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The 6 Phrases That Should Be Banned From Legal Writing

By **Jeff Zalesin**

Law360, New York (October 7, 2015, 2:30 PM ET) -- Next time you're about to turn in a brief full of technical jargon and age-old stock phrases, remember that judges hate stuffy writing just as much as ordinary readers do.

Take it from U.S. District Judge Lynn N. Hughes, who has served on the Southern District of Texas bench since 1985. He told Law360 that lawyers are often "insecure in their law and their English," so they adopt bad habits from others instead of taking control of their writing.

"Most legal writing reads like it was generated by a robot," Judge Hughes said. "It's very mechanical, and sentences are long and convoluted. You don't believe there's a human mind behind it all."

Judges aren't the only ones complaining about formulaic and hard-to-read court filings. Attorneys are often quick to admit that the legal profession has a writing problem, and some blame it on a false perception that the normal rules of composition don't apply to court papers.

"So much 'legal writing' is so poor," Podhurst Orseck PA partner Stephen F. Rosenthal said in an email to Law360. "I think the term should be banished since it gives lawyers the wrong impression that it's somehow effective to jettison clear expression of thoughts through the overuse of words like 'same' or 'as such.'"

Come now the experts, who would respectfully show Law360 why lawyers should cease and desist using the phrases enumerated herein.

'Wherefore, premises considered'

Steven Zager, a partner at Akin Gump Strauss Hauer & Feld LLP, put "wherefore, premises considered" at the top of his list of legal expressions that should have been retired long ago.

"Who says that, and where did it come from?" Zager said in an email to Law360.

The origins of the phrase may be lost to time, but plenty of lawyers still say it before telling the judge what relief they believe their clients deserve.

Judge Hughes said that it would be better to ditch "wherefore, premises considered" along with the common complaint openers "Comes now the plaintiff" and "To the honorable judge of said court." He reached that conclusion as a young litigator in the 1960s, when he decided to forgo those phrases in his

court filings.

No judge ever punished him for leaving out formalities and getting right to the point, he said.

Now, when attorneys question whether it's acceptable to cut "wherefore, premises considered" and similar phrases from their writing, Judge Hughes advises them to look at briefs filed by the U.S. solicitor general.

"They don't start out with any of that stuff, and they don't end with it," he said.

Evan M. Tager, a Mayer Brown LLP partner who has argued before the U.S. Supreme Court and appeals courts around the country, said he agreed that "wherefore, premises considered" is a waste of words.

"That should never be in a brief," Tager said. "That's just garbage."

'Such further relief as the court may deem just and proper'

Lawyers often tack this catchall request onto the end of filings, just in case they've overlooked some form of relief that a judge might be inclined to grant. Judge Hughes called it an "appalling" example of legalese.

"Assuming they're not wearing pantaloons and silk kneesocks, they shouldn't talk like that," Judge Hughes said.

Zager also criticized the cliche, taking aim at the idea behind it.

"[It's] as if to say, 'Gee, Judge, if I forgot something in my brief and you think of it yourself, please give me credit for it anyway,'" Zager wrote.

The phrase does have its defenders, even among attorneys who would like to see less jargon in legal writing overall. Tager said it can help to ensure the judge is comfortable granting a remedy that wasn't specifically called for in the motion papers.

"Waiver is a valid concern," Tager said. "Lawyers are paranoid, and often for good reason, that if they don't ask for something or if they don't say something, they'll be deemed to have waived it."

'By and through undersigned counsel'

This caveat can be safely omitted without giving anyone the misimpression that a party is litigating the case pro se, Tager said.

"Why would you need to say, 'By and through undersigned counsel?'" he said. "That's why we sign the briefs. It's just clutter."

Still, the phrase remains popular with plaintiffs and defendants in state and federal courts throughout the U.S.

In the past year, it has shown up in court filings on behalf of everyone from Boston Marathon bomber Dzhokhar Tsarnaev to a group of states suing the U.S. Environmental Protection Agency over its "waters of the U.S." rule.

‘It is axiomatic’

Judge Hughes said he generally considers it “pompous” to introduce a point as a legal axiom.

“If it were really axiomatic, then it might be all right, but usually it’s not,” Judge Hughes said.

Ross Guberman, the president of consulting company Legal Writing Pro LLC, told Law360 in an email that the overuse of “axiomatic” is just one consequence of “decades of bad habits and poor models” in legal prose.

“You're forced to wade through a lot of fluffy windups like ‘it is axiomatic that’ and ‘it is a threshold matter,’” Guberman said.

Mayer Brown senior associate Chad Clamage said in an email that lawyers sometimes write “axiomatic,” “pellucid” or even “beyond peradventure” when a simpler word would serve the same purpose.

“I dislike legal synonyms for ‘clear,’” Clamage said.

‘Moves this honorable court’

Tager said that he sees no good reason to tell the court about its own honor in a brief.

“They don’t need to know that,” Tager said. “That’s just pandering. Young lawyers see it in documents, and they just start to perpetuate it until someone says, ‘Why is this in here?’”

Similarly, Zager said that he’s suspicious of lawyers claiming to “respectfully show the court” something.

“When you have to tell a reader you are being ‘respectful,’ you probably are not,” Zager said.

‘The great weight of legal authority’

Judge Hughes said that lawyers do themselves no favors by pointing to a huge body of precedent and claiming that it tends to support a client’s case.

“I want to know what the holding is in the case with the facts closest to the one I have,” Judge Hughes said. “I don’t care if there are 200 cases about something involving a contract. How close are the facts to this?”

A better approach, he said, is to focus on just three citations: a “really old” U.S. Supreme Court ruling and two more recent appellate decisions.

Zager, meanwhile, said he saw a possible alternative meaning in references to the “great weight” of precedent.

“At 265 pounds, I always consider myself the great weight of legal authority,” Zager said.

--Editing by John Quinn and Edrienne Su.
