

Five Easy Ways to Make a Contract More Understandable: A Lesson from the Mackinac Bridge

By David T. Daly

Why are so many commercial contracts hard to read? One common reason is that a contract is a crossroads where complex commercial, financial, technical, and legal ideas meet. Another reason is that lawyers often fail to organize this complex information well, and as a result, the intersection turns into a hopeless traffic jam.

One of Michigan's most prominent intersections is where Interstate 75, one of the world's great highways, crosses the Straits of Mackinac, a part of one of the world's great seaways. I've heard that years ago people used to wait for hours during the summer or deer-hunting season to cross the Straits by ferry. That all changed when the Mackinac Bridge opened in 1958. Now millions of motorists cross the Straits quickly and safely each year, and the bridge is so beautiful that it has become one of the most popular symbols of our state.

In drafting a complex contract, we lawyers should strive to construct the legal equivalent of the Mackinac Bridge—a document that leads the readers quickly and safely where they need to go, and, if possible, is a thing of beauty. How do we do that? Here are five suggestions that will help any drafter, regardless of experience, to assess and improve the organization of

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any contract. While these principles are often ignored or underused, if followed consistently, they will help make most contracts easier to understand.

1. Provide a Short, Specific Title

Start each contract by giving it a short, specific title. This task takes little time for the drafter, and it can greatly help a reader understand the contract's subject matter. For example, the title "Widget Sales & Services Agreement" tells the reader at a glance what the contract is about.

Simply calling a contract "Agreement" is less helpful, since it provides little information about the subject matter and fails to distinguish one contract from another. On the other hand, a longer title such as: "Agreement for the Sale of ABC Brand Spare Parts for Widgets and for the Provision of Certain Related Services" is unique and does tell about the subject matter, but it's too long for easy reference. A reader would have to study a title like this instead of just scanning it.

2. Tell the Reader on the First Page What the Contract is About

Too often, poorly written recitals fail to tell what the contract is about. They may describe the parties' businesses or the background of the business situation, or even tell what the parties *desire*. But they never quite tell what the contract is about. I once reviewed a 20-page contract that never told what the contract was about. Instead, the frustrated reader was left to discern this from an exhibit.

A better approach is to start each contract—just after the parties' names—by directly and concisely stating the contract's purpose. I like the following format:

1. Object

This contract specifies the terms on which XYZ will sell widgets to ABC and pro-

vide technical services in connection with these sales."

This one sentence explains the contract's basic purpose. It may also be helpful to add some detail about the broad outlines of the contract, or to give some background information. The main thing is that this statement of purpose should be direct and concise, and come at the beginning of the contract.

In his book *Advanced Legal Writing & Editing*, Bryan Garner suggests that, in writing a legal brief, a drafter should strive to phrase the issue in fewer than 75 words. The reason is that "an issue that exceeds 75 words is likely to require greater concentration on the reader's part. A longer issue is harder work—a more daunting task."¹ Of course, writing a contract is different from writing a legal brief. But it's usually possible to state a contract's purpose in less than 75 words, and doing so will help the reader understand the contract.

3. Use Section and Subsection Headings

Headings help the drafter and the reader better comprehend information. When multiple ideas appear together, people naturally seek a connection. Normal prose fills this need with a topic sentence for each paragraph. But a contract often doesn't have normal paragraphs with topic sentences. In their place, or in addition to a topic sentence, a good heading helps the reader find the connection between ideas in a contract section.

Headings provide a checklist of contract topics. The process of adding a heading forces the drafter to ask, "What am I trying to say?" Asking this question helps to pull together similar or related ideas, and to keep unrelated ideas apart.

Putting related ideas together helps bring focus and identify omissions or redundancies. Of course, omitting an important idea

may cost your clients money, damage their important business relationships, or unnecessarily draw them into litigation. Redundancy is at least annoying and may confuse a reader who expects each contract provision to mean something unique. So if an idea appears twice, readers may logically seek some interpretation (perhaps a wholly unintended one) for one or both redundant statements.

Inexperienced drafters sometimes try to emphasize ideas through repetition. Sensing that they have never made the point clearly, they repeat it several times. A better approach is to state the idea just once and clearly.

I once reviewed a contract that was hard to read because it was poorly organized. In my mark-up of one especially turgid section, I added headings to each paragraph to provide a better overview. As I did this, I identified some hidden redundancies and saw that one paragraph consisted entirely of sentences that logically belonged in other paragraphs.

