

Drafting Contracts Potpourri

Presented by

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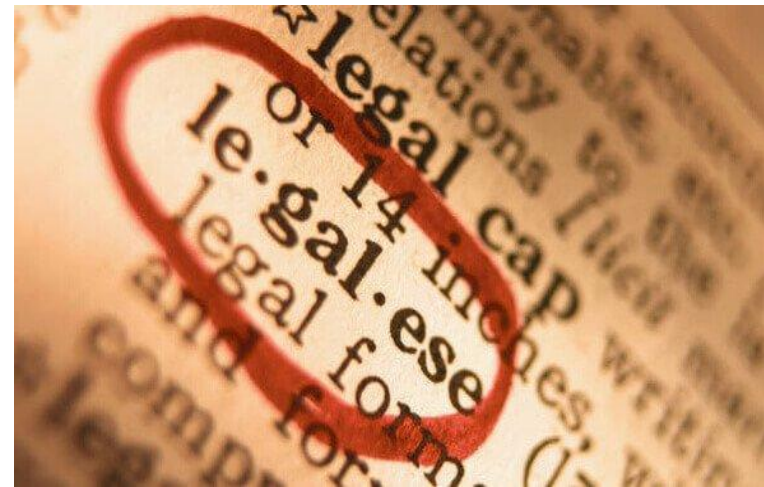
Agenda

- Drafting Contracts in Plain Language
- Boilerplate: Why it Should not be Ignored
- Executing a Contract: Best Practices

Drafting Contracts in Plain Language

Problem: Too Much Legalese

- “The specialized language of the legal profession.” – Merriam-Webster
- **Characteristics:** lengthy sentences, passive verbs, redundancy and archaic language rarely used in normal conversation
- **Examples:**
 - “..notwithstanding anything to the contrary herein..”
 - “..arising under or relating to this agreement or the subject matter hereof..”
 - “In witness whereof, the parties hereunto have agreed..”
- **Primary disadvantage:** Fails to align with a contract’s intended audience



Solution: More Plain Language

- “The writing and setting out of essential information in a way that gives a co-operative, motivated person a good chance of understanding the document at first read..”¹
- In addition to contractual language, can apply to content and organization
- **Characteristics:** Short sentences, simplistic language, active voice, avoids redundancy, logical organization and uncluttered design



1. Cutts, Martin. The Plain English Guide. New York: Oxford UP, 1995.

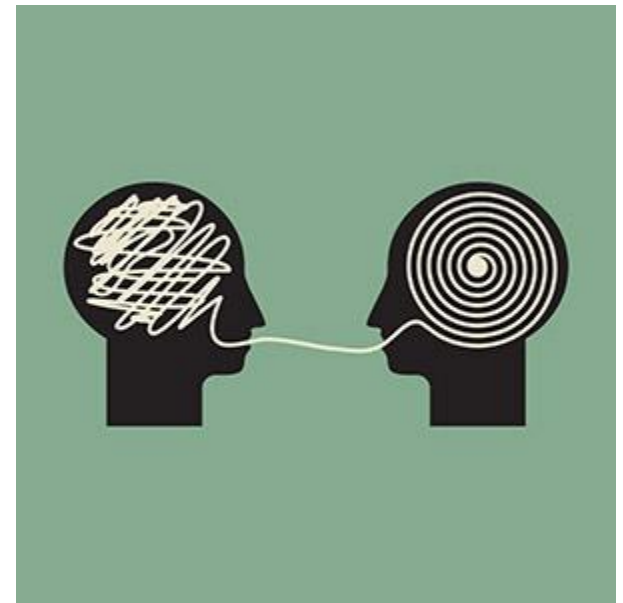
Advantages of Plain Language

- Enhances negotiating efficiency
- Allows the client to quickly understand and act on the terms of the contract
- Promotes client trust



Conversion Strategies

- While converting, CAUTION against:
 - Reducing parties' rights
 - Creating ambiguities
- Strategy #1: Remove surplus words
 - **Before:** “In consideration of the payment of the Purchase Price by the Purchaser to the Seller and for other good and valuable consideration, the Seller hereby agrees to sell to the Purchaser, and the Purchaser hereby agrees to purchase from the Seller, the Property for the Purchase Price, subject to and in accordance with the terms and conditions of this Agreement.”
 - **After:** “The Seller agrees to sell to the Purchaser, and the Purchaser agrees to purchase from the Seller, the Property for the Purchase Price.”



Conversion Strategies

- Strategy #2: Activate passive voice
 - **Before:** “On the **expiration** of this Agreement, a **notification** shall be given by Company..”
 - **After:** “When this Agreement expires, Company shall notify..”
- Strategy #3: Shorten sentences
 - **Before:** “**Subject to the terms and conditions,** the Company agrees to sell to each Purchaser, and each Purchaser agrees to purchase from the Company, at a purchase price of 102.25% of the principal amount **thereof**, plus accrued interest, if any, from and including January 23, 2020 to but excluding the Closing Date, the amount of Securities set forth opposite such Purchaser’s name in Schedule 1 **hereto.**”
 - **After:** “The Company agrees to sell to each Purchaser, and each Purchaser agrees to purchase from the Company, the amount of Securities set forth opposite such Purchaser’s name in Schedule 1 attached to this Agreement. The purchase price will be 102.25% of the principal amount of the Securities, plus accrued interest, if any, from and including January 23, 2020 to, but excluding, the Closing Date.

