Rebecca L. Peace Named ‘Government Lawyer of the Year’

The PBA Government Lawyers Committee presented its 2013 Government Lawyer of the Year award to Rebecca L. Peace, chief counsel for the Pennsylvania Housing Finance Agency (PHFA), during a PBA Committee/Section Day ceremony in Harrisburg on Nov. 22, 2013.

The award honors a government lawyer who has made a significant singular contribution or has dedicated his or her career to outstanding service to the profession for the benefit of the public or a government entity.

Since 1989 Peace has served as chief counsel for PHFA. She is a member of the agency’s senior management committee and provides legal counsel on all corporate matters to the agency’s governing board. PHFA, based in Harrisburg, works to provide affordable homeownership and rental apartment options for seniors, low- and moderate-income families and people with special housing needs. Through its mortgage programs and investments in multifamily housing developments, PHFA also promotes economic development across the state.

Peace was instrumental in the creation of two nonprofits: Commonwealth Cornerstone Group, which seeks to enhance, strengthen and revitalize Pennsylvania’s low-income communities, and ReImagining Communities, which assists PHFA in furthering its affordable housing goals.

Peace is a nationally known expert in affordable housing matters, specifically on issues related to fair housing, administration of federal programs and public finance. She regularly interacts with the Internal Revenue Service, Fannie Mae, Freddie Mac, the U.S. Department of Housing and Urban Development, capital market entities, state lawmakers, consumer advocates and action groups, mortgage and insurance companies, banks and consumer lenders, state and local governmental entities and housing-interest groups.

Peace is a founding member of Ladies First, an independent association that provides educational and networking opportunities for female public-finance professionals in the Mid-Atlantic region and promotes the role of women in the public finance industry.

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Subcommittee report

Professional Development Subcommittee

The subcommittee in November reported on law school events – panel discussions at Pennsylvania law schools that offer an “insider” perspective to students who are considering public sector practice upon graduation — that PBA Government Lawyers initiated at Drexel, Pitt and Penn.

Since that report was made, we are happy to report that an event was conducted at Duquesne. Jason T. Anderson, assistant counsel, Department of Labor & Industry, was the moderator. At the request of the law school, the scope of the panel was expanded to include private practitioners, which were as follows:
Sarah Burhan Abdullah, JBM Immigration Group
Polly Chia-Hsuan Chien, JBM Immigration Group
Aubrey Glover, Cohen & Grigsby
David Landay, solo practitioner
Rhoda Neft, GENCO Distribution System

In the spotlight

Christopher K. McNally, assistant counsel at the Department of State, Bureau of Professional and Occupational Affairs, presented a CLE seminar on “Pleadings in Administrative Agencies.” The course was sponsored by the Office of General Counsel, Litigation Practice Group, Administrative Law Subcommittee, chaired by Dr. Maria Battista.

Do you have ‘In the spotlight’ news?

Send your news of recent appointments, honors, speaking engagements — and family news — to Carol Mowery at camowery@state.pa.us or submit your news via a quick click on the “Newsletters” page of the Government Lawyers Committee Web site at www.pabar.org/public/committees/govtlaw/pubs/newsletters.asp.
What’s wrong with information technology solicitation and what government lawyers can do about it

by William W. Warren Jr., partner, Saul Ewing LLP, Harrisburg. This article reflects solely the opinions of the author. Any comments on this article should be submitted to the editors.

The commonwealth’s procurement of information technology (IT) services and equipment is a source of recurring problems. Contrary to the views of many state administrators, the issue is not whether there are too many bid protests. Given the great fear on the part of IT vendors of adverse consequences associated with protesting (whether that fear is real or perceived), in my view there are not enough protests and challenges testing the adequacy, propriety and sometimes the wisdom of IT procurements in an effective manner. Neither is the problem rapacious vendors clamoring to rip off the state treasury. Instead, the issue as I see it is whether there are sufficient numbers of qualified vendors willing to weather the rather harrowing processes, risks and great expense of preparing proposals. At stake is the credibility of and confidence in state IT procurement. There are too few vendors participating and too little credibility in the process.

These ideas can be implemented successfully without statutory change, but I leave that question to others and to the process and evolving nature of common law and administrative agency policy. I am simply being prescriptive here, out of my desire to see the legal aspects of IT procurement improve.

