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Contract Drafting Essentials: Structuring, Analyzing and Interpreting Business Agreements

THURSDAY, JANUARY 4, 2018

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CONTRACT DRAFTING ESSENTIALS PRESENTATION 1: ORGANIZATION AND STRUCTURE OF THE CONTRACT

January 4, 2018

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CONTRACT DRAFTING ESSENTIALS

ORGANIZATION AND STRUCTURE OF THE CONTRACT

I. Pre - Contract Agreements: Agreements to Agree

A. Letter of Expression of Interest

This letter communicates only that one party is interested in further discussing a proposed legal relationship with another party. It does not set forth terms or conditions.

B. Letter of Intent

1. Description of the objective of the ultimate contract,
2. Statement of the most fundamental rights and obligations of the parties that the ultimate contract will contain,
3. Statement that the parties will negotiate exclusively in good faith with each other for a set period of time or until a particular event occurs,
4. Statement that at the end of the negotiation the letter of intent will merge into the ultimate contract or that it will expire, and
5. Statement that the letter of intent itself does not create any binding obligations

C. Term Sheet

- Similar to a letter of intent but in the form of a chart.
- Sets for basic contract terms such as subject of the contract, price and manner of performance.
- Whether to use a letter of intent or a term sheet depends on how detailed the parties want to be. Term sheet is less detailed.

D. Memorandum of Understanding (MOU)

- The MOU is used in:
  - Substantial transactions such as mergers and acquisitions.
  - Transactions that require time-consuming and expensive due diligence.
  - MOU is detailed enough to be close to the final contract.

E. Confidentiality Agreements

- Usually accompany or precede agreements to agree.
- Used to restrict the use and disclosure of information during negotiations. Difficult to enforce.
- Used to arrange for the return of information that was exchanged during negotiations.

II. Five Pillars of Contract Organization

A. Identification of Parties
B. “Bargained For” Exchange
C. Contract Governance
D. Official Language
E. Signing the Contract

A. Identify Parties and Capacities

1. Business Entities

   a. Is the business entity contracting in its own name such that it can exercise rights and incur obligations?

   b. Is the business entity a parent or subsidiary of another entity?

   c. If a subsidiary or affiliate, is it authorized to bind the parent to the contract?

   d. Does it have sufficient capacity to perform under the contract or must individuals guarantee performance?

2. Government Agency or Instrumentality

a. Does the enabling legislation authorize the agency or instrumentality to conclude contracts in its own name?

b. Does the enabling legislation authorize the agency or instrumentality to sue or be sued in its own name?

c. Does the enabling legislation enable the agency or instrumentality to act on its own authority without approval from the government?

B. "Bargained-For" Exchange

1. Contracts for the Sale of Goods
    a. Description of the goods
    b. Time and place for delivery, passage of title
    c. Price, payment terms, method of payment and currency
    d. Quantity and quality
    e. Inspection rights
    f. Rejection rights
    g. Allocation of risk of loss
    h. Non-statutory warranties

1. Contracts for the Sale of Goods, cont..

i. Renewal - Extension – Indefinite

j. Events in default and curing events in default

k. Consequences of failing to cure an event in default

l. Remedies, limitation on liability, liquidated damage

m. Holds harmless and indemnification

n. Guaranty of Performance – Payment

o. Termination-Expiration

p. Opt-in /Opt-out of uniform laws such as UCC, CISG

2. Contracts for Services

a. Identification of contractor and description of services

b. Fees and method of calculation, expenses

c. Time and place for performance

d. Standards of performance, professional licenses/credentials

e. Renewal - Extension – Indefinite

2. Contracts for Services, cont.

f. Events in default and curing events in default

g. Consequences of failing to cure an event in default

h. Remedies, limitation on liability, liquidated damage

i. Holds harmless and indemnification

j. Guaranty of Performance – Payment

2. Contracts for Services, cont.

k. Confidentiality and non-disclosure

l. Non-solicitation covenants

m. Disposition of intellectual property

n. IRS-FLSA Independent contractors principles

3. Contracts of Employment

a. Description of duties, titles

b. Salary/wages, tax withholdings

c. Time and method of payment

d. At-will or term

3. Contracts of Employment, cont.

e. FLSA exempt or non-exempt from overtime; new rules in April 2018

f. Non-salary/wage benefits

g. Confidentiality and non-disclosure

h. Non compete/non solicitation covenants - social media

3. Contracts of Employment, cont.

i. Disposition of intellectual property created by employee

j. Disposition of employer materials, access tools

k. Termination for cause or without cause

l. Telecommuting

4. Contracts for Digital or Electronic Resources

a. Form of computer information, *i.e.*, software, download

b. Method of transmission

c. Price, payment terms, method of payment and currency

d. License or transfer of title – source codes

e. Restrictions on use

4. Contracts for Digital or Electronic Resources, cont.

f. Residual rights

g. Term

h. Opt-in/Opt-out of UCITA for Maryland and Virginia

i. Termination - Expiration

C. Contract Governance

- The rules that govern the implementation and performance of the contract.

D. Official Language of the Contract

- One language only for international contracts.
- If the contract is in a language that client does not speak, the contract must be translated or interpreted.
- The attorney is ethically obligated to take such measures as are necessary to satisfy him or herself that the client understands the text of the contract.

E. Signing the Contract & Electronic Signatures

- The parties that sign the contract must be the same as the Parties identified in Pillar 1.
- The individuals signing on behalf of entities must disclose the scope of their authority to bind the entity.
- The UETA and the Electronic Signatures in Global and National Commerce Act enable make electronic signature as enforceable as manual signatures.

III. Dispute Resolution

Methods of Alternative Dispute Resolution (ADR)

A. Neutral Case Evaluation

- The neutral case evaluator assesses the case presented by each party.
- The neutral case evaluator explains the strengths and weaknesses of the arguments of each party.
- No attempt to settle the case.

B. Mediation

- Parties communicate through the mediator and not directly.
- The mediator transmits offers of settlement back and forth between the parties. Sometimes performs as a neutral case evaluator.
- No decision or opinion of the mediator binding on the parties.
- Mediator cannot be called as witness at trial

C. Arbitration

- Conducted similar to a trial except that the parties control scheduling. The parties choose the arbitrator or arbitral provider.

- The parties must agree to arbitration either in the contract or after the dispute arises. No party can be compelled to arbitrate.

- Not necessarily cheaper than court. Can be binding or non-binding.

- Usually none or limited appeal rights..

D. Arbitration Provisions in Consumer Contracts

- Disagreement as to whether pre-dispute arbitration agreements put consumers at a disadvantage.

- Issue of consumer protection.

E. ADR in Retainer Agreements

An arbitration provision in a retainer agreement must :

1. Be prominent, even in big bold letters.

2. State whether the arbitration will be conducted by electronic means.

3. State that any dispute between the parties must be submitted to arbitration or state which categories of disputes are subject to arbitration. Disputes grounded in professional liability cannot be arbitrated.

E. ADR in Retainer Agreements, cont.

An arbitration provision in a retainer must :

4. State the consequences of binding arbitration *i.e.*, no appeal to courts except for an arbitrary or capricious award.

5. State that arbitration is not necessarily less expensive than litigation in court.

6. State that the client should be represented by counsel in arbitration.

IV. Notarial Instruments – Civil Law Systems

- The role of a notary in civil law systems such as continental Europe and South America.
- Not like a notary public in the U.S.

A. Functions

The civil law notary is an attorney who has undergone specialized training and is obligated to:

1. Represent the transaction and not a party.

2. Authenticate legal instruments.

3. Draft a legal instrument, that accurately reflects intent of the parties, assure that the parties understand the rights and obligations they undertake and that the legal instrument complies with applicable law.

B. Legal Effect of Notarized Instrument

A contract that has been authenticated by a notary is conclusively deemed genuine, legally binding, and an accurate statement of the agreement.

An authenticated contract cannot be challenged for lack of consideration, lack of mutual assent, no promissory estoppel, mistake or unfair advantage.

C. Civil Law Notary in the United States

Alabama, Florida, Louisiana, and Puerto Rico have enacted laws that enable civil law notaries.

These civil notaries are recognized by civil law courts.

V. Electronic Contracts

A. Definition of an Electronic Contract

Whether or not a contract is an electronic contract is determined by the means of communication that the parties use. Contracts formed through email, telex, social media, or a website are electronic contracts.

1. The traditional contract principles of offer, mutual assent, and acceptance apply to electronic contracts

2. In typical electronic contracts the parties are remote but can communicate instantly.

B. ***Determining the Time of Acceptance: The Mail Box Rule***

- Under the "mailbox rule" rule, unless the parties otherwise agree, the offeree accepts the offer when the writing evidencing the acceptance is placed in the postal service.
  - The "mail box rule" is adapted to electronic contracts. The contract is formed when the offeree places the acceptance with a third person who transmits the acceptance. With emails the contract is formed when the offeree presses the send button.
  - The Uniform Computer Information Transactions Act (UCITA) repeals the "mailbox" rule for transactions involving the exchange of computer information. Unless the parties otherwise agree, a contract is formed when the offeror receives the acceptance. Only Maryland and Virginia have enacted UCITA.

