The Story of a Famous Promissory Note

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Thirty years ago, I almost lost my job at Citibank for caring about plain language. I had recommended it to the bank's Urban Affairs Advisory Group, which I was a member of and whose job was to advise the bank how to be a better corporate citizen.

Citibank's chairman, Walter Wriston, created the Advisory Group in response to upheavals in the early '70s over the Vietnam War. He expected that we would help overcome growing cynicism on the streets about big banks, Citibank being the biggest of all. But because we were in virgin territory, nobody was sure where to begin. For the first few months, we mostly sat in meetings with the chairman, the president, and other senior officials, trying to identify what corporate citizenship is all about and then what to suggest that could generate respect for our citizen–employer. My plain-language proposal, one of a score I put on the table, shocked everybody but Wriston, who had essentially goaded me into it.

At one of our meetings, he told me to put up or shut up after I made a comment about management's reluctance to take on hard issues, in particular the bank's treatment of its consumer customers. Wriston objected because a year or so before, he had accepted a request from Ralph Nader's Public Interest Research Group (PIRG) to investigate the bank's consumer wing. The officials in charge apparently told Wriston that there was nothing to worry about — PIRG would give the bank a clean bill of health.

Wriston may also have been comforted by the fact that David Leinsdorf, son of the world-famous music conductor Eric

Leinsdorf, was going to head the PIRG effort. Citibank was a major contributor to the New York Philharmonic and had a director on its board. So what could go wrong? As it turned out, quite a bit, because the PIRG report gave the bank a failing grade on consumer protection. And then I had the temerity to say the report was right.

My paper to the Advisory Group caused a bit of a sensation within the bank's senior ranks, not just in New York but also in our offices around the world. As a vice chairman revealed to me 20 years later, the paper ignited a fear that a radical had somehow infiltrated the institution. My immediate superiors responded to my quasi-heresy by denying me raises and rating me unsatisfactory in my annual performance reports for two years.

To go back a bit, I became a plain-language advocate when I was at Indiana University Law School in the late '60s. Indiana at the time had the leading U.S. scholar on legal drafting, Reed Dickerson, whose advice to lawyers in numerous books and articles was to write clearly all the time, no matter what the assignment: drafting laws, contracts, briefs, or memorandums. His course was mandatory for first-year students, but unfortunately he taught it only the first day of class. Thereafter, a teaching assistant took over, but without following the Dickerson approach. Instead, he taught from a stodgy old formbook, expecting us to adopt its style.

I refused to go along. I hated the dreadfully written court opinions, statutes, and law-review articles we were forced to decipher day in and day out, often to the point of exhaustion. Because the language of the profession struck me as confusing and pretentious, I wrote every motion, memorandum, and contract we were assigned in simple language — and regularly got clobbered by the teaching assistant. Our relationship got so bad that he started reading my pieces to the class as examples of how a lawyer should not write.

One day toward the end of the semester, we had a blowup, and I promised that if I ever had the chance, I would find ways to force the legal profession to write clearly.

His "take that" for my arrogance was a C for the course, my proudest grade in law school. My revenge five years later was my plain-language recommendation to Citibank.

The idea initially got a mixed reaction in the bank. The business people, who rarely missed an opportunity to condemn lawyer gobbledygook, were mildly in support, but most of the in-house lawyers and the bank's lead law firm, Shearman & Sterling, condemned it as reckless.

Fortunately, one of my other recommendations paved the way for plain language to take hold at Citibank. I suggested that the bank hire a reputable outside consumer advocate to act as its ombudsman on consumer matters. Much to my surprise and delight, Walt Wriston picked Bess Myerson for the role. For the uninitiated, Myerson had been not only a former Miss America and beloved television star but also the path-blazing Commissioner of Consumer Affairs for New York City under Mayor John Lindsay. It's not an exaggeration to say that she matched Ralph Nader's contributions to the consumer movement.

I almost keeled over when Myerson called one day to introduce herself. She had read my paper and promised to make every recommendation happen — and indeed she did in her two years of advising the bank. It helped, of course, that she had the ear of Wriston, who seemed to swoon every time she was around. Her presence also saved me from getting fired.

