PLAIN LANGUAGE

How to draft a bad contract (Part 3)

BY MARK COHEN

Many experts have written on how to draft a good contract.[1] In the final installment of this series, I'll again approach the issue from the opposite end by explaining how to draft a bad one.[2]

CUT AND PASTE FROM THE INTERNET

One way that lawyers create bad contracts is by copying provisions from the internet (I did a Google search for "sample contract for sale of goods" and got 40.8 million results). Because law practice is so hectic, it's tempting to use this shortcut. We find a template that we like and use it over and over. Here's one that I see a lot:

> In any dispute arising out of this Agreement, the parties will submit to binding arbitration using the rules of the American Arbitration Association (AAA).

This makes your contract more bad for several reasons. First, it does not specify that the parties must use the AAA; it states only that they must use the AAA's rules. Second, it does not specify which AAA rules will apply; the AAA has many sets of rules for various types of disputes. Third, the lawyer using this language may not realize that the AAA's rules can be just as complex as the rules of procedure that the lawyer hoped to avoid by including an arbitration provision in the first place. Finally, the lawyer may be unfamiliar with the AAA's fee structure. In disputes involving small businesses or small amounts of money, it may not make sense to use the AAA.

DON'T INCLUDE A NONASSIGNMENT PROVISION

Generally, nothing prevents a party from assigning its interest in a contract to some other person or entity. A bad contract recognizes that your client really doesn't care too much about who it does business with and will therefore omit a nonassignment clause. If your client's local supplier assigns its interest in a contract to a supplier in North Korea, why should your client care? It's easy to get admitted to practice in North Korea. If you must include a nonassignment clause, leave a little wiggle room by not requiring written consent. Here's an example:

> No party may assign its interest in this Agreement without the consent of the other party.

BE REDUNDANT

If a provision is good enough to include in a contract, it is good enough to include more than once. One way to do this is to insert an attorney-fees clause into each paragraph that might result in litigation if a party fails to comply with the obligations set forth in that paragraph. For example, you could include an attorney-fees clause in the confidentiality provision, in the noncompetition provision, and in the provision on nonpayment and late payment. This will make your contract longer, thereby impressing your client, counsel for the opposing party, and any judge who may ultimately read it. Do *not* use one simple provision such as this:

> In any litigation arising out of this Agreement, the prevailing party is entitled to its actual attorney fees, expenses, and costs.

BE VAGUE ABOUT WHAT CONSTITUTES EFFECTIVE NOTICE

Many contracts require a party to give written notice to the other party for certain matters. A bad contract must be vague about when

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written notice is effective. Here is a vague notice provision that you may use:

> Wherever this Agreement requires a party to give written notice to the other, the party giving notice shall send the notice to the other party by certified mail, return receipt requested.

Do you see the beauty of this? Is the notice effective when sent or when it is received? Is it effective if the recipient does not claim the certified letter and sign the receipt? And what address should the party giving notice send the notice to?

USE A SMALL FONT

You want your contract to be thorough, but you worry that some may find a lengthy document intimidating. The solution? Use a smaller font. The standard in the legal profession is a 12-point font, but you could surely cut down on the number of pages by using a 6-point font. This will improve the badness of your contract by making it far more difficult for people to read. And it may give you a chance later to research and brief whether using a small font makes a provision unenforceable under the doctrine of procedural unconscionability.[3]

USE LEGALESE[4]

You slogged through three years of law school, possibly incurring a sizable debt in the process, and throughout that time you read volumes of decisions written by men long since dead concerning disputes arising out of documents written by men long since dead governing transactions long since forgotten. What was the point of that if you can't use their writing style? A detailed explanation of how to use legalese to draft bad contracts is beyond this article's scope, but here are a few tips on how to make your contract more bad by using legalese:

Use long sentences

Example:

> No person has been or is authorized to give any information whatsoever or make any representations whatsoever other than those contained in or incorporated by reference in this document, and, if given or made, such information or representation must not be relied upon as having been authorized. (47 words)

Do not use something like this:

> You should rely only on the information contained in this document. We have not authorized anyone to give you different information. (21 words)

Use passive voice whenever possible

In the active voice, the subject of the sentence performs the action. In the passive voice, the subject is acted on (or is sometimes missing altogether). The active voice requires fewer words and tracks how people think. It also unambiguously shows who has made a promise, who has a legal duty, or who has the right to act. It should therefore be avoided.

Passive:

> This contract may be terminated at any time by either party on 30 days' written notice to the other party. (20 words)

Active:

> Either party may terminate this contract on 30 days' written notice to the other party. (15 words)

Never use personal pronouns

Personal pronouns speak to the reader and help avoid abstractions. We can't have that in a bad contract.

