International Municipal Lawyers Association
2011 Annual Conference
Chicago, IL



The Ten Worst Faults in Drafting Contracts

Duke McDonald
Assistant City Attorney, Springfield, MO

©2011 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2011 annual conference, held September 11-14, 2011 in Chicago, Illinois. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

I hate legalese because it's confusing. I prefer straightforward prose. The best writing—including legal writing—doesn't confuse, but enlightens. To encourage the best legal writing, I am exposing the 10 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 13th 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.

For years, I 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 form books 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*, *hereinbefore*, *whereupon*, etc. 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's 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 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."

[1] Bryan A. Garner, *Advanced Legal Drafting* 42 (2004).
[2] Id. at 40

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*. *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 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 clear which party must comply. There are at least 2—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* 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 agreement phrases clutter documents with redundancy.

I deleted all the following phrases from the same document:

- *It is expressly agreed* (3 times)
- *It is understood and agreed* (twice)
- *Board agrees*
- *It is further understood and agreed* (twice)
- *Airline agrees* (4 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 agreement 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. This sets up the document much like Shakespeare sets up a play. Parties, just like actors, deserve top billing. So, I like to open with the title and the parties. For 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] or [five calendar years later] or [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 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 doesn't 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 packets.

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 5.

> 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 cumbersome. Starting with *Use of* misplaces sentence emphasis, which should be on "Airline." Placing synonyms together with "/" is confusing. The dreaded *provided that* clause is unnecessary. The 2 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 it 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 like we did sentence 2. After the director's title, it's better to use *will* than *shall*. We don't want to order our director around, so *must* is not a good option either. Now, we have: "The Director of Aviation will finally determine disputes about joint-use space between the airlines." On the reallocation point, we can say: "The Director of Aviation will finally reallocate that space as necessary." (Note: *The Director of Aviation will finally* appears twice in a row. We eliminate that repetition in our document-structure segment.)

> 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 will reimburse Airline's reasonable and necessary construction costs." We can finish with the condition so the sentence becomes: "The Board will reimburse Airline's reasonable and necessary relocation costs if the Director of Aviation reallocates 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 requests to occupy another airline's joint-use space to reimburse the Board for any costs associated with the occupation."

6. Using poor document structure

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

> Airline's joint-use space consists of passenger-gate areas and loading bridges it 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 concerning joint-use space allocations.
>
> The Director of Aviation will finally determine disputes between the airlines concerning joint-use space allocations.

The Director of Aviation will reallocate joint-use space between the airlines as necessary.

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

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

(Note: At our airport, we function with a board and a director. The 3 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 begins to emerge:

1. Property and Rights

1.1 Property

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

1.2 Rights

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

2. Board's Role

2.1 Obligations

The Board will reimburse Airline's reasonable and necessary relocation costs if the Director of Aviation reallocates 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 requests to occupy another airline's 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 will finally:

A. determine disputes about joint-use space between the airlines; and,

B. reallocate that space as necessary.

3.2 Options

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

7. Loading documents with definitions

I completed a contract war a while back. One of its 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 interrupt their reading to consult the list.

Whenever possible, avoid listing explicit, formal definitions. Give words meaning by the way you place them in provisions. (Recall our joint-use-space example.) Use an opening list of definitions only as a last resort.

8. Fearing graphics

"A picture paints a thousand words" and other graphics can too. I received a proposed contract that rambled on for 3 paragraphs about insurance coverage. 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 2 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 2 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 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.[3] 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. Too many of them treat readers like a pinball. Eliminate them if possible, and minimize them in every case.

I had a contract skirmish over an 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 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

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

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. That made them static so that they would not change with document changes. Sure enough, as opposing counsel 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.

Conclusion

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