How to Draft a Bad Contract™

"Simply brilliant." – Steven Pinker, Professor of Psychology, Harvard University

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Introduction

Many experts have written on how to draft a good contract.[1] To my knowledge, no legal scholar has approached the issue from the opposite end by explaining how to draft a bad contract. I do so now.

Why should lawyers draft bad contracts? Self-interest. A good contract clearly sets forth the rights and duties of the parties, defines key terms, addresses all issues that might arise, contains no ambiguities or inconsistencies, and employs plain English so non-lawyers can easily understand it. In short, a good contract reduces the risk of misunderstandings and costly (but profitable) litigation. Good contracts also mean clients need not rely so heavily on lawyers to explain them. Good contracts mean less work for lawyers.

The techniques a lawyer may use to draft a bad contract are limited only by the lawyer's creativity. Still, in my 40 years of practice, I have found a number of proven methods to draft a bad contract, and this article summarizes them. This will not be the final word on the subject; I hope only to inspire further academic discussion.

How to Draft a Bad Contract

1. Omit the title. A bad contract has no title at the top of the first page telling the reader what the document is. If you must use a title, use one that offers little information such as "Agreement" or "Contract." Do not, for example, use "Horse Purchase Contract" because that would reveal exactly what the document is.

2. Include a formal introduction. A bad contract begins with a verbose, formal introduction. Why? Because that's how they did it in England 400 years ago. Here is sample bad introduction you may use:

> This Agreement (hereinafter "Agreement") is made and entered into this ____ day of _____, 20___, by and between John Jones of Denver, Colorado (hereinafter "Seller") and Suzy Smith of

[1] *See, e.g.*, Adams, *A Manual of Style for Contract Drafting* (ABA Publishing, 2013); Burnham, *Drafting and Analyzing Contracts: A Guide to the Practical Application of the Principles of Contract Law* (LexisNexis,® 2003); Feldman and Nimmer, *Drafting Effective Contracts: A Practitioner's Guide* (Aspen Publishers, 1995).

> Durango, Colorado (hereinafter "Buyer") for the purchase of Seller's fifty percent (50%) interest in the horse known as "Silver."[2]

Do NOT use straightforward language like this:

> This is an Agreement ("Agreement") between John Jones ("Jones") and Suzy Smith ("Smith") for the purchase of Jones's 50% interest in the horse known as "Silver."

3. Use verbose recitals rather than short summaries. Historically, contracts included recitals to clarify intent, add to consideration, and/or bolster the importance of conditions in the contract.[3] A bad contract should include recitals that accomplish none of these goals and that include the word "WHEREAS" and the phrase "NOW, THEREFORE." Example:

> WHEREAS, Jones and Smith each own a fifty percent (50%) ownership interest in the horse known as "Silver";
>
> WHEREAS, Smith desires to purchase Jones's fifty percent (50%) ownership interest in said horse;
>
> WHEREAS, Jones is willing to sell his fifty percent (50%) ownership interest in "Silver" to Smith on the terms set forth herein; and,
>
> WHEREAS, Smith is willing to purchase Jones's fifty percent (50%) ownership interest in "Silver" on the terms set forth herein;
>
> NOW, THEREFORE, in consideration of the mutual covenants herein contained, and other good and valuable consideration, in hand paid, the receipt and adequacy of which is hereby acknowledged, the parties hereto mutually agree as follows:

Always use the "WHEREAS / NOW, THEREFORE" format for recitals. Do NOT replace the recitals with a concise summary such as this:

> Background
>
> Jones and Smith purchased a horse for $50,000 on January 1, 2012. They each paid $25,000 of the purchase price and agreed they would each own a 50% interest in the horse. Differences arose between Jones and Smith concerning the horse. Jones and Smith have agreed to resolve their differences on the terms set forth in this Agreement. A court may consider this background in deciding the meaning of any ambiguous term or provision in this Agreement.

