

# Readable contracts (Part 1)

BY WAYNE SCHIESS

Here I report on a study of contract language and offer comments and recommendations. The study is *Poor Writing, Not Specialized Concepts, Drives Processing Difficulty in Legal Language*.<sup>1</sup>

The three authors (two linguists and a lawyer/linguist) used corpus analysis to discover why contract language “remain[s] notoriously inaccessible” to nonlawyers. They asked which of these two causes could account for the difficulty:

- Is it the specialized and complex content?
- Is it the form of expression — the way contracts are written?

The authors concluded that the cause was the form of expression.

They compared a corpus (think “database”) of contracts with a corpus of standard English — newspapers, magazines, blogs, webpages, and TV and movie scripts. The two corpora<sup>2</sup> contained more than 10 million words, and the authors assessed five variables: frequency of all-caps text, frequency of passive voice, frequency of center-embedded sentence structure, frequency of everyday words, and frequency of words with higher-frequency synonyms (fancy words that could’ve been simpler).

The authors found that “all of the metrics we looked at were prevalent to a greater degree in contracts than in the standard English corpus.”<sup>3</sup> Let’s start with the first two variables: contracts use all-caps text and passive voice more than everyday writing does.

## ALL-CAPS TEXT

I’m not surprised that contracts use more all-caps text than other writing, but the question is, why?

Three possible reasons and a recommendation: First, all caps are a vestige of the typewriter, which couldn’t produce boldface or italics,

so some form contracts retain all caps because they’ve never been updated. Second, all caps really do stand out if the rest of the contract is in regular type. Third, some lawyers mistakenly assume that statutes require all caps for conspicuousness; but even though some statutes mention all caps, they almost always give other options.<sup>4</sup>

**Recommendation:** Convert all-caps text to boldface — and maybe even increase the type size. Blocks of all-caps text are difficult to read<sup>5</sup> and are nowadays perceived as shouting.

## PASSIVE VOICE

Why do contracts have more passive voice than ordinary writing? Two possible reasons: Passive voice is preserved because “it’s in the form.” Many contract drafters are wary of changing form language, especially if that form was the basis for numerous contracts that have closed and been performed without a glitch.

And passive voice just sounds more formal — more lawyerly. But if that’s a source of excessive passive voice, we can let it go. Consider these examples of passive voice that are clearer in the active:

1. Permits must be secured before work commences.
  - By whom? Better in active voice:
    - 1a. The owner or contractor must secure permits before work commences.
    2. The Purchase Price shall be paid by wire transfer of immediately available funds.
      - Who pays? Certainly, the contract earlier stated the buyer’s obligation to pay the Purchase Price, but I still prefer this active-voice version:

2a. The Buyer shall [must?] pay the Purchase Price by wire transfer of immediately available funds.

**Recommendation:** Unless you have a legitimate reason for using the passive voice (and legitimate reasons do exist<sup>6</sup>), your contract prose will be clearer in the active voice — especially for obligations.

### THREE MORE FINDINGS — WITH ADVICE

In the study comparing contract language with everyday written English, the authors offered three more findings: Contract language has higher frequencies of:

- center-embedded sentence structure
- words used rarely in everyday English
- words with higher-frequency synonyms (fancy words that could've been simpler)<sup>7</sup>

“Center-embedding” means inserting a phrase or clause within another phrase or clause. Here’s an example from the authors:

In the event that any payment or benefit by the Company (all such payments and benefits, including the payments and benefits under Section 3(a) hereof, being hereinafter referred to as the “Total Payments”), would be subject to excise tax, then the cash severance payments shall be reduced.<sup>8</sup>

In a sentence of 47 words, placing a clause of 22 words in the middle makes for difficult reading. An easy fix is to place the embedded definition clause in a separate sentence:

In the event that any payment or benefit by the Company would be subject to excise tax, then the cash severance payments shall be reduced. All such payments and benefits, including the payments and benefits under Section 3(a) hereof, are hereinafter referred to as the “Total Payments.”

