Notes from the Persuasive Writing Factory

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By Catherine W Smith

"Always Appealing" is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

Although oral argument gets all the attention, most appellate lawyers (and all appellate judges) will tell you that appeals are in the vast majority of cases decided on the briefs. An appellate law firm—and ours is no exception—is a persuasive writing factory. There's no formal assembly line, the product is always "bespoke," and the only manufacturing instructions are the Rules of Appellate Procedure (which, in RAP 10.3, exhorts the laborer to be "concise" and "fair" in drafting). But in our office we have instituted a primitive form of "quality control"—no briefs leave our office without at least two lawyers having read, and edited, the final product.

I am often the second lawyer. It is my favorite job in the factory.

I confess I fancy myself a wordsmith (see what I did there?)—and have, since my days, half a century ago, when the managing editor would send me down to the printing press in the basement of the Oklahoma City Times to shorten headlines on the fly for impatient linotype operators eager to put the afternoon paper1 to bed.

I'm no longer making red crayon proofreaders' marks on newsprint teletype rolls, but the task, and the results, are often not that dissimilar:

Use active voice (unless you can tell me why passive voice is better).

Put the action in the verb (you're doing it wrong if you've made it a noun).

Reduce unnecessary prepositional phrases (apostrophes are your friend!) and footnotes (there are no footnotes in newspapers).2

Never, ever, use the verb "indicate." Or "indicated."

Well, that last one may be a little extreme. But lawyers virtually always use the verb "indicated" when what they really mean is "said," "told," "testified," or even (and more persuasively) "agreed," "admitted," or "conceded." And it drives me crazy—as every lawyer in our office has learned, when I send the indicated product back to the factory floor.

But that's just me. In truth, I agree/admit/concede it may not make much difference. My mentor, Malcolm Edwards, who chaired the committee that initially drafted the Rules of Appellate Procedure in the 1970s, had an idiosyncratic (and, some would say, grammatically incorrect) fondness for the word "which." Likely as a consequence of his hand in drafting, the RAPs were littered with restrictive clauses, unfettered by commas, that in most instances probably should have begun with a "that."

It has taken decades, and several "which doctors," to scrub most of those uses of "which" from the RAPs. Still, the intended meaning of the phrases in the rules was, in most instances, clear. And according to the Merriam-Webster Dictionary of Usage: "Once upon a time, long ago, when the English language was still basking in its Edenic youth, that and which were freely interchanged. Everyone was very happy."

My point being that I'm not aware of a single instance in which the use of "which" rather than "that" in a RAP changed the interpretation of the rule in the courts. (If you have an example, though, I'd love to hear it.)

I have always found it intriguing, and even a little mysterious, that most appellate lawyers (and all appellate judges) profess to know the semantics and pragmatics3 of what is persuasive, yet there is no way to test whether a different

manufacturing process would have yielded the same result. Nevertheless, we all think we know the "how" and "why" a particular piece of writing persuades. But who knows what rhetorical fingernails I'm scratching on the chalkboard of a decision-maker when I submit a brief with some other word that (not which!) grates their eyes (and/or ears).

Returning to my own manufacturing bugaboo: "Indicate" first entered the English language from the Latin word meaning "point out" in the late 17th century. That's not long ago, in the grand scheme of things—I'd even wager "that" and "which" were interchangeable at the time. And "indicate" is not a synonym for any of the proposed substitute words recited above. So if you mean said (12th century, old German), told (13th century, middle English), testified (14th century, old French from Latin for "witness"), agreed (15th century, middle English), admit (15th century, old French), or even concede (16th century, Latin), consider using that, or another "older" verb, instead.

There are some circumstances in which the use of the word indicate is indicated. But not, generally, on my factory floor.

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1 My efforts (driven by the $10-a-day pay differential) to be transferred to the morning paper, the Oklahoman, were rebuffed by management on the grounds that it would have required me to work (and walk to the publishing company's parking lot) at night. In the dark. As a consequence of this enlightened policy, there were no women on the Oklahoman copydesk.

2 This footnote, however, is necessary: The Oklahoma City Times went the way of all afternoon papers, and was last printed in 1984. My favorite country-western song (the list of candidates for that honor is extremely short) remains "Oklahoma City Times," written by Paul Hampton and recorded, most famously (?), by Eddie Arnold. It contains these lyrics:

I want the world to remember me by deed if not by name.

Who knows if I'll own a mansion or just a cabin in the pines.

But I want to be more than just two lines in the Oklahoma City Times.

3 Semantics concerns the meaning of words, phrases, sentences, and larger chunks of discourse. Pragmatics concerns the same words and meaning but places an emphasis on social context.