Taming the Contract Clause from Hell: A Case Study

By David T. Daly

One of the defining characteristics of a plain-English document is that a reader can understand it on first reading. But from time to time, we all encounter a contract provision that is so turgid that we can't *read* it at all. Instead, we must *study* it if we want to discern its meaning. I call provisions like this "Contract Clauses from Hell," because they tend to hide substantive problems and make life miserable for everyone who has to deal with them.

This article seeks to analyze one clause from hell to determine what makes it so difficult and to offer suggestions on how it can be improved. This sample was part of a mutual indemnification clause—each party indemnifies the other—in a contract draft sent by a company wanting to do business with my client. Can you grasp it at first reading? Do you think this clause helped the client complete the deal quickly?

Sample Clause from Hell

8. Indemnification

...

(c) Promptly after receipt by an indemnified party under Section 1(g), 8(a) or 8(b) hereof of notice of the commencement of any action, such indemnified party shall, if a claim in respect thereto is to be made against an indemnifying party under such section, give notice to the indemnifying party of the commencement thereof, but the failure so to notify the indemnifying party shall not relieve it of any liability that it may have to any indemnified party except to the extent the indemnifying party demonstrates that the defense of such action is prejudiced thereby. If any such action shall be brought against an indemnified party and it shall give notice to the indemnifying party of the commencement thereof, the indemnifying party shall be entitled to participate therein and, to the extent that it shall wish, to assume the defense thereof with counsel satisfactory to such indemnified party and, after notice from the indemnifying party to such indemnified party of its election so to assume the defense thereof, the indemnifying party shall not be liable to such indemnified party under such Section for any fees of other counsel or any other expenses, in each case subsequently incurred by such indemnified party in connection with the defense thereof, other than reasonable costs of investigation. If an indemnifying party assumes the defense of such an action, (i) no compromise or settlement thereof may be effected by the indemnifying party without the indemnified party's consent (which shall not be unreasonably withheld) and (ii) the indemnifying party shall have no liability with respect to any compromise or settlement thereof effected without its consent (which shall not be unreasonably withheld). If notice is given to an indemnifying party of the commencement of any action and it does not, within ten days after the indemnified party's notice is given, give notice to the indemnified party of its election to assume the defense thereof, the indemnifying party shall be bound by any determination made in such action or any compromise or settlement thereof effected by the indemnified party.

[342 words, average sentence length: 57, Gunning Readability Index = 61.8]

Analysis

What makes this example so hard to read? I see five reasons:

1. The Sentences Don't Begin with the Main Clause

Probably the worst impediment is that the main—independent—clauses come far from the beginning of the sentences. In each of the four sentences, the drafter has added a dependent clause or two before the independent clause, so that the main idea comes 20 or more words from the beginning of the sentence.

Fixing a sentence like this is like picking up a snake—you have to know the right place to grab on. The right place is usually the main clause. Normally, you should put it first. Then put the main action verb near its subject. One of the key functions of a contract is to state the parties' rights and responsibilities. The main verb in a sentence that states an obligation or right is *must* or *may*, or equivalent words. The most straightforward sentence structure in a contract is usually: "Party A must [do X]" or "Party B may [do Y]."

In short, start with the main clauses and let the conditions or qualifiers follow—either in a list or in a separate sentence. Only if you have a short, single condition should you put it at the beginning of the sentence.

2. The Sentences Are Too Long

This paragraph contains 340 words divided into four sentences. Since the third sentence contains three sections, there are six distinct parts. Therefore, the average sentence/part length is 57 words.

"Plain Language" is a regular feature of the **Michigan Bar Journal,** *edited by Joseph Kimble for the State Bar's Plain English Committee. The assistant editor is George Hathaway, chair of the Committee. 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

Shorter sentences would make this section easier to read. Prof. Joseph Kimble advises writers to "Use short sections, or subdivide longer ones" and to "Break up long sentences."[1] Writing consultant Bryan Garner advises: "Strive for an average sentence length of 20 words—and, in any event, ensure that you are below 30 words."[2]

3. It Uses Too Many Long Words

This paragraph is also difficult to read because it contains so many long words. For example, the first sentence uses the words *commencement, indemnified* and *indemnification* twice each; *indemnifying* four times; and *liability, demonstrates,* and *prejudiced* once each. None of these words are inappropriate, but each adds to the sentence's complexity. The repetition of *indemnified* and *indemnifying* also tends to numb the mind.

The paragraph could be improved by replacing some of these long words with shorter words or by rewriting to use fewer long words. Prof. Kimble advises: "Use familiar words—the ones that are simple and direct and human."[3] For example, the word *show* could replace *demonstrate.* You could also rewrite to avoid repeating the words *indemnity* and *indemnified* so often.

