# The Ten Worst Faults in Drafting Contracts

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I hate legalese because it forces me to study. I like good prose because it allows me to read. Study tires me out. Reading can be a pleasure. The best writing — and legal writing is no exception — allows readers to read and does not require them to study. I am eager to do anything I can to encourage more reading and less study. So I am exposing the ten worst faults I see in drafting contracts.

## 1. Using words that were once the coin of the realm but have no modern currency

### Witnesseth *and* Whereas

*Witnesseth* and *whereas* have no legal effect, but I see them all the time in my work. *Witnesseth* "is founded on a misunderstanding. The word is not a command at all — it's the third-person singular verb (= *witnesses*, as in *This Agreement witnesses that whereas the parties . . .*)."[1]

*Whereas*, like *witnesseth*, is a holdover from the thirteenth century and beyond. It has persisted, I believe, out of ignorance and fear. But lest I project my own shortcomings onto others, I will speak for myself on this point.

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[1] Bryan A. Garner, *Advanced Legal Drafting* 42 (2004).

For years, I myself used *witnesseth* and *whereas* out of ignorance and fear. I was too uninformed to know that they lack legal effect. I was too timid to delete them for fear of violating some time-honored legal principle. After all, *witnesseth* and *whereas* appear in legal forms and formbooks nationwide. So they must have legal magic, right?

Wrong. These words clutter documents and abuse readers. Just as a cluttered room abuses the senses, a cluttered document abuses the mind.

### *Other archaic words*

I also see words like *herein*, *hereinafter*, *thereof*, and *whereupon* in contracts and leases all the time. "*Herein* is a vague word. The reader can rarely be certain whether it means *in this subsection*, *in this section*, or *in this document*."[2] Writing ambiguity into contracts is client abuse, colleague abuse, judge abuse, and bad public service.

Precision is better. Here is a real-world example from my own work: "Section 10.1's paragraphs A–D do not apply to Airline's now-pending bankruptcy proceedings." The document that contains this sentence has several lists of lettered paragraphs, in different sections, that go beyond the letter D. So it would be ambiguous — even within Section 10.1 — to write: "Paragraphs A–D herein do not apply to Airline's now-pending bankruptcy proceedings."

## 2. Writing in the passive voice rather than the active voice

The passive voice couples a form of the infinitive *to be* with a past participle, which is another verb that usually ends with *-ed*.

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[2] *Id.* at 40.

*Is constructed* and *was completed* are examples. The passive voice is weak, wordy, and often indefinite.

The active voice has a clear subject that makes the action in the sentence happen. It is focused and definite. It forces writers to commit to what they are writing, and readers reap the benefit.

Let's look at an example from Uncle Sam. Here's the first sentence from the Federal Aviation Administration's "ASSURANCES [from] Airport Sponsors": "These assurances shall be complied with in the performance of grant agreements for airport development, airport planning, and noise compatibility program grants for airport sponsors."

[*S*]*hall be complied with* is the flimsy passive voice. Uncle Sam is unnecessarily allowing some wiggle room here. It's not entirely clear which party must comply. There are at least two — and arguably more — parties to FAA grant assurances. (Other grant-assurance provisions specify terms that airports must put into their contracts with other parties.)

Since the FAA distributes federal dollars on behalf of American taxpayers, it could serve them much better with the active voice. *Airport sponsors must comply with* imposes the compliance duty where it belongs — squarely on airport sponsors' shoulders.

## 3. Agreeing too much

Contracts should not start with *This Agreement entered into*, then say, *It is therefore agreed as follows*, and then repeatedly say, *It is agreed* or *It is further agreed* or *It is expressly agreed.* All these *agree*-phrases clutter documents with redundancy.

I deleted all the following phrases from the same document:

- *It is expressly agreed* (three times)
- *It is understood and agreed* (twice)

- *Board agrees*
- *It is further understood and agreed* (twice)
- *Airline agrees* (four times)
- *It is agreed*
- *Airline covenants and agrees*
- *Airline further agrees*

That alone cut out 48 unnecessary words. (By the way, after all my revisions, I cut that document from 9,103 words to 4,897 words without losing substance.)

A fully executed document with "Contract" or "Agreement" in its title is enough to establish that the parties agree to its contents. And *Therefore, the parties agree as follows* more than fits the bill. If that phrase sits between the "Recitals" (I prefer "Background") and the provisions that follow them, the provisions themselves should not contain any more *agree*-phrases.

