

## Writer's Block on a Contract

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Folks,

I have a client who wants to terminate a contract (both parties want to terminate the contract and they've agreed on terms). I'm having a hard time getting started with the Whereas clauses, etc. Client wants me to give him something by COB today (thanks for the notice, client).

Anyone have anything that I can use as a springboard?

Thanks as always,

Blocked

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How 'bout (you can prettify the language to suit how you write things):

Recitals: name the parties, state that they're both able to enter into a contract

Body of contract:

1. Contract for \_\_\_\_\_ was entered into on [date]
2. Both parties have fulfilled the terms of the contract up until now (or until [date]) and waive all claims against each other for breach
3. Parties have decided to terminate the contract
  - 3a. Reasons for termination
  - 3b. Consideration?
4. Any other misc. concerns that both sides have

I would think that would do it, unless the original contract was very complex. As long as you identify the contract and state that both parties have agreed to terminate it, and that both waive any claim against the other for non-performance, you should be okay.

Hope this helps,

Russell D. Gray, Utah

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As someone who drafts contracts (and revises contracts drafted by others) for a living, I HATE whereas clauses. A simple statement of the purpose for the termination will give you some context (and the whereas clauses have no legal effect anyway). So, for example, here's a sample introductory clause with explanatory paragraph:

This Termination Agreement is dated \_\_\_\_\_, and is between Party A, a \_\_\_ corporation, and Party B.

Party A and Party B entered into a \_\_\_\_\_ Agreement effective \_\_\_\_\_, [ in which Party A agreed to \_\_\_\_\_ and Party B agreed to \_\_\_\_\_]. The parties now wish to terminate this agreement, subject to the following terms and conditions.

The parties therefore agree as follows:

- 1.
  - 2.
- etc. etc.

Kevin W. Grierson, Virginia

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Supposedly recitals/whereas clauses state the facts at the time the contract was entered into. At one time I thought I'd just leave them out, until I researched it.

Veronica M. Schnidrig, m Oregon

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I love whereas clauses. They fend off so much litigation. Of course, you do not need to call them that in the contract.

They explain context. If you are dealing with the possibility of misunderstandings, and international contracts always invoke that, you had darned well better explain what is intended.

Do what you want, of course, but I view it as hubris and sloth to avoid whereas clauses. I remember hearing in class at the Parker School of Foreign and Comparative Law about some Germans who take pride in reducing agreements to the bare minimum, such as just price and parties. Of course, it often ends in disaster.

Norm Solberg, Japan

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Allow me to clarify my earlier statement. As I noted in my example, I generally do include an introductory paragraph that lays out the reason the parties are contracting. What I don't do is the traditional list of representations with separate paragraphs, e.g. "WHEREAS, the party of the first part is a nerf herder and wishes to drive nerfs belonging to the party of the second part to market," and "NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties . . . " etc. For a good example of good form and purpose of introductory recitals, I recommend Ken Adams "Manual of Style for Contract Drafting." Here's what Ken has to say about recitals in Section 1.94: "Because courts regard recitals as subordinate to the body of the contract, don't address in any detail in the recitals the rights and obligations of the parties." As Ken notes, however, "courts do use recitals to help determine the intent of the parties."

I will reiterate my earlier statement, though, that there is generally no legal effect to whereas clauses or any introductory clause beyond an expression of intent. If the introductory clause says "WHEREAS the parties wish to terminate their prior agreement," but the new agreement instead extends and modifies the old agreement, the old agreement isn't going to be terminated. Furthermore, if there's something in a whereas clause that you think your client is relying on, you're on much sounder ground incorporating that something into a representation and warranty paragraph in the body of the agreement. So, if your client is relying upon the fact that the other party is an experienced nerf herder, then you have the other party make a representation to that effect in the body of the contract and don't leave that to a whereas clause.

Kevin W. Grierson

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Thanks, guys. I started writing and it just sort of came to me like a fairy on gossamer wings, or a good swift blow to the side of the head with a 2x4. Just, you know. Poof. There it is.

Grateful Lawyer

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