Some Words That Don't Belong In Briefs

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A discussion of some words that don't belong in briefs could probably be condensed into this concise comment: about fifty percent of them. This comment could not accurately be made in regard to judicial opinions; it would be necessary to omit "fifty percent" and substitute "sixty-five percent." This article, however, is not concerned with quantities of words, but only with some specific words and phrases that frequently infest briefs. They are useful, highly respectable words that can safely be used in the most hypocritical social circles—even on radio and television! But in briefs they are deserving of nothing except extermination. They are words that waste the court's time, try its patience, disturb its equanimity, imperil its disposition, and bruise its pride. S. I. Hayakawa says: "Law schools say much more about how law ought to work than about how it does work; the effects of the stomach ulcers, domestic troubles, and private economic views of judges upon their decisions are not regarded as fit topics for discussion in most law schools."[1] The eminent semanticist should, of course, have included briefs along with stomach ulcers, for an exasperating brief can adversely affect the administration of justice just as effectively as a stomach ulcer. The words that make briefs annoying are not ordinarily offensive, violent or blustering; they are merely undiplomatic, careless, discourteous, or superfluous.

I believe. Declarations of faith are commendable in their place, but a brief is simply not the place. What a lawyer believes in regard to the law is neither important nor persuasive to the court. It is doubtful whether any judicial opinion ever confessed, "We are deciding this case in favor of the plaintiff, because the plaintiff's attorney believes we should." The commendable faith of a lawyer in the soundness of his arguments may derive from investigation, contemplation, and meditation; it may also derive from partisanship and auto-credulity—*i.e.*, a tendency to believe everything he hears himself say or sees himself write. Regardless of the genesis of

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[1] HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 259 (1949).

beliefs, courts are much more likely to rely on a lawyer's logical arguments than on his personal beliefs. Moreover, in expressing his beliefs, a lawyer may unwittingly be less than candid: he may be expressing nothing more than a sincere hope, rather than dogmatic conviction, that the law is in his favor.

I think. What discredits "I think" in briefs is its inveterate ambiguity. It may mean: to hold an opinion, to believe, to suppose, to anticipate, to consider, etc. It does not necessarily involve any reasoning processes. In its most praiseworthy sense, thinking involves mental labor and hence does not enjoy the popularity it deserves. That may be why "I think" customarily means a surmise, which in turn means a fancy guess. Very few lawyers are sufficiently ingenuous to confide to the court that they are guessing, and hence they seek to disguise their guesses in whorls of words sprayed with asseverations. It really is immaterial whether "I think" indicates a lawyer's guess or a lawyer's opinion, for both will be disregarded: the guess, because it is a guess; the opinion, because the only opinions of importance in court are those expressed by the court itself —or, possibly, some other court.

I feel. For a lawyer to tell the court how he feels about a case seems like inappropriate sentimentality. When a brief confesses that "I feel" this or that, it may be indicating an emotional rather than an intellectual reaction; but whatever it means, it lacks all qualifications of persuasive argument. A medical expert may use the words to express his professional guess based upon his knowledge, experience, and currently accepted hypotheses. A brief, however, is not an expression of opinion; it is an instrumentality designed to elicit a sound opinion from the court. The courts, of course, like the medical experts, may render sound opinions based on feeling—they frequently do, but they wouldn't dream of saying, "We feel"; they would say, instead, and with appropriate solemnity, "It is our considered opinion."

It seems to me. A client is interested, financially and otherwise, in how things seem to his lawyer. The court isn't. The court is interested, intensely interested, in ascertaining how things seem to the court—more specifically, how they seem at the hour of decision, in view of the arguments, the judicial mood, and the prevailing weather (including atmospheric pressure). More useful to the court than a statement in the brief on how things seem to the lawyer would be a good recipe for braised lamb shanks, for instance, or even directions for mixing a perfect Martini. One of the cardinal

rules of good brief writing is never to include anything that can safely be omitted. It is always safe to omit "It seems to me." There are, of course, some exceptional lawyers who assume, for some strange reason or no reason at all, that the whole world is vitally interested in their views. They would consider their failure to apprise the court of their views as a serious infraction of the canons of ethics; and for lawyers in this class some misplaced self-expression is actually recommended, primarily because they'll sleep better for having told the court how things seem to them. Self-expression frequently has a sedative effect; listeners would be happier if the effect were soporiferous.

