Transactional Skills Class – 2016 First Day Assignment
Professor Hession

Welcome to Transactional Skills and Professionalism Lab (Course 1013). Readings are in Scott J. Burnham, *Drafting and Analyzing Contracts*, 3 Ed. By Professor Scott J. Burnham (“Burnham”).

Your assignments for the first day of class are as follows:

1. Read Part III of Burnham (pp. 317-366)(now available at the Bookstore and may also be available on line), How to Read and Analyze a Contract as follows: carefully read pp. 317-300 (Introduction and First Pass) and pp. 354-360 (Fifth Pass and Conclusion). Skim the section headings for pp. 330-354). Read in detail the analysis of the Sample Contract at pp. 361-366.

2. Read the following Article: “How to Draft a Bad Contract”, Mark Cohen, J.D., LLM, provided with permission.


As part of your twice-weekly class period you will each have the opportunity to address the class and present a brief quote, story or historical perspective about Abraham Lincoln (limited two (2) minutes). The date of your presentation will be pre-assigned so you will know in advance when you need to be prepared. I will take my turn on the first day of class.

***Please feel free to choose your own place to sit in the classroom. However, I want you to all be as close to the front of the room as possible. So please fill up the first three rows closest to the front.

***My email address is hessiond@gonzaga.edu and my personal cell number is (509) 844-2655
Introduction

Many experts have written on how to draft a good contract.\(^1\) To my knowledge no legal scholar has approached the issue from the opposite end by explaining how to draft a bad contract. I do so now.

Why should lawyers draft bad contracts? Self-interest. A good contract clearly sets forth the rights and duties of the parties, defines key terms, addresses all issues that might arise, contains no ambiguities or inconsistencies, and employs plain English so non-lawyers can easily understand it. In short, a good contract reduces the risk of misunderstandings and costly (but profitable) litigation. Good contracts also mean clients need not rely so heavily on lawyers to explain them. Good contracts mean less work for lawyers.

The techniques a lawyer may use to draft a bad contract are limited only by the lawyer’s creativity. Still, in my 31 years of practice I have found a number of proven methods to draft a bad contract, and this article summarizes them. This will not be the final word on the subject; I hope only to inspire further academic discussion.

How to Draft a Bad Contract

1. **The Caption or Title.** A bad contract has no caption at the top of the first page informing the reader of 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.

2. **The Introduction.** A bad contract begins with a verbose, formal introduction. Why? Because that’s how they did in England four hundred 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”).

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' horse "Silver."

3. The Recitals. Historically, contracts included recitals to clarify intent, add to consideration, and/or bolster the importance of conditions in the contract.\(^2\) 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 owns a horse known as "Silver";

WHEREAS, Smith desires to purchase said horse;

WHEREAS, Jones is willing to sell "Silver" to Smith on the terms set forth herein; and,

WHEREAS, Smith is willing to purchase "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:

Always use the "WHEREAS / NOW, THEREFORE" format for recitals. Do NOT replace the recitals with a concise summary such as this:

Background

X and Y purchased a horse on January 1, 2012, for $50,000.00. X and Y each paid $25,000.00 of the purchase price and considered themselves joint owners of the horse. Differences arose between X and Y concerning the horse. X and Y have agreed to resolve their differences on the terms set forth in this Agreement.

You can also increase the badness of a contract by including definitions or substantive provisions in the recitals. By including substantive provisions in the recitals you create an opportunity to later research and brief the issue of whether the recitals are part of the enforceable agreement.\(^3\)

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\(^3\) See, for example, McKinnon v. Baker, 370 N.W.2d 492 (Neb. 1985) (Recitals are "generally background statements and do not ordinarily form any part of the real agreement.")
4. Use WITNESSETH. Use “WITNESSETH” to separate the introduction from the contractual terms.\(^4\) Why? Because that’s how they did it in England four hundred years ago. I recommend a bold font, centering it, a space between each letter, and underscoring each letter like this:

\begin{center}
\textbf{WITNESSETH}
\end{center}

If you want, consider using the Olde English Text font for this:

\begin{center}
\textit{WITNESSETH}
\end{center}

5. Definitions. A good contract defines technical words or terms of art so all parties share a common understanding of them. A bad contract avoids this. 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.

6. Omit the Consideration. An agreement not supported by consideration is invalid and unenforceable.\(^5\) A truly bad contract omits any discussion of consideration. If you must include language concerning consideration, be vague by using something like “for good and valuable consideration, the receipt of which is hereby acknowledged.” Do NOT mention issues such as price, quantity, quality, time of performance, and time of payment.

7. Use Multiple Terms to Refer to the Same Thing. 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” or “this document” rather than “Agreement.” This will reduce your contract’s readability and may even create confusion, thus improving the badness of your contract.

\(^4\) Some prefer to insert WITNESSETH between the introduction and recitals. Others suggest it is more appropriate after the recitals.

