

Pre-Litigation correspondence skills: A useful tool

I once had a poster on my office wall quoting someone whose name I cannot remember but the quote I remember vividly. It said: ***“of all the arts in which the wise excel, nature's chief masterpiece is writing well”***. I find this very instructive in today's commercial circles where many managers, administrators and even lawyers have caused grave damage to several companies through wrong words processed, printed and posted. A right letter can save your day or win you a law suit. Clarity in language and facts often present an unassailable case that swing the scales one way or the other. The flip side is that a poorly conceived letter can put a noose round your neck with damage worth millions of naira. Commercial disputes are settled mainly on the documents and proper attention ought to be paid to the printed matter emanating from your company or firm – which include the letters. This is of particular importance for transactions about to metamorphose into a “matter” - heading for the court room. Permit me to share with you a few tips that may aid your correspondence skills in such situations. Some of these (and many others) you probably already know. Then let us remind ourselves!

1. Be Positive and definite.

One of the greatest problems encountered with business letters is reading it and having to guess what the point is. Or reading it and seeing a conclusion that is at variance with the facts stated therein. It is a great marketplace hazard. To avoid this one should be definite and positive. For example write: “Given the above facts we insist that we are not liable” instead of “Given the above facts we are not likely to be liable”. The first sentence leaves no doubt and allows no room for a play on words. A good advocate can pick on the second sentence and play on the words “not likely”. Frequent users of Microsoft word would notice that MSword assists the writer to speak in the positive rather than the passive voice. It underlines passive sentences. Do not ignore this tool! Another area is the heading and referencing of letters. Sometimes you read a file and find out that the parties had written series of letters over time but each letter had a different heading. The first letter was titled: “RE: MOTOR ACCIDENT ALONG CARR ROAD” and the reply to that was headed “SLAUGHTER OF MR SAM'S DOG” and the response to that reply may be captioned “ACCIDENT OF 20TH MAY 1999”. These headings seem clearly unrelated but indeed they are. Reading the three letters you realise that there was a motor accident on Carr road on 20th May 1999 and Mr Sam's dog died in the accident. Would it not be better if all the writers had been careful to keep to the original heading? It would surely help lawyers, judges and even their respective cases in the event of a litigation amassing a maze of documents.

2. Communicate rather than display knowledge.

There are key points that you are trying to project in every business letter. Do not shroud those points in a display of archaic words (King James grammar) or terminologies that the other party may not understand. Remember your focus (unless you have another agenda) is to get a message across. Communicate! People most guilty of “beclouding” the essence of their letters are those trained in specialties that have distinct terms or language e.g scientists, doctors, accountants and of course the lawyers. For example, a scientist wrote a report for an Arbitral panel and the reported concluded that: “the biota exhibited a 100 per cent mortality rate”. What does this mean? It simply means that “all the fish in the pond died”. If the arbitrators and the other parties are not scientists they may need further interpretation to this sentence. Also in communicating it is important to know your audience before you write. Your choice of words in a letter to a Korean construction manager in a civil construction company (who speaks passable English) must differ from your letter to Mr Jim Brown (not a real name) the Texan who runs the oil service company. It is unlikely that a man in the Korean construction manager mould understands the meaning of high sounding words like “aggrandizement” or “embellishment”. Even the Englishmen now shy away from these high sounding words in

business letters. As for the American, they prefer that you keep it simple and go straight to the point. All he wants to know is: What's up? Also if you are dealing with someone whose memory is slow or has no time to call for files to review previous correspondence or a briefcase businessman with no filing system, then recap the facts and attach copies of relevant documents. Do not insinuate that you are doing this because you know he has lost the previous documents. Just say it is for "ease of reference". There are however many situations where you cannot avoid writing in the traditional language or custom. For example specific terms and acronyms in international trade or shipping are essential in that line of business. In such situations writing in "another language" may be gibberish and perhaps a communication failure. In dealing with people who insist on terminologies in their correspondence it is your duty as a lawyer to seek clarification where you are not sure what they mean. Adopt an "avoidance of doubt" approach. Sometimes you may have a fair idea what the writer means and prefer to run your interpretation through him. In that case you should in your reply say something like: "I believe that what you mean by *"a carry to first oil"* is that the financier would bear the cost of production until the field hits first oil, after which repayment begins and given this interpretation our client is in agreement" If your interpretation is wrong the writer will come back to you on it. If he does not, then at least the basis for your client's decision is clear.

