Use Your Words

Commercial and Contracts

Many years ago, as I helped to set up operations in a new territory for a company I had just joined, I was reviewing a collection of form letters provided by a parent company that previously did the same work. One form letter notified a medical provider that we had reviewed some of their claims and determined they had been overpaid. It briefly explained the findings and gave instructions for remittance or offset of the amount owed and the option to appeal. It also contained this sentence: “We are holding no monies in escrow.”

I know what all these words mean, both individually and as a sentence, but I didn’t see the point of communicating this truth to the recipient. First of all —“monies”? I understand that it’s useful to highlight that the total is comprised of funds from multiple sources, but we were just one entity doing this not-holding. And why bring escrow into the picture just to tell someone it isn’t happening? What other non-actions should we be reporting?

I asked a senior auditor who had worked for the parent company how he interpreted the sentence. He admitted that he had no idea what it meant, but he knew it had been that way for years. He thought the government agency, which we contracted with, had issued an instruction about it, but he had never seen it. He directed me to someone in management at the other company who had been involved in this work for much longer. When I shared the sentence with that person, he chuckled and said, “Oh that thing made its way back into the letter, did it? That’s all wrong!” I had only a second to express my relief before he added, “It’s supposed to say ‘we’re holding no monies as if in escrow!’”

I took a deep breath, thanked him for the clarification, and asked him what that sentence meant in the context of the letter. He said he really didn’t know, but he was sure the government agency had issued a directive about it years ago, and he was pretty sure he saw it himself, though he had no way of finding it so many years later.

I took the sentence out. There were a few protests, and even an attempt to reintroduce it in a revision about a year later, but I removed that one too. In 17 years of performance under that contract, with audits of our work each year, we were never cited for failing to warn overpaid doctors of the absence of escrow.

As the work progressed, the collection of letter templates grew to address the various permutations of our efforts. I noticed a trend here, which also appeared in investigative reports we submitted to law enforcement, for the authors to sometimes begin a sentence with some form of the phrase “it has been determined that …” Invariably, it sat in front of a perfectly fine declarative sentence that more clearly accomplished the author’s intention. Various actors in the investigative reports “proceeded to” do things.

“Automobiles” were “exited”; no cars were gotten out of. I questioned these things, and was told that because these were serious communications, we should sound more formal.

I was hired to be the company’s lawyer, not its writing instructor. Nonetheless, my ventures out of my swim lane were accepted, learning occurred, and the written communication of the team improved.

Much more recently, outside counsel helped me prepare a model agreement that could be deployed for a frequently occurring service arrangement where inadequate contractual guardrails could create

real compliance risk for both parties. The finished product fully addressed each potential hotspot, but it read like something the attorney's great-grandparents might have prepared.

Perhaps I should've returned it, and demanded greater concision, clarity, and digestibility; I didn't. I've done that before and have since concluded that if the drafter didn't get those things right the first time, they probably aren't capable of delivering when their absence is noted. Besides, many lawyers of all ages continue to believe in the wisdom of not straying from phrasing that evidently served their forebears so well for ages.

My favorite defense of that approach is expertly, and sometimes humorously, addressed by Kenneth Adams in his excellent reference, *A Manual of Style for Contract Drafting*, as well as in multiple blog posts and presentations. The defense is that this language is "tested" in countless reported cases, and its meaning is settled, therefore it must be the safest approach, and tampering with it is just asking for trouble.

That sounds fine until you think about it a bit; what "tested" also (really?) means is that the language was so ambiguous or otherwise confusing that someone cared enough to sue someone over it, and the outcome was sufficiently troubling to the losing party that they funded an appeal, resulting in a reported decision. A ton of precedent supporting the interpretation means it took several such episodes before the language really reached "tested" status, and earned the love of traditional contract drafters across the land. Why not go with clear, unambiguous language instead? Why not choose language that doesn't result in you reassuring your businesspeople as to what the language "actually" means?

I spent an evening translating the model agreement into something I believed the people on both sides could put into action, and refer to when difficulties arose. I actually enjoyed the exercise. There are other templates we regularly use, and I would like to spend more time tending to them the same way, but it can feel like low-return effort even when one's plate is not overflowing with urgent matters. It's not. Contracts may be by the lawyers, but they're not supposed to be for them, at least not in most cases. If we expect our colleagues in the companies we serve to be able to apply and fulfill the agreements we prepare for them, if we expect our employees to follow the policies and guidance we issue, we must use language that speaks to its intended audience.

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