You may increase the badness of a contract by including definitions or substantive provisions in the recitals. By including definitions or substantive provisions in the recitals, you create an opportunity to later research and brief (at your hourly rate) the issue of whether the recitals are part of the enforceable agreement.[4]

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[2] Note the unnecessary use of "hereinafter" three times and the redundant "made and entered into." On some level, clients believe more words in a document justify higher fees, so to draft a bad contract strive for plenty of Legalese and redundancy.

[3] Jacobson, "A Checklist for Drafting Good Contracts," 5 *J. of the Ass'n of Legal Writing Directors* 79-117 (Fall 2008).

[4] *Compare*, *McKinnon v. Baker*, 370 N.W.2d 492 (Neb. 1985) (Recitals are "generally background statements and do not ordinarily form any part of the real agreement.") with *American Nat. Bank & Trust Co. of Chicago v. Chicago Title and Trust Co.*, 481 N.E.2d 71 (Ill. App. 1985) (Recitals

4. Use WITNESSETH. Use "WITNESSETH" to separate the archaic recitals from the contractual terms.[5] Why? Because that's how they did it in England 400 years ago. I recommend using a bold font, centering it, inserting a space between each letter, and underscoring each letter like this:

W I T N E S S E T H

If you want, consider using the Olde English Text font for this:

𝔚 𝔍 𝔗 𝔑 𝔈 𝔖 𝔖 𝔈 𝔗 𝔎

5. Don't define key terms. A bad contract avoids defining technical words or terms of art altogether or defines them in a way that prevents all parties from sharing a common understanding of them. If you must include definitions, you may still draft a bad contract by:

- Using ambiguous words in your definitions (for example, a "ton" could mean 2,000 pounds or a long ton of 2,200 pounds).
- Defining terms not used in the contract.
- Using the defined term in the definition (for example, you may define a "writing" to mean "any writing").[6]
- Defining more terms than necessary.
- Employing inconsistent definitions.
- Defining terms only after they have already appeared in the contract.
- Including substantive provisions of the agreement in the definitions.
- Sprinkling your definitions throughout the contract rather than including them all in alphabetical order in a single section of the contract.

6. Omit the consideration. An agreement not supported by consideration is invalid and unenforceable.[7] Failure to state the consideration may later result in profitable litigation when the other party moves to dismiss your client's breach of contract claim for failure to state a claim.[8] A truly bad contract omits any mention of consideration.

If you must include language concerning consideration, be vague by writing something like "for good and valuable consideration, the receipt of which is hereby acknowledged." Do NOT mention issues such as price, quantity, quality, time of performance, or time of payment.

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became an operative part of the agreement itself by virtue of language in the contract that it was entered into "[f]or and in consideration of the premises set forth in the foregoing Recitals").

[5] Some prefer to insert WITNESSETH between the first paragraph and the recitals. Others suggest it is more appropriate after the recitals because you've already prepared the reader for it by using "hereinafter" and "whereas" repeatedly.

[6] See, e.g., Tax Matrix Technologies, LLC v. Wegmans Food Markets, Inc., 154 F.Supp.3d 157 (E.D. Penn. 2016) (Use of "Refunds" to define "Refunds" was poor drafting giving rise to multiple reasonable interpretations)..

[7] *Ireland v. Jacobs*, 163 P.2d 203 (Colo. 1945).

[8] See, e.g., *Hoopla Sports and Entertainment, Inc. v. Nike, Inc*. 947 F.Supp. 347 (N.D. Ill. 1996)(Breach of contract claim dismissed for failure to state a claim for relief where Plaintiff's Complaint failed to allege the consideration for the agreement and failed to allege that Plaintiff had performed its obligations under the agreement).

7. Use inconsistent terminology. To draft a bad contract, you should use multiple terms to refer to the same thing. For example, if the contract defines "Agreement" to mean "this Agreement," you should sometimes use "Contract" or "this document" rather than "Agreement." This will reduce your contract's readability and may even create confusion, thus improving the badness of your contract and increasing the potential for profitable litigation.

