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One Size Does Not Fit All

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I
never have been much of a cook. For most of my life, hea-
ing up a premade meal from Whole Foods was a gourmet
dinner, and throwing a Hot Pocket in the microwave was
standard everyday fare. There were not many tricks in my
culinary trade. Recently, however, with a friend’s encour-
agement, I learned how to “cook.” I am still no Bobby Flay, but
finally, as I approach middle age, I have the patience and ability
to follow a recipe. Several months ago, I actually made risotto
from a recipe I found at a Virginia winery (another plug!), and
it wasn’t half bad. Today, with more confidence, I am actually
going with my gut (pardon the pun) and substituting ingredi-
ents to make the recipes even better. But enough about cooking:
after all, this column is about writing.

As legal writers, we need to resist the temptation to follow
the same recipe over and over, even if doing so saves us time and
makes us feel more comfortable. Legal writing is not comfort
food; although legal writing can be learned, it is not rote or
formulaic. Of course, there are formulas, such as IRAC, that
help us organize a discussion, and techniques, such as clarity,
conciseness, and proofreading, that we will use no matter what
kind of legal document we are drafting. But each client situation
is different, with different facts, different goals, and different
“players” in the mix. One size does not fit all.

Consider this quote from a trial lawyer in the early 1980s
about the way he conducts a new client interview: “First of all,
it’s a total waste of time, and secondly, I want to get to my end
by asking questions my own way. I don’t want to hear, ‘We got
married in December 1922, and then we had a fight in 1925.’
I’ll say, ‘Now keep quiet. Let me ask you questions for 15 min-
utes and if at the end there’s something you think I’ve left out,
then you tell me. What do you want, question number one, do
you want a divorce, a separation? Number two, are you looking
for money, if so, how much? How much do you need? How
much do you need for yourself? How much do you need for
the children? Number three, what do you have on your spouse?
What do you have that I can use as a compelling argument to
get you what you want? Do they have anything on you?” And by
the time that I get through . . . asking questions, I have the story,
and I have not been fed information which I have no need to
know.” (The Natl. L.J. 13, 44-45, 47 (Dec. 1, 1980).)

Most contemporary lawyers, I hope, see the unreasonable-
ness of this approach, as it assumes that all cases are exactly alike.

Such an extreme approach, particularly in 2012, will not win
friends or influence people. So, why then do so many legal
writers rely without hesitation on boilerplate language when
drafting a document, assuming that a document drafted in
one case can be molded and pigeonholed into a document
that needs to be drafted in another?

We all use boilerplate language when we draft. Reinvent-
ning the wheel each time we draft a new document is ineffi-
cient, ineffective, and would likely result in client complaints
about exorbitant attorneys’ fees. Boilerplate is a useful time-
and headache-saver.

Nevertheless, over-reliance on boilerplate language often
leads to cookie-cutter thinking. The best lawyers understand
the significance of every word, sentence, and paragraph that
they include in a document. When presented with boil-
plate or a sample document, make sure you know whether
and why each provision and word should be included. Above
all, tailor the terms of your document to the facts of the case
you are working on. Many lawyers rely heavily on documents
drafted for previous clients. While again, such documents
are a resource, using documents from previous clients as a
base can lead to embarrassment or worse. Hasty proofread-
ing and reliance on spell-checking often results in one cli-
ent’s name or facts inadvertently appearing in another client’s
documents.

Also keep in mind that many form books and computer
boilerplate are outdated and do not follow effective writing
strategies of clarity and precision. Many of the provisions are
full of legalese, which often results in ambiguity. Even if you
take the time to modify the boilerplate generally and then use
the more updated boilerplate for all subsequent cases, these
modifications will benefit your client.

As a legal drafter, you are like a master chef who might
have 20 or 30 recipes for a certain dish that you might refer
to from time to time for ideas. Each time the recipe will be
a little different depending on the quality of the ingredients,
the number and tastes of your guests, the time you have to
prepare the dish, etc. I still rely on recipes in my burgeon-
ing role as chef. I did not spend thousands of dollars and
countless hours learning to become a lawyer, however, so that
I could use a form book or “model” to help my clients. They
expect, deserve, and pay for much more.

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