8. Do Not Use 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 read 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(s) addressed in that paragraph. For instance, you might use “Attorneys’ Fees” as a heading, but include a waiver of jury trial in that paragraph. This may create an issue as to whether the jury waiver is enforceable.\(^6\)

9. Include Unrelated Items in the Same Paragraph. This is one of my favorite methods of drafting a bad contract. For example, in a paragraph stating that neither party may assign its interest in the contract, include a provision that requires an award of attorney’s fees to the prevailing party in any litigation. Do NOT create a separate paragraph with its own heading of “Attorneys’ Fees” to address the issue of fees.

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 minutes in court as 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 page seventeen, about mid-way through the paragraph, right after the semi-colon.”

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).

11. Do Not Specify the Date, Time, and Place of Performance. Remember, the goal of a bad contract is to confuse so that disputes arise and lawyers make money. Therefore, do NOT specify the date, time and place of performance.

Wrong: X will deliver the horse to Y at Y’s stable at 574 Ridge Road, Nederland, Colorado, by 5:00 p.m. on August 1, 2015, at X’s expense.

Right: X will deliver the horse to Y.

12. Do Not Address Attorneys’ 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.\(^7\) This is why good contracts include an attorney’s fees provision. A bad contract does not. Remember, even without an attorneys’ fees provision, you can always seek attorney’s fees if the opposing party’s position lacked substantial justification.\(^8\) Because the opposing party’s position always lacks substantial justification, an attorney’s fees provision is unnecessary.

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\(^7\) *Waters v. District Court*, 935 P.2d 981, 990 (Colo. 1997)

\(^8\) See, § 13-17-102, C.R.S.
13. Do Not Address Venue. Another way to draft a bad contract is to fail 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.9 And Durango is really beautiful. Maybe you could get in some skiing or swing by the Telluride Jazz Festival.

14. Do Not Include a Waiver of the Right to a Jury Trial. Be honest. One reason many of us chose law school is because we grew up watching Perry Mason trap witnesses on cross-examination. And there is nothing juries like more than being forced to listen to two profitable businesses fight over money. Jurors especially love hearing expert testimony from accountants and economists. Jurors enjoy math – that’s why so many are actuaries and statisticians. 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.

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. Good contracts include a merger clause to prevent parties from later alleging there were other promises or representations not included in the written contract. A bad contract includes no merger clause. This leaves the door open for disputes about promises or representations allegedly made that are not set forth in the contract. You should be able to bill at least one hour for refreshing your memory of the Parol Evidence Rule and another hour for preparing a brief explaining that the rule does not apply because the contract was not an integrated contract.10

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 that 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

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9 Mapquest estimates 6 hours and 32 minutes each way under ideal conditions if you travel via Highway 160. Thirteen hours at my hourly rate of $265 per hour is $3,445.00. That’s $3,445.00 for driving through some of the most scenic country in the United States while listening to great rock ‘n roll.
10 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. Tripp v. Cotter Corp., 701 P.2d 124 (Colo. App. 1985) (Emphasis added).
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.

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 set forth in this Agreement.

The first merger clause contains 174 words. The second contains 24 words. Simple arithmetic proves the former is 142 words better than the latter.

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 a writing signed by all parties. 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.

17. **Do Not Address Dispute Resolution.** A good contract specifies the method the parties will use to resolve disputes, e.g., mediation, arbitration, 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. Do NOT use a clause such as this that addresses the potential 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 ½ of the costs of mediation. 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 agreed to by the parties, the party sending the demand may seek an order compelling mediation, and in that event the party that did not respond to the demand or participate in the scheduled mediation shall pay the actual attorney’s fees and costs incurred by the party seeking an order to compel mediation.
18. **Include a Cockamamie Scheme to Select an Arbitrator or Mediator.** One creative way to draft a bad contract is to include a cockamamie scheme to select a mediator or arbitrator. For example, rather than agreeing on the mediator or arbitrator in advance and specifying that 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.

This is an excellent way to improve the badness of your contract. First, it assumes the arbitrators the parties select will be willing to meet and designate an arbitrator without charge. Second, it assumes the two arbitrators the parties select will be able to agree on who will serve as the arbitrator, but fails to address what will happen if they cannot agree.

19. **Include Inconsistent Provisions.** This is one of my favorites. To make your contract even more bad than it already is, 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 1/2 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’s 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.

You can see the beauty of this. The parties are now confused about whether they must arbitrate or are free to file suit.

20. **Do Not Specify What Jurisdiction’s Laws Will Govern.** Many contracts involve parties living or operating in different jurisdictions or that operate in several jurisdictions. In drafting a bad contract it is important to not address what jurisdiction’s laws will govern the contract. This will provide an opportunity to research and brief the doctrine of *lex loci contractus*, the doctrine 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. First, you get to use Latin. Second, 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.

21. Be Confusing About Who the Parties Are. One way to make your contract more bad is to confuse 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 “Jones” (owner of the LLC).

