LIMIT THESE FOUR PHRASES TO IMPROVE YOUR WRITING

By Ian Pike

Composing effective legal prose is hard. No matter the context — an email to a client, a sternly-worded letter to opposing counsel, or a dispositive motion in your biggest case — persuasive legal writing has a lot of work to do. As lawyers, we are naturally on the hunt for "the phrase that pays," something that carries a lot of weight with just a few words. The following four phrases aren't that, but they all have two things in common: (1) lawyers think they're awesome; and (2) they're totally overrated. We overuse them. We should stop. There are better ways to say what we mean.

Frivolous

Lawyers think this conveys, with a single word, how utterly meritless the other side's position is. But saying it doesn't make it true, and calling the other side's position "frivolous" serves little purpose beyond antagonizing opposing counsel. An effective writer shows the other side's weaknesses with citations to material facts and on-point law so the reader concludes "this is frivolous" without being told what to think. Stick to the merits, and save the f-word for a Rule 11 motion.

Courts Routinely...

Lawyers pair this little gem with a couple of citations to unreported Westlaw trial court orders, and they think it means they automatically win. But a handful of Westlaw cases falls far short of establishing the "routine" dispositions of the tens of thousands of cases docketed in courts throughout the country. Moreover, "the judge should just rule on this as a matter of 'routine' without thinking about it too much" is both unpersuasive and demeaning to the court's work ethic. A much more effective means of conveying how straightforwardly an issue can be resolved in your favor is by identifying binding authority that supports your position and explaining how your case is indistinguishable from that authority.

Reserves the Right

Language about "reserving rights" pops up all the time and in virtually limitless contexts. Lawyers seem to think it both excuses failure to comply with a present obligation *and* creates an opportunity for future advantage. Consider discovery responses where a party "reserves the right" to supplement in the future. That's like saying (wrongly), "I don't have to answer now," but (also wrongly), "I get to answer when I feel like it!" Many justify it as avoiding waiver. But that begs the question of whether there are rights to waive. Sticking with the discovery example, in federal court, supplementation is an *obligation* not a "right" to be exercised at a party's discretion. See Fed. R. Civ. P. 26(e). In state court there is likewise no "right" to supplement discovery: there is an obligation to provide supplemental responses when served with a supplemental request; and there is an option to produce "amended" responses under certain circumstances, the exercise of which comes with certain procedural caveats. See, e.g., Cal. Civ. Proc. Code §§ 2030.070, 2030.310. The "right to supplement" is a fiction. There are, therefore, no "rights" to "reserve" because you cannot reserve that which you do not possess in the first place. Most lawyers should omit this phrase because even though it's meaningless it just makes the other side suspicious.

Including But Not Limited To

Many lawyers think of this phrase as a magic way to ask a question (or answer one) without having to actually make up their minds about what they want to say. In truth, the only "magic" this overrated phrase accomplishes is making every question overbroad and every answer evasive because, rather than specifying what they mean with particularity, lawyers who use "including but not limited to" have made the other side guess what they mean. There's an obvious allure to taking the belt-and-suspenders approach to drafting, but deliberately creating vagueness and ambiguity doesn't actually benefit anybody in the long run. It's always better to leave no room for guessing. Say what you mean, and only what you mean, even if it takes a little more work.

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