C. Terms of the Electronic Contract

- Entering into a contract should always be a deliberate act.
- The parties should conclude an integrated contract in a single instrument – not rely on a series of electronic communications to form the contract.
- Parties with a long commercial relationship often form contracts through a series of communications rather than an integrated contract. The best practice is to have an integrated contract..

D. *Forming an Electronic Contract by Automated Means on a Website*

- Contracts formed on websites are automated contracts and there is no communication between the parties.

- There are four types of automated electronic contracts:
  1. BrowseWrap Contracts
  2. ClickWrap Contracts
  3. ScrollWrap Contracts
  4. Sign-in Wrap

- An automated contract can be modified only as long as the offeree/user has proper notice of the modification.

E. Signing the Electronic Contract

- The UETA has been enacted by all states.

- An electronic signature is an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

F. Duty to Read- Presumption of Knowing Assent

- As long as the contract is available, the law assumes that the parties have read it.

- Clicking the "I Agree" button signifies that the party understands that it is incurring a legal obligation and agrees to the terms.

G. Emails as Contracts

- An exchange of emails is a contract.
- Negotiations are often conducted through emails.
  - State in the initial email that the emails are for negotiations only and not binding until a final contract is signed.
  - State the authority of the individual on the email.
  - State whether the text is a translation from another language.

VI. Smart Contracts

A. <u>Smart Contracts in Concept</u>

1. Conditional Contracts, Conditional Transactions, and Artificial Intelligence Programs are names for Smart Contracts.

2. Smart Contracts are coded and entered into a computer program.

3. Once entered, the mechanism for payment, the amount of payment, and the method of payment cannot be changed by any of the parties for any reason.

B. Smart Contract Concept as a Traditional Concept

1. The vending machine is a simple form of a smart contract.

2. The price is set so that the user cannot negotiate a change in the price.

3. Once the user presses a button associated with a product, the user cannot change the product.

4. The vending machine delivers the product which is associated with the button the user presses and only that product.

B. Smart Contract Concept as a Traditional Concept, cont.

5. If the product that is delivered is not the product associated with the button, then there is a breach of contract.

6. The vending machine and the user do not have an agreed dispute resolution method.

7. The user may have recourse against the owner of the vending machine but the owner may say that because the vending machine contract does not provide for recourse, the owner is not liable.

C. ***Smart Contract Concept as a Traditional Concept, cont.***

8. No matter how sophisticated the code or how advanced the technology of the computer, an attorney must draft the terms and conditions which go into the smart contract.

9. Because the smart contract will execute and enforce only the terms and conditions which are coded into the program, the drafting must be even more precise than for a traditional contract.

Contract Drafting Techniques

Strafford Legal Seminars
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About Mark Cohen

Mark has 34 years of experience as a lawyer. He earned a B.A.in Economics at Whitman College and earned his law degree at the University of Colorado in Boulder. He earned an LL.M. Agricultural and Food Law from the University of Arkansas, where he also taught advanced legal writing. His diverse legal career includes service as an Air Force JAG, a Special Assistant U.S. Attorney, a prosecutor, a municipal judge for the City of Boulder, six years on the Advisory Board of The Colorado Lawyer (including one as chairperson), and service on the Executive Board of the Colorado Municipal League.

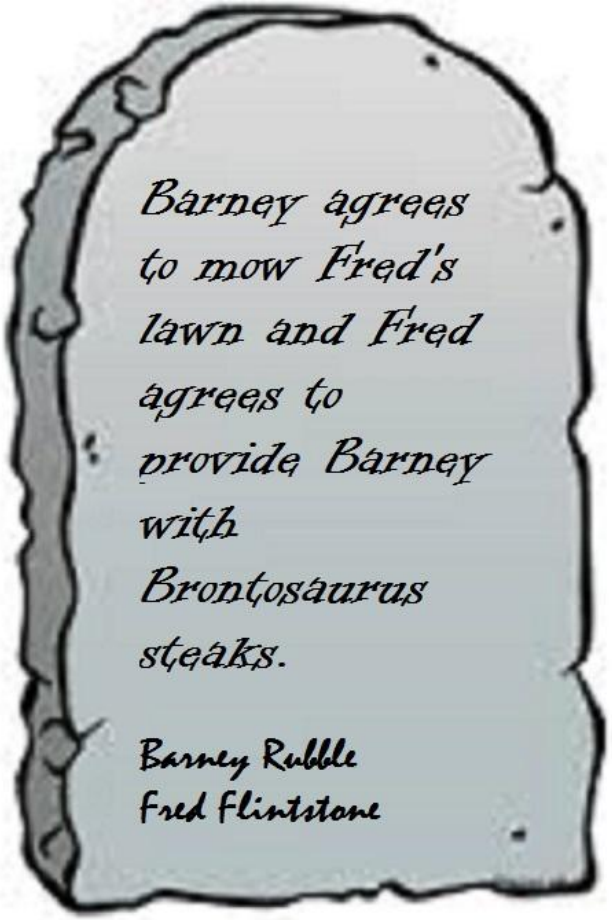
Mark wrote six articles in the Am.Jur. *Proof of Facts* series, including the seminal article on piercing the corporate veil. He has written numerous articles and book reviews for The Colorado Lawyer. In 2004, he won 2nd prize in the SEAK National Legal Fiction Writing Competition. He wrote two mysteries published by Time Warner, and his first mystery, The Fractal Murders, became a Book Sense ® mystery pick and was a finalist for the Colorado Book of the Year. His non-legal articles have appeared in magazines such as *Inside Kung Fu*, *Camping & RV*, and *Modern Dad*. He is a member of the Institute of General Semantics and the Mystery Writers of America. His article, *How to Draft a Bad Contract*, was praised by Harvard Professor Steven Pinker as "Simply brilliant."

Mark's practice focuses on drafting and reviewing legal documents including contracts, corporate documents, real estate documents, employment documents, intellectual property documents, motions, pleadings, and briefs. He also litigates cases arising out of poorly drafted documents. He enjoys helping businesses and other lawyers improve their legal and non-legal documents by translating them from Legalese into plain English. Learn more at Plain English Consulting.

Mark holds a black belt in karate and serves on the board of directors of Dart, Inc., a Boulder non-profit that offers training in personal safety, violence prevention, and appropriate dating relationships.

Contract Drafting Techniques

The First Contract



Lawn Care Contract

This agreement for Lawn Maintenance services between _____ (hereafter referred to as "Client") and _____ (hereafter referred to as "Contractor") is made and entered into upon the following date: ____/____/____.
The lawn stated in this agreement is found at the following address:
_____.
The Client would like to have the above mentioned lawn maintained on a regular basis. The Client and Contractor hereby agree to the following terms:

1. The Client will grant the Contractor access to the lawn during regular business hours Monday - Friday (8:00am - 5:00pm) CST and additional mutually agreed upon times.
2. Client or Contractor (Designate one or the other) will provide all equipment and supplies that are necessary to perform normal maintenance services on the above mentioned yard.
3. Client will pay Contractor $_____ on the first day of each month for regular maintenance services performed for the rest of the month.
4. Client will pay Contractor for additional maintenance or repair that may become required for the lawn to sustain an acceptable appearance. The Contractor shall bill the Client for the cost of work that is needed that is above and beyond what is considered reasonable and customary for normal maintenance of the lawn. This additional "above and beyond" repair hereafter shall be referred to as "ad hoc work".
5. Ad hoc work that has a cost that is less than or equal to $50 shall be performed by the Contractor without the Client's consent. However, work that is to be estimated greater than $50 the Contractor must receive authorization by the Client before the additional maintenance is provided.
6. "Regular Maintenance" will include the following: removal of debris from the yard, mowing of the lawn and trimming of trees and shrubs and any other plants that are in need of pruning, fertilization of the lawn's soil, inspection of plants and soil for insects, also the extermination of any insects or rodents that are discovered during normal maintenance activities.
7. Contractor will begin performing regular lawn maintenance on the following date: ____/____/____. Thereafter, regular lawn maintenance will be performed on a mutually agreed upon schedule.
Either party may terminate this contract at any time by supplying a written notice of termination on a specified date to the other party, with at least two weeks notice prior to the stated date of termination.
If there is any litigation needed between the Client and Contractor it shall be filed and tried in the Contractor's local jurisdiction.