22. Cut and Paste From the Internet. I did a Google search for “sample contract for sale of goods,” and got 40,800,000 results. Law practice today can be so hectic that we sometimes take shortcuts. We find a template we like and use it over and over. One way I see lawyers creating bad contracts is by copying provisions from the Internet. Here’s one I see a lot:

In the any dispute arising out of this Agreement, the parties will submit to binding Arbitration using the rules of the American Arbitration Association.

This makes your contract more bad for several reasons. First, it does not specify that the parties must use the AAA, it states only that they must use the AAA’s rules. Second, it does not specify which AAA rules will apply; the AAA has many sets of rules for various types of disputes. Third, 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. Finally, 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.

23. 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 is doing business with and the contract 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 consent of the other party.

24. 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, in the provision regarding non-payment and late payment, etc. 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.\textsuperscript{11} Do NOT use one simple provision such as this:

In any litigation arising out of this Agreement, the prevailing party shall be entitled to its actual attorney's fees, expenses, and costs.

25. Use Legalese.\textsuperscript{12} You slog 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? A detailed explanation of how to use Legalese to draft bad contracts is beyond this article's scope, but here are a few tips on how to make your contract more bad by using Legalese:

a. 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 contained in this document. We have not authorized anyone to provide you with different information. (22 words).

b. 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.

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).

c. 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:

\textsuperscript{11} Think about it from the client's perspective. If you charge $1,000.00 for a 5,000 word contract, the client pays only twenty cents per word. If your charge $1,000.00 for a 2,500 word contract the client pays a whopping forty cents per word!

\textsuperscript{12} Some examples in this section are taken from A Plain English Handbook, published by the U.S. Securities and Exchange Commission. You may download this at no cost at:
http://www.cohenslaw.com/areasofpractice/plainenglishconsulting.html
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.

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 http://www.nachi.org/sop.htm. You understand that these standards contain limitations.

d. Use Superfluous Words. Never use one word when several will do. More words mean longer contracts, and longer contracts justify higher fees. Long contracts also impress other lawyers. Be honest. When another lawyer sends you a fifty page residential lease you feel kind of bad that your standard residential lease is only nine pages long. Is it possible you left out 41 pages of important legal provisions that would better protect your client? That woman must be a really good lawyer.

Here are some examples of simple words that can be replaced with superfluous words:

<table>
<thead>
<tr>
<th>Simple</th>
<th>Superfluous</th>
</tr>
</thead>
<tbody>
<tr>
<td>If</td>
<td>In the event that</td>
</tr>
<tr>
<td>Although</td>
<td>Despite the fact that</td>
</tr>
<tr>
<td>Because</td>
<td>Owing to the fact that</td>
</tr>
</tbody>
</table>

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

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

e. Use Unnecessary, Legalistic Words. “Aforementioned” and “hereinafter” are always good, but you should also strive to incorporate as much Latin as possible in drafting a bad contract. I took four years of high school Latin and all I remember is “Quantum marmota monax
Fortunately, the Internet offers abundant resources to help you discover Latin phrases you may incorporate into your contracts.  

If you can’t work Latin into a contract, at least try to get a few foreign phrases in. “Force majeure” is a good one. The parties are more likely to understand that than sometime like “Extraordinary Events” or “Circumstances Beyond the Parties’ Control.”

26. Signatures. 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 47 page monstrosity they are signing (with W I T N E S S E T H emblazoned across the first page) is an important legal document rather than an unimportant 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 this 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)

Suzi Smith          (Date)

Conclusion

Good contracts pose a serious threat to the legal profession. Fortunately, most students emerge from law school with a basic understanding of how to draft a bad contract. After all, they’ve been reading Legalese for three years and are petrified that if they omit a word litigation will result. However, after years of practice and litigating disputes arising out of poorly drafted documents, some lawyers forget that the fate of the profession depends on a steady supply of poorly drafted documents. They begin to advocate for plain English. Soon passive voice starts to annoy them. Then “Sell, convey, assign, transfer, and deliver” becomes simply, “sell.” At that point, it’s all over. A good managing partner will stage an intervention and insist that the lawyer enter an appropriate 12-step program. Sometimes you’ve got to be cruel to be kind. While treatment can cure good drafting, the best approach is to prevent the problem in the first place. Law schools and the bar must do more to educate lawyers on how to draft bad contracts. We owe it to the profession.

13 How much wood would a woodchuck chuck if a woodchuck could chuck wood?
15 Nick Lowe, Cruel to Be Kind, Labor of Lust album, Columbia Records, 1979.
Mark Cohen has 13 years of experience as a business lawyer. He earned a B.A. in Economics at Washington College and a law degree at the University of Colorado in Boulder. He earned an L.L.M. in Agricultural and Food Law from the University of Arkansas. His diverse legal career includes service as an Air Force JAG, a Special Assistant U.S. Attorney, a prosecutor, a municipal judge for Boulder, 13 years as the Advisory Board of The Colorado Arbitrator, and as chairman of the Colorado Municipal League.