8. Omit or use misleading headings. Headings allow a reader to quickly see what each paragraph is about. A truly bad contract has no headings. A bad contract makes the reader search the entire document to find what they are looking for. If you must use headings, consider using headings that do not accurately reflect the issue addressed in that paragraph. For instance, you might use "Attorney Fees" as a heading but include a waiver of jury trial in that paragraph. This may create confusion about whether the jury waiver is enforceable.[9]

9. Include unrelated items in the same paragraph. This is one of my favorite methods of drafting a bad contract. For example, in a paragraph stating that neither party may assign its interest in the contract, include a provision that requires an award of attorney fees to the prevailing party in any litigation. Do NOT create a separate paragraph with its own heading of "Attorney Fees" to address the issue of fees.

10. Do not number the paragraphs or pages. Numbered paragraphs and pages make it easier for people to find and discuss specific portions of the contract. That's bad. It is more fun (and more profitable) to spend ten additional minutes in court while the judge and opposing counsel search the document for the relevant provision. Sometimes you can help by saying something like, "I am looking at the sixth paragraph up from the bottom on the seventeenth page, about midway through the paragraph, right after the semicolon." Then sit back and relax while everyone struggles to find page 17 because you didn't number the pages. If you must number your paragraphs and pages, consider using the archaic Roman numeral system. You will impress others with your knowledge of the numeric system used in ancient Rome. (Be sure to use only whole numbers in your contract because the Roman system contains no way to calculate fractions or to represent the concept of zero).

11. Do not specify the date, time, and place of performance. Remember, the goal of a bad contract is to confuse so that disputes arise and lawyers make money.

> 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.

12. Do not address attorney fees. In most states, the general rule is that a court will not award attorney fees unless authorized by statute, rule, or a provision in the relevant document.[10] This is why good contracts include 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

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[9] *See, Haynes v. Farmers Inc. Exchange*, 89 P.3d 381, 385 (Cal. 2004) (Court did not enforce a provision limiting coverage contained in a section with the heading "Other Insurance").

[10] *Waters v. District Court*, 935 P.2d 981, 990 (Colo. 1997).

justification[11] or violates C.R.C.P. 11. Because you are certain opposing counsel's position always lacks substantial justification and violates Rule 11, an attorney fees provision is unnecessary.[12]

13. 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 will be in Boulder County, Colorado.

I do not 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] And Durango is beautiful. Maybe you could get in some skiing or swing by the Telluride Jazz Festival.

If you must address venue, you can still make your venue provision bad by not making clear that the venue you specify is the *exclusive* venue for any action arising out of the agreement.[14]

14. Do not include a waiver of jury trial. Be honest. One reason many of us chose law school is that we grew up watching Perry Mason trap witnesses on cross-examination. And there is nothing jurors like 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. Another reason not to waive trial by jury is that it takes more time to prepare for a jury trial because you must prepare your voir dire and your proposed jury instructions. More time means larger fees.

15. 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 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 of the Parol Evidence Rule and more hours for preparing a brief explaining why you believe the contract was an integrated contract even though you did not include a merger clause.[15]

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[11] *See*, e.g, CRS § 13-17-102 allowing a court to award attorney fees when a party asserts a claim or defense that lacks substantial justification.

[12] If you're confused about whether to use "attorney fees," "attorneys fees," "attorney's fees," or "attorneys' fees," see, *Estate of Gentry v. Hamilton-Ryker IT Solutions, LLC*, United States District Court, S.D. Texas, Galveston Division. August 07, 2023 Slip Copy 2023 WL 5018432. You will still be confused, but you will know you are not the only one.

[13] Mapquest estimates six hours and thirty-two minutes each way under ideal conditions if traveling via Highway 160. Thirteen hours at my hourly rate of $295 per hour is $3,835. That's $3,835 for driving through some of the most scenic country in the United States while listening to great rock 'n' roll.

