PLAIN LANGUAGE

How to draft a bad contract (Part 2)

BY MARK COHEN

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

DO NOT SPECIFY THE DATE, TIME, AND PLACE OF PERFORMANCE

This is an excellent way to cause confusion so that disputes arise.

> *Wrong*: Jones will deliver the horse to Smith at 574 Ridge Road, Durango, Colorado, by 5:00 p.m. on August 1, 2015, at Jones's expense.
> *Right*: Jones will deliver the horse to Smith.

DO NOT ADDRESS ATTORNEY FEES

In Colorado, where I practice, the general rule is that a court will not award attorney fees unless authorized by statute, rule, or a provision in the relevant document.[3] This is why a good contract includes an attorney-fees provision. A bad contract does not. Remember, even without an attorney-fees provision, you can always seek attorney fees if the opposing party's position lacked substantial justification[4] or violates Colorado's Rule 11. Because opposing counsel's position always lacks substantial justification and violates Rule 11, an attorney-fees provision is unnecessary. You can rely on similar rules in your jurisdiction.

DO NOT ADDRESS VENUE

A bad contract fails to specify the venue for any litigation arising out of the contract. A good contract will contain something like this:

> The exclusive venue for any litigation arising out of this Agreement is Boulder County, Colorado.

I don't understand why some lawyers do this. If you practice in Boulder and the opposing party resides in Durango, isn't it better to let the opposing party file suit in La Plata County? You can bill a lot of hours for driving to Durango and back — 13 billable hours, according to MapQuest, for driving through some of the most scenic country in the United States. And Durango is really beautiful. Maybe you could get in some skiing or swing by the Telluride Jazz Festival. You might get similar opportunities in your home state, though Colorado is hard to match.

NEVER INCLUDE A WAIVER OF JURY TRIAL

Be honest. One reason that many of us chose law school is that we grew up watching Perry Mason trap witnesses on cross-examination. And juries like nothing more than being forced to listen to two profitable businesses fight over money. Jurors especially love hearing expert testimony from accountants and economists. Jurors enjoy math — that's why so many are actuaries and statisticians.

DO NOT INCLUDE A MERGER CLAUSE

A merger clause (or "integration clause") provides that the contract represents the complete and final agreement of the parties and that all prior discussions are merged into the contract. Good contracts include a merger clause to prevent parties from later alleging that there were other promises or representations not included in the written contract. A bad contract includes no merger clause. This leaves the door open for disputes about promises or representations allegedly made that are not in the written contract. You should be able to bill at least one hour for refreshing your memory about the parol-evidence rule and another hour for preparing a brief explaining that the rule does not apply because the contract was not an integrated contract.[5]

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 37 years. To contribute an article, contact Prof. Kimble at WMU–Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, visit www.michbar.org/plainlanguage.

If you include a merger clause, draft one that includes lots of legalese to impress your client, the other party's lawyer, and any judge or jurors who may ultimately read it. Here is a sample merger clause that you may use:

> This Agreement, along with any exhibits, appendices, addenda, schedules, and amendments hereto, encompasses the entire agreement of the parties, and supersedes all previous understandings and agreements between the parties, whether oral or written. The parties hereby acknowledge and represent, by affixing their hands and seals hereto, that said parties have not relied on any representation, assertion, guarantee, warranty, collateral contract or other assurance, except those set out in this Agreement, made by or on behalf of any other party or any other person or entity whatsoever, prior to the execution of this Agreement. The parties hereby waive all rights and remedies, at law or in equity, arising or which may arise as the result of a party's reliance on such representation, assertion, guarantee, warranty, collateral contract or other assurance, provided that nothing herein contained shall be construed as a restriction or limitation of said party's right to remedies associated with the gross negligence, willful misconduct or fraud of any person or party taking place prior to, or contemporaneously with, the execution of this Agreement.

Do *not* use a simple, concise merger clause such as this:

> This is the parties' complete agreement. There are no promises or representations other than those in this Agreement.

The first merger clause contains 174 words. The second contains 18 words. Simple arithmetic proves that the former is 156 words better than the latter.

DO NOT ADDRESS MODIFICATION

Litigation sometimes arises when a party claims that the parties orally modified their agreement after signing the contract. A good contract provides that any modifications must be in a writing signed by all parties. A bad contract contains no such provision, thus leaving the door open to expensive litigation revolving around statements and behaviors of the parties after they signed the contract.

