



Ross School of Business at the University of Michigan

Independent Study Project Report

TERM : Winter 1997

COURSE : LHC 750

PROFESSOR : Katherine M. Erdman

STUDENT : Jeremy Newman

TITLE : Business Lawyers and Plain English

FEB

9 1999

“They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters.”

Sir Thomas Moore, Utopia, 1516

BUSINESS LAWYERS AND PLAIN ENGLISH

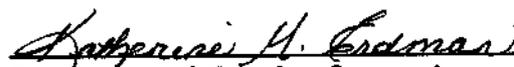
by
Jeremy Newman

A research paper submitted in fulfillment of the requirements for 1.5 credits,
GRADUATE INDEPENDENT RESEARCH PROJECT Winter Term 1997,
Professor Katherine M. Erdman, Faculty Supervisor.

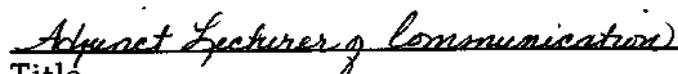
Faculty Comments

The purpose of this independent study by Jeremy Newman, a May 1997 graduate in the University of Michigan joint MBA/Law program, was to explore the application of managerial communication concepts and principles covered in LHC 522 and 523 to client aspects of corporate law pertinent to his post-graduation practice. Broader interest in this topic stems from on-going discussion in academia and industry about the role of professional school degree programs in preparing students not only to understand best current research in the field but also to translate that knowledge into outstanding professional performance.

This paper is a thorough yet concise discussion of the need for clarity in legal correspondence with business clients who are not themselves lawyers and is itself written for that audience. It reviews "Plain English" in this reader context, root causes of unclear legal text, and suggested guidelines for effective lawyer/client writing, and also provides two examples of documents prepared applying and illustrating these precepts. For readers, the paper sets forth the value added to professional expertise in a disciplinary and /or functional field by mastery of communications strategies and skills. While based on the legal profession, the paper should provoke critical analysis of the need for clear communication with end-users in fields such as medicine, pharmacy, social work, and engineering as well as in other areas of business such as accounting, finance, sales/marketing, and human resources.



Signature of Faculty Supervisor



Title

I had put in long hours on the project and was pleased with the results. A clerk at a large law firm, essentially an intern, I had been asked to prepare a letter to one of the firm's clients. I am going to be a business lawyer and the opportunity to communicate with a business client excited me.¹ The letter was based on my research in complex federal safety regulations and I felt I had written a clear and concise document. However, in preparing the letter I had forgotten my audience and generated the document as if the lawyer who assigned the work to me would be its only reader. My style was too formal and my writing was not clear enough. The assigning lawyer had to rewrite my work so the client, my ultimate audience, could easily understand the letter's contents.

My poor performance on the project spurred my interest in communication between lawyers and clients. This paper sets forth the results of my research on the importance of clarity when lawyers correspond with clients. The specific type of writing addressed here includes letters or memoranda meant to communicate information to clients, rather than legal documents which are given to clients but are actually written for specific legal purposes. The first section spells out my ultimate conclusion. The second section addresses why clear writing matters. The third section provides background on problems with legal writing and details the Plain English Movement. The final section explains some basic rules for clear communication between lawyers and clients. In addition, I have attached a rewritten version of my safety regulations letter and a brief letter on corporate restructuring as examples of clear lawyer-to-client communication.

I. CONCLUSION

It is critical for business lawyers to learn to write clearly, in "Plain English," when communicating with their clients. Plain English has a variety of definitions including using

¹I am a fourth year student in the joint MBA and law program at the University of Michigan. Because of my background in both business and law, the specific area of focus for this paper is communication between lawyers and their business clients.

simple words and employing techniques for scoring readability; however, for the purposes of this paper it means writing in a clear manner the lay audience will readily understand. Some advocates of Plain English have argued for increased clarity and simplicity in all legal writing. Other authors have expressed legitimate concerns regarding an attempt to simplify all of the varied forms of legal writing (such as statutes, legal briefs, client letters, etc.). This debate is likely to continue, but the conflict concerns more technical aspects of legal writing and does not weaken the fairly wide consensus that communications between lawyers and clients should be written in Plain English.

II. THE IMPORTANCE OF CLARITY

Communicating with business people is a critical component of any business lawyer's practice. Law is a service profession and lawyers work to satisfy the needs of their clients. Among the most basic needs of any person seeking legal assistance is understandable information and direction from their lawyer. Unclear writing, however, often stands in the way of effective communication between business lawyers and their business clients.

There is no all-inclusive, all-context definition of clarity in writing. What is important is a contingency definition of clarity which "treats clear writing as being to a large degree dependent on an organization's language customs."³ By extension, the "language customs" of that definition would apply with equal appropriateness to a professional organization or a group of persons with similar backgrounds and interests and would also depend upon the audience's membership or non-membership in the particular organization.

²While this seems to be the goal of anyone who puts pen to paper (or hands to keyboard), many lawyers do not write in Plain English even when writing to clients. Richard C. Wydick, *Plain English for Lawyers* (Durham: Carolina Academic Press, 1994) 2.

³James Suchan and Ronald Dulek, "A Reassessment of Clarity in Written Managerial Communications," *Management Communication Quarterly* 4 (1990): No. 1, 88.

