Keep it simple — sometimes

How to determine whether a legal document should be written in plain language

Interviewed by Kristen Hampshire

Documents written by lawyers are often hard to understand. They're chock-full of arcane terms, and they systematically violate every precept of the "plain language" movement.

Lawyers have only themselves to blame. Most of them can, and occasionally do, write clearly. But should you insist that your lawyer always use plain English? No, says William Maffucci, an attorney at Semanoff Ormsby Greenberg & Torchia, LLC.

Smart Business spoke with Maffucci about when to insist that your lawyer speak clearly and when, instead, to leave legalese alone.

What is plain language?

Plain language is language that a listener or reader is likely to understand.

Lawyers in the plain-language movement reject the assumptions that legalese is indispensable, that every fact recited at the beginning of an agreement must begin with 'whereas,' and that every affidavit must end with 'further affiant sayeth naught.' They begin sentences with 'and' and 'but' rather than 'moreover' and 'notwithstanding the aforesaid.' They use contractions. Even sentence fragments.

Advocates of plain language prefer small words (provided they do not compromise meaning), short sentences (but not to the point of monotony), short paragraphs (ditto), and the active tense (except when the passive tense serves a purpose). They strive to 'omit needless words,' but they recognize that sometimes repetition itself serves a need.

Is plain language always preferable to legalese?

In a perfect world, everyone — lawyers included — would always use plain language. Even in our imperfect world, lawyers should use plain language rather than legalese when all other things are equal. But rarely are all other things equal.

Writing an original document in plain language is hard, and excising legalese from an existing document is harder. Both take time.

Sometimes you should insist that your lawyer take that time. Clarity is critical in some documents, such as employee handbooks. Plain language is sometimes mandatory in consumer contracts. And the ability to enforce a waiver of a constitutional right often depends upon proving that the other party actually understood the waiver.

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But sometimes it makes no sense to require a lawyer to spend the time necessary to express a concept with plainer language or greater concision. Common commercial documents that conform to centuries of custom in an industry are likely to be understood by people in the industry. What would requiring your lawyer to rewrite them in plain English achieve, other than a higher legal fee?

Other times, a lawyer may be unwilling to buck tradition. Every term traditionally used in deeds, for example, has at some time been interpreted by the courts. The fact that the term still appears in modern forms leads lawyers to assume that the term serves some (often unknown) purpose.

Have the courts concluded that the traditional terms always serve a purpose?

No. Occasionally the courts have declared that some of traditional conveyancing words can be omitted without consequence. So have the legislatures.

By statute in Pennsylvania, the words 'grant and convey' are sufficient to convey real estate, so conveyancers no longer need include the other terms traditionally used for that purpose — 'bargain and sell, release and confirm.' But here's a dirty little secret of the legal profession: Very few lawyers have memorized all of the authorized shortcuts. And I don't think any court or legislature has ever handed down an opinion or enacted a statute specifying that the continued use of a term that has been deemed to be surplusage makes the instrument ineffective.

At the same time, there have been court decisions and statutes establishing that certain boilerplate phrases (think 'small print') are indispensable. One statute makes it important to include in certain contracts a provision specifying that, by signing the contracts, the parties 'intend to be legally bound.'

And court decisions have turned on the distinction in construction subcontracts between the words 'if' and 'when' in the phrases 'pay if paid' and 'pay when paid.' Lawyers share horror stories of fortunes lost in court decisions interpreting such seemingly inconsequential terms. Naturally, the lawyers develop a reluctance to change words that have been used since time immemorial.

Is there a rule of thumb for deciding when to tell you lawyer to use plain English and when to leave legalese alone?

Never stop considering the context in which a lawyer is being asked to communicate. If the lawyer is drafting a loan-participation agreement that will bind only long-established financial institutions conducting business as usual, the lawyer should not be faulted for pulling a tried-and-true template off the shelf and making no effort to clarify it. If the lawyer is drafting workplace rules for a glass factory, the lawyer should be faulted for not using the vernacular of that trade. If the lawyer is drafting an agreement by which the client's neighbor would grant the client an easement over the neighbor's property, the lawyer should use language that is likely to be understood not just by the client but also by the neighbor — and by future owners of the properties, if the original parties intend that the easement last in perpetuity.

Consider the additional time that your lawyer would spend to communicate more clearly to be an investment, and always ask yourself whether the investment makes sense. <<

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