My first plain-language effort was to redraft the promissory note the bank used for most of its consumer loans, of which there were roughly a million a year. The note, first introduced in the 1920s, had apparently changed only slightly over four decades. It ran about 3,000 words, was in small type, and was very difficult to read. My

plain-language draft reduced it by 80%, to 600 words. While this was good for the cause, it scared the daylights out of the lawyers and in doing so scared the business people. They had been conditioned to believe that agreements had to be in lawyers' gibberish to be enforceable (in our favor, of course).

Enter two more people to the rescue. One was Alan Siegel, president of a brand-development company, Siegel & Gale, and Carl Felsenfeld, then a senior lawyer at Citibank and now a professor of banking law at Fordham University in New York. Siegel was hired by the business people to produce a palatable alternative to my plain-language note. But when Myerson got wind of him, she patched us together to write the note as a common effort. Felsenfeld, himself a superb writer, made us a threesome. He had the added role of convincing senior management that our project would not backfire on Citibank.

I pushed our group to create the shortest agreement possible. My reason was that replacing 3,000 stuffy words in stuffy sentences with 3,000 simple words in short sentences was not an improvement, not useful plain language. The note had to be shortened to enable consumers to read it, and one way to that end was to delete scores of unfair provisions.

For example, every note came with a wage assignment that allowed the bank, upon the borrower's failure to repay, to serve the assignment on an employer and immediately garnish the borrower's salary. Virtually every creditor in the country used these insidious collection devices to abuse borrowers who worked for employers covered by garnishment laws (i.e., big companies with big payrolls). Wage assignments enabled creditors to bypass the court system. Because the wage assignment brought in big money, the business people argued that eliminating it would significantly reduce revenues and in the process give other lenders a competitive advantage.

With Myerson's officiating, we eventually wore down our detractors on the wage-assignment issue and a slew of others. We threw out a provision that denied borrowers a right to a jury trial, added one that gave them legal fees if they beat us in court, reduced a dozen complex default triggers to two, added a hotline phone for customers to call if they were in financial trouble, and provided the new note in Spanish — another first.

The banking industry adopted virtually all these improvements within a year after our effort went public.

One of our most enjoyable successes was in getting the bank to abandon a centuries-old convention about how a note should begin — to ensure its negotiability. Virtually every consumer and commercial note in the lending industry opened with words that paid strict homage to negotiable-instruments law and the Uniform Commercial Code: *In consideration of* or *For value received.* To the consternation of the lawyers who were opposing our project, our plain-language note began simply, *To repay my loan, I promise to pay you* .... Their argument was that without the standard wording, the new note would not be negotiable and thus would be devalued by commercial markets.

It was as though they had never left the commercial-law class they sat in 20 years before, never imagined what might actually happen if the supposedly rock-solid wording from ancient times could survive modernization. We asked, Would investors really give the cold shoulder to safe, enforceable, highly profitable borrowing agreements simply because consideration was implicit and not in hard print? Would courts likewise deny enforcement in the face of the obvious?

Fortunately, the lawyer who mattered most, who knew more than any of them about commercial instruments, blessed our prefatory language without any qualms. Carl Felsenfeld had taught and

written extensively about negotiable-instruments law, knew its history cold, and was a key adviser on commercial paper to several relevant UCC committees. His word — and the concurrence of the bank's treasury department that investors and their lawyers would take our proposal in stride — ended the debate.

After that, only one obstacle remained. At the request of the general counsel's office, Myerson, Felsenfeld, Siegel, and I had to meet with the executive vice president of consumer businesses, James Farley, for one last go/no-go decision. Like his namesake uncle who had been Franklin Roosevelt's close friend and Postmaster General of the United States, Farley was a freethinker.

The general counsel and two senior Shearman & Sterling lawyers showed up for the meeting and advised us, outside Farley's office, to drop our effort. They reminded us that the note had been written to protect Citibank with impregnable language and that a plain-language revision would put the bank's loans at risk. Their words echoed the baloney that had turned me off in law school five years before.

The meeting with Farley was a more dignified version of what had happened outside his office. Our opponents went first, arguing as a tag team that the plain-language note would expose the bank to harm. After Felsenfeld and Siegel made their case in its favor, Farley asked Myerson if she still wanted to go forward. Not missing a beat, she put his question to me, saying that I had her proxy. And so the plain-language movement began.

