Keeping It Simple: A Law Firm Marketing Opportunity

By Thomas M. Clyde©

This month we begin a series of articles on the marketing or market value of plain language. Call it plain language in action. We will alternate these articles with articles—described in last month's column—about our sampling of Michigan documents for Clarity Awards and for legalese.

Incidentally, the author of this month's article has drafted a stock-purchase agreement in plain English to illustrate his market-driven approach to drafting. You may contact him about the agreement at 18 Shawmut Street, Boston, MA 02116. Phone: (617) 695-9335.

—JK

A Competitive Edge

Law firms are overlooking the marketing opportunity presented by today's arduous legal papers. Corporate and business executives have become increasingly uneasy about the length, complexity, and cost of legal documents, yet law firms have not been moving to meet those concerns. A firm can gain a competitive advantage by streamlining its written product and making its papers more readable, hard-hitting, and cost-effective.

The papers lawyers prepare for business dealings are inevitably vehicles of communication—chiefly among the parties but with other audiences as well. But today's typical agreements and other legal papers tend to get in the way of communication. The papers are too long, complicated, and difficult to read. They consume too much time and money, sometimes work against the client's goals, and can even increase the risk of mistakes.

Those widespread shortcomings give a law firm a chance to differentiate itself from its competition. Legal papers can be spare, sensibly organized, and clearly written—while serving and protecting the client's interests better than the standard product.

Heavy Going

By 3:30 in the morning the conference room had the usual stale and slightly desperate feel. Eight discontented persons were sitting around the table. What was bringing us together for all of a summer night was a 60-page, single-spaced draft of an agreement for the sale of one of my employer's subsidiaries. The buyer's law firm had prepared the draft, and now representatives of both sides were trying to stay awake, to negotiate in reasonably good faith, and to get to the next draft. A familiar scene in the course of a substantial business transaction.

Familiar also was the draft agreement. In its length, its preordained organization, its taxing style and legalese, and its goal of exhaustive content, the draft was an immediately recognizable product of a sophisticated American law firm. It was standard fare for the transaction but a pretty difficult instrument of communication.

At 3:30 a.m. the hot topic was the level of materiality that should apply to the 14th of the 33 seller representations proposed by the buyer. Timeworn artillery exchanges over the representations droned on almost by rote. Since covenants and conditions followed the representations, we definitely had a long way to go.

It had become obvious that our little band was stuck there for the entire night, and at least one of us blamed the length and difficulty of the draft. Working through its tangled provisions was taking forever. Also, the continuous opportunities to disagree over details and remote contingencies—virtually all of them meaningless as a practical matter—seemed to be pushing the parties apart. Intruding repeatedly was the thought that a simpler, more direct piece would have been a contribution, rather than an obstacle, to reaching an overall agreement—and would have had us home in bed several hours before.

We were not even discussing important issues. Several remained open, but the business chiefs would not be taking those up again until normal hours. Instead, we were grinding away, line by line, on "technical matters." That meant we were arguing, suggesting, discussing the grammar and punctuation of, correcting, and conforming the details of the wording in every one of the knotty and intertwined provisions.

The session continued doggedly on until mid-morning, and further sessions followed. Over the next few days the parties resolved their differences

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and signed an agreement. That outcome somewhat offset the aggravation, at least temporarily.

At least one of us, however, came away with a sense that we had wasted a lot of time and energy. The conventional approach to drafting had seemingly prolonged—and even endangered—the negotiations. One measurable penalty had been the escalation of both sides' legal fees.

Further, we learned later that, in grinding through the endless language and detail, both sides had overlooked a significant, and subsequently troublesome, issue. We had missed a forest for the trees.

There had to be a better way to paper a deal.

Penalties of Complexity

A long seller's market for legal services has allowed law firms to take a product-driven, rather than a market-driven, approach to documenting business arrangements. It is lawyers who have decided what legal papers will contain and will look like, without much reference to the market—clients and prospects. Lawyers have just not had to be that concerned about the readability or efficiency of papers.

