are essential instruments of commerce; and, like any instrument, if the contract is not well crafted, it will produce unwelcome results: dispute and litigation.

The contract, though, is not like any other writing. It is unique. That a lawyer can write an elegant brief is no assurance that the lawyer will write a good contract. In fact, I have seen agreements drafted by fine litigators which, themselves, were invitations to litigation. Here is but one example.

A settlement agreement, providing for the distribution of the proceeds from the sale of real estate, specified that after payment of the expenses of sale and the outstanding principal amount of the loan and accrued interest, the balance of the proceeds from the sale would be distributed according to a formula as follows:

- (a) first to the owner, an amount equal to \$27 million less any optional prepayments of the loan made by the owner;
- (b) second...

Clear? Yes. Simple? Yes. Correct? No—wrong by millions of dollars. Here is what item (a) should have said:

- (a) first to the owner, *the amount, if any, by which*
 - (i) *the difference between \$27 million and any optional prepayments of the loan made by the owner exceeds*
 - (ii) *the principal amount of the loan outstanding at the time of the sale;...*

xiv Prelude

The first and incorrect statement of the amount payable did not deduct the principal balance of the loan. Thus, if the prepayments were \$10 million and the balance of the loan was \$10 million, under the first statement the owner would receive \$17 million while under the second and correct statement the owner would receive only \$7 million.

To write a contract well, the mind must adjust its focus from other forms of writing to this distinct form; and it is that adjustment with which the balance of this book deals.

Writing Contracts

A Distinct Discipline