Mark wrote six articles for the Fennco Press Hotline series, including one on showing the corporate will. He wrote seven articles and book articles for the Colorado Lawyer. He taught Advanced Legal Writing at the University of Arkansas School of Law. In 2004, he was a final judge in the National Legal Writing Competition. He wrote two law books published by Aspen Publishers and has become a board member of the Broomfield Bar Association. The non-legal articles have appeared in magazines such as the National Law Journal, the American Bar Association, the American Bar Association Journal of Legal Writing, and the Modern Lawyer. He is a member of the Board of the American Bar Association and the Modern Lawyer.

Mark is a practicing attorney specializing in drafting and reviewing business documents, including contracts, corporate formations, real estate 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. He can be reached at Mark@CohenLaw.com.

Mark also serves as an arbitrator by agreement of the parties. The Arbitration Act of Arbitration Rules he believes are simpler and more flexible than the A.M.A.'s rules. He offers arbitration services online or via Skype by agreement of the parties. Lencore at Cohen Arbitration.

If you have samples of particularly bad legal drafting, please email them to me at mark@cohenslaw.com.
Mediate, Arbitrate or Litigate: What Would Lincoln Do?

Hon. Larry M. Boyle  
United States District Court

Several months ago I accepted an invitation to speak at the 2012 Texas State Bar annual meeting. One of the topics is the vanishing trial and the role ADR has played in that decline. My assigned topic is Mediate, Arbitrate or Litigate: What would Lincoln do?

Abraham Lincoln wasn’t perfect, either as a man or as a lawyer. In fact, Lincoln had many critics, some calling him overrated and others arguing his larger than life legacy as a lawyer is a myth. Other critics claim that “Honest Abe” really wasn’t more honest than many of his contemporaries, did not have a good knowledge of the law, and lost cases he should have won. A former law partner said Lincoln was deficient as a lawyer, described him as being a case lawyer and nothing more, and objected to him being called a great lawyer.

However, those notions are soundly rejected by the vast majority of Lincoln scholars. The overwhelming consensus is that Lincoln was a premier attorney, and one of the most creative, intelligent and exceptional advocates ever to address a court or jury.

Lincoln has been called “our most admired and least understood president.” Assuming that to be true, how well do we understand Lincoln as a lawyer? If we can understand how he practiced law and counseled people involved in a dispute we will have an answer to the question: “What would Lincoln do - mediate, arbitrate or take it to a jury?”

Lincoln the man

Most of the material in this article has been gleaned from Lincoln biographies. In that regard, Lincoln warns,

Biographies as written are false and misleading. The author of the life of his hero paints him as the perfect man - magnifies his perfections and suppresses his imperfections - describes the success of his hero in glowing terms, never once hinting at his failures and blunders.

But, Leo Tolstoy, a Lincoln admirer, places the passage of time into perspective,

We are still too near his greatness. But after a few centuries more of our posterity will find him considerably bigger than we do. His genius is still too strong and too powerful for common understanding....

Although Lincoln may have been skeptical of biographies in general, Tolstoy’s prediction has proved accurate and the abundance of source material describing Lincoln’s life is staggering. In fact, historians have suggested that more has been written about Abraham Lincoln than anyone in the history of the world, with the exception of perhaps Jesus of Nazareth and possibly Napoleon.

From the multitude of sources, a good place to begin is Lincoln’s character, which prompted Justice Anthony Kennedy’s admonishment that we should adopt “the simple honesty of Lincoln.”

It is well known that Lincoln was born into wretched poverty, had incredibly limited formal education, was self-taught in the law, had a woefully unhappy marriage, was of a melancholy personality, and suffered migraines and depression. Yet despite all these obstacles and even after the passage of 150 years, most of us are still moved, as if reading holy writ, by his Second Inaugural Address, which promised there would be “malice toward none, with charity for all...”

Writing of Lincoln at Gettysburg, a major American city newspaper observed:

The year was 1863. The nation was torn by a civil war that had claimed more than 100,000 lives, and the president was struggling against virulent political forces eager to abandon the fight against a rebellion that had split the country in two.