In short order, a press conference was set for the president, Bill Spencer, to announce Citibank's commitment to plain-language agreements. I was floored to see how it proceeded. The president, along with Myerson, stood on a platform next to a ten-foot blowup of the plain-language note, which looked dazzling, thanks to Alan Siegel's deft hand. In the room were several dozen people from the print and electronic media, including all of New York's major TV

stations, *The New York Times*, *The Wall Street Journal*, *Business Week*, and others. To a person, they were thrilled at what Citibank had done, as though something profound had happened. They couldn't find a flaw in the note, so easy was it to read and so incontestably fair.

That afternoon and evening, the announcement was all over New York's TV and radio stations, and the next morning it appeared on front pages across the United States. A few days later, Wisconsin Senator William Proxmire, chairman of the powerful Senate Banking Committee and no friend of banks, gave a speech on the Senate floor that flowed with praise for the Citibank plain-language note. His kind words resonated for months afterward across numerous committees of Congress whenever Citibank testified. Senior management liked the praise so much that they bragged about the note in the bank's 1975 annual report.

The glare of this attention caused a politician in New York to imagine an opportunity of a different kind. Within a month of the press conference, Assemblyman Peter Sullivan proposed amending New York law to require every lender in the state to adopt the Citibank note. He literally made it a part of his bill.

The head of New York's Public Interest Research Group, my friend Donald Ross, wasted no time in teasing me about the bill. He said PIRG wanted to support a plain-language bill, but not one with *Citibank* all over it. I assured him that Citibank would be against a plain-language law but then made the mistake of bragging that I could write the bill he longed for, one that encompassed every contract between a consumer and business in the state — and in just a single paragraph at that. Sullivan's bill covered only bank installment loans.

A couple of weeks after my display of conceit, Ross called my bluff, saying that he had gotten Sullivan's okay to invite me to write a better bill, but he warned that neither of them had been able to

figure out how one bill could encompass every genre of consumer contracts. They guessed that up to a dozen bills would be necessary to amend the laws covering each of those contracts. Because I had never written legislation before, I was scared about how the bill would look, fare in public, and proceed in the legislature. I had no doubt, however, that I could cover every bloody consumer contract from Buffalo to Montauk Point in a one-paragraph amendment of New York's General Obligations law. I knew that law inside out because, unlike Peter Sullivan and Don Ross, I dealt with it almost daily. So like a fool, I told them I'd have a draft in a week or so.

After that, I tried hard to avoid them because I knew I was in over my head. For weeks, I fabricated excuses to keep Ross off my back. But one morning he announced that he was coming to my office to get the draft. I panicked because I hadn't written anything yet, except in my head. Fortunately, that morning the muses were kind to me. I quickly scribbled the thing on a pad, and my secretary had a final copy by the time Ross showed up. One paragraph!

Much to my delight, PIRG and Assemblyman Sullivan liked it. In a flash, Sullivan had it printed, filed, and sponsored by most of the Assembly's members, Republicans and Democrats. But after the media started to pay attention, some of the sponsors, sensing that it would move, began to look at the bill more closely. Ironically, several of them didn't like that the bill was written in plain language and not in traditional legislative style. To keep them as sponsors, Peter sheepishly asked me to redraft it to suit the desires of these gobbledygook powerhouses. This time I obliged.

As it turned out, virtually all the fundamentals in my draft eventually became law. Except for agreements to purchase securities and similar specialized agreements, every other kind of financial-services and retail contract, including product warranties, became subject to a plain-language mandate.

Moreover, as I intended, the new law came with no serious enforcement teeth. Its only penalty for a violation was a modest $50 fine. The amount was set low to ensure the bill's passage and to discourage lawyers and judges across the state, most of whom couldn't write to save themselves, from using the law as a weapon to harass the business community. In effect, the new law was more like a resolution encouraging better contract transparency than an act of the legislature.

Shortly after Peter Sullivan filed the bill, I was aghast to learn that he had rounded up enough sponsors to enable its passage. I remember thinking, It can't be this easy, can it? In fact, it was — thanks to Sullivan's sharp political instincts. He was a conservative Republican who had once committed apostasy by working with PIRG on a liberal consumer-protection bill. Looking back on it, I guess it also helped that the governor, Hugh Carey, a Democrat, was Sullivan's friend as well as a fellow Irish Catholic.

