



Plain drafting is tricky business

by Paul Emanuelli

USING PLAIN LANGUAGE in your contract documents isn't as easy as it sounds. While plain language advocates argue for using plain words in legal documents and for interpreting those words based on their ordinary meaning, achieving this objective is complicated by two factors. First of all, using technical language is sometimes essential to the accurate and succinct expression of complex ideas. Secondly, there's no consensus on what we mean by the "ordinary meaning" of a word. As this column explains, drafting technical details in plain language may be harder than you think.

Using plain language in legal documents

The plain language philosophy has significant influence in international legal circles. For example, the European Parliament's *Joint Practical Guide* for legislative drafting recognizes plain drafting as its first principle and calls for legislation that is: (a) clear, easy to understand and unambiguous; (b) simple, concise, containing no unnecessary elements;

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and (c) precise, leaving no uncertainty in the mind of the reader. While no one can reasonably disagree with these objectives, achieving them is not nearly as simple as proclaiming them. There are, unfortunately, complicating factors awaiting us on the path to plain language utopia, particularly when we apply plain writing to our contract documents.

The inescapable need for technical terms

The things we buy are often described in the marketplace in technical terms. Our use of plain language needs to be tempered by this commercial reality. For example, try going into a technology store and asking a clerk for an MP3 player without using the term "MP3 player." Try saying that you are looking for "one of those small devices that you attach to your computer to record music that you can then detach and walk around with to listen to music with your headphones." As this example illustrates, technical terms often serve as the succinct shorthand of the marketplace. The trick is to distinguish between helpful technical terms that facilitate accuracy and brevity in communication and gratuitous technical terms that serve no purpose other than showing off knowledge in obscure subject areas. Knowing the difference is critical to precise contract drafting.

... keeping things simple is much harder than it appears.

Battling interpretations: ordinary vs. technical

Once you cut your content down to the essential technical terms, you still face a challenge in achieving contractual certainty since your technical terms may have no universally understood meaning. Much may depend on your audience. In fact, the common meaning of a term, as generally understood by a non-expert, is often inconsistent with the more precise meaning of that term as understood by an expert.

In *Sullivan and Driedger on the Construction of Statutes*, Ruth Sullivan provides two good examples dealing with “fruits and vegetables” under Canada’s *Excise Tax Act*. In the first case the court determined that the statute did not apply to the defendant peanut importer since nuts (which, technically speaking, fall within the category of “fruits and vegetables”) did not fall within the common understanding of “fruits and vegetables.” In the second case the court found that the statute did apply since mushrooms (which, technically speaking, are a type of fungus) were commonly understood to be vegetables. In both of Sullivan’s examples, the outcome would be reversed if the court had applied a technically precise meaning over an “ordinary meaning” interpretation. This illustrates the big risk of plain language interpretations: they may not line up with what you originally intended when you used a technical term in your contract.

Further interpretive technicalities

Furthermore, there is no consensus on what we even mean by an “ordinary meaning” or on when it should trump the technical meaning. As F. A. R. Bennion notes in *Bennion on Statute Law*, the “ordinary meaning” of a term can be “impacted by education levels, regions and class variations.” In other words, who’s “ordinary meaning” applies? Furthermore, Bennion notes that: (a) a technical term should be given its technical meaning when used within its specialized area; but (b) a term that has both a technical and ordinary meaning should be interpreted based on the context. This begs the question: what interpretation applies when that context is unclear? Is it my understanding of “MP3 player” or that of some teenage technowizard? Does it depend on where we’re standing?

The devil’s in the details

It may give you little comfort to know that your next contract interpretation dispute could land you in a courtroom where lawyers may be unable to agree on the meaning of “ordinary meaning,” let alone on whether that meaning should prevail over the technical meaning of your disputed term. Contract drafters should therefore define their technical terms as precisely as possible since, as it turns out, keeping things simple is much harder than it appears. 

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