## 4. Opening badly

I see a lot of *KNOW ALL MEN BY THESE PRESENTS.* This is outdated clutter.

I also see *This Agreement is entered into this* _____ *day of* _____, _____ *by and between* . . . . This has many problems. It opens with an *agreement*-phrase that often duplicates succeeding *agreement*-phrases, opens with the passive voice, forces the reader to plow through several words to find out who the parties are, and calls attention to a date that commonly has no relevance to the contract's terms. (I often see "Term" sections that specify

when a contract will start and end without referring to the date in the opening.)

After the title has given me a sense of what the contract is about, the next thing I want to know is who the parties are. The drafter thus sets up the document, just as Shakespeare sets up a play. Parties, just like actors, deserve top billing. So I like to open with the title and the parties. An example:

**Certificated Passenger-Airline Lease**

**Parties**

Springfield: The City of Springfield, Greene County, Missouri

Airline: _____

Dates are usually most relevant in the "Term" section, so it makes sense to put them there. In my own case, I tie the beginning date to when I finally approve the contract as to form:

> This Agreement begins when an assistant city attorney approves it as to form and ends [one calendar year later] [five calendar years later] [on _____ ____, _____].

The last item in the contract is:

Approved as to form

_____

Assistant City Attorney

Signing date: _____ ____, _____

## 5. Making a cesspool of words, phrases, sentences, and paragraphs

Not too long ago, I read an unintelligible paragraph in a bond form. It jammed words, thoughts, and sentences together in a stream-of-consciousness jumble. No matter how many times I read it, I could not make sense of it. The thought crossed my mind that its author had had a nip or two before dictating it.

Not all writing can be as simple as "See Spot run," but simplicity is a good start. Simplicity is a primary goal, and there are many ways to achieve it. Write to essence. Don't be wordy. Group sentences in paragraphs around one idea. If a sentence does not relate to a paragraph's idea, start a new paragraph. Small paragraphs are better than big ones because the brain is most efficient at taking in new information in small pieces.

Here, for example, is a paragraph that places too much information in one big block:

> **Use of Joint Space.** Use of the passenger gate/hold room areas, and the loading bridges referenced herein, shall be nonexclusive; provided that, the airlines using the facilities may agree among themselves as to informal, preferential uses of certain gate/hold room areas and loading bridges to be primarily and regularly used by each carrier in its scheduled operations. The use of these facilities shall be as may be agreed between the carriers, subject to reasonable approval by the Director of Aviation, as the agent for the Board in these matters. In the event of a dispute between the airlines over the use of the facilities, or of an occurrence requiring a reallocation of the available space, the Director of Aviation shall make the final determination between the carriers as to the use of the facilities. In the event such a reallocation of the available joint use space results in a carrier having an informal, preferential use being required to withdraw from such space and/or relocate its informal, preferential use, said carrier shall be entitled to reimbursement by the Board of necessary and reasonable construction

> or alteration costs incurred by the carrier in connection with the withdrawal and relocation of the carrier's equipment and fixtures. The Board may require a carrier seeking to occupy space preferentially used by another carrier to reimburse the Board these costs as a condition of its occupancy of the space.

Let's break the paragraph down sentence by sentence. There are five of them.

> 1. Use of the passenger gate/hold room areas, and the loading bridges referenced herein, shall be nonexclusive; provided that, the airlines using the facilities may agree among themselves as to informal, preferential uses of certain gate/hold room areas and loading bridges to be primarily and regularly used by each carrier in its scheduled operations.

The sentence is obviously cumbersome. Starting with *Use of* misplaces sentence emphasis, which should be on "Airline." Placing multiword synonyms together with a slash is confusing. The dreaded *provided that* clause is unnecessary. The two points in the sentence — nonexclusive use and agreeing among themselves — are separable.

Let's apply these observations to rewrite the sentence. We will take up the "nonexclusive" and "agree" points in order.

*Airline holds* correctly emphasizes the tenant airline. It also makes clear the legal point that the airline has a leasehold on what now naturally follows: "passenger-gate (or hold-room) areas." *Passenger-gate areas* imparts enough information to make *(or hold-room)* superfluous. "Nonexclusive" is the final point the sentence needs. So it could become: "Airline holds passenger-gate areas and loading bridges on a nonexclusive basis." Or even better: "Airline holds passenger-gate areas and loading bridges in common with other airlines."

Now we could introduce some shorthand for *passenger-gate areas and loading bridges in common with other airlines.* That yields: "Airline's joint-use space consists of passenger-gate areas and loading bridges that Airline holds in common with other airlines."

