



**Monday, October 20**  
**11:00 am-12:30 pm**

**109 Simplifying Agreements: Making Documents Shorter, Easier to Understand, and Adaptable to Risk**

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## Faculty Biographies

### Ted Gizewski

Ted Gizewski is a senior attorney at Microsoft Corporation in Seattle, and is responsible for overseeing the OEM channel's worldwide marketing organization, all Asia-based PC manufacturer transactions (comprising more than \$12 billion in annual revenue), and the worldwide OEM services team.

Mr. Gizewski has extensive experience assisting clients in diverse industries with a wide range of international intellectual property, contracting, and alliance matters, including the acquisition, development, and commercialization of software and software services, server and "cloud" offerings, and other forms of technology; international, regulatory and e-commerce issues; technology-related due diligence and corporate mergers and acquisitions, spin-offs and asset divestitures, venture capital investments, joint ventures, and other commercial transactions; and online advertising and marketing.

### Morris G. Kremen

Morris G. Kremen is the associate general counsel for Worldwide Commercial Licensing at Microsoft Corporation in Seattle. Mr. Kremen's practice is a general commercial practice, with an emphasis on software licensing and related services. He manages a team of 40 attorneys and other legal professionals who support Microsoft's biggest revenue-generating businesses.

Prior to joining Microsoft, Mr. Kremen was formerly the associate general counsel of SpaceLabs Medical Inc., a manufacturer of vital sign monitoring medical devices. Additionally, Mr. Morrison was previously a partner at the Seattle law firm of Riddell Williams Bullitt & Walkinshaw.

Mr. Kremen received a BA from Stanford University and is a graduate, cum laude, of Harvard Law School.

## Why do simplicity and readability matter?

- Because job #1 is to help your clients do business
- Risk management is only job #2!
- Readability and simplicity are good for your client's business

## Complexity causes customer/partner dissatisfaction

- Contributes to:
  - Confusion
  - Frustration
  - Suspicion

The licensing is way too complicated to keep up with. I have a manager now that devotes his time to this. MS acct reps are helpful, but still very time consuming to figure out what you need and whether or not you're in compliance.

The worst problem with Microsoft products isn't security, but working with all the licenses and deciding what has to be bought and how it's going to be bought. It's completely absurd the way it's currently done.

## Complexity increases costs of selling

- Contributes to:
  - Longer sales cycles
  - Increased overhead to answer more questions about contract terms
    - In one recent fiscal year, 44 % of handled by Microsoft Sales Information were licensing issues
    - 70 % of MSI call center research time spent on licensing issues
- Unintentional noncompliance

The whole area of licensing and software is very complex. Helping customers understand it makes it easier to sell products.

Microsoft licensing is based on the fiction that someone actually understands the range of licenses and their terms . . . , a utopia where humans can understand more than 5-6 concepts simultaneously. Do you think the average end user reads or comprehends the click wrap?

## Complexity increases legal risk

- Interpretation ambiguities: Lengthy and complex language increases likelihood of multiple possible interpretations
- Enforceability problems
  - Dense formatting makes terms impenetrable
  - Long words, sentences and clauses reduce likelihood that user will read and understand
  - Check out the example on the next slide

