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Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices

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SAY THE MAGIC WORD: A RHETORICAL ANALYSIS OF CONTRACT DRAFTING CHOICES

Lori D. Johnson[†]

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INTRODUCTION

The western wave was all a-flame,
 The day was well nigh done!
 Almost upon the western wave
 Rested the broad bright sun;
 When that strange shape drove suddenly
 Betwixt us and the sun.
 - Samuel Taylor Coleridge¹

Imagine yourself at midnight, drafting an amendment to a complex set of loan documents. The client, of course, wants an immediate turnaround. You turn to your firm's precedent files. However, having recently encountered literature touting the manifest benefits of the "plain English"² approach to contract drafting, you also open a newly-published drafting style guide. You quickly find yourself awash on the "western wave" of transactional practice—making complex and legally determinative language choices for a high paying client, balancing drafting scholars' urgings to purge "archaisms"³ in the contract text with the desire to retain the traditional terms included in the firm's preferred forms.

Similar to the function of the figure of speech "western wave" in the Coleridge poem, where it represents the broader concept of the ocean, certain traditional "terms of art"⁴ in contract forms operate as

1. 1 SAMUEL TAYLOR COLERIDGE, *The Rime of the Ancient Mariner*, in THE POETICAL WORKS OF SAMUEL TAYLOR COLERIDGE 165 (T. Ashe ed., George Bell & Sons, London 1890) (1834).

2. BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH 109 (Univ. of Chi. Free Press 2d ed. 2012) [hereinafter GARNER, PLAIN ENGLISH]. Note that scholars have various ways of referring to the plain language movement in the drafting context, including "common English," GEORGE W. KUNEY, THE ELEMENTS OF CONTRACT DRAFTING: WITH QUESTIONS AND CLAUSES FOR CONSIDERATION 47 (3d ed. 2011) and "standard English." KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING §§ 1.22, 1.28-29 (ABA Bus. Law Section 3d ed. 2013) [hereinafter ADAMS, MANUAL OF STYLE] (noting a distinction from the "plain English" movement, focused primarily on consumer contracts, so as not to suggest a "dumbing down" of complex commercial contract language, rather the use of "straightforward alternatives" in lieu of "terms of art").

3. ADAMS, MANUAL OF STYLE, *supra* note 2 §§1.4-.6.

4. The phrase "term of art" as used in this Article refers to a phrase having "specialized doctrinal meaning" and serving as "shorthand for legal concepts." ADAMS, MANUAL OF STYLE, *supra* note 2, § 1.7. Note that "terms of art" are considered conceptually distinct from the concept of "boilerplate," which encompasses "standard provisions inserted at the end of almost every transactional document." KUNEY, *supra* note 2, at 153. Rather, "terms of art" encompass traditionally expressed "specialized terminology," or "standard provisions" specifically chosen by drafters to satisfy a particular purpose, including terms

“artful deviations from the ordinary mode of speaking or writing.”⁵ Such phrases, sometimes derogatorily referred to as “magic words,”⁶ can serve as elegant shorthand for more complex legal concepts. Classical rhetoricians from Quintilian to Aristotle have recognized that these figures of speech function as a vital “means of lending credibility” and “clearness” to written work.⁷ This article proposes that these classic analytical tools can be applied not only to narrative writing, but also to the drafting of complex modern commercial contracts.

Nonetheless, a few modern drafting scholars have recently begun to argue for a near-wholesale elimination of terms of art in favor of “plain English.”⁸ This urge to purge traditional language has its origins in the plain language movement. Although that movement was originally focused on public and consumer documents, some drafting scholars have extended it to argue for the use of terms easily understood by non-legal readers, even in complex contracts between sophisticated parties.⁹

The dichotomy between plain language and the more traditional text included in forms preferred by senior attorneys can leave the drafter, particularly the inexperienced drafter, unsure when it may be acceptable to deviate from time-tested language in favor of a more modern approach. As a result, some senior transactional attorneys suggest that traditional text tends to be “preserved” in complex contracts “because an inexperienced drafter will not be sure why it is there or whether taking it out would help or hurt the document.”¹⁰ Further, at least one modern drafting scholar asserts that inertia is the

like “hypothecate,” “coupled with an interest,” and “time is of the essence.” ADAMS, *MANUAL OF STYLE*, *supra* note 2, §§ 1.7-2.1.

5. EDWARD P. J. CORBETT & ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 379 (Oxford Univ. Press 4th ed. 1999).

6. ADAMS, *MANUAL OF STYLE*, *supra* note 2, §§ 1.28-.29. Adams describes “archaisms, magic words, and terms of art” as phrases of “traditional contract prose” which differ from “standard English—the English used by educated native English speakers,” the use of which he suggests should be the “aim” of all drafters. *Id.* § 1.28. Adams distinguishes this “standard English” from “plain English,” which he describes as “the simplified language required of consumer contracts.” *Id.* § 1.29. However, as will be described in Section I.B *infra*, the plain language movement has influenced current drafting scholarship’s push toward the redrafting of traditional terms.

7. CORBETT & CONNORS, *supra* note 5, at 377-78.

8. KUNEY, *supra* note 2, at 18.

9. See *infra* text accompanying notes 38-77. Complex commercial contracts have been chosen as the basis for the analysis in this article, as the public policy considerations associated with plain language for consumer contracts are less applicable.

10. MITU GULATI & ROBERT E. SCOTT, *THE 3½ MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 10 (Univ. of Chicago Press 2013) (quoting Lee C. Buchheit of the firm Cleary Gottlieb Steen & Hamilton).

dispositive factor in retaining traditional terms of art.¹¹

However, this Article will prove that the motives of contract drafters in retaining traditional terms of art often go beyond simple inertia. Particularly, the application of pentadic rhetorical criticism¹² to a particular contract proves that the decision whether to redraft terms of art into plain language in complex contracts is not the straightforward matter of style some modern drafting scholars may make it seem.¹³ Kenneth Burke's method of pentadic rhetorical criticism uses a five-pronged analysis of a particular piece of writing, which enables the critic to determine what the writers of the document "are doing and why they are doing it[.]"¹⁴

This determination of the rhetorical and philosophical underpinnings of the choice to retain particular terms of art provides insight into the behaviors of drafters and justifications for the retention of traditional terms of art. The application of rhetorical criticism to contract drafting choices will demonstrate that retention of traditional terms of art in complex contracts has a very distinct and important motivation beyond the pure scrivener's role, that of advocacy on behalf of the client. In applying Burke's pentad, it becomes clear that the act of drafting a contract in a way that favors a client, and predisposes the potential end-user of the contract to come to a similarly favorable interpretation, can actively underlie a drafter's decision to retain a traditional term of art.

This Article will proceed in four parts. The first section will provide background on the debate between time-tested terms of art and plain language in contract drafting. The second section will specifically identify the "time is of the essence" clause as a helpful term of art to understand drafters' rhetorical choices. The third section will illuminate how pentadic rhetorical criticism applies to the field of contract drafting. Finally, the fourth section will apply rhetorical criticism to argue that traditional, tested terms of art are often retained by drafters based on a specific motivation and should not be jettisoned when necessary for effective advocacy.

11. ADAMS, *MANUAL OF STYLE*, *supra* note 2, § 1.5.

12. See KENNETH BURKE, *A GRAMMAR OF MOTIVES* xv (Univ. of Cal. Press Cal. ed. 1969) [hereinafter BURKE, *GRAMMAR*].

13. See ADAMS, *MANUAL OF STYLE*, *supra* note 2, § 1.22; KUNEY, *supra* note 2.

14. BURKE, *GRAMMAR*, *supra* note 12, at xv.

I. THE DRAFTER'S DEBATE: PLAIN LANGUAGE VS. TIME-TESTED TERMS

[The lawyers] described contract terms as 'magic incantations' and 'talismans,' [and] referred to contract drafting as a 'ritual.'

-Mitu Gulati & Robert E. Scott¹⁵

The debate between terms of art and plain English in the context of contract drafting is a relatively modern one. The basis for this modernity may rest on the fact that formal American legal education in drafting style has only become widespread in the past twenty years.¹⁶ While experiments in teaching contract drafting occurred as early as 1965,¹⁷ the earliest collection of data concerning the number of law schools offering dedicated courses in contract or transactional drafting dates back only to 1992, at which time only thirty-one American law schools provided such course offerings.¹⁸ By 2010, that number had increased 210% to 122 law schools.¹⁹

Thus, more and more drafters are currently leaving law school armed with a foundation in modern drafting style, which due to the influence of the plain language movement, advocates for the removal or redrafting of traditional contract terms. These young attorneys enter a workforce dominated by seasoned practitioners who often favor a more traditional approach, leaving the inexperienced attorneys struggling to determine whether the redrafting of traditional terms is appropriate.

Valuable insight into this dilemma can be gained by the application of modern rhetorical criticism to sophisticated contracts. Rhetorical analysis can assist in determining the possible motives of drafters in retaining traditional terms of art. In order to undertake a rhetorical analysis, the history of contract drafting scholarship and underpinning theories concerning the "sticky" nature of these phrases must first be explored. Also, traditional notions concerning the authorship and literary function of contracts must be unpacked in order to understand the backdrop against which modern drafters of sophisticated contracts make language choices. These modes of analyzing contracts help to explain some of the potential benefits of retaining traditional terms, and

15. GULATI & SCOTT, *supra* note 10, at 109.

16. AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010 78 (Catherine L. Carpenter et al. eds., 2012).

17. REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 3 (Little, Brown & Co. 3d prtg. 1965).

18. AMERICAN BAR ASSOCIATION, *supra* note 16, at 78.

19. *Id.*

also influence drafter motives.

A. Review of Early Drafting Scholarship

Little formal scholarship exists discussing the debate between the use of traditional terms of art and modern contract drafting styles, likely based on the fact that the uptick in formal education on drafting style has only occurred in the recent past.²⁰ Even as recently as 2012, drafting scholars have continued to bemoan the fact that contract drafting skills have been “neglected in . . . research.”²¹ To bridge this gap in the scholarship, the development of modern drafting style over time and how it has influenced modern drafting scholars’ and practitioners’ views on whether to retain traditional terms must be explored.

One of the earliest guidebooks on contract drafting style, Reed Dickerson’s *The Fundamentals of Legal Drafting*,²² provides helpful insight into historical views on the debate between traditional and modern language in contracts. Dickerson stands as an early proponent of clarity in contract drafting and provides suggestions for modernizing contract language, while recognizing that contracts constitute a communication whose “ultimate audience includes the courts and other agencies that may be called upon to enforce them.”²³

Dickerson, in providing his suggestions on drafting style, remains cognizant of the fact that contractual “[c]ommunication is based on the language habits of particular speech communities,” and therefore requires some “adherence to the existing conventions of language.”²⁴ He notes that a drafter who neglects the fact that the audience of a contract “is part of an established speech community” does so at her own peril.²⁵ While recognizing that contracts should be intelligible to the lay client, Dickerson does not go so far as to encourage the wholesale removal of all terms of art.²⁶

Specifically, in the section of his book devoted to “Suggestions on Specific Wording,” Dickerson foreshadows modern drafting scholars by suggesting the removal of words like “aforementioned” and

20. See *supra* note 16 and accompanying text.

21. Preston M. Torbert, *Contract Drafting: A Socratic Manifesto*, 14 SCRIBES J. LEGAL WRITING 93, 95 (2012).

22. DICKERSON, *supra* note 17.

23. *Id.* at 18.