In agreement to the above mentioned terms the Client and Contractor sign below:

Applicable Law

This contract shall be governed by the laws of the State of _____ in _____ County and any applicable Federal Law.
_____ Date_____
Signature of the Client
_____ Date_____
Signature of Contractor

The 3 Main Causes of Contract Disputes

- Ambiguity

When an ambiguity is found to exist and cannot be resolved by reference to other contractual provisions, **extrinsic evidence** must be considered by the trial court in order to determine the mutual intent of the parties at the time of contracting. *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310 (Colo. 1984).

- Inconsistency

Where it is impossible to reconcile conflicting clauses of a contract, it is proper to receive **extrinsic evidence** for the purpose of determining the intent of the parties. *Ryan v. Fitzpatrick Drilling Co.,* 342 P.2d 1040 (Colo. 1959).

- Failure to address an issue altogether

Silence on a matter in a contract creates an ambiguity when it involves a matter naturally within the scope of the contract. *Cheyenne Mtn. Sch. Dist. #12 v. Thompson*, 81 P.2d 711 (Colo. 1993). **Extrinsic evidence** is admissible to determine the intent of the parties.

Questions of Fact and Questions of Law

Whether a contract is ambiguous is a question of law. *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310 (Colo. 1984).

However, once a court determines that a contract is ambiguous, the meaning of the ambiguous term is a question of fact. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996).

Once a court determines that a contract is ambiguous, the intent of the parties is question of fact. *Metropolitan Paving Co. v. City of Aurora*, 449 F.2d 177 (10th Cir. 1971).

And If a Question of Fact Exists…

NO SUMMARY JUDGMENT

The Parol Evidence Rule

In the absence of allegations of fraud, accident, or mistake in the formation of the contract, parol evidence may not be admitted to add to, subtract from, vary, contradict, change, or modify an **unambiguous integrated** contract. *Boyer v. Karahenian*, 915 P.2d 1295 (Colo. 1996).

Terms used in a contract are **ambiguous** when they are susceptible to more than one reasonable interpretation. *B&B Livery, Inc. v. Riehl,* 960 P.2d 134 (Colo. 1998).

An **integrated contract** is one that contains all the terms the contracting parties agreed to. *Harmon v. Waugh*, 414 P.2d 110 (Colo. 1966).

What is the Goal?

The goal is to make sure all parties are on the same page. Your three guiding principles in drafting should be:

1. Simplicity
2. Clarity
3. Completeness

Techniques

One way to learn good drafting techniques is to study BAD techniques and then do the opposite.

Ways to Draft a Bad Contract

1. Omit the caption or title. A bad contract has no caption at the top of the first page stating 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.

Ways to Draft a Bad Contract

2. 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 is sample bad introduction 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." (46 words)

Do NOT use straightforward language such as this:

This is an Agreement ("Agreement") between John Jones ("Jones") and Suzy Smith ("Smith") for the purchase of Jones's 50% interest in the horse known as "Silver." (26 words)

Ways to Draft a Bad Contract

3. Use verbose recitals over short summaries. Historically, contracts included recitals to clarify intent, add to consideration, and/or bolster the importance of conditions in the contract. A bad contract should include recitals that accomplish none of these goals and that include the words "WHEREAS" and the phrase "NOW, THEREFORE." Example:

WHEREAS, Jones and Smith each own a fifty percent (50%) 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%) interest in "Silver" to Smith on the terms set forth herein; and,

WHEREAS, Smith is willing to purchase Jones's fifty percent (50%) 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: (107 words)

Ways to Draft a Bad Contract

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. They each paid $25,000 of the purchase price and agreed they would each own a 50% interest in the horse. Differences arose between Jones and Smith concerning the horse. Jones and Smith have agreed to resolve their differences on the terms set forth in this Agreement. (54 words)

Ways to Draft a Bad Contract

4. Use WITNESSETH. Use "WITNESSETH" to separate the introduction from the contractual terms. 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

Ways to Draft a Bad Contract

Even better…

Ways to Draft a Bad Contract

5. 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 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
- Employing inconsistent definitions
- Defining terms only after they have already appeared in the contract
- Including substantive provisions of the agreement in the definitions

Ways to Draft a Bad Contract

6. Omit the consideration. An agreement not supported by consideration is invalid and unenforceable. *Ireland v. Jacobs*, 163 P.2d 203 (Colo. 1945).

A truly bad contract omits any discussion of consideration. If you must include language concerning consideration, be vague by writing something like "for good and valuable consideration, in hand paid, the receipt of which is hereby acknowledged." Do NOT mention issues such as price, quantity, quality, time of performance, method of payment, and time of payment.

Ways to Draft a Bad Contract

7. 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, "this document" and “this understanding” rather than "Agreement." This will reduce your contract’s readability and may even create confusion, thus improving the badness of your contract.

Ways to Draft a Bad Contract

8. Omit headings or use misleading headings. Headings allow a reader to quickly see what each paragraph is about. A truly bad contract has no headings. A bad contract makes the reader peruse the entire document to find what they are looking for. If you must use headings, consider using headings that do not accurately reflect the issue or issues addressed in that paragraph. For instance, you might use "Attorney Fees" as a heading but include a waiver of jury trial in that paragraph. This may create confusion about whether the jury waiver is enforceable.

See, Haynes v. Farmers Inc. Exchange, 89 P.3d 381, 385 (Cal. 2004) (Court did not enforce a provision limiting coverage contained in a section with the heading "Other Insurance").

Ways to Draft a Bad Contract

9. Include unrelated items in the same paragraph. This is a favorite method of drafting a bad contract. For example, in a paragraph stating 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.

Ways to Draft a Bad Contract

10. 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 am 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).

Ways to Draft a Bad Contract

11. Do not specify the date, time, and place of performance. Remember, the goal of a bad contract is to confuse so 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.

Ways to Draft a Bad Contract

12. Do not address attorney's fees. In Colorado, the general rule is that a court will not award attorney's fees unless authorized by statute, rule, or a provision in the relevant document. *Waters v. District Court*, 935 P.2d 981, 990 (Colo. 1997)

This is why good contracts include an attorney's fees provision. A bad contract does not.

Remember, even without an attorney's fees provision, you can always seek attorney's fees if the opposing party's position lacked substantial justification. Because you feel the opposing party's position ALWAYS lacks substantial justification, an attorney's fees provision is unnecessary. *See,* CRS § 13-17-102.

Ways to Draft a Bad Contract

13. 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:

The parties agree that the exclusive venue for any litigation arising out of this Agreement will be in the District Court of Boulder County, Colorado.

I do not 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. And Durango is really beautiful. Maybe you could get in some skiing? Or swing by the Telluride Jazz Festival?

Ways to Draft a Bad Contract

14. Do not include a waiver of the right to a jury trial.

- One reason many of us older lawyers chose law school is because we grew up watching *Perry Mason* trap witnesses on cross-examination. (Or *L.A. Law*, *Boston Legal*, etc).

- There is nothing juries like more than being forced to listen to two profitable businesses fight over money.

- Jurors especially enjoy hearing expert testimony from accountants and economists. Jurors love math.

- 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.

Ways to Draft a Bad Contract

15. Do not include a merger clause. A merger clause (sometimes called an 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.

A bad contract includes no merger clause, thus leaving the door open for disputes about promises or representations allegedly made that are not in the contract.

Ways to Draft a Bad Contract

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 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. (174 words)

Do NOT use a simple, concise merger clause such as this:

This Agreement sets forth the complete agreement of the parties. There are no promises or representations other than those in this Agreement. (22 words)

Ways to Draft a Bad Contract

16. Do not address modification. Litigation sometimes arises when a party claims the parties orally modified their agreement after signing the contract. A good contract provides that any modifications must be in writing. 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.

Ways to Draft a Bad Contract

17. Do not address dispute resolution. A good contract specifies the method 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 you may use:

In any dispute arising out of this Agreement, the parties will submit to mediation.

Ways to Draft a Bad Contract

Do NOT use a clause such as this that addresses issues that may arise:

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 mediator's fees. Any party may initiate mediation by sending a written demand for mediation to the other party. If the other party does not respond to the demand within fourteen days or fails to participate in any scheduled mediation, the aggrieved party may seek an order compelling mediation, and in that event the other party shall pay the aggrieved party's attorney's fees and costs incurred by the party seeking an order to compel mediation.

Ways to Draft a Bad Contract

18. 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.

Ways to Draft a Bad Contract

19. 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 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.

Ways to Draft a Bad Contract

20. State that the parties will agree on a term later.

Seller will deliver a vehicle to buyer in a color to be agreed upon.

Ways to Draft a Bad Contract

21. Do not specify which jurisdiction's laws will govern. Many contracts involve parties living or operating in different jurisdictions or operating in several jurisdictions. In drafting a bad contract, it is important not to address which jurisdiction's laws will govern. This will provide 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:

1. You get to use Latin.
2. 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.

Ways to Draft a Bad Contract

22. 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).