First, the “seven-day rule,” as it is commonly called, must be applied with greater circumspection and waived when necessary. Because the “seven-day rule” in my view isn’t a rule and is really two separate and distinct requirements, I reject the proposition that government attorneys have no choice but to approach timeliness issues during the course of solicitations inflexibly and rigidly.

Secondly, bid protests must be handled, not as a litigation game, but as a method of airing doubts about the propriety of the procurement, the decisions of the involved officials and the like. We need to change the rules and practices that prevent vendors from getting answers to their questions and instead facilitate review by granting more freely to the protesting vendor the documents and information relevant to and relied upon in responding to protest. In short, the disclosure procedures need to be applied more flexibly and no longer used as tactical litigation weapons against the agencies’ IT contracting partners — the vendors. The Commonwealth Procurement Code was, after all, specifically adopted to provide a remedy to disappointed bidders that was realistic, substantive and readily available. The Code was not adopted to provide a remedy that was illusory or a remedy that in reality is a sham.

The Death of Reason: the Seven-Day Rule

The “seven-day rule” has been applied with undue inflexibility. In my view, too many protests are responded to reflexively by an objection as to timeliness. Dismissals grounded in the “seven-day rule” are issued by the agencies and courts, and all too often the substance of the protest receives inadequate attention. In the vernacular, the analysis of the substance of the protest becomes only “make-weight,” by which I mean to say that substance is given inadequate attention. Vendors want to know what happened substantively; a dismissal on this procedural ground suggests to vendors that the state is hiding behind an unfair rule of mere procedure.

The “seven-day rule” in actuality consists of two separate components: As all understand, a vendor has seven days to file, measured from when the vendor knew or should have known of the facts giving rise to the protest. Title 62 Pa. C.S. §1711.1(b) provides, in pertinent part, that

... the protest shall be filed with the head of the purchasing agency within seven days after the aggrieved bidder or offeror or prospective contractor knew or should have known of the facts giving rise to the protest.

I call this the first seven-day period for the filing of a protest.

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(Continued from Page 3)

However, subsection (b) continues, again in pertinent part, providing that “… in no event may a protest be filed later than seven days after the date the contract was awarded.” This second seven-day period could have easily been five days or 10. The drafters of the Commonwealth Procurement Code created this second, seven-day period as an absolute bar to any protest by a disappointed bidder. Here, there is clear intent to create a final and very inflexible deadline for action. Can the same be said for the Code’s first seven-day period?

What seems to attract little attention, perhaps because both periods are seven days in duration, is that it is only the second seven-day period that is explicitly inflexible, hard and fast. The first seven-day period is triggered by a “knew or should have known” standard. There is nothing inflexible or rigid about a standard of this nature. While the second seven-day period has to be inflexible in order for procurements to proceed in a timely manner, it makes considerably more sense, putting aside the tactical advantage an inflexible approach provides to the agencies, for the commonwealth to think twice before applying the first seven-day period to bar a protest.

Application of the first seven-day period should instead be flexible. For example, there is no reason to compel vendors to protest an RFP within seven days of its issuance if the RFP includes a question-and-answer process that could resolve the issue. The state’s interest is in avoiding a delay in a procurement unnecessarily; prematurely filed protests create delay. Why adopt a policy that encourages interference in the solicitation process prematurely?

Moreover, knowledgeable commonwealth counsel know how reluctant vendors are to raise objections. If anyone doesn’t know this, let me tell you: there is great reluctance. In any event, this fact should be clear from the number of occasions when protests are filed and commonwealth lawyers see the opportunity to argue that the protest is late and untimely. Vendors hold off filing until circumstances force them to take action. But merely because this procedural objection can be raised by agency counsel does not mean it should be.

There is no reason to use the first seven-day period to bar necessary, legitimate and, I respectfully suggest, helpful inquiry into the solicitation process. Which is preferable from the standpoint of the citizens of the commonwealth: successful avoidance of a necessary inquiry through aggressive use of this defense or the securing of answers to legitimate questions raised in the course of a solicitation process? The question answers itself. When a serious question has been raised, applying the first seven-day period rigidly is a mistake. In order for vendors to participate on an on-going basis in commonwealth procurement, they require honest answers to important questions. What they often get instead is a defend-at-any-cost reaction that is short-sighted and self-defeating.

It would be better to look at the application of the first seven-day period with a measure of flexibility. Was it absolutely certain that the problem could have been identified when the RFP was issued, when the amendment or addendum was received or when the question during Q&A was answered? Most potential problems arise in a factual matrix that is somewhat complex. Close questions should be called in a way that favors the securing of answers to legitimate questions. Stated another way, agencies are required to apply the “knew or should have known” standard according to the facts presented.