Another time, when I was preparing a contract using a form from a similar deal, I gathered several scattered provisions together under the heading "Intellectual Property." Doing this helped identify and eliminate redundancies that hadn't been apparent when the provisions were spread out. It also made it easier to determine whether all the intellectual-property issues had been adequately addressed.

4. Use Subsections and Lists

A good system for numbering sections and subsections helps a drafter better define the relationship, relative importance, and hierarchy of information. Again, the process of adding numbers makes you ask, "Does this idea belong on its own, or does it belong in the same section with another idea? Should it have its own article, or is it a subsidiary idea, requiring only a section? Should this idea be broken down into smaller parts?" Asking these questions, in turn, helps the drafter organize material in a logical way.

Consider how subsections and lists transform the following 200-word sentence by breaking it down into more manageable parts:

Using subsections and lists also allows for easier reference. In the examples above,

[Original Version—Box 1]

14. Work Stoppage

If the work of Builder shall be stopped under any Court order or by other public authority through no act or fault of Builder, his employees or agents, or for any reason outside Builder's control (such as the neglect, delay or fault of the Owner), for a period of thirty (30) days, or if Owner shall default in the payment of any amount due Builder hereunder, and such default continues for five (5) days after notice from Builder, or if Owner shall become a debtor in a bankruptcy proceeding, or if Owner's lender shall begin foreclosure of the Property, or if a tax lien shall be filed against the Property, or if Builder learns that any representation and warranty of the Owner was untrue when made or has subsequently become untrue due to no act or fault of the Builder, then Builder may, in addition to any legal or equitable rights otherwise available to Builder, stop work and/or terminate this Agreement and recover from the Owner payment for all work completed and any losses sustained by Builder through the date of termination, together with such profit that Builder might have derived had the work been completed as contemplated by this Agreement.

[Revised Version—Box 2]

14. Work Stoppage

a. Reasons for Stopping Work or Terminating Contract

Builder may stop work, or terminate this contract, or both, if:

- (1) Builder's work is stopped under any court order or by other public authority through no act or fault of Builder, his employees or agents, or for any reason outside Builder's control (such as the neglect, delay or fault of Owner), for 30 days or more;
- (2) Owner defaults in paying any amount due Builder under this contract, and the default continues for 5 days after notice from Builder;
- (3) Owner becomes a debtor in a bankruptcy proceeding;
- (4) Owner's lender begins foreclosure on the Property;
- (5) A tax lien is filed against the Property; or
- (6) Builder learns that any representation and warranty of Owner was untrue when made or becomes untrue due to no act or fault of Builder.

b. Payment for Work Completed and Lost Profits

In case of termination under 14.a., Builder may recover from Owner:

- (1) Payment for all work completed and any losses Builder sustains through the date of termination; and
- (2) Profit that Builder might have derived had the work been completed as contemplated by this contract.

it is easier to refer to "14.a(3)" in Box 2 than to "Section 14, fifth line, the clause starting after the comma" in Box 1.

5. Add a Table of Contents

Assuming that you have chosen good section headings and section numbers, adding a table of contents to a longer contract can help the drafter see the big

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picture and determine whether the ideas appear in a logical order.

A table of contents also helps the reader find information quickly. Unlike a letter or a legal brief that is meant to be read from beginning to end, a contract is also a reference document. So it helps if the reader can quickly find the answer to the specific question at hand and skip over other information. A New York telephone book contains more information than most contracts, but I've never heard anyone complain that it is hard to read. Why? Because the information is in alphabetical order, so readers can quickly find the information they need and ignore the rest.

A table of contents can help the reader do the same thing with a contract. Since the information in a commercial contract is usually more complicated than the information in a phone book, contracts usually require organization principles that are more complicated than simple alphabetical order. But a table of contents can help the reader to quickly understand a contract's organization and find the required information.

Some word-processing programs can create a table of contents automatically. If yours doesn't have this feature, you can also make a table of contents by copying the contract, deleting the text (leaving just the section numbers and headings), and adding page numbers.

Conclusion

Organization makes a big difference in how well a reader can understand a contract, especially if it's complex. Consistently using the five principles outlined in this article—a good title, a statement of purpose, headings, subdivisions and lists, and a table of contents—will go a long way toward improving organization and helping make your contract understandable. So next time you write a contract, don't just give your clients a draft. Give them the (legal equivalent of) the Mackinac Bridge.

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

Footnote

1. Garner, *Advanced Legal Writing & Editing* (LawProse, Inc, 1994), p 12.