Using a relative definition such as this shows how a group like lawyers can believe their writing is clear, while the same writing can be incomprehensible to those outside of the group. In the context considered by this paper, lawyers writing to business clients, the clients' definition of clarity should be used and legal writing should be measured against this standard.

It is ironic that unclear writing by lawyers is such a prevalent problem, since lawyers are essentially professional writers.⁵ Lawyers spend a large portion of their professional lives engaged in the task of writing; and, when it is all said and done, the ultimate product of most legal work is a written document.⁶ One would think professionals who spend so much time writing would recognize the importance of clearly conveying information to their audiences. However, many lawyers seem to have missed this lesson and continue to produce murky legal writing.

Lawyers must learn to write better and more clearly. The world is changing and expectations of lawyers are changing. Tolerance for convoluted "legalese" is on the wane. States are requiring an increasing number of consumer documents to be understandable to the parties signing them.⁹ These state laws tend to focus on documents such as insurance contracts and loan documents. More fundamentally, clear writing can help lawyers

⁴In his 1987 essay on the state of legal writing, Gopen offered a fourteen page bibliography devoted to the issue. George D. Gopen, "The State of Legal Writing: Res Ipsa Loquitur," Michigan Law Review 86 (1987): 360.

Matthew J. Arnold, "The Lack of Basic Writing Skills and Its Impact on the Legal Profession," Capital University Law Review 24 (1995): 229; J. Christopher Rideout and Jill J. Ramsfield, "Legal Writing a Revised View," Washington Law Review 69 (1994): 37.

⁶Arnold 230-231.

⁷Even if you do not regularly come into contact with lawyers, you encounter legal writing on the back of tickets to sporting events, in car rental agreements and hospital waivers, and in numerous other similar locations.

⁸"Most lawyers write poorly. That's not just our lament. Leading lawyers across the country agree." Tom Goldstein and Jethro K. Lieberman, The Lawyer's Guide to Writing Well (New York: McGraw-Hill, 1989) 3.

⁹Richard H. Weisberg, When Lawyers Write (Boston: Little, 1987) 22.

improve performance of their duties. For example, unclear documents may hide substantive deficiencies. Clear writing can illuminate these deficiencies and, as a result, allow for better analytical thinking.¹⁰ Not only are non-lawyers demanding that lawyers write clearly but this clear writing offers a means for lawyers to sharpen their legal skills.

Clarity is particularly important when business lawyers write to their business clients, who expect to be able to understand the information and guidance they receive.¹¹ Failing to satisfy clients' expectations of clarity may ultimately cause lawyers to lose their clients. This makes intuitive sense because there are many ways for unclear writing to cost clients money. If an issue remains unclear because the client never understood or because they incorrectly deciphered correspondence from their lawyer, significant costs can be incurred. For example, a lawsuit might be brought or a transaction might fail. If a client is forced to clarify an issue that poor legal writing left unclear, they have two alternatives: (1) the client can take the time to decipher the issue themselves, or (2) the client can ask their lawyer to explain the matter again. The first alternative consumes the client's time and the second is likely to result in additional legal fees. As the market for legal services becomes increasingly competitive and businesses become less loyal to law firms, lawyers cannot afford to impose these extra costs on their clients.¹²

Clarity in communications with clients is also important because clients tend to have few tools with which to gauge the quality of legal services. It is difficult for non-lawyers to judge the quality of a contract, will, court brief, or other legal documents. As a result, the process by which legal services are provided becomes an important measure for clients as they evaluate their lawyers' performance.¹³ Communication between lawyers and clients

¹⁰Thomas W. Taylor, "Plain English for Army Lawyers," *Military Law Review* 118 (1987): 240.

¹¹Michele M. Asprey, *Plain Language for Lawyers* (Sydney: Federation Press, 1991) 59.

¹²Arnold 239.

¹³Susan Raridon, "Satisfied Clients Bring in New Clients," *Legal Economics* 13 (1987): 26.

is a critical part of the process. If written documents are not clear and understandable, clients are likely to feel that their lawyers could have done a better job providing the services.

III. THE PLAIN ENGLISH MOVEMENT

A. Background of Legal Writing and the Plain English Movement

On the whole, lawyers are notoriously unclear writers and have been so throughout history. As far back as the 16th century there were complaints about the increasing number of laws and the complexity of legal language. It is claimed that England's King Edward the VI (who reigned from 1547-1553) stated, "I wish that the superfluous and tedious statutes were brought into one sum together and made more plain and short so that men might better understand them."¹⁴ Writing by American lawyers has been equally problematic. In 1817 Thomas Jefferson wrote the following about a clearly written bill he had submitted:

I should apologize, perhaps, for the style of this bill. I dislike the verbose and intricate style of the modern English statutes . . . You however can easily correct this bill to the taste of my brother lawyers, by making every other word a "said" or "aforesaid" and saying everything over two or three times so as that nobody but we in the craft can untwist the diction, and find out what it means.¹⁵

More recently, concern with the confusing quality of legal writing has increased, and reformers have begun to advocate clarity and simplicity in legal writing. These reformers have garnered enough support from inside and outside of the legal profession to earn their campaign the label "the Plain English Movement."¹⁶

Plain English is a loosely defined term, and supporters argue for different meanings. To some, Plain English simply means writing documents that can be understood merely by reading them. For example, in his article on the UCC, Steven Weise

¹⁴Asprey 28.

¹⁵Goldstein 7.