Under that product-driven approach, documentation has become more and more involved. As a result, the client, even the well-educated client, has found business legal papers increasingly difficult to grapple with.

This trend has ignored clients' anxieties over the increasing costs of legal services. Clients are concerned as well that, since length and complexity interfere with communication, overdone legal papers can delay, and even pose risks to, transactions.

Intricate documentation confuses—sometimes even misleads—the client. Even the sophisticated client can have difficulty understanding where the transaction stands and whether the client's priorities (sometimes poorly communicated) are getting the right attention. Needless length and complexity inhibit the client's participation.

Elaborate, overdetailed papers can lead lawyers and clients to miss or mishandle key points. Shorter, simpler, and clearer papers keep the focus on important items and help to prevent mistakes.

Conventional documents also delay transactions. Unnecessarily complex papers draw out negotiating and closing processes and extend the time needed to complete a transaction—which of course means higher fees for the client.

Length and complexity also contribute to misunderstandings after signing. Confusing, artificially organized, arduous provisions are ripe for challenge and dispute down the road. Agreements that only lawyers can understand are poor road maps for the parties' continuing relationship.

Finally, product-driven drafting and the consequent difficulty of business papers help to sustain the corrosive notions that the law is some kind of mystery and the legal profession some kind of remote priesthood. In the 1990s, the profession should be discouraging the myth that only lawyers should be able to understand the papers that lawyers draft.

The Marketing Opportunity

A market-driven strategy for drafting can respond to business-community concerns, attract new clients, and expand a firm's legal work and billings.

Law firms have *not* competed with each other on the basis of the style, clarity, or readability of their business documents. Firms do compete hotly to be "better," "more effective," "more responsive," or "tougher" in providing advice and negotiating support. But when you see the documents—agreements, prospectuses and proxy statements, closing and other papers—they tend to look pretty much the same from firm to firm.

This sameness provides an opening to break away from the pack. A firm can adopt a strategy of simplicity and clarity for the firm's product and publicize that new approach aggressively to its clients and prospects. In promoting the new strategy, the firm would emphasize several themes:

(1) This law firm does not merely provide the same services better than other law firms. Its goal is to provide a different brand and style of services—

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simpler, clearer, more understandable, and therefore more effective.

(2) This firm seeks to make its services and product as uncomplicated, clear, and direct as possible and to ensure that the client can contribute to the process. The firm's aim is to operate so that a reasonably well-educated person can easily understand its services and their value.

(3) This firm's agreements and business documents will be in plain English—clear, concise, and hard-hitting.

(4) This firm's striving for simplicity and clarity will save the client time, effort, anxiety, and legal fees. The firm intends to provide better services at less cost.

The firm needs to communicate the new approach both to clients and prospects, and to the firm's own people. The object is to build into the firm's culture and reputation a mandate for clear and concise communication, particularly in its written product. That effort will soon distinguish the firm from its competitors, strengthen the regard of clients and prospects, and be a source of pride for those who work there.

Implementation

The firm executes the strategy by establishing and relentlessly reinforcing its new culture. The firm seeks to bring a new frame of mind and instinct to its papers—a new concern for the plight of the reader.

A firm can achieve this goal and still fully protect its clients' interests. Papers prepared under the new culture can and will serve clients better than conventional documents. For the client, less really can be more.

Ultimately, the process is about attitude, method, and a few mechanics. Among other things, it calls for a heavy investment of thought and effort at the outset of drafting, particularly about content and organization. This planning will pay off later, as the work progresses.

Content

A drawback of conventional drafting is its goal of exhaustive content. Standard indoctrination calls for the lawyer to attempt to deal with every conceivable contingency that might crop up. This effort not only wastes resources but also is frustratingly impossible of achievement. Even the longest and most detailed papers often do not cover the particular situations that actually come up.

The lawyer must first think through what the client is trying to achieve, and when and where. The writer must also consider the purposes of the document and its audience.

The lawyer has to make judgments about what really needs to be included. The idea is to be selective and to burden the readers only with what is important and what is reasonably likely to take place or go wrong in the parties' relationship. The goal is to deliver the sparest possible piece.

