Fighting the Good Fight

Plain-Language Tales from the Corporate Trenches

By Chadwick C. Busk

Several months ago, I retired from my position as an in-house attorney at a *Forbes Magazine* top-25 privately held company based in west Michigan. My career spanned 34 years and largely consisted of drafting, reviewing, or revising a variety of commercial contracts. I probably drafted or revised at least four contracts a week, so a rough calculation is that I "interacted" with more than 6,000 contracts!

The pyramid principle applied to my work. About 5 percent of the contracts that I reviewed or revised were clear and concise. After some negotiation over business issues, they were good to go. Around 45 percent needed some work on the legal front to exterminate the more grievous plain-language errors,[1] in addition to incorporating business changes that my company wanted. And the remaining 50 percent were awful in numerous ways. They were chock-full of legal jargon, riddled with grammatical errors, and one-sided from both a legal and a business view. Here are some observations—from the trenches.

If there is one universal truth in contracts today, it is this: lawyers still love the verb *shall*. No matter that it is seldom used in everyday speech. No matter that Bryan Garner, a plain-language expert and the editor of *Black's Law Dictionary*, calls *shall* a "hopeless ambiguity . . . misused by lawyers."[2] Borrowing from Shakespeare, the first thing I did was to kill all the *shall*s and replace them with either *will* or *must*. Sometimes opposing counsel would balk at this. After trying to persuade them that *will* was fine to denote a mandatory obligation, I'd agree to add an interpretation section at the end of the contract that defined *will* in that way. Totally unnecessary, but the deal had to be done.

Another not-so-great truth: lawyers are fond of *such* as a pointing word in place of *the*, *this*, or *that*. In a 12-page contract drafted by a prominent financial institution, I found 162 instances of *such*. I deleted all but the one that properly used *such* in the sense "of this kind." The opposing counsel never argued the point, but I was armed with reasons to purge *such* from Professor Garner[3] and contract-drafting expert Ken Adams.[4]

The same contract was rife with *IN CONSIDERATION OF*. In fact, this useless recitation existed both in the introductory section and in about a half-dozen subsections throughout the agreement. Apparently, it wasn't enough to say a meaningless phrase once. Opposing counsel demanded that these phrases remain intact despite my recounting Ken Adams's reasoned view on the subject;[5] rather than delay the deal, I gave in.

Lawyers often resist plain-language changes on the premise that some piece of legalese is a term of art. Not only has this argument been discredited,[6] but common blemishes such as *set forth*, *pursuant to*, *executed* (as a substitute for *signed*), *hereunder*, *and/or*, *deem* (when not used to create a legal fiction), *including but not limited to*, and *prior to* can't even make that claim. These are just poor word choices for any contract.[7] If there is caselaw discussing them, it is usually in the context of a court's trying to determine their meaning, not recognizing them as terms of art.

I also observed that some of my colleagues on the other side of the negotiating table did not appreciate plain-language changes to their form agreements. They often viewed the changes as inconsequential, a view that cut both ways. The changes would be either accepted or rejected en masse. The former result was great; the latter result threatened to delay the deal. I finally prepared a document shrewdly titled "Why I Made Plain-Language Changes to Your Contract" and asked my client to send it to the other side. The document contained a table of the 30 or so most common plain-language changes to legal jargon, with the authoritative support for each. That usually (but not always) did the trick.

Another unfortunate truth is that legal jargon and poor formatting of contracts often go hand in hand. Many contract-drafting lawyers were quick to share their formatting faults with me. Pagination? "Who needs it?" One column? "No way. Let's put the text

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in two columns with .3-inch margins and make the text in a 6-point (or smaller) font[8]—because if the other side can't read our contract, they certainly won't ask for changes!" Thankfully, word-processing software—assuming that the document is not locked—makes it very easy to restore reason to contract formatting.

Apart from legal jargon and formatting failures, I reviewed many form contracts containing provisions so blatantly one-sided that it was hard to believe any attorney on the other side would ever agree to them. My favorite "gotcha" provision is this gem, which is common in vendor-drafted technology license agreements:

> *Any rights not expressly granted to Customer under this Agreement are reserved by Vendor.*

Let's analyze this sentence to see the problems it presents for the customer. First, the phrase *any rights*. *Any rights* is much too broad. Perhaps the provision is less dangerous if this phrase is changed to *any intellectual-property rights*. But *any rights* can mean anything that favors the vendor. For example, if the indemnity provision in the agreement is silent on whether the customer may defend the vendor against a lawsuit with a lawyer selected by the customer, then this provision would support the argument that the vendor can select its own lawyer, whom the customer must pay for. Or if the agreement provides that the customer waives indirect, incidental, and consequential damages against the vendor but does not state that the vendor does the same against the customer, this provision could be used to support the argument that a mutual waiver of these damages is not required.

