Why I Made Plain-Language Changes to Your Contract

By Chadwick C. Busk

Author's Introductory Note: For years, I provided counsel for the other side with custom explanations of why I made plain-language changes to their contract. Then I decided to write a standard explanation that tried to justify the usual changes. To set the stage for this article, imagine that you are counsel for a company wanting to do significant business with my client. And you sent me your turgid form agreement (formatted with no pagination, two columns, and a 6-point font) that all your customers sign with few changes—until now. Here's my response.

You'll notice—probably in a redlined version of your contract—that I made many plain-language changes to the contract. I didn't make these changes to delay the deal or prove that I'm a better contract drafter than you are. Rather, after many years of drafting contracts in traditional legalese, I've come to believe that there is a better way—I'm a plain-language convert. Perhaps after you review my changes, you'll be converted to plain-language principles too. If so, I predict that once you explain to your clients the differences in "before" and "after" versions of your contract, they will appreciate the plainer language and thank you for it.

But why plain language in the first place? Professor Joseph Kimble of Western Michigan University Cooley Law School, in his book *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law*, states that "guidelines for writing in plain language aren't offered for some rarefied aesthetic purpose. They are ways to reach the ultimate goal of clarity—of readers' being able to find, understand, and use."[1] And Steven Pinker, an award-winning cognitive scientist, Harvard University professor, and author of the recent best seller *The Sense of Style*, declares, "Improving legalese is actually a high priority because there's so much waste and suffering that results from impenetrable legalese: People don't understand what their rights are because they don't understand a contract or they waste money hiring expensive lawyers to decipher contracts for them. I think there's a high moral value in reducing legalese to the bare minimum."[2] I may be old school, but if an idea or conduct, including plain language, has a "high moral value," then it should be practiced.

I relied on several noted authorities in making the plain-language changes to your contract. In addition to Professors Kimble and Pinker, the following resources support the changes I made (all these materials—except for Garner's *ABA Journal* article, available for free at the hyperlink below—can be purchased on Amazon for a modest price):

- Kenneth A. Adams, *A Manual of Style for Contract Drafting*, 3rd ed., American Bar Association, Chicago, 2013. Cited as "MSCD."
- Matthew Butterick, *Typography for Lawyers*, McClure Publishing, Houston, 2013. Cited as "Butterick."
- Bryan A. Garner, *Garner's Dictionary of Legal Usage*, 3rd ed., Oxford University Press, New York, 2011. Cited as "Garner, DLU."
- Bryan A. Garner, *The Redbook: A Manual on Legal Style*, 3rd ed., West Academic Publishing, 2013. Cited as "Garner, Redbook."
- Bryan A. Garner, "Ax these terms from your legal writing," *ABA Journal*, April 2014, available at http://www.abajournal.com/magazine/article/ax_these_terms_from_your_legal_writing/. Cited as "Garner, ATT."

These authors are recognized as preeminent authorities on plain language. Kenneth Adams gives national and international seminars on drafting contracts and was awarded the 2014 Golden Pen Award by the Legal Writing Institute. He also lectures on contract drafting at various law schools, including Notre Dame University Law School (my alma mater). Matthew Butterick is a respected Los Angeles graphic designer and attorney who writes frequently about text, typography, and related topics in the context of legal writing. His book *Typography for Lawyers* was endorsed by Bryan Garner. Garner has been editor in chief of all editions of *Black's Law Dictionary* since 1994 and is a distinguished research professor of law at Southern Methodist University Dedman School of Law.

Having established these experts' credentials, I'll explain what I changed in your contract and why, along with the authority supporting the change. (See the chart on the following page.)