Even where there is neither doubt nor ambiguity as to whether a matter could have been raised at an earlier time, it often would make perfect sense to permit the protest to be heard on the merits and the objection based upon the seven-day period waived. The solicitation process may not have reached the point where proposals are due. Even if proposals have been received, the tactical objection can be waived so that serious questions can be answered. Waivers are allowed in contexts too numerous to mention. Constitutional rights can be waived. Courts can allow time periods to be extended, both before and after a deadline. Courts also treat seemingly mandatory legislative commands as merely directory instead.

What the agencies are really saying when the first seven-day period is invoked rigidly for tactical advantage is that the concerns of the protesting vendor are not significant enough to be heard. Nothing in the mere existence of the first seven-day period suggests that waiver is beyond the discretion of the agencies and agency counsel. Sure, it is nice to be rid of a case and check off a box on the list of things to do. But be aware that invocation of the first seven-day period as a tactical defense leaves vendors believing the worst. This contributes to disrespect for the process and contributes to decisions to withdraw from the commonwealth IT market. And many important potential vendors have done just that.

At the same time, the second seven-day period, by its very nature, must be applied as a true “drop dead” deadline. In contrast to the first period, the second has all the elements of a mandatory and not merely directory statutory command.

The benefit to commonwealth IT procurement from a policy change led by agency attorneys will be substantial. Such a change would benefit the commonwealth through greater vendor confidence in decision-making and higher levels of vendor participation.

Hiding the Ball: Access to Documents and Information

Similarly pernicious is the way in which the statutory provisions on access to documents and information are applied. In my view, there are re-
What’s wrong with information technology solicitation and what government lawyers can do about it

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ally two stages of the protest process that involve access to documents and information. The first involves a disclosure under 62 Pa. C.S. §1711.1(d) of documents and information the contracting officer “deems relevant” to the protest during the course of the contracting officer’s review of the process. The second occasion for disclosure is during the evaluation of the protest by the agency head or designee under §1711.1(e). The documents and information to be disclosed by the head or designee are those “deemed necessary” to render a decision.

These provisions would seem to be easily understood. If the contracting officer has used documents or information in responding to the protest, then those documents and information were deemed relevant or he or she wouldn’t have used them. The documents and information must be “include[d]” in the contracting officer’s response. Documents and information are therefore producible under subsection (d).

Likewise, if documents or information are used by the head or designee in resolving the protest under subsection (e), then they should be producible. Specifically, the head or designee is required to “provide” documents and information “deemed necessary” for a decision. Documents and information are therefore producible under subsection (e).

For what reason, other than a tactical one, would a state agency seek to withhold documents or information that fall within one or both of these subsections? Does it make any difference that documents and information are to be included in the contracting officer’s response under subsection (d), while documents and information are to be provided in the decision of the head or designee? Or is this a difference without a distinction?

Notwithstanding what the courts decide, agencies and their counsel should be generous in making decisions on disclosure. There is, of course, a way of protecting information that is truly confidential. At the same time, ultimately, the documents used by the contracting officer and the head or designee will be obtainable under Right-to-Know. Agency counsel should be most interested in any arguments that can be fashioned from documents or information connected to the protest while the protest is still pending. Finding out that something was done incorrectly after-the-fact is hardly helpful to building a trusting relationship and attracting vendors.

If the disclosure of documents and information occurred liberally, the agencies could be more confident of their decisions, and vendors, more confident of the fairness of the protest process. If information that is relied upon is not tested, i.e. is not presented to the protestant to see if there is contrary information that may affect the decision making, the quality of protest decisions will suffer. The failure of the contracting officer or the head or designee to disclose documents or information that he or she views as pertinent is bad policy and is a practice that agency counsel need to address. If the documents and information are not provided, the prospective vendor will believe the worst. There is no reason for this state of affairs. No one likes to have his or her decisions questioned and challenged. But instilling confidence, increasing participation and assuring propriety in the IT procurement process are overriding policy objectives and in everyone’s interests in the long run.

