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Writers on Writing: Metadiscourse

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THE LEGAL WRITER

Writers on Writing: Metadiscourse

BY GERALD LEBOVITS

This is to inform you that from our point of view, we would venture to suggest in the final analysis something that goes without saying: Metadiscourse is cliché-driven discourse about discourse. Legal writers should get to the point without preambles and running starts. Metadiscourse takes up space and adds nothing. Metadiscursive writers talk to their readers by explaining the writers' thinking and writing. Metadiscourse is throat clearing.

The adage "First say what you will say, then say it, then say you've said it" works only if you are subtle. Contrary to popular advice, do not say that you are about to say something. That pedantic and condescending way of speaking and writing frustrates even children.

In their new book on legal writing, a team of New York Law School professors offers good advice on metadiscourse to cut clutter and edit editorializing: "Let the thought itself carry its own interest or importance: if the point is truly interesting or important, let the reader find it so by how you express it."¹

Delete the following metadiscourse: "Another aspect of the case that ought to be considered is that . . ."; "As a matter of fact . . ."; "As far as the court is concerned . . ."; "Bear in mind that . . ."; "Consideration should be given to the possibility of [or *that*] . . ."; "For all intents and purposes . . ."; "From our point of view . . ."; "I would venture to suggest that . . ."; "If I may be permitted to add . . ."; "In connection with . . ."; "In dissent I propose to argue that . . ."; "In our opinion . . ."; "In the final analysis . . ."; "It appears to be the case that . . ."; "It can be said with certainty that . . ."; "It goes with saying that . . ."; "It has come to our attention that . . ."; "It is clear that . . ."; "It is conceivable that . . ."

"It is hornbook law that . . ."; "It is important [or *helpful* or *interesting*] to

remember that . . ."; "It is important to state at the outset that . . ."; "It is logical to believe that . . ."; "It is significant that . . ."; "It is submitted that . . ."; "It is the court's conclusion that . . ."; "It is true that . . ."; "It should be emphasized that . . ."; "It should [or *must*] be noted that . . ."; "It should not be forgotten that . . ."; "It stands to reason that . . ."; "It would seem that . . ."; "Let me say that . . ."; "Needless to say . . ."; "On balance . . ."; "One feature of which one should be aware . . ."; "Petitioner is aware that . . ."; "Please be advised that . . ."; "Speaking with all deference . . ."

"Suffice it to say . . ."; "That is to say . . ."; "The court recognizes that . . ."; "The court suggests that . . ."; "The fact of the matter is that . . ."; "The fact is that . . ."; "The first thing this court will write about is . . ."; "The point I am trying to make is that . . ."; "The next issue defendant will deal with is . . ." (*becomes*: "The next issue is [or *Second*] . . ."); "The third section of this brief concerns . . ."; "There is no doubt but that . . ."; "This court finds that . . ." (use rarely, and only to show a sharp break between the litigants' contentions and the court's findings); "This is a case that . . ."; "This is to inform you that . . ."; "To get to the point . . ."; "To me . . ."; "We believe that . . ."; "We happen to believe that . . ."; "What I mean to say is that . . ."; "When all is said and done . . ."

Suffer not sing-song metadiscourse: "The contract is invalid. Why is the contract invalid? The contract is invalid because it violates public policy. How does the contract violate public policy? The contract violates public policy because it promotes illegal gambling. How does the contract promote illegal gambling? . . ." Sing-song metadiscourse is common from religious pulpits. The technique fails with legal readers.

Metadiscourse is unsubtle and therefore unpersuasive. As Professor (and for a time New York County Judge) Younger explained, legal writing should be "modest and quiet, confident that its merit lies partly in the art by which the author has concealed his art . . . [L]egal writing should be like a triple-dry martini – colorless but powerful."² Stated another way, "in legal writing, unlike much other writing, your personalities should remain in the background. Creativity and discursiveness, which perhaps earned you kudos as undergraduates, should give way to clarity and logical analysis."³ Thus, eliminate overwrought metadiscourse: "The record is devoid of even a mere scintilla of evidence that . . ."; "Opposing counsel has offered a series of bald assertions."

Legal writers should get to the point without preambles and running starts.

Metadiscourse also hides. Many judges, not merely many practitioners, use overstated metadiscourse to conceal. Judicial metadiscourse was condemned 40 years ago in an American Bar Association committee report:

Avoid expressions such as "a cursory examination is sufficient" or "this point need not detain us long." The losing lawyer will feel the examination has been too cursory and that the court should have detained itself a little longer. The phrase "no citation of authority is needed" is redundant. If the citation of authority is not needed the informed reader will know it. But where this expression is used many will suspect that a citation was really needed but could not be found.⁴

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Judges use highlighting metadiscourse not only to add space. Judges highlight as a rhetorical device to show that they are informed – and that raises ethical concerns. A Westlaw check of May 31, 2002, discloses 31 times that New York State judges have congratulated themselves in the Official Reports for conducting “a through review of the record”; 60 times for conducting “exhaustive research”; 131 times for conducting “a close reading” of the papers, cases, or statutes; 23 times for conducting “thorough reading” of them; and a notable 1,285 times for conducting “a careful reading” of them. Seventy-seven times in the Official Reports have judges told their readers that they engaged in “careful deliberation,” 90 times that they conducted a “complete review,” and 46 times that “it is necessary to understand” a line of argument or factual issue.

