

Le Mot Juste

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The best writers have a large vocabulary, because they need to use the right word to make a case that is accurate, precise, concise, memorable, and vivid. But even writers with a large vocabulary can struggle to choose *le mot juste*—or less pretentiously, the right word.

For many legal documents, *le mot juste* can be a wasteful luxury. Workaday documents don't need to be works of art; they need to be clear, easy to read carefully, and even easier to scan. If your words are good enough, you waste your time and your client's money searching for better ones. To borrow an ugly but useful term from economics, your words need only to "satisfice," to do what is necessary to get the job done, and no more.

But when the stakes are high, the situation is competitive, and the environment is noisy with other parties' words, the right word is no luxury. The right word—or better, many right words working together—can be essential for protecting your client's interests, money, or even freedom.

We can give you no advice that will work in every case, but we can identify principles for choosing words in particular situations. We addressed some of those principles in earlier columns, but that advice was scattered and missed some of the questions most commonly asked about choosing words. What follows are 10 common questions about word choice in pleadings and other competitive, high-stakes documents.

1. Whose Story Should I Tell?

Nothing should influence your choice of your words more than the point of view of your "story." Recall that with everything you write, whether a narrative in a statement of facts or a complex legal analysis, readers will understand and remember it in terms of a mental scenario that is essentially a narrative.¹ Each sentence adds to the general story your readers take away. But if you manage them carefully, your sentences will also shape the structure of that story. In that shaping, your most important tool is how you begin sentences.

When your sentences consistently begin with some one person, entity, legal principle, or idea as their main character (usually the subject of the sentence), readers are likely to put that character at the center of their remembered story and so see everything in relation to that point of view. It's the difference between these two:

- A. Hillary Clinton prepared the document that Susan McDougal used to obtain illegal loans in the Whitewater matter. The First Lady ...
- B. Susan McDougal used a document prepared by Hillary Clinton to obtain illegal loans in the Whitewater matter. Ms. McDougal ...

In a longer passage, such a consistent point of view can determine not only what story readers understand and remember, but how they judge the people and events in that story.

We can't give you a single, clear principle for deciding which character—if any—creates the most effective point of view. You have to consider details specific to the case. The only general rule is to choose the character that puts your client on the right side of the law (or your opponent on the wrong side) by

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¹ See Joseph M. Williams & Gregory G. Colomb, *Telling Clear Stories: A Principle of Revision That Demands a Good Character*, 5 *Perspectives: Teaching Legal Res. & Writing* 14 (1996).

highlighting those actions and details that work for your argument.

But we can give you a specific strategy for making that decision: restate your story so that the characters and the story match familiar stereotypes (what Aristotle called *topoi*):

- Our client is a responsible professional who must limit discovery to protect the confidential information that his clients have entrusted to him.
- Our opponent is a lazy, ineffective employee who thinks she is discriminated against when harder working, more responsible employees are rewarded for their good work.
- The law clearly sets forth the procedures complainants must follow; those procedures were clearly explained to this complainant, who then ignored them.
- Our clients are innocent bystanders whose businesses will be ruined by unintended consequences of the proposed regulation.
- Our client's customers will be bewildered and confused, not informed, by the labeling requirements in the proposed rule.

You probably won't write anything so stereotypical in your pleading, but if you can reduce your best argument to such a formula, then you should build that argument around the character highlighted in it.

Often you will have more than one stereotype to choose from:

- A. Our opponent is a lazy, ineffective employee who thinks she is discriminated against when harder working, more responsible employees are rewarded for their good work.
- B. Our client treated this employee fairly, following to the letter all of its procedures and the applicable rules.

In that case, you have to hope that you have the skill and experience to know which story (or mix of stories) will effectively move your specific decision maker.

Of course, you cannot substitute stereotype for carefully reasoned argument. But if you build your story around that character and introduce

the stereotype into occasional sentences, readers will get the message and (you can hope) structure their understanding of your argument around it.

2. What Should I Call the Parties?

Most lawyers refer to the parties by their institutional roles, plaintiff or defendant. Those generic terms can be useful: sometimes they help decision makers know who's who in a complex matter with many participants; sometimes they characterize the parties in ways that support the rhetorical appeal of your argument. But just as often, those terms are unnecessarily vague, bland, and at cross-purposes with your rhetorical appeal to a decision maker.