Conversion Strategies

- Strategy #4: Increase use of tabulation
 - **Before:** “The performance by Seller of this Agreement does not and will not result in a violation of any provision of the certificate of incorporation or by-laws of Seller or the Company or **result in a violation** of any provision of any Law or Governmental Order applicable to Seller or the Company.”
 - **After:** “The execution, delivery and performance by Seller of this Agreement, and the consummation of this Agreement’s transactions, do not and will not:
 - a) violate any provision of the certificate of incorporation or by-laws of Seller or the Company, or
 - b) violate any provision of any Law or Governmental Order applicable to Seller or the Company.

Conversion Strategies

- Strategy #5: Replace archaic with simple and familiar

Don't Use	Use
Attached hereto	Attached to this Agreement
is binding upon	binds
Subsequent to	after
In the event that	if
In order to	to
Notwithstanding the foregoing	Despite the previous sentence

Benefits > Cost

- Conversion to plain language is time intensive, but can be gradual and focused
- Can substantially enhance contractual effectiveness and clarity
- Builds a competitive advantage



**Boilerplate: Why it Should
not be Ignored
Or
Why Boilerplate Should
not be called Boilerplate**

What is Boilerplate?



Today we Will Cover

- Indemnification
- Written Amendments
- Severability
- Merger

Selected Boilerplate Clauses

- **Indemnification**
 - Why Common Law Remedies are Inadequate
 - No Privity of Contract
 - No Attorney's Fees
 - No Protection from Disclosed Liabilities
 - No Cap on Liability
 - No Early End to Representations
 - No Protection from Nickle & Dime Claims



Selected Boilerplate Clauses Cont...

- Why a Simple Provision is Inadequate
 - **Sample Provision:** *Indemnitor shall indemnify Indemnitee against any losses, liabilities, and claims arising out of or relating to [a particular event, litigation, or misrepresentation]*
- *What's Missing*
 - Should the Indemnitor have a duty to defend?
 - Should there be more than one Indemnitor?
 - If there is more than one Indemnitor, should liability be joint and several?
 - Should there be an escrow?

Selected Boilerplate Clauses

Cont...

- Who are the indemnitees? Do third parties who qualify as third party beneficiaries have the right to enforce the indemnification provisions?
- What is the subject matter of the indemnification? For example, if the drafter's goal is to broaden the indemnification provision with respect to cleanup costs.
- Should the indemnity cap apply to willful misrepresentations and breaches of warranties?

Selected Boilerplate Clauses

Cont...

- Is the indemnitor required to pay the indemnitee's attorney fees incurred in defending a third party claim? What about the attorney's fees incurred in enforcing the indemnification provision?
- What about consequential damages, punitive damages, litigation costs and expenses, fines, penalties, accountants' fees, court costs, and investigation expenses?
- Is there a time limit to indemnity? How does a "basket" limit the indemnitor's obligations?

Selected Boilerplate Clauses Cont...

- Is there a cap on the indemnitor's liability under the indemnification provision?
- What is the process to enforce the indemnity?
 - Is notice of condition a precedent?
 - Who controls the defense of any underlying actions?
 - Does the indemnitor have the right to select the indemnitee's counsel?



Selected Boilerplate Clauses Cont....

- Baskets and Caps



Selected Boilerplate Clauses Cont...

- **Amendments to the Agreements**
 - Oral Modification of a Written Contract

Typical Provision: *This agreement may be amended only by an instrument in writing signed on behalf of all Parties.*



Selected Boilerplate Clauses

Cont...

Iowa Jury Instruction:

A written contract may be modified, amended, altered, or changed orally, even when the written contract states that any modifications, amendments, alterations, or changes must be in writing. In other words, a provision in a written contract stating the contract can only be modified, amended, altered, or changed in writing is ineffective. Consent to the modification, amendment, alteration, or change may be either express or implied from acts or conduct.

Seneca Waste Solutions, Inc. V. Sheaffer Mfg. Co., LLC, 791 N.W.2d 407, 412-13 (Iowa 2010)

Passehl Estate v. Passhl, 712 N.W.2d 408, 417 (Iowa 2006)

Wahlen v. Connelly, 545 N.W.2d 284, 291 (Iowa 1996)

Humiston Grain Co. v. Rowley Interstate Transp. Co., Inc, 483 N.W.2d 832 834-25 (Iowa 1992)

Selected Boilerplate Clauses Cont....

- **Severability**
 - Common Law:
 - Clearly distinct and independent clauses may be enforced
 - Otherwise, entire contract may be unenforceable
 - Restatement Approach
 - A finer point on the common law



Selected Boilerplate Clauses Cont....



– Blue Pencil Rules



Selected Boilerplate Clauses Cont....