24. *Id.* at 19.

25. *Id.* Note that Dickerson himself, writing in the era before gender-neutral drafting, does not use the female pronoun. This Article will attempt to give gendered pronouns an equal footing.

26. *Id.*

“hereinafter,” because such wording constitutes “pure gobbledygook.”²⁷ Dickerson also suggests the removal of “redundancies,” “pairs of words or expressions one of which includes the other,” and “circuitous or otherwise unnecessary expressions.”²⁸ These edits, in Dickerson’s view, provide “greater general clarity” in the document, and leave “the fewest possible language barriers between” a drafter and his audience.²⁹

Yet Dickerson pauses when considering how to treat “preferred expressions” by suggesting that “terms of art often must be honored.”³⁰ He notes that while removal of certain traditional, preferred language may enhance readability, “[t]he draftsman [must] pay careful attention” when considering its removal.³¹ Dickerson further suggests that “[t]he draftsman should not change a term of art merely because it contains words” that may be deemed to decrease readability.³² It is important to note that operative terms, such as “hypothecate” or “time is of the essence,” do not even make Dickerson’s list of phrases that should be considered for removal.³³ His list focuses more closely on phrases like “in lieu of” and “per centum,” which can be considered more archaic than operative, since they have concise alternatives and have not been heavily interpreted by courts and commentators.³⁴

In viewing Dickerson’s work, the reader must bear in mind that he was writing in an era before the surge of the modern plain language movement, which influenced the attitudes of modern contract drafting scholars and encouraged enthusiasm for a wholesale redrafting of complex contract language into plain terms understandable by lay readers. Dickerson’s measured approach concerning the redrafting of traditional language contrasts somewhat sharply with suggestions made by these more modern scholars. Dickerson’s work stands as one of the few voices on contract drafting style uninfluenced by the plain language movement and provides helpful insights into redrafting for readability while keeping the legal audience in mind.³⁵

27. DICKERSON, *supra* note 17, at 125.

28. *Id.* at 125-26. Examples of each including “due and owing,” “any and all,” and “mutually agree.” *Id.*

29. *Id.* at 112.

30. *Id.* at 126-27.

31. DICKERSON, *supra* note 17, at 126-27.

32. *Id.* at 130.

33. *Id.* at 127-29.

34. *Id.* For example, “instead of” and “percent.” *Id.* at 128-29.

35. Dickerson’s is one of the only mid-century American texts available focusing solely on contract drafting style (rather than a mixture of legislative and transactional drafting), though at least one Australian text on the topic had been published earlier. See J.K. AITKEN, *THE ELEMENTS OF DRAFTING* (5th ed. 1976) (noting that a First Edition was

B. The Dawn of Plain Language & Drafting Scholars' Responses

The intellectual foundation for the plain language movement was built by David Mellinkoff in his 1963 book *The Language of the Law*,³⁶ and the movement began to pick up speed in the American legal academy with the publication of Richard Wydick's widely-cited *Plain English for Lawyers* in 1979.³⁷ The movement is most often associated with requirements for the use of "simplified language . . . in consumer contracts"³⁸ and the clarification of "the dense, impersonal prose of most public documents."³⁹ Some drafting style scholars have recently adopted the virtues of the movement in the non-consumer drafting context, stating that "[c]losely related to the virtues of plain English is the goal of drafting [contract] provisions that are clear and conspicuous to non-lawyers."⁴⁰

This application of the plain language movement to contracts tends to result in a focus on terms of art as an opportunity for modernization. Some modern drafting style experts take aim at traditional language and "terms of art, real or imagined," by suggesting their replacement with straightforward alternatives.⁴¹ Advocates of plain language support an emphasis on "clear and effective communication—the opposite of legalese" in all legal writing, including sophisticated commercial contracts subject to judicial interpretation.⁴²

By way of example, noted plain language advocate Bryan Garner has suggested that the goal of clarity, achieved in part through the use of

published in 1946).

36. DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (Little, Brown & Co. 1963). It is important to note that even Mellinkoff, considered by many the father of the plain language movement, stated that "[t]erms of art make . . . compression and . . . precision possible. And whenever such precision is both possible and desirable, the competent lawyer uses terms of art at his command." *Id.* at 391.

37. See JOSEPH KIMBLE, *WRITING FOR DOLLARS, WRITING TO PLEASE: THE CASE FOR PLAIN LANGUAGE IN BUSINESS, GOVERNMENT, AND LAW* 47-48 (Carolina Academic Press 2012).

38. ADAMS, *MANUAL OF STYLE*, *supra* note 2, § 1.29; see also CARL FELSENFELD & ALAN SIEGEL, *WRITING CONTRACTS IN PLAIN ENGLISH* 27-30 (1981) (noting that the "objective" of "plain English" is "to make complex legal documents intelligible to the average consumer" or "customer.").

39. Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 *SCRIBES J. LEGAL WRITING* 1, 3 (1997).

40. KUNEY, *supra* note 2, at 19. As mentioned, drafting scholars are careful to distinguish their simplified drafting style suggestions from pure, consumer-driven plain language, by labeling it as "standard English," "common English" and the like. See *supra* text accompanying notes 4 and 6.

41. ADAMS, *MANUAL OF STYLE*, *supra* note 2, § 1.22.

42. Kimble, *supra* note 39, at 1.

plain language, extends to legal drafting.⁴³ Particularly, he challenges as “wrongheaded” the notion that “lawyers should draft contracts . . . with the judicial reader in mind.”⁴⁴ Garner posits that a legalistic style is detested by judges.⁴⁵ He suggests that the judiciary should not be the focus in making drafting choices because they are “back-end users” and “only a small fraction of 1%” of all contracts are ever litigated.⁴⁶ In Garner’s view, contracts should be written for ordinary readers rather than “remote decision maker[s].”⁴⁷

Widely-cited drafting expert Kenneth A. Adams⁴⁸ also supports a broad-ranging application of plain language to contracts. In discussing the distinction between plain language in consumer contracts and language choices in sophisticated contracts, Adams notes that the use of “standard English” (his variation on the plain language theme) provides a benefit even in sophisticated contracts, since by its use “a drafter can articulate a transaction without recourse to usages that interfere gratuitously with the ability of any reader—lawyer or non-lawyer—to understand the contract.”⁴⁹ Thus, Adams suggests a wholesale “purge[] of archaisms” in order to reduce “distance between the text and the reader.”⁵⁰

Adams specifically states that recognition of the judiciary as an audience that consistently interprets time tested terms of art is merely a “lazy platitude,” or “excuse” for failing to redraft such clauses into standard English.⁵¹ Adams further asserts that “traditional contract language” is rooted in a nagging linguistic “dysfunction.”⁵² Drafting scholars have also posited that lawyers remain rooted in traditional language based on a “fear of being original.”⁵³ Others suggest that lawyers who employ tested terms are drafting passively, “submissively

43. BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* 4-5 (Oxford Univ. Press 2d ed. 2002).

44. GARNER, *PLAIN ENGLISH*, *supra* note 2 at 109.

45. *Id.*

46. *Id.*

47. *Id.* at 109, 111.

48. The Board of Directors of the Legal Writing Institute presented Adams with the 2014 Golden Pen Award. See Legal Writing Institute, *Ken Adams: 2014 Golden Pen Award Recipient*, ADAMS ON CONTRACT DRAFTING (2014), <http://www.adamsdrafting.com/wp/wp-content/uploads/2014/01/Golden-Pen-Ken-Adams-2014.pdf>.

49. ADAMS, *MANUAL OF STYLE*, *supra* note 2, § 1.29.

50. *Id.* § 1.5.

51. *Id.* §§ 1.32, 1.36.

52. Kenneth A. Adams, *It's Time to Get Rid of the "Successors and Assigns" Provision*, 56 *ADVOC.* 30, 30 (2013) [hereinafter Adams, *Successor and Assigns*].

53. PETER SIVIGLIA, *WRITING CONTRACTS: A DISTINCT DISCIPLINE* 73 (Carolina Academic Press 2d prtg. 2001).

awaiting judges' decisions on the documents they draft" and should rather undertake "a systematic initiative to draft in a way that would avoid litigation."⁵⁴

The effect of the plain language movement on drafting scholarship results in a blinkered focus on the modernization of language, readability to clients, and dismissal of the judiciary as an important audience. This modern approach also lacks the thoughtful analysis of audience employed by Dickerson, particularly the recognition that the "secondary audience" of a contract "is the court."⁵⁵ Drafters who retain traditional terms attempt to avoid litigation by employing terms that have been consistently interpreted by courts and have a known meaning amongst practitioners and sophisticated clients.⁵⁶ Also, the public policy justifications of clarity in language are less applicable in the case of negotiated commercial contracts between sophisticated parties represented by counsel, due to the unlikelihood that lay readers would ever become an audience.

Additionally, not all modern drafting scholars cling to plain language as a basis for wholesale redrafting of terms of art.⁵⁷ Peter Siviglia has suggested that avoiding the removal of form language that has been interpreted by the judiciary is "not wrong," but rather "prudently cautious."⁵⁸ If, as defined by drafting scholars, clarity in contracts is grounded in "language that will be interpreted by all subsequent readers in exactly the same way"⁵⁹ it would necessarily follow that tested language, which is granted a consistent meaning by judicial interpretation, may add clarity. Consistency and clarity serve as strong potential motivators for drafters retaining these terms.

Further, Charles M. Fox, a long-time practitioner-turned-drafting-scholar pointedly asserts, even more recently, that:

54. Torbert, *supra* note 21, at 100.

55. DICKERSON, *supra* note 17, at 19.

56. This approach also has the benefit of potentially avoiding costly malpractice liability based on the inclusion of "iffy" clauses. See Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 LEWIS & CLARK L. REV. 989, 1012, 1019 (2010). The issue of ethical liability in the context of contract drafting is an evolving one, and an area ripe for further scholarship, though outside the scope of this Article.

57. See HOWARD DARMSTADTER, *HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING* 5-6 (ABA Publishing 2d ed. 2008) (Also noting that while words such as "hereof" have a "distance from common speech [that] makes them prime candidates for the chop," the author does not "object to legal terminology where it's necessary to express a legal concept that has no compact equivalent in non-legal speech.").

