2008

More Views from the Ivory Tower: The KISS Principle - Keep it Simple, Solicitor

David Spratt

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev

Part of the Contracts Commons, and the Evidence Commons
More Views from the Ivory Tower:
The “KISS” Principle – Keep it Simple, Solicitor!

BY: DAVID H. SPRATT

My son, now twenty-one months old, is quite a verbal little tyke. As hard as I try not to be “one of those parents” who continually brags about their children, my son knew his ABCs (except the oft-omitted “W”) at fourteen months. These days, he is tackling sentence formation. His sentences are short, to-the-point, and void of any unnecessary words and phrases – what a delightfully rare event for a writing professor! As he attempts to express himself clearly, I am hesitant to tell him that ensuring clarity and precision will be a life-long process.

A few months back, I sat atop my “Ivory Tower” and pondered questions that arose about family law in a Family Law Practice and Drafting Class that I taught last summer. During the same class, students also asked questions about writing that were equally thought-provoking and similarly difficult to answer. One of the more interesting “problem areas” discussed in my class are addressed below:

1. Why do most lawyers use the phrase “Adjudged, Ordered, and Decreed” in their orders? Don’t these words mean basically the same thing?

"Most law can be expressed in ordinary English. Most of it is. But by the time lawyers get through mashing up ordinary English, very few English speakers and only some lawyers can recognize it."1

Lawyers are prone to use more words than they need to get the job done; whether we subconsciously think that we get paid by the word or that we need to sound intelligent by using big words, the result confuses the lay reader.

One example of unnecessary wordiness is the phrase, “Adjudged, Ordered, and Decreed,” a phrase that finds its way into most of the orders that lawyers draft and sign regularly. A quick check with Merriam-Webster Online2 uncovers the following definitions:

Adjudge: To decide or rule upon as a judge; To hold or pronounce to be
Order: To give an order to
Decree: An order usually having the force of law

Perusing Black’s Law Dictionary3 provides the following guidance:

Adjudge: 1) Adjudicate; 2) To deem or pronounce to be; 3) To award judicially
Order: A written direction or command delivered by a court or a judge
Decree: 1) Traditionally, a judicial decision in a court of equity, admiralty, divorce, or probate; 2) A court’s final judgment; 3) Any court order, but especially one in a matrimonial case.

Although at one time, the word “decree” might have signified an order in a court of equity or chancery, in 2008, given the merger of law and equity in most court systems, this distinction is no longer valid or necessary. Doesn’t simply saying “Ordered” or “Decreed” (if you cannot bear to give up the distinction) make the same point, using simple, everyday language that your reader can readily follow without purchasing a historical treatise of the law?

2. Why are so many property settlement agreements full of archaic overly formalistic language that is difficult to understand?

"With a charity born of ignorance, most people believe that there must be a good reason why lawyers write like they were trying to reach spirits long departed."4

In most situations lawyers are acting on behalf of clients, either individual or corporate, to provide professional services. Frequently, the clients have had no legal training and little, if any, exposure to the legal discourse community. Accordingly, to ensure client satisfaction, lawyers must remember their primary audience, and use language that the reader(s) can readily understand. To understand my point, think back to a time when you were unexpectedly confronted with a foreign language or could not easily follow what someone was saying to you. How did that make you feel? Will a client appreciate having to grab a dictionary (or enter a word into Google) to understand what their lawyer is saying (or writing)?

To rectify this widespread “problem” and promote clarity and precision, I advocate the KISS principle: “Keep it simple, solicitor!”5 Because of my family law background, I will illustrate the KISS principle by examining some of the boilerplate language that frequently finds its way into a Property Settlement Agreement (a basic contract between two divorcing parties). Notwithstanding my family law focus, the KISS principle is equally applicable in all other legal specialties.

a. Introduction

Below is a typical introductory paragraph to a Property Settlement Agreement:

THIS AGREEMENT made and entered into this 5th day of January, 2007, by and between JACK SMITH (hereinafter referred to as “Husband”) and JILL SMITH (hereinafter referred to as “Wife”), together called “the parties.”

KISS away the wordiness, and the paragraph reads as follows:

JACK SMITH (“Jack”) and JILL SMITH (“Jill”) (together

JUNE/JULY 2008
Professor David H. Spratt is a legal rhetoric instructor at The American University, Washington College of Law. He received a B.A. degree in Government and Psychology from The College of William and Mary and graduated summa cum laude from The American University, Washington College of Law. Prior to teaching legal rhetoric, Professor Spratt taught legal writing and research at the George Washington University School of Law, legal analysis and writing at Concord School of Law, and legal methods at the Washington College of Law. Previously, Professor Spratt was a founding partner of Schwartz & Spratt, PLC, an associate at the Law Office of Betty A. Thompson, Ltd., and The Lewis Law Firm, in Washington, D.C.

The VBA Law Practice Management Division has established an agreement with the American Bar Association to sell ABA books to all members of the VBA/LPMD — that is, all members of The Virginia Bar Association — at a 20 percent discount.

You can go to www.vba.org, click on a link to the Book Program, peruse a list of books and print out an order form to send to the VBA office with your payment.

NOTE: All books purchased by the ABA — not just the ones listed on the VBA website — are available with the 20 percent discount. You must, however, place your order through the VBA office to receive the discount.

Continued on page 23
boiler is probably based on form books, and many lawyers do not take the time to craft agreements to address the needs of each client. Do not rest on the laurels of the boilerplate language that you or your esteemed predecessors have "always used." First, always tailor the contract terms to the facts of the instant case; do not overly rely on the forms. One can always improve on the boiler. Take care to use only the contract provisions that apply to your client's case. If your agreement does not involve any financial obligations (e.g., you are simply drafting a custody agreement), then take out the standard hold harmless provisions, as they do not apply. Second, remember 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. These issues can be avoided by simply taking the time to modify the forms to fit the particular circumstances of your client's case. (Even if you take the time to modify the boilerplate generally and then use the more updated boilerplate for all subsequent cases, this will benefit your client).

Because we are all being honest, I admit that when I practiced, I did not always "practice" what I preach in this article (so my former opposing counsel can refrain from pulling Property Settlement Agreements that I drafted and nit-picking my language). I did, however, spend time tailoring my agreements and tried to eliminate much, but not all, of the unnecessary wordiness and legalese. Because boilerplate had withstood the "test of time," I was afraid to tinker with success and did so only incrementally.

My toddler son, while grappling with language, often repeats what he hears (and this has done wonders for my sometimes locker room vocabulary). When I slip and utter profanity, I will teach him not to do as I have always done and tell him that I am trying to change my language for the better. I hope this article helps you do so as well.

NOTES:

1 David Mellinkoff, Legal Writing: Sense and Nonsense vi (1982).
2 http://www.merriam-webster.com
4 David Mellinkoff, Legal Writing: Sense and Nonsense, 1 (1982).
5 A kinder, gentler variation on the more familiar, "Keep It Simple, Stupid"; as used here, solicitor is simply a synonym for lawyer.
7 "Words like 'witnesseth' at the beginning and 'seal at the end make a legal form the stuff of wizardry, beyond the ken of mere mortals." Nick Pro Tunc, Out of Order: Legalspeak: An Endangered Species, 71 Wisc. Law. 9 (Sept. 1998).
10 David Mellinkoff, Legal Writing: Sense and Nonsense vii (1982).