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What Changed?	Changed To:	Why?	Authority
shall	*will*	*Shall* can mean "has a duty to," "should," "is," "will," and even "may." Use *will* to denote a mandatory obligation.	Garner, DLU, pages 952–54; Garner, Redbook, pages 520–21, 524–37
such or *said*	*the* or *that*	*Such* and *said* as pointer words should be avoided because they're legalese and because they can create ambiguous antecedents.	Garner, ATT; MSCD, sections 13.590, 13.635–.636
executed	*signed*	*Execute* creates ambiguity to the extent that it conveys meaning beyond simply "sign."	MSCD, sections 5.9–.13
including *without limitation* or a variant	deleted	This qualifying phrase is not helpful. As a fallback position, the intent that *including* should be interpreted as "without limitation" can be handled in an interpretation provision at the end of the contract.	MSCD, section 13.264
without limiting the generality of the foregoing	deleted	This phrase is ponderous and sometimes ambiguous. The sentence should be rewritten; sometimes *including* or a variant may be used.	MSCD, sections 13.763–.770
and/or	*and* or *or*	*And/or* creates ambiguity and has often been litigated.	Garner, ATT; Garner, DLU, pages 57–58
deemed or a variant	deleted or replaced with *considered*	*Deemed* should be used only to create a legal fiction; other uses are archaic.	Garner, ATT; Garner, DLU, page 254
provided that	*But*, *except*, or *on the condition that*	Garner states that *provided that* is the bane of legal drafting. Its meaning and reach are often unclear, and it causes sentences to sprawl. Better to simply use *But* (with a preceding period), *except*, or *on the condition that.*	Garner, ATT; MSCD, sections 13.541–.548
with respect to, in connection with, or *in order to*	*about, on, for, to*	These phrases are wordy and add no meaning to what the drafter intends.	Garner, DLU, pages 440, 460, 780; MSCD, section 17.14
upon	*on*	Use *upon* only for a condition or event.	Garner, DLU, page 917
the provisions of [*this Agreement*], *the terms and conditions of* [*this Agreement*], or [*for the purpose of*] *this Agreement*	deleted	The unbracketed phrases are usually unnecessary.	MSCD, Appendix 1-B, page 441, note 143
whatsoever or *for all purposes*	deleted	These intensifiers are unnecessary.	MSCD, section 1.60 and Appendix 1-B, page 441, note 154
give prompt notice or *give prior notice*	*promptly notify* or *notify in advance*	These phrases have buried verbs and can be ambiguous as well.	MSCD, sections 13.458–.464 and 17.7–.8
by and between	*between*	*By and between* is a silly couplet.	Garner, DLU, page 295; MSCD, section 2.46
prior to *subsequent to* *pursuant to* *set forth*	*before* or *earlier* *after* *under* (usually) *stated*	Legalese.	Garner, DLU, pages 708, 737, 857; MSCD, section 17.14
herein, hereunder, therein, thereunder, thereof, foregoing	*in this agreement* or *in this section*, etc.	*Here-* and *there-* words (and *foregoing*) create ambiguity, and provisions that use them are often litigated; the drafter should be more precise.	Garner, ATT; Garner, DLU, page 407; MSCD, sections 13.260–.261
witness, or *in witness whereof* in the contract's signature block	deleted	This word and phrase date back to Elizabethan usage and are unnecessary.	Garner, ATT
due to	try *because of*	*Due to* is best used to mean "attributable to."	Garner, DLU, page 301; Garner, Redbook, page 272
as of followed by date blank	*on*	*As of* serves no useful purpose; omitting it removes a potential source of confusion.	MSCD, section 2.33
made and entered into	*entered into* or *from*	Another example of a couplet that doesn't add meaning.	Garner, DLU, page 295
which	try *that*	*Which* is best used with a comma in nonrestrictive clauses, those that give supplemental, nonessential information.	Garner, DLU, page 888
duly [*signed/authorized*]	deleted	*Duly* is redundant in phrases like these (although not in some others).	MSCD, sections 13.165–.174
x, y and z	*x, y, and z*	Note the addition of a comma after *y*. This is the Oxford comma preferred by most authorities except in journalistic writing.	Garner, DLU, page 731; MSCD, sections 12.55–.56
[*party*] *acknowledges and agrees that*	deleted or trimmed	You occasionally need the first verb, but never the pair.	MSCD, sections 3.83–.85, 3.318
in consideration of	deleted	A recital of consideration in a contract does not save the contract if there is in fact no consideration. In rare cases in which consideration is not apparent, you should state meaningful information describing the consideration.	MSCD, sections 2.149–.164

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Finally, I changed your text formatting and font and added pagination. Common sense (and version tracking) demands pagination and using the document file name in a footer on each page. And I prefer a system font: Book Antiqua, 11-point, single-column text, left-justified. Book Antiqua is called "generally tolerable" by Butterick (page 83). He views Times New Roman as "questionable," and Arial (all styles) as "fatal to your credibility." Left justification of text (not full justification) is also recommended by Butterick (page 136), Garner (Redbook, section 4.10), and Adams (MSCD, Appendix 1-C). Adams discourages a two-column format because the font to make that work is usually smaller than 10 point.

If I made other plain-language changes to your contract that are not discussed here, please contact me so that I can explain my reasoning. Thanks. ■

Author's Closing Note: More times than not, this explanation of plain-language changes is positively received by the other side. Of course, it helps to have business leverage and an understanding client that supports your efforts to eradicate legalese!

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. Kimble, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* (Carolina Academic Press, 2012), p 17.
2. McCulloch, *What Can Linguistics Tell Us About Writing Better? An Interview with Steven Pinker*, Slate Magazine (September 30, 2014).