[14] *See, Barrett v. USA Service Finance, LLC*, United States District Court, E.D. North Carolina, Eastern Division, March 5, 2019, Not Reported in Fed. Supp. 2019 WL 1051177 (Where forum selection clause did not contain words such as "exclusive," "sole," or "only" to indicate that the parties intended to make venue exclusive in one county, venue in other counties or states was not precluded).

[15] *See*, *Tripp v. Cotter Corp.*, 701 P.2d 124 (Colo. App. 1985) ("In the absence of allegations of fraud, accident, or mistake in the formation of the contract, parol evidence may not be admitted to add to, subtract from, vary, contradict, change, or modify an unambiguous *integrated* contract.") (emphasis added).

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 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 Agreement sets forth the complete, final agreement of the parties. There are no promises or representations other than those in this Agreement.

The first merger clause contains 174 words. The second contains 23 words. Simple arithmetic proves the former is 151 words better than the latter.

16. Do not address modification. Litigation sometimes arises when a party claims 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.

17. Do not address dispute resolution. A good contract specifies the method 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 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 that 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 may not last longer than eight hours unless both parties consent. The parties will each pay half of the costs of mediation. Any party may initiate mediation by sending a written demand for mediation to the other party. If the other party does not respond within fourteen 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 to the demand or participate in the scheduled mediation shall pay the attorney fees and costs incurred by the party seeking an order to compel mediation.

18. 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 the arbitrators the parties select will be willing to meet and designate selection of an arbitrator without charge. Second, it assumes the two arbitrators will be able to agree on who will serve as the arbitrator, but fails to address what will happen if they cannot agree.

19. 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 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 of 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.

20. Do not specify which jurisdiction's laws will govern. Many contracts involve parties living or operating in different jurisdictions or that operate in several jurisdictions. In drafting a bad contract, it is important not to address which jurisdiction's laws will govern. This will provide 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.

21. 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 as to 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).

22. Cut and paste from the Internet. I did a Google search for "sample contract for sale of goods," and got 33,900,000 million results. Law practice today can be so hectic that we sometimes take shortcuts. We find a template we like and use it over and over. One way I see lawyers creating bad contracts is by copying provisions from the Internet. Here's one I see a lot:

> In any dispute arising out of this Agreement, the parties will submit to binding Arbitration using the rules of the American Arbitration Association (AAA).

This makes your contract more bad for several reasons. First, it does not specify that the parties must use the AAA; it states only that they must use the AAA's rules. Second, it does not specify which AAA rules will apply; the AAA has many sets of rules for various types of disputes. Third, the lawyer using this language may not realize that the AAA's rules can be just as complex as the rules of procedure the lawyer hoped to avoid by including an arbitration provision in the first place. Finally, the lawyer using this provision may be unfamiliar with the AAA's fee structure. In disputes involving small businesses or small amounts of money, it may not make sense to use the AAA.

23. Don't include a non-assignment provision. Generally, nothing prevents a party from assigning its interest in a contract to some other person or entity. A bad contract recognizes that your client really doesn't care that much about who it does business with and will therefore omit a non-assignment clause. If your client's local supplier assigns its interest in a contract to a supplier in North Korea, why should your client care? It's easy to get admitted to practice in North Korea. If you must include a non-assignment clause, leave a little wiggle room by not specifying that any consent to an assignment must be in writing. Here's an example:

> No party has authority to its interest in this Agreement without the other party's written consent, and any purported assignment without the other party's written consent is void.