58. SIVIGLIA, *supra* note 53, at 76.

59. WILLIAM K. SJOSTROM, JR., *AN INTRODUCTION TO CONTRACT DRAFTING* 16 (Thomson Reuters 2d ed. 2012).

Effective writing consists of clear communication of the subject matter to its intended audience. The audience for commercial contracts is sophisticated business people and their lawyers. 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.... [A] contract that embodies a complex commercial transaction will contain specialized diction and vocabulary familiar to its audience.⁶⁰

Moreover, modern drafting scholar Tina Stark has argued that the skill of contract drafting is premised on more than just style, and that the successful drafter positions herself at the intersection of the applicable law, the business deal, and the drafting details.⁶¹ She posits that although pure legalese such as “herein” and “hereby” should be replaced by “acceptable alternatives,” the drafter must retain important “substantive” phrases.⁶²

Thus, the demonstrated tension between retaining and redrafting traditional contract language in complex contracts hinges on modern drafting scholarship’s well-founded focus on the removal of legalese. There can be little debate that “arcane and often formalistic jargon,”⁶³ such as “herein,” “whereas,” and “wherefore,” add little to the clarity of contract text. This debate, however, turns on how contract drafters define the edge of where “legal jargon that has an everyday English equivalent” ends, and “unsimplifiable terms of art” begin.⁶⁴

Modern drafting scholars’ support of a more thoughtful focus on language choices in contracts is laudable and has done much to improve clarity in drafting. Certainly danger exists in allowing a useless provision to survive because drafters “are unsure what function it serves and so are loath to get rid of it.”⁶⁵ The fact that drafting has become “an exercise in regurgitation” results in a failure to “reimagine the options” available for a specific type of transaction.⁶⁶ Also, the use of “promiscuous copying” results in mistakes, and “misconceptions as to

60. CHARLES M. FOX, *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU* 73 (Practising Law Inst. 2d ed. 2008).

61. TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* 3 (Wolters Kluwer Law & Business 2d ed. 2014).

62. *Id.* at 256-59.

63. SJOSTROM, *supra* note 59, at 17.

64. GARNER, *PLAIN ENGLISH*, *supra* note 2, at 45.

65. Adams, *Successors and Assigns*, *supra* note 52, at 31.

66. Kenneth A. Adams, *The New Associate and the Future of Contract Drafting*, 245 N.Y. L.J. 62, Apr. 1, 2011, (Outside Counsel), at 4 [hereinafter Adams, *New Associate*], available at <http://www.adamsdrafting.com/wp/wp-content/uploads/2014/01/NYIJ-New-Assoc-Future-of-Contract-Drafting-Directors-Cut.pdf>.

the legal effect of phrases” can have disastrous consequences for contract clarity and precision.⁶⁷

And yet, if the stated purpose of plain language is cited as “bridg[ing] the gap between what you know and what [your] reader knows,”⁶⁸ this purpose is less well-served when one of the audiences, as Dickerson suggests, is a court tasked with interpretation of the contract.⁶⁹ On the contrary, in such instances perhaps “an unusual word is exactly right for the job.”⁷⁰ Certainly there are cases where words become archaic and are no longer “doing a useful job.”⁷¹ But upon deeper examination, terms of art differ from legalese, boilerplate, and useless jargon. Terms of art are thus particularly useful in the context of judicially-interpreted contracts, because they are known by the judicial audience “as having a particular meaning.”⁷²

While bemoaning the fact that drafters who retain terms of art “rarely get around to offering arguments to support”⁷³ their decision, modern drafting experts who call for the removal of terms of art similarly fail to undertake a thoughtful analysis of the motives of these drafters. According to a post on Adams’ popular blog, “[t]he nature of traditional contract language suggests that for most practicing lawyers, notions of quality come a distant second to expediency.”⁷⁴ This assertion begs the question of why the notion of thoughtful drafting requires an implied assertion that drafters are choosing to retain traditional terms of art based on “expediency” or “submission,” rather than on a conscious choice. Particularly, the assertion that “someone cannot draft a contract without understanding how a judge might interpret it”⁷⁵ weakens the argument that language choices within the contract are thoughtless.

67. Kenneth A. Adams, *The Illusion of Quality in Contract Drafting*, 248 N.Y. L.J. 11, July 17, 2012, (Outside Counsel), at 4, available at <http://www.adamsdrafting.com/wp/wp-content/uploads/2014/05/Illusion-of-Quality-NYLJ.pdf>

68. MARTIN CUTTS, *THE PLAIN ENGLISH GUIDE* 20 (Oxford Univ. Press 1995).

69. DICKERSON, *supra* note 17, at 19.

70. CUTTS, *supra* note 68, at 21. By way of example, Adams notes that it “would be awkward to draft a security agreement without using the noun *perfection* or the verb *perfect*, terms of art relating to security interests.” ADAMS, *MANUAL OF STYLE*, *supra* note 2, § 1.9.

71. CUTTS, *supra* note 68, at 22.

72. Robert C. Illig, *A Business Lawyer’s Bibliography: Books Every Dealmaker Should Read*, 61 J. LEGAL EDUC. 585, 625 (2012).

73. ADAMS, *MANUAL OF STYLE*, *supra* note 2, § 1.36.

74. Kenneth A. Adams, *A New Article on Teaching Contract Drafting*, ADAMS ON CONTRACT DRAFTING (Sept. 30, 2012), <http://www.adamsdrafting.com/a-new-article-on-teaching-contract-drafting/>.

75. Torbert, *supra* note 21, at 100.

Thus, consideration of the judicial audience is a recognized and supported argument against some modern drafting scholars' view concerning the redrafting of traditional terms of art. Further, there exists little empirical data to support the assertion of these modern drafting scholars that the choice to retain terms of art is rooted in a tradition of thoughtless, expedient drafting. Despite assertions that rationalizations for retaining tradition language "fall apart" upon examination,⁷⁶ very little formal examination of the motivations of the drafters has been undertaken. Adams himself notes that "evidence" for the expediency argument is "necessarily anecdotal," though "overwhelming."⁷⁷

On the other hand, there exists clear scientific and literary support for the notion that retaining terms of art provides benefit. The existing theories and empirical studies of the use of terms of art must be explored in order to more fully deconstruct the push for wholesale redrafting and to demonstrate the need for rhetorical criticism as a possible mode of determining drafter motives.

C. Empirical and Literary Support for Retention of Terms of Art

Not only can modern drafting scholars' views on terms of art be disputed based on judicial audience considerations, recent studies provide supplementary theories supporting the benefits of retention of traditional terms in sophisticated contracts. Particularly, Mitu Gulati and Robert E. Scott's work studying the use of the *pari passu* clause in sovereign debt offering transactions,⁷⁸ and Tal Kastner's work on authorship notions in contracts, provide support for the retention of traditional terms of art.⁷⁹

Gulati and Scott's complex and lengthy study of the *pari passu* clause discusses potential theories for the retention (or "stickiness") of "standard, widely used clause[s]," such as those included in the sovereign debt offering contracts they studied.⁸⁰ These theories have

76. Adams, *New Associate*, *supra* note 66, at 4.

77. Kenneth A. Adams, *Dysfunction in Contract Drafting: The Causes and a Cure*, 15 TENN. J. BUS. L. 317, 324 (2014) [hereinafter Adams, *Dysfunction*].

78. See GULATI & SCOTT, *supra* note 10, at 119-138 (performing an empirical analysis of the use of the *pari passu* clause in sovereign bond contract transactions).

79. See generally, Tal Kastner, *What is a Contract?: The Absent Author of the Written Contract and the Function of Certain Conventions of Drafting and Construction* (Princeton Univ., Working Paper No. 814068, 2005), available at <http://ssrn.com/abstract=814068> (applying Foucault's theories to contracts).

80. GULATI & SCOTT, *supra* note 10, at 10-11. It is important to note that Gulati and Scott undertook a wide-ranging empirical study of the use of the *pari passu* clause, which while a slightly lengthier than the typical, expedient "term of art," is nonetheless helpful to examine due to its nature as a clause that has been traditionally used and heavily judicially

direct applicability to the consideration of the possible motives of drafters in retaining any operative terms of art.

Gulati and Scott propose that there is “no inefficient stickiness” of standard terms.⁸¹ They suggest a variety of hypotheses to support the theory that these standard terms will only change when motivated by “costly litigation.”⁸² Specifically, the theory of “learning externalities” provides support for drafters’ retention of terms of art. This theory provides that the longer terms are used, the “better [they are] understood.”⁸³ This sense that risks of using the language are known and understood leads to “understanding and confidence in the ‘reliability’ of these terms,” particularly since they are unlikely to be “erroneous[ly] interepret[ed] by a court.”⁸⁴ Therefore, higher risk and less efficiency would result in the use of alternative terms, motivating drafters to retain the time-tested terms of art.

Gulati and Scott also propose that “network externalities” may explain the “stickiness” of tested terms. This theory provides that “products become more useful as the number of users increase.”⁸⁵ Therefore, a “single actor attempting a change in its contracts faces a risk that the lack of uniformity . . . will result in a significant . . . penalty.”⁸⁶ The theory of “satisficing” also supports efficiency as a cause of retaining terms of art.⁸⁷ Since preparing contracts is “costly and subsequent adverse events are rare,” drafters often take the more efficient and “costless” approach of integrating tested language.⁸⁸ These theories support the notion that retaining terms of art has benefit in spite of the style concerns associated with traditional phrasing.

In direct contrast to the arguments of modern drafting scholars that terms of art are retained based on inertia, the theory for “stickiness” that Gulati and Scott found “most implausible” was that of “inadvertent copying.”⁸⁹ The study authors note that when reviewing the dataset they

commented upon. The full study will not be discussed in detail here, but it is important to note that it was criticized by Adams as “unconvincing.” Adams, *Dysfunction*, *supra* note 77, at 326. The focus of the discussion of Gulati and Scott’s work in this Article will be on applying the scientific theories they cite for the persistence of traditional clauses in modern drafting.

81. GULATI & SCOTT, *supra* note 10, at 43.

82. *Id.*

83. *Id.* at 34.

84. *Id.*

85. *Id.* at 35.

86. GULATI & SCOTT, *supra* note 10, at 35.

87. *Id.* at 37-38.

88. *Id.* at 37.

89. *Id.* at 121.

collected concerning the inclusion of the *pari passu* clause in “sovereign bond contracts,” the theory that the term was retained solely based on “inadvertent copying . . . beg[an] to unravel.”⁹⁰ Particularly, the study authors noted that there were various edits to and permutations of the term, despite its repeated inclusion in this type of contract.⁹¹ Thus, Gulati and Scott’s study provides a counterargument to the assertion that drafters thoughtlessly retain terms of art.

Other possible explanations for drafters’ choices to retain of terms of art may be rooted in long-standing and culturally-accepted notions concerning the literary status and authorship of contracts. Particularly, drafting scholars have noted that contracts fall outside of the standard dichotomy of literary forms, consisting of “creative” or “expositive” literature.⁹² Rather, contracts exist as a separate form of writing that “transcribe the negotiated intent of two or more persons into a set of instructions or specifications—a blueprint for a relationship.”⁹³

Viewing contracts in this manner, it becomes easy for scholars to divorce the drafter from a conscious role as an author of the document, thoughtfully making choices to retain or redraft terms of art, and to paint the drafter as a scribe simply regurgitating the intent of others. This characterization makes the hypothesis that contract drafters retain terms of art found in forms due to inertia⁹⁴ more plausible.

Furthering the theory of passive drafting has been a cultural acceptance of contracts as “authorless” documents, propounded primarily by Michel Foucault.⁹⁵ Foucault, in his influential essay entitled “What is an Author?” notes that while a contract “may well have a guarantor—it does not have an author.”⁹⁶ This absence of author, according to Foucault, impacts the understanding of contract language as a distinct mode of discourse.⁹⁷ The absent author concept implies that the contract “does not enjoy the function of the author as an

90. *Id.*

91. GULATI & SCOTT, *supra* note 10, at 122-23. Similarly, there are various different formulations of many modern terms of art, particularly the time is of the essence clause. See Gertrude Block, *Language Tips*, 86-APR N.Y. ST. B.J. 61, 61 (Mar./Apr. 2014) (providing guidance to practitioners concerning the most effective phrasing of this term of art).