It would seem. To say that the law seems to be so-and-so means that the law appears to be so-and-so, and the appearance is probably not illusory. But just what does "it would seem" mean? Does it mean that the law wishes to appear that way, or persists in so appearing, or that it might do so in the future? If "it seems" conveys the idea of some uncertainty, "it would seem" logically should convey the idea of augmented uncertainty. The probabilities are that the users of the phrase have no clear idea of what idea they wish to convey—they use it imitatively for rhythm rather than sense. Some courts use the phrase prodigally, possibly in hopes of evoking the aroma of erudition; such use is ineffective and seldom noticed, possibly because readers of judicial opinions are peepers rather than scanners. Incidentally, the use of unnecessary or ambiguous words in judicial opinions is no authority for doing so in briefs; that is because briefs, unlike opinions, derive their effectiveness entirely from soundness of reasoning and clarity of expression.

Supra and infra. There are a number of good reasons why courts should use *supra* and *infra:* to compel lawyers to read or reread carefully the entire opinion; to shorten the opinion—the lawyers won't look up the cases and hence don't need citations every time a case is cited. Lawyers are naturally more solicitous about the convenience of the court than the courts are of the convenience of lawyers. Elevation to the bench is capable of producing a certain type of amnesia which obliterates all recollections of the years spent in practicing law. As a matter of courtesy, the full citation should be given every time a case is referred to; not to do so may lead the court to construe *supra* and *infra* as synonymous with *skip.* Any word, device, symbol, or omission which may induce the court not to read any portion of a brief is an abomination—it is equivalent to equipping a brief with a medium for self-destruction.

Obviously. This word is usually employed in desperation—that

is, when it is difficult or impossible to explain something, simply say, "Obviously, etc." While something is obvious if it is easy to see or understand, unfortunately calling something obvious doesn't make it so. Something may be obvious to the writer of a brief, but invisible to everyone else; he may have a private mirage and be genuinely amazed at the inahility of others to perceive. And even if something should be obvious, don't rely on it. One of the common methods of losing a case is to assume that the court knows the obvious. The assumption is a natural result of the almost universal tendency of lawyers to overestimate the wisdom of courts. Very few courts know of this tendency—and some deem it impossible. The sound lawyerlike procedure in briefs is to underestimate judicial wisdom but not too flagrantly. Never, then, use *obviously* unless all possibilities of establishing the correctness of a statement have been explored and found inadequate. For example, if there is absolutely no evidence that the opposing party was negligent, it may be permissible to say, "Obviously, the defendant was negligent." There is always the possibility that the court might agree.

Read carefully. Briefs should never admonish any court to read anything carefully. To do so discloses unpardonable ignorance of one of the basic hypotheses of a successful judicial system, *i.e.*, that courts invariably read everything with scrupulous care. Some lawyers have difficulty in accepting this hypothesis without question, and it must be admitted that acceptance is more difficult in some jurisdictions than in others. The failure of a court to adopt or refute the arguments in a brief is not always proof of non-reading; it may indicate careful reading, proper evaluation, and judicial benignity. If a court should have scruples about reading briefs, no importunities to read, or read carefully, will overcome these scruples. Besides, it is doubtful that reading the brief would change the ultimate result—the language of the opinion, yes, but the result, no. The outstanding features of our courts are their honesty, their appreciation of the obligations of high office, and their common sense. Erudition is not essential; that is why mediocre lawyers so frequently make excellent judges. For proficiency in the performance of judicial duties, a reputation for wisdom is more important than actual wisdom. And a reputation for reading briefs is more important than actual reading.

The court must. Courts may be urged—gently, politely, timidly. They may also be implored and beseeched, and at certain seasons of the year they may also be advised. But for a brief to intimate that the court *must* do anything approaches blasphemy. Some

courts are easily persuaded—indeed, they persuade themselves—that they have natural immunity against all compulsions (except, of course, those exerted by their wives), and hence they fiercely resent the slightest implication that they may be compelled to do anything. This is merely some evidence that judges are human. Actually, it is reassuring to believe that only the dictates of justice can influence judicial action. Justice is a sublime concept that becomes mundane when subjected to human caprice. For a brief, then, to proclaim—or even intimate—that the court must do something is undiplomatic and mildly destructive of the essential illusion that courts are immune from all coercions from individuals, corporations, and political organizations.

