

The Misleading Ellipsis

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The Ninth Circuit recently questioned several appellate lawyers about misleading statements in their briefs, including quotes from cases with ellipses, thereby omitting the very language that showed the quote and case were inapplicable to the case at issue. Reading about the court's order brought several thoughts to mind, some practical and others aspirational.

I see from time to time in my own appellate practice briefs setting forth quotes with ellipses or quotes that just end without going on to the following sentence that makes it clear why the quote does not apply in the pending case due to an exception or the like. It often appears that the author simply found a good sound bite through a computer word search and didn't bother to read the entire case.

While not as venal as deliberately omitting a material part of a quote -- which obviously is a bad, and indeed dangerous, practice -- no case or client is worth doing that. Apart from the hit to your credibility with respect to everything else you have said or will say to the court, the court may simply rule against your client without allowing a do-over, as the Ninth Circuit ordered. And, once your credibility has been placed in doubt, you won't gain it back.

As the Ninth Circuit's order also reminds us, unfortunately, you need to read the cases cited by your opponents and check the quotes in their briefs. You may strike gold. Which thought led me to reflect on the senior lawyers in my firm when I was a baby lawyer. They never would have engaged in such misleading tactics, and they made it absolutely clear that no other lawyer in our firm should do so.

So too, at the memorial service for Don Cowan, a wonderful North Carolina trial lawyer who recently died after a tragic stroke in the prime of his life, one of his partners outlined the five professional principles that guided Don's practice:

- the highest ethical standards
- exhaustive preparation that never ceases
- less is more – hyperbole has no place
- act when issues arise and not later
- always keep one's credibility

No one ever thought to check words Don had put in quotation marks. They knew that was a correct quote. All of us should stand back for a few minutes and resolve that the same could be said at a memorial service for us someday.

Authored By



Sylvia H. Walbolt

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