



An Ounce of Prevention

One Lawyer's View on Professional Writing for Engineers

By Matthew R. Rechten, P.E., Esq.

You probably did not go to engineering school to learn to write... and you probably did not take your job for its writing opportunities. Admit it; you probably look forward to drafting written communications about as much as you do reviewing steel shop drawings. However, if you have read any of the author's earlier articles, you know the importance of the latter task. The former is just as critical.

However much one may discount the value of good writing to structural engineering, it is essential to the business and legal aspects of the job. Of course, good writing is critical to prudent contracting. It is also critical to the daily management of the business of structural engineering.

There are two major components of construction disputes: the facts and the law. As a legal matter, construction projects are large, complex commercial transactions. Moreover, in any given commercial transaction, emails and other correspondence are the heart of the evidence; along with drawings, RFIs, submittals and the like, they tell the story. They establish and corroborate the facts to which the law is applied.

That makes attorneys the end-users of your writing. Do witnesses matter? Of course. However, the documents are key. It is from that perspective that this article is formulated, which lays out recommendations for your written communications. As you read, keep in mind that for every general recommendation, there are exceptions. You must use your professional judgment, in light of the whole context.

Recommendation No. 1 No Secrets

Write assuming that the person you least want to see your writing one day will. Modern lawsuits go through discovery, a period in which parties may serve on each other, and on third parties, requests that they produce documents. The law protects litigants' rights to access evidence, including documents. Under the Federal Rules of Civil Procedure, for example, "[a] party may serve on any other party a request... to produce... any designated documents or electronically stored

information – including writings" so long as they are not privileged and are "relevant to any party's claim or defense." Responding to these requests, and producing responsive documents, is not optional.

With modern technology – servers, backup tapes, and internet service providers – your writing is likely to exist, in some form (more likely, multiple forms: hard copy, pdf, email, etc.) in some repository, long after it was created, and long after you would have hoped it would disappear. If you end up in a legal dispute, you should assume that communications will come out.

Conduct yourself accordingly. Keep in mind that what you write today is tomorrow's evidence. Write as though your letter will eventually be on display to a jury. Write as though you will be in the witness box, answering questions about your writing from a hostile lawyer. If you only do that, you are likely to avoid many of the problems this article is meant to avoid.

Recommendation No. 2 The Toothpaste Doesn't Go Back Into the Tube

The second recommendation closely relates to the first. Because you will assume that everything you write, from a formal report to draft email, will endure long into the future, you will and should draft your professional writings with commensurate sobriety. There are no take-backs. If you write it, you will not be able to un-ring the bell later. This is especially true once correspondence leaves your office. At that point, you have no control, no document retention policy that will dictate the document's longevity.

What does all of this mean? That you *can* write something does not mean you *should*. Consider your choice before you proceed. Consider whether you would be better off not writing it at all.

Recommendation No. 3 "Just the Facts, Ma'am"

Professional writing should be prosaic, not poetic. If a lawyer is reading your writing,

it is because a legal dispute is brewing. In that situation, the lawyer will know little of the nuanced context in which your communication was written. It may be years later. Without context, emotion, hyperbole, humor, irony and sarcasm may be impossible to interpret. While these rhetorical tools certainly have their value in screenplays, poems, speeches and conversations, their use in professional writing is generally very risky. Your professional writing is not art, and it is not supposed to entertain. Emotion or hyperbole that make sense at the time, in light of the complete picture, will come across differently when your communication is, as it likely will be, viewed in isolation.

The same can be said for any unnecessary characterization of the facts. Try to avoid words that end in "ly." Characterizations are usually debatable and therefore are not facts. Admittedly most of us are offenders here. Sometimes a person just cannot avoid the bait, and we respond to emotion with emotion, to insult with sarcasm. Resist the urge to respond in kind, or to be too cute; resist the urge to write how you might casually speak.

Take care with respect to how you state the facts; facts you state in writing are likely to become admissions in later litigation. If you are involved in a case, what you stated as a fact in 2007 is more believable than your contrary testimony today.

Recommendation No. 4 Be Nice, or at Least Truthful

"Sticks and stones may break my bones but words will never hurt me." Baloney. Little is as powerful as an idea. Words express ideas. As that great jurist, Oliver Wendell Holmes Jr., said: words are "the skin of a living thought..."