Long sentences and long words make a document harder to read. One gauge of reading difficulty, the Gunning Readability Index, determines reading difficulty by adding these two factors. The Index for a given writing sample is the average sentence length plus 0.4 times the number of "long" words in a 100-word sample, which equals the average reading level for a person in that grade in school. (A "long" word is a word with three or more syllables—excluding proper nouns and two-syllable words that turn into three-syllable words when you add *-ed* or *s* at the end. Thus, words like *edited* and *sentences* don't count as "long" words.)

One Possible Plain-English Revision

Revised Indemnification Clause

8. Indemnification

....

8.3 Legal Action Against Indemnified Party

a. Notification

A party that seeks indemnification under Section 1(g), 8(a), or 8(b) must promptly give the other party notice of any legal action. But a delay in notice does not relieve an indemnifying party of any liability to an indemnified party, except to the extent the indemnifying party can show that the delay prejudiced the defense of the action.

b. Participation in or Assumption of Defense

The indemnifying party may participate in or assume the defense. If the indemnifying party elects to assume the defense, then:

(1) the indemnifying party:

A. must give the other party notice of its election;

B. may select counsel satisfactory to the other party;

C. is not liable to the other party for any fees of other counsel or any other expenses incurred by the other party in defending the action, other than reasonable investigation costs; and

D. must not compromise or settle the action without the other party's consent; and

(2) the indemnified party:

A. must not unreasonably withhold its consent to any proposed settlement; and

B. has no liability with respect to any compromise or settlement effected without its consent.

c. Failure to Assume Defense

If an indemnifying party doesn't give notice of its election to assume the defense of an action within 10 days after it receives notice of the action, then the indemnifying party is bound by any determination made in the action or by any compromise or settlement that the other party may effect.

[231 words (excluding headings), average sentence length: 17.8, GRI: 22.2]

So, for example, if a writing sample has an average sentence length of 12 words, and there are 10 "long" words in a 100-word sample, the Gunning Index would be 12 + 0.4 × 10 = 16, which would be the average reading level of someone in their 16th year of schooling, or a senior in college. Using the Index to evaluate the reading level of the sample clause from hell, the reading level is 61.2! No one ever gets that much education, so it's no wonder that this clause is unreadable. My experience is that any writing with an Index above 30-35 starts to be very hard to read.

4. It Fails to Identify Separate Topics

A fourth thing that makes this clause hard to read is that the drafter failed to separate the subject matter by topic with separate subsections and subheadings. Each of this clause's four sentences deals with a separate subject. Breaking this clause into separate subsections and giving each one

EQUITY
Solution

P	R	E	L	I	M	I	N	A	R	Y
E	A	G	E	R	■	M	E	R	G	E
R	R	■	T	R	A	P	S	■	■	L
F	E	■	■	E	■	R	T	■	F	L
O	■	R	E	P	R	O	■	F	A	O
R	E	M	■	A	■	V	■	L	A	W
M	R	S	■	R	E	E	K	Y	■	B
A	A	■	P	A	■	M	■	■	A	E
N	■	■	A	B	N	E	T	■	V	L
C	I	V	I	L	■	N	O	V	E	L
E	V	I	D	E	N	T	I	A	R	Y

David T. Daly is commercial manager for Dürr, Inc., of Plymouth. He is the winner of three Clarity Awards for Clear Legal Writing from the Plain English Committee of the State Bar of Michigan. He received his JD and MBA degrees from the University of Michigan in 1986, and his BA in mathematics and music from Kalamazoo College in 1981.

its own heading would greatly improve readability.

5. The Subject Matter May Be Unfamiliar to the Drafter

This clause is obviously hard to read, but the rest of the contract draft wasn't so bad. So why didn't the drafter do something about it? My guess is that the contract drafter was a corporate lawyer who felt uncomfortable with litigation procedures.

There is a natural human tendency to think, "if it ain't broke, don't fix it." But that may be the wrong approach in this case. This clause's turgid language may have obscured substantive issues that need to be addressed. These issues become easier to spot when the clause is rewritten in plain English. Read the revised version of the same clause (on the previous page) and consider these questions: How long does an indemnifying party have to assume the defense of an action (effectively and in theory)? Must the indemnified party obtain the indemnifying party's consent to a settlement? If so, under what circumstances? Does a party have to give notice of threatened actions?

Conclusion

This article shows how one hellish contract clause could be rewritten in a more readable form while keeping about the same substantive content. I believe that other hard-to-read contract clauses often suffer from similar problems, and that some of the same techniques can be used to fix them. The process of rewriting in plain English helps the drafter to spot hidden issues and problems and to improve the contract's content.

Turgid, unreadable contract clauses are never necessary. They waste time and try the patience of everyone who must read them. So next time you encounter a contract clause from hell, be an angel and rewrite it.

[Please send your questions and comments to the author at ddaly@durr-usa.com] ■

Footnotes

1. Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 Scribes J. Legal Writing 1, 6, 7 (1996-1997).
2. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 663 (2d ed. 1995).
3. Kimble, *supra* n. 1 at 7.