92. See SIVIGLIA, *supra* note 53 at 11 (noting that “[p]lays, poetry, novels and short stories are creative” and “essays, memoranda and briefs are expository”).

93. *Id.*

94. ADAMS, *MANUAL OF STYLE*, *supra* note 2, § 1.5.

95. See Kastner, *supra* note 79, at 4.

96. MICHEL FOUCAULT, *What is an Author?*, in 2 *AESTHETICS, METHOD, AND EPISTEMOLOGY* 211 (James D. Faubion ed., The New Press 1998).

97. Kastner, *supra* note 79, at 4.

authoritative interpretive principle,” as is the case in typical literature.⁹⁸

The theory of the absent author thus affects the search for meaning in the use of contract language, because, as law and literature scholar Tal Kastner notes:

The law generally seeks systems of interpretation that will identify the correct, or best, meaning of a text, and, as such, is continually engaged in the limitation of meaning, or the development of principles analogous to the author function in literary discourse. The text of the contract, which itself functions within the parameters of the law, is ostensibly the product of the parties' efforts to solidify—and thereby enforce—the substance of their agreement. As instruments of agreement intended to govern the behavior of the parties, written contracts represent attempts to fix consensual meaning in a text, and consequently enlist the attendant authority of the law.⁹⁹

Although the drafter's personal identity as an author may not function to fix meaning, particularly where a contract is heavily negotiated by a number of drafters,¹⁰⁰ the function of the author to communicate meaning exists in a contract through applicable principles of interpretation applied by courts and commentators.¹⁰¹ The consistency of interpretation provided by commentators sets boundaries around the meaning of language in the same way that the notion of authorship functions to provide “homogeneity” and “reciprocal explication” in Foucault's analysis.¹⁰²

It follows logically that efforts to fix meaning in a contract find root in language choices, which are inherently decided upon by the drafter, whether by retaining certain terms from a form or independently adding them. Terms of art, specifically, as they are heavily commented upon and interpreted by courts and commentators, have a particularly strong connection to the idea of authorship and meaning in the contractual context. Terms of art, based upon the imposition and bounding of meaning by courts and commentators, necessarily function as language “that must be received in a certain mode and that, in a given culture, must receive a certain status.”¹⁰³ Therefore, a drafter's choice to retain such terms, even from a form, is a choice to adopt a certain mode of discourse and a particular meaning.

98. *Id.* at 5.

99. *Id.* at 5-6.

100. *Id.* at 6.

101. Kastner, *supra* note 79, at 6-7.

102. FOUCAULT, *supra* note 96, at 211.

103. *Id.*

This necessary recognition of “writer, audience, reality, and language” that occurs each time a drafter makes a choice whether to retain or add a term of art places the drafter’s choice clearly within the process of communication,¹⁰⁴ and therefore able to be studied through rhetorical criticism. Simply put, the choice of whether to include terms of art, as made by the contract drafter, constitutes a motivated, rhetorical choice which “mark[s] off the edges”¹⁰⁵ of meaning in the contract. Thus, additional theories support the thesis that drafters have particular motivations for retaining traditional contract terms beyond pure inertia.

D. Moving Forward to Discover Motive

Based on the theory that the employment of a term of art is a motivated language choice, rhetorical criticism becomes the appropriate method to determine drafters’ particular motives in retaining terms of art.

While Adams suggests that “[j]ust because a court attributes a particular meaning to a bit of confusing contract language doesn’t mean that drafters should stick with [it],”¹⁰⁶ the motive of the drafter must be explored in order to determine whether the intent in using an easily recognizable term of art is actually the avoidance of confusion.

Rhetorical criticism in the tradition of Kenneth Burke can assist in supporting the argument that careful drafters make thoughtful choices to retain terms of art. This mode of criticism serves as a helpful and appropriate tool for making the determination of the drafter’s motive in retaining terms of art, as rhetoric assists in “the attributing of motives.”¹⁰⁷ In order to proceed with this rhetorical technique, a particular artifact of contract language functioning as a term of art must first be chosen and described, the Burkean method must be explained in detail, and the pentadic analysis of the chosen artifact undertaken.

This Article will proceed with this rhetorical analysis in the following three sections, and conclude that drafters who retain traditional terms of art are motivated by a desire to advocate for their clients in light of potential favorable judicial interpretations. This conclusion motivates several recommendations for drafters in employing traditional terms of art.

104. Linda L. Berger, *Applying the New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155, 157 (1999).

105. FOUCAULT, *supra* note 96, at 211.

106. *Id.*

107. BURKE, GRAMMAR, *supra* note 12, at xv.

II. TERMS OF ART IN DETAIL: TIME IS OF THE ESSENCE

Literary tastes may differ, of course, but it's worth knowing what judges say—and have been saying for a long time—about the language we lawyers use.

- Bryan A. Garner¹⁰⁸

In order to understand drafters' potential motives in retaining terms of art, the rhetorical critic must first deeply understand how terms of art function generally, and how the time is of the essence clause functions particularly. Another way to define a legal term of art is as "a short expression that (a) conveys a fairly well-agreed meaning, and (b) saves the many words that would otherwise be needed to convey that meaning."¹⁰⁹ This definition excludes many of the examples of legalese or "lawyerisms" which the plain language movement seeks to purge,¹¹⁰ and catches many phrases used consistently by lawyers who seek to tailor their "choice of words" to their reader.¹¹¹ Proponents of drafting style, therefore, often tread lightly when it comes to advocating for a removal or redrafting of such terms.¹¹²

Nonetheless, some modern contract drafting scholars have gone beyond suggestions to use plain language in lieu of meaningless legalese, and begun to specifically call for a removal or redrafting of terms of art. For example, Peter Siviglia instructs drafters to "not use terms of art . . . because these terms comprehend too many variables."¹¹³ Siviglia specifically identifies terms like "right of first refusal" and "after-tax earnings" as examples of terms of art that are too broad to be used effectively in drafting.¹¹⁴

Additionally, according to Ken Adams, "[l]egal terms of art add complexity"¹¹⁵ and while some allow "concepts to be articulated with a minimum amount of fuss,"¹¹⁶ Adams dubs others problematic.¹¹⁷

108. Bryan A. Garner, *Judges on Effective Writing: The Importance of Plain Language*, MICH. BAR J., Feb. 2005, at 44, available at <http://www.michbar.org/journal/pdf/pdf4article845.pdf>

109. RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 19 (Carolina Academic Press 5th ed. 2005).

110. See KUNEY, *supra* note 2, at 47 (noting that phrases like "Witnesseth," "Now, Therefore," and "Know all men by these presents" can be eliminated and "common English" used "in their place").

111. WYDICK, *supra* note 109 at 58.

112. See *supra* text accompanying notes 58-63.

113. SIVIGLIA, *supra* note 53, at 17 (emphasis omitted).

114. *Id.*

115. ADAMS, *MANUAL OF STYLE*, *supra* note 2, § 1.8.

116. *Id.* § 1.7.

117. *Id.* §§ 1.7-10.

Adams suggests in his writing that drafters rely on terms of art and other tested language choices because they are “safer than expressing meaning clearly using standard English.”¹¹⁸ In his widely adopted *Manual of Style for Contract Drafting*, Adams calls for the replacement of several terms of art with “straightforward alternatives.”¹¹⁹

The problems with the terms of art identified by Adams fall into three main categories: (i) misapplied terms of art; (ii) improvised terms of art; and (iii) top-heavy terms of art.¹²⁰ The focus of this analysis will be the top-heavy terms of art, those identified by Adams as having “a meaning that’s fairly well established but that’s also sufficiently broad, or sufficiently complex, that drafters are quick to use them without fully appreciating the implications.”¹²¹ Adams suggests that the use of such top-heavy terms of art often result in unenforceability of the term, or unanticipated consequences.¹²² A detailed discussion of a top-heavy term of art, the time is of the essence clause, helps to flesh out the debate concerning whether to redraft such terms, and the possible motivations for retention.

A. An Overview of the Time is of the Essence Clause

One of the top-heavy terms of art targeted by Adams for removal or redrafting is the time is of the essence clause.¹²³ The time is of the essence clause is widely-used, and clearly functions as a term of art, since it more succinctly expresses a complex concept concerning the requirement for timely performance of contractual obligations. In more detail, according to *Williston on Contracts*, the function of the time is of the essence clause can be described as follows:

In any contract, one party may make a promise expressly conditional on the exact performance of any agreed term, including that performance shall occur on a specified day or hour or before a specified day. Moreover, although performance at the specified time is in terms merely a promise, if the parties also provide that *time is of the*

118. *Id.* § 1.36.

119. *Id.* § 1.22. Specifically, Adams suggests that replacing problematic terms of art causes “[c]ontracts [to] be clearer” and “makes life easier for the reader.” ADAMS, MANUAL OF STYLE, *supra* note 2, §§ 1.22, 1.26. While Adams does concede that replacing such terms may result in “too much fruitless debate” and cautions the drafter to consider “whether there’s any indication that courts accord significance to use of that term of art,” he concludes that since courts “don’t have a literal-minded approach to terms of art,” such terms should often be replaced. *Id.* §§ 1.23, 1.27.

120. *Id.* §§ 1.10-21.

121. *Id.* § 1.21.

122. *Id.*

123. ADAMS, MANUAL OF STYLE, *supra* note 2, §§ 1.21, 13.687-697.

essence, in those or equivalent words, they effectively agree that a breach of that promise is material or, in other words, that timely performance is in effect an express condition precedent to the promisee's duty to render the counter-performance under the contract.¹²⁴

In a slightly shorter iteration, *Black's Law Dictionary* defines the term to mean a contractual requirement "so important that if the requirement is not met, the promisor will be held to have breached the contract and a rescission by the promisee will be justified."¹²⁵ Based on the length of the explanation of the term required by these sources to describe the concept, it becomes clear that "time is of the essence" functions as a prime example of a term of art that could be considered by drafters as a useful phrase to reduce length and fuss.

However, Adams asserts several well-reasoned problems with the use of time is of the essence in modern contract drafting.¹²⁶ He argues that despite the fact that "courts tend to hold that late performance isn't grounds for termination unless the" parties clearly state the "time is of the essence [clause] isn't up to the task" of clearly expressing parties' intent that failure of timely performance constitutes a material breach.¹²⁷

Adams notes that time is of the essence clauses are often misused by drafters who mistakenly include an overbroad statement that "*Time is of the essence of this agreement.*"¹²⁸ This construction is "too general," as it fails to specifically identify a particular contract provision for which the failure to timely perform is intended by the parties to result in a material breach.¹²⁹

Adams' proposed solution to the issue of specificity with time is of the essence, with regard particularly to a closing date in a contract, would be to rephrase the provision as follows:

The parties acknowledge that due to [describe time constraints on the parties], if a party wishes to terminate this contract in accordance with section X [the drop-dead-date provision], that party will not be required to give the other party any time beyond the Drop-Dead Date to allow that party to satisfy any condition or perform any obligation under this agreement.¹³⁰

124. 15 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 46:3 (Thomson Reuters 4th ed. 2014) (emphasis added).

125. BLACK'S LAW DICTIONARY 1196 (9th ed. 2009).

126. ADAMS, MANUAL OF STYLE, *supra* note 2, § 13.690-.694.

127. *Id.* § 13.690 (emphasis omitted).