Second, consider the phrase *expressly granted*. Unless *expressly* is carefully defined in the agreement, the meaning of *expressly* itself begs to be litigated. Does *expressly* mean that the right is "clearly" stated in the agreement? If so, in how much detail? If something is stated in the agreement, isn't it "expressly stated" anyway?

Third, we have the verb *reserved*. The plain meaning of *reserved* in this context is that the vendor has the right but does not have to exercise it. The customer relinquishes its common-law right to argue that the vendor waived a particular right or is estopped from exercising it because the vendor didn't exercise the right.

The final tale is about signing a contract. You'd think that after a contract had been fully negotiated (assuming that the parties have identified their authorized signatories), obtaining signatures would be simple. That's what I thought until a contract with a consumer-goods vendor was ready to sign. Because we were working under a tight deadline, I offered to exchange signature-ready copies by fax or e-mail (in PDF). I was told not only that the seller required ink signatures on multiple hard copies, but also that the contract had to be on official vendor paper. When I pointed out that electronic-signature laws recognized electronic or imaged signatures as valid and enforceable[9] and that I'd never heard of a vendor's having an official paper stock for its contracts, I was met with stony silence. The signature copies of the contract arrived a few days later on the official paper. Why was the paper official? Because every page of the contract contained the vendor's tradename hand-stamped at the bottom. Now, that's official! I almost called to ask why the vendor had forgotten the seal.[10]

The plain-language movement—and its goal of restoring greater simplicity, rationality, and common sense to legal writing—may be gaining traction in drafting legislation and court pleadings, but in my experience, many of the contract-drafting lawyers who serve corporate America need, to paraphrase the Beatles, "a damn good [mental] whacking"[11] to fully embrace it. The good fight continues. ■

Chadwick C. Busk, a 1977 graduate of Notre Dame Law School and veteran of the corporate trenches, is now honing his contract-drafting skills at http://www.busklaw.com.

ENDNOTES

1. See, e.g., Garner, *Ax these terms from your legal writing*, ABA J, April 2014, available at <http://www.abajournal.com/magazine/article/ax_these_terms_from_your_legal_writing/> (accessed December 19, 2014).
2. Garner, *Garner's Modern American Usage* (3d ed) (Oxford University Press, 2009), p 742.
3. *Ax these terms*, ABA J.
4. See Adams, *A Manual of Style for Contract Drafting* (3d ed), §§ 13.635–636.
5. See *id.* §§ 2.157, 2.160 ("[T]he traditional recital of consideration will, in most contracts, be ineffective to remedy a lack of consideration . . . . So on those rare occasions when it's not otherwise readily apparent whether a contract is supported by consideration, don't rely on a traditional recital of consideration. Instead, ensure that the recitals contain meaningful information pertaining to consideration.").
6. See e.g., Kimble, *Writing for Dollars, Writing to Please* (Carolina Academic Press, 2012), p 36 ("[E]ven under the most expansive view of technical terms as including any terms that have been litigated, they remain just a sprinkling in the much larger mix.").
7. See, e.g., Adams, §§ 13.141–144, 13.260–261, 13.264–284, (discussing *deem, including but not limited to,* and *hereunder*); *Ax these terms*, ABA J (discussing *and/or*).
8. See Adams, § 4.64 ("A two-column format should be the exception rather than the rule.").
9. 15 USC 7001 *et seq.*; MCL 450.831 *et seq.* The definition of electronic signatures is sufficiently broad to include a physically signed copy that is electronically transmitted (e.g., a scanned and e-mailed original). The challenge with contracts in PDF format is that they may not always be legible, especially when they have been copied multiple times in the course of obtaining signatures.
10. For an amusing take on "sealing" a contract, see *Horse Feathers* (Paramount Pictures 1932) <https://www.youtube.com/watch?v=asHg6w-vEPg> (accessed December 19, 2014).
11. "Piggies," in *The White Album* (EMI Records 1968). The exact phrase (attributed to George Harrison's mother) is "what they need's a damn good whacking." As Ken Adams said in a tweet (@KonciseD): "'Do you know of a good source of forms written in plain English?' No! You have to separate the less crappy from the crappy." 18 July 2014, 12:05 p.m.