## Presentation, format, and content must work together

If they can't read it, what it says may not matter

'In consideration of receiving permission to enter the premises, being permitted and privileged to participate or assist others participating in said event, as evidenced by the Permit colored, coded and numbered as shown on this form each of the undersigned, for himself, his heirs, next of kin, personal representatives and assigns, hereby RELEASES, REMISES AND FOREVER DISCHARGES AND AGREES TO SAVE AND HOLD HARMLESS AND INDEMNIFY NASCAR AND SANCTIONING BODY AND THE PROMOTERS PRESENTING SAID EVENT. THE OWNERS, SPONSORS AND MANUFACTURERS OF ALL RACING EQUIPMENT USED IN SAID EVENT AND THE OFFICERS, OFFICIALS, DIRECTORS, AGENTS, EMPLOYEES AND SERVANTS OF ALL OF THEM OF AND FROM ALL LIABILITY CLAIMS, DEMANDS, CAUSES OF ACTION AND POSSIBLE CAUSES OF ACTION WHATSOEVER, ARISING OUT OF OR RELATED TO ANY LOSS, DAMAGE OR INJURY (INCLUDING DEATH) THAT MAY BE SUSTAINED BY OUR RESPECTIVE PERSONS OR PROPERTY, THAT MAY OTHERWISE ACCRUE TO ANY OF US OR TO OUR RESPECTIVE HEIRS, NEXT OF KIN OR PERSONAL REPRESENTATIVES WHILE IN, ON, EN ROUTE TO, FROM, OR OUT OF SAID PREMISES FROM ANY CAUSE WHATSOEVER INCLUDING NEGLIGENCE OF ANY OF THE FOREGOING, NASCAR, or sanctioning body, and their assigns may use any of our names and photographs including pictures of our cars and photographs taken during said event for publicity purposes including endorsements, in any media before, during and after the above event.'

'The five-and-one-half-point print is so small that one would conclude defendants never intended it to be read. . . . Any contract of release from negligence must be clear and explicit, free of ambiguity or obscurity . . . . The language must be comprehensible. Defendants' contract fails to meet these requirements. The agreement was lengthy; the language purporting to exculpate defendants from negligence was contained . . . in a convoluted 193-word sentence.'  
*Conservatorship of Link*, California Court of Appeal 1984

## What are the goals?

- Communicate clearly
  - Combination of design, words, style, + content
- Reflect the deal
- Speed up the process
- Avoid disputes
- Resolve disputes in your client's favor
- Consistency from contract to contract

## Who is the audience?

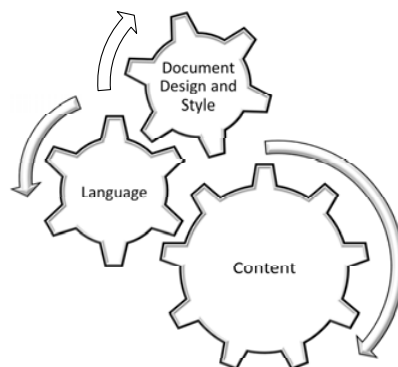


May vary from provision to provision

## Content

- Get rid of excess baggage
- Eliminate language that doesn't serve a real—or legitimate--business or legal purpose
  - Distinguish real risks and costs from theoretical, and address only the former
- Watch out for the lawyers' reflex to "address the kitchen sink"
  - What is lost—what changes for the worse---if the provision simply isn't there?
    - Regurgitating an existing legal rule
    - Addressing an issue that isn't really there
    - Conditioning non-obligations: "During the term hereof, and **provided no Event of Default exists, Seller may request** that Buyer purchase Receivables and **Buyer may elect to purchase** receivables"

## The path to simplicity and readability



## Content contd.

- Watch out for a similar reflex in your clients
  - Eliminate provisions your client wouldn't or couldn't enforce
  - Consider practical alternatives (e.g., in software, build a technical limitation into the product rather than rely on a contractual term)
- Be prepared to be an advocate for simplicity
  - Challenge/convince your clients when needed
- A great young lawyer spots issues; a great experienced lawyer spots the issues and then knows how to be a smart risk-taker

## Language

- **Get rid of the excess baggage---sensing a theme?**
- **Simplify word choices – use familiar words and don't use two words (or a longer litany) when one will do**
  - “*software*” instead of “software products”
  - “*device*” instead of “PDA, PC, computer or other similar device”
  - “you may not *transfer* the software” instead of “you may not sell, assign, transfer, or pledge the software”
  - if using “including,” why do you need the list that follows?  
(Perhaps examples are necessary to clarify. In that case, consider using a different word to begin with.)
- **Don't use verbs as nouns**
- **Omit “without limitation” after “including”**
  - Court will not interpret “including” alone to mean an exhaustive list

