



Back to Basics: Why Word Choice, Grammar and Punctuation Still Matter

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As lawyers, our existence is governed by rules: court rules, procedural rules, evidentiary rules and Bluebook rules, just to name a few. We are not, however, immune to the effects of media influences, such as stories edited to video clips for shortened attention spans or the impact of special effects on content. Can an emoji text be an out-of-court statement offered for the truth? Are commas and periods superfluous? Have character limitations on social media platforms, Urban Dictionary and the evolution of slang terms and phrases changed the rules?

Between you and me—*not* “you and I”—rules are rules, and they need to be followed. As staid and unfashionable as it might sound, proper grammar, punctuation and word choice still count because they provide structure and clarity. Lawyers’ tools are words, in both writing and oral advocacy. Our existence as litigators depends on our ability to persuade the trier of fact, whether that means one judge or six jurors, and our ability to persuade depends on our ability to communicate effectively.

Even among litigators, patent lawyers in particular are notorious for arguing about word choice and the meaning of words, since claim construction (the process by which courts interpret the meaning and scope of patent claims to define the invention to which the patent owner is granted the right to exclude) can make or break a case.

In 1886, the U.S. Supreme Court held, “The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms. This has been so often expressed in the opinions of this court that it is unnecessary to pursue the subject further.” *White v. Dunbar*, 119 U.S. 47, 52 (1886) (holding that claimed method of preserving shrimp in a can was limited to using a lining made of textile fabric, as opposed to any kind of lining inserted between the can and seafood contents).

In 2024, the U.S. Court of Appeals for the Federal Circuit reiterated, “It is a bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled to the right to exclude.... Attending this principle, a claim construction analysis must begin and remain centered on the claim language itself...” *Innova/Pure Water v. Safari Water Filtration*, 381 F.3d 1111, 1115-16 (Fed. Cir. 2024) (“operatively connected” reflects a functional relationship, meaning that the claimed components must be connected in a manner capable of performing the function).

Patent lawyers have argued about the meaning of “substantially.” See *Playtex Products v. Proctor & Gamble*, 400 F.3d 901, 907-09 (Fed. Cir. 2005) (“The term ‘substantial’ is a meaningful modifier implying ‘approximate,’ rather than ‘perfect.’... Thus, we...conclude that ‘substantially flattened surfaces’ means surfaces, including flat surfaces, materially flatter than the cylindrical front portion”).

We have also argued about the meaning of “a.” See *Salazar v. AT&T Mobility*, 64 F.4th 1311, 1315-17 (Fed. Cir. 2023) (“At issue in this appeal is the proper construction of the articles ‘a’ and ‘said.’...[T]he claim language here requires a singular element...to be capable of performing all of the recited functionality...For a dog owner to have ‘a dog that rolls over and



fetches sticks,' it does not suffice that he have two dogs, each able to perform just one of the tasks").

These may be extreme examples, but they demonstrate that the specific words that are used matter.

This concept is not limited to patent law. To illustrate, "simple" (plain, basic, straightforward, uncomplicated) is different from "simplistic" (omitting or ignoring complicating factors or details; dumbed down), even though "simplicity" may refer to the state of being either simple or simplistic.

At the other end of the spectrum, "complex" and "complicated" also have varied attributes and are not interchangeable. In this last example, however, which of these adjectives has a more positive or flattering connotation depends on the subject and context. The problem may be complex, and the answer may be complicated.

"Multiple" and "many" are likewise distinct. "Multiple" may encompass many parts or elements in a single thing or event, and "many" simply connotes a large number.

Our job as trial lawyers is to simplify, without trivializing multiple issues in a case or condescending to many members of the audience, in order to guide the decision makers to the correct conclusion.

Even a comma can affect the outcome of a case. In *Ultimax Cement Manufacturing v. CTS Cement Manufacturing*, 587 F.3d 1339, 1351 (Fed. Cir. 2009), the district court had found that the lack of a comma between "f" and "cl" in the claim to indicate that both fluoride and chlorine needed to be present in the claimed compound, rendering the claim indefinite. Fortunately for the patentee, the Federal Circuit ultimately reversed, reasoning that a person of ordinary skill in the art would know that there should be a comma, but the mere absence of a comma could have cost the patent owner the rights to this invention.

The words we select are like salt or spice. Used appropriately, they can explain, highlight or accentuate the main points, or they can confuse, bury or muddy the substance. Punctuation and capitalization provide framing and emphasis, akin to how plating a dish can make it more appealing and direct a diner how to consume the dish. If everything is piled together, it is difficult to know where to focus. These are meaningful differences, whether you and I—not "me"—are limited to 2,200 characters for an Instagram caption or 14,000 words for a petition to the U.S. Patent and Trial Appeal Board seeking inter partes review.

To summarize, "gas, food, lodging" indicates the availability of three things at a rest stop, not the presence of lodging for gas food. Capitalization can make a big difference when I am helping my (never "I's," even though this made-up possessive pronoun seems to be having a moment, along with other improper uses of "I") Uncle Chase off a horse.

Finally, an emoji text may be a written assertion under Fed. R. Evid. 801(a) and possibly qualify as a hearsay exception under Fed. R. Evid. 803(3), assuming it would be at all relevant under Fed. R. Evid. 401.

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