128. *Id.* § 13.691.

129. *Id.*

130. *Id.* § 13.697.

While this redrafted provision specifically elucidates the consequence of a failure to timely close, it is considerably wordier than the possible alternative term of art statement that “Time is of the essence with regard to the Drop-Dead Date.” Therefore, this proposed redraft actually violates one of the rules of contract drafting style commonly cited by drafting scholars, that of concision.¹³¹

While Adams rightly identifies some challenges to the usefulness and appropriate application of the time is of the essence clause, practitioners and drafting experts have continued to recognize the utility of the provision, even in recent practitioner-oriented publications. This affinity for the phrase may be due, in part, to the length of proposed alternatives. Specifically, in noting that the phrase “time is of essence” would be preferable to the longer rephrasing of “time is essential to the contract,” legal language expert Gertrude Block advises practitioners to use the former term, reasoning that the term “is well understood and well-respected by the courts,” and “[preferable] to its alternative.”¹³²

Therefore, while Adams’ criticisms of the time is of the essence clause have merit, the term continues to be used consistently by drafters today. It remains, similar to the *pari passu* clause identified in Gulati and Scott’s study,¹³³ a problematic, yet “sticky” example of traditional contract language. A rhetorical analysis of a particular use of the term can provide insight into the possible motives of drafters in retaining this particular term of art, despite modern scholarship to the contrary and associated problems of interpretation and application.

B. Time is of the Essence in Practice: A Case Study

In considering the practical implications of the decision whether to include a particular term of art in a complex commercial contract between sophisticated parties, no better case study exists than that of the time is of the essence clause. The United States Court of Appeals for the Second Circuit recently issued a decision overturning a nearly five million dollar damage award, based in part on the inclusion of a time is

131. See, e.g., SCOTT J. BURNHAM, DRAFTING AND ANALYZING CONTRACTS 291 (LexisNexis 3d ed. 2003) (“Replace wordy phrases.”); DICKERSON, *supra* note 17, at 113 (“The draftsman should avoid long sentences when shorter ones will say the same thing as well.”); THOMAS R. HAGGARD & GEORGE W. KUNEY, LEGAL DRAFTING IN A NUTSHELL 8 (Thompson/West 3d ed. 2007) (“Being concise means saying all that needs to be said with the fewest number of words . . . concision is an essential element of good drafting.”); ROBERT J. MARTINEAU & MICHAEL B. SALERNO, LEGAL, LEGISLATIVE, AND RULE DRAFTING IN PLAIN ENGLISH 53 (Thomson/West 2005) (“[T]he elimination of unnecessary words enhances the readability and understanding of what is written.”).

132. Block, *supra* note 91, at 61.

133. See generally GULATI & SCOTT, *supra* note 10.

of the essence clause in an amended loan agreement.¹³⁴

The *Gaia House* case provides an example of the effect of the 2008 collapse of the credit markets on existing loan agreements,¹³⁵ and a lens through which to view the impact of choosing to include a term of art in a sophisticated commercial contract. In *Gaia House*, the Second Circuit overturned a bench trial judgment from the United States District Court for the Southern District of New York ruling that the borrower in a complex, multi-level loan transaction was entitled to the return of accrued interest it had paid under protest in excess of \$4.5 million dollars, along with certain professional fees and damages.¹³⁶

The factual background of the case is intricate, but understanding the main facts is important in setting the background for the use of the time is of the essence clause and consideration of the drafter's motivations. The borrower, Gaia House Mezz, LLC ("Gaia House Mezz"), entered into a Mezzanine Loan Agreement¹³⁷ in 2006 with Lehman Brothers to finance the construction of a condominium building in the trendy West Chelsea neighborhood of Manhattan.¹³⁸ The Mezzanine Loan Agreement contained a time is of the essence clause stating that "[t]ime is of the essence of each and every term of this Loan Agreement."¹³⁹ Upon Lehman Brothers' bankruptcy in 2008, State Street Bank and Trust Company ("State Street") assumed the loan and began a course of dealing with Gaia House Mezz concerning the loan throughout the troubled economic times following the collapse of the real estate and credit markets.¹⁴⁰

134. *Gaia House Mezz LLC v. State St. Bank & Trust Co.*, 720 F.3d 84, 94 (2d Cir. 2013) (Note that the opinion uses hyphens when describing the "time-is-of-the-essence" clause, which will be avoided here for the sake of readability and consistency.).

135. *See id.*

136. *Id.* at 87.

137. *Id.*; *see generally* Steven Horowitz & Lise Morrow, *Mezzanine Financing, Real Estate Financing Documentation: Strategies for Changing Times*, ALI-ABA COURSE OF STUDY, SM008 ALI-ABA 683, 685-688 (2007) (explaining that Mezzanine Financing was a popular loan structure prior to the 2008 collapse of the capital markets, which permitted borrowers (typically in the real estate industry), the ability to "obtain higher levels of loan proceeds" without resorting to the typical first and second mortgage structure). A mezzanine loan would be secured by a pledge of equity interests in the borrower entity to the mezzanine lender, rather than a mortgage on the property itself (which was typically encumbered by a primary mortgage loan, often from a different lender). *Id.* This type of financing was thus more expensive and more risky than a standard real estate loan, since it was junior and unsecured by the property. *Id.*

138. *Gaia House Mezz LLC*, 720 F.3d at 87.

139. Joint Appendix Volume III of VIII at JA-446, *Gaia House Mezz LLC*, 720 F.3d 84 (2013).

140. *Gaia House Mezz LLC*, 720 F.3d at 87-89.

State Street and Gaia House Mezz entered into three modifications to the original Mezzanine Loan Agreement, the latter two of which are relevant here. The impetus for making these modifications was Gaia House Mezz's inability to pay off the loan by the original maturity date of July 1, 2009 (at which time Gaia House Mezz owed State Street approximately \$20.7 million in principal and \$10.1 million in interest).¹⁴¹ In addition to extending the maturity date of the loan, these modifications, executed in September 2009 and May 2010, respectively, also required Gaia House Mezz to substantially complete the building and obtain a temporary certificate of occupancy ("TCO") for certain units in the building by a specific date.¹⁴²

Additionally, the Second Modification to the Mezzanine Loan Agreement dated September 23, 2009 (the "Second Modification") provided, in pertinent part: "[I]f the entire Debt, other than the . . . [Accrued Interest], is paid in full on the [extended] Scheduled Maturity Date and no Event of Default occurs prior to such Scheduled Maturity Date, Lender shall waive the payment of Accrued Interest from Borrower."¹⁴³ It also contained a time is of the essence provision stating that "[t]ime is of the essence of each provision of this Agreement."¹⁴⁴

According to the Second Circuit, these provisions "had the effect of freezing interest at \$10.1 million and providing an interest-free loan on the \$20.7 million in principal, provided there were no future Events of Default."¹⁴⁵ Unfortunately, Gaia House Mezz committed several additional Events of Default after execution of the Second Modification, including the failure to obtain the TCO by the specified date.¹⁴⁶

The parties then entered into the Third Loan Modification on May 19, 2010 (the "Third Modification"), which provided Gaia House Mezz until July 15, 2010 to obtain the TCO.¹⁴⁷ The Third Modification also contained a time is of the essence provision stating that "time is of the essence of each provision of this Agreement."¹⁴⁸ This provision

141. *Id.* at 87-88.

142. *Id.*

143. *Id.* at 88. The term "Accrued Interest" referred to any interest in excess of the \$10.1 million owed upon the original maturity date of the Mezzanine Loan Agreement. *Id.*

144. Joint Appendix Volume IV of VIII at JA-818, *Gaia House Mezz LLC*, 720 F.3d 84 (2013).

145. *Gaia House Mezz LLC*, 720 F.3d at 88.

146. *Id.*

147. *Id.*

148. Reply in Support of State Street's Motion to Dismiss Gaia's Equitable Estoppel Claim at 5, *Gaia House Mezz, LLC v. State St. Bank & Trust Co.*, 2012 WL 1530385 (S.D.N.Y. Apr. 30, 2012) (No. 1:11-cv-03186-TPG), 2011 WL 8198348, at *5.

specifically related to the extended July 15, 2010 deadline to obtain the TCO. Nonetheless, Gaia House Mezz also missed this extended deadline.¹⁴⁹ Therefore, on December 2, 2010, State Street notified Gaia House Mezz of this and other Events of Default and stated “that, because of the Events of Default, State Street was not required to waive the Accrued Interest.”¹⁵⁰

In July 2011, Gaia House Mezz paid the outstanding balance of the loan to State Street, and also paid the \$4.5 million in disputed Accrued Interest and additional associated professional fees, under protest.¹⁵¹ In order to pay the Accrued Interest, Gaia House Mezz was required to obtain a loan from a third-party lender, and therefore incurred \$328,097 in loan fees, which Gaia House Mezz later claimed as damages when they filed suit against State Street to obtain the return of the Accrued Interest and professional fees.¹⁵²

The district court ruled, after a bench trial, and without considering the time is of the essence provisions included in the Second Modification and the Third Modification, that “Gaia House earned [a refund of] the Accrued Interest.”¹⁵³ Therefore, the district court judge ordered the return to Gaia House Mezz of “\$4,558,500, the full amount of the Accrued Interest it overpaid,” along with a portion of the professional fees, and “an award of \$328,097” representing the loan fees for the loan used to pay the Accrued Interest.¹⁵⁴

In reversing and remanding the district court’s decision, the Second Circuit accepted the argument made by State Street’s attorneys that the application of the time is of the essence provisions included in the original Mezzanine Loan Agreement and each of the Amendments made the extended “July 15 deadline” to obtain the TCO “material as a matter of law,”¹⁵⁵ and that the time is of the essence clause included in the Third Modification was “by itself dispositive in refuting Gaia’s ‘equity’ claim”¹⁵⁶ for refund of the Accrued Interest and fees.

149. *Gaia House Mezz LLC*, 720 F.3d at 88

150. *Id.*

151. *Id.* at 89.

152. *Id.*

153. *Gaia House Mezz, LLC v. State St. Bank & Trust Co.*, No. 11 Civ. 3186 (TPG), 2012 WL 1530385, at *3 (S.D.N.Y. Apr. 30, 2012), *rev’d*, 720 F.3d 84 (2d Cir. 2013).

154. *Id.* at *24.

155. *Gaia House Mezz LLC*, 720 F.3d at 93-95; Brief of Defendant-Appellant State Street Bank & Trust Co. at 31, *Gaia House Mezz LLC*, 720 F.3d 84 (No. 12-2481-cv), 2012 WL 5197396, at *31.