Ways to Draft a Bad Contract

23. Cut and paste from the Internet. I did a Google search for "sample contract for sale of goods," and got 40.8 million results. Law practice today can be so hectic that we sometimes take shortcuts. We find a template we like and use it repeatedly. One way I see lawyers creating bad contracts is by copying provisions from the Internet. Here's one 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:

1. It does not specify that the parties must use the AAA; it states only that they must use the AAA's rules.
2. It does not specify which AAA rules will apply; the AAA has many sets of rules for various types of disputes.
3. The lawyer using this language may not realize that the AAA's rules can be just as complex as the rules of procedure the lawyer hoped to avoid by including an arbitration provision in the first place.
4. 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.

Ways to Draft a Bad Contract

24. Don't include a non-assignment 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 that much about who it does business with and will therefore omit a non-assignment 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 non-assignment clause, leave a little wiggle room by not specifying that any consent to an assignment must be in writing. Here's an example:

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

Democratic People's Republic of Korea

License to Practice Law

I, Kim Jong-Un, the Supreme Leader of the Democratic People's Republic of Korea, do hereby affirm that ***MARK COHEN*** *is hereby admitted to practice law in the Democratic People's Republic of Korea.*

Done this 9th day of December, 2015, at Pyongyang, Democratic People's Republic of Korea.

김정은

_____

Kim Jong-Un, Supreme Leader
최고 지도자

Ways to Draft a Bad Contract

25. 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's 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's fees clause in the confidentiality provision, in the non-compete provision, or in the provision regarding nonpayment and late payment. This will make your contract longer, thereby impressing your client, counsel for the opposing party, and any judge that 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 court must award the prevailing party its actual attorney's fees, expenses, and costs.

Ways to Draft a Bad Contract

26. Use a formalistic signature format. Now that you have prepared the baddest contract ever, the parties must sign it to indicate they agree to its terms. A bad contract must include a formal signature section to make sure the parties know that the forty-seven-page monstrosity they are signing (with 𝔚 𝔍 𝔗 𝔑 𝔈 𝔖 𝔖 𝔈 𝔗 𝔜 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:

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.

Do NOT do this:

_____
John Jones (Date)

_____
Suzy Smith (Date)

Ways to Draft a Bad Contract

27. Use legalese. You slogged through three years of law school, possibly incurring a great deal of 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 employ their writing style?

Ways to Draft a Bad Contract

28. Change Your Language Without Wanting to Change Your Meaning

"Except to the extent expressly permitted by this Agreement, Shareholders may not sell, transfer, assign, pledge, encumber or otherwise dispose of or convey (by operation of law or otherwise) shares of the Corporation."

"If a shareholder proposes to transfer shares and dies prior to the closing of the sale and purchase contemplated by Section 1 . . . ."

This example taken from *Transactional Skills Drafting: Contract Drafting – Beyond the Basics*, Scott J. Burham, Tennessee Journal of Business Law (2009, page 253).

Ways to Draft a Bad Contract

29. Don't pay attention to modifiers.

"Seller shall ship oranges and grapefruit from Florida."

"Seller shall ship: (1) oranges, and (2) grapefruit from Florida."

"Seller shall ship oranges and grapefruit, both from Florida."

This example taken from *Transactional Skills Drafting: Contract Drafting – Beyond the Basics*, Scott J. Burham, Tennessee Journal of Business Law (2009, page 253).

Ways to Draft a Bad Contract

30. Don't pay attention to punctuation.

The Agreement shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.

The Agreement shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms unless and until terminated by one year prior notice in writing by either party.

This example taken from *Transactional Skills Drafting: Contract Drafting – Beyond the Basics*, Scott J. Burham, Tennessee Journal of Business Law (2009, page 253).

Ways to Draft a Bad Contract

31. Don't incorporate by reference.

Unless otherwise noted in this Agreement or not possible, we will perform the inspection in accordance with the current Standards of Practice (SOP) of the International Association of Certified Home Inspectors ("InterNACHI"), posted at www.nachi.org/sop.

I just saved myself the trouble of putting 11 pages of SOP's into the contract.

Part 2

Writing in Plain English Rather than Legalese

What Is Legalese?

Like "hard-core pornography," you may not be able to define "Legalese" precisely, but you know it when you see it.

See, *Jacobellis v. Ohio*, 378 U.S. 184 (1964), concurrence of Justice Stewart.

Legalese

- Double negatives
- Jargon
- Lengthy sentences
- Massive paragraphs
- Needless words
- Passive voice
- Redundant provisions
- Poor structure

Plain English Defined

Plain English is writing that is clear, concise, and readily understood by the target audience.

Plain English

"Furthermore, the release agreement here was written in simple and clear terms, it was not inordinately long and complicated, and Riehl indicated in her deposition that she understood that by executing the agreement, she was in fact granting B & B a release." *B&B Livery, Inc. v. Riehl,* 960 P.2d 134 (Colo. 1998). (Release that was broader than statutory limitation on liability was enforceable).

Indemnification provision was enforceable where it is "clear and unambiguous and is written in plain language, not hidden nor lost in a haze of small print and legalese." Midwest Concrete Placement, Inc. v. L&S Basements, Inc., 363 Fed.Appx. 570 (10th 2010).

Disclaimer language in employee manual not enforceable where written in "confusing legalese." *Nicosia v. Wakefern Food Corporation*, 643 A.2d 554 (N.J. 1994).

SO ORDERED.

SIGNED this 21 day of February, 2006.

LEIF M. CLARK
UNITED STATES BANKRUPTCY JUDGE

United States Bankruptcy Court

Western District of Texas
San Antonio Division

IN RE RICHARD WILLIS KING DEBTOR	BANKR. CASE NO. 05-56485-C CHAPTER 7
FACTAC, INC.. *PLAINTIFF* V. RICHARD WILLIS KING *DEFENDANT*	ADV. NO. 05-5171-C

ORDER DENYING MOTION FOR INCOMPREHENSIBILITY

Before the court is a motion entitled "Defendant's Motion to Discharge Response to Plaintiff's Response to Defendant's Response Opposing Objection to Discharge." Doc. #7. As background, this adversary was commenced on December 14, 2005 with the filing of the plaintiff's complaint objecting to

the debtor's discharge. (Doc. #1). Defendant answered the complaint on January 12, 2006. Doc. #3. Plaintiff responded to the Defendant's answer on January 26, 2006. Doc. #6. On February 3, 2006, Defendant filed the above entitled motion. The court cannot determine the substance, if any, of the Defendant's legal argument, nor can the court even ascertain the relief that the Defendant is requesting. The Defendant's motion is accordingly denied for being incomprehensible.[1]

###

[1] Or, in the words of the competition judge to Adam Sandler's title character in the movie, "Billy Madison," after Billy Madison had responded to a question with an answer that sounded superficially reasonable but lacked any substance,

> Mr. Madison, what you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could even be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.

Deciphering motions like the one presented here wastes valuable chamber staff time, and invites this sort of footnote.

Benefits of Plain English

- Lowers costs
- Improves productivity
- Increases credibility
- Reduces misunderstandings
- Shortens documents
- Less likely to scare potential customers
- Makes it more difficult for a party to claim lack of understanding
- Easier for a judge or jurors to understand

How to Write in Legalese

1. 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 in this document. We have not authorized anyone to provide you different information. (20 words)

How to Write in Legalese

2. Use passive voice. In the active voice, the subject of the sentence performs the action. In the passive voice, the subject is acted upon. The active voice requires fewer words and tracks how people think, and you should avoid it if you want to write in Legalese.

Passive: This contract may be terminated at any time by either party on thirty day's written notice to the other party. (20 words)

Active: Either party may terminate this contract on thirty day's written notice to the other party. (15 words)

How to Write in Legalese

3. 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 accordance 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. (55 words)

How to Write in Legalese

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. (42 words)

How to Write in Legalese

4. Use superfluous words. Never use one word when several will do. More words mean longer contracts, and longer contracts justify higher fees. Here are some examples of simple words that can be replaced with superfluous words:

Simple	**Legalese**
If	In the event that
Although	In spite of the fact that
Because	Owing to the fact that

How to Write in Legalese

You can also use a thesaurus to find synonyms to increase your word count. Some of my favorite examples are:

- rest, residue, and remainder
- null and void
- remise, release, sell, and quit claim
- due and payable
- indemnify and hold harmless
- sell, convey, assign, transfer, and deliver

How to Write in Legalese

5. Use unnecessary, legalistic words.

- Aforementioned
- Hereinafter
- Whatsoever
- Therein
- Notwithstanding

How to Write in Legalese

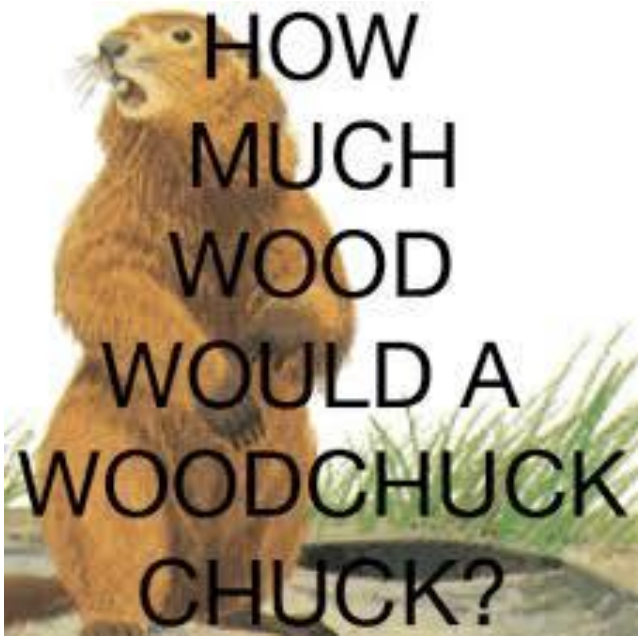
6. Strive to incorporate as much Latin as possible. For help, visit

en.wikipedia.org/wiki/List_of_legal_Latin_terms

How to Write in Legalese

Quantum marmota monax si marmota esset lignum possit?

