

How to draft a bad contract (Part 1)

BY MARK COHEN

Many experts have written on how to draft a good contract.¹ I'll approach the issue from the opposite end by explaining how to draft a bad one.²

Why do lawyers draft bad contracts? Lack of skill, most likely. Or blind copying of old forms. A cynic might even say self-interest. A good contract clearly sets forth the rights and duties of the parties, defines key terms, addresses all issues that might arise, contains no ambiguities or inconsistencies, and uses plain English so that non-lawyers can easily understand it. In short, a good contract reduces the risk of misunderstandings and costly (but sometimes profitable) litigation. Good contracts can also mean that clients need not rely so heavily on lawyers to explain them — which in turn can mean less work for lawyers.

The techniques that a lawyer may use to draft a bad contract are limited only by the lawyer's creativity. Still, in my 33 years of practice, I've found a number of proven methods, and this article summarizes them. This will not be the final word on the subject; I hope only to inspire further academic discussion.

OMIT THE CAPTION OR TITLE

A bad contract has no caption at the top of the first page telling the reader what the document is. If you must use a caption, use one that offers little information, such as "Agreement" or "Contract." Do not, for example, use "Horse-Purchase Contract" because that would reveal exactly what the document is.

INCLUDE A FORMAL INTRODUCTION

A bad contract begins with a verbose, formal introduction. Why?

Because that's how they did it in England 400 years ago. Here's a sample bad introduction that you may use:

This Agreement (hereinafter "Agreement") is made and entered into this ___ day of _____, 20___, by and between John Jones of Denver, Colorado (hereinafter "Seller") and Suzy Smith of Durango, Colorado (hereinafter "Buyer") for the purchase of Seller's fifty percent (50%) interest in the horse known as "Silver."

Do *not* use straightforward language like this:

This is an agreement between John Jones and Suzy Smith for the purchase of Jones's 50% interest in the horse known as Silver.

USE VERBOSE RECITALS RATHER THAN SHORT SUMMARIES

Historically, contracts included recitals to provide background, clarify intent, add to consideration, or bolster the importance of conditions in the contract.³ A bad contract should include recitals that accomplish none of these goals and that include *WHEREAS* and *NOW, THEREFORE*. Example:

WHEREAS, Jones and Smith each own a fifty percent (50%) ownership interest in the horse known as "Silver";

WHEREAS, Smith desires to purchase Jones's fifty percent (50%) ownership interest in said horse;

WHEREAS, Jones is willing to sell his fifty percent (50%) ownership interest in "Silver" to Smith on the terms set forth herein; and,

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WHEREAS, Smith is willing to purchase Jones's fifty percent (50%) ownership interest in "Silver" on the terms set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, and other good and valuable consideration, in hand paid, the receipt and adequacy of which is hereby acknowledged, the parties hereto mutually agree as follows:

Always use the *WHEREAS/NOW, THEREFORE* format for recitals. Do *not* replace the recitals with a concise summary such as this:

Background

Jones and Smith purchased a horse for \$50,000 on January 1, 2012. Each paid \$25,000 for a 50% interest in the horse. Because differences arose between Jones and Smith, they have agreed to resolve their differences on the terms set forth in this Agreement

You can also increase a contract's badness by including definitions or substantive provisions in the recitals. This creates an opportunity to later research and brief the issue whether the recitals are part of the enforceable agreement.⁴

USE WITNESSETH

Use *WITNESSETH* to separate the introduction from the contractual terms.⁵ Why? Because that's how they did it in England 400 years ago. I recommend using a bold font, centering it, inserting a space between the letters, and underscoring each letter like this:

WITNESSETH

If you want, consider using the Olde English Text font for this:

WITNESSETH

DON'T DEFINE KEY TERMS

A bad contract avoids defining technical words or terms of art altogether or defines them in a way that prevents all parties from sharing a common understanding of them. If you must include definitions, you may still draft a bad contract by:

- using ambiguous words in your definitions (for example, a "ton" could mean 2,000 pounds or a long ton of 2,200 pounds);
- defining terms not used in the contract;
- using the defined term in the definition (for example, you may define a "writing" to mean "any writing");
- defining more terms than necessary;
- using inconsistent definitions;

- defining terms only after they have already appeared in the contract;
- including substantive provisions in the definitions;
- putting a definition used only once in an alphabetical section at the beginning, rather than where it's used.

OMIT THE CONSIDERATION

An agreement not supported by consideration is, of course, invalid and unenforceable. A truly bad contract omits any mention of consideration. If you must include language about consideration, be vague by writing something like "for good and valuable consideration, the receipt of which is hereby acknowledged." Do *not* mention terms such as price, quantity, quality, time of performance, and time of payment.

USE INCONSISTENT TERMINOLOGY

To draft a bad contract, you should use multiple terms to refer to the same thing. For example, if the contract defines "Agreement" to mean "this Agreement" (which is usually an unnecessary definition to begin with), you should sometimes use "Contract" or "this document" rather than "Agreement." This will reduce your contract's readability and may even create confusion, thus improving its badness.

OMIT OR USE MISLEADING HEADINGS

Headings allow readers to quickly see what each paragraph is about. A truly bad contract has no or few headings, forcing readers to peruse the entire document to find what they're looking for. If you must use headings, consider ones that do not accurately reflect the issue addressed in that paragraph. For instance, you might use "Attorney Fees" as a heading but include a waiver of jury trial in that paragraph. This may create confusion about whether the jury waiver is enforceable.⁶

INCLUDE UNRELATED ITEMS IN THE SAME PARAGRAPH

This is one of my favorite methods for drafting a bad contract. For example, in a paragraph stating that neither party may assign its interest in the contract, include a provision that requires an award of attorney fees to the prevailing party in any litigation. Do *not* create a separate paragraph with its own heading of "Attorney Fees" to address the issue of fees.

DO NOT NUMBER THE PARAGRAPHS OR PAGES

Numbered paragraphs and pages make it easier for people to find and discuss specific portions of the contract. That's bad. It is more fun (and more profitable) to spend ten additional minutes in court while the judge and opposing counsel search the document for the relevant provision.

Sometimes you can help by saying something like, "I'm looking at the sixth paragraph up from the bottom on the seventeenth page, about midway through the paragraph, right after the semicolon."

Then sit back and relax while everyone struggles to find page 17 because you didn't number the pages.

If you must number your paragraphs and pages, consider using the archaic Roman-numeral system. You will impress others with your knowledge of the numeric system used in ancient Rome. (Be sure to use only whole numbers in your contract because the Roman system contains no way to calculate fractions or to represent the concept of zero.)

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ENDNOTES

1. See, e.g., Adams, *A Manual of Style for Contract Drafting* (4th ed) (Chicago: American Bar Association, 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. Jacobson, *A Checklist for Drafting Good Contracts*, 5 J ALWD 79, 91 (2008), available at <<https://www.alwd.org/lcr-archives/fall-2008-volume-5/209-a-checklist-for-drafting-good-contracts>> [<https://perma.cc/XA4G-7ZE4>] (website accessed August 5, 2022).
4. See, e.g., *McKinnon v Baker*, 220 Neb 314, 317; 370 NW2d 492 (1985) (Recitals are "generally background statements and do not ordinarily form any part of the real agreement.")
5. Some prefer to insert *WITNESSETH* between the introduction and recitals. Others suggest that it's more appropriate after the recitals.
6. See, e.g., *Haynes v Farmers Ins Exch*, 32 Cal 4th 1198, 1205; 89 P3d 381 (2004) (refusing to enforce a provision limiting coverage contained in a section with the heading "Other Insurance").

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