By Kenneth A. Adams

The New New Rules of Drafting (Part One)

Of the many different forms of bad prose, corporate agreements are among the worst.

"Splendid," I hear you groan, "more high-handed professorial advice that I can safely ignore."

But the language of contracts, filled as it is with archaisms, redundancies, and freakish solecisms, has real-world consequences. All too often, after signing a contract, a party finds that because of a drafting flaw, such as an ambiguous defined term, a given provision may not mean what the party had thought it meant. This could defeat an anticipated benefit under the contract or result in a dispute leading to litigation; countless lawsuits have their origin in awkward drafting. Of more immediate significance, however, is the fact that contracts take longer than they should to draft and negotiate, and so cost more—often much more.

Authors of mediocre prose can be under the pronounced illusion that they are entirely competent, even rather gifted. This is often the case with corporate lawyers: they tend to be complacent about their own drafting abilities and are quick to dismiss questions of legal usage as going to form rather than substance. One consequence is that junior corporate lawyers often receive little training in the principles of drafting, rely on flawed form contracts, and unwittingly perpetuate poor drafting techniques.

If there is going to be any transition to more modern and efficient contract language, it will probably have to be accomplished by junior lawyers, who are not set in their drafting ways. But how to disrupt the endless recycling of deficient drafting? As an alternative to my sometimes dense book on the subject, *Legal Usage in Drafting Corporate Agreements*, I offer here, as a short-sharp-shock introduction, a few of the rules that junior associates should know if they want to be anything other than hack drafters.

Enough With the Redundant Synonyms, Already

Rather than select the best word for a given provision, many lawyers instead offer two, three, or more synonyms or near synonyms, presumably with the idea that if you use a blunderbuss, you'll have a greater chance of hitting the target. For instance, it would be unexceptional for a drafter to provide that *Smith shall purchase from Jones, and Jones shall sell, assign, convey, transfer, and deliver to Smith, the Shares on the Closing Date.* Just as *purchase* is adequate to reflect the transaction from Smith's perspective, Jones can simply *sell* the Shares. *Convey*, *assign*, and *transfer* reflect concepts that are implicit in a sale, while any concerns Jones might have about delivery would be best addressed by listing in a separate section what needs to be delivered at closing.

The problem with redundant synonyms is not only that they render prose pompous and less readable. Since every word is supposed to be given meaning, clever litigators can convince a court to accord to the individual elements of a synonym-string a meaning that the drafter did not intend.

Sometimes a synonym-string is necessary to cover the universe of possibilities. For instance, if my client were buying shares, I would require the other party to represent not simply that the shares are free of any *lien*, but that they're free of any *lien, claim, community property interest, equitable interest, option, pledge, security interest, right of first refusal, or restriction of any kind*, or some similar formulation. I would do so because I'm unsure how broad a meaning courts would accord "lien." (That said, I acknowledge that this list no doubt includes some redundancy.) To avoid making life difficult for the reader, I would create and use the defined term *Lien* if I needed to use this synonym-string a number of times in a given contract.

In sum, if the model contracts you are using suggest that you should be using a synonym-string, consider whether each of the terms conveys a meaning that is both sufficiently apt and sufficiently distinct from any accompanying terms that you would be justified in keeping it. Very often, it will not.

Eliminate the Traditional Recital of Consideration

Generally, the lead-in of a contract will contain a "recital of consideration." The traditional recital of consideration seeks to establish that the promises made by the parties are supported by consideration. It can take many forms, but here's a relatively full-blown example: *NOW, THEREFORE, in consideration of the premises and the mutual covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto covenant and agree as follows.*

Recitals of consideration are, however, just so much blather, since they are ineffective. For one thing, a recital cannot transform into valid consideration something that cannot be consideration; a contract containing a recital of consideration will be unenforceable if a party can show that its promise was, for example, gratuitous or based on past consideration. Similarly, a false recital of consideration cannot create consideration where there

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"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Bar Journal Advisory Board's Plain English Committee. The assistant editor is George Hathaway. The committee seeks to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901. For information about the Plain English Committee, see our website—www.michbar.org/committees/penglish/pengcom.html.

was none; a recital stating that Roe's promise is in consideration for performance, or promised performance, by Acme would not render that contract enforceable if Roe can show that there was in fact no such bargain. (There is limited authority to the effect that recitals of consideration are effective in the context of option contracts and guaranties, but it is not convincing.)

Recitals can shed light on the parties' intent, so courts give some weight to recitals of consideration when determining whether a promise is supported by consideration. That does not, however, constitute an argument for retaining the standard recital of consideration: since the parties to a contract, and their lawyers, invariably give no thought to the standard recital of consideration, a court should disregard it when determining whether a promise was supported by consideration. Instead of relying on a traditional recital of consideration, you should craft recitals so as to ensure that they contain much more meaningful information about the background to the transaction. Generally, providing this sort of information would simply help orient the reader, but on rare occasions it could help establish that that the contract is supported by consideration.

Stripping from the lead-in the traditional recital of consideration makes the lead-in much more readable. Once you eliminate the remaining archaisms and redundancies, you are left with my preferred form of lead-in: *The parties therefore agree as follows.*

Go Easy on Your Readers' Eyes

Inefficient typography is one way to make unreadable an otherwise decent contract. Here are some suggestions for keeping your contracts as readable as possible:

- use single-spaced lines of text
- instead of full justification, use left justification (ragged right margin)
- use a serif typeface such as Times New Roman, and abjure any Courier typeface
- use all-capitals sparingly (for instance, for the title, for article headings, and for the names of the parties in the introductory clause and the signature blocks)
- to emphasize text elsewhere (for example, section headings, defined terms when they are first defined, and references to exhibits and schedules), use underlining; for contract drafting, I find boldface too emphatic and italics too subtle
- to render conspicuous an entire provision (such as an implied warranty of merchantability), use some alternative to all-capitals (for example, bold italics), if you can do so and still comply with state law ✦

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