How to Write in Legalese



How to Write in Legalese

If you can't find any Latin, try to work some foreign language into your contract to make it more bad.

Force majeure is a good one. The parties are more likely to understand that than "extraordinary events" or "circumstances beyond the parties' control."

How to Write in Legalese

7. Use long sentences and paragraphs

Accepted readability formulas such as the Flesch Reading Ease Scale rely heavily on sentence and paragraph length. Try to keep your *average* sentence length to 20 or 25 words. A long sentence usually indicates you are trying to say too many things at once. The same applies to paragraphs; try to keep the *average* number of sentences in a paragraph to five or six.

How to Write in Legalese

8. Use nominalizations, not verbs

Legalese	Plain English
You may make an application	You may apply
If a court makes a determination	If a court determines
You will provide information	You will inform

How to Write in Legalese

9. Use negatives

Legalese: Persons other than the primary beneficiary may not receive these dividends. (12 words)

Plain English: Only the primary beneficiary may receive these dividends. (10 Words)

How to Write in Legalese

Negative compound	**Single word**
not able	unable
not accept	reject
not certain	uncertain
not unlike	similar, alike
does not have	lacks
does not include	excludes, omits
not many	few
not often	rarely
not the same	different
not … unless	only if
not … except	only if
not … until	only when

How to Write in Legalese

10. Keep the subject, verb, and object as far apart as possible.

Legalese: Holders of Class A and Class B certificates will be entitled to receive on each payment date, to the extent monies are available therefor (but not more than the Class A Certificate Balance or Class B Certificate Balance then outstanding, a distribution. (42 words)

Plain English: Class A and Class B Certificate Holders will receive a distribution on each payment date if cash is available on those dates for their class. (25 words)

How to Write in Legalese

11. Use numerals AND letters.

Legalese: Buyer will pay seller one million nine hundred fifty thousand dollars ($1,950,000.00).

Plain English: Buyer will pay seller $1,950,000.00.

Using MS Word to Reduce Legalese

Microsoft Word's grammar check function offers the ability analyze the readability of any document. It tells you:

- the number of words in the document
- the number of characters
- the number of paragraphs
- the number of sentences
- the average sentences per paragraph
- the average words per sentence
- the average number of character per word
- the percentage of sentences that employ passive voice
- the Flesch Reading Ease Scale
- the Flesch-Kincaid Grade Level Scale

There are also similar open source programs such as Abiword.

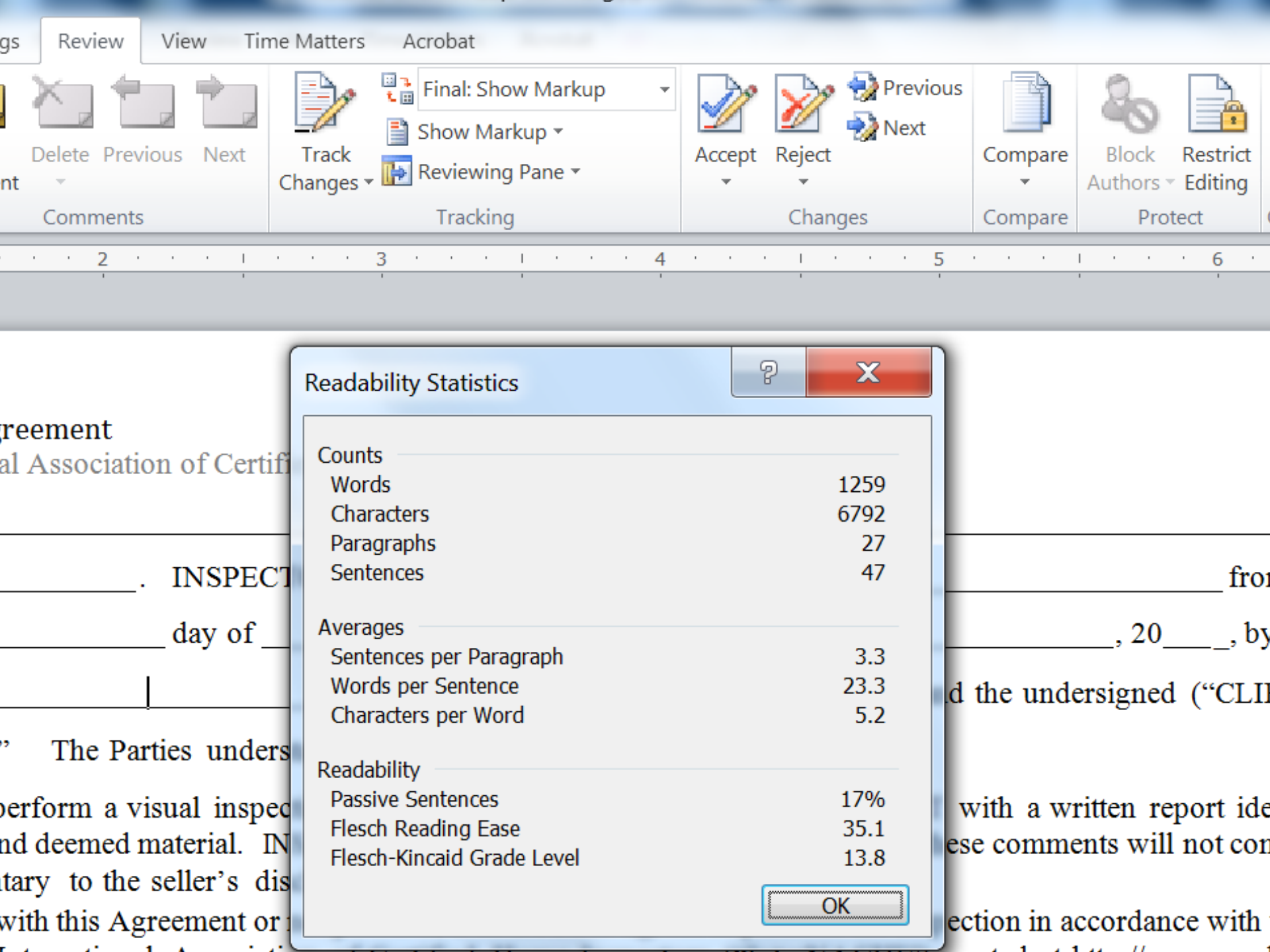
InterNACHI Home Inspection Agreement

The address of the property is: _____. Fee for the inspection is $_____. INSPECTOR acknowledges receiving a deposit of $_____ from CLIENT. THIS AGREEMENT made this _____ day of _____, 20___, by and between _____ (hereinafter "INSPECTOR") and the undersigned ("CLIENT"), collectively referred to herein as "the parties." The Parties understand and voluntarily agree as follows:

