DRAFTING CONTRACTS (AND EVERYTHING ELSE) TO AVOID AMBIGUITY

CHAD BARUCH, *Dallas*
Johnston Tobey Baruch, P.C.

State Bar of Texas
ESSENTIALS OF BUSINESS LAW COURSE 2016
March 3-4, 2016
Houston

CHAPTER 5

CHAD BARUCH

Johnston Tobey Baruch
3308 Oak Grove Avenue
Dallas, Texas
www.jtlaw.com

Chad Baruch ended 2015 by filing a "gone-viral" brief in the U.S. Supreme Court representing what the New York Times termed "a glittering array of hip hop stars." Rolling Stone called his brief "a crash course in hip hop" for the Court.

Chad is a Board Certified attorney in Civil Appellate Law, and a former college basketball coach and government professor. He has been selected a "Best Lawyer in America," as well as one of the "Best Lawyers in Texas" by D Magazine and a Texas Monthly "Super Lawyer" in each of the past five years. One of his cases, *Rhine v. Deatons*, became the first case in American legal history in which the United States Supreme Court requested briefing of a state solicitor general at the *certiorari* stage. *Rhine* is one of three appeals that Chad has handled with constitutional scholar Erwin Chemerinsky. Chad serves as a contributor to Black's Law Dictionary, and has been quoted as scholarly authority in at least two published First Amendment decisions.

In the past 24 months, Chad has:

- Represented the Office of the Dallas County District Attorney, successfully obtaining reversal and a judgment on acquittal on a contempt of court conviction against the DA.
- Served as Dallas County District Attorney Pro Tem in the appeal of the criminal fraud case against Hunt Oil heir Albert G. Hill III, successfully obtaining a reversal and reinstatement of the criminal fraud charges.
- Represented one of the Navy SEALs who shot and killed Osama Bin Laden.
- Represented the family of murder victim Marjorie Nugent in seeking the return of her killer, Bernhardt Tiede (made famous by the movie *Bernie*) to prison to serve out his life sentence.

Chad has served on the Board of Directors for the State Bar of Texas and is Chair of the Texas Bar College. He is the 2015 winner of the State Bar's Gene Cavin Award, given to one Texas lawyer each year for lifetime contributions to continuing legal education in Texas. In 2015, Chad also was the inaugural recipient of the Helen Cassidy Lifetime Achievement Award for continuing legal education.

In his educational career, Chad has been honored by the Southern Poverty Law Center for his efforts to promote diversity and tolerance, and also been an Honoree for Teaching Excellence, Texas Association of Accredited Private Schools (2002), and Finalist for State Coach of the Year from the Texas Association of Basketball Coaches (2006). He has served as men's basketball coach at the University of Dallas and Paul Quinn College.

TABLE OF CONTENTS

DRAFTING CONTRACTS (AND EVERYTHING ELSE) TO AVOID AMBIGUITY

I. INTRODUCTION

> "[T]he term 'legal writing' has become synonymous with poor writing: specifically, verbose and inflated prose that reads like – well, like it was written by a lawyer." Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1389 (1984). Legal writing suffers from "convoluted sentences, tortuous phrasing, and boring passages filled with passive verbs." *Id.*

Many lawyers roll their eyes at discussions of legal writing, and use legal writing presentations during seminars as coffee breaks. They regard legal writing as a topic for law professors, judges, and all-around eggheads, one that has little application to their practices. They are wrong. As Irving Younger explained:

> So prevalent is bad legal writing that we get used to it, shrugging it off as a kind of unavoidable occupational disability, like a cowboy's bowlegs. This is an unfortunate state of affairs. Bad writing goes with bad thinking, and since bad thinking is the source of many of the ills that beset us, lawyers should acknowledge a professional obligation to wage war against bad writing. If the author who produced it is you, correct it. If another, condemn it.

Irving Younger, *Symptoms of Bad Writing*, SCRIBES J. OF LEGAL WRITING 121, 121 (2001-2002).

II. A PRELIMINARY POINT: AMBIGUITY AND PLAIN ENGLISH

Most lawyers now know of the "plain English" drafting movement in American law. And many lawyers mistakenly equate this idea with avoidance of ambiguity. Of course, writing more simply generally minimizes the risk of ambiguity. But ambiguity can exist both in plain English and legalese.

This paper discusses the avoidance of ambiguity regardless of whether the contract is written in plain English or more technical legal language. The decision about how much technical legal language to use generally depends on a different question: how important is it that the parties signing the contract understand it? Most of the time, that is very important. But not always. Sometimes lawyers draft contracts with one, and only one, purpose—protection of the client. Sometimes, whether the other party understands the contract does not matter a bit.

