

Explaining with Examples

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Contracts seldom contain any explanatory material such as commentary, examples, or other bits of the standard paraphernalia of explanation and clarification. Why not?

Contrast contracts with statutes. Does anyone think that the UCC would be clearer if we deleted the official comments? If comments make the UCC clearer, why don't lawyers use commentary in their contracts?

I think the lawyer's answer would be that businesspeople phrase their contracts in terms of principles and outcomes. The drafter's task, however, is to clarify the business deal by thinking through the particular actions that will be required to achieve the client's goals. Precise drafting requires setting down instructions to perform particular actions in specified circumstances.

An obvious analogy to the legal drafter is the computer programmer. A programming project begins with a description of goals to be achieved, and it ends with the actual program — detailed and precise instructions (in a programming language) to be performed by a computer. In between falls the discipline of programming. In writing the program, the programmer is forced to confront and resolve all the latent ambiguities and conflicts in the initial statement of goals.

Drafting as Programming

The legal drafter is the programmer of the business deal. As the drafter thinks through the problems involved in reducing an informal agreement on principles and outcomes to a set of instructions, he or she identifies problems that escaped the parties' notice. In the discipline of drafting as programming, the lawyer both memorializes and makes workable the parties' intention.

Basking in this sunny view of the lawyer's role, we may come to believe that neither statements of goals nor examples and commentary have a place in the agreement. It is easy to conclude that just as the computer's operations can be governed only by its precisely written program, so too the business deal should be governed only by the drafter's program-like instructions.

Such a view fails to realize all the implications of the programming analogy. In legal drafting, as in computer programming, the price of clarity is fragility. Precisely worded instructions in computer programs and in contracts often fail to work as intended.

When a program freezes, someone has to figure out what the program meant to do in the large and also what the intention was behind the bits and pieces. The operative language (the program) may be the object of the exercise, but it doesn't tell the whole story. The statement of overall goals, the flowcharts, and the programmer's remarks are all descriptions at various levels of specificity, each having its own uses and importance. When things go wrong, the programmer must reconsider the flowcharts and other statements of goals.

You never know whether a program has frozen unless you know what it was intended to do. Perhaps the apparently anomalous result was the real goal. (As they say at Microsoft, "It's not a bug; it's a feature!") Similarly, you don't know whether an agreement is drafted correctly unless you know what the parties intended. But lawyers, unlike programmers, deliberately cut themselves off from

all help outside the document. If you take seriously admonitions that “this document contains the entire agreement of the parties,” then you will want the agreement to contain both the tightly drafted “program” and some less precise statements of the business deal. The “programming language” bits of the agreement clarify the statement of the deal, but it works the other way as well.

Explanation isn’t all one-way. We explain things at many levels of generality and precision, and every level adds something. If you have to explain an agreement with examples and commentary (and you usually do), it’s time to consider whether the best place for the examples and commentary might not be the agreement itself.

A simple example: two affiliated borrowers under a revolving credit agreement, Titan Corp. and Midget Enterprises, separately agree that Titan will borrow no more than 60% of the amount available under the credit agreement and that Midget will draw no more than 40%. The credit agreement, however, requires Titan to pay all facility and administrative fees, so a side agreement between the borrowers provides that Midget will reimburse Titan for Midget’s share of the fees. You could draft the side agreement to say:

Whenever Titan pays a facility or administrative fee, Midget will reimburse Titan for 40% of the payment.

But it’s probably better to draft it like this:

The borrowers intend to bear all facility and administrative fees in proportion to the maximum amount each is permitted to borrow under the revolving credit agreement. Accordingly, whenever Titan pays a facility or administrative fee

The Cast of Characters

There is an art to constructing examples; this section will essay some tricks for naming the *dramatis personae*.

An example in the prefatory note to UCC Article 4A, “Funds Transfers,” begins in the following folksy way:

X, a debtor, wants to pay an obligation owed to Y

Stop right there. Do you know anyone named X? How many people do you know who even have an initial X (and whose first name isn’t Francis)?

The problem with X and Y isn’t just that they’re bloodless (what kind of person do you imagine X to be? how different is he or she from Y?), but also that they’re easily confused. Midway through the paragraph (which, on a quick count, contained 42 Xs and Ys), you may forget who is the debtor and who the creditor.

Compare the example above with one from the official comment to UCC § 9-328:

Debtor owns 1,000 shares of XYZ stock held through a securities account with Able & Co. . . . Debtor borrows from Beta [Bank] and grants Beta a security interest in 1,000 shares of XYZ stock.

Notice the superiority of the “Debtor meets Able & Co.” nomenclature. Debtor identifies the role of the character and is, in addition, an unlikely name for a brokerage firm. Able & Co., in contrast, could plausibly be the name of a brokerage firm but not of a bank, a widget manufacturer, or a law firm.

Not all the names in the example above are so felicitous. The official comment to the section uses Beta and, elsewhere, Alpha as bank names. Nothing in those words suggests banks. Better names would be First National and Second National. Furthermore, if it’s

important to distinguish one bank from the other, city names may help — Yuma National Bank has a different feel from Penobscot National.

