

The New New Rules of Drafting (Part Two)

Get Rid of Olde-Worlde Archaisms

More often than not, recitals—the part of a contract that follows the introductory clause and precedes the body of the contract—are given the heading *WITNESSETH*. While drafters presumably use *WITNESSETH* because it has a picturesque oyez-oyez quality to it, it is not only archaic, but also inane: *WITNESSETH* is not a command in the imperative mood, but rather a third-person singular verb and the remnant of a longer phrase, such as *This document witnesseth that . . .*

Other common archaisms are the *WHEREAS* that precedes most recitals, the *NOW*, *THEREFORE* often used at the beginning of the final recital (known as the lead-in) and the *IN WITNESS WHEREOF* often used at the beginning of the concluding clause, just before the signatures. And by expressing dates as *this 22nd day of May, 2002*, rather than *May 22, 2002*, drafters often use six words where three will do. I could go on. You should omit all such archaisms: they are a distraction, convey no meaning, and indicate that the drafter is an utter slave to precedent.

Keep *Shall* on a Short Leash*

A phrase or sentence in the body of a contract can serve one of a number of purposes, each requiring its own category of language. Drafters blur the distinctions between these categories.

The principal culprit in this regard is *shall*. *Shall* has a tortured history that gave rise to exception-ridden rules about when *shall* conveys simple futurity and when it conveys compulsion. *Shall* has been all but discarded in general usage and many plain-language

commentators would do away with it, but I use *shall* when drafting contracts, partly because I find it superior to the alternatives.

Principled usage requires that *shall* be used only to impose a duty on the subject of a sentence; in other words, you should only use *shall* to mean “has a duty to,” as in the sentence *Widgetco shall purchase the Shares from Jones*. But lawyers use *shall* in all sorts of other ways, thereby violating the basic drafting tenet that you should not use any given word or term in more than one sense. Below is a selection of representative contract provisions that use *shall* inappropriately.

- *The Closing shall take place [read The parties shall hold the Closing] at Acme’s offices.*
- *Jones shall receive [read Widgetco shall pay Jones] an annual salary in the amount of \$100,000.*
- *This agreement shall be [read is] governed by New York law.*
- *“Securities Act” shall mean [read means] the Securities Act of 1933, as amended.*
- *Jones shall pay the Purchase Price by wire transfer to any account Acme shall specify [read specifies] in writing.*
- *If Doe shall transfer [read transfers] the Shares without Acme’s prior written consent, that transfer shall [read will] be void.*

What explains this rampant overuse of *shall*? Perhaps drafters mistakenly think that

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you should use the future tense liberally, since a contract is meant to govern future conduct, and then out of familiarity they use *shall* rather than *will*. Or perhaps drafters feel that contract language will somehow not be legally binding if there isn’t a *shall* in there somewhere.

Overuse of *shall* might not seem like much of an issue, since any one instance of misuse is unlikely to result in confusion. But it does serve to muddy the meaning of *shall*; there is a pile of litigation on the subject. More generally, inappropriate use of *shall* indicates a lack of control over meaning; instead of mastering the issues of grammar raised by any given category of contract language, it is far easier to simply use *shall* everywhere, even if doing so washes out the contrasts that help convey meaning.

In Most Contexts, Don’t Use Both Numerals and Words to Convey Numbers

You probably use both words and numerals to convey numbers: *forty (40) days*; *Ten Thousand Four Hundred Twenty-Two Dollars and 46/100 (\$10,422.46)*; *five percent (5%)*; and so forth. This practice presumably arose because drafters valued the conciseness of numerals yet recognized that they are more vulnerable to typographic errors than words, and so decided that using both afforded the immediacy of numerals while providing insurance against a potentially drastic mistake.

The words-and-numerals approach has no doubt saved the occasional contracting party (and its lawyer) from the adverse consequences of a misplaced decimal point or other error involving numerals. But this benefit is analogous to the protection afforded by wearing a crash helmet 24 hours a day: doing so might save your life on the off chance that you are struck by a falling brick, but it is very inconvenient and makes you look a

*Some commentators would choke it to death. See the November 2000 column. —JK

little ridiculous. In most contexts, such as in a provision stating that a party is entitled to appoint “three (3) members of the board of directors,” no useful purpose is served by the belt-and-suspenders approach.

All told, you should abandon the words-and-numerals approach, except perhaps in certain potentially sensitive contexts (such as a promissory note’s statement of the principal amount of the indebtedness). Instead, spell out whole numbers one through ten and use numerals for 11 onwards. This approach applies to ordinal numbers (e.g., *fifth*, *18th*) as well as cardinal numbers. I use numerals for whole numbers below 11 in lists of numbers; when numbers occur often in the text; in percentages; and in amounts of money or times of the day. At the beginning of sentences, I of course use words for numbers 11 and over. Which system you adopt is less important than ensuring that you do not distract the reader by being inconsistent.

Conclusion

These rules reflect just a few of the principles underlying modern and efficient contract prose. What does it mean if you elect not to follow them? A number of things.

Maybe you think that contracts are impenetrable because, hey, the law is inherently complex. Or that verbose and archaic language is the price you pay for precision. Or that case law has settled the meaning of much legal vocabulary, leaving the drafter with little discretion. If you believe any of these myths, then you are on the losing side of a battle that was waged in recent decades in legal-writing circles.

Maybe you acknowledge that these rules result in more efficient contracts, but think there’s something a little touchy-feely in worrying about whether your contracts are as intelligible as they might be. Perhaps many corporate lawyers secretly share this *Bleak House* perspective, but it’s probably not one

that the governing bodies of the legal profession would encourage.

Maybe you don’t want to bring attention to yourself by abandoning the traditional formulations. In this regard, bear in mind that many of the changes I recommend would go unnoticed. If a client expresses skepticism or—especially relevant—a partner volunteers that “we don’t draft contracts like that around here,” you can explain why you made the change, but don’t hesitate to beat a hasty retreat: the battle for sensible contract prose will be a long one, so nothing is gained by taking early casualties. ♦

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