Do judges highlight to assure skeptical readers that they spend their time deciding cases rather than playing golf? Or do judges highlight out of habit? Either way, metadiscursive verbiage telling a reader that a judge is honest, smart, deliberate, detail-oriented, impartial, articulate, or empathetic has a negative effect. The words “sound hollow, contrived, and overly defensive,” and at best “readers may find them off-putting.”⁵

Instead of explaining how closely they analyzed the facts, advocates and judges should analyze the facts closely – and prove it by written analysis, not by false expressions of candor. Instead of explaining how exhaustively they researched the law, advocates and judges should, if appropriate, discuss the research exhaustively. Instead of explaining how carefully they considered the issues, advocates and judges should consider the issues carefully. Instead of explaining how articulate they are, advocates and judges should write well.

Speaking to the reader directly is immodest, patronizing, theatrical, and insincere. Worse, doing so tells critical legal readers – the best lawyers, in other words – that perhaps the advocate or judge did not read the papers

closely or research the matter exhaustively. An advocate’s naked metadiscourse masks fair argument. A judge’s naked metadiscourse masks deliberation and empathy.

Legal writers should not use the royal “we” or “us.” For trial judges, doing so is inaccurate because a trial judge is singular. For attorneys, doing so is pompous. Appellate majority opinions written by one judge (as opposed to *per curiam* or memorandum opinions) may use “we” or “us.” Appellate concurrences and dissents, even when joined by others, should use “I,” not “we” or “us.” Appellate concurring and dissenting judges should not use “I” at every turn. Immature and self-absorbed writers, whether practitioners or judges, write that way. But an “I” is better than circumlocutions that avoid it, such as “the present writer” and “the author.” On the other hand, many “I” statements are metadiscursive. It is obvious that many statements are opinion. The instant “Legal Writer” would strike the “I believe that” in “I believe that valid contracts require consideration.”

As the ABA committee advised, “Avoid trite and hackneyed phrases such as ‘well-settled’ and ‘constrained to hold.’”⁶ The phrase “well settled” is especially hackneyed. A Westlaw check of May 31, 2002, disclosed exactly 10,000 times that New York courts have used it in officially published opinions. The same Westlaw check disclosed an astonishing 6,830 times that New York courts, in officially published opinions, have been metadiscursively “constrained” to decide a case in a particular way. Judges who admit to being “constrained” shift responsibility from themselves. They are really saying, “I’m about to render an unjust, idiotic decision. Blame the legislature or other judges. Don’t blame me.”

Chief Justice David J. Dixon of the Missouri Court of Appeals, Kansas City District, explained what goes through judges’ minds when they use phrases like “well settled,” “no citation of authority is necessary,” and “we need not dwell on the contention of counsel”⁷:

“I am about to apply *stare decisis* and although the result in this case may

seem absurd, it is unnecessary to give any reason.”

“I have an appointment at the Rotary Club to speak on the ‘Integrity of Judicial Opinions’ and my law clerk has been so busy getting my wife’s anniversary present, he has not had time to find any analogous authority.”

“The lawyer has skewered you and you need to get off the hook.”

But Chief Justice Dixon also noted that using these expressions will not cause much trouble: “You can rest assured that if you utilize these expressions, your opinions will look like most opinions. Never mind the carping of law professors and their stooges on the Law Review.”⁸

Needless to say – and accordingly even more needless to write – it goes without saying that when all is said and done, it is well settled that metadiscourse is verbose, unpersuasive, and often unethical. And on this point it is the present author’s opinion that we should detain the reader no longer.

1. Cathy Glaser et al., *The Lawyer’s Craft: An Introduction to Legal Analysis, Writing, Research and Advocacy* 196 (2002).
2. Irving Younger, *Persuasive Writing* 32–33 (1990).
3. Gertrude Block, *Effective Legal Writing* 74 (4th ed. 1992). Note that Professor Block’s excellent text is now in its fifth (1999) edition.
4. American Bar Association, Section on Judicial Administration, Committee Report, *Internal Operating Procedures of Appellate Courts* 37 (1961). This report was written mostly by Ninth Circuit Judge (and previously Washington Chief Justice) Frederick G. Hamley.
5. Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 137, 151 (2002).
6. *Internal Operating Procedures of Appellate Courts*, *supra* note 4, at 37.
7. See *Lexicon for Appellate Judges*, N.Y.U. Appellate Judges Seminar (1973), reprinted in Robert A. Leflar, *Appellate Judicial Opinions* 193, 193–95 (1974).
8. *Id.* at 195.

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