156. Reply in Support of State Street’s Motion to Dismiss Gaia’s Equitable Estoppel Claim, *supra* note 148, at *5.

Based on the inclusion of the time is of the essence provisions, the Second Circuit directly criticized the district court's conclusion that the Events of Default were "trivial or technical breaches" based on the parties' clear designation of time as essential to the performance of obligations by their deadlines.¹⁵⁷ According to the Second Circuit, the inclusion of the clause "rendered the deadlines material."¹⁵⁸ Interestingly, these clauses were each broadly constructed, and yet were enforced by the Second Circuit with regard to the particular failure of Gaia House Mezz to timely obtain the TCO, despite scholarship criticizing the clarity and potential applicability of such broad constructed provisions.¹⁵⁹

Although the Second Circuit includes ancillary reasoning for its holding in favor of State Street, Gaia House Mezz's entire equity argument concerning the return of the Accrued Interest and related fees failed because the Second Circuit refused to disregard the significance of the term of art time is of the essence.¹⁶⁰ This finding alone entitled State Street both to retain the Accrued Interest and to avoid payment of the \$328,097 in financing damages.¹⁶¹ The choice of State Street's attorneys to include that five word term of art in Section 20 of the Third Modification caused a swing of nearly five million dollars in favor of their client when considering whether the eventual breach of the modified July 15th deadline included in that document was material.¹⁶²

This case stands as an paradigmatic example of the effect that the inclusion of a term of art can have on a client's outcome in litigation, and the importance of a measured approach when considering whether, as suggested by modern scholars such as Adams and Siviglia,¹⁶³ to rephrase or remove terms of art focused on legal or judicial audiences into plain English aimed at an unsophisticated client. While it is unlikely a client would ever be called upon to read or interpret a

157. *Gaia House Mezz LLC*, 720 F.3d at 94.

158. *Id.*

159. See ADAMS, MANUAL OF STYLE, *supra* note 2, § 13.691.

160. *Gaia House Mezz LLC*, 720 F.3d at 94.

161. *Id.* at 87, 95.

162. State Street's attorney(s) most certainly drafted the Third Modification, as it is overwhelmingly common practice in commercial real estate finance for lender-side attorneys to serve as primary drafters of the loan documents and any modifications, while borrowers' attorneys provide comments. Further, State Street's brief itself supports this assertion, stating that "*State Street twice restructured the loan* because of Gaia's repeated failures to complete construction on time" (emphasis added) and that "[i]n the Modifications, State Street also added several provisions." Brief of Defendant-Appellant State Street Bank & Trust Co., *supra* note 155, at *5, *10; *Gaia House Mezz LLC*, 720 F.3d at 94-95.

163. ADAMS, MANUAL OF STYLE, *supra* note 2, § 1.5; SIVIGLIA, *supra* note 53, at 76.

provision buried on the twelfth page of a sophisticated loan modification document, the phrase can become critically important in the eyes of a judge (particularly a trained appellate judge) when reviewing the contract in detail in connection with litigation.

While Garner rightly notes that the circumstance of judicial interpretation is somewhat rare,¹⁶⁴ the existence of language such as that included in the *Gaia House* opinion can certainly have influence on attorneys drafting contracts or negotiating for settlement on disputed contracts, even prior to the litigation stage. Thus, the true impact of judicial interpretations of these terms of art is difficult to measure empirically, and may have more impact from the perspective of the lawyer acting as advocate prior to a judicial interpretation.¹⁶⁵ Therefore, a rhetorical analysis of the motives of the State Street attorneys in including the traditional term of art can provide important insight to practitioners faced with drafting scholars advocating for redrafting of such language into plain terms.

While it is important to note that “[a] single provision in a specific kind of contract is a slim basis for drawing conclusions regarding transactional drafting as a whole,”¹⁶⁶ the determination of the rhetorical and philosophical underpinnings of the choice to retain particular terms of art provides insight into the behaviors of drafters, and possible justifications for the retention of such language beyond Adams’ suggestion of pure inertia.¹⁶⁷ In order to make these determinations, Kenneth Burke’s method of rhetorical analysis must be explained and applied to the Third Modification between State Street and Gaia House Mezz.

III. MODERN RHETORICAL CRITICISM: THE BURKEAN PENTAD

What is involved, when we say what people are doing
and why they are doing it?

- Kenneth Burke¹⁶⁸

Talk of rhetoric often conjures up images of orators employing Aristotle’s three topics of *logos*, *ethos*, and *pathos* in pursuit of the persuasion of a crowd of jeering statesmen.¹⁶⁹ Therefore, the

164. GARNER, PLAIN ENGLISH, *supra* note 2, at 109.

165. See generally Adams, *Dysfunction*, *supra* note 77 (criticizing Gulati & Scott’s empirical study of the *pari passu* clause).

166. *Id.* at 318.

167. See ADAMS, MANUAL OF STYLE, *supra* note 2, § 1.5.

168. BURKE, GRAMMAR, *supra* note 12, at xv.

169. WENDY OLMSTEAD, RHETORIC: AN HISTORICAL INTRODUCTION 15 (Blackwell Publishing 2006).

applicability of rhetorical criticism may seem "remote from the concerns and needs of contemporary society,"¹⁷⁰ particularly the modern transactional attorney. However, rhetorical criticism can be particularly helpful as "an art for 'breaking down' what has been composed."¹⁷¹ In this sense, rhetoric becomes critical to understanding why a modern contract drafter may retain traditional terms of art and to what effect.

In order to most accurately apply rhetorical criticism to a contemporary drafting issue, it is helpful to look to modern rhetorical criticism. The "rebirth of rhetoric" in modern American scholarship took root in the disciplines of communication and criticism.¹⁷² This dual focus clearly applies to the question of why and how modern drafters choose to communicate complex contract concepts, and rhetorical criticism can and should be employed to provide insight into the motives behind these drafters' choices.

The most commonly cited purpose of modern rhetorical criticism "is concerned with effect. It regards speech as a communication to a specific audience, and holds its business to be the analysis" of the selected "method of imparting . . . ideas."¹⁷³ Modern rhetorical analysis has been distinguished from the classical Aristotelian approach by noting a focus on "man as essentially a 'rhetorical' or 'symbol using' . . . animal" who seeks a "cooperative relationship" with his "audience."¹⁷⁴ Thus, modern rhetorical criticism offers a tool to analyze language choices in an evolving mode of discourse, providing a clear contrast to classical rhetoric's focus on "formal persuasion"¹⁷⁵ in a stable, "cohesive society."¹⁷⁶

Modern rhetorical criticism's focus on the study of symbol-using by the rhetor provides particular insight into the study of legal drafting. The "New Rhetoric" as applied to legal writers focuses "on what writers 'do' rather than on what writers 'know,' believing that what writers do

170. CORBETT & CONNORS, *supra* note 5, at 24.

171. *Id.* at 25.

172. Robert J. Connors, Lisa S. Ede & Andrea A. Lunsford, *The Revival of Rhetoric in America*, in *ESSAYS ON CLASSICAL RHETORIC AND MODERN DISCOURSE* 8 (Robert J. Connors, Lisa S. Ede & Andrea A. Lunsford eds., S. Ill. Univ. Press 1984).

173. Herbert A. Wichelns, *The Literary Criticism of Oratory*, in *METHODS OF RHETORICAL CRITICISM: A TWENTIETH CENTURY PERSPECTIVE* 67 (Bernard L. Brock & Robert L. Scott eds., Wayne State Univ. Press 2d ed. 1980).

174. *On Distinctions Between Classical and Modern Rhetoric*, in *ESSAYS ON CLASSICAL RHETORIC AND MODERN DISCOURSE*, *supra* note 172, at 38.

175. DANIEL FOGARTY, *ROOTS FOR A NEW RHETORIC* 130 (Bureau of Publ'ns, N.Y. 1959).

176. *On Distinctions Between Classical and Modern Rhetoric*, *supra* note 174, at 38.

is how they come to know.”¹⁷⁷ What the drafter chooses to do and how he does it is clearly a symbolic and rhetorical choice. Legal writing and rhetoric scholars have even noted that the use of forms to draft legal documents constitutes an attempt to “enter a particular . . . discourse community.”¹⁷⁸ As such, much can be learned from the application of rhetorical criticism to a drafter’s choice whether to retain terms of art or use more modern language.

Rhetorical critic Kenneth Burke asserts the possibility of discovering motive for rhetorical action through the application of a five-term, or pentad, analysis based on dramatism.¹⁷⁹ In order to understand the workings of this “pentad,” one must first recognize the two main assumptions underlying Burke’s notion of dramatism: the concepts of motion and action.¹⁸⁰ Specifically, this understanding requires recognition that action encompasses more than simply motion, which Burke defines as primarily biological.¹⁸¹ Rather, action “originate[s] in our symbolicity, as when we strive to reach goals.”¹⁸² Burke argues that human conduct, including speech, is in the realm of “symbolic action,” with man (in this case, the drafter) as the “symbol-maker.”¹⁸³

According to Burke, the strategic answers employed by drafters in making symbolic language choices answer “questions posed by the situation in which they arose.”¹⁸⁴ Further, the “mere act of naming an object or situation decrees that it is to be singled out as such-and-such rather than as something-other.”¹⁸⁵ Thus, the critic must view the choice of how to present a message as the result of the rhetor acting in a specific situation, much like an actor in a drama.¹⁸⁶ Dramatistic analysis of the rhetor’s choices can provide clues into the rhetor’s motives or why they do what they do.¹⁸⁷

177. Berger, *supra* note 104, at 156.

178. Kirsten K. Davis, Legal Forms as Rhetorical Transaction: Competency in the Context of Information and Efficiency, 79 UMKC L. REV. 667, 669 (2011).

179. BURKE, GRAMMAR, *supra* note 12, at xv.

180. KENNETH BURKE, LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD 53 (Univ. of California Press 1966) [hereinafter BURKE, LANGUAGE].

181. SONJA K. FOSS, RHETORICAL CRITICISM: EXPLORATION AND PRACTICE 355-56 (Waveland Press, Inc. 4th ed. 2009).

182. *Id.* at 355.

183. BURKE, LANGUAGE, *supra* note 181, at 63.

184. KENNETH BURKE, THE PHILOSOPHY OF LITERARY FORM: STUDIES IN SYMBOLIC ACTION 1 (Louisiana State Univ. Press 2d ed. 1967) [hereinafter BURKE, LITERARY FORM].

185. *Id.* at 4.

186. BURKE, LANGUAGE, *supra* note 180, at 63.

187. FOSS, *supra* note 181, at 356.

In order to analyze the motive behind a particular rhetorical choice (often referred to as the artifact being investigated),¹⁸⁸ Burke's pentad analysis focuses on five main principles: "what was done (act), when or where it was done (scene), who did it (agent), how he did it (agency), and why (purpose)."¹⁸⁹ These five inquiries have been likened to the five elements required in journalistic writing: "who? (agent), what? (act), why? (purpose), when? and where? (scene)."¹⁹⁰ It is important to note, in understanding Burke's pentad, that "each of these elements is interconnected in the structure of action," thus, "our understanding of one term necessarily is tied to our understanding of all of the other terms."¹⁹¹

Therefore, the critic must look at each element required in the pentad more closely in order to understand its application to a drafter's choice whether to retain a particular term of art. First, the "agent," as described by Burke, "embraces not only all words general or specific for person, actor, character, individual," etc., but also words for "motivational properties or agents" and "collective words for agent."¹⁹² It has been recognized that the rhetor herself can serve as the agent in a Burkean analysis.¹⁹³ Burke's second element of the pentad, the "act," has been defined as "the rhetor's presentation of the major action taken . . . by the agent."¹⁹⁴ A helpful way to think about Burke's act is to "think of a thing not simply as existing, but rather as 'taking form,' or as the record of an act which gave it form."¹⁹⁵

Next, Burke's concept of "agency" is rooted in the "means" used to perform the act.¹⁹⁶ Burke identifies the agency as so important that "ends become treated in terms of means."¹⁹⁷ As such, terms of art, in this analysis become the instrument or method by which the act is achieved.¹⁹⁸ Burke's fourth pentadic concept, the "scene," is "the kind of stage the rhetor sets" for the act, including "social and cultural influences."¹⁹⁹ Burke describes the scene in terms of the background for

188. BURKE, GRAMMAR, *supra* note 12, at xv.

189. *Id.*

190. FOSS, *supra* note 181, at 357.

191. J. Clarke Rountree, III, *Coming to Terms with Kenneth Burke's Pentad*, 1 AM. COMM. J. 2 (1998), available at <http://ac-journal.org/journal/vol1/iss3/burke/roundtree.html>.

