

Top 10 Phrases Not to Use in a Contract— A Lesson from Dr. Frankenstein

By David T. Daly

When a lawyer drafts a contract, the creative process is more like Dr. Frankenstein's than like God's. Instead of creating something out of nothing, we take whatever parts we can find and try to knit them together into a coherent whole.

As I remember the story, Dr. Frankenstein's creation turned into a monster because his assistant, Igor, gave him a criminal brain instead of a normal one. We lawyers can learn a lesson from this. In drafting contracts, we need to carefully scrutinize the parts other attorneys give us, and reject those that aren't going to work well.

Over the years, I've had the privilege of working with many fine lawyers and clients in drafting, reviewing, and negotiating commercial contracts. I've also seen my share of drafting monstrosities. From this experience, here is my list of the top 10 common contract phrases that we should reject because they impede saying what needs to be said—clearly and concisely.

1. Naming a contract

"Agreement" and nothing more

One of the most important things a contract drafter can do is give the contract a specific, descriptive title. For example, your

reader will probably find the title "Widget Sales & Services Agreement" more helpful than the simple title "Agreement." Adding a good title takes little time for the drafter, but it can greatly help a reader understand what the contract is about.

I once had to search 20 boxes of documents to find a particular contract. During my search, I found dozens of contract drafts titled simply "Agreement" before I found the one I was looking for. How much time and effort it would have saved if the drafters had given each contract a descriptive title!

2. "Agreement" as a defined term

Sparingly used, definitions are a useful tool in drafting a clear, concise contract. But there is one definition that we can almost always do without: the defined term "Agreement" (referring to the contract itself). Since the word "Agreement" is vague, lawyers often create a defined term, the "Agreement."

When you refer to your contract, use the words "this contract" (not defined) instead. Only lawyers and their groupies use the term "Agreement." The word "contract" is also more precise than "agreement," since all contracts are agreements, but not all agreements are contracts.

3. "Now, therefore, in consideration of the foregoing and the mutual promises and covenants herein contained, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:"

A good contract clearly explains each party's consideration. Usually, one party supplies goods or services, and the other pays money. If the consideration is clear, the phrase quoted above is unnecessary and should be omitted. If the consideration

is not clear, it's risky to rely on this formalistic statement to fix the problem.

Like a display window in the front of a department store, the space on the first page of a contract is precious for its value to attract and hold the reader's attention and to tell the reader what the contract is about. You shouldn't waste it on empty boilerplate language.

4. "The parties [expressly] agree"

Presumably, the parties agree to everything in the contract, or they wouldn't sign it. You should just set out the parties' rights and duties, without repeatedly saying "the parties agree."

Lawyers sometimes use the phrase "the parties expressly agree" to emphasize the idea that follows. It has the effect of saying "and I really mean it!" But unfortunately, using the phrase "the parties expressly agree" to create emphasis implies that other statements in the contract are less important. If an idea needs emphasis, consider instead whether you can create that emphasis by reorganizing the contract, or by working out the idea in greater detail.

5. "Unless otherwise agreed"

The phrase "unless otherwise agreed" is logically unnecessary so long as the parties remain free to amend the contract. You may, however, want to use it sparingly to indicate a section where the parties specifically expect a change, such as for prices

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or credit terms that may vary from time to time. When you do, you will probably also want to specify how the change will be documented.

Of course, you could add the phrase "unless otherwise agreed" to every sentence in the contract. The danger is that if you include "unless otherwise agreed" in some sentences but not in others, you may create the implication that some sentences can be amended orally, or in some other way that does not constitute a formal contract amendment.

6. "Hereby"

Always eliminate this unnecessary word. I have been looking for the last few years to find an example of a necessary *hereby*, and I am still looking. In his *Dictionary of Modern Legal Usage*, Bryan Garner states that "*hereby* is often a flotsam phrase that can be excised with no loss of meaning."¹ Garner adds that "*here-* and *there-* words... abound in legal writing (unfortunately they do *not* occur just here and there), usually thrown in gratuitously to give legal documents that musty smell."²

7. "Notwithstanding anything in this contract to the contrary"

This phrase indicates that the writer doesn't know what the rest of the contract says, or how the provision in question relates to the rest of the contract. Instead of using this crutch phrase, create the sense of priority and emphasis through good contract organization. Eliminate the inconsistency. At the least, specify, by number, which provision overrides which other provision.

8. "Written notice"

It is better to say—once in the notice provision—that all notices must be in writing. Then delete the word "written" wherever it appears in connection with notice. This eliminates redundancy and avoids the unfortunate implication that there is more than one kind of notice. If one contract section says that a party must give "written notice" but another section says that a party must give "notice," the difference could logically be interpreted to imply that the latter notices may be oral.

9. "Headings used in this Agreement are included for convenience of reference only and shall not constitute a part of this Agreement for any other purpose and will have no force or effect in the construction of this Agreement."

Like a good contract title, carefully chosen section headings greatly help the reader to understand a contract. Therefore, choose section headings as carefully as the text of the contract. A provision to the effect that section headings don't count is a poor substitute for good headings that do in fact guide the reader. It also adds unnecessary words—words that don't help the reader understand the contract's substantive content.

10. "In witness whereof, the parties have caused this contract to be executed by their duly authorized representatives."

Eliminate this needless phrase and, instead, just jump to the signature lines. If a contract signer is not duly authorized, this statement doesn't fix the problem (except that it may make an unauthorized

signer personally liable for the contract obligations).

Of course, authorization is important. If there is any doubt about whether a signer is duly authorized, have the other party show due authorization through a source outside the contract (for example, by having the company's secretary provide a certificate of incumbency and certified board resolution approving the contract).

Conclusion

Obviously, clear legal writing goes far beyond any short list of dos and don'ts. I hope this list challenges you to reject any clause that doesn't help make your contract clear and concise. Learn that simple lesson from Dr. Frankenstein. If you scrutinize contract forms carefully, you'll never look at the contract you've just written and say, "I've created a monster!"

[Please send your questions and comments to the author at dtd@daimlerchrysler.com] ■

Footnotes

1. Garner, *A Dictionary of Modern Legal Usage* (2d ed.), p 402.
2. *Id.* at 401.

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- U.S. Securities and Exchange Commission, *A Plain English Handbook* (Bowne, 1998).
Bryan A. Garner, *Advanced Legal Drafting* (LawProse, Inc., 1994).

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