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MAXIM-IZING RESULTS: HOW TO USE MAXIMS OF JURISPRUDENCE TO PERSUADE

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Judges often cringe when advocates use Latin phrases. The reason is simple: they usually don't remember exactly what the phrases mean.

The most common Latin phrases that lawyers learn in law school are the "Maxims of Jurisprudence." Advocates shouldn't shy away from invoking these legal maxims in court. But, they should learn how to say them in plain English so they can deliver succinct legal and equitable concepts that courts will remember. When advocates paraphrase maxims in English, the court is better able to understand the principles behind the maxims, making them more persuasive and effective. Judges may not know what the Latin phrases mean, but they will most likely know the fundamental fairness principles behind the phrases. You should know them too.

Speaking in Latin doesn't necessarily make you sound smart.

Do you know what this phrase means? *Si hoc legere scis nimium eruditionis habes.* It means: if you can read this you're overeducated.

In the 17th century, Sir Francis Bacon compiled a list of the known legal maxims in Latin "because he regarded that language 'as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest authority and majesty to be vouched and alleged in argument.'" (Smith, *The Use of Maxims in Jurisprudence* (1895) 9 Harv. L.Rev. 13, 25.) Two and a half centuries later, Harvard law professor Jeremiah Smith recommended that lawyers avoid stating legal maxims in Latin, observing that "there is the obvious disadvantage that maxims 'put in Latin' will be more liable to be misunderstood by the average lawyer than by a man of Bacon's scholarship." (*Id.* at p. 26.) Professor Smith also observed that clothing legal maxims "in the words of a dead language has had, in some instances, the effect of preventing proper inquiry into their meaning." (*Id.* at p. 25.)

Some lawyers still use Latin phrases to sound smart or because they don't know the English translations. But if the reader or listener, such as a judge, doesn't remember the meaning of the Latin phrases, then they can be received as gibberish, making them less effective.

Remember these phrases: *Ejusdem generis*, *expressio unius est exclusio alterius*, and *noscitur a sociis*? I'd be willing to wager that you kind of, sort of, remember learning about these maxims in law school, and you vaguely remember that they have something to do with interpreting statutes or contracts. But if someone put you on the spot without having Black's Law Dictionary by your side, you probably wouldn't be able to define exactly what they mean (unless you took Latin in high school).

"[*N*]*oscitur a sociis*" means that a word "'is known by its associates.'" (*People v. Prunty* (2015) 62 Cal.4th 59, 73.) Thus, if a word's meaning in a statute or contract is unclear, its definition should be determined by the words immediately surrounding it. When the time comes to argue this interpretive principle to the Court of Appeal, one of my partners doesn't state the maxim in Latin. Rather, he will refer to "that Latin phrase that I can't pronounce about a word being known by its associates." Usually that leads to a trio of nodding judicial heads, as they understand the legal principle even though they may not remember how to pronounce the phrase in Latin.

Paraphrasing maxims in English is always more effective than trying to state them in Latin. After all, a maxim is simply a

traditional legal or equitable principle "that has been frozen into a concise expression." (Black's Law Dict. (11th ed. 2019).) So, the key is to state the legal or equitable concept behind the maxim simply, clearly, and concisely so the recipient understands its meaning and why it favors your side.

Use the English version of maxims to argue what's fair and equitable.

Although many maxims are regularly stated in Latin, many are not. Indeed, several maxims are codified in English in the California Civil Code. (Civ. Code, §§ 3510–3548.) These 38 maxims, most of which were codified in 1872, "are a pithy set of principles / proverbs / rules of construction for interpreting and applying California law." (*Macias / Hall / Bisto / Avina v. Chrysler* (C.D.Cal., Aug. 13, 2020, No. ED CV 17-511 MRW) 2020 WL 4723976, at p. *1 [nonpub. opn.].) Generally, these maxims cannot be used as primary authority, but they can be wielded effectively in the right context to inject some argument into your case about what the "fair" result should be for your client.

Judges tend to do what they think is fair. In a sense, equity is involved in every case, even those not involving equitable rights. And, "maxims of jurisprudence serve as guideposts of equity and fairness." (*Tintocalis v. Tintocalis* (1993) 20 Cal. App.4th 1590, 1595.) For instance, one well-known maxim says that "[i]nterpretation must be reasonable." (Civ. Code, § 3542.) So even in a case involving contract or statutory interpretation that doesn't *directly* implicate equity, reasonableness (i.e., "fairness") is always at play.

