The Mismatch

By Mark Cooney

This 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 joining 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. Well, Herb, it almost guarantees that he 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." It has become visual white noise to legal professionals. Or as another expert put it, it is "[u]se less verbiage" that "drift[s] along in legal writing like so much deadwood in a stream." 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." In other words, clearly invites skepticism. Consider this advice: "[W]hen 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." So the word undermines the writer's argument rather than bolstering it, "rendering uncertain or toothless the statements in which [it] appear[s]."

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.

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
4. Carnathan & Kemble, Hints on writing law court briefs from some people who read them, 9 Me BJ 318, 320 [1994].