Yet, in a three-minute speech, Abraham Lincoln rallied a war-weary people around the cause of freedom through union and refined the purpose and identity of the nation. It was, perhaps, the
greatest use in American history of the sheer weight of one man’s character and the authority of the office he holds.8

Lincoln cultivated humility, and carefully avoided the development of vain, egotistical pretension and affectations. This may have been, at least in part, an attempt to hide his feelings of social inferiority due to his lack of formal education.9 This sentiment also caused Lincoln to avoid judging others. Historian Carl Sandburg noted that Lincoln wasn’t judgmental of other people. “In his own mind he did not divide people into good people and bad people.”10 Likewise, he “was certainly a very poor hater. He never judged men by his like or dislike for them.”11

Truth was central to Lincoln’s entire perspective. Lincoln himself gives us a window into this element of his character:

I determined to be so clear that no honest man could misunderstand me, and no dishonest man could successfully misrepresent me.12

Many in Lincoln’s time said he had a “special quality,” about him, and it was common for people to use words such as “truthfulness,” “honesty,” and “integrity” when speaking of him. Although awkward and ungainly in appearance, there was an “indescribable quality” about Lincoln that “commanded respect.”13 A friend said Lincoln was “. . . true to himself, he was true to everybody and everything about and around him . . . his whole aim in life was to be true to himself & being true to himself he could be false to no one.”14

Beyond these basic moralities, learning, skills and sophistication came as he studied the law and was tutored by mentors. The law not only provided Lincoln a path out of poverty, but it also helped him gain confidence. However, through the years, Lincoln’s focus on truth remained. It was in the setting of his private practice and appearing in the state and federal courts of Illinois that “Honest” became a lasting part of his name and legacy.

Lincoln the lawyer

Lincoln’s decision to study law “stunned his friends and neighbors” because he had no means to obtain even a common school education and they believed “that people born in humble life should be content with their lot.”15 These observers underestimated Lincoln’s desire for education. In fact, even after he was admitted to the bar, Lincoln continued this quest, studying astronomy, political economics and philosophy — subjects many of his fellow circuit riders had learned in college, causing one fellow circuit rider to observe, “Life was to him a school, . . . and he was always studying and mastering every subject which came before him.”16

He was also a master storyteller, a skill he learned sitting around the fireplace listening to the adults tell stories. As a six-year-old, young Abraham repeatedly retold the stories in his mind determined to tell a story in “language plain enough... for any boy I knew to comprehend.”17 Lincoln’s natural gift of storytelling was perfected on the Illinois circuit and “would eventually constitute his stock-in-trade throughout his legal and political careers,” remaining with him his entire life.18 He possessed an extraordinary ability to convey practical wisdom in stories that his listeners would remember.19

These natural skills were aided by the guidance of excellent mentors. Lincoln was fortunate to become associated with Stephen T. Logan, a former Illinois state circuit court judge. When they began working together it became obvious there were considerable differences in the two men; Judge Logan was well-read, studious, highly organized and meticulous. According to Sandburg, Logan was:

one of the most neat, scrupulous, particular and exact lawyers in Illinois when it came to preparing cases, writing letters, and filing documents. In law practice Logan knew how to be thorough, how to make results come from being thorough. From him Lincoln learned; the word “thorough” became important among his words.20

Initially, Lincoln was the opposite, even disorganized. Logan being “methodical, industrious, particular, painstaking, and precise,” he could not tolerate Lincoln’s “disorderly” ways.21

Logan is viewed by historians as perhaps the most constructive influence in Lincoln’s life.22 Through this development, Lincoln continued to stress the virtues of truth and honesty.

Even in petty and trivial cases, otherwise dull and uninteresting, can be found touches of his characteristic love of justice, honesty, humility and forbearance. They are replete with his moral courage, humaneness, modesty, sympathy, tact and adroitness, wit, humor, and power of satire. Here can be found his human weaknesses as well as the elements of his greatness.23

A two-time Pulitzer Prize winner explains how Lincoln got his nickname,
In handling hundreds of cases in the circuit courts, Lincoln firmly reestablished his reputation as a lawyer. It was a reputation that rested, first, on the universal belief in his absolute honesty. He became known as "Honest Abe"... the lawyer who was never known to lie. He held himself to the highest standards of truthfulness.24

Lincoln wrote, "... [i]f, in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation."25

Lincoln's success as a lawyer was not hampered by his unwillingness to compromise his core principles. According to legal scholars, Lincoln was not in any sense the word a simple "country lawyer."26 Lincoln was a prolific rainmaker, making his living handling a prodigious number of cases, and became a "lawyer's lawyer."27 Lincoln scholar John A. Lupton observes,

He was not a folksy, down-home kind of guy. Instead he was a shrewd, sophisticated, tough and aggressive litigator with a staggering case load who cared about making money...28

Despite the pressures of a successful practice, Lincoln eventually became a mentor to younger, less experienced lawyers and many were the beneficiaries of his advice and assistance. In one interesting circumstance, Lincoln was in a courtroom waiting for his case to be called when he observed a young lawyer make a weak argument. After stating his case in a "bewildered, feeble" manner, the young lawyer recounted he was,

... about to sit down, and let the case go by default, as it were, when a tall, homely, loose-jointed man sitting in the bar, whom I had noticed as giving close attention to the case, arose and addressed the court in behalf of the position I had assumed in my feeble argument, making the points so clear that when he closed the Court at once sustained my demurrer. This act of kindness prompted the opposing counsel, Isaac N. Arnold, to rebuke his friend for meddling. Lincoln replied, "that he claimed the privilege of giving a young lawyer a boost when struggling with his first case, especially if he was pitted against an experienced practitioner."29

