

Why Bother to Write Contracts in Plain English?

By David T. Daly

The old story goes that the lawyer hands the judge the hurriedly written brief and says apologetically: "Sorry, your Honor. If I'd had more time, I would have written less." Lawyers who litigate know that it takes more time to write a brief clearly and concisely, and to organize ideas well. But when they have the time, they use it because a clear, concise brief has the power to inform and persuade—and ultimately to win the case.

Just as it takes more time to write a good brief, a business lawyer often needs more time to write a good contract. The benefits of writing a contract clearly and concisely may be less obvious and less dramatic than for a brief (where one party wins and one party loses). But since a business transaction is usually a win-win situation, and since—unlike with legal briefs—nonlawyers often read contracts, I believe that writing contracts in plain English can add even greater value than writing briefs in plain English.

Why bother to write contracts in plain English? Because it makes good business

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sense if the benefits to the client exceed the added cost, if any, of drafting in plain English. The cost of having a lawyer take extra time to draft a document is immediate and obvious. But the benefits of a plain-English contract may be less obvious to those who have never drafted one. They may also accrue over time as the lawyers and clients negotiate, and later interpret, the contract. When all the benefits are considered, I believe that it almost always makes sense to draft contracts in plain English. The following is a discussion of some of those benefits.

Plain English Improves Substantive Content

The process of trying to express ideas clearly almost always leads to improving the substantive content of the document. Traditional legal drafting can be converted into plain English through a collection of writing techniques and processes.¹ Each of these techniques and processes is simple, but the combined effect is often a document that is radically different—clearer, shorter, less cluttered, and less ambiguous.

Plain English makes a contract more accessible to just about everyone: to other lawyers, engineers, finance people, accountants, and salespeople. Readers usually understand a plain-English contract better.² And if they understand it better, they may be able to give better input and comments that will improve the substance of the contract. Depending on how complex the original document was, readers might read through and understand a plain-English version who could not read through and understand the original.

An experienced attorney adds a lot of value in negotiating and drafting a contract by identifying issues and helping to structure solutions. Unfortunately, business people often fail to appreciate this added value, since traditional drafting methods tend to obscure it. A readable contract draft becomes a checklist for negotiation, and serves as an important tool in the negotia-

tion process, instead of something that lawyers "write up" afterwards.

With a readable draft, the negotiating process may identify and resolve more potential problems. This could mean that the negotiations take as long or longer, but it may also mean that there will be more commitment by both sides. Bringing the parties deeper into negotiations is usually not the type of delay that loses deals. Instead, it tends to forge more satisfactory long-term relationships. In my view, this means that both sides get a better deal.

Plain English Benefits Your Clients

Again, writing in plain English helps the clients and their negotiating partners understand a contract better. This helps the parties identify and avoid potential misunderstanding in advance, and avoid the costs associated with broken business relationships. If clients understand their contract, they can often resolve issues more quickly and without having to call their lawyer as often.

In his article *Writing for Dollars, Writing to Please*,³ Joseph Kimble details 25 studies and reports that demonstrate how plain-language documents save tons of time and money for businesses and government agencies. The more a contract is used, as opposed to simply filed, the greater the benefits of plain English.

Using plain English can also create a negotiating advantage for your client. If you write in plain English and the lawyer for the other side writes in legalese, there is a good chance that the clients on both sides will want you to do all the drafting. That may help you resist the other attorney's suggestions for verbose changes and "clarifications."

If the clients can read the contract more easily and resolve contract questions themselves, doesn't that mean less billable hours for the lawyer? My experience is that clients—on both sides of a negotiation—respect the lawyer's ability to express ideas clearly. When they see good writing, they are less likely to try to do it themselves.

While most business people can fake "legalese," writing in plain English takes practice. It takes real talent to express complicated legal, technical, financial, and commercial ideas in a straightforward way.

Lawyers add value in commercial transactions by helping to identify, assess, allocate, and manage risks. Legalese may obscure all the benefits that an experienced attorney brings in planning a transaction. But these benefits are easier to see if they are set down in plain English. And when the clients can see them, they usually respect them.