## Language contd.

- **Eliminate legalese, jargon, fancy words – use simpler synonym**
  - “*use*” instead of “utilize” or “*under*” instead of “pursuant”
  - “hereinafter”, “heretofore”
  - Exceptions for legal terms of art when required, e.g., “merchantability” and “fitness for particular purpose” per UCC
- **Avoid elegant variations---consistency is good** (e.g, acknowledge, agree, confirm, represent)
- **Active voice** – action sentences
  - “user obtained the right” instead of “has been duly obtained by the user”
  - “licensor licenses software to licensee” instead of “the software is licensed to licensee”
- **Commas matter (anyone seen the book Eats, Shoots and Leaves?)**
- **Shorten sentences and paragraphs**
  - Break up w/lists – either bullets or numbers – formatting to make less dense improves visual
- **Define terms only when necessary to distinguish from plain language meaning**
- **Measure, measure, measure. If you can't measure progress, you'll have a tough time achieving it.**

## Don't use two words where one will do

*'Free and clear* mean the same thing. Using both is an unnecessary lawyerism. *Free* is English; *clear* is from the French *clere*. After the Norman Conquest, English courts were held in French. The Normans were originally Vikings, but after they conquered the region of Normandy, they became French; then they took over England. But most people in England, surprisingly enough, still spoke English. So lawyers started using two words for one and forgot to stop for the last nine hundred years.'

*Kohlbrand v Ranieri*, Ohio Court of Appeals (2005)

## Writing Techniques

- **Good writing is good writing**
- **Create bite-size chunks**
  - short sentences, paragraphs, and sections
  - enumerate list with bullets or numbers (if sequential or cumulative list)
  - white space
- **Don't place modifying clause at end**
  - should follow right after subject being modified
- **Linear drafting**
  - “may modify if...” instead of “*notwithstanding* the foregoing, you may not modify...”
- **Use singular instead of plural**
  - “any right or obligation” instead of “any rights or obligations”

## Writing Techniques contd.

- **Keep subject, verb and object close together**
  - “you may use *only* the features that” instead of “you may *only* use the features that”
- **Use parallel sentence structure**
  - “The user *should* destroy the software and *should* promptly notify us”
- **Convert nouns back to verbs and use base form of verb**
  - “licensor does not *represent* that” instead of “licensor does not make any *representation* that”
  - “the warranty is void if you *modify* the software and that causes the failure” instead of “the warranty is void if failure resulted from *modification*”
  - “indicate that you *accept* by” instead of “indicate your *acceptance* by”

## Measuring Readability

- Flesch-Kincaid Grade Level and Flesch Reading Ease scores
  - Tried and true algorithms based largely on number of words in sentence and number of syllables in words
- To enable in **Word 2007**
  1. Click the **Microsoft Office Button**, and then click **Word Options**.
  2. Click **Proofing**.
  3. Make sure **Check grammar with spelling** is selected.
  4. Under **When correcting grammar in Word**, select the **Show readability statistics** check box.
- To enable in **earlier versions of Word**
  1. Go to the **Tools** menu.
  2. Select **Options**.
  3. Select **Spelling and Grammar**.
  4. Check “Show Readability Statistics” (last box in the Grammar options)

## Document design and style

- The visuals: affect communication; make document easy to digest
- Fonts matter: Use those that are easy-to-read
  - Paper: serif fonts, e.g., Georgia
  - Screen: non-serif, e.g., Trebuchet or Tahoma
  - Not all serif (or non-serif) fonts created equal. Think about width and evenness of stroke, size of openings....or rely on an expert’s opinion
- Use flush left, ragged right
- Use informative captions and headings
- Use bulleted lists
- Don’t use all caps to make text conspicuous

## All caps ≠ conspicuous

‘Lawyers who think their caps lock keys are instant “make conspicuous” buttons are deluded.’

In re Basset, 285 F.3d 882 (9th Cir. 2002)