

CLIENT COMMUNICATIONS: DELIVERING A CLEAR MESSAGE

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In our last three columns, we explained how to construct legal memoranda for in-house clients and documents for the court, so that those readers can read, understand, and act on them as easily as their substance allows.¹ Writing to clients is no less demanding, and in some ways is more so.

When you write an internal memo to a colleague or a pleading to a court or commission, you don't have to invent a new form for each document. Pleadings and memoranda have conventional forms, often set by a firm's practice or by the rules of a court. When you write for clients, however, you can't always know what they expect. They are unlikely to know the conventional forms of the law, so you usually have to adapt a standard form or invent a new one to fit your particular communication to your particular reader.

Also, when you write to other lawyers or the courts, you can assume your readers know the law and understand your role in it. You usually don't have to define terms of art, cover basic background, or explain the rudimentary bases of your legal reasoning. And in certain ways, you can play your legal role more directly. With colleagues, you can usually be as objective as possible in order to get the law right, and let the chips fall where they may. In court documents, both you and the

court understand how you can—and cannot—argue the law and facts to suit your client's cause. Everyone understands the conventions and their constraints. With most clients, however, you have to explain basic concepts, and you must make them believe that you are committed to their success, even when the law is against them.

Above all, you and your client are likely to have different ideas about what makes the best legal writing. When you write for a court, for a supervising attorney, or to opposing colleagues, you have a deep interest in getting the law right in their eyes, both now and in the future, when something you write today could return to haunt you. And so you value writing that respects the full complexity of the law, its nuances and ambiguities, hedging when necessary, anticipating unobvious contingencies, detailing prior holdings or the development of the law, and laying out every step of your best legal reasoning. But that kind of writing makes most clients roll their eyes. Their interest is not the complexities or history of the law, but the practicalities of their situation. They care less about your seeming to be right on the nuances of the law than they do about accomplishing their goals.

For example, consider these next two excerpts from a letter advising a client about the tax consequences of choosing Florida as a place of residence:

1a. You have asked about tax consequences of a residency change to Florida. Florida law prohibits individual state income tax. Instead, the Code taxes intangible personal property, wherever that property is. It defines intangible personal property as property which is not itself intrinsically valuable, but which derives value from that which it represents. This definition includes stocks, mutual fund shares, notes, bonds, and other obligations for the payment of money and certain leases of property. The Code establishes two classes of intangible personal property. Examples of the first are notes, bonds, and other obligations for payment of money secured by a mortgage or other lien on Florida real estate. A one-time tax of

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¹ *Delivering a Persuasive Case: Organizing the Body of a Pleading*, 11 Perspectives: Teaching Legal Res. & Writing 84 (2003); *Framing Pleadings to Advance Your Case*, 10 Perspectives: Teaching Legal Res. & Writing 92 (2002); and *So What? Why Should I Care? And Other Questions Writers Must Answer*, 9 Perspectives: Teaching Legal Res. & Writing 136 (2001).

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2 percent on the value of intangible property applies, payable within 30 days following the creation of obligation. Other intangible personal property constitutes the second class. An annual tax of up to 1.5 percent of property value applies to this class. The first \$20,000 of property is exempt, and a tax of 1 percent of value of the property applies to the next \$80,000. The Code makes it possible to double the exemption for a husband and wife filing a joint return. Your particular circumstances make this move financially plausible. On balance, the Florida Revenue Code offers you many advantages, given the nature of your property.

1b. You have asked about the tax consequences if you move to Florida. Given the nature of your properties, you would find certain tax advantages there.

You would not pay state income tax in Florida. Instead, you would pay a tax only on your intangible property. You would treat as intangible property anything that you own that has no intrinsic value, but represents a value, no matter where that property is located. You would thus pay a tax on your stocks, mutual fund shares, notes, bonds, certain leases of property, and anything else that obligates another party to pay you money.

You would divide this intangible property into two kinds and pay taxes on it at different rates:

- You would include in the first kind of property all your notes, bonds, and mortgages on property you own in Florida. On this property, you pay a one-time tax of 2 percent. You must pay that within 30 days after you acquire the property.

- In the second kind you would include all your other personal property. On this property you exempt the first \$20,000, then pay an annual tax of up to 1 percent on the next \$80,000. Then you would pay 1.5 percent on everything over that.

If you and your wife file a joint return, you can double these exemptions.

Plainly enough, few if any clients would choose to receive a letter written like 1a. rather than the more reader friendly 1b. It feels dense, abstract, and legalistic. Some of the causes of the differences are obvious, but others are not.

In this column and the next, we discuss issues to focus on when you write to clients. In this column, we focus on style and sentence structure. In the next, we focus on organization and the visual appearance of a client communication.