Every party to a dispute or controversy has many names:

defendant—debtor—borrower—homeowner—
Johnson—Esther Johnson

plaintiff—supermarket industry—Grocery
Manufacturers of America—grocers—food stores

Each name creates a different image of the party, an image that can support or contradict your overall story. Which name(s) should you use? The one whose *image* is most consonant with your story.

Here's a strategy for deciding: imagine—or better, ask a friend to imagine—what mental picture each name conjures up. For example, close your eyes and picture a defendant. [____] Now picture a plaintiff. [____] Do those terms give you *any* mental picture? (Focus on the pictures themselves, not all the other things you know about plaintiffs and defendants.) How specific are your pictures? How different are they? Now picture a debtor. [____] Now, picture 68-year-old homeowner Esther Johnson. [____]

Here's the point: when readers create their mental scenario from your text, they generate different mental images from different names for the same person or entity, images that can influence how they understand and judge your argument.

You cannot avoid naming parties by their generic, institutional names. But neither are you restricted to them. And the more generic the name, the less vivid the picture. When your story is best served by

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seeing a party as a distinct individual, use the proper name. When it is best served by seeing a party in some specific social or legal role—*debtor, seller, employer, teacher, farmer*, and so on—use that name. When it is best served by having readers ignore all of those specifics, then by all means call the parties *plaintiff* or *defendant*.

3. Is It *the Plaintiff* or Just *Plaintiff*?

This seemingly punctilious point is sometimes raised by writers who think that one is correct and the other incorrect. They are wrong. You can use either form. But sometimes, the question is asked by those who think they can feel a difference between the two, but are not quite sure what it is. They are onto something—a subtle, but real difference in the rhetorical effects of using general terms.

As standard count nouns (any noun that you can put *a* in front of), the terms *plaintiff* and *defendant* normally appear with the definite article *the* when they refer to specific parties. Although lawyers sometimes drop the *the* (*Plaintiff argues ...*), English speakers normally do not:

This: The rock is under the paper.

Not this: Rock is under paper.

On rare occasions we may drop *the* when a noun is used in a generic sense, as in statements of instructions or general principles, especially those that include terms naming a social or institutional role:²

Paper covers rock.

Father knows best.

Teacher is always right.

² This is analogous to the common usage in which no definite article is used for mass nouns that refer to a general substance:

Coffee is my favorite drink.

Air is necessary to life.

Contrast these cases that refer to specific subsets of the general substance:

The coffee spilled.

The air rushed out of the balloon.

When you refer to your opposition without *the*, as just *plaintiff* or *defendant*, you reduce them to their institutional role, making them even less individualized, less distinctive. That's why writers drop articles most often in case reports, where we care about the parties not as individuals but as representative instances:

Plaintiff in this case had sold defendant ...

Here, plaintiff was a union that had ...

If you want to reduce a party to its institutional role, if you want to keep readers from creating a vivid mental image of a party, if you want your prose to feel generic, distant, and hyper-legalistic, then use *plaintiff* or *defendant* without *the*. If not, use the more normal form: “The plaintiff hereby asks this court ...”

4. How Should I Address the Court?

Although every pleading seems to *ask* for something, it actually tells a decision maker what she *should* or even *must* do. Some lawyers happily give decision makers what sound like orders: “For these reasons, the court must award ...” But many more find it awkward to demand things from a court, since few people respond well to orders from applicants.

We can't give you a general rule: sometimes you should address the court directly, sometimes not. But we can help you predict how readers will respond to your choices so that you can make informed decisions that suit your overall rhetorical approach.

When you plead for a decision maker to take a specific action, you manage your tone primarily through your subjects and verbs. Subjects assign responsibility for actions, which determines how aggressively you seem to be pleading. In choosing subjects, you have three choices:

1. You can address the decision maker directly. This is the most aggressive approach that focuses on both the decision maker's responsibility and your demand.

- The court should grant the motion.
- This Commission must not implement the proposed rules without modification.

2. You can use a passive verb to drop the decision maker out of your sentence entirely. This is less aggressive: while you are still making a demand, you focus more on the outcome than on the decision maker's responsibility for making it happen.

- The motion should be granted.
- The proposed rules must not be implemented without modification.

3. You can deflect responsibility away from yourself and the decision maker by assigning responsibility to the law, the evidence, or other abstract features of the process:

- The law requires that the motion be granted.
- The evidence shows that the proposed rules must be modified before implementation.
- These precedents indicate that all four prongs of the *Wilson* test must be considered.