An anecdote from my experience as a governmental attorney for school districts and local governments illustrates the point I am attempting to make here. Sometimes in public construction contract bidding, contractors believe that they are being treated unfairly. The practice at the local level is to open the bids for examination at the time of bid opening. Thereafter and historically, the bids and all associated attachments, the bid tabulation and the like are not available for review. The construction bidders do not attend bid openings with counsel. Indeed, construction bidders are often represented by individuals who are not the highest-ranking or most-experienced individuals in the organization. Oftentimes, the right questions are not asked at time of bid opening. Tactically, when asked thereafter for disclosure of the bid documents, the local government’s solicitor can “hide the ball,” and force the bidder to either file a taxpayer challenge in local court blindly or abandon the effort. Abandonment involves leaving at least one bidder unsatisfied, disgruntled and lacking confidence in the local government’s bidding process. Contrary to this tactical position, it is often immediately apparent that the grounds being asserted for the challenge, based on surmise, rumor and the like, are in fact baseless. Local government entities can and should be advised to put the information and documents that will answer the questions on the table and available for bidder review, even if the time for unfettered access to the bidding documents has passed. Doing this as a practice resolves the overwhelming majority of bidding complaints without bid protests. Allowing access even when not required is in the interests of local governments.

Conclusion

Whether it is the invocation of the so-called “seven-day rule” or a narrow view of the documents and information to be produced in a protest, use of these tactics will result in more apparent “wins” for the state. The fact that most bidders abandon challenges or never mount them in the first place does not, however, mean that they believe that they have been treated fairly. Making the protest process seem fairer to vendors ultimately will benefit the commonwealth.

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With the merits of a protest considered, and with information and documents provided, the commonwealth will still win the cases that should be won. And in any event, the vendor community will have greater confidence in the fairness of the process. Having qualified vendors at the table with increased regularity will accomplish much and secure great additional benefit to the commonwealth’s procurement process. These objectives are within the reach of agency counsel willing to move the procurement processes in the direction advocated here.

If the protestant is a prospective bidder or offeror, a protest shall be filed with the head of the purchasing agency prior to the bid opening time or the proposal receipt date. If a bidder or offeror, a prospective bidder or offeror or a prospective contractor fails to file a protest or files an untimely protest, the bidder or offeror, the prospective bidder or offeror or the prospective contractor shall be deemed to have waived its right to protest the solicitation or award of the contract in any forum. Untimely filed protests shall be disregarded by the purchasing agency.

Thinking twice and being flexible in applying the “knew or should have known” standard does no violence to the commonwealth’s sovereign immunity in my view. The Legislature waived sovereign immunity when the standard was created. What remains is for the standard to be applied in accordance with the circumstances presented in a particular case.

Post-bid debriefings have not been shown to solve this problem. Often, if not always, debriefings are limited to matters within the vendor’s own proposal. Operating from instructions from agency counsel or as a matter of policy, agency officials say so little that the debriefings often fail to inform to a degree sufficient to reestablish the vendor’s confidence in the commonwealth’s process. I would like to add to our list of matters that agency counsel can and should address, the unnecessarily paranoid restrictions placed on commonwealth procurement officials. Telling the truth about a procurement can never be bad. If telling the truth results in more protests, then perhaps more protests are needed.

See, e.g., JPay, Inc. v. Department of Corrections, No. 625 CD 2013, Slip opinion at 8-9 (Cmwlth. Court, April 8, 2014), holding that the 60-day period allowed for rendering a decision under 62 Pa. C.S. §1711.1(f) will not be applied to render an agency decision on a protest announced on the 62nd day invalid. Speaking for the panel, Judge Colins found that, under all the circumstances, the 60-day period was directory, rather than mandatory. There is no reason that this same analysis cannot be applied to instances where the first seven-day period is at issue.

Commonwealth attorneys like to call this “discovery,” pejoratively. Rather, what the Code so clearly requires is disclosure of a limited scope of documents and information that have been relied upon by state officials in addressing protest issues.

Section 1711.1(d) provides: Within 15 days of receipt of a protest, the contracting officer may submit to the head of the purchasing agency and the protestant a response, including any documents or information he deems relevant to the protest. The protestant may file a reply to the response within ten days of the date of the response.

Section 1711.1(e) provides: The head of the purchasing agency or his designee shall review the protest and any response or reply and may request and review such additional documents or information he deems necessary to render a decision and may, at his sole discretion, conduct a hearing. The head of the purchasing agency or his designee shall provide to the protestant and the contracting officer a reasonable opportunity to review and address any additional documents or information deemed necessary by the head of the purchasing agency or his designee to render a decision.