1. INSPECTOR agrees to perform a visual inspection of the home/building and to provide CLIENT with a written report identifying the defects that INSPECTOR both observed and deemed material. INSPECTOR may offer comments as a courtesy, but these comments will not comprise the bargained- for report. The report is only supplementary to the seller's disclosure.
2. Unless otherwise inconsistent with this Agreement or not possible, INSPECTOR agrees to perform the inspection in accordance with the current Standards of Practice of the International Association of Certified Home Inspectors ("InterNACHI") posted at http://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. CLIENT understands that InterNACHI is not a party to this Agreement and has no control over INSPECTOR or representations made by INSPECTOR and does not supervise INSPECTOR. Unless otherwise indicated below, CLIENT understands that INSPECTOR will NOT be testing for the presence of radon – a colorless, odorless, radioactive gas that may be harmful to humans. Unless otherwise indicated below, CLIENT understands that INSPECTOR will NOT be testing for mold. Unless otherwise indicated in a separate writing, CLIENT understands that INSPECTOR will not test for compliance with applicable building codes or for the presence of potential dangers arising from asbestos, lead paint, formaldehyde, molds, soil contamination, and other environmental hazards or violations.
3. The inspection and report are for the use of CLIENT only, who gives INSPECTOR permission to discuss observations with real estate agents, owners, repairpersons, and other interested parties. INSPECTOR shall be the sole owner of the report and all rights to it. INSPECTOR accepts no responsibility for use or misinterpretation by third parties, and third parties who rely on it in any way do so at their own risk and release INSPECTOR (including employees and business entities) from any liability whatsoever. INSPECTOR'S inspection of the property and the report are in no way a guarantee or warranty, express or implied, regarding the future use, operability, habitability or suitability of the home/building or its components. All warranties, express or implied, including warranties of merchantability and fitness for a particular purpose, are expressly excluded to the fullest extent allowed by law. If any structure or portion of any structure that is to be inspected is a log home, log structure or includes similar log construction, CLIENT understands that such structures have unique characteristics that make it impossible for an inspector to inspect and evaluate them. Therefore, the scope of the inspection to be performed pursuant to this Agreement does not include decay of the interior of logs in log walls, log foundations or roofs, or similar defects.
4. INSPECTOR assumes no liability for the cost of repair or replacement of unreported defects or deficiencies either current or arising in the future. CLIENT acknowledges that the liability of INSPECTOR, its agents and/or employees, for claims or damages, costs of defense or suit, attorney's fees and expenses arising out of or related to the INSPECTOR'S negligence or breach of any obligation under this Agreement, including errors and omissions in the inspection or the report, shall be limited to liquidated damages in an amount equal to the fee paid to the INSPECTOR, and this liability shall be exclusive. CLIENT waives any claim for consequential, exemplary, special or incidental damages or for the loss of the use of the home/building. The parties acknowledge that the liquidated damages are not intended as a penalty but are intended (i) to reflect the fact that actual damages may be difficult and impractical to ascertain; (ii) to allocate risk among the INSPECTOR and CLIENT; and (iii) to enable the INSPECTOR to perform the inspection at the stated fee.
5. INSPECTOR does not perform engineering, architectural, plumbing, or any other job function requiring an occupational license in the jurisdiction where the inspection is taking place, unless the inspector holds a valid occupational license, in which case he/she may inform the CLIENT that he/she is so licensed, and is therefore qualified to go beyond this basic home inspection, and for additional fee, perform additional inspections beyond those within the scope of the basic home inspection. Any agreement for such additional inspections shall be in a separate writing.
6. In the event of a claim against INSPECTOR, CLIENT agrees to supply INSPECTOR with the following: (1) written notification of adverse conditions within 14 days of discovery; and (2) access to the premises. Failure to comply with the above conditions will release INSPECTOR and its agents from any and all obligations or liability of any kind.
7. The parties agree that any litigation arising out of this Agreement shall be filed only in the Court having jurisdiction in the County in which the INSPECTOR has its principal place of business. In the event that CLIENT fails to prove any claims against INSPECTOR in a court of law, CLIENT agrees to pay all legal costs, expenses and fees of INSPECTOR in defending said claims. CLIENT further understands that any legal action against InterNACHI itself allegedly arising out of this Agreement or INSPECTOR's relationship with InterNACHI must be brought only in the District Court of Boulder County, Colorado. No such action may be filed unless the plaintiff has first provided InterNACHI with 30 days' written notice of the nature of the claim. In any action against INSPECTOR and/or InterNACHI, CLIENT waives trial by jury.
8. If any court declares any provision of this Agreement invalid, the remaining provisions will remain in effect. This Agreement represents the entire agreement between the parties. All prior communications are merged into this Agreement, and there are no terms or conditions other than those set forth herein. No statement or promise of INSPECTOR or its agents shall be binding unless reduced to writing and signed by INSPECTOR. No change shall be enforceable against any party unless it is in writing and signed by the parties. This Agreement shall be binding upon and enforceable by the parties and their heirs, executors, administrators, successors and assignees. CLIENT shall have no cause of action against INSPECTOR after one year from the date of the inspection.
9. Payment of the fee to INSPECTOR (less any deposit noted above) is due upon completion of the on-site inspection. The CLIENT agrees to pay all legal and time expenses incurred in collecting due payments, including attorney's fees, if any. If CLIENT is a corporation, LLC, or similar entity, the person signing this Agreement on behalf of such entity does personally guaranty payment of the fee by the entity.
10. If CLIENT requests a re-inspection, the re-inspection is also subject to all the terms and conditions set forth in this agreement.
11. This Agreement is not transferable or assignable.
12. Should any provision of this Agreement require judicial interpretation, the Court shall not apply a presumption that the term shall be more strictly construed against one party or the other by reason of the rule of construction that a document is to be construed more strictly against the party who prepared it.

CLIENT HAS CAREFULLY READ THE FOREGOING, AGREES TO IT, AND ACKNOWLEDGES RECEIPT OF A COPY OF THIS AGREEMENT.

FOR INSPECTOR CLIENT OR REPRESENTATIVE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Acrobat
Delete
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Next
Comments
Track Changes
Final: Show Markup
Show Markup
Reviewing Pane
Tracking
Accept
Reject
Previous
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Block Authors
Restrict Editing
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with this Agreement or
ection in accordance with
Readability Statistics
Counts
Words 1259
Characters 6792
Paragraphs 27
Sentences 47
Averages
Sentences per Paragraph 3.3
Words per Sentence 23.3
Characters per Word 5.2
Readability
Passive Sentences 17%
Flesch Reading Ease 35.1
Flesch-Kincaid Grade Level 13.8
OK

InterNACHI Home Inspection Agreement

This is an Agreement pertaining to our inspection of the Property at:

_____.

1. You will pay us $_____ for our inspection. You have paid a deposit of $_____.

2. We will perform a visual inspection of the Property and give you a written report identifying the defects we (1) observed and (2) deemed material.

3. We will inspect the Property in accordance with the Standards of Practice of the International Association of Certified Home Inspectors ("InterNACHI") posted at http://www.nachi.org/sop.htm. These standards contain limitations. You understand that InterNACHI is not a party to this Agreement and does not supervise or exercise control over us.

4. We will NOT test for the presence of radon – a colorless, odorless, radioactive gas that may be harmful to humans. We will not test for mold. We will not test for compliance with applicable building codes or for the presence of or for any potential dangers arising from the presence of asbestos, lead paint, formaldehyde, soil contamination, and other environmental hazards or violations. If any portion of any structure we inspect is a log home, log structure or includes log construction, you understand that such structures have unique characteristics that may make it impossible for us to evaluate them. Therefore, the scope of our inspection will not include decay of the interior of logs in log walls, log foundations or roofs, or similar defects.

5. Our inspection and report are for you only. You give us permission to discuss our observations with real estate agents, owners, repair persons, or other interested parties. We are not responsible for use of our report by third parties; third parties who rely on it do so at their own risk and release us (including employees and business entities) from any liability. If you provide the report to a third party who then sues you and/or us, you release us from any liability and agree to pay our costs and legal fees in defending any such action. Our report is not a guarantee or warranty, express or implied, regarding the future use, operability, habitability or suitability of the home/building or its components. We disclaim all warranties.

6. We assume no liability for the cost of repair or replacement of unreported defects or deficiencies either current or in the future. You agree that in all cases our liability shall be limited to liquidated damages in an amount equal to the fee paid. You waive any claim for consequential, exemplary, special or incidental damages or for the loss of the use of the Property. You acknowledge that the liquidated damages are not a penalty, but that we intend them to (i) reflect the fact that actual damages may be difficult and impractical to ascertain; (ii) allocate risk between us; and (iii) enable us to perform the inspection for the agreed upon fee.

7. We do not perform engineering, architectural, plumbing, or any other job function requiring an occupational license. If we hold a valid occupational license, we may inform you of this and you may hire us to perform additional functions. Any agreement for such additional services shall be in writing.

8. If you believe you have a claim against us, you agree to provide us with (1) written notification of adverse conditions within seven days of discovery; and (2) immediate access to the premises. Failure to comply with these conditions releases us from liability.

9. You agree that the exclusive venue for any litigation arising out of this Agreement shall be in the county or district court for Boulder County, Colorado. If you fail to prove any claim against us, you agree to pay all our legal costs, expenses and fees incurred in defending that claim. You agree that any legal action against InterNACHI must be filed in the county or district court for Boulder County, Colorado. Before bringing any such action, you must provide InterNACHI with 30 days' written notice of the nature of the claim. In any action against us or InterNACHI, you waive trial by jury.

10. If a court declares any provision of this Agreement invalid, the remaining provisions remain in effect. This Agreement represents our entire agreement; there are no other terms or promises. No statement or promise by us shall be binding unless in a writing signed by one of our authorized officers. Any modification of this Agreement must be in writing and signed by both parties. This Agreement shall be binding upon and enforceable by the parties and those that acquire their interests in this Agreement. You must file any lawsuit against us within one year from the date of the inspection.