For the protection of their clients, lawyers always should strive to avoid ambiguity. But that does not necessarily mean that every contract must be written without reference to technical legal language. With that said, though, lawyers generally should prefer simple and understandable language and phrasing.

III. TIPS FOR AVOIDING AMBIGUITY

A. Beware the Last One You Did

There are few better ways to create ambiguity than simply cutting and pasting from the last similar contract you prepared. Templates are nice—but their use requires extra vigilance.

B. Keep It Simple

Strive for simplicity and clarity in drafting contracts. Using shorter sentences and avoiding legalese both will help keep the writing simple.

C. Define Your Terms

One fertile area of ambiguity is the meaning of terms. Define important contract terms to avoid any possible dispute about their meaning.

D. Be Consistent

If you are going to refer to "goods," refer to them that way throughout the contract. Don't call them "goods" in one place and "products" in another. Be consistent in labeling.

E. Harmonize Agreements

Where the contracting parties already have other agreements in place, it may be important to explain how the various contracts are to be treated in light of one another.

F. Never Leave Wiggle Room

Lawyers sometimes intentionally leave ambiguity as a way of avoiding having to resolve a difference over language. This always is a mistake. If the parties cannot resolve their differences when entering into the contract, they almost certainly will continue to have the same differences after signing it.

G. Edit to Remove Syntactic Ambiguity

The best safeguard against ambiguity is careful editing. Consider, for example, the following contractual provision:

> Upon occurrence of a Change in Law or Act of God that materially affects the Seller's performance, the parties will negotiate in good faith to determine whether to enter into a change order.

Is the triggering event a Change in Law, or is it a Change in Law that materially affects the Seller's performance? The better approach would be to make plain the effect of the clause.

If a Change in Law or an Act of God materially affects the Seller's performance, the parties will negotiate in good faith to determine whether to enter into a change order.

H. Eliminate Legalese

One sure way to undermine the power of your writing is to use legalese. All of us know this rule, and all of us break it (or stand mute while others do). We obligate our clients to *agree and covenant* not to do certain things, as though agreeing without covenanting somehow is not enough. We seek *any and all* documents, *bind and obligate* parties, demand that others *cease and desist*, help our clients *give, devise, and bequeath* their belongings, and declare contracts *null and void*. Sometimes these outdated terms of art are actually necessary, but only rarely. Most of the time, a single word will perform the work of these phrases. Similarly, is there really any reason to use words like *aforementioned*, *herein*, *hereinabove*, *inter alia*, *arguendo*, *hereinafter*, or *wherefore*? These are grand words on the Scrabble board and at the Renaissance Faire, but not in your motions and briefs.

I. Write in English

Latin is legalese's insufferable cousin. Avoid writing in any foreign language (except of course, when practicing law in the jurisdictions where they are spoken). The principal benefits of writing in English are (1) being understood and (2) avoiding sounding like a pretentious jackass. A side benefit is avoiding the "marvelous capacity of a Latin phrase to serve as a substitute for reasoning." Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229 (1922). Impress your friends at cocktail parties with your command of Latin. Write in English.

J. Using However

You should not begin a sentence with however. You may, however, move it inside the sentence.

K. The Important Case of That v. Which

Confusion regarding the use of these words abounds. Much of the time when *which* is used, it should be *that* instead. The result of this confusion is misuse of both words, causing ambiguity. The best way to remember when to use these words is to understand that *that* is restrictive, while *which* is nonrestrictive. Remembering this simple rule will, at least most of the time, permit you to use *that* and *which* properly. The real mistake most writers make is to use *which* restrictively. So long as you remain vigilant in avoiding the restrictive *which*, you should be fine.

L. Understand the Doctrine of the Last Antecedent

Under the rule of the last antecedent, "qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding" and not to "others more remote." *United States v. Hodge*, 321 F.3d 429, 436 (3d Cir. 2003) (citations omitted). The rule is not absolute and can be overcome by evidence the parties intended a different meaning. *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330 (1993). But the Supreme Court has reversed this court's interpretation of statutory language for failure to follow the rule. *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). According to the Court, construing language in accord with the rule is "quite sensible as a matter of grammar." *Id*. (*quoting Nobleman*, 508 U.S. at 330).

The Court illustrated the rule with the simple example of a parents' warning to their teenage son: "You will be punished if you throw a party or engage in any other activity that damages the house." In this example, the last-antecedent rule requires that the relative pronoun *that* attaches only to *other activity*—not to *party*. "If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged." *Id*. at 27.