A somewhat more aggressive version of this strategy is to have the law or evidence compel the decision maker:

- The law requires this court to grant the motion.
- The evidence makes it clear that the Commission cannot implement the proposed rules without modification.
- These precedents indicate that this court must consider all four prongs of the *Wilson* test.
- Justice demands that the plaintiff be compensated for his loss.

Your subjects determine how aggressive your demand seems; your verbs determine how aggressively you seem to be making it.

The court must ... / is required to ... / cannot avoid ... / should ...

The law demands ... / compels ... / requires ... / leads to ...

The evidence compels ... / requires ... / shows ...

Finally, you can manage how aggressive you seem by introducing yourself as the main character and then using different verbs to characterize your claim on the decision maker:

Plaintiff demands that the court ... / requests that the court ... / begs the court ...

Which tone should you choose? The one that best matches your overall rhetorical strategy. You have to base that decision on the details of your case and the character of the decision maker, but here are a few general considerations:

- If there are no special circumstances, make your default choice a moderate to slightly aggressive tone (*the court should, the law requires, the plaintiff requests*).
- If your case is weak, be resolutely moderate. Don't let your tone signal your weakness, but also don't try to mask weakness with an aggressive tone. No one responds well to claims that they are compelled to do something based on no good reason.
- If your case is strong and you are confident that the decision maker will see that, take a moderate or even soft tone. If the evidence and the law speak for themselves, don't put yourself in their way.
- If you suspect that the decision maker may not recognize the full force of your argument, take an aggressive tone and assign responsibility to the law (evidence, equity, etc.) whenever possible.

5. How Should I Characterize Claims?

Since pleadings are by definition arguments, you cannot avoid making claims and responding to the claims of others. But when you report what others claim, your words will also *characterize* that claim—"spin" it in terms of its plausibility, certainty, fairness, appropriateness, and so on. (You can also spin your own claims: "Plaintiff begs this court to ...")

Choose those words wisely, and you can make your argument more persuasive. Choose poorly, and you can damage both your argument and your credibility.

When you choose, the most important variable is what aspect of the claim a term emphasizes. For example, the phrase *plaintiff states* is neutral with respect to the nature of the claim and your stance toward it. On the other hand, with phrases such as *plaintiff contends* or *plaintiff proposes*, you step back from the claim to emphasize that it is the *plaintiff* who makes it and that you do not (at least in the

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current sentence) endorse or accept it. With phrases such as *plaintiff insists* or *plaintiff maintains*, you emphasize the *manner* of making the claim. Doing so, you not only highlight the maker of the claim but also emphasize that the claim is contestable. (When you use such terms for your own claim—*I insist* or *I maintain*—you emphasize both its contestability and your conviction.)

The following chart lists some common terms for making claims sorted by what they emphasize. Use it (and your thesaurus) to prime your thinking until you develop a wide range of terms for characterizing what others say.

Neutral	Maker	Manner/ Contestability
say	claim	maintain
write	assert	avow
state	contend	answer
report	avow	petition
argue	propose	demand
aver	advocate	insist
show	advance	proclaim
	profess	press
	submit	protest
	declare	accuse
	proffer	complain
	allege	beg
		clamor
		boast
		declaim
		implore

When you choose, look for words

- that emphasize those characteristics of the claim that support your argument
- that readers will accept as accurate, or at least plausible
- that do not cross the bounds of fair advocacy

Each choice depends on the details of the situation and your rhetorical goals. As with all matters of style and tone, the best policy is to use relatively neutral words most of the time, in order to set a background against which your more pointed sentences can pop off the page. Both shouts and whispers lose their effect when that’s all a decision maker hears.

6. Should I Avoid Legalisms?

Most legal controversies require you to use the technical terms of the law: plaintiff, discovery, proximate cause, estoppel, and on and on. Though too arcane for ordinary readers, they are not a problem for decision makers schooled in the law. You can and should use them as needed.

However, there are other terms and phrases that are not necessarily technical terms, but that *feel* like legalese because only lawyers use them. These are entirely avoidable. A few examples:

for the reasons explained **absent** such evidence
hereinafter

during the **pendency** of this matter the state **made a showing** that ...

the **forementioned** case **said** statement

When you use unnecessary legalisms, you don’t help readers understand your story, but you do significantly affect their mental image of *you*—that projected character or persona called your *ethos*. Experienced practitioners sometimes use such legalisms out of old habit, which gives their prose a tired, rumpled, legalistic air. Young ones sometimes use them to project a more authoritative ethos, but the effect is usually the opposite: they too easily seem inexperienced, wearing grown-up clothes that don’t quite fit. These terms rarely improve your ethos or advance your cause.