¹⁶Steven O. Weise, "Plain English Will Set the UCC Free," Loyola of Los Angeles Law Review 28 (1994): 372; Gopen 346; Taylor 224.

states, “[w]riting an understandable document requires using simple words and simple formatting techniques.”¹⁷ Others advocate Plain English as an audience-focused process resulting in clear writing. To these proponents, “Plain English is a dynamic approach to writing in clear conversational language your audience will easily understand.”¹⁸ Finally, there are some who advocate a more extreme approach with greater simplicity as the ultimate goal. An example of this last camp is Rudolf Flesch, who suggests legal writing meet certain readability scores derived from formulas based on sentence length and word length.¹⁹ Although there are differences among the proposed approaches, the overarching theme is the need for greater clarity.

The Plain English movement has a long history in the United States. Roots of the movement can be traced back to World War II, when the Office of Price Administration (OPA) found businesses could not understand wartime regulations. The OPA hired Flesch to help clarify their regulations and he went on to become a leading advocate of Plain English.²⁰

Plain English gained momentum along with the consumer movement in the 1970s. States began to pass laws requiring Plain English for documents used in consumer transactions. Minnesota was the first in 1977 with a statute requiring insurance contracts to be written so that the average consumer could understand them.²¹ By 1987 more than half of the states had some type of Plain English statute which applied to consumer contracts, insurance policies, and similar documents.²² The federal government also played a role; in 1978 President Carter signed an executive order requiring federal regulations to be written in “plain English and understandable to those who must comply with them.”²³ Many

¹⁷Weise 372.

¹⁸Taylor 219.

¹⁹Rudolf Flesch, How to Write in Plain English (New York: Harpers, 1979) 20.

²⁰Taylor 223.

²¹Gopen 347.

²²Taylor 229.

²³Goldstein 18.

authors continue to write on the subject, indicating that clarity in legal writing remains a concern.

Plain language in legal writing is not solely an American issue. Michele Asprey, an Australian solicitor and plain language writing consultant, authored a book on plain language similar to those produced by American writers. In this book Asprey describes plain language movements both in common law countries (legal systems based on English common law) such as the United States, Canada, the United Kingdom, South Africa, India, New Zealand, and Australia and in civil law countries (with legal systems based on the Napoleonic code) such as Sweden and Denmark.²⁴ Unclear writing by lawyers appears to be a global issue, one affecting two of the most basic types of national legal systems in the world.

Despite the appeal of a call for greater simplicity and clarity in all legal writing, there are legitimate arguments against Plain English in every case. As noted above, some advocates of Plain English tend to lump together all writing done by lawyers. But, according to Richard Hyland, all of the varied types of legal writing are "too heterogeneous to merit uniform treatment."²⁵ Just as legal writing should not be uniformly technical and complicated, monolithic simplicity in legal writing could have significant costs. One of the best arguments against Plain English is that there are risks inherent in trying to make complicated concepts, facts and issues appear too simple.²⁶ One response to this argument is that legal writing should be simplified in appropriate contexts, such as consumer transactions where individuals are likely to be without legal counsel because the amounts of money involved are not large enough. In these situations clarity of understanding is most

²⁴ Asprey 33-51.

²⁵ Richard Hyland, "A Defense of Legal Writing," University of Pennsylvania Law Review 134 (1986): 600-601.

²⁶ Taylor 222.

important.²⁷ Essentially, lawyers, like all writers, should be aware of audience and context. Richard Weisberg makes this a central theme of his book When Lawyers Write.

There is no reason to attack blindly all types of traditional legal language. The main point of this book . . . - that being aware of your audience almost guarantees effective legal writing - induces broadscale reform only in certain areas of the lawyer's work. In other professional situations reform should be more modest, for no efficiency is gained therein [!] by undercutting tradition and fixing what already works.²⁸

Awareness of audience is critical for lawyers learning to write in a clear manner when communicating with clients.

B. Reasons for Unclear Legal Writing

Authors on the subject of legal writing have identified a wide variety of possible explanations for why lawyers do not write clearly. I have drawn from these books and articles several explanations which appear particularly insightful.

1. Basic Writing Skills. Perhaps the most fundamental reason for unclear legal writing is the lack of rudimentary writing skills among law students and lawyers.²⁹ American primary, secondary, and undergraduate schools simply fail to provide future lawyers with skills such as grammar, punctuation and style. Law schools have begun to address this failing but their efforts have been fitful and in many cases half-hearted.

2. Legal Education. In the past, law schools were comfortable assuming that someone else would teach students to write before they reached law school. This assumption no longer holds true and all law schools accredited by the American Bar Association have some sort of writing program.³⁰ These programs, however, do not appear to be sufficient to prepare law students to function in a profession where they are essentially professional writers. "[T]raining is still poorly funded, poorly managed, and

²⁷Taylor 222-223.

²⁸Weisberg 5.

²⁹Arnold 228. See also Weisberg 31; Goldstein 28.

³⁰Rideout 37.

poorly understood. While legal writing professors are seeking to remedy that situation amidst bare budgets and broken spirits, most legal educators have responded poorly to the need for better legal writing training.”³¹

3. Economic. There are several different economic explanations for why lawyers fail to write clearly. First, lawyers use language as a device to maintain their position in society and their economic perks.³² Lawyers are able to charge large sums of money for their services because non-lawyers do not understand what lawyers say or do. Opaque language keeps clients in the dark and allows lawyers to continue to charge these high fees. A second argument is that lawyers’ writing is unclear because they use legalese as a device to save time and money.³³ Finally, some apologists have argued lawyers would actually like to write more clearly but non-lawyers expect legal language to be mystifying.³⁴ Under this reasoning lawyers use language to maintain their position in society, but rather than trying to dupe clients as in the first argument, they are merely trying to satisfy their clients’ expectations.