As a legal matter, words matter. Our founders did not ratify the First Amendment for nothing. Words are not just statements, but actions. They carry legal consequences. Black's Law Dictionary defines defamation as "[a] false written or oral statement that damages another's reputation." It defines the tort of tortious interference as "[a] third party's intentional inducement of a contracting party to break a contract..." And, finally, it defines

extortion as “[t]he act... of... compelling some action by illegal means, as by force or coercion.” Each of these defined terms can lead to civil or criminal liability. Each can be accomplished by little more than an injudiciously drafted letter. It may be hard for you to imagine one of your writings falling within one of these definitions. That is reasonable. However, the bottom line is that words are acts to which the law attaches consequences. Write carefully. To the extent you can, avoid reducing to writing disparaging comments, threats or intermeddling. If you must wade anywhere near those waters, be relentlessly and scrupulously truthful, avoid threatening things you have no right to do, and, as a segue, follow recommendation No. 5 below.

Recommendation No. 5

“Brevity is the Soul of Wit”

– Shakespeare, *Hamlet*

“I didn’t have time to write a shorter letter.” Whether coined by Mark Twain or Blaise Pascal, this truism expresses the final recommendation. If brevity is not the ideal in love letters, it is, as the saying suggests, in written engineering communications. However, the saying also affirms that brevity requires time and effort to achieve. You probably do not have the time to endlessly draft, review and edit each communication just to ensure its brevity. You will have to strike a balance based on its importance, but the goal should generally be succinctness. Each communication has an objective. Be aware of that objective and say no more than needed to accomplish it. Edit aggressively and often; remove any unnecessary language.

One tip is to avoid the passive voice. Consider, for example, the question: “subsequent to your termination from the project, what did you do with respect to finding other work?” “What did you do to find work after the owner terminated you” works much better: shorter, clearer, more effective.

The reasons for this recommendation are self-evident. Brevity enhances clarity by removing distractions; and if it is worth writing something, it is worth doing it clearly. Think of it as form following function. The contents of the letter should be singularly driven by what you are trying to accomplish. With brevity as a goal, and a focus on the purpose of the communication, you will also naturally reduce the risk of violating the other recommendations. And when, should things go awry, that letter is in your lawyer’s hands, he or she will have a much better prospect of

making use of it. Finally, brevity is something your readers will appreciate, which is reason enough for the rule.

A Couple of Cautionary Examples

With these recommendations in mind, a couple of cautionary examples are in order. Both are loosely based on actual correspondence (with the names changed to protect the guilty).

Consider example 1, a vendor letter:

To whom it may concern,

We would like to introduce Acme as your new local source of anchors. In the past we have sold through John Doe. His recent defrauding of us, however, caused us to decide to serve your area directly. We would also ask that if you owe John Doe money, you contact us before paying. He owes us \$15,000.00.

We look forward to serving you.

Acme

This is a high-risk letter a client wanted to circulate. It is obviously an extreme, but illustrative, example. Not only does the author open the door to defamation (first underlined passage) and tortious interference liability (second), but by reducing these words to writing and circulating them to a broad audience, he or she is guaranteeing zero control over the longevity and endurance of the evidence. About the only thing the letter has going for it is that it is brief, and arguably to the point.

Consider as well example 2, a written response to a project-related communication about compensation for “extras”:

Mike:

Your letter is so full of crap, I hardly know where to start.

Try this –

Issue No. 7: We have not received written direction for this extra. An apparent difficulty of yours!

Issue No. 8: More crap! You have hardly completed anything because of your terrible mismanagement! If you pursue your threats, I will have my attorney shut the job down and will show the owner your lousy work. You are out of line in your letter. I can prove it!! Retract it, pay me for all the extras, and we will continue.

Very Sincerely, Bill

Again, an extreme example, but instructive still. It contains potentially extortionate threats, defamatory statements, unhelpful emotion, and sarcasm. It is unnecessarily personal. It generally looks horrible, reflecting very poorly on its author. If this were your letter, your attorney would be on damage control in dealing with it in a lawsuit. This is exhibit A of what not to do.

Conclusion

These recommendations and examples are not intended to over encumber you in your daily work. You need not suffer from paralysis by analysis. Rather, they are intended to give you some broad themes to keep in mind as you write, and to remind you just how important this otherwise mundane task may be. The professionalism that goes with being a professional engineer should never stop at the drawings’ edge. ■

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