The General Principles of Clear Sentences

In briefest form, these are the basic principles for a clear and direct style:

1. Avoid beginning a sentence with a long, complicated phrase or subordinate clause.
2. Make the subject of each sentence short, concrete, and familiar, preferably its main character.
3. Make the verb of each sentence express the main action associated with the character in the subject.
4. Avoid interrupting the subject and verb.

Those four principles reflect a single desire of your readers:

Readers want to grasp the subject of a sentence quickly and easily, then quickly connect that subject to a verb expressing a strong action.

In the next examples, the 1a. version departs from these principles; the 1b. version follows them closely.

1a. Although the inclusion of two variance provisions in the Act was intended to encourage pollution reduction (e.g., section 301(c)'s variance for economic hardship; section 301(l)'s variance allowing up to two additional years for compliance with effluent limitations for innovative technology that will result in greater effluent reduction than is required), relief from other requirements of the Act is insufficient to actually encourage pollution reduction.

1b. Under the Act, manufacturers can use two variance provisions that encourage them to reduce pollution:

- A manufacturer faces economic hardship (section 301(c)).
 - A manufacturer has two additional years to comply with effluent limitations for innovative technology, if the technology will reduce an effluent more than is required (section 301(l)).
- Neither variance, however, offers manufacturers enough relief to actually encourage them to reduce pollution.

Those general principles apply to writing intended for all audiences, but they require fine-tuning when you write to clients.

Applying the Principles in Client Communications

Focus on Characters and Actions

All readers understand sentences more easily and accurately when they begin with a concrete subject that names a familiar character closely followed by a verb expressing the main action associated with that character, but clients need this structure more than most.

When readers are already familiar with the predictable elements of a story and argument, they rely less on the words and more on their prior knowledge. So your colleagues familiar with the law are less likely to complain or even notice when your prose gets a bit dense. In fact, some may even prefer it if they think that bespeaks deep professional thinking.

But most clients have a different experience. Dense prose usually annoys or intimidates them (or both). Worse, it makes them read less accurately. So a difficult style is especially risky when your clients have a legal problem, especially when they want to do something advantageous but legally uncertain. We are all averse to bad news so clients tend to resolve all doubts about what you mean to support what they want to do. The less clear and more ambiguous your prose, the

more they will misinterpret. Most difficult is for clients to see obligations and limits that block their goals. So the harder it is for clients to accept what you say, the more explicit you have to be.

When you write to clients, you want the message to be clear. It is particularly important to emphasize—even overemphasize—your primary points. Use simple, direct sentences with a prototype character-action structure. That style may feel too simple to you, but after 25 years of working with legal writers, we have yet to hear a client complain about a lawyer who writes too clearly.

Give Special Attention to Point of View

There is an aspect of style where the instincts of lawyers—especially of newly minted ones—might agree with the needs of their clients: the principle that subjects should name short, concrete, and familiar main characters in your story or argument. The problem is that what seems short, concrete, and familiar to you may not be to them.

For example, the next passage explains a legal basis on which a client might recover damages on a property he rents. Most of the lawyers who have read it report that the passage is relatively easy to understand.

In contrast to the statutory method, there are several advantages in the equitable right of recovery. First, recovery in equity does not require strict compliance with statutory limits. Because recovery can be tailored to the particular facts of the controversy, the amount recovered may be greater. In a statutory action, recovery of rents is limited to the value of use and occupation exclusive of improvements to the property. However, in an equitable action (*Wilson*), the plaintiff recovered rents based upon the value of the property with the defendant's improvements thereupon. Second, proceedings in equity relax the evidentiary standard. In another equitable action (*Tyson*), the court allowed evidence of the original cost of the improvements instead of

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limiting it to the amount the improvements had enhanced the value of the land. Most importantly, recovery in equity does not require one year of possession prior to suit.

They find this a simple story that flows naturally from sentence to sentence, idea to idea, because the concept *recovery in equity* is familiar enough that it seems to them a concrete legal character in a familiar legal story. In fact, some lawyers have told us that this version of the story is not only easy to understand, but the only one that respects the law.

But unless they have been through this before, clients disagree. For them, recovery in equity may be short, but it is neither concrete nor familiar, and it certainly does not feel like a character they can even *imagine* telling a story about. Think how such a reader would react if you tried to start a story, *Once upon a time there was recovery in equity*. ...

Fortunately, when you tell stories about the law to clients, you almost always have appropriate alternatives for characters/subjects. Rather than focus on legal concepts familiar to you (*recovery in equity*, *good faith*, etc.), you can focus on the legal role of the people involved (*the court*, *plaintiff*, *lessor*, *landlord*).

You can use legal actors for threats and cases when you want to focus clients on the consequences of their actions. Compare:

Under this regulation, you may not modify the emissions controls ...