4. Legal. How lawyers use language to persuade courts and how courts interpret words in documents lead to three possible explanations for unclear legal writing. These arguments are used to explain “lawyerisms” and some of the odd stylistic conventions adopted by lawyers (redundant noun and verb clusters for example) as well as the general abstract nature of legal writing.

a. When writing for courts, lawyers generally attempt to persuade from existing precedent by showing how similar or different the issue in their case is from cases that have been decided before. This persuasive technique results in a

³¹Rideout 37-38.

³²Goldstein 23. See also Arnold 232; Taylor 229.

³³Goldstein 23.

³⁴Weisberg 25; Taylor 229.

great deal of abstraction in writing done for the courts and this spills over into all legal writing.³⁵

b. Lawyers use “lawyerisms” because these words are “terms of art” which have settled meanings in the law.³⁶ While this may explain certain obscure terms such as *res ipsa loquitur* (a tort doctrine addressing obvious negligence) or *fee simple absolute* (the most complete right to real property), it does nothing to explain the non-technical gobbledygook that makes up most legalese. For example, herein, whereas, said, and similar terms have no specific legal meanings. I will address this issue more completely in the last section of this paper.

c. Even if words have not been specifically defined by courts, lawyers are cautious by nature and continue to use unclear words and stylistic conventions that have not caused any problems in the past.³⁷

5. Sociological. The unclear legal style and vocabulary of the law serve as symbols, setting the legal profession apart from the rest of the world and creating cohesiveness within the group.³⁸ Much like a secret handshake, this murky language shows who belongs to the club. Because they master these symbols during law school and the early stages of their careers, while desperately trying to learn and fit into the profession, lawyers become particularly attached to the unclear legal style and vocabulary that seem to be required to achieve membership in the bar.³⁹

6. Historical. Early rules of pleading “as stylized as movement in a Kabuki play” contributed to the unclear nature of modern legal writing.⁴⁰ Even though reformers simplified the pleading rules long ago, centuries of bad habits caused by the old

³⁵Gopen 338-339.

³⁶Goldstein 22; Weisberg 103; Taylor 228.

³⁷Taylor 228-229.

³⁸Goldstein 19; Gopen 339; Taylor 227.

³⁹Taylor 227.

⁴⁰Goldstein 16.

requirements linger on. Similarly, historical methods for determining legal fees are likely to have contributed to the verbose, redundant legal style which remains to this day. At one time lawyers practicing before English courts were paid by the page for documents filed, creating an obvious incentive for wordiness.⁴¹

7. Professional. Lawyers have a duty to act in the best interests of their clients. Intentionally foggy writing may serve as a tool to hide losing causes.⁴² Also, continually writing for a hostile audience may result in an over-inclusive style which can be unclear.⁴³ For example, rather than trying to interpret documents the way the author intended, opposing counsel and judges tend to look for deficiencies in documents and search for interpretations which contradict the author's intent. As a result, lawyers write to cover every last contingency instead of trying to be simple and clear.

8. Technological. Modern machines such as computers and typewriters contribute to poor legal writing in two ways: (1) these machines make wordiness easy, and (2) computers allow lawyers to borrow already existing written work.⁴⁴ Borrowing what has been written before can result in thoughtless repetition of unclear language and documents which do not fit the context. In addition to word processing, much legal writing is dictated. Although dictation is fast, it can lead to poorly planned documents and reliance on comfortable constructs whether they are clear or not.⁴⁵

9. Institutional. As a rule lawyers write under time pressure.⁴⁶ In this environment writing often does not receive sufficient attention to insure clarity. Also, much legal writing is accomplished by groups.⁴⁷ Multiple authors contributing to one document can lead to inconsistent styles and poor organization.

⁴¹Asprey 32.

⁴²Arnold 233; Goldstein 21.

⁴³Arnold 234; Gopen 340.

⁴⁴Goldstein 25.

⁴⁵Goldstein 67.

⁴⁶Goldstein 25-26; Gopen 341.

⁴⁷Gopen 341.

10. Intellectual. It is possible that many lawyers do not think clearly enough to write clearly.⁴⁸

IV. KEYS TO CLEAR WRITING

This section presents basic rules for lawyers writing to clients.

A. Awareness of Audience

When lawyers write, they should focus on their audience. A major problem with legal writing is that “lawyers needlessly alienate and confuse certain audiences by adopting stylistic postures fitting only other audiences.”⁴⁹ If lawyers become more aware of to whom they are writing, communication between lawyers and clients will be much clearer. Therefore, writing should be done with the reader firmly in mind and indirectness, formality and complexity in a document should be tailored to fit the audience.⁵⁰

1. Indirectness. Lawyers tend to write in an indirect style. For example, instead of immediately addressing the most important point in a letter, lawyers will often set an indirect tone and begin with one of the following mannerisms: (1) the attachment mannerism (attached please find . . .), (2) the recapitulation mannerism (pursuant to our telephone conversation of Wednesday, July 5th . . .), or (3) the social mannerism (it was a pleasure to meet with you and Joe at . . .).⁵¹ As a general rule, when writing to clients, lawyers should employ a direct style and place vital information at the beginning of the letter.⁵²

2. Formality. Legal writing tends to be stiff and formal. Perhaps this formality is a result of spending too much time writing to opposing counsel and for the benefit of courts.

