

# The Mismatch

By Mark Cooney

**T**his is Herb Haymaker ringside, ladies and gentlemen, and this oughta be a whale of a bout! In one corner, we have the steady, reliable *because*. And in the other corner, we have the intense, flamboyant *clearly*. I'm joined this evening by renowned legal-writing analyst M. Dash Colon. Dash, that's quite an entourage in *clearly*'s corner.

Yes, and *clearly* looks confident, even a bit cocky. Its longtime trainer and manager is *obviously*, and I think *obviously*'s personality has rubbed off on *clearly*. *Clearly* is a chip off the ol' block.

How 'bout some thoughts on tonight's bout, Dash. Give us the tale of the tape. What's in store for the crowd?

Well, Herb, I don't think it's going to be much of a contest, to be honest with you.

But these are two words that routinely appear in legal briefs, Dash—two litigator standbys. This should be a memorable battle of the Titans!

With all due respect, Herb, I think we've got a mismatch on our hands. *Because* is a true heavyweight, but *clearly* is a lightweight.

Why does *because* pack such a wallop, Dash?

Well, Herb, when a legal writer uses the word *because*, it almost guarantees that he or she is giving a concrete reason for a conclusion. The writer who uses *because* is,

by definition, explaining why. And that's a characteristic of the best legal writing. Writing that doesn't explain why—that leaves readers to fill the analytical gaps—isn't worth much in the legal profession.

What else, Dash?

*Because* is persuasive without drawing attention to itself. Social psychologists have noted the word's power to influence, and this is true even when no real reason or new information accompanies it; the word itself seems to trigger a belief that a legitimate reason exists.<sup>1</sup>

But why are you so down on *clearly*, Dash? It's got pizzazz! Why would that word be in the lightweight class?

Well, Herb, *clearly* has three weaknesses.

First, as a fellow expert has said, it "is so overused in legal writing that one has to wonder if it has any meaning left."<sup>2</sup> It has become visual white noise to legal professionals. Or as another expert put it, it is "[u]seless verbiage" that "drift[s] along in legal writing like so much deadwood in a stream."<sup>3</sup> It doesn't have the power that legal writers think it has.

Second, *clearly* often does the opposite of what legal writers intend. Rather than reassuring readers that the writer's position is ironclad, adverbs like *clearly* "have been reduced to red flags that actually signal a need for closer scrutiny."<sup>4</sup> In other words, *clearly* invites skepticism. Consider this ad-

vice: "[W]henver you read the word *clearly* in a text, look for a hole in the writer's logic. In most situations, *clearly* will remind you of the orator who pounds on the podium in the hope that his ardor will obscure his argument's weakness."<sup>5</sup> So the word undermines the writer's argument rather than bolstering it, "rendering uncertain or toothless the statements in which [it] appear[s]."<sup>6</sup>

Third, *clearly* lulls legal writers into a false sense that they've given substantive, persuasive reasons for a legal conclusion. Some lawyers rely on the word *clearly* as a shorthand substitute for the real work at hand: explaining why the law applies to the facts in a way that supports the lawyer's position. *Clearly* gives readers empty calories when they crave analytical nutrition.

Well, Dash, you certainly seem pessimistic about *clearly*'s chances. But talk never won a boxing match, so how 'bout we let the combatants decide this? [Ding!] And that's the bell for Round 1! Hold on to your hats, ladies and gentlemen. Here come the words, out of their corners:

- *Clearly, the customer list is not a trade secret.*
- *The customer list is not a trade secret because the information on the list is readily available to the public through trade publications and phone directories.*

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Rather than reassuring readers that the writer's position is ironclad, ... *clearly* invites skepticism.... Many take *because* for granted, but it's a legal writer's best friend.

Well, Dash, *because* landed a pretty good jab in that round. Let's see if *clearly* can shake it off and rally back. [Ding!] Here we go—Round 2:

- *The herniated disc has clearly affected the plaintiff's "general ability to lead his...normal life," as required by the statutory definition.*
- *The herniated disc has affected the plaintiff's "general ability to lead his...normal life" because it has prevented him from bending forward and lifting, which are both necessary for his work as a manual laborer.*

I think *because* took that round, too, Dash. *Clearly* just can't seem to hang with *because*.

I agree, Herb. *Clearly* looks a bit limp; its punches aren't landing. *Because* isn't flashy, but it's effective.

[Ding!] Okay, on to Round 3:

- *Based on the Clean Water Act's language and the obvious intent behind the Act, the sandy*

*sediment clearly satisfies the definition of "pollutant."*

- *The sandy sediment is a pollutant because the Clean Water Act's definition of "pollutant" expressly includes "sand," and courts have interpreted "pollutant" to include sandy soil and similar natural substances.*

This is getting ugly, Herb. *Clearly* is stunned and looks defenseless. Somebody's gotta stop this thing.

Yes, Dash, I think the ref is stepping in and...yes, yes, he's waving his hand. It's all over, ladies and gentlemen. *Because* has licked *clearly*—no doubt about it.

Another solid, workmanlike performance by *because*, Herb. Many take this word for granted, but it's a legal writer's best friend.

Indeed, Dash. Indeed. Well, ladies and gentlemen, we hope you've enjoyed tonight's main event. And we hope you'll tune in next week to watch *if* take on *in the event that* in a steel-cage wrestling match. Expect some

no-holds-barred action in that one! So long from ringside. ■



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## FOOTNOTES

1. See, e.g., Cialdini, *Influence: The Psychology of Persuasion* (Collins, 2007), p 4.
2. Enquist & Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* (2d ed), p 133.
3. Garner, *The Redbook: A Manual on Legal Style* (2d ed), p 192.
4. Carnathan & Kemble, *Hints on writing law court briefs from some people who read them*, 9 Me B.J. 318, 320 (1994).
5. Ray & Ramsfield, *Legal Writing: Getting It Right and Getting It Written* (4th ed), p 77.
6. Garner, *A Dictionary of Modern Legal Usage* (2d ed), p 926.