Without personal pronouns:

> Unless otherwise inconsistent with this Agreement or not possible, INSPECTOR agrees to perform the inspection in accordance with the current Standards of Practice of the International Association of Certified Home Inspectors posted at www.nachi.org/sop.htm. Although INSPECTOR agrees to follow InterNACHI's Standards of Practice, CLIENT understands that these standards contain limitations, exceptions, and exclusions.

With personal pronouns:

> Unless otherwise noted in this Agreement or not possible, we will perform the inspection in accordance with the current Standards of Practice of the International Association of Certified Home Inspectors ("InterNACHI") posted at www.nachi.org/sop.htm. You understand that these standards contain limitations.

If it might otherwise be unclear, the (good) contract can identify who "you" and "we" are.

Use superfluous words

Never use one word when several will do. More words mean longer contracts, and longer contracts justify higher fees and impress other lawyers. Be honest. When another lawyer sends you a 50-page residential lease, you feel kind of bad that your standard residential lease is only 9 pages. Is it possible that you left out 41

pages of important legal provisions that would better protect your client? That drafter must be a *really good* lawyer.

Here are some examples of simple words that can be replaced with superfluous words:

Simple	Superfluous
If	*In the event that*
Although	*Despite the fact that*
Because	*Owing to the fact that*

You can also use a thesaurus to find synonyms to increase your word count. Some of my favorite examples are:

- rest, residue, and remainder
- remise, release, sell, and quitclaim
- due and payable
- indemnify and hold harmless
- sell, convey, assign, transfer, and deliver

Use unnecessary, legalistic words

Aforementioned and *hereinafter* are always good, but you should also strive to incorporate as much Latin as possible when drafting a bad contract. I took four years of high-school Latin, and all I remember is *Quantum marmota monax si marmota esset lignum possit?*[5] Fortunately, the internet offers abundant resources to help you discover Latin phrases to incorporate into your contracts.[6]

If you can't work Latin into a contract, at least try to get a few foreign phrases in. *Force majeure* is a good one. It's shorter (and therefore more understandable) than *extraordinary events* or *circumstances beyond the parties' control*.

USE HYPERFORMAL SIGNATURE BLOCKS

Now that you have prepared the baddest contract ever, the parties must sign it to show that they agree to its terms. A bad contract must include a formal signature section to make sure the parties know that the 47-page monstrosity they're signing (with **W I T N E S S E T H** emblazoned across the first page) is an important legal document rather than a less important communication, like a note to little Wendy's teacher explaining that her bunny ate her homework. I recommend something like this:

> IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

This is particularly bad when there is no date and year above the signatures. Also, I like the reference to seals because few people or organizations use seals these days.

Do *not* do this:

> John Jones (Date)
>
> Suzy Smith (Date)

CONCLUSION

Most students emerge from law school with a basic understanding of how to draft a bad contract. After all, they've been reading legalese for three years and are petrified that if they omit a word, litigation will result. But after years of practice and litigating disputes arising out of poorly drafted documents, some lawyers forget that the profession depends on a steady supply of poorly drafted documents. They begin to advocate for plain English. Soon they begin to be annoyed by passive voice. Then *sell, convey, assign, transfer, and deliver* becomes simply *sell*. At that point, it's all over.

A good managing partner will stage an intervention and insist that the lawyer enter an appropriate 12-step program. Sometimes you've got to be cruel to be kind.[7] While treatment can cure good drafting, the best approach is to prevent the problem in the first place. Law schools and the bar must do more to educate lawyers on how to draft bad contracts. We owe it to the profession and our clients.

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ENDNOTES

1. E.g., Adams, *A Manual of Style for Contract Drafting (4th Ed)* (Chicago: ABA, 2018), Burnham, *Drafting and Analyzing Contracts: A Guide to the Practical Application of the Principles of Contract Law (4th Ed)* (Durham: Carolina Academic Press, 2016), and Garner, *Garner's Guidelines for Drafting and Editing Contracts* (St. Paul: West Academic Publishing, 2019).
2. For an article that does something similar, see McDonald, *The Ten Worst Faults in Drafting Contracts*, 11 Scribes J Legal Writing 25 (2007).
3. See *DR Horton, Inc v Green*, 120 Nev 549, 556; 96 P3d 1159 (2004) (refusing to enforce an arbitration clause that, among other things, was written "in an extremely small font").
4. Some examples in this section are taken from *A Plain English Handbook: How to create clear SEC disclosure documents*, US Securities & Exchange Comm, available at <https://www.sec.gov/pdf/handbook.pdf> [https://perma.cc/8PTM-JUGT] (site accessed October 7, 2022).
5. How much wood could a woodchuck chuck if a woodchuck could chuck wood?
6. An excellent resource is *List of Latin legal terms*, Wikipedia <https://en.wikipedia.org/wiki/List_of_Latin_legal_terms> [https://perma.cc/NTW8-75DZ] (site accessed October 7, 2022).
7. Nick Lowe, "Cruel to Be Kind," on *Labour of Lust* (Columbia Records, 1979).