⁴⁸Goldstein 32; Hyland 625-626.

⁴⁹Weisberg 44.

⁵⁰Weisberg 88.

⁵¹Weisberg 93.

⁵²Weisberg 93. See also Goldstein 85-86.

Normally, a high level of formality is inappropriate for correspondence with clients. “[N]onlawyers find the usual stilted lawyerisms disconcerting and mystifying.”⁵³ Lawyers should be respectful but informal when they write to clients.⁵⁴ In a similar vein, lawyers have a tendency toward the pompous that should be avoided in all forms of legal writing.⁵⁵

3. Complexity. The level of complexity in any document should be adjusted based on the ability of the audience to comprehend. Numerous aspects of writing, including sentence length and word length, contribute to the complexity of a letter. Regarding complexity it has been noted, “[t]he writer who uses words unknown to his readers might as well bark.”⁵⁶ Audience awareness should help eliminate unnecessary complexity.

B. Common Sins of Legal Writing

The books and articles reviewed for this paper contain numerous suggestions for improving legal writing. Presented below are suggestions for correcting common mistakes made by lawyers. The recommendations chosen were made by more than one author and go beyond simple grammar rules to issues I believe affect lawyers on a regular basis.

1. Poor Word Choice. The first, and perhaps the easiest recommendation to implement, is eliminating lawyerisms. Lawyerisms are words like herein, whereas, said, and pursuant often used by lawyers even though they have no real legal significance. All these words do is confuse and irritate clients. Lawyers should adopt a concrete, familiar vocabulary when writing to nonlawyers.⁵⁷

Lawyerisms are different from terms of art, which are words that have special legal meanings. Examples of terms of art (used previously in section III.B.4.b.) are *res ipsa loquitor* (a tort doctrine addressing obvious negligence) and *fee simple absolute* (the most

⁵³Weisberg 109.

⁵⁴Weisberg 88, 90-94.

⁵⁵Asprey 80.

⁵⁶Charles Beardsley, 1941, quoting approvingly an editorial in the *San Francisco Chronicle*. Goldstein 62.

⁵⁷Wydick 53-59. See also Goldstein 119; Weisberg 103; Flesch 33.

complete right to real property). Lawyers should continue to use terms of art, but these terms must be explained in clear language when writing to clients.⁵⁸

My personal experience has been that like moths to a flame, lawyers are attracted to complex words generally, not just lawyerisms. Often a two-dollar word is used when a nickel one would have been clearer. There is no place for this practice in correspondence with clients.⁵⁹ In fact it is counterproductive. In his book Management: Tasks, Responsibilities, Practices (Harper & Row 1974), Peter Drucker explained:

One can communicate only in the recipient's language or in his terms. And the terms have to be experience-based. It therefore does very little good to try to explain terms to people. They will not be able to receive them if they are not terms of their own experience. They simply exceed their perception capacity.⁶⁰

2. Sentence Length. Long sentences can make writing difficult to understand. Lawyers often try to combine a variety of thoughts into one sentence. The results are long complicated sentences. A simple solution offered by Richard Wydick is to put only one main thought in *most* sentences and "to keep *average* sentence length below twenty-five words."⁶¹ He does not advocate mindless application of hard and fast requirements but suggests keeping these rules in mind will keep sentences shorter and will result in authors' carefully considering the decision to write long, potentially confusing sentences.

3. Passive Voice. Lawyers overuse the passive voice.⁶² When the passive voice is employed, the subject of a sentence is acted on: "The paper is written by Jeremy." When the active voice is employed the subject of a sentence performs the action: "Jeremy writes the paper." Lawyers may be drawn to the passive voice because it allows them to avoid assigning any responsibility ("it is claimed," "it is written," etc.). While there may be times

⁵⁸Flesch 39.

⁵⁹Wydick 56.

⁶⁰Milton W. Zwicker, "The Power of Communication on the Billing Process," Law Practice Management 18 (1992): No. 5, 22.

⁶¹Wydick 36 (emphasis added). See also Goldstein 159; Weisberg 111-112; Flesch 20-32.

⁶²Wydick 27; Asprey 126; Goldstein 141; Weisberg 51.

where it is appropriate to use the passive voice in legal writing, this construction should not be abused. Overuse of the passive voice results in wordiness and lifeless writing because the subjects of the sentences are never acting.

4. Nominalizations. Legal writing should be alive. Lawyers should use base verbs, the action verbs, instead of nominalizations.⁶³ A nominalization is a base verb that has been made into a noun. For example, *pay* can be changed to *payment*. Nominalization causes simple sentences like *Sue pays Bob* to become more complex - *Sue makes payment to Bob*. More words are used and the action is less clear. In addition, nominalizations often result in sentences moving from the active to the passive voice. Nominalizations result in wordiness and rob legal writing of its vitality.⁶⁴

5. Overcaution and Reckless Abandon. Lawyers often cautiously use hedge words like “appears” and “seems” because they are afraid to be shown wrong.⁶⁵ A similar problem exists with emphatic words such as “clearly” and “obviously,” which are often used by lawyers who fear they have not convinced their audience.⁶⁶ Lawyers employ these emphatic words believing that their certainty will persuade the reader even if their arguments did not. However, few issues addressed in the law are actually clear or obvious, so these words are not persuasive and tend to stand out as signs of weak writing. Used appropriately, words of caution and emphasis can be effective tools, but when overused they “enfeeble rather than enhance the prose.”⁶⁷

6. Double and Triple Negatives. As noted before, lawyers tend to write long sentences. A possible result of overly long sentences is multiple negatives which cause the reader to switch back and forth between no and yes (one negative is no, two negatives

⁶³Wydick 23; Asprey 132.