In JPay v. Department of Corrections, No. 625 CD 2013, Slip opinion at 8-9 (Cmwlth. Court, April 8, 2014), the court held that subsection (d) did not entitle a protestant to review documents cited by the contracting officer.

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1. William Warren Jr. is a member of the PBA Government Lawyers Committee, a past chair of the Dauphin County Bar Association’s Government Law Section, a former chief counsel at the Department of General Services and chief of litigation in the Office of General Counsel. He counsels school districts and local governments in construction matters and state technology vendors and service providers in commonwealth procurements. The views expressed here are his own.

2. Title 62 Pa. C.S. §1711.1(b) provides:

(b) Filing of protest.—If the protestant is a bidder or offeror or a prospective contractor, the protest shall be filed with the head of the purchasing agency within seven days after the aggrieved bidder or offeror or prospective contractor knew or should have known of the facts giving rise to the protest except that in no event may a protest be filed later than seven days after the date the contract was awarded.

3. The views expressed are consistent with the cases in which the “knew or should have known” standard was the applicable standard.

4. Section 1711.1(d) provides:

The views expressed are consistent with the cases in which the “knew or should have known” standard was the applicable standard.

5. Section 1711.1(e) provides:

The views expressed are consistent with the cases in which the “knew or should have known” standard was the applicable standard.

6. Section 1711.1(f) provides:

The views expressed are consistent with the cases in which the “knew or should have known” standard was the applicable standard.
by Jan Matthew Tamanini, JMT Law LLC, Harrisburg

Though I’ve been in private practice for the last seven years, I spent most of my legal career — nearly 25 years of state government practice — in five different commonwealth agencies. During that time, I ran into mounds of legal gobbledygook on almost a daily basis. A good portion of that was enshrined in statutes and regulations, but contracts and written communications were also replete with legalese, redundancies and ambiguities — some of them contained in form documents in use for decades.

I made it my mission (to the extent higher-ups in the legal offices would allow) to simplify any legal writing for which I was a drafter or reviewer. Whatever the form — negotiated agreement, draft statute or regulation, position memorandum, pleading or brief — my aim was to “clean up” the language to make the end product clear to anyone who might review it upon its completion.

One agency attorney with whom I worked during my state government career scoffed at using plain language in legal communications. His position was that he went to law school to learn these peculiar legal expressions and therefore using plain English would somehow negate what he went to law school to learn. If his goal was to impress people by writing and speaking with others who are legally trained, using a particular term of art may be entirely appropriate. But if you’re writing a client, a layperson or an agency adjudicator, translating the language to make the end product clear to someone who isn’t familiar with the subject.

In his 2005 scholarly article on several experiments conducted at Stanford University evaluating the impact of complex written text versus straightforward writing, Daniel Oppenheimer summarized the results with this conclusion: “[W]rite clearly and simply if you can, and you’ll be more likely to be thought of as intelligent.” Consequences of Erudite Vernacular Utilized Irrespective of Necessity: Problems with Using Long Words Needlessly, http://bit.ly/1kqRnZp (love the tongue-in-cheek title!).

So how can you be sure you’re communicating clearly? Here are 10 basic principles that will help improve your work product:

1. Write for your audience. This is a key consideration in knowing when it’s OK to use legal jargon and when you should simplify terms. Granted, when speaking with others who are legally trained, using a particular term of art (for example, res judicata, prima facie or ex post facto) can cut through a mountain of non-legal language necessary to convey a concept.

   If you’re writing a letter to opposing counsel in litigation or writing a brief for an appellate court, using terms of art may be entirely appropriate. But if you’re writing to a client, a layperson or an agency adjudicator, translating legal concepts into lay terminology can avoid both confusion and misinterpretation of your points.

   Even when you’re writing to other lawyers or judges, using plain language might make you stand out in a crowd and make your readers appreciate your clear, concise communication style. Most judges have mountains of paper to review. Do you think being overly verbose or using arcane terms will endear you to a court? If so, think again.

2. Use active rather than passive voice wherever it makes sense. When does it make sense to use active sentence construction? Virtually every time you write a sentence! Using active voice is a simple, eloquent way of making a clear point. A simple declarative sentence is ever so much more effective than a rambling eruption of words with a period at the end.