A good contract should specify that a purported assignment without the other party's written consent is void.[16]

24. Be redundant. If a provision is good enough to include in a contract, it is good enough to include more than once. One way to do this is to insert an attorney fees clause into each paragraph that might result in litigation if a party fails to comply with the obligations set forth in that paragraph. For example, you could include an attorney fees clause in the confidentiality provision, in the non-compete provision, or in the provision regarding nonpayment and late payment. This will make your contract longer, thereby impressing your client, counsel for the opposing party, and any judge that may ultimately read it. A longer contract will make your client think it is getting more for its money.[17] Do NOT use one simple provision such as this:

> In any litigation arising out of this Agreement, the Court must order the losing party to pay the prevailing party's attorney's fees, expenses, and costs.

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[16] See, *In re Woodbridge Group of Companies, LLC*, 606 B.R. 201 (D. Delaware 2019) (When contract limits a party's right to assign instead of the power to do so, an assignment is valid and enforceable, but generates a breach of contract action that the non-assigning party may bring against the party assigning its interest).

[17] Think about it from the client's perspective. If you charge $1,000 for a 5,000-word contract, the client pays only twenty cents per word. If your charge $1,000 for a 2,500-word contract, the client pays a whopping forty cents per word!

25. Don't specify that required notices must be in writing.

A good contract specifies that any required notices must be in writing. This reduces the risk of litigation where one party claims it provided the required notice verbally.[18] A good contract also specifies what "writing" means. For instance, in the information age a contract might provide that a "writing" includes an email if it is sent to the last email address provided by the recipient and if the sender keeps a record showing that it was sent.

26. Be vague about what constitutes effective notice and when notice is effective. Many contracts contain provisions that require a party to give notice to the other party concerning certain matters. A bad contract must be vague about what notice is required and when it is effective. Here is a vague notice provision you may use:

> Wherever this Agreement requires a party to give written notice to the other, the party giving notice shall send the notice to the other party by certified mail, return receipt requested.

Do you see the beauty of this? Is the notice effective when sent or when it is received? Is it effective if the recipient does not claim the certified letter and sign the receipt? What address should the party giving notice send the notice to?

27. Use a small font. You want your contract to be thorough, but you worry that some may find a lengthy document intimidating. The solution? Use a smaller font. The standard in the legal profession is to use a 12-point font, but you could sure cut down on the number of pages by using a 6-point font. This will improve the badness of your contract by making it far more difficult for people to read. It may also later give you the chance to research and brief the issue of whether using a small font may render a provision unenforceable under the doctrine of procedural unconscionability.[19]

28. Don't include a provision allowing a court to reform an invalid provision.

There is always a chance that a court will find a contractual provision to be invalid. The general rule is that courts enforce contracts as written and are not at liberty to rescue parties from the consequences of a poorly made bargain or a poorly drafted agreement. See, e.g., *Hassler*, 505 P.3d at 173 (Wyo. 2022). A good contract includes a provision like this:

> If a court finds any provision in this Agreement invalid, it shall modify that provision to the maximum extent the law allows for protection of the party the provision was intended to benefit.

29. Do not specify that the contract is binding on the successors and assigns of the parties.

Generally, one who is not a party to the contract is not bound by it. Therefore, where it is possible that one party may assign its rights to a non-party, it is best to make clear that the contract provisions are

[18] See, e.g., *Sutter Ins. Co. v. Applied Systems, Inc.*, United States District Court, N.D. Illinois, Eastern Division., January 26, 2004, Not Reported in F.Supp.2d2004 WL 161508 (Dispute about whether written notice as required).

[19] See, *D.R. Horton, Inc., v. Green*, 96 P.3d 1159 (Nev. 2004) (Arbitration clause not enforceable where it was in an extremely small font).

binding on the assigns and successors of a party. However, the best practice is for the assignment to make clear that the assignee is bound by the agreement and to have the assignee acknowledge that in writing.

30. Do not specify that time is of the essence.

There may be cases where the question of whether a party is in default or has breached the contract depends on whether time was of the essence. A good contracts includes a time is of the essence clause. See, e.g., *Schenectady Steel Co. v. Bruno Trimpoli General Constr. Co.*, 350 N.Y.S.2d 920 (N.Y. App. 1974) (where contract provided that time was of the essence and work was to be completed in 1968, appellant defaulted when the work was not finished on December 31, 1968), aff'd, 34 N.Y.2d 939 (1974).