⁶⁴Goldstein 138.

⁶⁵Goldstein 125. See also Joseph M. Williams, Ten Lessons in Clarity and Grace, 2nd ed. (Glenview, Illinois: Scott, Foresman, 1985) 82.

⁶⁶Goldstein 125. See also Williams 82.

⁶⁷Goldstein 125.

changes to yes, but then three switches back to no, and so on). Unclear sentences containing multiple negatives should be simplified.⁶⁸ For example, the following sentence contains a triple negative:

Although *it is doubtful* that the mortgage loans will generate enough revenue to service the interest on the Bonds, retire the Bonds pursuant to the sinking fund, and pay the principal on the Bonds as they mature, *it is not a certainty* that the bonds *will not be* self-sufficient.⁶⁹

This convoluted sentence can be rewritten as - “The Bonds may be self-sufficient even though the mortgage loans may not generate enough revenue to . . .”⁷⁰ Eliminating multiple negatives makes sentences clearer.

7. Needless Repetition. Lawyers often use several words where one would be sufficient. Phrases like “give, devise, and bequeath” and “release, relinquish, and remit” are scattered throughout legal writing.⁷¹ This tendency has been described as “killing one bird with three stones.”⁷² The convention arose because historically lawyers often had several languages to choose from when drafting and would choose a word from each to insure understanding.⁷³

Modern lawyers do not usually work with multiple languages but there are reasons for the continued use of this convention. First, there are some coupled words which have specific legal definitions. “Aid and abet” is an example of words which have a particular meaning when used together. However, the vast majority of words commonly grouped together in legal writing do not have any special legal importance. Second, clusters of words are often used in a shotgun approach to insuring all possible variations are covered. Thoughtful use of words with different meanings to guarantee proper interpretation of a document is simply good lawyering. Unfortunately, too many lawyers blindly use several

⁶⁸Goldstein 132; Weisberg 112; Flesch 94.

⁶⁹Weisberg 112 (emphasis added).

⁷⁰Weisberg 112.

⁷¹Weisberg 114.

⁷²Asprey 109.

⁷³Wydick 18.

words with the same meaning thinking they have made a document more precise. Such redundant legal phrases should be eliminated unless there is a legitimate reason for retaining them.

Wordiness. Aside from simple repetitiveness, lawyers waste their readers' time with sheer wordiness.⁷⁵ Whole phrases are used when single words would work better (*in accordance with* versus *by* or *under*)?⁷⁶ In addition to annoying an audience, verbose writing contributes to the complexity of legal documents. Lawyers should resist the desire to hear themselves talk (see their words on paper) and avoid wordiness whenever possible.

⁷⁴Wydick 18; Weisberg 114.

⁷⁵Goldstein 130; Weisberg 116.

⁷⁶Wydick 11.

Bibliography

Books

- Asprey, Michele M. Plain Language for Lawyers. Sydney: Federation Press, 1991.
- Flesch, Rudolf. How to Write in Plain English. New York: Harpers, 1979.
- Goldstein, Tom and Jethro K. Lieberman. The Lawyer's Guide to Writing Well. New York: McGraw-Hill, 1989.
- Weisberg, Richard H. When Lawyers Write. Boston: Little, 1987.
- Williams, Joseph M. Ten Lessons in Clarity and Grace. 2nd ed. Glenview, Illinois: Scott, Foresman, 1985.
- Wydick, Richard C. Plain English for Lawyers. Durham: Carolina Academic Press, 1994.

Articles

- Arnold, Matthew J. "The Lack of Basic Writing Skills and Its Impact on the Legal Profession." Capital University Law Review 24 (1995): 227-256.
- Gopen, George D. "The State of Legal Writing: Res Ipsa Loquitor." Michigan Law Review 86 (1987): 333-380.
- Hyland, Richard. "A Defense of Legal Writing." University of Pennsylvania Law Review 134 (1986): 599-626.
- Raridon, Susan. "Satisfied Clients Bring in New Clients." Legal Economics 13 (1987): 26.
- Rideout, J. Christopher and Jill J. Ramsfield. "Legal Writing a Revised View." Washington Law Review 69 (1994): 35-99.
- Suchan, James and Ronald Dulek. "A Reassessment of Clarity in Written Managerial Communications." Management Communication Quarterly 4 (1990): No. 1, 87-98.
- Taylor, Thomas W. "Plain English for Army Lawyers." Military Law Review 118 (1987): 217-241.
- Weise, Steven O. "Plain English Will Set the UCC Free." Loyola of Los Angeles Law Review 28 (1994): 371-390.
- Zwicker, Milton W. "The Power of Communication on the Billing Process." Law Practice Management 18 (1992): No. 5, 22.

Appendix A

I have attached a rewritten version of my safety regulations letter. In addition to changing the letter to improve clarity, I changed the names to eliminate any issues of client confidentiality. My main focus when I rewrote the letter was to make it clear, direct, and informal. Provided below are several examples of how I altered sentences in the original document.