Presidential historian Doris Kearns Goodwin confirms Lincoln "arrogated to himself no superiority over anyone — not even the most obscure member of the bar... He was remarkably gentle with young lawyers."30

Lincoln also could not tolerate injustice. William H. Herndon, a former law partner, said, "As he was grand in his good nature, so he was grand in his rage."31 Another colleague said:

Personal abuse, injustice, and indignity offered to himself did not disturb him, but gross injustice and bad faith towards others so enraged him that his eyes would blaze with indignation, and his denunciation few could endure.2

Lincoln added a remarkable intellect to these remarkable virtues. When appearing before an appellate court, Lincoln would seize the strong points of a case and present them with clearness and great compactness. His mind was logical and direct, did not indulge in extraneous discussion and his power of comparison was large.33

Lawyers in the 1850s tried even the pettiest cases before a jury and Lincoln grew to possess the important quality of diligent preparation. Former law partner Herndon quipped, "He was always calculating and planning ahead. His ambition was a little engine that knew no rest."34 In a day long before discovery, by studying the opposite side of every case Lincoln was rarely surprised by the testimony of the opposition and thus showed great confidence before the jury. "[C]lients and other lawyers also respected Lincoln's incredible capacity for hard work... Lincoln's clients rarely lost a suit because of carelessness or inattention on the part of their attorney."35

Lincoln's sharp mind and diligent preparation helped him acquire a gift for presenting the essential facts to the jury in the simplest, clearest fashion. Using common words, he was direct and concise, using words understandable by the common person, always showing perfect calm when before a jury.36

In the courtroom Lincoln had his own unique style.

With Lincoln, the emphasis was on casual, friendly questioning of the witnesses, far from technical matters. He would good-naturedly concede nine points of the ten to the opposing counsel, until it seemed he had given his case away. But on the tenth point, he would insist, and it was the nub of the action.37

Lincoln's style allowed him to adapt to the circumstances. This was true of his approach to examination of witnesses:

He only asked necessary questions of a witness and refrained from brow-beating, confusing, distracting or alarming them. If he found a witness to be honest and truthful he questioned them in a gentle and friendly manner, but if he believed a witness was lying or evasive he became severe and merciless.38

Lincoln was also known to be fair to opposing counsel and rarely raised objections to their introduction of evidence, but this does not mean he yielded essentials.

What he was so blandly giving away was simply what he couldn't get and keep... [M]any a rival lawyer was lulled into complacency as Lincoln conceded, say six out of seven points in argument, only to discover that the whole case turned on the seventh point. "Any man who took Lincoln for a simple-minded man... would very soon wake up with his back in a ditch."39

Lincoln's skill in making closing argument caused one Illinois journalist to place him "at the head of the profession in this state... though he may have had his equal, it would be no easy task to find his superior."40 Waldman concludes, "All his colleagues agree that for lucidity of statement, clear reasoning power, and analogy Lincoln had no superior at the bar of Illinois."41

In addition to his courtroom skills, Lincoln had the ability to "think outside the box." For example, in defending a medical malpractice case, rather than using formal medical jargon he used a brittle chicken bone to illustrate the effects of ag-
It is well known that Lincoln met with disputants and counseled them to reconcile disputes and preserve relationships.

As Lincoln's reputation spread, his practice prospered and his clients increasingly involved larger landowners, banks, railroads, ranchers, professionals, the wealthy and the growing middle class. Lincoln's cases increasingly involved disputes with railroads, and he was good at his job, both for and against the railroads. Humble individuals and great corporations placed their affairs in his hands.

Lincoln was acknowledged by his peers, judges and jurists before whom he practiced as "the best all-around lawyer" of his day in Illinois, possessing the rare combination of moral and intellectual qualities that are essential to the making of a good lawyer. He was considered to be the finest lawyer the Chief Justice of the Illinois Supreme Court ever knew because he possessed a professional bearing that was high-toned and honorable, and proceeded justly and without derogating the claims of others, a model well worthy of the closest imitation.

Lincoln had the most uncommon of possessions — common sense — and "logic" was always his "constant companion." Lincoln created an atmosphere of "honesty, candor, and fair dealing," and that one of his strengths was seeing the kernel of the case and never let the court or jury forget that "This is the real point."

Lincoln, the master of understatement, was a "courtroom strategist who fought his legal battles with a light brigade... calling upon his heavy artillery only when absolutely necessary."

Woldman declared "Lincoln is the law profession's noblest contribution to American civilization," and states as a lawyer-President, that his constitutional interpretations, his understanding of broad principles of law and justice, and his fine legal conscience and reasoning power are "causing the most respected jurists to rank Lincoln among the greatest lawyers of history." Perhaps the greatest testament to Lincoln is "... even more conclusive of his high regard and recognition of his qualification as a lawyer is the fact that so many other members of the bar — competitors if you please — employed him, of all the thousand or more barristers then practicing in Illinois."