11. You will pay the fee (less any deposit noted above) when we complete the inspection. You agree to pay all costs and attorney's fees incurred in collecting the fee owed to us. If the Client is a corporation, LLC, or similar entity, you personally guarantee payment of the fee.

12. If you request a re-inspection, the re-inspection is subject to the terms of this Agreement.

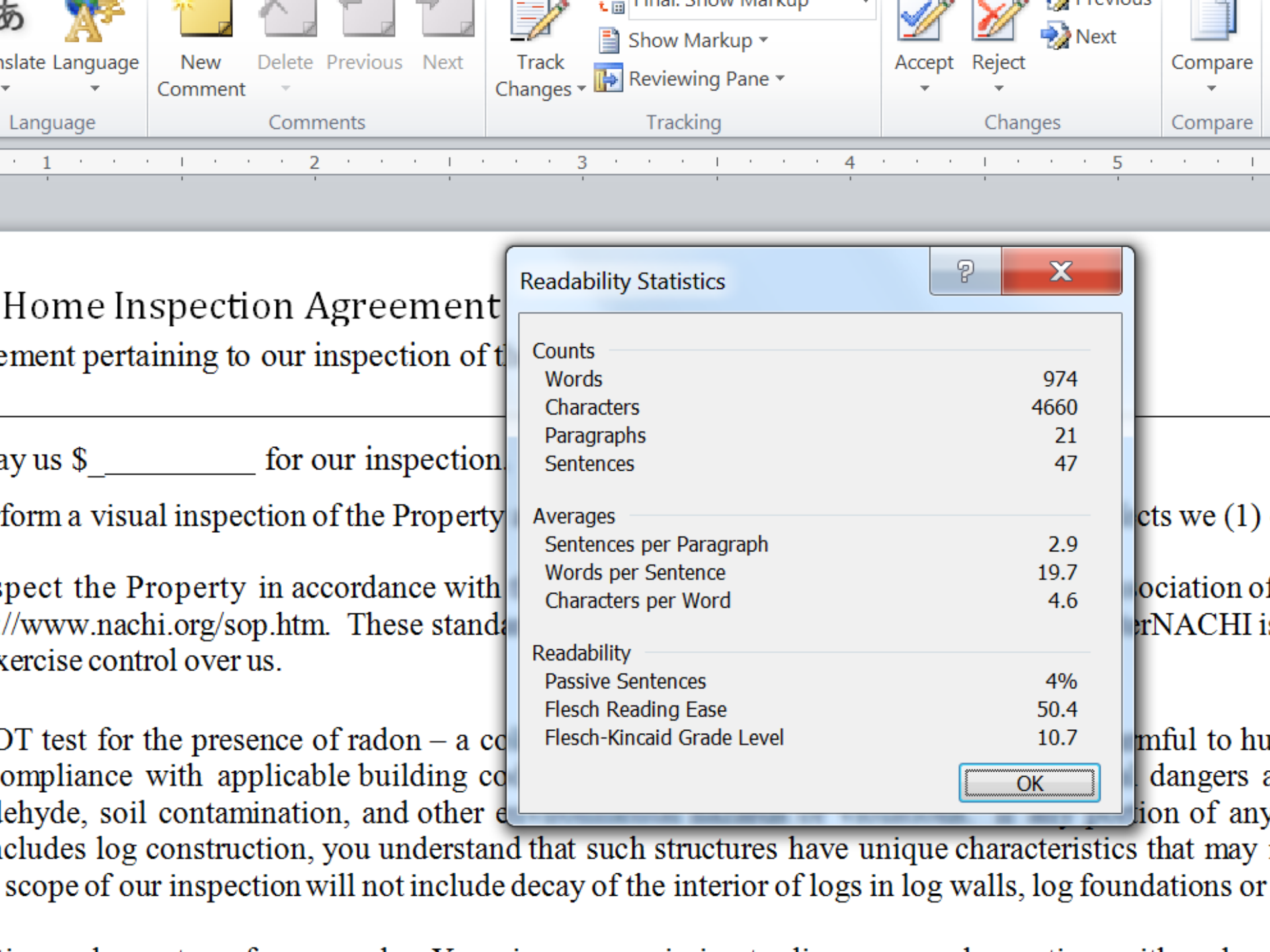
13. You may not assign this Agreement.

14. If a court finds that any term of this Agreement is ambiguous or requires judicial interpretation, the court shall not construe that term against us by reason of the rule that any ambiguity in a document is construed against the party drafting it. You had the opportunity to consult qualified counsel before signing this Agreement.

15. If there is more than one Client, you are signing on behalf of all of them, and you represent that you are authorized to do so.

I HAVE CAREFULLY READ THIS AGREEMENT. I AGREE TO IT AND ACKNOWLEDGE RECEIVING A COPY OF IT.

CLIENT (Date) CLIENT (Date)


Translate
Language
Language
New Comment
Delete
Previous
Next
Comments
Track Changes
Show Markup
Reviewing Pane
Tracking
Accept
Reject
Next
Changes
Compare
Compare
Home Inspection Agreement
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ay us $_____ for our inspection.
form a visual inspection of the Property
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DT test for the presence of radon – a co
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dangers a
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ion of any
ncludes log construction, you understand that such structures have unique characteristics that may
scope of our inspection will not include decay of the interior of logs in log walls, log foundations or
Readability Statistics
Counts
Words 974
Characters 4660
Paragraphs 21
Sentences 47
Averages
Sentences per Paragraph 2.9
Words per Sentence 19.7
Characters per Word 4.6
Readability
Passive Sentences 4%
Flesch Reading Ease 50.4
Flesch-Kincaid Grade Level 10.7
OK

Using MS Word to Reduce Legalese

1. Open MS Word
2. Click “File”
3. Click “Options”
4. Click “Proofing”
5. Check the box “Check grammar with spelling”
6. Check the box, “Show readability statistics”
7. For “writing styles, select “grammar and style”
8. Click “Settings” and check all the boxes under “grammar” and “style”
9. Click “OK”

Materials on Plain English

Legal Writing in Plain English by Bryan A. Garner and

Plain English for Lawyers (5th ed.) by Richard C. Wydick.

U.S. Securities and Exchange Commission Plain English Handbook available for free at https://www.sec.gov/pdf/handbook.pdf

Part 3

Boilerplate in Plain English

Boilerplate

Not Assignable. Neither party may assign this Agreement without the other party's written consent.

Boilerplate

Binding on Successors. This Agreement binds the parties' successors.

(Define "successors" in the definitions if you wish).

Boilerplate

Governing Law. Colorado law governs this Agreement.

Boilerplate

Invalidity. If a court declares any provision in this Agreement invalid, the other provisions remain valid. In that event, the court must modify the invalid provision for the (Seller's) (Buyer's) benefit to the fullest extent the law allows.

Boilerplate

Reading / Review of Counsel. The parties have read this Agreement and had the opportunity to have qualified counsel review it.

Boilerplate

Voluntary Agreement. The parties sign this Agreement voluntarily, free of any duress.

Boilerplate

Venue. The exclusive venue for any action arising out of this Agreement will be the County or District Court of Boulder County, Colorado.

Boilerplate

Venue (in a Lease).

A. The exclusive venue for any eviction or injunction we may seek arising out of this lease will be Arapahoe County, Colorado. The exclusive venue for any other action arising out of this lease will be in Boulder County, Colorado,

B. You may not assert a counterclaim against us in any action for eviction or injunction that we file against you; however, you may file a separate action against us in Boulder County.

Boilerplate

Waiver of Jury. In any action arising out of this Agreement, the parties waive trial by jury.

Boilerplate

Attorney's Fees, Expenses, and Court Costs. In any action arising out of this Agreement, the court must award the prevailing party its actual attorney's fees, litigation expenses, and court costs.

Boilerplate

Construction. If a court determines any provision in this Agreement is ambiguous, the court shall not construe that provision against the party drafting the Agreement. Both parties participated in negotiating this Agreement and had the opportunity to consult counsel before signing it.

Boilerplate

Entire Agreement. This Agreement sets forth the complete understanding of the parties. There are no promises, representations, or terms other than those in this Agreement.

Boilerplate

Modification. The parties may not modify this Agreement, except in a writing signed by the parties.

Boilerplate

Headings. The headings in this Agreement are for convenience; they do not define, limit, or extend the scope of any provision in this Agreement.

Boilerplate

Prompt Performance. Time is of the essence in all provisions in this Agreement.

Boilerplate

Representations. The parties represent that they have the ability and intent to comply with every provision in this Agreement, that they are solvent, and that they are not aware of any matter that might cause them to be unable to perform their obligations under this Agreement.

Boilerplate

Waiver. Failure to invoke any right in this Agreement by either party is not a waiver of that right.