31. Do not include a force majeure (extraordinary events) clause.

A force majeure event is an event beyond the control of the parties which prevents performance under a contract and may excuse non-performance. Parties generally don't want to be liable for non-performance that was beyond their control. Although a party may still be able to avoid responsibility for non-performance under the doctrines of impossibility or frustration of purpose, a good contract contains a force majeure clause that specifies what a force majeure event is. See, e.g., *Ner Tamid Congregation of North Town v. Krivoruchko*, 638 F.Supp.2d 913 (N.D. Ill. 2009) (Court noted the contract contained no force majeure clause and granted summary judgment against purchaser on purchaser's claimed defenses of impossibility and impracticability of purpose).

Because I don't speak French and don't live in France, I choose not to use "force majeure," and instead include a clause governing "extraordinary events" such as this:

> In no event shall a party be liable for any failure to perform or delay caused by circumstances reasonably beyond its control that were not foreseeable. This does not include changes in economic or market conditions, and does not include changes in the law or any applicable regulations.

Although I shy away from "force majeure," one advantage of it is that the term generally has an accepted meaning in each state.

32. Do not include appropriate limitations on liability and types of damages.

Generally, parties to a contract are free to agree on limitations on damages and on the types of damages if the limitations are not unconscionable. It is common for contracts to include a provision specifying that no party may recover consequential damages. Here is a sample clause from a home inspection contract:

> LIMITATION ON LIABILITY AND DAMAGES. We assume no liability for the cost of repair or replacement of unreported defects, either current or arising in the future. In all cases, our liability is limited to damages in an amount not greater than 1.5 times the fee you paid us. You waive any claim for consequential, special or incidental damages or for the loss of the use of the home/building. You acknowledge that these limitations are not a penalty, but that we intend them to allocate risk between us and enable us to perform the inspection for the agreed-upon fee. If you wish to eliminate these limitations, we are willing to perform the inspection for an increased fee of $____, payable in advance.

Note that this clause specifically states that the limitations are intended to allow the inspector to perform the inspection for the agreed upon fee. It also gives the customer the option of paying more to eliminate the limitations on damages, thus reducing the customer's ability to argue that the contract was an adhesion contract.

Don't confuse limitations on liability and types of damages with liquidated damages. Liquidated damages are only available when it would be difficult or impossible to prove actual damages.

33. Do not include a provision stating that there are no third-party beneficiaries.

Litigation sometimes arises when a non-party files suit against a party claiming it was a third-party beneficiary of a contract. A person not a party to an express contract may bring an action on the contract if the parties to the agreement intended to benefit the non-party, provided that the benefit claimed is a direct and not merely an incidental benefit of the contract. *E.B. Roberts Constr. Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 865 (Colo.1985). While the intent to benefit the non-party need not be expressly recited in the contract, the intent must be apparent from the terms of the agreement, the surrounding circumstances, or both. Id. A great way to make clear that the parties do not intent to benefit any third party is to state that in the contract. A good contract contains a provision like this:

> This Agreement is for the sole benefit of the parties. The parties do not intend to benefit any other person or entity.

34. Do not include a provision concerning construction.

One of the first things taught in law school is that courts construe any ambiguity against the drafter of the document. Although this rule is less commonly applied when both parties are commercially sophisticated, a good contract contains a clause such as this:

> Both parties participated in negotiating this Agreement and had an opportunity to have counsel review this Agreement. Accordingly, if a court finds any ambiguity in this Agreement, the court shall not apply the rule of construction that ambiguities are construed against the drafter.

