

The Scrivener: Modern Legal Writing



A Thousand Probabilities¹

by K.K. DuVivier

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The July *Scrivener* column² addressed the use of intensifiers, words such as “very” and “really” that are used to amplify a concept. This month’s column addresses words at the other end of the spectrum—qualifiers, such as “probably” and “possibly,” that are used to limit a point.

While intensifiers may give our writing a strident tone, qualifiers will give it an air of uncertainty. By succumbing to the temptation of trying to protect ourselves with the addition of a “probably” or a “possibly,” we foster the reputation of attorneys as people who never give a straight answer.

Qualifiers have their place; attorneys often are asked to make predictions and to answer questions that cannot be answered, without noting some exceptions. However, some of the uncertainty may be remedied simply by deleting the wishy-washy phrasing.

Qualified language: The court probably will find that the estoppel defense protects our client.

Unqualified language: The estoppel defense should protect our client.

The unqualified version is stronger and more accurate for four reasons. First, it eliminates extra words so readers can more quickly distill its meaning. Second, removing the introductory phrasing better focuses the sentence. In the qualified version, the subject of the sentence is “court” and the verb is “will find.” Exactly what the court will find—the key point being communicated by the sentence—has been relegated here to a subordinate “that” clause. In contrast, the unqualified version places the key information in the key grammatical positions in the sentence: *The estoppel defense* [subject] *should protect* [verb] *our client* [complement].

Third, reference to “the court” is extraneous. Most legal readers will understand from the context that certain issues are before a court. A generic reference to “the court” will not tell them specifically which court is referenced. That information will have to be deduced from a citation or other references in the memorandum or brief.

Fourth, the unqualified version is more accurate. Courts and juries defy prediction. Although we can address why a certain case would lead to a certain outcome, we cannot accurately predict whether the court will agree with our argument and will rule as we have guessed. Because it is risky business to state that we know how a court will rule, we attempt to protect ourselves with the addition of a “probably” or “possibly.” The unqualified alternate above still addresses

this uncertainty. The conditional “should protect” is substituted for the present tense “protects” in the qualified version. Yet the unqualified version is more honest; it does not attempt to impose a qualified certainty on something as unpredictable as a court’s holding.

As an alternate to adding “probably” to a risky prediction, we can also narrow our sentences to components of the problem that can be more accurately predicted. Note how the following eliminates the qualifier by narrowing the sentence’s focus away from a global conclusion:

Global Conclusion: Ms. Johnson probably won’t be found liable.

More Precise Conclusion on a Sub-issue: Under the Shaw reasoning, estoppel is a strong defense against Ms. Johnson’s liability.

Finally, while qualifiers may be added in an effort to assure complete accuracy, the added uncertainty may have a downside. For example, an Illinois appellate court recently took a lawyer’s careful statement in a brief that money was “probably mislaid” as evidence demonstrating that the facts were ambiguous.³ The result was that the client claiming the money was mislaid lost the case; in situations where the facts are ambiguous, the benefit of doubt is given to the finder of the property rather than the property owner as caretaker of mislaid property.⁴

Both qualifiers and intensifiers shift the balance of a sentence away from the nouns and verbs. Instead, let the key components of the sentence—the nouns and verbs—be the laboring oars. The adjectives and adverbs cannot bear the full weight of meaning; therefore, use them only sparingly.

NOTES

1. “A thousand probabilities do not make one truth.” English proverb.

2. DuVivier, “The Lady Doth Protest Too Much, Methinks,” 23 *The Colorado Lawyer* 1511 (July 1994).

3. *Hendle v. Stevens*, 586 N.E.2d 826, 833 (Ill. Ct.App. 1992).

4. *Id.*

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catchy sound bites to distort what it will accomplish. The problems it creates are complicated. We owe it to our communities forcefully to oppose this amendment.

NOTES

1. The Colorado Bar Association Board of Governors discussed Amendment 12 at the April and July Board Meetings and voted to oppose Amendment 12. I appointed an Amendment 12 Task Force to analyze Amendment 12. Much of the research for this article comes from that Task Force [see also, Nichol, "Why Lawyers (and

Everyone Else) Should Oppose Amendment 12," 23 *The Colorado Lawyer* 2083 (Sept. 1994)]. I drew heavily from research provided by Mary Stewart, Holme, Roberts & Owen, Natalie Hanlon-Lei and Faegre & Benson. Anyone interested in participating on the Task Force should contact Michael Valdez, the CBA's legislative lobbyist, at 860-1115.

2. See the entire text of Amendment 12 in Valdez, "Amendment 12: Vote Will Be on November 8," 23 *The Colorado Lawyer* 823 (April 1994).



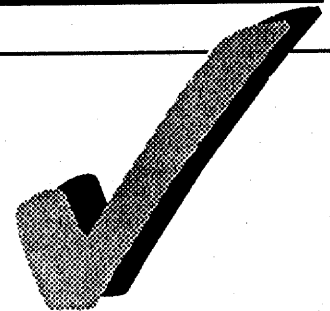
VACANCY NOTICE ABA House of Delegates Representatives

The CBA has a vacancy in its delegation to the American Bar Association ("ABA") House of Delegates. The delegate must be less than thirty-five years of age as of August 11, 1994. The term of appointment is two years, beginning in August 1994. Subsequent terms (two maximum) are for two-year periods. The delegate must be under age thirty-seven for the duration of each of the two-year terms. Duties include:

- attendance at ABA Annual Meeting in August (two-day meeting);
- attendance at ABA Mid-Year Meeting in February (two-day meeting); and
- attendance at the CBA Board of Governors meetings (January, April, July, September).

Expenses for travel and a *per diem* allowance are paid by the CBA for the ABA meetings; expenses are not reimbursed for the Board of Governors meetings. Submit resume and a brief letter expressing interest by October 1 to: ABA Delegate, Colorado Bar Association, c/o Charles C. Turner, 1900 Grant St., #950, Denver, CO 80203.

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