There are no precedents. When a brief brashly announces that there are no precedents, no cases in point, no authorities of any kind, the brief is bluffing, guessing, or lying. It is impossible to make such a thorough search that the existence of precedents is absolutely excluded. After all, lawyers seldom live beyond the age of one hundred, and thus seldom have sufficient time to investigate all legal literature. Also, a precedent may be born between the dictation and transcription of the brief—this is more likely with some secretaries than with others. Another hazard comes from precedents which fail to make the headnotes, and the danger that opposing counsel or the court may possess a perverse memory for trivia and thus recall reading something in a certain case about twenty-three years, two months, and three days ago (the temperature was 78 degrees, and he had corned beef on rye for lunch). Rather than declare that there are no precedents, a brief should state that no precedents have been discovered. While candor with the court is always highly commendable, that does not mean that a lawyer should tell the court everything. For instance, it is unnecessary to say, "A superficial search revealed no precedents," or, "My office library contains only the statutes, a form book, and a 1956 World Almanac, and I was too busy (or lazy) to go to the library," or "The size of my fee did not justify the comprehensive search this case requires."

The authorities are evenly divided. Just how does one determine that there is a fifty-fifty split—does one use a ruler, an abacus, or a fish scale? If a lowest-lower court decides one way, and the Supreme Court of the United States decides the other way, it might be urged that the authorities are evenly divided, one to one. If two lowest-lower courts decide one way, and one lower court decides the other way, who is authorized to make the odds—*i.e.*, that two

lowest-lower court decisions are equal to one lower court decision? Besides, it is frequently impossible to decide which side an authority is on; that is because courts, by skillful exercise of their distinction-making function, can deftly switch authorities from one side to the other. This isn't the old shell game, but it may be a highly respectable cousin. When a court says that a case is distinguishable on the ground that the defendant wore a green tie, whereas the defendant in the present case wore a blue tie, no experienced lawyer will snort, "Nonsense!" Experienced lawyers won't even notice the tenuous distinction, for they have found that complete blindness to judicial nonsense is a beneficent defect. Possibly the practical solution is to say that the authorities *seem* to be evenly divided; that statement recognizes that lawyers, like children, have widely divergent ideas of what "evenly divided" means.

The weight of the authority is. When a brief speaks of the weight of the authority, it has abandoned the ruler and the abacus in favor of the fish scale. It also means that the authorities are not evenly divided and hence they must all be weighed. The trouble is that most lawyers don't know how to use scales to weigh the authorities; indeed, they are compelled to rely upon a sort of mental hefting. The only safe procedure is to let the courts do the weighing, for all courts come equipped with amazingly accurate devices for weighing authorities, accurate to one milligram or even less. Lawyers have never seen them, to be sure, but it is generally believed that the devices are purely verbal: when a court announces where the weight of authority lies, lo and behold, there it lies!

In other words. When used in briefs, "in other words" generally means that the first attempt at expressing the idea was patently unsuccessful; hence another attempt will be made, but without deleting the words that failed. Eliminating useless words is not wasting words; it is saving words. Some lawyers, however, would rather lose a finger or a toe than relinquish one of their written words. If they don't succeed in expressing the idea "in other words," they may say, "Stated differently," and then try again. They seek to achieve clarity by adding fuzziness to fuzziness, and that's something that can't be done. Just because "in other words" is usually objectionable, does not mean that the phrase has no proper use. An example of proper usage: "The lower court decided the case in accordance with law and justice—in other words, against me."

Opposing counsel is a nitwit. Of course, opposing counsel is not a nitwit—his membership in a learned profession makes that im-

possible—but even if he were, a brief is too public a place in which to advertise that fact. Morever, it's bad taste to use words of derogation or castigation about any one in a brief, and especially lawyers. It may be proper to describe conduct or language which seems improper; the characterization of such conduct or language must be left to the courts. A brief is an intellectual document, not a diatribe. For a lawyer to permit his cantankerous, bellicose temperament to corrupt his brief is unfair; unfair to his brief because it is deprived of all opportunity to assist the court in deciding the controversy correctly; unfair to his client, unfair to the opposition, unfair to the court. Besides, it's fatuous.

The court below, or the administrative agency, was deficient in intelligence and/or integrity. The words "and/or" frequently enrage the courts and hence should never be used in a brief.[2] It probably should also be mentioned that briefs which cast aspersions upon any court or governmental agency are customarily stricken —and you can't win without a brief! The striking of briefs is invariably accompanied by judicial blistering, the kind that leaves permanent scars on professional careers. Courts insist that every one should accord all governmental agencies the presumption of honesty and proper performance of duties. Some courts, however, suspect every administrative decision, apparently on the assumption that courts have a monopoly of intelligence, honesty, and experience; and if an administrative decision differs from the one the courts would have made, those courts have no reluctance in denigrating the administrative body. However, one mildly disparaging remark from a lawyer about an administrative body may goad the court into mounting its white horse and sallying forth in defense of the dedicated public servants. That's chivalrous of the court, to be sure, but it involves the dangers of galloping: courts invariably gallop in the wrong direction; when they proceed in the right direction, they walk calmly, resolutely, and—it must be confessed—rather slowly.