3. Edit yourself — and let someone you trust review your work whenever possible. I’m sure you’ve read other lawyers’ work that screams for editing. You’ve almost certainly written things yourself that have made you cringe on review after a couple of days’ distance. Whenever possible, put your important filings and correspondence aside at least overnight and read them with fresh eyes the next day. You’d be surprised at what may jump out at you from the original with the perspective of even a few hours’ distance.

   If there’s someone you consider a good writer in your office who’s willing to review your work before it leaves for the outside world, take advantage of the opportunity. You’re of course bound by ethical rules and client confidentiality concerns, but especially in your communications to non-clients, a spare pair of eyes within your chain of command (up, down or sideways) may spot things that you, due to immersion in the drafting, may have missed.

4. Learn how to “read” people. Take a cue from your agency clients when you’re discussing a legal matter. Don’t assume that because they don’t ask...
10 tips for better writing
(Continued from Page 7)

questions about something that clients understand what you’re saying. Sometimes they’ll remain silent because they’re embarrassed that they don’t understand what you’re saying — they think that since you’re using unfamiliar terms as if they should understand you, they’ll look stupid if they ask what you mean. In reality, silence doesn’t equate with approval or agreement.

Ask your clients if they understand your communications. “Do you understand?” is inadequate. Ask specific questions, either in person or by phone, about what you’ve written. If your clients can’t answer easily, it’s a good bet that they have little (if any) idea of your points. Learn the technique of reflective listening: have your clients repeat what you’ve said in their own words and do the same with what your clients tell you. You might be surprised at how often what you think you’ve heard isn’t what the originator meant.

5. Make your point at the beginning of your writing. When you’re writing a legal memorandum, state your conclusion(s) up front and then present your supporting material. If you make your reader wade through details to get to your conclusion, you’re likely to miss the best opportunity for supporting your conclusion.

6. Don’t repeat things needlessly. If you’re stating the main point of your communication, you’ll usually want to put it both at the start and the end of your writing. But don’t state the same premises within a document by using three different versions of the same thing.

Needless repetition of both general concepts and specific terms seems especially prevalent in drafting contracts and pleadings. For instance, an agreement may feature two or more separate sections dealing with a party’s obligations to the other party, and those separate sections may contain some duplicative language, often similar, but with slight differences. If there’s a dispute, you’re faced with seeing how to read these provisions to give effect to all they say; if that’s not possible, you have a problem.

The same goes for allegations in pleadings. I’ve seen plenty of examples where a claimant makes two separate paragraphs, or even counts, out of something that should be contained in one, merely by changing a few words here and there. If you think a court will look favorably on your pleading because you say basically the same thing slightly differently in separate paragraphs, you might want to reconsider. Most judges would agree that, in general, less is more.

When drafting or reviewing drafts, omit lists of words that mean the same thing to the extent possible (which should be virtually every time you’re tempted to use them). I’ve provided my own list (hal!) with several example phrases here, all of them taken from documents I received from commonwealth agencies during two recent Board of Claims proceedings. I’ve stricken the redundancies, which added nothing other than length (and a possible argument from the non-drafting party that the additional language means anything else not stated is left out of the concept), and in some cases substituted simpler, more direct terms:

- “This agreement is made and entered into” (better: “The parties make this agreement”)
- “The parties covenant and agree” “recitals...are and shall form”
- “hereby releases and forever discharges”
- “releases from all actions, claims, debts, demands, allegations, obligations, costs, damages, fees, or causes of action”
- “The parties declare and represent agree that”
- “It is further understood and agreed that” “The parties also agree that”
- “In the event that If any part, term or provision of this agreement”
- “This agreement shall be binding upon and inure to the benefit of binds all parties” (note: I’d wager most of us couldn’t give a simple definition of “inure” if asked what it means. If we can’t explain it, why would anyone use it? And saying “inure to the benefit of” is a redundancy. See www.merriam-webster.com/dictionary/inure)
- “to amend, modify, or change” “interpreted and construed”
- “duly-authorized representatives” “averts that claims”
- “in the event of a controversy; dispute, or claim arising out of this agreement” (better: “If there is a dispute about the terms of this agreement”)

I could continue, but you get the idea. More words don’t make a sentence better. In some cases, they may even provide ammunition that could be used against you. The documents from which I’ve taken these examples are likely the product of long-used standard forms in the agencies involved (much of the language was familiar to me from my own time as commonwealth counsel), but just because a form has been used for decades doesn’t mean it’s the gold standard for clarity.