Advice from Lincoln

Many of Lincoln's early trials were over trivial matters, misdemeanors, property disputes, bankruptcies, assaults, battery, neighborhood quarrels, divorce, collections and mortgage foreclosures. Certainly not landmark cases for a future president, but it appears then, as it is today, young lawyers started with small, seemingly insignificant cases.

It is significant that the first case Lincoln handled, Hawthorne v. Woolbridge, was settled before going to trial. All probability Lincoln and the other lawyer self-mediated by negotiating and reaching a mutually agreeable resolution of the dispute.

As the years passed, Lincoln won and lost cases in the state and federal courts. Beginning in the 1980s, thousands of yellowed handwritten documents were discovered in courthouse basements relating to more than 5,000 cases Lincoln handled, including more than 400 appeals before the Illinois Supreme Court. In addition, the majority agreed with Lincoln in two of the three cases he presented to the United States Supreme Court.

Despite this success, Lincoln urged clients and neighbors to avoid litigation. ... disputing neighbors had learned to leave their differences for settlement to him as an arbitrator. Lawyer Lincoln's office early became a court of conciliation. ... Lincoln discouraged litigation, turned away business, and tried to keep people out of court. He persuaded his clients to compromise their difference with their adversaries when they could do so with honor."

Lincoln counseled,

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.
He was indeed a peacemaker.
In a case that resulted in a hung jury and had to be retried, Lincoln’s approach is instructive.
The bitter feelings would have to be intensified, the slander repeated, the old hurts reopened. Lincoln abhorred this type of litigation. He (successfully) urged the litigants to drop their charges and to make peace with each other.68

Lincoln condemned lawyers for aggressively pursuing clients to file lawsuits, saying, “Never stir up litigation. A worse man can scarcely be found than one who does this,” and referred to that type of lawyer as a “friend.”69

Lincoln relied on his wealth of experience when deciding to litigate or seek other options. As mentioned, Lincoln was involved in “at least” 5,000 cases and knew the alternatives.70 Would Lincoln litigate? Of course he would. Lincoln was a master trial lawyer who tried 2,000 or more cases.71 In the right case and given time to prepare, Lincoln was more than prepared to litigate forcefully. Yet, Lincoln urged his clients to settle their differences with adversaries “when they could do so with honor,”72 and “discouraged litigation, turned away business, and tried to keep people out of court.”73

Assuming the scholars are correct that Lincoln was “involved in” 5,000 cases and “tried” 2,000 cases, what happened in the remaining 3,000 cases? It is well known that Lincoln met with disputants and counseled them to reconcile disputes and preserve relationships. Reason tells us he counseled them to dismiss pending cases or settled cases by negotiating with opposing counsel. He even arbitrated cases. If none of these efforts were successful he would file a lawsuit if the claim had merit, but that wouldn’t necessarily bring an end to negotiations. Lincoln was known to prepare thoroughly, bring “masterly ingenuity . . . and legendary skill,”74 and be a formidable, even dangerous, advocate for his client. That likely gave other lawyers incentive to settle lawsuits they had with Lincoln, accounting for some of the 3,000 cases.

Even after the battles were over, Lincoln treated other members of the bar with dignity and courtesy. As a prevailing lawyer in litigation, and later as a victorious war-time president, Lincoln became a peacemaker who treated defeated opponents with respect. When that terrible war ended, Lincoln the peacemaker emerged. He directed Grant to preserve Lee’s dignity at Appomattox, but also to offer him a generous peace.75 Abraham Lincoln, as a lawyer or a president, burnt no bridges—even with a former adversary.

Conclusion: What would Lincoln do if he were practicing today?
Inasmuch as Lincoln’s office was known to be a court of conciliation, if he were practicing law with us today, at the beginning stages of a dispute I am confident Lincoln would be a peacemaker and negotiate with the other lawyer to reach real common ground. I am confident he would practice law in much the same manner as fine lawyers practice today. David H. Leroy, former Idaho Attorney General, Lieutenant Governor and now practicing lawyer, explains the importance of this ability, stating: “The ability to ride into town, make friends, win a client, analyze facts, cross-examine and win a jury over were the skills that saved the Union!”76

In addition to pointing out Lincoln’s peacemaking and reconciliation efforts at the end of the Civil War, my colleague Judge Stephen S. Trott wrote,
Just think, it took a lawyer to save our nation, a man who by training and experience in private practice and our courts knew there can be no rights, life, liberty, or pursuit of happiness without the rule of law. Without Abraham Lincoln, the dreams of our ancestors would have been lost.77

Regardless of whether Lincoln would choose to mediate, arbitrate or litigate, depending on the circumstances I believe he would do what was right, honest and best for his client. This great man left us a rich professional legacy and a roadmap to follow. That’s what lawyer’s lawyers do.