35. Do not include a provision stating that failure to assert a contractual right is a waiver of that right.

A party sometimes has a contractual right that it chooses not to enforce. For instance, if the other party is late in making a payment, the party owed money may choose to ignore that for sake of maintaining a good relationship. However, it's important to make clear that by not enforcing a right, a party is not waiving its right to enforce that right in the future. A good contract contains a provision like this:

> A party's failure to invoke any right in this Agreement is not a waiver of such right.

36. Use legalese.[20] You slogged through three years of law school, possibly incurring a great deal of debt in the process, and throughout that time you read volumes of decisions written by men long since dead concerning disputes arising out of documents written by men long since dead governing transactions long

[20] Some examples in this section are taken from *A Plain English Handbook* (U.S. Securities and Exchange Commission, 1998), www.sec.gov/pdf/handbook.pdf.

since forgotten. What was the point of that if you can't employ their writing style? A detailed explanation of how to use legalese to draft bad contracts is beyond this article's scope, but here are a few tips on how to make your contract worse by using legalese:

a. Use long sentences. Example:

> No person has been or is authorized to give any information whatsoever or make any representations whatsoever other than those contained in or incorporated by reference in this document, and, if given or made, such information or representation must not be relied upon as having been authorized. (47 words)

Do NOT use something like this:

> You should rely only on the information in this document. We have not authorized anyone to provide you different information. (20 words)

b. Use passive voice. In the active voice, the subject of the sentence performs the action. In the passive voice, the subject is acted upon. The active voice requires fewer words and tracks how people think, and you should therefore avoid it.

> Passive: This contract may be terminated at any time by either party on thirty day's written notice to the other party. (20 words)

> Active: Either party may terminate this contract on thirty day's written notice to the other party. (15 words)

c. Don't use personal pronouns. Personal pronouns speak to the reader and help avoid abstractions. We can't have that in a bad contract.

> Without personal pronouns:

> Unless otherwise inconsistent with this Agreement or not possible, INSPECTOR agrees to perform the inspection in accordance with the current Standards of Practice of the International Association of Certified Home Inspectors ("InterNACHI") posted at www.nachi.org/sop.htm. Although INSPECTOR agrees to follow InterNACHI's Standards of Practice, CLIENT understands that these standards contain limitations, exceptions, and exclusions.

> With personal pronouns:

> Unless otherwise noted in this Agreement or not possible, we will perform the inspection in accordance with the current Standards of Practice of the International Association of Certified Home Inspectors ("InterNACHI") posted at www.nachi.org/sop.htm. You understand that these standards contain limitations.

d. Use superfluous words. Never use one word when several will do. More words mean longer contracts, and longer contracts justify higher fees. Long contracts also impress other lawyers. Be honest. When another lawyer sends you a fifty-page residential lease, you feel kind of bad that your standard residential lease is only nine pages. Is it possible you left out forty-one pages of important legal provisions that would better protect your client? That woman must be a *really good* lawyer.

Here are some examples of simple words that can be replaced with superfluous words:

Simple	**Superfluous**
If	In the event that
Although	Despite the fact that
Because	Owing to the fact that

You can also use a thesaurus to find synonyms to increase your word count. Some of my favorite examples are:

- rest, residue, and remainder
- remise, release, sell, and quit claim
- due and payable
- indemnify and hold harmless
- sell, convey, assign, transfer, and deliver.

e. Use unnecessary, legalistic words. "Aforementioned" and "hereinafter" are always good, but you should also strive to incorporate as much Latin as possible in drafting a bad contract. I took four years of high school Latin and all I remember is *Quantum marmota monax si marmota esset lignum possit?*[21] Fortunately, the Internet offers abundant resources to help you discover Latin phrases to incorporate into your contracts.[22]

If you can't work Latin into a contract, at least try to get a few foreign phrases in. *Force majeure* is a good one. The parties are more likely to understand that than "extraordinary events" or "circumstances beyond the parties' control."

