How to Draft a Bad Contract

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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 that nonlawyers can easily understand it. In short, a good contract reduces the risk of misunderstandings and costly (but profitable) litigation. Good contracts also mean that clients need not rely so heavily on lawyers to explain them. Good contracts mean less work for lawyers.

The techniques that a lawyer may use to draft a bad contract are limited only by the lawyer's creativity. Still, in my 33 years of practice, I've 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.

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[1] *See, e.g.*, Kenneth A. Adams, *A Manual of Style for Contract Drafting* (3d ed. 2013); Scott J. Burnham, *Drafting and Analyzing Contracts: A Guide to the Practical Application of the Principles of Contract Law* (3d ed. 2003); Robert A. Feldman & Raymond T. Nimmer, *Drafting Effective Contracts: A Practitioner's Guide* (2d ed. 1995).

Omit the caption or title.

A bad contract has no caption at the top of the first page telling the reader what the document is. If you must use a caption, 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.

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's a sample bad introduction that 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 Durango, Colorado (hereinafter "Buyer") for the purchase of Seller's fifty percent (50%) interest in the horse known as "Silver."

Do *not* use straightforward language like this:

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

Use verbose recitals rather than short summaries.

Historically, contracts included recitals to clarify intent, add to consideration, or bolster the importance of conditions in the contract.[2] A bad contract should include recitals that accomplish none of these goals and that include *WHEREAS* and *NOW, THEREFORE*. Example:

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[2] M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 J. ALWD 79, 91 (2008).

> 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. Each paid $25,000 for a 50% interest in the horse. Because differences arose between Jones and Smith, they have agreed to resolve their differences on the terms set forth in this Agreement. . . .

You can also increase the badness of a contract by including definitions or substantive provisions in the recitals. This creates an opportunity to later research and brief the issue whether the recitals are part of the enforceable agreement.[3]

[3] *See, e.g.*, *McKinnon v. Baker*, 370 N.W.2d 492, 494 (Neb. 1985) (Recitals are "generally background statements and do not ordinarily form any part of the real agreement.").

Use *WITNESSETH.*

Use *WITNESSETH* to separate the introduction from the contractual terms.[4] 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 I T N E S S E T H

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");
- defining more terms than necessary;
- using inconsistent definitions;
- defining terms only after they have already appeared in the contract;
- including substantive provisions in the definitions;

[4] Some prefer to insert *WITNESSETH* between the introduction and recitals. Others suggest that it's more appropriate after the recitals.

- sprinkling definitions throughout the contract rather than placing them, alphabetically, in a single section.

Omit the consideration.

An agreement not supported by consideration is invalid and unenforceable.[5] 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 terms such as price, quantity, quality, time of performance, or time of payment.

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.

Omit or use misleading headings.

Headings allow readers to quickly see what each paragraph is about. A truly bad contract has no headings, forcing readers to peruse the entire document to find what they're 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

[5] *Ireland v. Jacobs*, 163 P.2d 203, 206 (Colo. 1945).

a waiver of jury trial in that paragraph. This may create confusion about whether the jury waiver is enforceable.[6]

Include unrelated items in the same paragraph.

This is one of my favorite methods for 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.

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'm 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.)

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6 *See Haynes v. Farmers Ins. Exch.*, 89 P.3d 381, 385 (Cal. 2004) (refusing to enforce a provision limiting coverage contained in a section with the heading "Other Insurance").

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.

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.[7] 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[8] 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:

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

[8] *See* Colo. Rev. Stat. § 13-17-102.

> 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.

Do not 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. Another reason not to waive trial by jury is that it takes more time to prepare for a jury trial, and more time means larger fees.

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 of 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.[9]

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:

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[9] *See Tripp v. Cotter Corp.*, 701 P.2d 124, 126 (Colo. Ct. App. 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).

> 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 may 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 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.

Do not specify which jurisdiction's laws will govern.

Many contracts involve parties living or operating 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 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).

Cut and paste from the Internet.

One way that lawyers create bad contracts is by copying provisions from the Internet. (I did a Google search for "sample contract for sale of goods" and got 40.8 million results.) Because law practice is so hectic, it's tempting to use this shortcut. We find a template that we like and use it over and over. Here's one that 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 that 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.

Don't include a nonassignment 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 too much about who it does business with and will therefore omit a nonassignment 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 nonassignment clause, leave a little wiggle room by not requiring written consent. Here's an example:

> No party may assign its interest in this Agreement without the consent of the other party.

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 noncompetition provision, and in the provision on nonpayment and late payment. This will make your contract longer, thereby impressing your client, counsel for the opposing party, and any judge who may ultimately read it. A longer contract will make your client think it is getting more for its money. Do *not* use one simple provision such as this:

> In any litigation arising out of this Agreement, the prevailing party is entitled to its actual attorney fees, expenses, and costs.

Be vague about what constitutes effective notice.

Many contracts require a party to give written notice to the other party for certain matters. A bad contract must be vague about when written notice is effective. Here is a vague notice provision that 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? And what address should the party giving notice send the notice to?

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 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. And it may give you a chance later on to research and brief whether using a small font makes a provision unenforceable under the doctrine of procedural unconscionability.[10]

Use legalese.[11]

You slogged through three years of law school, possibly incurring a sizable 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 since forgotten. What was the point of that if you can't use their writing style? A detailed explanation of how to use legalese to draft bad con-

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[10] *See D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1164–65 (Nev. 2004) (refusing to enforce an arbitration clause written "in an extremely small font").

[11] Some examples in this section are taken from U.S. Sec. & Exch. Comm'n, *A Plain English Handbook: How to Create Clear SEC Disclosure Documents*, https://www.sec.gov/pdf/handbook.pdf (last visited Mar. 7, 2017).

tracts is beyond this article's scope, but here are a few tips on how to make your contract more bad 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 contained in this document. We have not authorized anyone to give you different information. (21 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 on (or is sometimes missing altogether). The active voice requires fewer words and tracks how people think. It also unambiguously shows who has made a promise, who has a legal duty, or who has the right to act. It should therefore be avoided.

> *Passive*: This contract may be terminated at any time by either party on 30 days' written notice to the other party. (20 words)
>
> *Active*: Either party may terminate this contract on 30 days' 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 accor-

> dance 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 and impress other lawyers. Be honest. When another lawyer sends you a 50-page residential lease, you feel kind of bad that your standard residential lease is only 9 pages. Is it possible that you left out 41 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 quitclaim
- 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 when 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?*[12] Fortunately, the Internet offers abundant resources to help you discover Latin phrases to incorporate into your contracts.[13]

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. It's shorter (and therefore more understandable) than "extraordinary events" or "circumstances beyond the parties' control."

Use hyperformal signature blocks.

Now that you have prepared the baddest contract ever, the parties must sign it to show that they agree to its terms. A bad contract must include a formal signature section to make sure the parties know that the 47-page monstrosity they're 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:

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

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

> 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 seals because few people or organizations use seals these days.

Do *not* do this:

____

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. But 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 they begin to be annoyed by passive voice. 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 12-step program. Sometimes you've got to be cruel to be kind.[14] 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 and our clients.

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[14] Nick Lowe, "Cruel to Be Kind," *on Labour of Lust* (Columbia Records 1979).