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Probate and Property
May/June, 2012

Feature

WRITING GOOD, LEGAL SENSE AND MORE OR LESS

Mark A. Senn [a1]

The title makes sense to an experienced lawyer but probably not to anyone else. By following just 10 easy rules, anyone can learn to write titles just like it. By avoiding them, a lawyer can be understood by almost everyone. These rules are not mere grammar school drills; after all, no one would write "for good and valuable consideration, the receipt and adequacy of which is acknowledged" knowing that "receipt and adequacy" requires a plural verb.

1. Use Vague or Meaningless Words

Real lawyers use and/or. They pay no attention to its characterizations in a century of cases: "one of those inexcusable barbarisms ... sired by indolence and damned by indifference ... [with] no more place in legal terminology than the vernacular of Uncle Remus has in Holy Writ," *Cochrane v. Florida E. Coast Ry.*, 145 So. 217, 218 (Fla. 1932); and a "befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean," *Employers Mut. Liab. Ins. Co. v. Tollefsen*, 263 N.W. 376, 377 (Wis. 1935). "And/or" has been held to mean neither, both, or either of the joined items, David Mellinkoff, *The Language of the Law* (1963), and has made at least one agreement unenforceable.

DISSENT: The terms "A or B, or both" and "A and B, or either" are clear, simple replacements.

A building "in compliance with FAR" is obviously in compliance with the "floor area ratio" or "federal acquisition regulations."

2. Use Latin and Archaic Expressions

N.B. Latin words per se add value and ipso facto justify premium billing. Use "e.g." instead for "for example," "i.e." for "that is," and "inter alia" for "among others." Mix and match; no one knows the difference. Supra and infra are discussed in rule 3. Greek is very expensive and beyond the budget of most clients.

An agreement without archaisms is deficient. "This Indenture Witnesseth" is a familiar opening for clients who are 400 years old, and it should be used for all of their work. An "indenture" in the original sense of the word is a document that is torn or cut irregularly so that its parts match--obsolete since the enrollment of deeds two centuries ago. Indentures are now used only to decorate law offices. Use words whose meaning is unclear; incorporeal hereditaments are always in good taste. Heretofore, wherein, and herein are fine. Don't be deterred by their ambiguity leading to litigation, such as *Trustees of First Union Real Estate Equity and Mortg. Inv. v. Mandell*, 987 F.2d 1286 (7th Cir. 1993), in which "thereof" was on trial. At issue was a provision that required the tenant to pay its landlord 50% of percentage rent paid by the subtenant to the tenant "under their lease for part or all of the Demised Premises during the initial term and any period ***37** thereof." Id. at 1288. The question was whether "thereof" referred to "their lease" or the "initial term." If "thereof" referred to "their lease," then the tenant's payments

were due for the many possible extensions, but if it referred to the "initial term," then those payments ended at the end of the initial term. On appeal, the landlord prevailed.

3. Give Helpful Directions

Although the provisions are in numerical order, it is still necessary to use section 5 below or paragraph 10 above because the reader of section 3 or paragraph 17 needs help to navigate the agreement. Similarly, alphabetized provisions are not sufficient; in clause (c), remind the reader that clause (a) above came before clause (c). Of course, infra and supra are useful.

On the subject of directions, always note that an agreement is a "forward commitment" to distinguish it from its elusive relative--the "backward commitment."

Directions need not make sense. For example, "corridor doors shall remain closed except when in use"--which presumably means they are to be closed when not open--is sure to save lives.

4. Repetition and Redundancy Are Not Null and Void and Are in Full Force and Effect

After the Norman Conquest, lawyers could not be certain whether their documents might come before a native English judge or a conquering French one. So they used couplets of a French term and an English one to avoid giving offense; "sell and convey" has half French and half English origins. Just because the likelihood of offending a French judge has diminished in the past millennium, there is no reason to use half as many words. A "true, correct and complete copy" is better than a mere "copy." Ignore those who say a "copy" is the same as what was copied and that if it is not "true, correct and complete" it is different and not a copy. Similarly, things that are the "same" are identical, but "exactly the same" is useful surplusage. "In the event that" is much better than a measly "if."