29. Signatures. Now that you have prepared the baddest contract ever, the parties must sign it to indicate they agree to its terms. A bad contract must include a formal signature section to make sure the parties know that the forty-seven-page monstrosity they are signing (with **W I T N E S S E T H** emblazoned across the first page) is an important legal document rather than a less important communication like a note to little Wendy's teacher explaining that her bunny ate her homework. I recommend something like this:

> IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

This is particularly bad when there is no date and year above the signatures. Also, I like the reference to the use of seals because few people or organizations use seals these days.[23]

Do NOT do this:

[21] How much wood could a woodchuck chuck if a woodchuck could chuck wood?

[22] An excellent resource is Wikipedia's "List of legal Latin terms," https://en.wikipedia.org/wiki/List_of_Latin_legal_terms

[23] Also, the word "seal" is ambiguous. I would admire any lawyer willing to argue that because a party failed to attach a six-hundred-pound marine mammal to a contract in spite of the clear reference to a seal, the contract is invalid.

_____
John Jones (Date)

_____
Suzy Smith (Date)

Conclusion

Good contracts pose a serious threat to the legal profession. Fortunately, most students emerge from law school with a basic understanding of how to draft a bad contract. After all, they've been reading legalese for three years and are petrified that if they omit a word, litigation will result. However, after years of practice and litigating disputes arising out of poorly drafted documents, some lawyers forget that the profession's fate depends on a steady supply of poorly drafted documents. They begin to advocate for plain English. Soon passive voice starts to annoy them. Then "Sell, convey, assign, transfer, and deliver" becomes simply "sell." At that point, it's all over. A good managing partner will stage an intervention and insist that the lawyer enter an appropriate twelve-step program. Sometimes you've got to be cruel to be kind.[24] While treatment can cure good drafting, the best approach is to prevent the problem in the first place. Law schools and the bar must do more to educate lawyers on how to draft bad contracts. We owe it to the profession.

About the Author

Mark Cohen has 40 years of experience as a lawyer. He earned a B.A.in Economics at Whitman College and earned his law degree at the University of Colorado in Boulder. He earned an LL.M. Agricultural and Food Law from the University of Arkansas, where he also taught advanced legal writing. His diverse legal career includes service as an Air Force JAG, a Special Assistant U.S. Attorney, a prosecutor, a municipal judge for Boulder, six years on the Advisory Board of The Colorado Lawyer (including one as chairperson), and service on the Executive Board of the Colorado Municipal League.

Mark wrote six articles in the Am.Jur. *Proof of Facts* series, including the seminal article on piercing the corporate veil.[25] He has written numerous articles and book reviews for The Colorado Lawyer. In 2004, he won 2nd prize in the SEAK National Legal Fiction Writing Competition. He wrote two mysteries published by Time Warner, and his first mystery, The Fractal Murders, became a Book Sense ® mystery pick and was a finalist for the Colorado Book of the Year. His non-legal articles have appeared in magazines such as *Inside Kung Fu*, *Camping & RV*, and *Modern Dad*. He is a member of the Institute of General Semantics and the Mystery Writers of America. He writes a regular column for the Nederland Mountain-Ear.

Mark's practice focuses on drafting and reviewing legal documents including contracts, corporate documents, real estate documents, employment documents, intellectual property documents, motions, pleadings, and briefs. He also litigates cases arising out of poorly drafted documents. He enjoys helping businesses and other lawyers improve their legal and non-legal documents by translating them from Legalese into plain English. Learn more at Plain English Consulting.

Mark holds a black belt in karate and serves on the board of directors of Dart, Inc., a Boulder non-profit that offers training in personal safety, violence prevention, and appropriate dating relationships. In 2022, Colorado Governor Jared Polis appointed Mark to serve on Colorado's Combative Sports Commission, formerly known as the Colorado Boxing Commission.

You may view Mark's complete bio at http://www.cohenslaw.com/markscohen.html.

[24] Nick Lowe, "Cruel to Be Kind," *Labor of Lust* (Columbia Records, 1979).

[25] 45 POF3d 1