7. Swear off using the compound preposition crutch. Would you speak to anyone — including a judge or fellow attorney — using these terms?
- herein
- hereinafter
- hereinbefore
- whereas
- hereby
- thereby
- heretofore

Except for commonly used compound prepositions, like “throughout” or “into,” there’s no reason to use these in your writing.

8. Don’t use ornamented words and phrases or unneeded adjectives where plain language will do. Write “use” instead of “utilize,” “near” instead of “in close proximity to,” “help” or “enable” in-
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stead of “facilitate,” “start” or “be-
gin” instead of “commence.” If your
content is so specific that only longer
words will do, then go ahead — but
that should be the exception. Keep it
simple. Otherwise, you may sound
pretentious and lose your reader.

The great American writer Mark
Twain offered valuable advice to other
writers: “Substitute damn every time
you’re inclined to write very; your edi-
tor will delete it and the writing will
be just as it should be.” The use of
many modifying words — “basically,”
“very,” “little” and “rather” — won’t
do much to improve your presentation
and may even detract from it. Though
limited use of these terms may be an
effective tool, make sure it’s just that:
limited.

9. Telegraphing that a statement is
an opinion weakens your point. Unless
you’re writing a legal opinion (and
even in many instances where you are
giving your legal opinion), it’s coun-
terproductive to use phrases such as
“In my opinion ...” or “We think that ...
” or “It is the agency’s position that ...
.” If you’re writing a brief or a po-

sition memo, everything you write is
your opinion or your agency’s posi-
tion. Anyone reading your argument
will understand that. You’re trying to
persuade the reader. Straight declara-
tive statements are much stronger
than statements qualified with an introduc-
tion stating the obvious.

10. Thou shalt not use “shall!” Think
that “shall” has a clear legal meaning?
Not so, according to a multitude of
courts.

Bryan Garner, editor-in-chief of
Black’s Law Dictionary, is widely rec-
ognized as America’s premier auth-
ority on plain legal language. In his 2001
edition of the Dictionary of Modern Legal
Usage, Mr. Garner notes that, though
the words “must” and “will” may have their own baggage, using them is
still preferable to using “shall” in legal
documents. Why? Because, as Mr. Gar-
ner explains, “… courts in virtually ev-
ery English-speaking jurisdiction have
held — by necessity — that shall means
may in some contexts, and vice-versa.”

If you need more proof that
“shall” is fodder for trouble in legal
documents, consider that the defini-
tive American compilation of judicial
definitions, Thompson Reuters’ Words
and Phrases, a hundred-plus volume set
with a hefty $6,965 price tag, devotes
76 pages of small-font text to chronicle
cases parsing the meaning of the word.

For a more detailed discussion of
“shall” in various legal contexts, check
out the “Language” blog from The
Economist at http://econ.st/1oGT5Xs
and The Lawyerist blog at http://bit.ly/lUuSopaa, where Andy Mergendahl
notes

Many lawyers sprinkle “shall” around in documents like some sort of pixie dust, hoping it will magically make
the document seem more “lawyerly,” and therefore less
likely to be challenged in terms of its meaning. ...“Shall,” due
to its multiple meanings, cre-
ates ambiguity that greatly
increases the likelihood of dis-
putes about what a sentence
means. That is exactly what
we are paid to avoid.

None of us is perfect; we all break
at least a few of these rules from time
to time. But by increasing our aware-
ness of the tools for better writing,
we’re bound to become better writers
— and more effective counsel for our
clients.

Jan Matthew Tamanini has been a mem-
ber of the PBA Plain English Committee
since its inception and is now entering
her fifth year as chair. A frequent writer
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publications, she concentrates her Central
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PBI faculty member and course planner
for effective communication and business
law courses. Contact her at JMTLaw@plainenglishlaw.com.

Government Lawyer of the Year Award
Nominations Sought

The PBA Government Lawyers Com-
mittee is seeking nominations for the
2014 Government Lawyer of the Year
Award. The award honors a practic-
ing lawyer employed by any branch
or level of government who has made
a singular achievement that demon-
strates an outstanding contribution to
a governmental entity serving the citi-
zens of the commonwealth or who has
dedicated his or her career to a govern-
mental entity for the benefit of the citi-
zens of the commonwealth. The award
will be presented at the PBA Commit-
tee/Section Day luncheon at the Holi-
day Inn East, Harrisburg, on Nov. 20.

The online nomination form can be
found in the committee area of the
PBA website at www.pabar.org. Nom-
inations are due by Oct. 10.