Similarly, XYZ Co. is not the best name for the company whose shares are to be pledged. XYZ Motors would be better, and Standard Motors would be better yet. The word *Motors* suggests an entity that is unlikely to be a customer, a brokerage firm, or a bank.

Unlikely, but not impossible. Motor-car companies and banks can be customers of brokerage firms, and a brokerage firm might have a name like Standard or First National (although Debtor remains implausible). But Able & Co. for the brokerage, First National for the bank, and Standard Motors for the securities issuer are names that fit smoothly into familiar story lines.

By “story lines” I mean the internalized pictures of the world involved in so much of our thinking. Story lines aren’t usually fictitious, although they usually aren’t exactly true. As our mental powers grow through education and experience, our story lines take on greater complexity and adaptability. We leave the good-guy, bad-guy simplicities of childhood for a more mature and nuanced picture of life’s complexities. But we may still be familiar with some simple story lines that we don’t necessarily believe.

For example, there’s a familiar story line — call it a stereotype — that accountants are dull, dry, meticulous bean counters. This stereotype doesn’t conform to my experience, and possibly not to yours, but the stereotype does not have to be believed to be useful. In developing my example, I’m more likely to give my accountant a name like Elmer Precision than Lance Almost. As I work through the example, it’s unlikely that anyone will forget that Elmer is the accountant (although if the example involved accounting error or hanky-panky, a name like Jerry Jugglemeister might be better).

Looking back at our “Debtor meets Able & Co.” example, we may wonder whether the name Debtor is the best solution. A better solution might be to call our debtor Mr. Micawber or Spendthrift or some other name that reliably suggests straitened circumstances.

Using a story line or stereotype helps the reader follow a complicated example. But we must face a controversial issue in using stereotypes. In the prevailing story line, accountants are not only dull and dry, but also male and white.

About race and ethnicity, I shall say little. Unless you work at it, first names give few clues to race or ethnicity. The same is true for invented surnames like Precision and Almost. And in America at least, an “American” last name like Able stands more for a bland uniformity than for a particular ethnic group, such as Anglo-Saxons.

In contrast, gender issues in naming are unavoidable. You could, of course, call your characters Precision and Almost *tout court*, but that is hardly an improvement over calling them X and Y. Story lines need people, not placeholders.

So in constructing your example, should your accountant be Elmer Precision or Priscilla Sharp-Pencil? It all depends. If you’re trying to guide your reader through some ultratricky terrain, go with Elmer. Your reader may already have enough to absorb without the distraction of having his consciousness raised. If, on the other hand, the terrain is not too difficult, you should seriously consider some stereotype demolition. But don’t just call your accountant Priscilla Sharp-Pencil. If you’re going to bash the accountancy stereotype altogether, go the whole hog: this is a job for Sheena Starr, CPA.

The point that I’m making is about writing, not political correctness. Writing requires decisions about when your readers should be carried along by the current of a stereotype and when they should be forced to swim against it. And there’s often much to be gained by heading upstream.

The Front Page, by Ben Hecht and Charles MacArthur, is a frequently revived 1920s play about Chicago newspapermen. Its hero is Hildy (Harold?) Johnson, a quick-witted and none-too-scrupulous master of the arts of yellow journalism. Part of the play involves his ambivalent feelings about his fiancée, who wants him to marry, settle down, and live a regular life. When Howard Hawks and Charles Lederer brought *The Front Page* to the screen (for the second time), they stumbled onto the idea of having Hildy played by Rosalind Russell, with Ralph Bellamy as the fiancé. The film was released in 1940 as *His Girl Friday*.

I have nothing perceptive to say about the mechanisms at work in our reacting to reversals of gender stereotypes, but it's hard to ignore the effects: *His Girl Friday* has a snap and sparkle that more faithful renditions of *The Front Page* lack. (The effect of the gender swap may have been even more powerful in the 1940s, when there were fewer female professionals.)

The lesson is that if you have a feel for stereotypes, you can use them to reduce the reader's burden of understanding or to increase the reader's enjoyment and awareness by cutting against them.

In populating your examples, you should watch out that your protagonists don't have names that are distracting. In another article, I used Worrywort for the name of a company that received a guaranty. When I was writing that article, I initially called the company Shylock Corp. Shylock is, of course, the most famous receiver of a guaranty in literature. But Shylock is also the villain in a play widely regarded as anti-Semitic. Being Jewish myself, I wasn't too worried about charges of anti-Semitism (and I love *The Merchant of Venice* despite all), but I eventually decided that using Shylock would simply be too distracting for many readers.

A more humdrum example of the same phenomenon is found in the previous section, where I used an example with a "Titan Corp." Again, I originally thought of using Titanic Corp., but the

movie *Titanic* had induced a wave of interest in the great ship. The name Titanic Corp. would have suggested disaster at sea, young lovers parted, box-office receipts — all topics unrelated to my purpose — so I changed it.

One final practical tip on naming protagonists is that, if there are two individuals, make one a man and one a woman. This may give you the opportunity to exploit the old boy-meets-girl story line, but there's a more prosaic consideration: two differently sexed characters allows you to use gender-specific pronouns — *he, she, his, her*, etc. — without ambiguity.