192. BURKE, GRAMMAR, *supra* note 12, at 20.

193. FOSS, *supra* note 182, at 358.

194. *Id.*

195. BURKE, GRAMMAR, *supra* note 12, at 228.

196. *Id.* at 276.

197. *Id.*

198. *Id.* at 275.

199. FOSS, *supra* note 181, at 358.

the act, but going beyond this environmental conception of the scene, Burke also views determination of the scene as a consideration of upon what grounds the agent acted.²⁰⁰

The final component of the pentad is the "purpose," or the agent's intention in acting.²⁰¹ The "tools and methods" used by the agent are thus used for a particular purpose.²⁰² It is important to note that "[p]urpose is not synonymous with motive."²⁰³ Determination of motive, while the goal of a pentadic analysis, requires an in-depth inquiry into the "internal relationships which the five terms bear to one another" and "their range of permutations and combinations."²⁰⁴

Rhetorical scholars have suggested that this "pentad is particularly adapted to an analysis of words,"²⁰⁵ such as terms of art invoked by contract drafters, such as those in the *Gaia House* case. The pentad has been identified as "a universal heuristic growing out of the very concept of action recognized by writers on human motives."²⁰⁶ Thus, the application of the pentad to the use of time is of the essence in *Gaia House* can help solve the problem of determining the underlying motive of the drafter in retaining the particular terms of art.

To apply the pentad, the critic must use ratios linking and comparing the five terms of the pentad, as applied to the piece of writing in question, in order to determine which term controls or dominates. Within the dominant term, "Burke suggests, motive is located."²⁰⁷ Discovery of this motive helps us understand the "larger explanation for the rhetor's action."²⁰⁸ In the case of contract drafting, the application of the pentad helps us understand the motive behind the drafter's choice to employ terms of art rather than standard English, and more importantly, helps us recognize the validity of that choice.

200. See BURKE, GRAMMAR, *supra* note 12, at 12.

201. See *id.* at 289.

202. *Id.*

203. FOSS, *supra* note 181, at 358.

204. BURKE, GRAMMAR *supra* note 12, at xvi.

205. Rountree, III, *supra* note 191, at 5.

206. *Id.*

207. FOSS, *supra* note 181, at 357.

208. *Id.* at 358.

IV. APPLICATION OF THE BURKEAN METHOD, RESULTS, AND RECOMMENDATIONS

A word must maintain a correspondence to a reality beyond language so that our words will mirror reality, the action of life.

- Jan M. Broekman²⁰⁹

Having suggested the methodology, the rhetorical critic turns to consideration of a specific drafter's choice to retain a traditional term of art through the lens of the pentad, in order to determine motives and philosophical influences that underpin such a choice. The application of the pentad to the Third Modification to the Mezzanine Loan Agreement between State Street and Gaia House Mezz provides important rhetorical insights, and also motivates several recommendations that practicing attorneys and drafting scholars can consider and apply regarding traditional terms of art.

A. Application of Burke's Pentad to the Third Modification

A rhetorical analysis of the Third Modification between State Street and Gaia House Mezz, as interpreted by the Second Circuit in the *Gaia House* case, begins with an identification of the main pentadic elements of the contract.²¹⁰ Viewing State Street's attorney (the drafter of the Third Modification)²¹¹ as the rhetor, an understanding of the story being told, and the potential motives for telling that story in a particular way, come to light:

Agent:	State Street
Act:	Amending the Mezzanine Loan Agreement to allow Gaia House Mezz an additional opportunity to perform
Scene:	During collapse of credit and real estate markets and ongoing poor performance of Gaia House Mezz under the Mezzanine Loan Agreement

209. Jeffrey A. Ellsworth, *Semiotics in Legal Theory Design*, in SEMIOTICS OF LAW IN LEGAL EDUC. 137 (Jan M. Broekman & Francis J. Mootz, eds., Springer 2011).

210. The focus on the Third Modification to the Mezzanine Loan Agreement is intentional, as the facts of the case and the related pleadings provide the most insight into the background concerning this particular piece of drafting. Based on the retelling of facts, there existed an ongoing, acrimonious relationship between the parties which provides an interesting and informative "scene" for the pentadic analysis.

211. See *supra* text accompanying note 163. Note that for the remainder of the Article, I will refer to the drafter as "she" in the interests of gender-neutral drafting, as the gender of the drafter is unknown.

Purpose: To extend certain deadlines previously breached by Gaia House Mezz

Agency: Use of various revised contract terms, including a traditional time is of the essence clause

Based on rhetorical principles, the rhetor uses the Third Modification to tell us something about the situation between State Street and Gaia House Mezz. Particularly, as noted by scholars of Burke, the rhetor's language choices in the Third Modification act as "a strategic response to a situation."²¹² The rhetor attempts to structure the reader's view of the situation between State Street and Gaia House Mezz in a certain way, based upon her particular language choices.

It is important to note that the attorney is certainly cognizant of the parties' difficult relationship during the drafting of the Third Modification, as State Street had entered into a previous modification to the Mezzanine Loan Agreement only eight months prior, based on Gaia House Mezz's failures to perform. In looking at how the rhetor composes the Third Modification, and the story it tells, the pentadic elements can be identified and paired to determine which element dominates. This dominant element provides insights into the rhetor's motive in drafting the Third Modification the way she did. As noted by scholars of Burke, rhetors will feature one of the pentadic elements "when they express their thoughts."²¹³

Before determining which of the pentadic elements is featured, it is helpful to understand how the pentadic elements have been set. Here, the rhetor, as an attorney, represents State Street, and therefore frames this party as the protagonist or agent in the pentad created by the Third Modification. The rhetor notes that State Street is the "holder" of the debt, and that Gaia House Mezz has "failed to comply" with the loan documents in the past.²¹⁴ This clearly sets State Street as the pentadic agent, choosing to act in a particular way vis-à-vis the Mezzanine Loan Agreement.

The way the rhetor "present[s] . . . the major action taken" in the transaction functions as the act in the pentad.²¹⁵ Here, the document grants Gaia House Mezz additional opportunities to successfully perform in State Street's favor. This willingness to amend is the act

212. Bernard L. Brock, *Rhetorical Criticism: A Burkeian Approach Revisited*, in *METHODS OF RHETORICAL CRITICISM: A TWENTIETH CENTURY PERSPECTIVE*, *supra* note 172, at 183.

213. *Id.* at 188.

214. Joint Appendix Volume VI of VIII at JA-1229, *Gaia House Mezz LLC*, 720 F.3d 84 (2013).

215. FOSS, *supra* note 181, at 358.

undertaken by State Street, and it is clear that State Street is purposefully undertaking this act because the rhetor is careful throughout the document to acknowledge Gaia House Mezz's previous defaults.²¹⁶ Based on mentions of these defaults, the rhetor implies that State Street could simply call the loan into default, but has graciously chosen to act to amend the documents with the hopes of a positive outcome.

Next, "the kind of stage the rhetor sets"²¹⁷ or scene, which serves as the backdrop for the Third Modification, is one of difficulty and economic hardship, based upon the state of the real estate market as well as the parties' own dealings. The rhetor makes clear that the parties were operating in a difficult financial relationship by mentioning the previous modifications made to the Mezzanine Loan Documents due to Gaia House Mezz's failures to perform.²¹⁸

The final two pentadic elements are closely related. Purpose, from a Burkean perspective, encompasses what "the agent intends to accomplish by performing the act" and agency the "means . . . to accomplishing [it]."²¹⁹ Since the agent intended to amend the Mezzanine Loan Agreement to permit Gaia House Mezz additional opportunities to perform favorably by extending various deadlines, the agency for doing so must necessarily have been to revise the terms of the Mezzanine Loan Agreement. In addition to these revised terms, the rhetor included a traditional time is of the essence clause, as part of the agency for requiring that the revised deadlines would be enforced strictly. These clauses, including the time is of the essence clause, served as the agency to accomplish the purpose of extending the time for performance.

The strictest potential outcome related to breaches of the revised deadlines would arise if the breaches were considered material. To induce a material breach would have required any well-versed attorney to include a time is of the essence concept in the document.²²⁰ In this case, the rhetor chose to incorporate the time is of the essence concept through the use of a traditional term of art construction, rather than a plain English style. The attorney's motivation for drafting the Third Modification in this way, and the related rhetorical and philosophical justifications, will be determined by applying Burkean analysis to pair

216. Joint Appendix Volume VI of VIII, *supra* note 214, at JA-1238-40.

217. FOSS, *supra* note 181, at 358.

218. Joint Appendix Volume VI of VIII, *supra* note 214, at JA-1228.

219. FOSS, *supra* note 181, at 358.

220. See *supra* text accompanying notes 125-126.

the five pentadic elements and determine which term dominates.

Application of the ratios of the pentadic terms suggests that the dominant term in this pentad is the *act* of amending the Mezzanine Loan Agreement to give Gaia House Mezz the opportunity to successfully perform in State Street's favor. The dominant term in any pentad necessarily "influences or requires" the rest of the terms of the pentad to exist as proposed by the rhetor. Stated another way, a specific pentadic term "typif[ies] th[e] discourse."²²¹

The rhetor's presentation of the act as State Street's amendment on favorable terms dominates the pentad because it influences both the purpose and the agency, as presented by the rhetor-attorney. The act of amending the document in State Street's favor, when considering the scene of chronic late performance, necessarily required the use of an agency that employed language choices most likely to be beneficially interpreted by end-users, particularly the judiciary. As rhetorical scholars have noted, language choices in contracts are attempts to "communicate information in a way that is recognized by the intended audience and to effectuate a specific purpose that audience acknowledges."²²² Therefore, the act of favorable amendment required the use of a traditional term of art.

B. Outcomes of Rhetorical Analysis

The application of Burke's pentad to the Third Modification in *Gaia House* shows that the dominant feature was the act of State Street's favorable amendment to the Mezzanine Loan Agreement. The success of this act necessarily required that the rhetor, in telling State Street's story through the Third Modification, serve as an advocate for State Street's interests through her language choices. This motivation necessarily compelled the attorney to include language responsive to the circumstances presented by the client in connection with the transaction. In this case, Gaia House Mezz had breached the extended April 15, 2010 deadline to obtain the TCO in the very recent past when State Street's attorney began drafting the Third Modification, executed on May 9, 2010.²²³

Based on the backdrop provided by this scene, the act of favorably amending the Mezzanine Loan Agreement through the Third Modification necessarily required the rhetor to use language choices

221. Brock, *supra* note 212, at 188.

222. Davis, *supra* note 178, at 669.

223. *Gaia House Mezz LLC v. State St. Bank & Trust Co.*, 720 F.3d 84, 88 (2d Cir. 2013).

that would cause breaches of deadlines to have severe consequences. This determination of the client's interests, and response in the document with language which would advance them, required the drafter to specifically state that failure to timely perform would be considered a material breach. Based on the status of the law in the Second Circuit, the required agency for doing so required the use of a traditional term of art.²²⁴

Further, the position and perspective of the client became the primary motivating features in the decision of which type of language to include in the document to achieve the purpose of extending Gaia House Mezz's deadlines in a way that would still favor State Street. As an advocate, the rhetor would certainly be expected to become familiar with the most effective means of achieving the desired outcome for the client in the jurisdiction in which she operates.