[Note that further editing is needed: *in the event that = if; shall be = are* in this instance; no *hereof*; probably no *hereinafter referred to as*.]

Drafters would do their readers a favor by seriously cutting down on center-embedding.

Now we approach a thornier topic. Let’s take the second and third findings together. Even without this study, any lawyer and anyone else who has read a contract could’ve told you that contracts use words that are rare in everyday English as well as words that have simpler or more readable synonyms. But is that a problem?

On this topic, I won’t offer recommendations for using shorter or simpler words in every contract. Yes, doing so could make contracts more readable, but I’ll propose three reasons that *always* doing so might not be ideal.

#### 1. The studied contracts were commercial contracts entered by sophisticated parties represented by counsel.

In my review of the contracts in the corpus, I didn’t see a single consumer contract: apartment lease, credit-card agreement, software-user agreement, car-insurance policy.

So the studied contracts don’t necessarily need to be read and understood by someone without legal training. For the contracts in the corpus, those who need to read and understand the language are lawyers, and those lawyers — we hope — can explain the contract language to those who need to understand it.

#### 2. Contracts contain some legal terms that either cannot or should not be simplified.

Yes, contracts use words and phrases unique to legal language or with a different meaning from the everyday-English meaning. But replacing each of those words and phrases to enhance readability could introduce risk, or it could require the drafter to use even more words to explain what the legal term means.

Still, the number of terms of art or unique legal terms is fairly small — smaller than some legal drafters claim. In one study, only 3% of the words found in a standard real-estate-purchase agreement had ever been construed or defined by a court.<sup>9</sup> So even if we might choose not to replace every archaic, long, or fancy legal word, we can certainly drop or replace some.

#### 3. Revising lengthy, complex contracts for readability might not be cost-effective.

Given that the commercial contracts in the study were prepared by, were reviewed by, and could (I assume) be explained by transactional lawyers, how would we justify the cost of revising them? We’d need to replace rare words with everyday words and replace or explain legal terms. Who’s going to pay for it?

These contracts were certainly based on forms or precedents from previous transactions, a practice that saves time and money. Add to that fact the reality that very few contracts result in “disputes” (as high as 9%, according to one commercial source<sup>10</sup>) and that even fewer end up in litigation (fewer than 0.1%, by one estimate<sup>11</sup>). So the incentives to revise for readability are small.

But remember: consumer contracts are a different matter altogether.

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## ENDNOTES

1. Martinez, Mollica & Gibson, *Poor Writing, Not Specialized Concepts, Drives Processing Difficulty in Legal Language*, 224 *Cognition* 105070 (2022) <<https://doi.org/10.1016/j.cognition.2022.105070>> [<https://perma.cc/XBW7-25E7>] (all websites in the article were accessed on May 6, 2024).
2. Yes, that's the plural of "corpus," which I had to look up.
3. *Poor Writing*, § 2.2.
4. See, e.g., *Tex Business Orgs Code Ann* § 1.005, which defines conspicuousness as follows: "Required information in a document is conspicuous if the font used for the information is capitalized, boldfaced, italicized, or underlined or is larger or of a different color than the remainder of the document."
5. Butterick, *all caps*, *Butterick's Practical Typography* <<https://practicaltypography.com/all-caps.html>> [<https://perma.cc/Z75X-ZD8N>].
6. Adams, *A Manual of Style for Contract Drafting* §§ 3.23--26, pp 53-54 (5th ed 2023); Kimble, *Minimize Prepositional Phrases. Question Every of (Part 2)*, 102 *Mich B J* 40 (Oct 2023).
7. *Poor Writing*, § 2.2.
8. *Id.* at § 1.
9. Barr, Hathaway, Omichinski & Pratt, *Legalese and the Myth of Case Precedent*, 64 *Mich B J* 1136, 1137 (Oct 1985).
10. *Contract Assistant, Not Good: Average of 9 Percent of Contracts Result in Dispute* <<https://contractassistant.com/not-good-9-percent-of-contracts-result-in-dispute/>> [<https://perma.cc/L4DX-KAB9>].
11. *Id.*



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