



*"The Perfect Fit for
Your Business"™*

ROBERT H. CARPENTER, JR.

ATTORNEY AT LAW
5912 CASTLEBAR LANE
PLANO, TEXAS 75093

—
TELEPHONE 972.473.4834

—
email: Bob.Carpenter@CarpenterLaw.net

—
www.CarpenterLaw.net

May 2005

C³ = The Right Word

The difference between the almost right word & the right word is really a large matter—it's the difference between the lightning bug and the lightning.¹

C³ – “*be clear, be concise, be complete*” – is a simple set of drafting rules that can improve any written document; but these rules are particularly appropriate for legal agreements.² Legal agreements, or contracts, have long suffered from obfuscation, obtuseness and omission, or O³, the converse of C³. A clear, concise and complete contract best memorializes the parties’ agreements and provides well-defined rules of behavior to govern their relationship.

A commercial contract is, simply put, *the basis upon which the parties have agreed to do business*. But, for the parties to fulfill their mutual obligations (business’s “two-way street”), they must know what these obligations are.

Rule #1 – Be Clear

Lawyers have long purveyed their legalese – the distinguishing mark of the lawyer’s hand – by sprinkling “whereas,” “therefore” and sundry other traditional words throughout their writings. Now, lawyers and their clients are recognizing the value of writing that is simpler and more understandable.

In the last 20 years insurers have introduced “easy reading” policy language to clarify insuring

¹ Letter from Samuel L. Clemens (Mark Twain) to George Bainton (Oct. 15, 1888), <http://www.twainquotes.com/Lightning.html>. Jimmy Buffet reprises this famous Mark Twain witticism:

*But the right word at the right time/May get me a little hug
That's the difference between lightning/And a harmless lightening bug*

JIMMY BUFFETT & ANN LEE, *Fruitcakes*, on FRUITCAKES (MCA Records 1994).

² “Clear, concise and complete” reprises commentary on Julius Caesar’s writing style in *Caesar in Gallia*: “terse, straightforward and unadorned.”

agreements. This example from a property and casualty insurance policy demonstrates how helpful such clarity can be:

We do not cover loss caused by the destruction of property by order of governmental authority. But we do cover loss caused by acts of destruction ordered by governmental authority taken at the time of a fire to prevent its spread, if the fire would be covered under this policy.

Even commercial insurance policies have implemented the “easy reading” principle. A recent directors and officers’ liability policy insures with the following simplicity:

The Company will pay on behalf of an insured all loss that an insured becomes legally obligated to pay on account of any claim first made against an insured during the policy period for a wrongful act committed, attempted, or allegedly committed or attempted, before or during the policy period by them or by any natural person for whose wrongful act an insured is legally responsible.

These “plain English” provisions demonstrate the advantage of clarity – everyone can better understand what to expect from their relationship. This better understanding decreases disagreements during the relationship and improves its efficiency.

There are, of course, other elements to Rule #1; among them are: Use proper English; the wrong choice of words and misplaced modifiers are confusing. Use the same word or expression throughout a contract when the same idea is presented; consistency rather than elegant variation decreases the chances that a court will attach a different interpretation to the same idea because it is expressed in different ways.

Rule #2 – Be Concise

Why use two words when one will do? “Be concise.” means state much in a few words. Superfluous words or phrases create confusion. Often an example attempts to clarify poor draftsmanship, or to obfuscate, and adds unnecessary length. For instance, the following provision from a merger agreement does nothing to demonstrate how one might determine “an appropriate adjustment” in any, but the most marginal, situation:

All references herein to closing prices of publicly traded securities (or figures derived therefrom) shall be subject to appropriate adjustment for any stock dividend, stock split or combination, recapitalization or similar event. By way of example, if the ex-dividend date for a 10% stock dividend falls on the fifth day of the ten Trading Day period over which the Average Closing Price is being calculated, then the Closing Price for each of the first through and including the fourth Trading Days of such ten-day period shall be divided by 1.1.

And, when a dispute does arise and an example has been given, the result can be an argument over whether the example or the general terms should govern; and the choice may yield different results.³

Rule #3 – Be Complete

Finally, being complete may be the single most important objective for a legal agreement. Parties memorializing the basis upon which they agree to do business should understand how their relationship will work in all but the most marginal situations.

³ When clauses like “appropriate adjustment” appear, watch out for boilerplate miscellaneous provisions, usually near the end of a contract and often overlooked, that give one party the right to interpret such terms in its sole discretion or “in good faith.”

In contracts where the advantages to all parties depend in large measure on the long-term nature of their relationship, their agreement should address what happens when either party wants to terminate prior to the planned date. Parties often have differing objectives in such an event. Because neither party wants to address this complex and contentious situation at the beginning of their relationship, they often seek a “diplomatic” solution – they agree on a mechanism that avoids the matter and leaves it to resolution after a dispute has arisen. Here is an example of such an attempt:

If fifty percent or more of the stock or assets of Customer are acquired by another person or entity, whether by merger, reorganization, sale, transfer, or other similar transaction, then Company and Customer will negotiate in good faith the terms and conditions upon which this Agreement may be modified to accommodate such transaction. If the parties are unable to agree upon such modification, either party upon written notice to the other may terminate this Agreement upon the consummation of such acquisition or on a mutually agreeable date thereafter.

This provision has created, after the fact of an acquisition, more than one dispute about what it means. It is not only incomplete, but also unclear. (A contract provision that violates one rule often violates one or both of the others and compounds the problem.) The parties to this agreement, in an early attempt to pass over an issue that was difficult to discuss and to resolve, bring to themselves certain and painful disaster.

Getting a “Big Hug”

Parties who enter into a legal agreement that observes these three simple drafting rules will benefit from the certainty in their relationship.

Except at the margins—that is, those cases that just cannot be reasonably contemplated in advance of their occurrence—all parties will know how to behave as they conduct business with each other.

The “right word” and a purposefully constructed contract will certainly earn the parties’ appreciation, and maybe even a “big hug.”

© 2005, 2007 Robert H. Carpenter, Jr.

This client newsletter is for informational purposes only, and is not intended to be legal advice. Transmission of this newsletter is not intended to create, and its receipt does not establish, an attorney-client relationship. Legal advice of any nature should be sought from legal counsel.

IRS CIRCULAR 230 DISCLOSURE: Notice regarding federal tax matters: Internal Revenue Service Circular 230 requires us to state herein that any federal tax advice set forth in this communication (1) is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties that may be imposed by federal tax laws, and (2) cannot be used in promoting, marketing, or recommending to another person any transaction or matter addressed herein.

OTHER RECENT CLIENT NEWSLETTERS

“Secrets of the Code”, the April 2005 newsletter explores the nature of source code and the risks inherent in its distribution in a proprietary business model.

The March 2005 newsletter presented the “dark side” of arbitration and suggested a mediation alternative that provides a viable alternative dispute resolution (ADR) mechanism that preserves the elements that distinguish the U.S. legal system.

“The Price Escalator Clause: A *Masked Bandit?*”, the February 2005 newsletter, discusses the behavior of pricing indices and how they may overstate inflation and, thus, vendor cost increases.

ePayments and how they challenge the new regulatory environment is the topic of the January 2005 newsletter “ePayments Put the Paper Check ‘Out to Pasture’.”

Client newsletters are available at <http://www.carpenterlaw.net/newsletters/archivednewsletters.html>.