In this case, based on well-established Second Circuit precedent, the inclusion of a traditional, broadly constructed time is of the essence clause was likely determined to be the most effective way to advance the client's interest as presented to the eventual end-user of the document, the judge. This recognition of audience in the dominant act is supported by Dickerson's early work on drafting style, prior to the dawn of the plain language movement, which recognized that the judiciary serves as an important audience for a drafter's work.²²⁵

The recognition of client advocacy as the primary motivating feature in this drafter's choice to use the traditional construction of a term of art disproves Torbert and Adams' theories that retaining terms of art is a passive exercise, which awaits judicial interpretation rather than seeking to avoid litigation.²²⁶ In this instance, the choice to include a traditional term of art acts as a means of asserting a client's position and could ideally avoid litigation if the potential implications of judicial interpretation of the term are presented to an opposing party at the pre-litigation stage.

Thus, the drafting attorney's recognition that the court's eventual interpretation of the clause would be highly beneficial for her client motivates the inclusion of the traditional clause as a means of

224. By way of example, the time is of the essence clause is so strictly enforced in the Second Circuit that lower courts in the jurisdiction have gone so far as to imply the existence of such a clause where none is even explicitly included in the document being litigated. *See generally* *Cliffstar Corp. v. Alpine Foods, LLC*, No. 09-CV-00690(A)(M), 2012 WL 7828966 (W.D.N.Y. July 18, 2012).

225. *See supra* text accompanying notes 22-34.

226. *See supra* text accompanying notes 53-55.

strengthening a client's position.²²⁷ This theory is supported by Foucault's notion that courts and commentators assist in setting the boundaries of meaning of heavily interpreted terms²²⁸

The determination that an act of advocacy motivated a rhetor in a pentad concerning the preparation of a legal document, even a contract, should not be surprising, as advocacy necessarily underpins rhetorical choices made by an attorney. According to legal rhetoric scholar Linda Berger:

[T]he outcome of a legal argument is inherently rhetorical. That is, it is rhetorical because any agreement with the conclusion rests upon the ability of one proponent to persuade another, or to persuade *an authoritative decision maker, to read a document or to understand a situation in a certain way.*²²⁹

Additionally, the focus on advocacy as a motivating factor behind maintaining traditional terms of art finds support in Gulati and Scott's study of the *pari passu* clause.²³⁰ Specifically, Gulati and Scott's theory that the reduction of risk is a primary basis for the "stickiness" of traditional terms²³¹ implies that an attorney seeking to avoid potential unfavorable judicial outcomes would advocate most effectively for a client by including a tested term which is likely to be interpreted by a judge in a client's favor. This choice to advocate through the use of tested terms is also strengthened by the fact that it "enlist[s] the attendant authority of the law"²³² through relying on favorably interpreted terms.

Further support for successful advocacy toward a judicial audience as a primary motive for retaining traditional terms of art can be found by considering the controlling philosophical influence underpinning a pentad focused on act. According to Burke's writings, where "act is featured in the pentad . . . the corresponding philosophy is realism."²³³ The philosophy of legal realism, based on the writings of Karl Llewellyn, has been described as including a focus on "how judges [have] decided cases," noting that decisions offer "critical insight into

227. See *Gaia House Mezz LLC*, 720 F.3d at 95 (noting that "[n]either Gaia House nor the court may re-write the contract," thus implying that State Street, the only other party involved, likely wrote it).

228. See FOUCAULT, *supra* note 96, at 211.

229. Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 J. LEGAL WRITING: J. LEGAL WRITING INST. 3, 11 (2010) (emphasis added).

230. See *supra* text accompanying notes 79-92.

231. GULATI & SCOTT, *supra* note 10, at 35.

232. Kastner, *supra* note 79, at 6.

233. FOSS, *supra* note 181, at 363.

legal practice.”²³⁴ Thus, Llewellyn’s legal realism supports the notion that “the meaning of a legal rule is known only in its use.”²³⁵

Therefore, the advocacy-focused motivation of a drafter correctly bears in mind the potential of judicial interpretation, in a legally realistic manner. With regard to the application of realism, Burke himself notes that “judges talk the same language” which, over time, causes “our very notions of reality [to be] affected.”²³⁶ Therefore, the realistic drafter of a contract would necessarily be attentive to judicial interpretations and construct its contract to make beneficial use of these interpretations in the client’s favor.

The outcome of this pentadic analysis directly contradicts the assertion that utilizing terms of art based on an appreciation for the perspective of the judicial reader is “wrongheaded,”²³⁷ as well as theories that “fatal weaknesses” exist in relying on judicial interpretations to motivate retention of terms of art.²³⁸ Rather, the dominant motive of effective advocacy when including a traditional term of art necessarily requires a realistic understanding of the judiciary as audience for the term used.

Therefore, based on this Burkean analysis, the drafter’s choice to retain a traditional term of art is strongly motivated by the desire to obtain the most favorable result for a client in a particular transaction. This focus on positive results necessarily requires a consideration of the judge as a potential end-user of the document, in the same way a brief-drafter would focus on the judiciary as the audience. The dominance of act in this pentad, highlighting advocacy as the drafter’s primary motive, provides an opportunity for recommendations to practitioners and drafting scholars in how to approach the question of whether and when traditional terms of art should be retained.

C. Recommendations for Practitioners and Scholars

In light of a potential motivation to retain traditional terms of art based on advocacy, scholars of contract drafting style must adjust the ways in which they discuss the intersection of style and substance. Particularly, scholars must take care when approaching the issue of whether to lump terms of art in with meaningless “legalese” which is appropriate fodder for redrafting into plain English.

234. Francis J. Mootz III, *Introduction* to ON PHILOSOPHY IN AMERICAN LAW, at xiv (Francis J. Mootz III ed., Cambridge Univ. Press 2009).

235. *Id.*

236. BURKE, GRAMMAR, *supra* note 12, at 174.

237. GARNER, PLAIN LANGUAGE, *supra* note 2, at 109.

238. ADAMS, MANUAL OF STYLE, *supra* note 2, §§ 1.30-36

As demonstrated by the foregoing Burkean analysis, drafters who retain terms of art phrased in the traditional manner have rhetorical and philosophical motivations for doing so, based on their desires to advocate for their clients, protect their clients' interests, and speak the language of the jurists who may potentially interpret the language used. Therefore, it becomes clear that transactional attorneys must not be so quick to rephrase time-tested terms of art into plain language. Rather, drafters must undertake three important steps of analysis before altering a traditional term of art.

First, in order to avoid the pitfall of "unintended consequences" which Adams associates with "top-heavy" terms of art²³⁹ a drafter must fully research the judicial interpretations of each term of art included in a particular contract in the controlling jurisdiction. A second and related step requires the drafter to determine the appropriate phrasing of the term, as preferred by the judiciary in the controlling jurisdiction. These steps effectively combat Adams' critique of "top-heavy" terms of art as often being drafted incorrectly.²⁴⁰

Each of the foregoing determinations requires that the drafter perform deep research into the case law of the controlling jurisdiction in order to determine the significance placed upon such terms by the particular judiciary which may eventually become a secondary audience to the contract, as well as the preferred method of construction of the term. This research into the interpretations of the term made by judges in the particular jurisdiction may provide the drafter with guidance concerning proper and preferred formulations of the particular term of art. For example, a drafter may discover that broad constructions of the term are not favored and thus, choose to redraft the term in a more narrow way.

Finally, and most importantly, a drafter must consider the client's particular position within the proposed transaction and whether the inclusion of a particular traditional term of art could have potential benefit. The drafter must act as an advocate for the client in the subject transaction. Just as the drafter of a brief would strive to phrase her legal arguments most persuasively to the identified judicial audience, a drafter must carefully consider whether the traditional construction of a term of art would be the most effective means of communicating within the particular discourse community that may eventually interpret the contract.

239. *Id.* § 1.21.

240. *Id.* § 13.691.

This step requires a deep understanding of the client's desired outcomes, as well as the existing course of dealing between the parties involved in the transaction. The role of the drafter when considering language choices in a contract must then necessarily go beyond that of a scrivener to become a true business counselor.²⁴¹ Only upon taking on this role can the language choices of the drafter be fully informed and appropriately motivated. Encouraging drafters and students of drafting to become cognizant of business issues and mores is thus critical in ensuring that the drafter will effectively and accurately use traditional terms of art when beneficial to the client.²⁴²

By way of example, as demonstrated in the *Gaia House* case,²⁴³ lenders' attorneys would be wise to retain a traditionally-constructed time is of the essence clause related to borrower performance covenants, particularly due to the history of failure to timely perform. The focus on the potential benefit to the client of retaining the term of art, and potential risk associated with an unfamiliar phrasing, should be more heavily stressed when making the determination of whether to rephrase a term of art. This consideration goes beyond a mere reliance on the language being time-tested by the court to determine if the most frequent outcomes in litigation over such terms of art potentially benefit the client.

CONCLUSION

The plain language movement has done much to encourage drafters to modernize, clarify and reduce needless ambiguity in their drafting. Many suggestions made by modern scholars of drafting style concerning the removal of needless "legalese" have streamlined contract prose and permitted clients to more fully understand the documents being drafted on their behalf. However, where the redrafting of a traditional term of art, a phrase that stands as heavily-interpreted legal shorthand for a particular concept, would potentially undermine an attorney's efforts to most effectively advocate for his or her client's desired outcomes in a transaction, the traditional term of art should be

241. See STARK, *supra* note 61, at 369, stating that "[s]ophisticated drafting requires a lawyer to understand the transaction from a client's business perspective and to add value to the deal."

242. See generally Illig, *supra* note 72 ("Although the typical law school curriculum places an appropriately heavy emphasis on theory and doctrine, the importance of a solid grounding in context should not be underestimated. The best business lawyers provide not only legal analysis and deal execution. We offer wisdom and counsel.").

243. See generally *Gaia House Mezz LLC v. State St. Bank & Trust Co.*, 720 F.3d 84, 95 (2d Cir. 2013).

retained.

These terms of art exist as more than needlessly convoluted jargon meant to elevate legal discourse beyond the comprehension of the layman. Rather, they serve as a means of lending credibility and persuading audiences within an established discourse community. As noted by Burke himself,

The magical decree is implicit in all language . . . an attempt to *eliminate* magic, in this sense, would involve us in the elimination of vocabulary itself as a way of sizing up reality. Rather, what [drafters] need is *correct* magic, magic whose decrees about the naming of real situations is the closest possible approximation to the situation named.²⁴⁴

As advocates, drafters must always strive to use this “correct magic” on their clients’ behalf.

244. BURKE, LITERARY FORM, *supra* note 184, at 4.