A related way your vocabulary can damage your ethos is when you show off not that you know lots of legalisms but that you know that a particularly graceful fistfight might also be called a *contretemps*. Inexperienced lawyers sometimes think that such fancy words give them authority (even if they need a dictionary to make sure they got them right). And sometimes they do, when judiciously used.

The key to thinking about the level of vocabulary you should use is not authority or geography but class and its effect on your ethos. Whenever you use lots of words that less educated people would have to look up, you project an image of someone asserting a class privilege: you are better, smarter, and more educated than most *and you want your readers to notice*. That can work for you on some occasions,

and a few specialty firms thrive on a white-shoe image that includes documents that are classier-than-thou. But that image goes against the mainstream of American culture.

Let your readers' linguistic limits set the bounds for your vocabulary. You don't have to go to the extreme of the mythic Ivy-educated, small town lawyer who could explain the etymology of *contretemps*, but whose language is more suited to a barroom brawl. But never send your readers to the dictionary.

7. Should I Avoid Technical Terms?

Legal controversies routinely involve technical knowledge in fields beyond the law—economics, environmental science, medicine, sociology, psychiatry, and many others—all of which have their own body of technical terms that can feel arcane, even offensive, to lawyers. But when your argument turns on such external specialized knowledge, those alien terms of art may be hard to avoid.

If your decision makers are specialists, as for example in a comment on proposed FTC regulations, then use technical terms as freely as you would necessary legal terms. (But remember that a decision maker who is a generalist will always be less well-versed than you are on the background to your issue.)

If your decision maker will recognize but might not fully understand the technical terms, then use those terms but pair them with nontechnical explanations, either before or after.

- When you use unnecessary legalisms, you significantly affect readers' mental image of you—that projected character or persona called your *ethos*.
- Readers understand what you write through several *parallel mental representations*. These are mental images or “maps” representing different aspects of your text—its grammar, its underlying story, its argument, its organization, your *ethos*, and so on.

If your decision maker might be baffled or put off by a technical discussion, make your case in ordinary language and reference a

more technical account that you include elsewhere (footnote, appendix, etc.).

- [in text] The drugs called calcium blockers are used to treat high blood pressure (hypertension), chest pain (angina), and abnormal heart rhythms (arrhythmias). They decrease the heart's pumping strength and relax blood vessels because they limit how much muscles contract. When the calcium in muscle tissue is reduced, the muscle fibers are less likely to contract excessively, which then relaxes blood vessels and reduces how much the heart pumps.
- [in footnote] Muscular contraction is the result of the interaction of proteins in the sarcomere, the fundamental unit of contraction. Contraction is a product of the interaction of myosin, an ATPase or energy producing protein, and actin, a contractile protein. This interaction is controlled by the inhibitory protein tropomyosin. When the myoplasmic concentration of Ca⁺⁺ exceeds 10⁻⁷, tropomyosin no longer inhibits the interaction, which produces contraction. By limiting the concentrations of Ca⁺⁺, calcium blockers limit contraction.

8. When Should I Disparage the Other Side?

One of the most tempting rhetorical appeals is that the other side is a bad actor. It is always helpful to show that your opponent breaks rules, violates covenants, acts in bad faith, abuses the system, harms others, or otherwise deserves scorn—if true. But it is worth a moment's thought to ask whether that is the story that best serves your argument and your *ethos*.

You must, of course, highlight your opponent's bad *actions* that involve the substance of a dispute, central elements of a case, or key factors in a decision. But you may go too far if you also disparage the *actor*. Don't distract your decision maker with name-calling, even if you are sure that the decision maker will share your disapproval. (In fact, a responsible decision maker will try to avoid deciding on the basis of personal disapproval, especially if the bad actor is the weaker party.)

Be especially cautious when your opponent's bad actions involve not the substance of the dispute but its procedures. Do explain how their abuses have unfairly harmed your client. But if your language

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reflects too much of your own anger and frustration, you can obscure the key issues.

- Once more plaintiff raises an unnecessary issue of discovery to exhaust the defendant and distract the court from its repeated, intentional failures to meet the court’s entirely reasonable deadlines. Plaintiff shows no intention to let the court resolve this dispute. Since plaintiff originally filed this action without a good faith basis, it is not surprising to see him repeatedly show bad faith in all of his dealings with the court and the defendant. Given plaintiff’s total loss of credibility, the court should deny the current request, enforce its deadlines, and put an end to these unfair and unethical tactics.

