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Litigation Practice Tip - June 2021

Addition by subtraction: improving your advocacy by avoiding these ten words and phrases

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What you omit can often improve your advocacy as much or more than what you add. Helpful omissions can range from entire arguments to just a word or phrase. **Here are ten such words and phrases.**

1. "including *but not limited to*"

Think about it. Why the "but"? Is there some universe in which "including" means "limited to"?

2. My oral argument favorite: "With all due respect, judge . . ."

It doesn't matter what comes next; when I hear those words in a courtroom, I immediately begin looking for a table to duck under. The judge knows what the attorney really means is, "your power to hold me in contempt prevents me from saying out loud what I really think of you." And the judge suspects that whatever the attorney next says will be anything but respectful. It's part of the job description to disagree with a judge at times. You should do so politely and yes, with a respectful tone, but without the "with all due respect" nonsense.

3. "As [opposing party/counsel] well knows . . ."

Three problems with that: (1) you don't usually know what your opponent knows; (2) it is almost always irrelevant; and (3) it's likely to irritate the judge as uncivil. Just state your factual or legal proposition without speculating on what your opponent knows. This advice applies equally to communications with opposing counsel (i.e., "as you well know"), especially in settlement negotiations. You want to convey the strength of your position, but without potentially scuttling the negotiations by making matters personal.

4. Using "said" as an adjective, as in, "defendants misconstrue *said* statute."

To be sure, "said" is a perfectly good verb. Indeed, the late Robert B. Parker, in his Spenser novels, never used any other verb to describe dialogue.[1] But as an adjective, "said," along with its cousin "aforesaid," is pretentious legalese. Stick with "defendants misconstrue *the* statute" or "*that* statute."

5. [when representing the plaintiff] "Plaintiff contends…"

That suggests: "this is what my client believes; personally, I'm not too sure about it." Don't distance yourself from your client; just make the argument.

6. [when in California state court] – "*California* Civil Code section 1942.5 provides …"

Regardless of what is suggested by the Bluebook, which is written for a national, academic

audience, you don't need to tell a California state judge we're talking about the California Civil Code, not Mississippi's. (Unless, of course, you are talking about Mississippi.) Same goes for "*California* Legislature." Just plain "the Legislature" will do.

7. "Clearly" is the most over-used word in legal writing.

At best, it means that the *author* thinks the argument that follows is right, which is not very persuasive. And at worst, especially if used repeatedly, "clearly" will be construed as quite the opposite: i.e., the author doesn't have the facts or the law, but thinks that shouting at the judge will carry the day. It won't.

8. "Plaintiffs, *through their attorney of record*, hereby submit their opposition to the motion…"

Leave aside for a moment whether the first thing you want the judge to see is what is already apparent in the title of the brief.**[2]** If you are signing the brief as "Attorney for Plaintiffs," you don't need the italicized information. Same with "the parties, *through their respective attorneys of record,* stipulate . . ." Admittedly, in a stipulation this is fairly harmless. But still, if you omitted that phrase, do you think the reader would conclude that the parties are stipulating through their respective baristas?

9. "[Opponent's] *self-serving* declaration…"

Describing a declaration or statement as "self-serving" is unnecessary, unless you think that ordinarily people deliberately make statements that are self-destructive.

10. [when opposing a discovery request]: "this is nothing more than a fishing expedition."

Of course, it's a fishing expedition; if they already had the information, they wouldn't be looking, i.e., fishing for it. And if you need to use an insulting metaphor, try something that wasn't rejected by the Supreme Court 60 years ago. *Greyhound Corp. v. Superior Ct.*, 56 Cal. 2d 355, 384 (1961) ("there is nothing improper about a fishing expedition, per se.")

While I stand by my position on all ten of these examples, I don't claim these are necessarily the most important offenders. They are just ten personal favorites, and if you want to call them "pet peeves" I won't be offended.

What words and phrases you see in briefs or hear in arguments irk you the most? Send me yours, and once there are enough of them they will appear in a future Litigation Tip.

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[1] I personally thought that was overdoing simplicity, and that a little variety would not have hurt. But given the 25 million or so difference in readership between Parker and me, you are free to take my opinion with a grain of salt.
[2] For an answer to that question, *see* **February 2021 Litigation Tip: "Who cares about introductions anyway?"**

For questions or advice, please reach out to Richard Rothschild at rrothschild@wclp.org.

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