- Severability Clauses
 - Is a severability clause a good idea?
 - **The Basic Form:** *If any provision of this agreement is held invalid, illegal, or unenforceable, the validity and enforceability of the remaining provisions of this Agreement are not affected or impaired in any way.*

Selected Boilerplate Clauses

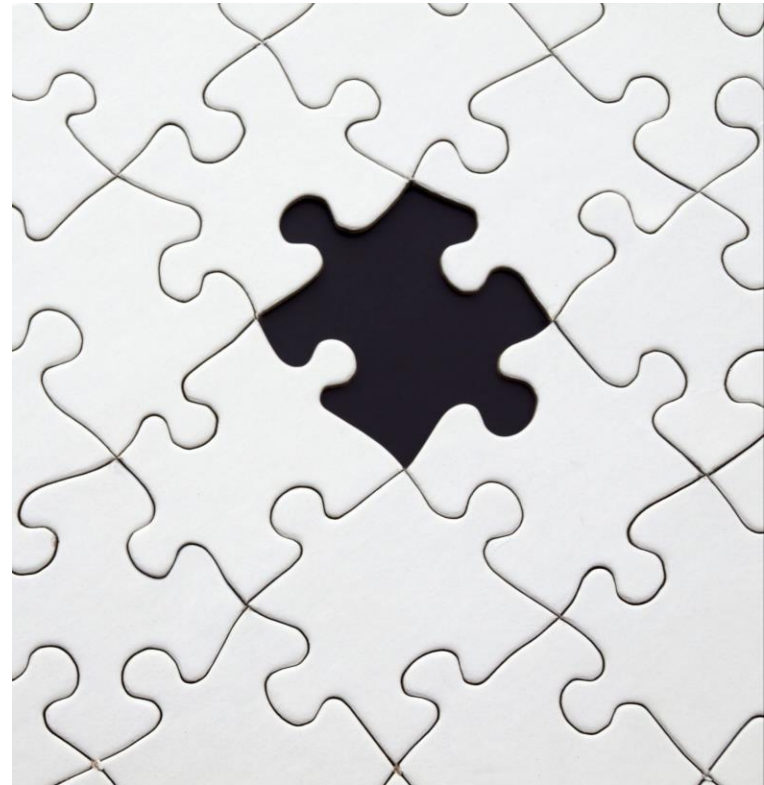
Cont....

- **A More Nuanced Approach:**

- *Section 11.8 Severability. In the event any provision of this Agreement is rendered invalid, unenforceable or impossible to perform by federal or state legislation or lawful regulation or declared null and void by a court of competent jurisdiction, the remainder of this Agreement will remain in effect, unless the removal has the effect of materially altering the obligations of any party to the extent that in the judgment of the party affected it will (a) cause serious financial hardship to the party, (b) cause the party to act in violation of any law or regulation or its corporate Articles or Bylaws, or (c) substantially impair the ability of the party to carry out its obligations under this Agreement or achieve the purposes of this Agreement, then the party so affected will have the right to terminate this Agreement upon ten (10) days prior written notice to the other parties.*

Merger or Integration Clauses

- Why is this an issue?
- **Typical:** *This Agreement (i) constitutes the entire agreement and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof and (ii) shall be binding upon and inure for the benefit of the parties and their respective successors and is not intended to confer upon any other person any rights or remedies hereunder.*



Merger or Integration Clauses Cont...

Better: *This Agreement constitutes the final Agreement between the parties. It is the complete and exclusive expression of the parties' Agreement on the matters contained in this agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this Agreement are expressly merged into and superseded by this Agreement. The provisions of this Agreement may not be explained, supplemented, or qualified through evidence of trade usage or a prior course of dealings. In entering into this Agreement, neither party has relied upon any statement, representation, warranty, or Agreement of the other party except for those expressly contained in this Agreement. There are no conditions precedent to the effectiveness of the Agreement other than those expressly stated in this Agreement.*

Thank you. Questions?

For more information please see:

*Negotiation and Drafting Contract
Boilerplate*

Executing a Contract: Best Practices

Prepare Signature Page

1. Create a page break before signature page.
2. Note execution is as of the date “first written above” instead of putting date on signature page.
3. Remove information in footer (e.g., document number) except reference to document that is being signed (e.g., “Signature Page to [name of document]”).
4. Add title for signatory.

Execute Signature Page

5. Typically, the signature page is sent to client via e-mail and then client prints, signs, and returns a copy of the signed signature page via e-mail.
 - “Wet ink” signatures are not needed for most documents.
 - “DocuSign” and other applications are commonly used.
6. When a client returns a signed signature page, it is typically held “in escrow” until the client authorizes the page to be released from escrow and attached to the document to be executed. This can be extremely helpful if a document will undergo extensive revisions and be finalized during a time when a client is not expected to have the ability to return a signed signature page.

Compile Executed Document

7. Run spell check and double check for bracketed information, blanks and footnotes.
8. Remove “Draft” lines and add “Execution Version” on first page.
9. Add document number, if applicable, in footers (except on signature page).
10. Circulate to parties and confirm all signatures are released from escrow.