Detail and precision are not always desirable in legal papers. The parties are often better served by general formulations, such as provisions on mutual cooperation and material adverse change. General provisions cover more eventualities and can usually be agreed on more quickly.

Organization

As in any writing, a legal document's organization should display its priorities. Its structure should reflect the way the client thinks about the transaction and in that way help the client to contribute to its drafting and to remember its contents. Any document should convey through a mere scanning the parties' significant goals and concerns.

For instance, in most sales of companies or assets, the buyer is relying heavily on the seller's financial statements. The seller's representations about financial statements should be a separate, prominent section of the sale agreement and not be buried in a series of routine affirmations.

Plain English

The drafting should use plain, concise, forceful English. Sentences should be crisp and use ordinary, conversational language. Vigorous writing relies on strong verbs and concrete nouns, rather than adjectives and adverbs. Verbs should generally be active voice rather than passive. The brief and excellent guide, *Plain English for Lawyers*, by Richard Wydick, should be a basic tool of every lawyer, and so should Bryan Garner's *Elements of Legal Style*.

Informal, unstilted English enables greater precision in communicating the parties' intent. The lawyer has available the full range of the language instead of only a highly formalized segment that often relies on conventions familiar only to the legal profession.

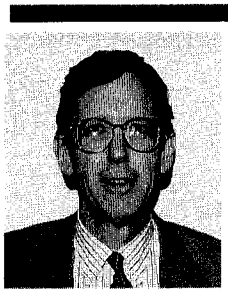
The plain language insurance policies and banking forms prompted by consumer-protection laws demonstrate the advantages of drafting legal documents in simple, straightforward English. Those readable papers have proven easier to enforce and more effective in communicating with the customer than their tortuous predecessors.

Say It Only Once

It is vital to deal with an idea or provision only once. Having the same material in several places not only lengthens the document but also multiplies the opportunities for mistakes and confusion. If an idea recurs in a document, it probably deserves its own separate section where it can be dealt with fully and once only.

Legalese and Boilerplate

Any drafting should eliminate legalese. Artificial terms such as "hereinafter," "herein" and "therein," tortured



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"shall"s, "whereas," and "now therefore" are distracting time-wasters. Redundant phrases such as "representations and warranties" or "indemnify and hold harmless" should be pared down.

Boilerplate should be reduced and streamlined. It is difficult to dream up a scenario where a counterparts provision would become important in today's world, yet it continues to appear ritualistically in full-blown agreements.

Letter Agreements

Agreements, no matter how important and solemn, can usually be in letter form. Letter agreements are flexible in their organization and presentation, and lend themselves to tailoring for the particular transaction. Letter agreements are less intimidating and therefore tend to get done faster. For instance, because they are easier to write, introductory paragraphs of a letter agreement tend to be more informative and a better expression of what the parties are trying to achieve than "whereas" this and "whereas" that.

Examples

Examples help to make legal papers more readable. There is no need to go through the frustration of trying to work and rework the wording of a difficult concept or formula when an example can capture it conveniently and forcefully.

Exhibits

The same holds true for exhibits (and annexes, schedules, attachments, etc.). Human beings seem to be more comfortable drafting exhibits than main text provisions. Exhibits can look like anything—be in any form—and are therefore less intimidating.

Closing

Law firms should be offering simplicity and clarity in the drafting of business documents, and clients will before long be insisting on it. A firm should be moving to change its style and approach before market pressures force a change.

A firm can of course introduce the new approach in stages—as cautiously as it wishes—or even just as an experiment. The firm may feel that certain forms or papers are more capable of being simplified. And the new approach may be more effective with certain clients and prospects than with others. For example, many foreign clients would almost certainly welcome simpler and clearer papers.

An approach of simplicity and clarity will have implications for the firm's other activities as well—memorandums, lawsuit papers, wills and trusts, and so on. Once under way, the strategy can have a broad and constructive effect on a firm's entire culture and performance. ■

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