Because Clients Like Plain English, It Benefits You

An easy-to-read contract presents a good impression of you and your firm. Clients like plain English, and happy clients are repeat clients. They refer other business, and they will trust you and want you to handle all their legal work. Once people see the difference between plain English and legalese, they will never be satisfied with legalese again.

Clients like plain English because it makes them feel smart and less frustrated with their lawyer. When discussing the contract with their potential customer, they don't have to be embarrassed or apologetic about the document.

A contract is often used as part of selling your client's products or services, or a deal that your client wants to complete. People won't sign a deal they don't understand. Instead, they study, delay, or procrastinate—all of which costs time and money.

Lawyers give advice more quickly on contracts they understand. If a prospective contracting partner reads a contract, understands it, and then sends it to their lawyer to review (just to be sure everything is okay), the lawyer may be put under pressure not to find problems. On the other hand, if the prospective contracting partner can't understand the contract, their lawyer now has a hunting license to scrutinize closely, find problems, and make substantive comments detrimental to your client.

Since contracts in legalese take longer to review, they can delay your client's deal. If, in the interim, the potential customer's management changes, the customer's priorities change, or the market changes, a delayed deal may be a lost deal! If the client perceived that a wordy document caused the delay, the client may want to change lawyers.

When people negotiate a business deal, they usually want to create a friendly, cooperative atmosphere with their prospective business partners. A plain-English contract helps to do this by creating a businesslike tone. Legalese, on the other hand, often sounds snotty, arrogant, imperious, and threatening—which is probably not the tone your client wants to set.

Plain English Helps International Transactions

Nowadays, many business transactions are international and many clients are foreigners, or else their prospective customers may be foreigners. While English is the main international business language, this does not necessarily include American legalese.

Using plain English demonstrates cultural sensitivity. While most foreign executives have studied English in school and can read and speak English, they don't necessarily understand legalese. Even with advanced degrees from their home countries, most foreign executives have difficulty reading complex legal English. Remember that most three-year-olds speak their own native language fluently. A well-educated foreigner may read and speak English only on a high-school level or below. The more common vocabulary, shorter sentences, and simple grammatical structures make plain English the ideal language for international business transactions.

Since foreign business people have studied English, they often appreciate the kind of English literary style taught by their high-school English teachers. Once, when negotiating a contract with a group of German executives, I suggested that a particular sentence be rephrased in the active voice instead of the passive. One German executive looked up, as if to search his memory, and then recited the words "subject-verb-object," apparently recalling the words of a high-school English teacher. He then nodded his head to acknowledge that what I was suggesting was indeed consistent with the English grammar rules he learned in school.

Plain English is Socially Responsible

Since plain-English contracts usually are shorter, they save paper and time in printing, copying, faxing, and storing. Over time, this adds up. Plain-English con-

tracts also include more people in the process of reviewing and negotiating contracts, such as people who speak English as a second language, people who are less educated, or people who just have difficulty reading legalese.

Plain English is Good for the Legal Profession

Why do so many people dislike lawyers? One reason is that lawyers write documents that are infuriatingly difficult to understand, and yet these documents affect people's lives in important ways. Writing in plain English will help promote public respect for the profession. That in itself is a worthy goal.

[Please send your questions and comments to the author at david_daly@mail.com]

Conclusion

Why bother to write contracts in plain English? Because the benefits usually outweigh the cost. A clear contract maximizes the benefit of a win-win negotiation. It improves a contract's substantive content and promotes the client's interests. This not only pleases the client but should also be good for you and for the legal profession. ■

Footnotes

1. See Robert D. Eagleson, *Writing in Plain English* (1990); Bryan A. Garner, *Securities Disclosure in Plain English* (1999); Plain English Campaign, *The Plain English Story* (rev. ed. 1993); Richard C. Wydick, *Plain English for Lawyers* (4th ed. 1998).
2. See Joseph Kimble, *Answering the Critics of Plain Language*, 5 *Scribes J Legal Writing* 51 (1994-1995) (summarizing 15 studies which show that plain language improves comprehension).
3. 6 *Scribes J Legal Writing* 1 (1996-97).



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