The general rule is that "failure to use a comma can limit application of the qualifying language to the word or phrase immediately preceding it." *Nat'l Sur. Corp. v. Midland Bank*, 551 F.2d 21, 34 (3d Cir. 1977). But there is a corollary rule: when a comma sets a modifying phrase off from the previous phrase, the modifying phrase applies to ***all*** the previous phrases—not just the immediately preceding phrase. *Id*.

The Fifth Amendment to the U.S. Constitution demonstrates the application of this corollary rule. That amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The comma before the phrase *without due process of law* signals that the phrase modifies all three words: *life*, *liberty*, ***and*** *property*.

M. Understand Restrictive and Nonrestrictive Clauses

A restrictive clause:

> [P]rovides information that is ***essential to the meaning of the sentence.*** Restrictive relative clauses are usually introduced by *that* (or *who*/*whom*/*whose*) and are ***never set off by commas*** from the rest of the sentence."

CHICAGO MANUAL OF STYLE at 6.22 (emphasis added). In contrast, a nonrestrictive clause is "one that does not serve to identify or define the antecedent noun." WILLIAM STRUNK JR. AND E.B. WHITE, THE ELEMENTS

OF STYLE at 3-4 (4th ed. 1999). "A nonrestrictive clause is a subordinate clause which is ***not essential to the meaning of a sentence***. A nonrestrictive clause functions more like an appositive or a parenthetical expression. You might call it a throw-in remark. That is the reason why the nonrestrictive clause ***is set off by commas***." MADELINE SEMMELMEYER & DONALD O. BOLANDER, INSTANT ENGLISH HANDBOOK 216-17 (1993) (emphasis added).

To simplify and put it the way so many of us learned it in the fifth grade: a clause that cannot be removed without changing the meaning of the sentence is restrictive and must ***never*** be set off by commas. *Id.* at 277; *see also* STRUNK & WHITE at 4.

N. Serial Commas/Using Commas

Always use the serial comma. Consider the following sentence: A woman walked into an elevator with her boyfriend, a dentist and an animal tamer. How many people walked into the elevator? Is the boyfriend only a dentist, or does he also tame animals?

Lynne Truss, of *Eats Shoots and Leaves* fame, is the author of the greatest rule ever written about commas: *Don't use commas like a stupid person.* Well said and worth saying again in big scary letters:

> DON'T USE COMMAS
> LIKE A STUPID PERSON

The comma is the most overused, misunderstood mark in the English language. Please don't:

- Substitute a comma for the word *and* ("Agent, principal both responsible for defamation);
- Misplace a comma (the classic gun-toting panda who feels compelled to fire into the air because of a dictionary's misplaced comma— he believes a panda actually eats, shoots and leaves);
- Delete a necessary comma ("The captain crawled out of the boat's cabin before it sank and swam to shore");
- Use the gratuitous comma (The plaintiffs, were required to sign sworn statements waiving their DTPA rights);
- Overuse commas, placing them, at every turn, throughout your writing, leaving the reader to navigate, in frustration, what, otherwise, might be compelling prose.

Of course, some people can get away with breaking all the comma rules. In his farewell address before leaving Springfield after being elected president, Abraham Lincoln relied heavily on commas yet produced compelling prose still praised more than a century later:

> My friends – No one, not in my situation, can appreciate my feeling of sadness at this parting. To this place, and the kindness of these people, I owe every thing. Here I have lived a quarter of a century, and have passed from a young to an old man. Here my children have been born, and one is buried. I now leave, not knowing when, or whether ever, I may return, with a task before me greater than that which rested upon Washington. Without the assistance of the Divine Being, who ever attended him, I cannot succeed. With that assistance I cannot fail. Trusting in Him, who can go with me, and remain with you and be every where for good, let us confidently hope that all will yet be well. To His care commending you, as I hope in your prayers you will commend me, I bid you an affectionate farewell.

O. Eliminate And/Or

Its inherent ambiguity and ugliness aside, the hatred many judges have for this phrase should be enough to persuade you to avoid it. Here is what the Wisconsin Supreme Court had to say about it (and this should convince you!):

> It is manifest that we are confronted with the task of first construing "and/or," that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean . . . .

Employers' Mut. Liab. Ins. Co. v. Tollefsen, 263 N.W. 376, 377 (Wis. 1935).