This regulation prohibits you from modifying the emissions controls ...

But for the most part, focus on your client, not on the law and its manifestations.

For example, if your client were both a plaintiff and a lessor, you could focus the story on either of those characters:

In contrast to the statutory method, plaintiffs find several advantages in the equitable right of recovery. First, a plaintiff does not have to comply strictly with statutory limits. Because a plaintiff can recover an amount tailored to the particular facts of the controversy, he may recover more. In

a statutory action, plaintiffs can only recover rents up to the value of use and occupation exclusive of improvements to the property. However, in an equitable action (*Wilson*), the plaintiff recovered rents ...

In contrast to the statutory method, lessors find several advantages in the equitable right of recovery. First, a lessor does not have to comply strictly with statutory limits. Because a lessor can recover an amount tailored to the particular facts of the controversy, he may recover more. In a statutory action, lessors can only recover rents up to the value of use and occupation exclusive of improvements to the property. However, in an equitable action (*Wilson*), the lessor recovered rents ...

But of the two, clients have an easier time seeing themselves in the more familiar role of plaintiff than of lessor, but an even easier time yet as a landlord. (Try making the subjects of that passage *landlords*.)

But the most familiar character that all clients are centrally interested in, of course, themselves:

In contrast to the statutory method, you may find several advantages in the equitable right of recovery. First, you do not have to comply strictly with statutory limits. Because you can recover an amount tailored to the particular facts of the controversy, you may recover more. In a statutory action, you could only recover rents up to the value of use and occupation exclusive of improvements to the property. However, in an equitable action (*Wilson*), the plaintiff recovered rents based upon the value of the property. ...

There is one situation that might appear to be an exception to these principles, but is not. Sometimes, you send clients a document (or part of one) that doesn't directly address the client but a secondary legal audience. For example, when you write an opinion letter so a client can meet due diligence requirements, your real audience is not the client but some future court. To cover all the legal bases, you may need to write from the point of view of the law. But if you do, simply add an executive summary or cover letter that gives the

client the gist of the story in terms that make sense to him or her.

In most client communications, you give advice, explain a law or regulation, show the client how to comply, describe legal implications of a decision, and so on. If so, unbutton your vest, loosen your tie, and talk to your client as a friend would. Not like this:

The Board's decisions in *General Foods, Sparks Nugget*, and *Mercy-Memorial*, and the Sixth Circuit's opinion in *Streamway* suggest that compliance with section 8(a)(2) is more likely if the council's representative aspect is minimized. Much more frequent rotation of membership on the council would be helpful in this regard. An emphasis on employees' voicing their own individual concerns rather than purporting to speak on behalf of others also would help, as would opening council meetings to any employee with a concern to raise.

But like this:

As suggested in several Board decisions, you are likely to minimize the council's representative aspect if you comply with section 8(a)(2) (see *General Foods, Sparks Nugget*, and *Mercy-Memorial*, and the Sixth Circuit's opinion in *Streamway*). In particular, try to rotate the membership on the council more frequently and emphasize that employees are voicing their own individual concerns rather than purporting to speak on behalf of others. To this end, you could open council meetings to any employee with a concern to raise.

Avoid the Trappings of Law

Nobody likes reading citations, but they disrupt clients a lot more than lawyers who have learned to bear with them. No matter who your readers, avoid beginning a sentence with a long citation, especially as a subject:

The Supreme Court in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S. Ct. 1099 (1962), a case in which employees left their workplace because the factory was too cold, for it lacked heat in the winter months, held that section

seven of the Act protects the rights of workers to act together to better working conditions.

Your best option is to move the entire citation to the end of the sentence.²

The Supreme Court has held that section 7 of the Act protects the rights of workers to act together to better working conditions. (*NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S. Ct. 1099 (1962)).

Otherwise, put the shortest possible reference in a prepositional phrase and move all the identifying clutter to the end:

In *NLRB v. Washington Aluminum Co.*, the Supreme Court held that section 7 of the Act protects the rights of workers to act together to better working conditions. (370 U.S. 9, 82 S. Ct. 1099 (1962)).

Finally, lose the Latin phrases, the antique terms, and every instance of *aforementioned*, *hereunder*, *heretofore*, *therein*, and so on. Your clients want today's English, not a mishmash of Latin, Early Modern English, and words no one but a lawyer could utter.

There are some other issues in constructing sentences specifically for clients, but we'll deal with those in our next column, when we discuss matters of organization and the visual appearance of client communications.

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² You can also move the citation to a footnote, but many readers object to this practice because it forces them to leave the flow of the argument in order to find the information they want. (As this footnote does.) Footnotes work better for clients than for other lawyers, because for the most part clients just ignore citations, which is easier when they are at the bottom of the page.

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