3. Crosscheck your facts.

In writing commercial letters be sure of the facts you commit to writing. It could be omissions as "negligible" as the date of an event or the names of persons at a meeting or conflicting facts in two separate letters - perhaps as to dates or amounts. Some of these discrepancies may determine whether a client in a court action for debt recovery will get summary judgment (under the undefended list procedure) or will go to trial. Remember that summary judgement will only be given if the documentary facts are undisputable. Conflicts in letters often raise the doubt that tilts the "balance of probability" in a civil case.

4. A Recap letter is a wonderful tool.

Recap letters are formal letters written to recap discussions at a meeting. People often have meetings on a particular subject that end with handshakes. These hands have barely gone cold when a dispute arises as to the agreements at that meeting. To avoid this it is advisable for one party (usually the one who has more to protect) to follow up after such meetings with a letter recapping the discussions at the meeting and the conclusions. Remember you can also recap a telephone conversation - "further to our telephone conversation". Please endeavour to obtain proof of delivery of such letters. Recap letters are particularly useful in situations where for one reason or the other one party needs to obtain a written commitment from the other party but is unable to demand it head on. A verbal commitment followed by a recap letter stating the people in attendance at the meeting and the agreements can suffice if the letter has acknowledgement of receipt and it is not refuted. The recap method is particularly useful after business discussions that would require several other meetings before the final contract is signed, or in settlement negotiations. In these scenarios it is good to capture positions taken to avoid backward shifts at subsequent meetings. This is a useful tool in labour/employer negotiations. It is also used where all prior transactions are verbal and it seems to be getting "sour" so you need to gather the essence of the relationship before denials set in. In such a case the letter will start by recalling the entire relationship, previous agreements and then zero in on the points in dispute and perhaps proffer solutions.

5. Replies are critical

Some letters demand a speedy reply whilst some can be ignored and ought to be ignored. Where a reply is required do not wish the letter away or ignore it. In replying, identify the critical issues raised in the letter being replied. Oftentimes emotionalism or ignorance writes a "sternly" worded reply and side steps the issues that form the crux of the matter. A reply that fails to address for example the imputation of liability is as good as having not replied. It pays to underline the key points in the referenced letter and address them sequentially in your reply.

6. When you are liable and intend to settle be letter shy but verbally strong.

Some issues are better discussed verbally before committing to writing. For example, an attempt to settle a particular matter out of court should not be opened by a quick letter admitting liability. Rather it should be done verbally at meeting(s) after which the terms of settlement are committed to writing in exchange for a corresponding obligation on the other party to abide with the terms. For example after negotiating payment terms to a debt you forward a letter recapping the agreed payment terms and attaching the cheque for the first payment. The acceptance of the first cheque signifies a done deal. In certain situations it is believed that inserting the words "without prejudice" at the top of your letter admitting liability is the way to go. The legal essence of a without prejudice letter is that the letter is not admissible in court as evidence against the writer because it was written simply as part of a reconciliation process. However in practice "without prejudice" letters are still bandied in court as exhibits to front loaded affidavits or even sought to be tendered in court. The reality is that even if it is not admitted in evidence, it has already created an impression in the mind of the judge. It may seem advisable to have "without prejudice" discussions rather than write "without prejudice" letters.

7. With demand letters for debt recovery – the more the merrier.

Whenever letters are being written in demand for a liquidated money demand there is no harm in writing as many demand letters as the situation and your time would permit. Send them by courier and keep the receipt of delivery. The recipient may choose not to respond or may write to admit and offer to pay at a given time or when business improves. Any of these attitudes will suit your case in court when you ask for summary judgement under the undefended list or even if the matter goes to trial. It would either show a clear admission of the debt or a deliberate refusal to pay.

8. Watch out for libel

Some clients and lawyers have written in expressions of anger casting aspersions on the character of the person on the other side. For example your company does a contract with a bigger company and certain issues arise concerning the job and your payments are delayed. Your contention is your company has met your obligations under the contract and the other side thinks you still need to tidy up. In your angst (and perhaps justified) you write a letter to the Managing Director of the company calling him all sorts of names like "thief" "dupe" and the like. One wrong stroke of your pen may see you defending yourself in a libel suit claiming damages in a sum in excess of your contract with the company. You will need a good barrister.

Stephen Covey in his book "7 habits of highly effective people" says one of the habits is to always "begin with the end in mind" when you start anything- a project; a meeting; a business; or whatever. To view the end, ask the following questions: What response do I elicit? Who is my audience? How do I communicate? How do I avoid damage? Next time you hold your pen, remember these things!

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