Not surprisingly, Sullivan quickly got the Democratically controlled Assembly to pass the bill. But the Senate, which was controlled by the Republicans, initially had a mixed view about how to deal with it. They liked the favorable media attention it was bringing to their party but worried about the bad vibes they were getting from the business and legal communities. Happily, by the time the Senate Judiciary Committee met to consider the bill, Sullivan miraculously neutralized their fears by getting *The New York Times* to run an editorial encouraging its passage.

The editorial convinced me to go along with Sullivan's next plan, which was for me to stay near a phone on the afternoon of the Committee hearing and feed answers to the questions that stumped the bill's supporters. Sullivan kept me busy doing this for two hours. It was a rip to learn that our conspiracy worked, for the Committee and then the full Senate passed the bill in short order. All that was left was for Governor Carey to withstand one last round of

lobbying from the bar and trade associations for a veto. Their arguments were a broken record — that the plain-language law would usurp language that had worked unfailingly for centuries, that plain language cannot be achieved in any contract, and that the new law would needlessly expose the business community to waves of litigation.

The waves, which on my last count numbered fewer than ten lawsuits after almost 30 years since enactment, never made a sound.

In a press release after he'd signed the bill into law, Governor Carey gushed that the plain-language law — N.Y. Gen. Oblig. Law § 5–702 — was landmark consumer protection. Of course, it was not, but it was exciting enough to motivate other legislatures around the country to mimic what New York had done. I believe, though, that some of them went too far, requiring contracts to have words, sentences, paragraphs, and formatting that met precise standards.

In any case, a later development has dealt a blow to any effort to write some consumer contracts in plain language. Since the late '60s, the financial-services industry, in particular, has been swamped with so many state and federal disclosure laws that consumers drown in them nowadays, making short, understandable agreements impossible.

Every year, the roster of government-mandated disclosures grows dramatically — so much so that new laws increasingly require disclosures to be more conspicuous than the clutter of previous mandates. The laws try to accomplish this by mandating large, bold, italic, or colored letters, borders around the disclosure, placement of the disclosure at the top of the agreement or on a separate page or in a delivery several days before or after the primary agreement, and so on. Other notices contain exceptions telling the consumer when state or federal law trumps the disclosure. A new routine is to require marketing solicitations to have a disclosure on the envelope about the disclosures inside. Recorded messages that scream surely can't be too far in the future.

Disclosure overload has made plain language an impossible exercise. In the name of consumer protection, government has erected a regime guaranteeing that consumers will never read bank documents, except through the expensive eyes of a lawyer. Three decades ago, a consumer could close a mortgage with about 5 to 10 pages of documents. Today it takes almost 200 in most parts of the country. A credit-card account was once covered by a page, but now by about 25. At the rate disclosure laws are being enacted, in ten years it will take 300 pages to close a mortgage and 50 or more to open a card account.

This is madness. If anything, excessive disclosure laws benefit businesses more than consumers because the laws camouflage bad practices under a veneer of protection — under the veneer of truthfulness in the case of the federal Truth in Lending Act (15 U.S.C. §§ 1601–1665b (2000)).

Moreover, disclosure mania has all but ended whatever there was to theories about adhesion contracts. In 1975, Citibank was essentially the sole author of its consumer notes, but today the primary author of every consumer-debt agreement is unequivocally the government.

Sadly, the scourge of information overload will probably never abate, never reverse, because too many forces will not allow it, especially lawyers and politicians, for whom writing obtuse commandments is too irresistible.

In hindsight, as stressful as it was, I had it easy maneuvering the plain-language note through the Citibank system. The controlled gymnastics of our debates surely were the reason why our note turned out as well as it did. We were lucky to have the likes of Walt Wriston and Bess Myerson pushing us to think in new ways about how we wanted consumers to view the bank. That we decided on the boldest loan document ever is a testimony to Citibank and the profound influence an enlightened company can have on a very

important issue. Wriston's management style was to encourage a vigorous airing of major issues, always confident that the exercise would lead to good results. His philosophy was one of the things that made working at Citibank in the 1970s such a fabulous experience.

I must confess, however, that despite the pride I took in our noble effort, never for a second did I think that most consumers would start reading agreements once they were shortened and written in plain language. I didn't keep my philosophy on the matter a secret: if an agreement can be written clearly and fairly, there can be no ethical or business-justified alternative. If only government lived by the same standard.