Robert Benchley's *Law of Distinction* holds that "there are two kinds of people in the world, those who believe there are two kinds of people in the world and those who don't." Following this rule, conscientious lawyers can achieve perfect clarity. A disclaimer of "all warranties express or implied" must include more warranties than merely "all." Let a tenant who cannot put signs on the interior or exterior of its premises wonder what there is to the premises besides the inside and outside.

5. More or Less

Construing a lease for premises of "1,666?/- square feet," a Connecticut court quite sensibly wrote: "The court has always asked 'plus or minus what."' *Professional Mktg. Serv., Inc. v. Mat Realty, Inc.*, No. CV 990363795S, 2000 WL 1475545, at *5 (Conn. Super. Ct. Sept. 18, 2000).

DISSENT: Often the exact area or price cannot be determined at the time an agreement is signed, and someone is so surprised when the price or area is determined that they litigate the ambiguity. At the outset a range can be stated such as "between 4.95 and 5.10 acres, inclusive." A right to terminate can be appropriate if the actual price or area is out of bounds.

6. Include "Etc." and So on

"Etc." has been featured in many cases. "Etc." has gone to appellate courts in the state of Washington on at least two occasions. The courts adapted the dictionary definition that "etc." means "and others (of the like kind)." In one Washington case, *Forman v. Columbia Theater Co.*, 148 P.2d 951 (Wash. 1944), a theater operator unsuccessfully contended that a memorandum that was attached to a bill of sale conveying "fixtures, seats, furniture and theater equipment" and that ended "etc." included wiring,

conduits, fire doors, and door frames. In an unpublished case, *Cases, Inc. v. City of Arlington*, No. 43527-2-I, 1999 WL 1020726, at *4 (Wash. Ct. App. Nov. 8, 1999), the lease provided:

> Landlord agrees that it will not increase or demand an increase in rent for any year of the term beginning after January 1, 1990 for an amount in excess of 10% of the annual rent in effect during the previous years of the term. (For example: Rent for the rental period 1990 would not be more than 10% higher than the rent for the period 1989, and the rent for the period 1991 would not be more than 10% higher than the rent [sic] the period 1990, etc.)

***38** The landlord contended that this allowed annual increases of as much as 10%, but the tenant believed the 10% reference limited increases for successive five year terms. The court found that "etc." allowed the landlord to increase the rent by up to 10% each year.

A New York tenant had the right to use its premises to sell pipes, pipe tobacco, cigarettes, ash trays, cigars, cigarette and pipe lighters, boxed and loose candies and chocolates, pre-packaged glazed and dried fruit, specialty nuts, gift baskets, stuffed animals, dolls, mugs, steins, minimum 6# gift cards, gift tins, gift jars, piñatas, balloons, etc., and for no other purpose. Inexplicably and unsuccessfully, it maintained that etc. gave it the right to sell lottery tickets. *Smokes 'N' Sweets, Inc. v. W. Lake Assocs.*, 227 A.D.2d 757 (N.Y. App. Div. 1996).

7. Be a Lawyer, Not a Mathematician

There is no reason for someone with a fine legal education to waste billable time on mere arithmetic. Lots of people will know that a $1 million guarantee that reduces 10% each year will be $900,000 after a year, $800,000 after two years, and so on to $500,000 after five years. Only troublemakers will contend it is $900,000 after a year, $810,000 after two years, $729,000 after three years, and so on, to $590,490 after five years. How could anyone doubt that the 10% referred to $1 million every year? Why would anyone simply say it reduces $100,000 each year?