Two sentences might be best for the "agree" point: "Airline may agree with other airlines on how to allocate informal, preferential joint-use space among themselves. Airline must tie allocation proposals to scheduled operations."

> 2. The use of these facilities shall be as may be agreed between the carriers, subject to reasonable approval by the Director of Aviation, as the agent for the Board in these matters.

Again, starting with *The use of* misplaces sentence emphasis. The sentence should start with its real power player: the Director of Aviation. [*S*]*hall be as may be* is odd. Let's delete it. The fact that the Director of Aviation is the Board's agent is one of those pieces of information that a reader should know early on. I would place it in the contract's "Background." Now the sentence becomes: "The Director of Aviation may reasonably reject agreements between the airlines on joint-use-space allocations."

> 3. In the event of a dispute between the airlines over the use of the facilities, or of an occurrence requiring a reallocation of the available space, the Director of Aviation shall make the final determination between the carriers as to the use of the facilities.

Since this sentence is also about the Director of Aviation's authority, we can structure it much as we did sentence 2. After the director's title, we will replace *shall* with *must.*[3] Now we have: "The Director of Aviation must finally determine any dispute between

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[3] *See* Joseph Kimble, *A Modest Wish List for Legal Writing*, in *Lifting the Fog of Legalese: Essays on Plain Language* 42, 72, 159–60 (Carolina Academic Press 2006).

the airlines over joint-use-space allocations." And the sentence is probably short enough that we can add the reallocation point: "and must reallocate that space between the airlines as necessary."

> 4. In the event such a reallocation of the available joint use space results in a carrier having an informal, preferential use being required to withdraw from such space and/or relocate its informal, preferential use, said carrier shall be entitled to reimbursement by the Board of necessary and reasonable construction or alteration costs incurred by the carrier in connection with the withdrawal and relocation of the carrier's equipment and fixtures.

The Board carries the ball in this sentence, so we should start with *The Board.* The next bit should state who gets what: "The Board must reimburse Airline's reasonable and necessary relocation costs." We can finish with the condition so that the sentence becomes: "The Board must reimburse Airline's reasonable and necessary relocation costs if the Director of Aviation reallocates informal, preferential joint-use space in a way that forces Airline to relocate within the airport terminal."

> 5. The Board may require a carrier seeking to occupy space preferentially used by another carrier to reimburse the Board these costs as a condition of its occupancy of the space.

Since this sentence grants an option to the Board, *The Board may* is a good start. The phrase *preferentially used by* slouches back into the passive voice. Consistent references to the same object are best, so we can repeat *informal, preferential joint-use space.* It is also better to repeat *airline* in place of *carrier.* Now we have: "The Board may require an airline that asks to occupy another airline's informal, preferential joint-use space to reimburse the Board for any costs associated with the occupation."

## 6. Using poor structure

Good document structure goes right along with simplifying word choice, sentences, and paragraphs. Here again are our simplified and clarified sentences from point 5:

> Airline's joint-use space consists of passenger-gate areas and loading bridges that Airline holds in common with other airlines.
>
> Airline may agree with other airlines on how to allocate informal, preferential joint-use space among themselves. Airline must tie allocation proposals to scheduled operations.
>
> The Director of Aviation may reasonably reject agreements between the airlines on joint-use-space allocations.
>
> The Director of Aviation must finally determine any dispute between the airlines over joint-use-space allocations and must reallocate that space between the airlines as necessary.
>
> The Board must reimburse Airline's reasonable and necessary relocation costs if the Director of Aviation reallocates informal, preferential joint-use space in a way that forces Airline to relocate within the airport terminal.
>
> The Board may require an airline that asks to occupy another airline's informal, preferential joint-use space to reimburse the Board for any costs associated with the occupation.

Note that at our airport, we function with a board and a director. The three parts below are right out of one of our leases: "Property and Rights," "Board's Role," and "Director's Role."

We can now easily organize our sentences. They practically group themselves. A small-scale model like this begins to emerge:

## 1. Property and Rights

### 1.1 Property

Airline's joint-use space consists of passenger-gate areas and loading bridges that Airline holds in common with other airlines.

### 1.2 Rights

Airline may agree with other airlines on how to allocate informal, preferential joint-use space among themselves. Airline must tie allocation proposals to scheduled operations.