1. More Direct Introductory Sentence

Original: As you requested, I have prepared this letter addressing the consequences of violating Chapter 301 - Motor Vehicle Safety ("Chapter 301").

Rewritten: As you requested, this letter explains the possible negative consequences for manufacturers who violate federal motor vehicle safety standards.

2. Less Repetition and Shorter Sentences

Original: Chapter 301 expressly prohibits the manufacture for sale, sale, offer for sale, importation, and introduction into interstate commerce of noncomplying motor vehicles and equipment and requires certification of compliance by manufacturers and distributors.

Rewritten: Manufacturers must provide certificates verifying that motor vehicle equipment meets the applicable safety standards. Chapter 301 requires such certification and expressly prohibits manufacturing or selling noncomplying motor vehicle equipment.

3. Eliminate Legal Jargon and Explain Legal Terms

Original: Penalties for violations of Chapter 301 are provided in the statute. Most importantly *Chapter 301 provides a civil penalty* for violating certain sections of the statute, including *the §30112 prohibition on manufacturing, selling, and importing noncomplying motor vehicles and equipment*.

Rewritten: There are substantial federal penalties for violating Chapter 301. Most importantly, *there is a civil penalty, a fine*, for violating certain sections of the statute, including *the section prohibiting manufacturing or selling noncomplying motor vehicle equipment*.

Newman, Ped & Winters
Attorneys at Law
1000 Washington Street
Eugene, Oregon 97401
(541) 555-1212

April 28, 1997

Mr. Robert Smith
Vice-President
ABC Corporation
P.O. Box 333
Ann Arbor, Michigan 48105

Re: Motor Vehicle Safety Standards

Dear Mr. Smith:

As you requested, this letter explains the possible negative consequences for manufacturers who violate federal motor vehicle safety standards. Federal law, Chapter 301- Motor Vehicle Safety ("Chapter 301") formerly known as the National Traffic and Motor Vehicle Safety Act, requires manufacturers of motor vehicle equipment to meet the Federal Motor Vehicle Safety Standards set by the Secretary of Transportation (the "Secretary"). Standard No. 108 for lamps and reflective devices applies to the center stop lamp included in the aftermarket spoilers you manufacture. Failure to comply with this standard or any other violation of Chapter 301 can result in severe penalties.

Manufacturers must provide certificates verifying that motor vehicle equipment meets the applicable safety standards. Chapter 301 requires such certification and expressly prohibits manufacturing or selling noncomplying motor vehicle equipment. As a result, dealers and distributors will violate Chapter 301 if they sell noncomplying equipment. However, these sellers are able to protect themselves by obtaining the required certification of compliance from manufacturers. Under Chapter 301, if a dealer or distributor has certificates of compliance they will not be liable if the motor vehicle equipment they are selling fails to meet safety standards. Therefore, dealers and distributors are likely to demand certification from manufacturers.

There are substantial federal penalties for violating Chapter 301. Most importantly, there is a civil penalty, a fine, for violating certain sections of the statute, including the section prohibiting manufacturing or selling noncomplying motor vehicle equipment. Manufacturers, dealers, and distributors can be liable to the federal government for up to \$1,000 for each violation of Chapter 301, with maximum damages capped at \$800,000. Each item of noncomplying motor vehicle equipment manufactured and sold is a separate violation. In addition, any failure to perform an act required by Chapter 301 is a violation. These penalties for noncompliance can be severe. For example, in at least two cases I have seen manufacturers fined the maximum possible amount.

In addition to civil penalties for violating Chapter 301, if the Secretary discovers any safety related defect or noncompliance with applicable motor vehicle safety standards, they can require manufacturers to correct any deficiencies. There is a formal procedure the Secretary must use to determine whether equipment is defective or does not meet safety standards. This procedure allows for the Secretary to investigate the facts and receive input from the manufacturer. If the Secretary follows this procedure and decides motor vehicle equipment is deficient, manufacturers are obligated to undertake a two part remedy. First, the manufacturer must give notice of the defects or noncompliance to the owners, purchasers, and dealers of the motor vehicle equipment. Second, the manufacturer must correct the defects or noncompliance. As a result, once safety defects or noncompliance with safety standards are discovered, manufacturers face stiff civil penalties and expensive requirements to remedy the situation.

The Secretary discovers safety defects and noncompliance with safety standards in a number of different ways. Most importantly, the National Highway Traffic Safety Administration (the "Administration") conducts yearly tests to determine whether motor vehicles and equipment comply with the standards. Based on the results of these tests the Secretary decides whether to seek correction of any defects or noncompliance and also whether to impose any penalties on manufacturers. Manufacturers themselves have a continuing obligation to notify and remedy any defect or noncompliance in their products. How seriously a manufacturer takes this obligation may affect whether the Secretary of Transportation decides to impose fines if a problem is discovered.

People other than government agents can act to cause manufacturers, dealers, and distributors to produce and sell defect free motor vehicle equipment that meets safety standards. The Administration is interested in informal information about the manufacture or sale of noncomplying motor vehicles or equipment. This information can be provided by anyone on an informal, confidential basis. After they receive the information, the Administration decides how to pursue the matter. Chapter 301 provides another possible course of action. Under the statute an "interested person" may formally petition the Secretary to look into a matter. "Interested person" is defined very broadly by the statute, and, as a result, many people including manufacturers, dealers, or distributors can ask the Secretary to look into safety defects or failures to comply with safety standards.