DO NOT ADDRESS DISPUTE RESOLUTION

A good contract specifies the method that the parties will use to resolve disputes, such as mediation, arbitration, or litigation. A bad contract does not. If you must address this issue, draft a clause that is vague and leaves many unanswered questions. Here is a sample that you may use:

> In any dispute arising out of this Agreement, the parties will submit to mediation.

Do *not* use a clause such as this, which addresses all potential issues:

> In any dispute arising out of this Agreement, the parties will participate in mediation before filing suit. The mediator will be Jane Johnson of XYZ Mediation, Inc., and the mediation will be held in Boulder, Colorado. The mediation must not last longer than eight hours unless both parties consent. The parties will each pay half the costs of mediation. Either party may initiate mediation by sending a written demand for mediation to the other party. If the other party does not respond within 14 days or fails to participate in any scheduled mediation, the party sending the demand may seek an order compelling mediation, and in that event the party that did not respond or participate must pay the attorney fees and costs incurred by the party seeking an order to compel mediation.

INCLUDE A COCKAMAMIE SCHEME TO SELECT AN ARBITRATOR OR A MEDIATOR

For example, rather than agreeing on the mediator or arbitrator ahead of time and identifying him or her in the contract, try something like this:

> In any dispute arising out of this Agreement, the parties agree that they will select an arbitrator by the following method: Each party shall designate its choice to serve as the arbitrator by serving written notice of that party's choice on the other party. If the parties do not agree on the arbitrator, the two arbitrators selected by the parties shall then designate a person to serve as the arbitrator.

This is an excellent way to improve the badness of your contract. First, it assumes that the selected arbitrators will be willing to meet and select a third arbitrator without charge. Second, it assumes that the two selected arbitrators will be able to agree on the third arbitrator, but fails to address what will happen if they cannot agree.

INCLUDE INCONSISTENT PROVISIONS

This is one of my favorites. To make your bad contract even worse, include terms that are or may be inconsistent. For instance, include an arbitration clause such as this:

> In any dispute arising out of this Agreement, the parties agree that they will participate in binding arbitration to resolve the dispute. The arbitrator will be Don Davis of Davis Arbitration, and the hearing will be held in Boulder, Colorado. The parties will each initially pay half the costs of arbitration, but the arbitrator shall order the party that does not prevail to reimburse the prevailing party for those costs. The arbitrator shall also award attorney fees and other costs to the prevailing party.

Then, in the next paragraph, include something like this:

> In any dispute arising out of this Agreement, the parties agree that the exclusive venue for any litigation shall be in the District Court of Boulder County, Colorado.

You can see the beauty of this. The parties are now confused about whether they must arbitrate or are free to file suit.

DO NOT SPECIFY WHICH JURISDICTION'S LAWS WILL GOVERN

Many contracts involve parties who live or operate in different jurisdictions. In drafting a bad contract, it is important not to address which jurisdiction's laws will govern. This provides an opportunity to research and brief the doctrine of *lex loci contractus*, which holds that when a contract is silent on what law will govern, the governing law will be that of the jurisdiction where the contract was made. This has two benefits. First, you get to use Latin. Second, if the parties reside in different jurisdictions and signed the contract in their respective jurisdictions, you can research and brief the issue of where the contract was made.

MAKE IT DIFFICULT TO DISTINGUISH THE PARTIES

Suppose one party is ABC, Inc., and it owns ABC Transportation, Inc. and ABC Credit, Inc., both of which the contract mentions. By simply referring to "ABC" throughout the contract, you can create confusion about which entity is a party to the contract or whether all three are. A variation on this is to confuse an entity with its individual owner. For instance, you might sometimes refer to a party as "Acme, LLC," but at other times refer to it as "Johnson (owner of the LLC)."

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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. *Waters v District Court*, 935 P2d 981, 990 (1997).
4. Colo Rev Stat 13-17-102.
5. *Tripp v Cotter Corp*, 701 P2d 124, 126 (1985) ("Absent allegations of fraud, accident, or mistake in the formation of the contract, parol evidence is inadmissible to add to, subtract from, vary, contradict, change, or modify an unambiguous *integrated* contract.") (emphasis added).

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