## 2. Board's Role

### 2.1 Obligations

The Board must reimburse Airline's reasonable and necessary relocation costs if the Director of Aviation reallocates informal, preferential joint-use space in a way that forces Airline to relocate within the airport terminal.

### 2.2 Options

The Board may require an airline that asks to occupy another airline's informal, preferential joint-use space to reimburse the Board for any costs associated with the occupation.

## 3. Director's Role

### 3.1 Obligations

The Director of Aviation must:

(1) finally determine any dispute between the airlines over joint-use-space allocations; and

(2) reallocate that space between the airlines as necessary.

**3.2 Options**

The Director of Aviation may reasonably reject agreements between the airlines on joint-use-space allocations.

## 7. Loading documents with definitions

I fought a contract war not long ago. One of the battles was over definitions. I stripped a bunch of them out, and the other side protested. The opening paragraph identified "The City of Springfield (hereinafter referred to as [shorthand name])." On the same page, the definitions section said, "[Shorthand name] means" what the opening paragraph says it means. Other definitions basically said, "If you want to know what this term means, look at section _____."

A list of definitions — especially unnecessary ones — burdens readers. They have to learn a list of terms before they can even start reading, and then they have to interrupt their reading to consult the list.

Whenever possible, avoid giving an explicit, formal definition by the way you state a provision. (Recall our joint-use-space example, 1.1 above.) If you can't avoid a definition, at least try to place it within the text that uses it. Use an opening list of definitions only as a last resort.

## 8. Fearing graphics

A picture paints a thousand words, and other graphics can do that too. I received a proposed contract that rambled on for three paragraphs about insurance coverages. The more I looked at it, the more I realized that a table would be more concise and easier to read. So I created a simple table with two columns and expandable rows.

**Insurance-Coverage Limits**

| | |
|---|---|
| Combined Single Limit | $1 Million |
| Bodily Injury per person | $300,000 |
| Bodily Injury per accident | $1 Million |
| Property Damage | $100,000 |

In our Airport's "Certificated Passenger-Airline Lease," I use pictures to minimize words and better specify lease terms. For example, the words *as color-indicated in Lease's "First Floor Plan" and "Second Floor Plan"* point to two exhibits that show precisely which areas our airline tenants are renting. Achieving the same simplicity and clarity with a flurry of words would be impossible.

And graphics can enhance and clarify other kinds of legal writing as well. I read a U.S. Court of Appeals opinion that used many words to describe a comparison between two photographs.[4] The comparison was crucial to understanding the opinion. Two pictures inserted into the opinion would have helped tremendously.

## 9. Overdoing cross-references

Cross-references interrupt a document's flow. And using too many of them treats readers like a pinball. Eliminate cross-references if possible, and minimize them in every case.

I had a contract skirmish over a totally unnecessary cross-reference. Part 5 covered one topic, Part 17 another. At the end of a sentence in Part 5, opposing counsel added a "subject-to"sentence

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[4] *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 34–35 (1st Cir. 2001).

that pointed to the provisions in Part 17. Somehow, opposing counsel feared that the absence of the subject-to sentence would nullify Part 17, even though each part stood on its own two feet. After some haggling, I allowed the cross-reference — not because it made sense, but to keep things moving along.

I have no doubt that opposing counsel was working conscientiously. It's just that old habits die hard.

## 10. Not using the power of modern word processors

Word processors have a lot to offer legal writers. They have automatic tables of contents, styles, cut-and-paste functions, tables, dynamic cross-reference capabilities, and so on. Not only can these features make drafting legal documents more efficient, they can also save legal writers from making material errors.

I see a lot of contracts without tables of contents. That should not be — except possibly in short contracts. Preparing a table of contents is a breeze with consistent use of the conventions in point 6.

Styles are the best tool for applying conventions to text. I have a style called "Part," one called "Section," one called "Paragraph," and so on. For body text, I use a style called "Normal."

Cut and paste speaks for itself. I will not belabor that point.

Tables are great. I like to use them for signature pages because they line everything up so well. In our leases, I use a table for our board's signature block, and one for the other party's signature block.

As for cross-references, I remember once when opposing counsel's secretary physically typed some into a contract. This made them static so that they would not change with document changes. Sure enough, as the other attorney and I modified the document,

the static cross-references became inaccurate. It's much better — and legally safer! — to use automatic cross-references because cross-references that point to the wrong part of a document could have unintended and disastrous legal consequences.

## 11. Conclusion

WHEREAS, the foregoing witnesseth the pitfalls herein of legalese as aforesaid, the end of the matter is thus: Write plainly.