The court's reasoning does not support its decision. This comment, when made in regard to any decision of the court, is a symptom of arrested professional development. What is important is the decision, not the accompanying apology. Courts, like most human beings, frequently find it easier to do the right thing than to explain why they do it; like human beings, they frequently never

[2] For excellent rages, see Employers Mut. Life Ins. Co. v. Tollefsen, 219 Wis. 434, 437, 263 N.W. 376, 377-78 (1935); State *ex rel.* Adler v. Douglas, 339 Mo. 187, 189-90, 95 S.W.2d 1179 (1936).

fully understand their basic motivation. It really is immaterial what reasons are assigned for proper actions; reasons become important only when actions seem improper. Human beings are seldom entirely truthful in their explanations as to why they reached certain conclusions, and neither are the courts. Explanations *why* are usually attempts at justification *for*. Sometimes courts attempt to explain so volubly that minor errors escape unnoticed in the deluge. Such defects, however, like most defects in opinions, are usually the result of pressure and speed—but surely promptness of decision is preferable to perfection of opinion! Perfection, with all of its admirable qualities, in the wrong place may be a thief of time and a squanderer of human efforts.

This court was wrong. Among the unforgivable blunders that a brief may commit is to say "*This* court was wrong." No impropriety is involved, however, in saying "*That* court was wrong." The difference is that no court considers it possible for any other court to be right always. Courts don't like being told they are wrong. Who does? Some courts find it extremely annoying, which is unfortunate, because judicial dignity wobbles a bit in the presence of irritations, and efficient and unbiased performance of duties becomes more difficult. Contrary to some lawyers' opinions, the mere declaration by a lawyer that the court was wrong does not conclusively establish judicial error. The court, as the judge of credibility, might not believe the lawyer—this has happened more than once. Also, the court might inquire, "Who vested the lawyer with authority to pass conclusive judgment on the soundness of judicial decisions."? While courts have governmental authority to pass upon the correctness of lawyers' opinions, no such governmental authority has been conferred on lawyers in regard to judicial opinions. Not that it might not be a good idea, but it hasn't been done so far, although some courts seem to be accelerating the day. Occasionally—at least once in a thousand times—it is not a waste of time to tell a court that it was wrong. Generally, however, if a court believes it was right, a whole army of briefs, even with artillery support, will not change its mind; and if the court knows it was wrong, it may excoriate the lawyer who was stupid enough to perceive the error. All of us are more embittered when our falsehoods are disbelieved than when our truths are doubted. Courts have the inherent right to err, and there is nothing reprehensible in exercising that right in the furtherance of justice—provided, of course, not carried to the point of judicial lawlessness.

Miscellaneous. A discussion of some words that don't belong in briefs must resist the allurement of overexpansion. Generalizations are powerful allies in the struggle to keep within reasonable bounds, generalizations such as: None of the words discussed in *Dictionary of American Underworld Lingo,* or Eric Partridge, *A Dictionary of Slang and Unconventional English* belongs in briefs, unless perchance it sneaks in by way of the evidence. Pleonasms and clichés are not discussed, because they are ubiquitous and can't be kept out of briefs any more than they can be kept out of any other place. There are some words which are entitled to admission into all briefs except those submitted to individual courts. The words that should be blackballed if they seek admission into briefs submitted to individual courts can generally be ascertained by confidential discussions with the local bar. These words are usually of two types: trigger words, which hurtle the court into prolonged verbal sprees; picador words, which get the court fighting mad. For some courts there seems to be a third type: marijuana words, which delude the court into believing it is Harun-al-Rashid.

Summaries should be avoided, because if successful they reveal the superfluity of the precedent discussion. Nevertheless, by way of summary: Any word that may materially disturb judicial complacency does not belong in briefs. Perhaps a more useful summary would be: Only those industrious, painstaking, proficient words which serve to express arguments succinctly, clearly, and interestingly are entitled to acceptance into briefs; all other words don't belong in briefs—and that leaves hundreds of thousands of words for use in historical novels, filibusters, judicial opinions, and wherever else voluminosity is paramount.