Geometry has no place in the law. Thus, according to the Supreme Court of Virginia, a restriction against a competing store "within an area of 2,000 feet in any direction of the Leased Premises" means the same as a 2,000 foot radius from the premises. *Marriott Corp. v. Combined Properties Ltd. P'ship.*, 391 S.E.2d 313 (Va. 1990). Never hesitating to display the skill that got it in court, the landlord contended that the "appropriate mathematical formula by which 'area' of a circle is determined [is] ($A = r^2$)." Id. at 317.

DISSENT: Words were sufficient to express the numeric aspects of agreements in the "old days" when compound interest seemed like a revolutionary concept. The frequent collision (and collusion) of JDs and MBAs has complicated matters so that a mathematical example may be used to describe what is also agreed in words; to avoid inconsistency, a practitioner should state which of the verbal agreement or mathematical expression controls. When reviewing an agreement prepared by someone else, working an example from the words is well advised. In a Texas case, the defeasance amount on a $1.25 million loan was (in round numbers) $750,000, and, after the borrower's default, the guarantors were liable for it despite a claim of its being an "excessive and unreasonable and shocking." *AMK 2000-a, L.L.C. v. Maliek*, 411 Fed. Appx. 703 (5th Cir. 2011). Whether preparing or reviewing, work an example as though a tacit assumption (such as the CPI always increases) may not be true.

8. Don't Lapse into a Comma

Is the north half of Lot 1 and Lot 2 (N/2 Lot 1 and Lot 2) the same as the north half of Lot 1, and Lot 2 (N/2 Lot 1, and Lot 2)? Of course not, but why waste a comma? But is the north half of Lot 1, Lot 2 and Lot 3 (N/2 Lot 1, Lot 2, and Lot 3) three halves or a one-half lot and two whole lots?

DISSENT: A semi-colon may help (N/2 Lot 1; Lot 2; and Lot 3).

9. Stay Authentic with a Quick E-mail

According to legend, the Teutonic tribes debated their proposed legislation twice, once while sober for a reasoned discussion and once while drunk for their "real feelings." E-mail is a convenient means of unrestrained self-expression. In *Crestwood Shops, L.L.C. v. Hilkene*, 197 S.W.3d 641, 645 (Mo. Ct. App. 2006), a frustrated shopping center tenant sent an e-mail to a friend (who had asked how he might help the tenant and happened to be the son of one of the owners of the center). In part she wrote: "You can help me by killing [the property manager] and the landlords," and "I want out of that f ..... g lease." Id. at 645. (The ellipses are in the court's opinion.) The experienced practitioner does not need to read much further to guess how the tenant's claims fared.

10. Look "Within" or Be Without

When a lease can be renewed by notice given "within thirty (30) days from the expiration of the original term of this Lease," a court may find that the lease can be renewed by notice given within 30 days before or after the expiration date. *McQuinn v. City of Guntersville*, 169 So. 2d 771 (Ala. 1964). "From" is no clearer; there are two dates that are 30 days from an expiration date. If improvements cannot be constructed "within 30 feet" of a boundary, does that mean 30 feet on either side or just the inside (whichever that may be)?

DISSENT: Sometimes the context rescues the meaning; the buyer cannot deliver the survey to the seller before it gets the survey just because "Buyer will deliver a copy of the survey to Seller within ten days from the date Buyer receives it." As an infallible precaution, however, "before" or "after" can be used for perfect clarity.

Conclusion

But seriously, experienced or not, lawyers need to correct each other only when it is necessary for the clear expression of the agreement and only when they are sure they are right. No matter how good it feels, correction for its own sake is annoying pedantry. For example, why would anyone point out that "good and valuable consideration" is actually two different considerations at early common law: "good" means love and affection and "valuable" means a benefit to the recipient, but either is sufficient to bind a contract. Kudos await the lawyer that ignores these 10 rules. (If the grammar in the last sentence seems wrong, check the dictionary.)

Footnotes

a1 **Mark A. Senn** is a partner with Senn Visciano Canges P.C. in Denver, Colorado.

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