Yes, Abraham Lincoln was an honest, premier lawyer, but in my well-formed view he does not stand alone on higher ground. In my mind’s eye, I see Thurgood Marshall at his side. Does it end there? I think not. Rather, I am convinced we have lawyer’s lawyers among us today—not likely Lincoln’s superior, but certainly his equal.

About the Author
Judge Larry M. Boyle has served the state and federal judiciaries since 1986 as a State District Judge, a United States Magistrate Judge and an Associate Justice of the Idaho Supreme Court.

Endnotes
1 DAVID HERBERT DONALD, WE ARE LINCOLN’S MEN 75 (2003).
2 Geoffrey C. Ward, N.Y. TIMES BOOK REVIEW (noted in DONALD, supra note 1).
4 DAVID H. LEROY, MR. LINCOLN’S BOOK (2009).
5 ALBERT A. WOLDMAN, LAWYER LINCOLN, Preface (Reprint 1994 Preface; original printing 1936).
7 CARL SANDBURG, 6 ABRAHAM LINCOLN 92-94 (1936).
8 Commanding Moral Authority, ATLANTA CONSTITUTION (Sept 27, 1998) (emphasis added).
9 EDWARD J. KEMPY, ABRAHAM LINCOLN’S PHILOSOPHY OF COMMERCE SNEHL, AN ANALYTICAL BIOGRAPHY OF A GREAT MIND, PART 1, 158 (1965).

Lincoln Taught Importance of Listening
During Lincoln’s Presidency, it was difficult to find him in the White House. He visited troops in the field and in hospitals, toured naval facilities, inspected fortifications, and visited members of Congress and members of his Cabinet in their homes. Lincoln’s personal secretaries stated that he spent nearly 75% of his time meeting with people. Upon removing General John C. Fremont from the command of the Department of the West, Lincoln noted(“His cardinal mistake is that he isolates himself, and allows nobody to see him; and by which he does not know what is going on in the very matter he is dealing with.”

Lincoln utilized this behavior during his days as a lawyer also. He literally rode the circuit of the court and was diligent in seeking out the individuals with knowledge and facts of each matter he handled.

This is an attribute that I am trying to incorporate more in my legal practice. Although email and text messages can be a good way to keep in touch with current and prospective clients, I have found that clients, especially business clients, appreciate a personal visit. Taking the time to gain an understanding and appreciation of a current or prospective client’s operation shows them that you are invested in what they are doing. It also assists in the representation of the client as it is easier to understand a client’s need or problem if the attorney takes the time to gain an understanding of the client’s business.

- Benjamin Ritchie
The Idaho Academy of Leadership for Lawyers (IALL) stopped during Lawyers as Leaders session to view the Lincoln statue in front of the Idaho Capitol this winter. This group includes those from the steering committee, and the IALL class. From left are Ben Ritchie, Hon. Mike Williams, Paul McFarlane, Paul Arrington, Tim Tyree, Bill Hancock, Jonathan Voiny, Deborah Ferguson, Christine Salmin, Peg Dougherty, Hon. Mick Hodges, Joe Pirtle, Nicole Hancock, Jim Martin, Monica Salazar, Gene Petly, Mahmood Sheikh. Not pictured are Javier Gabriola and Diane Minnick.

Idaho Academy of Leadership for Lawyers Study Lincoln

Over the last year, I have had the pleasure of serving on the seven-member Steier Committee for the newly formed Idaho Academy of Leadership for Lawyers. The idea was that the committee would arrange several days of instruction and the young lawyers would learn a lot.

The day titled “Lawyers as Leaders,” which had a focus on Abraham Lincoln’s skills, had to be my favorite so far. Included in that day was a discussion of the book, Lincoln on Leadership, Executive Strategies for Tough Times (Donald T. Phillips, Hatchette Book Group, 1993)

Lincoln on Leadership can be quick read, focusing on concrete examples of leadership accomplished by the 16th President. I was fascinated to learn that Abraham Lincoln’s principles were his original work, i.e., “Never try, you will never succeed,” or “Remember that compromise does not constitute weakness”. Repeatedly, I told myself, “I thought that was from the Bible... Jimmy Buffett... Dale Carnegie”, etc.

In my work as a Magistrate Judge, I hope to remember two poignant principles from this great man:
1. When you extinguish hope, you create desperation;
2. Remember, the best leaders never stop learning.

I agree there is greatness in our profession in Idaho. I would go so far to say as this next great attorney may currently be enrolled in the Idaho Leadership Academy for Lawyers

- Hon. Mick Hodges

66 Frederick Trevor Hill, Lincoln the Lawyer 102-03 (1996).
67 Spiegel, supra note 26, at 22.
68 Woldman, supra note 5, at 246.
69 Id. at 30.
70 Id.
71 Donald, supra note 1, at 150.
73 Handwritten note from David H. Leroy to the author (March 5, 2012) (on file with author).
74 E-mail from Hon. Stephen S. Trott to the author (March 8, 2012) (on file with author).

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