

The Scrivener: Modern Legal Writing



Letters from Readers



by K.K. DuVivier

This month's column features remarks from readers concerning previous columns. In response to a request from Judge Warren O. Martin to find a gender neutral term to replace "foreman or forewoman,"¹ Judge Adele K. Anderson of the Tenth Judicial District wrote:

The challenge to come up with an alternative for "foreman or forewoman" of the jury has engaged me. I also have wished for a better term in fleeting moments while reading or preparing jury instructions. . . . How about a totally new term? Borrow from the business world. Head clerk, head teller, head nurse, "head juror"? Or how about "lead juror"? I just this minute thought of these. Want to run them up the flag pole to see if anyone salutes?

Gerald Harrison of Golden also tackled the jury foreman issue by proposing "jury facilitator" with the following explanation:

I am guessing "foreman" probably arose as a hierarchical description used under the English Common Law prior to 1607. The U.S. corporate and academic worlds have used non-hierarchical teams with facilitators for many years. The American jury has been, and should be, the quintessential team aided by a facilitator much more than a gaggle of people supervised by one person. Facilitator would not only solve the gender objection but would more accurately remind jurors of the roles our judicial system properly expects. In this sense, "foreman" or "forewoman" is actually misleading.

With respect to the choice of gender-neutral terms, Rosalie Maggio wrote to say that her book *The Bias-Free Word Finder* is a good reference source that lists all the words and phrases in the language that might be considered biased, along with suggested alternatives.

Milam Randolph Pharo of Pharo & Penkowsky in Denver discovered a problem with one of the metaphors used as an illustration in the last *Scrivener* column:²

I noticed that you had put "the whole nine yards" under sport metaphors. It is my understanding that this phrase

actually refers to the amount of concrete carried by a standard size cement truck with the rotating container so that if you use the metaphor "the whole nine yards" it means that you are purchasing an entire load of concrete or getting all that someone has got to give in the particular context of the statement. The nine yards refers to nine cubic yards of material.

Of course, I may learn that my understanding of what that phrase means is incorrect, but in either event, it does prove the point you were trying to make regarding the use of metaphors [that if the reader doesn't understand the metaphor, its use will obscure, rather than clarify your point].

Mr. Pharo is correct. The expression "the whole nine yards" arose among construction workers approximately thirty years ago.³

On the topic of universal metaphors, some of my students have used *Sesame Street's* song "One of these things is not like the other" as a metaphor to explain a position. Although a *Sesame Street* metaphor would rarely be appropriate in a formal legal setting, it is safe to say that exposure to certain television shows is a nearly universal experience for younger Americans in our society.

Finally, Terry John Miller of Denver took issue with the use of President Clinton's inaugural address as an example of *legal speaking or writing*. I concede. "The tail wagging the dog," a vivid universal metaphor used by the U.S. Supreme Court,⁴ would have been a more representative example of metaphor in traditional legal writing.

NOTES

1. DuVivier, "Gender Neutral II," 21 *The Colorado Lawyer* 2373 (Nov. 1992).

2. DuVivier, "Misguided Metaphors," 22 *The Colorado Lawyer* 507 (March 1993).

3. Hendrickson, *Facts on File Encyclopedia of Word and Phrase Origins* (New York, N.Y.: Facts on File, 1987). Michael J. Mirabella, of Norman & Mirabella, P.C., also sent me a kind letter alerting me of this error.

4. *United States v. Internat'l Boxing Club of New York, Inc.*, 348 U.S. 236, 251 (1955).

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through *The Scrivener* column. Send your questions to: K.K. DuVivier, University of Colorado School of Law, Campus Box 401, Boulder, CO 80309-0401.

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