

What Should Our Duties Be in Preparing Transactional Documents?

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Overview to the discussion

We have to comply with various ethical rules, such as

1.1. Competence

The documents must do the job. They should reflect the state of the law. They should stand up in litigation.

1.3. Diligence

Promptness is also required. We are charged with zealously pursuing the client's needs and desires. Legal documents are not necessarily neutral. Employers and employees prefer different clauses as do buyers and sellers. See the ICLE form bank. Clients want documents that reflect their interests. Reflecting their choices is a complex matter.

1.2. Scope of Representation

We cannot knowingly assist a client in anything that is fraudulent, illegal, or prohibited.

4.1. Truthfulness in Statements to Others

If we have to talk with other persons who sign or are otherwise involved, we cannot mislead them.

2.2 Intermediary

There are special rules if we claim to be representing multiple clients who want us to memorialize their agreement in some document.

1.14 Client under a Disability

If the client here is under a disability or if the client is a fiduciary, there are duties to the protected person as well as the client. Note of course that the client isn't necessarily the person who pays.

The question is whether those are our only duties. The question goes beyond duties that could engender sanctions, such as grievances or malpractice claims. Are there things we ought to do?

Persons concerned with the bottom line would add that we ought to be cost-effective. In private practice, we don't want to lose money. Even in pro bono environments, we want to use our time wisely. This leads to the use of boilerplate and canned forms, which leads to further problems.

What is the Purpose of the Document? How is to be Used?

Perhaps some are not expected to be used at all, unless there is litigation. Then the document sets parameters for litigation. Many have expected uses. A

consumer contact might be intended to tell consumers what to do in certain situations, such as how to cancel a service contract. The business presumably does not want the costs of litigation every time a consumer wishes to cancel. Documents that are not overtly adversarial are much more likely to be used outside of court. Powers of attorney and trusts are prime examples. Consider a power of attorney instrument. Is it more like a passkey or a user's manual? A passkey is something that can be shown to a third party, like a bank, to get something done. A user's manual assists the agent in getting something done. Arguably, the agent needs both a passkey and a user's manual.

Usability

If a document is to be used, we can measure its usability. Usability for documents is not the same as readability. Readability is to a large degree a local measure. Can a subject pick up a passage and understand it? Many legal documents fail miserably on readability measures. Many more, especially those of any significant length, fail at usability. Usability measures how easily a person can find the information she needs. Nowadays more usability research is done on web sites than printed texts. In part this is because many products have dispensed with manuals and replaced them with on-line help. Some attorneys seem to consider that a phone call to them is the equivalent of on-line help. "If you don't understand what you are supposed to do as trustee, you can always give me or a lawyer of your choice a call." Not so likely if the phone call is billed at hourly rates.

How much feedback do we get about usability much less testing? Are we failing to serve our clients well if we produce documents that are not easy to use as intended?

Minimalism or Redundancy

Attorneys do not encapsulate everything they know in transactional documents. Should we do more? A recent discussion on the probate listserv indicates that most powers of attorney do not indicate that agent has no power to represent the principal in court without an attorney. That right is non-delegable. Should we say this?

In general, should we restate things in ordinary language for persons who do not understand legal terminology? Certainly, ordinary human beings do not speak of per stirpes or tenants by the entirety. Is a legally minimal document a recipe for disaster?

Discovering Client Choices

Presumably documents we prepare for clients should reflect their choices. They might for highly salient choices, but probably don't for less salient choices. One reason is that few documents are created "from scratch" but come from canned sources. Sometimes the attorney created them. Often the attorney "borrowed" them from some other source without really appreciating the implications of choices made. That is one challenge in redrafting a document, such as a will or trust. How

many of the “choices” in the original were really made by the client? Even rarer would be informed choices by the client.

The solution might be to ask the client. That isn't so easy. First, we don't like having too many choices, especially for things we don't care about. I had that experience when our house was built. I got very bored in having to answer questions about handles on cabinets. I also am annoyed about voting for offices like the state board of education. I have no idea who those people are and resent it if somebody thinks it's my duty to find out.

We could use a questionnaire if it isn't too long. However, there are many issues in survey design. There may be no neutral approach. Consider framing. It is no accident that the camps choose the labels pro-choice and pro-life. Researchers have learned that the way questions are presented has a major effect on the answers given. People generally give optimistic answers and don't want to consider bad events. “Tell me who in your family should not be trusted with major responsibilities?”

Many questions require some instruction before they can be posed. There is no reason to think that clients will have any idea about the default effects of divorce or death of a beneficiary on estate planning. The developers of the Uniform Probate Code, the inspiration for our EPIC, claimed to reflect popular choices, but how much effort was spent in really explaining scenarios if they in fact did any testing?

Nudging

This was the subject of an article I wrote for *BRIEFs*. Do we ignore the problem of choice or do we attempt to guide clients through it? If we guide them, is there some bias? There is an expected bias in things like buy-sell agreements or employment contracts. Consider “happy family” documents such as estate plans or life plans such as powers of attorney. We have seen the dark side. We know of problems. Should we suggest protective measures or possible remedial acts?

Thaler and Sunstein suggest that the government should engage in what they call libertarian paternalism. People should have choices, but they should have to opt out of a decision that is in their interests. Obviously, that raises a lot of issues. Should we do the same?

Consider some examples:

- Reporting to close family members in a power of attorney if the principal is incapacitated
- Using a procedure such as www.edivvyup.com to resolve disputes over distribution of an estate
- An alternative dispute mechanism is persons with standing object to a decision by a fiduciary
- Requiring an agent/trustee to give notice to the principal/grantor if she feels the person is incapacitated
- Requiring notice to close family members
- Allowing a decision on incapacity to stand unless the person objects in which case there is an alternative dispute mechanism

Using “Tested” Language

It would be foolish, even malpractice, to ignore “magic words” in statutes that provide safe harbors, e.g., health, education, maintenance, and support. On the other hand, it is not so clear that a phrase that was upheld in litigation is really safe. Perhaps a clearer phrasing would have avoided any hint of a dispute. There is no guarantee that another court will make the same decision on a close call.

Educating Users

Do we have any duty to educate the intended end-users of the documents we draft? This is especially obvious for life planning documents such as powers of attorney and advance medical directives.

Some References

Usability

The federal government, through the Department of Health and Human Services, has a site www.usability.gov

There are various books, although most of the recent ones stress web sites. One favorite title is

DON'T MAKE ME THINK: A COMMON SENSE APPROACH TO WEB USABILITY by Steve Krug

A broader approach is taken in HANDBOOK OF USABILITY TESTING: HOW TO PLAN, DESIGN, AND CONDUCT EFFECTIVE TESTS by Jeffrey Rubin and Dana Chisnell

Another relevant subject area is document design

Choices

THE PARADOX OF CHOICE: WHY MORE IS LESS by Barry Schwartz

CHOICES, VALUES, AND FRAMES by Daniel Kahneman and Amos Tversky

QUESTIONNAIRES IN SECOND LANGUAGE RESEARCH by Zoltan Dornyei

Nudging

NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS by Richard Thaler and Cass Sunstein

Education

MAKING MEDICAL DECISIONS FOR SOMEONE ELSE: A GUIDE FOR MARYLANDERS by the American Bar Association and the Maryland Attorney General

Former judge Kirkendall developed a DVD for guardians

Contract Drafting

A MANUAL OF STYLE FOR CONTRACT DRAFTING (2d ed.) by Kenneth Adams and his excellent blog at <http://adamsdrafting.com>