Government is the primary actor in the system contemplated by Chapter 301 and individuals are not entitled to sue under the statute. As a result, my research did not uncover any cases where an individual plaintiff injured in an automobile accident successfully sued under this statute or its predecessor. However, it is worth noting that in different contexts private causes of action (i.e. the right to sue) have been inferred from federal statutes that did not explicitly grant individuals the right to sue. In addition, violation of Chapter 301 can serve as evidence of negligence in cases based on state tort laws (e.g. product liability, wrongful death, etc.). Essentially, what this means is that an injured plaintiff suing under state law can rely on violations of Chapter 301 as evidence to satisfy the negligence element of their tort claims. Such strong evidence bearing on one of the critical elements of a tort claim can greatly benefit a plaintiff. As a result, potential tort liability provides one more reason for motor vehicle equipment manufacturers to avoid violating safety standards.

The possible negative repercussions of failing to comply with Chapter 301 are significant and should be avoided. All manufacturers should be sure to meet the safety standards set by the Secretary of Labor. If you have any questions please call me.

Sincerely,

Jeremy D. Newman

Appendix B

Attached is a brief letter explaining issues of corporate structure and limited liability. As I wrote this letter, my main focus was to make it clear, direct, and informal. I also tried keep the material reasonably simple and to avoid legal jargon whenever possible.

Newman, Ped & Winters
Attorneys at Law
1000 Washington Street
Eugene, Oregon 97401
(541) 555-1212

April 28, 1997

Ms. Jane White
Chief Executive Officer
XYZ Corporation
P.O. Box 777
Fresno, California 93711

Re: Restructuring XYZ Corporation to Limit Liability

Dear Ms. White:

I am writing to follow up on our recent telephone conversation about restructuring XYZ Corporation. We discussed creating a new auto parts subsidiary to protect the rest of XYZ Corporation from the potential product liability inherent in this line of business. While forming a subsidiary will help shield the remainder of XYZ Corporation from liability, this protection is not absolute.

As a general rule, parent corporations are not legally responsible for the debts or liabilities of their subsidiaries. The law treats corporations as separate legal entities from their shareholders. Because they are separate legal entities, courts normally will not force shareholders to pay the debts or liabilities of their corporations. As a result, shareholders have limited liability. Shareholders can lose the money they have invested in a corporation but no more. Since a parent corporation is a controlling shareholder of its subsidiary, the same rules apply and parent corporations are not usually held responsible for the debts or liabilities of their subsidiaries. However, the protection offered by a parent and subsidiary structure has some limitations.

There are circumstances where courts will disregard the separateness of parent and subsidiary corporations and hold the parent responsible for the debts or liabilities of its subsidiary. When a court holds shareholders, individuals or corporations, liable for the debts of the corporation whose shares they own, the court is said to have "pierced the corporate veil." When deciding whether to pierce the corporate veil, courts look to see if the corporation has observed all of the legal requirements for maintaining its corporate status and if the corporation has in fact been separate from its shareholders. In addition, courts investigate whether the legal separateness of corporations and their shareholders has been used for any unfair or illegal purpose. This corporate veil piercing doctrine is very flexible and courts generally use it to reach equitable results.

Because corporate veil piercing doctrine is so flexible, it is not possible to provide hard and fast recommendations which will guarantee that the separateness of a parent and subsidiary corporation will be respected by all courts. However, I have provided some

broad guidelines to keep in mind if you decide we should move forward on this restructuring project and create a new auto parts subsidiary for XYZ corporation:

- (1) the subsidiary should have its own assets, clearly earmarked, used only by the subsidiary, and recorded on its own records;
- (2) the subsidiary should have its own bank account and there should be no commingling of funds with those of XYZ Corporation and the subsidiary's funds should not be used for the benefit of XYZ Corporation or at the direction of XYZ Corporation;
- (3) the subsidiary should maintain separate books from XYZ Corporation and should keep them in good order;
- (4) the subsidiary's board of directors should hold meetings separate from those of the XYZ Corporation board and the proceedings should be properly recorded in the subsidiary's own minute book; and
- (5) the daily operations of XYZ Corporation and the subsidiary should be kept separate.

These guidelines primarily address the first part of the corporate veil piercing doctrine, whether a subsidiary corporation has met the legal requirements for maintaining its corporate status and whether a subsidiary has in fact been separate from its parent.

Since the second part of the doctrine focuses on issues of fairness, it is difficult to provide guidelines beyond striving to act in a principled manner. It is worth noting that forming a subsidiary for the express purpose of limiting the liability of the parent corporation has been accepted as perfectly legal. However, a key issue as courts apply the fairness component of the corporate veil piercing doctrine is whether a subsidiary was adequately capitalized. If a subsidiary does not have sufficient capital to operate its business (including purchasing its own liability insurance) courts are more like to pierce the corporate veil and hold the parent responsible for the subsidiary corporation's debts and liabilities. As a result, if you choose to create an auto parts subsidiary, the amount of protection from potential liability provided by this structure will depend, in part, on how well the subsidiary is capitalized.

Hopefully this letter will provide you with additional guidance as you consider how to deal with the potential products liability facing your auto parts business. If you have any questions please call me.

Sincerely,

Jeremy D. Newman