Interest Rates for Money Judgments

Under MCL 600.6013 (Revised January 1, 2015*)

I. [MCL 600.6013(8)] FOR ALL COMPLAINTS FILED ON OR AFTER JANUARY 1, 1987 UNLESS SECTION II, III, or IV APPLIES:

Interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. See interest rate chart below.

II. [MCL 600. 6013(7)] FOR COMPLAINTS FILED ON OR AFTER JULY 1, 2002 THAT ARE BASED ON A WRITTEN INSTRUMENT WITH A SPECIFIED INTEREST RATE:

Interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually.

III. [MCL 600. 6013(5 and 6)] FOR COMPLAINTS FILED ON OR AFTER JANUARY 1, 1987, BUT BEFORE JULY 1, 2002 THAT ARE BASED ON A WRITTEN INSTRUMENT:

Interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

Notwithstanding the prior paragraph, if the civil action has not resulted in a final, nonappealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in Section I above.

IV. ADDITIONAL CONSIDERATIONS:

If the complaint was filed before January 1, 1987, refer to MCL 600.6013(2)–(4).

Interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment. [MCL 600.6013(1)]

The amount of allowable interest may be different in certain settlement and medical malpractice case scenarios. [MCL 600.6013(9-13)]

Effective Date	Average Certified by State Treasurer	Statutory 1%	Interest Rate
Jan. 1, 1987	6.66%	1%	7.66%
July 1, 1987	7.50%	1%	8.50%
Jan. 1, 1988	8.39%	1%	9.39%
July 1, 1988	8.21%	1%	9.21%
Jan. 1, 1989	9.005%	1%	10.005%
July 1, 1989	9.105%	1%	10.105%
Jan. 1, 1990	8.015%	1%	9.015%
July 1, 1990	8.535%	1%	9.535%
Jan. 1, 1991	8.26%	1%	9.26%
July 1, 1991	7.715%	1%	8.715%
Jan. 1, 1992	7.002%	1%	8.002%
July 1, 1992	6.68%	1%	7.68%
Jan. 1, 1993	5.797%	1%	6.797%
July 1, 1993	5.313%	1%	6.313%
Jan. 1, 1994	5.025%	1%	6.025%
July 1, 1994	6.128%	1%	7.128%
Jan. 1, 1995	7.38%	1%	8.38%
July 1, 1995	6.813%	1%	7.813%
Jan. 1, 1996	5.953%	1%	6.953%
July 1, 1996	6.162%	1%	7.162%
Jan. 1, 1997	6.340%	1%	7.340%
July 1, 1997	6.497%	1%	7.497%
Jan. 1, 1998	5.920%	1%	6.920%
July 1, 1998	5.601%	1%	6.601%
Jan. 1, 1999	4.8335%	1%	5.8335%
July 1, 1999	5.067%	1%	6.067%
Jan. 1, 2000	5.7563%	1%	6.7563%
July 1, 2000	6.473%	1%	7.473%
Jan. 1, 2001	5.965%	1%	6.965%
July 1, 2001	4.782%	1%	5.782%
Jan. 1, 2002	4.14%	1%	5.14%
July 1, 2002	4.36%	1%	5.36%
Jan. 1, 2003	3.189%	1%	4.189%
July 1, 2003	2.603%	1%	3.603%
Jan. 1, 2004	3.295%	1%	4.295%
July 1, 2004	3.357%	1%	4.357%
Jan. 1, 2005	3.529%	1%	4.529%
July 1, 2005	3.845%	1%	4.845%
Jan. 1, 2006	4.221%	1%	5.221%
July 1, 2006	4.815%	1%	5.815%
Jan. 1, 2007	4.701%	1%	5.701%
July 1, 2007	4.741%	1%	5.741%
Jan. 1, 2008	4.033%	1%	5.033%
July 1, 2008	3.063%	1%	4.063%
Jan. 1, 2009	2.695%	1%	3.695%
July 1, 2009	2.101%	1%	3.101%
Jan. 1, 2010	2.480%	1%	3.480%
July 1, 2010	2.339%	1%	3.339%
Jan. 1, 2011	1.553%	1%	2.553%
July 1, 2011	2.007%	1%	3.007%
Jan. 1, 2012	1.083%	1%	2.083%
July 1, 2012	0.871%	1%	1.871%
Jan. 1, 2013	0.687%	1%	1.687%
July 1, 2013	0.944%	1%	1.944%
Jan. 1, 2014	1.452%	1%	2.452%
July 1, 2014	1.622%	1%	2.622%
Jan. 1, 2015	1.678%	1%	2.678%

*For the most up-to-date information, visit http://courts.michigan.gov/Administration/SCAO/Resources/Documents/other/interest.pdf.