IV. DRAFTING EFFECTIVE CONTRACTS

A. Write in Something Resembling English

Though hardly difficult, drafting contracts in English requires a willingness to set aside entrenched writing habits and embrace the use of plain language. Here are some examples of traditional contract provision, and their plain English counterparts:

> *This Agreement constitutes the entire understanding between the parties with respect to the subject matter of this Agreement and supersedes any prior discussions, negotiations, agreements, and understandings between the Parties.*

> *This Agreement contains the entire agreement between the parties.*

The terms of this Agreement may not be varied or modified in any manner, except by a subsequent written agreement executed by all parties.

The parties can amend this Agreement only by signing a written document.

B. Prepare Documents in a Readable Typeface

To enhance readability, prepare documents in a serif typeface (serif refers to the lines or curves at the top and bottom of a letter) like Times New Roman or Garamond. Avoid using Courier and Arial. Whatever typeface you choose, use at least 12-point font.

A contract prepared in Garamond is readable.

A contract prepared in Courier is not.

Neither is Arial.

C. Use Plenty of White Space

Magazine editors know that the intelligent use of white space pleases the human eye and enhances readability. Use enough white space in your contracts that the reader's eye gets a break from the text. Place this white space strategically throughout the contract to prevent the reader from being overwhelmed by text.

D. Give Your Contract a Title

A contract entitled *Contract* or *Agreement* does not help the reader very much. On the other hand, a contract entitled *Contract for Alarm Services* or *Agreement to Provide Computer Consulting Services* may help the reader understand the contract's purpose.

E. Include a Table of Contents

For contracts more than a few pages long, provide a table of contents.

F. Give Each Section a Clear and Specific Title

Regardless of the length of your contract, provide section titles that clearly and specifically state the subject matter of each section. Meaningful section titles are easy to draft and make the contract more understandable. In other types of legal writing, a well drafted topic sentence fulfills this function. Think of your contract's section headings as a series of topic sentences, or alternatively as a roadmap through the contract. Here are some examples of good section headings:

How to Provide Notice
The Law Governing This Agreement
How to Amend this Agreement
What We Can Do If You Default

G. Provide an Introduction That Explains the Contract

In addition to a good title and descriptive section headings, provide an introductory statement that helps the reader understand the purpose of the contract.

This contract specifies the terms on which CenterCorp will provide alarm monitoring services to Smith's Widgets.

H. The Strategic Use of Bullet Points

Bullet points are a remarkable tool both to enhance clarity and for persuasion. They are an excellent way to present any type of list, so long as the listed items have no rank order. To avoid adding more numbers to a contract, use bullet points when listing items that do not have a rank order.

I. Avoid Underlining and All-Capital Letters

The use of all capital letters is distracting and makes type very difficult to read. While lower case letters have distinctive shapes, most fonts do not include those individual characteristics for capital letters, meaning the capital letters have a uniform shape and appearance that renders them inherently difficult to read. Similarly, underlining – a holdover from the days of typewriters – fails to provide sufficient emphasis for critical contract terms and often looks unnatural. ***To add emphasis, use italics or boldface type.***

V. THINGS NOT TO SAY IN CONTRACTS

Here are some other common words and phrases that should be excised from contracts:

A. Prior To

Prior to is a longwinded way of saying *before*. Just say *before*. *Prior to* leads to other clunky phrasing (as in *prior to commencement of the option period* – instead of *before the option period begins*).

B. Shall

Once upon a time, lawyers were taught that *shall* was a legal term of art imposing a mandatory duty. Whether that ever was true, it certainly isn't now. Lawyers routinely use *shall* to mean all sorts of different things, including *is* (*There shall be no right of appeal from the county court at law*) and *may* (*No floor supervisor shall investigate or resolve any complaint of harassment by a subordinate employee*). Where a contract calls for required action, use *must* instead of *shall*. It sounds more natural and leaves no doubt as to its mandatory effect.

C. Now, Therefore, in Consideration of the Foregoing and the Mutual Covenants and Promises Herein, the Receipt and Sufficiency of Which are Hereby Acknowledged

This commonly used phrase causes a ordinary reader's eyes to glaze over, and adds nothing to the contract. A good contract specifies each party's consideration, making this clause redundant. If the contract fails to specify the consideration, this vague clause will not suffice to do so.

D. The Parties Agree

Isn't the whole point of a contract that the parties agree to all the terms?

E. The Parties Expressly Agree

By specifying certain terms that the parties "expressly agree" about, this language implies the parties do not expressly agree about all the other terms.

F. Unless Otherwise Agreed

If this language refers to other potentially contradictory language in the contract, that other language should be specified. If it refers to contemplated amendments, it is unnecessary and probably confusing, so long as the contract specifies its amendment process.