Boilerplate

Events Beyond A Party's Control. No party will be liable for failing to perform any obligation under this Agreement if unforeseeable events beyond that party's control prevent performance.

Boilerplate

Disputes.

A. Required Notice. If you believe you have a claim against us arising out of this Agreement, you must provide us with a written notice of your claim in sufficient detail and with sufficient supporting documents that we can intelligently evaluate it. Failure to provide this notice bars you from filing suit.

B. Mediation. If you provide the notice required by subparagraph A and we are unable to resolve the matter, you must participate in non-binding mediation before filing suit. The mediator will be Steve Smith of XYZ Dispute Resolution in Boulder. Each party will pay ½ of the mediator's fees. The mediation may not exceed four hours unless both parties consent.

Boilerplate

Notices.

A. Where this Agreement requires or permits one party to give notice to the other, the party giving notice must send the notice by email. Smith's email address is president@smithcorporation.com. Jones' email is legal@jonesllc.com

B. Notice sent by email is effective on the date sent.

C. If a party's email address changes, that party must promptly notify the other party of its new email address.

Boilerplate

Authority. If X is a corporation, LLC, or similar entity, the person signing this Agreement for X represents that he has authority to do so.

Boilerplate

Personal Guaranty. In consideration of X's willingness to enter into this Agreement, I personally and unconditionally guarantee Y's prompt performance of all obligations in this Agreement. I agree I am bound by all provisions in the Agreement and any modifications to it. X may enforce this guarantee without first resorting to other remedies.

_____

GUARANTOR (Date)

Part 4

CONTRACT CHECKLIST

Contract Checklist

Title
Introduction
Parties
- Exact Legal Name
- DBA
- Short name to be used in the contract, e.g., XYZ Corporation (“XYZ”)
- State of Incorporation can be helpful, but not essential

Effective Date (may be different than date signed)
Definitions
Representations
Duties of Each Party
Rights of Each Party
Price
Quantities
Delivery Date
Which Party Pays for Delivery?
Risk of Loss
Time of Payment
Method of Payment, e.g., check, certified check, wire transfer, etc.
Term of Agreement (Perpetual, fixed term)

Contract Checklist

Termination of Agreement
- For cause
- Without cause
- Notice of Termination Required Time Period

Survival of Provisions After Termination (confidentiality, noncompetition, nonsolicitation)
Security
Interest
- Rate
- How compounded

Late Payment Fees
Insurance
- Types and levels of coverage
- Providing proof of coverage
- Requiring notice if coverage is cancelled

Exclusivity (franchise agreements, distributorship agreements, etc.)
Risk of Loss
Conditions Precedent
Conditions Subsequent
Statutorily Required Language (Example: Equine Liability Statute)
Indemnification (one way or mutual?)
Independent Contractor Provisions
Notice and Opportunity to Cure
Warranties
Disclaimer of Warranties

Contract Checklist

Forum Selection / Venue
Governing Law
Dispute Resolution
- Arbitration
- Mediation
- Limits on length of mediation or arbitration
- Who pays for arbitration or mediation?
- Who will be the arbitrator or mediator?

Waiver of Jury
Attorney's Fees, Expense, and Costs

Limitations on Liability (State that the limitation is reasonable and enables the party to provide the good or service at the agreed price). *Core-Mark Midcontinent, Inc. v. Sonitrol Corp*., 300 P.3d 963 (Colo. App. 2012)

Liquidated Damages
Non-Assignability
Default
Taxes
- Property taxes
- Sales taxes
- Income taxes
- Allocation of purchase price (IRS Form 8594)

Confidentiality
Personal Guaranty

Contract Checklist

- Invalidity / Severability
- Reading / Review of Counsel
- Voluntary Agreement
- Integration / Merger Clause
- Modification
- Rules of Construction
- Authority to Bind the Business
- Remedies
  - Damages
  - Specific performance
  - Injunctive relief
- Signatures
  - Counterparts
  - Fax / Electronic Signature
  - Duplicate or Triplicate Originals
- Protection of Intellectual Property
  - Confidentiality
  - Ownership of IP / Works for Hire
  - Noncompetition Agreements (magic words from Colorado statute)
  - Nonsolicitation Agreements
- Exhibits / Attachments
  - Incorporation of Documents via Hyperlinks
- Rights and Obligations of Successors
- Time is of the Essence
- Renewal
  - Automatic Renewal
  - Option to Renew / Renewal Terms
- No Waiver
- Notices
  - Method of notice
  - Address or email address
  - When notice effective

A 12-Step Program For Lawyers Addicted to Legalese

1. I admitted I was addicted to verbose writing filled with the passive voice, redundancies, negatives, jargon, unnecessary footnotes, big words, and phrases from other languages such as *force majeure* and *inter alia* – that I was a better writer before I began law school and that my professional life had become unmanageable.

2. I came to believe that a Power greater than myself *might* be able to restore me to sanity. Currently, that Power is frozen margaritas, but I'm keeping an open mind.

3. I made a decision to turn my life over to the care of God *as I understand him.* I currently understand God to be a universal flowing energy that likes the music of Jerry Jeff Walker, gigantic dogs, and frozen margaritas.

4. I made a searching and fearless moral inventory of myself.

5. I admitted to God, to myself, and to another human being the exact nature of my one flaw – my addiction to Legalese.

6. I was entirely ready to have God help me write in plain English.

A 12-Step Program For Lawyers Addicted to Legalese

7. I humbly asked God to help rid me of my addiction to Legalese.

8. I made a list of all persons I had *allegedly* harmed through my poor legal writing, and became *theoretically willing* to make amends to them all.

9. I made direct amends to such people wherever possible, except when to do so would injure them or others.

10. I continued to take personal inventory and in the *highly unlikely* event I was wrong I promptly admitted it.

11. Sought through frozen margaritas and meditation to improve my conscious contact with God, *as I understood Him*, praying only for knowledge of His will for me and the power to carry that out.

12. Having had a spiritual awakening as the result of these Steps, I tried to carry this message to other lawyers, and to practice these principles in all my affairs.

CONTRACT ESSENTIALS: BOILERPLATE LANGUAGE

Brooke Ashton

Mountain West Law

(Fetzer Simonsen Booth Jenkins)

brooke@mountainwestlaw.com

801-328-0266

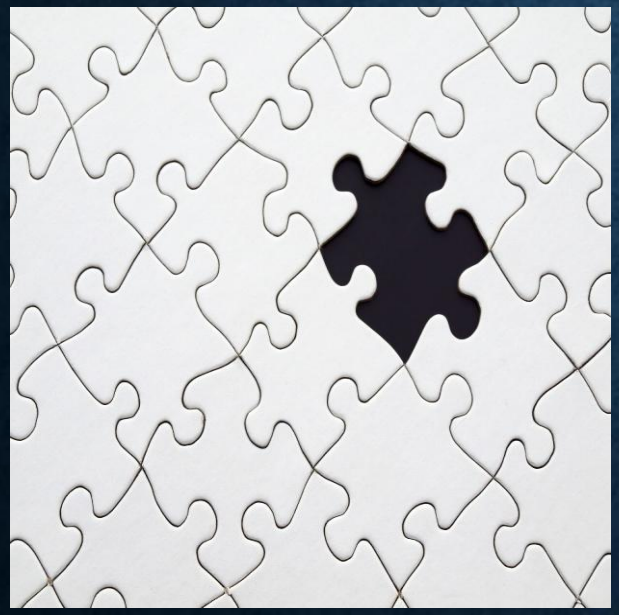
BOILERPLATE: THEN AND NOW

- A term from the 1900 printing world referring to printing plates of text for widespread reproduction such as advertisements or syndicated columns. The plates were created and distributed to newspapers around the United States providing "ready to print" stories and ads.

- A term used to describe standard contract language, clauses, parts or entire contracts of today's contract world.

WHEN ARE BOILERPLATE CLAUSES MOST NOTICEABLE?

When they are missing!



Boilerplate language makes up the provisions that determine how disputes are resolved and how a court enforces a contract. A substantially share of contract litigation involves disputes over the interpretation of boilerplate language

STANDARD BOILERPLATE CLAUSES

- Jurisdiction
- Choice of Law
- Assignability
- Costs and Attorney Fees
- Severability
- Amending

STANDARD *NOT* STAGNANT

Interpretation of boilerplate language and clauses evolves over time.

Some boilerplate language is contract specific. For example, a "time is of the essence" clause is in appropriate for a contract where timeliness is not required and can not be assured.

When using boilerplate language keep in mind the specifics of the transaction and the intent of the parties. 7

Boilerplate Blunders

- The Georgia Court of Appeals relies on a contract's boilerplate severability clause to sever the illegal noncompete clause while holding that the remainder of the contract will remain intact despite the parties clear intention to include the noncompete provision as part of the consideration. *Circle Appliance Leashing v. Appliance Warehouse, Inc.*, 425 S.E.2d 339 (1992)