Since the other side will give as good as they get, you can reduce the dispute into a shouting match in which it is hard for the court to care about the difference between your good cause and their bad deeds.

Only if you believe that your opponent’s bad character is your very best argument, should you take the time and space to paint it in the worst possible light (but first see #9).

9. How Should I Disparage (or Praise)?

When you do decide to paint your opponent in a bad light (or your client in a good one), you’ll do a better job if you rely less on adjectives and adverbs and more on nouns and verbs. It’s the difference between claiming that something is so and showing it.

Not A. When Jones’s excessive and unfounded anger led her to work more slowly and less carefully, Chang reasonably thought that Jones would probably act in ways that would be deleterious to the group’s work environment.

But B. When Jones’s pique led her to neglect her work, Chang reasonably suspected that Jones might be a troublemaker.

Not A. Once more this deceptive plaintiff raises a bogus issue of discovery to force a less wealthy defendant to use legal services it cannot easily afford and to keep the court from noticing that it has repeatedly and intentionally not met the court’s deadlines.

But B. Once more plaintiff manufactures an issue of discovery to exhaust the defendant’s limited resources and distract the court from its repeated decisions to ignore the court’s deadlines.

When you use adjectives and adverbs to express personal judgments, those judgments are right on the surface: they seem to be *your* judgments that you hope readers will share: “Jones’s excessive and unfounded anger”; “this deceptive plaintiff”; “repeatedly and intentionally not met.” But with nouns and verbs, those judgments seem to be less *imposed* on the story and more *embedded* within it: “Jones’s pique”; “plaintiff manufactures an issue”; “repeated decisions to ignore.”

10. When Should I Paint a Picture?

Every trial lawyer knows the persuasive value of a good picture, blown up to life-size or larger. You gain some of that persuasive power when you tell your story in ways that readers can easily picture. But there are also moments when you can paint verbal pictures that “sell” your argument without actually making it. Here, for example, an industry association is trying to block what it sees as excessive food labeling requirements:

These regulations would mandate warning labels for trace amounts of ubiquitous naturally occurring substances, including nutrients and natural food constituents that are not deliberately added to food and pose no significant risk. Under these regulations, every local food store would become a forest of warning labels, frightening ordinary consumers with warnings on every product, not just those composed of a stew of artificial chemicals but every perfectly safe one containing only naturally occurring substances. How could any mother without a degree in chemistry differentiate between organically grown broccoli, with its warning label covered by more than 40 items she’s never heard of, and artificial sweetener, with only two?

Almost always, such verbal pictures work when they depict extreme cases that show that a rule or conclusion is impractical, harmful, unfair, or otherwise intolerable on its face. To be effective, such a picture must closely match its less vivid argumentative counterpart:

Consumers are unlikely to confuse the TOPs mark for its computer networking hardware and software with Abco's toy top mark for its brand of copier paper. ...

No clerk ever went out to buy paper for the copying machine and came back with a computer network. And what IT specialist could be so confused by the two marks that he might try to network the office computers with sheets of paper?

These verbal pictures must supplement, not supplant, your legal argument. They are best used early, when you first frame an argument, or as a final flourish after the argument is complete.

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Another Perspective

“The case method should be only one tool in the lawyer’s tool box. To use a crude analogy, it is as if we were teaching carpenters how to build houses through a three-year training program in which the entire first year was spent teaching them how to use hammers (e.g., how to hammer floorboards, how to hammer the framing, how to hammer the wallboards, and how to hammer the shingles on the roof). In the second and third year of their training, we hand them an occasional screwdriver and pair of pliers. But by this time, of course, the hammer has become the tool of choice. It is no surprise that after graduation, when faced with a construction problem, our carpenter’s immediate solution is: “Let’s hammer it!” If we wish to avoid this consequence, we must start training our carpenter early in the use of other valuable tools. We still want our carpenter to be able to use the hammer, but in the first year we will also expose the carpenter to the saw, the level, the screwdriver, the wrench, and the pliers. We want to inculcate our carpenter early with instruction in a variety of tools, and with the flexibility of mind to reach for the right tool at the right time. We want our carpenter to understand early that there is a range of options.”

—Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 Cal. W. L. Rev. 351, 355 (1998).