G. Hereby

This word never serves any legitimate function, and clutters otherwise sound legal writing.

H. Wherefore

Let me introduce you to hereby's more annoying cousin.

I. Notwithstanding Anything in this Contract to the Contrary

This provision serves only to confuse the reader. A well written contract should not have inconsistencies necessitating this language. If two provisions may be interpreted inconsistently and this cannot be avoided, the better practice is to explain the apparent inconsistency and how it should be resolved.

J. In Witness Hereof, the Parties have Caused this Contract to be Executed by Their Duly Authorized Representatives.

This is another common phrase without any real meaning.

VI. ADDITIONAL TIPS FOR DRAFTING CONTRACTS

A. Spell Check (A Dangerous Tool!)

Spell check is a wonderful tool but is no substitute for thorough editing. The dangers of spell check are illustrated by a recent federal criminal pleading in which the government stated its intention to prosecute an alien for "Attempted Aggravated Sexual Assualt of a Chile." Jerry Buchmeyer, *Who Was That Masked Man?*, 69 TEX. BAR J. 491, 492 (2006) (and presumably giving whole new meaning to the term *hot sex*).

B. "A Few Too Many Words"

Salieri said it best in *Amadeus*: "A few too many notes." Though probably an unfair criticism of Mozart, it remains an accurate assessment of most legal writing. Lawyers use too many words.

To improve your writing, review each draft with an eye toward cutting needless words. Be relentless in hacking unnecessary words from your writing. Shorten sentences. Simplify language. Cut, cut, cut.

C. Active, Not Passive

Many lawyers use the passive voice without realizing the damage it does to their writing. With the passive voice, the subject of the clause does not perform the action of the verb. A classic example of a passive sentence is: *The deadline was missed by Mr. Jones.* The same sentence in active voice would read: *Mr. Jones missed the deadline.* The passive voice is weak and often ambiguous. Instead of saying that an actor acted, you say that an action was taken, meaning the reader might not realize who acted.

Lawyers who write strong, persuasive, and effective sentences avoid the passive voice. The passive voice adds unnecessary words, muddles writing, and undermines clarity.

Examples of passive phrases include:

Is dismissed
Are docketed
Was vacated
Were reversed
Been filed
Being affirmed
Be sanctioned
Am honored
Got paid

The passive voice is acceptable in certain situations, such as when the actor cannot be identified or is unimportant. Use the passive voice when the active might alter what you want to say. On the whole, however, avoiding the passive voice saves words, promotes clarity, and animates your style. You will snatch and hold the reader's attention with clear, assertive sentences.

D. Quotation Marks

The misused quotation mark is inescapable in American society. My son and I pass a church sign each morning on the way to school that states:

ACADEMY NOW "ENROLLING"

Despite an entire year of trying, we have yet to figure out what it means. Our local driver's education school engages in the curious but common practice of using quotation marks to emphasize key words, along these lines:

> It is imperative that "any" student who wishes to take the driving test bring "all" forms of requested identification, and each student "must" pay the testing fee. There are "no" exceptions.

An entire page of this actually made my eyes hurt. The misused quotation mark is so common that there is an episode of *Friends* devoted in part to Joey's inability to understand how quotation marks are used!

Quotation marks should be used when you are quoting someone, when you are referring to a word (as in, *the Legislature's use in the statute of the word "the" denotes an intent to signal a particular class*), and when you are pointing out that a word or phrase is being misused (as in, *Smith's classification of a giraffe as a "farm animal" flies in the face of a century of caselaw, not to mention common sense*). Other than that, avoid the use of quotation marks. "Really."

E. Numbers

Numbers greater than ten should be written as numbers (100), but only words should be used for one through ten. The most important exceptions to this rule are (1) when a passage contains numbers in both categories, in which case only numbers should be used, (2) references to discovery requests or other numbered items, (3) when referring to percentages, where only numbers should be used, and (4) when the number begins a sentence. Finally, don't engage in the puzzling practice of using words and numbers, as in ten (10). Few judges and lawyers will assume that by ten you mean 26.

VII. CONCLUSION

This paper is so brief a collection of ideas about drafting contracts that it really constitutes little more than a random collection of personal pet peeves. In applying these suggestions, remember that rules – at least many of them – were made to be broken. So, to paraphrase Richard Bach's reluctant messiah (RICHARD BACH, ILLUSIONS: THE ADVENTURES OF A RELUCTANT MESSIAH 136 (1977)):

> Everything in this paper may be wrong.