

Appendix VI

MUMBO JUMBO

In-house counsel need to understand and use general business and industry-specific lingo and jargon. For example, in corporate insurance policies what lay people call a “deductible” is a “retention.” M&A lawyers have shortened “Confidentiality Agreement” to “Confi.” In corporate executive relocation programs, the transaction is a “relo.” A relatively new and cute term has been coined by real estate developers to describe how they signal to lenders that they intend to stop making mortgage payments; they send the lenders the keys to the property — “jingle mail.”

Some euphemisms soften reality, using a neutral or friendly name to make something more palatable than it would be by its “unvarnished” name. Would raw fish, raw beef or calf pancreas sell nearly as well as sushi, carpaccio and sweetbreads?

There are, however, euphemisms that dull the senses and mislead their users. Fuzzy language can reflect fuzzy thinking (or no thinking at all). Some familiar examples of the euphemisms that can lead to trouble are: resume “embellishment,” “dissemblance,” “pre-texting,” (recall HP’s earlier imbroglia), “padding” time sheets and expense accounts and “spinning” (as in those “hot” IPO allocations to CEO’s).

Abbreviations and pet names are common, useful and usually harmless.

There are, however, euphemisms that dull the senses and mislead their users. Fuzzy language can reflect fuzzy thinking (maybe no thinking). Here are just a few examples.

Embellishment

Resume “embellishment” is rampant. The media are full of stories about executives who lost their jobs for falsifying their resumes by claiming unearned degrees, and senior in-house counsel and law firm partners who practiced for years without a license. Would this practice be so prevalent if it were called “misleading prospective employers to get a job?”

Although rules of professional conduct generally prohibit lawyer dishonesty, fraud, deceit and misrepresentation, some codes permit “dissemblance” if it is in connection with a legal investigation and the lawyer believes in good faith that there is a reasonable possibility that unlawful activity has taken place, is taking place or will take, place in the foreseeable future. The ends, it seems, justify the means.

Another dangerous euphemism is “pretexting.” Just ask the former Chairwoman of the Board, General Counsel and ethics experts involved in the Hewlett Packard investigation of board leaks and the ensuing investigation. If they had called their

private investigators' tactics "impersonation to obtain confidential information," they might have thought twice and not permitted the subterfuge.

One common complaint about law firm billing is the "padding" of timesheets and expense accounts. Some senior partners are forced to leave their firms for overbilling time or overstating expenses charged to clients. If these practices were called "intentionally overcharging the client," they might be less common.

Perquisites

Employees, particularly executives, frequently receive "perks" from their employers. Those of significant value may be required to be disclosed to senior officers, the board, and in public companies, to shareholders. Authorized and disclosed "perks" directly from the employer are often reasonable and beneficial. There are, however, "perks" that raise serious ethical and legal issues.

A corporate culture full of executive "perks," e.g., frequent use of the company plane for personal travel, tax and financial services at company expense, and lavish expense accounts, may lead executives and other employees to help themselves to employer property. Shareholders revolt when the amounts involved, individually and in the aggregate, become excessive, particularly in light of the company's financial performance. If these "perks" were called "benefits paid for by the company at shareholders' expense," they might less often become extravagant.

"Perks" from suppliers or customers are more dangerous. Suppliers often offer employees with purchasing authority gifts, travel and entertainment in not so subtle efforts to promote sales of their products. The amounts involved run from *de minimis* to ridiculous. Participants on both sides may be lulled into unethical or illegal conduct. As the amounts involved and their effects increase, the "gratuities" or "facilitating payments," become "bribes" or "kickbacks." No matter what they are called, they are intended to influence decisions in favor of the offeror, usually at the expense of the interests of the recipient's employer.

Backdating

Stock options are an important part of compensation for many employees at many public companies. Media reports revealed the legal problems that many companies and their executives, including in-house counsel, encountered with "backdating" option grant dates in order to decrease the exercise prices of options. In many cases, there were rational business reasons for using the apparently more valuable options to hire and retain employees. Some argued that the "in-the-money options were a relatively inexpensive way to compensate employees. In most cases, "backdating" led to securities law violations, inaccurate accounting and improper tax treatment. The ensuing investigations and litigation were very expensive for those involved; some lost their jobs, and some faced criminal charges. If the "backdating" had been called "granting under market options," participants might have been alerted to the possible legal and ethical issues involved.

Subprime Mortgages

Much has been written about the contribution of “subprime mortgages” to the recent recession. Although there are plenty of parties, e.g., mortgage brokers, appraisers, lenders, rating agencies, federal government and the purchasers and sellers of the mortgages, to blame, the label itself may have had a role. If the loans had been referred to as “loans that will be unlikely to be repaid if interest rates increase, housing values drop precipitously, or borrowers’ circumstances decline significantly,” some people may not have been burned so badly.

Window Dressing

Although this term was used to describe purchases and sales of stocks by portfolio managers to “pretty up” their portfolios before quarter and year-end, its more recent application is to the end of quarter reduction of short-term debt by financial institutions. The institutions claim that the trading in repurchase agreements (“repos”) just before and shortly after quarter-end reflected market conditions and the needs of their clients. Perhaps, it is just a coincidence that the trading consistently decreased significantly short-term debt just prior to the end of the quarter, and trades shortly after quarter-end significantly increased the level of short-term debt at the beginning of the next quarter. Even if the practices were not illegal, the effect was to mislead investors about the short-term risks undertaken by the financial institutions that engaged in the “window dressing.” The practice might not have become so prevalent and attracted SEC attention if it had been called “reducing short-term debt temporarily to avoid its reflection on the balance sheet.”

Green Washing

Companies are responding to activists and consumer demand by claiming that their products and services are “eco-friendly” in many different ways. Some are labeled “green,” “natural,” “sustainable” or “energy-saving.” Unfortunately, many claims are misleading or false. Some claims lack evidence; others are vague or fail to disclose trade-offs. Still others use narrow comparisons or falsely imply third-party endorsements. Even claims that are literally true may be misleading if they tout the lack of ingredients that are banned by law. These promotions might be less common if people called them “vague or incomplete statements about contents and processes.”

Quote Stuffing

According to media reports, some traders were placing large orders to buy or sell stocks and canceling them a fraction of a second later. It is unclear what, if any, legitimate purpose there is for the practice. Regulators suspect that high-frequency traders are attempting to profit from tiny discrepancies in stock prices created by the slow-down in electronic trading caused by the orders, or to distort prices and liquidity in order to buy or sell at artificial prices. If the huge orders that are intended to be canceled almost immediately were called “intentionally false orders designed to mislead other traders,” maybe traders would think twice before using them.

Robo-Signing

As the volume of mortgage foreclosures increased dramatically, so did the need to file affidavits in court reflecting the review of the loan files in order for the foreclosures to proceed. According to media reports, some employees at some companies were each able to file thousands of affidavits each month simply by omitting the review of the loan files. Perhaps, these clerical employees decided to do so on their own, but one suspects that higher level employees approved or knew of the practice. If the high-volume processing were called “falsifying under oath statements that will be filed in court,” it might have been “stopped in its tracks.”

Conclusion

Euphemisms and jargon may lull lawyers into permitting their clients to engage in conduct that they would not undertake absent the obfuscation. If lawyers describe conduct accurately, they and their clients may be less likely to slip over the proverbial “lines” between legal and illegal, and ethical and unethical, conduct.