The primary reason that you should use maxims to bolster your legal arguments is that judges generally want to decide a case based on what's fair and equitable. The maxims of jurisprudence give them a legal hook to do what's right even when a statute or contract is confusing or conflicting. Above all, counsel should remember that these maxims (even the best of them) are only maxims; "they are neither definitions nor treatises"; and "in many instances, they are merely guide-posts pointing to the right road, but not the road itself." (Smith, *supra*, 9 Harv. L.Rev. at p. 26.) Thus, legal maxims should be invoked when they demonstrate the equitable policy reason behind the legal argument that you are making to the court.

How to use maxims to persuade courts.

Don't hesitate to take advantage of maxims when equity is on your side, and you want to ask the court to do what's fair. For instance:

When you want to argue that a law has outlived its usefulness, invoke this maxim: "When the reason of a rule ceases, so should the rule itself" (*Cessante ratione legis, cessat lex ipsa*). (Civ. Code, § 3510.)

> * "The first maxim of California jurisprudence is that 'When the reason for a rule ceases, so should the rule itself.' (Civ. Code, § 3510.) Insurance Code section 11580.2, subdivision (i) has long outlived its usefulness and should be repealed." (*Kortmeyer v. California Ins. Guarantee Assn.* (1992) 9 Cal.App.4th 1285, 1297 (conc. opn. of Johnson, J.).)

When you want to argue that your client has an absolute right to take legal action through the court system: "For every wrong there is a remedy" (*Ubi jus ibi remedium*). (Civ. Code, § 3523.)

> * "Equitable relief is by its nature flexible, and the maxim allowing a remedy for every wrong (Civ. Code, § 3523) has been invoked to justify the invention of new methods of relief for new types of wrongs." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 390.)

When you're trying to avoid a procedural mistake or prevent a case from being decided on a technicality, or if you're asking the court to pierce the corporate veil under the alter ago doctrine: "The law respects form less than substance." (Civ. Code, § 3528.) This is also known as the substance-over-form principle. (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1356.)

> * "First, it is a codified maxim of jurisprudence that '[t]he law respects form less than substance.' (Civ. Code, § 3528.) Thus, '[o]n appeal, the substance and effect of the order controls, not its label.'" (*Salmon v. Salmon* (2022) 85 Cal.App.5th 1047, 1055.)

> * "'The alter ego doctrine is an equitable principle that elevates substance over form in order to prevent an inequitable result arising from unjustifiably observing a corporation's separate existence.'" (*Cruz v. Fusion Buffet, Inc.* (2020) 57 Cal.App.5th 221, 243.)

When you want to avoid the effect of extraneous terms in a statute or contract so the court focuses on the writing's basic principles: "Superfluity does not vitiate" (*Utile per inutile non vitiatur*). (Civ. Code, § 3537.)

> * "This maxim directs that the presence of arguably

> unnecessary terms in a statute should not, by itself, produce an interpretation that will defeat the Legislature's central aim in enacting the law." (*General Development Co., L.P. v. City of Santa Maria* (2012) 202 Cal.App.4th 1391, 1395.)

When you want to blame the other side for doing something wrong (unclean hands): "No one can take advantage of his own wrong" (*Nullus commodum capere potest de injuria sua propria*). (Civ. Code, § 3517.)

> * "There can be no doubt that a terrible miscarriage of justice occurred in this case. If ever a case demanded application of the legal maxim 'No one can take advantage of his own wrong,' this would be the case. (Civ. Code, § 3517.) Simply put, Roché misused our state court system to seize his neighbor's land." (*Lang v. Roche* (2011) 201 Cal.App.4th 254, 266.)

When the other side previously agreed—or failed to object—to what they are now complaining about (waiver/estoppel): "Acquiescence in error takes away the right of objecting to it" (*Consensus tollit errorem*). (Civ. Code, § 3516.)

> * "A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221–222, citing, e.g., Civ. Code, § 3516.)

When you want the court to excuse your client from having to perform a statutory or contractual duty because performance would be impossible: "The law never requires impossibilities" (*Lex non cogit ad impossibilia*). (Civ. Code, § 3531.)

> * "We note that it would often be impossible for a party to prove he was prejudiced by not learning what he hasn't learned and doesn't know. The law requires neither the impossible nor idle acts which attempt it. (Civ. Code, §§ 3531, 3532.)" (*Puritan Ins. Co. v. Superior Court* (1985) 171 Cal.App.3d 877, 886, fn. 9.)

When you want to say "sh*t happens" (force majeure/act of God): Remind the court that "[n]o man is responsible for that which no man can control" (*Actus Dei nemini facit injuriam*). (Civ. Code, § 3526.)

> * "Acts of God which are within the rule of law that 'no man is responsible for that which no man can control' (Civ. Code, [§] 3526) are those which operate independently of human agency. [Citations.] The jury was required to determine as a fact whether the injury was caused by an act of God, and its conclusion, if reasonably supported by evidence, is conclusive on appeal." (*Conlin v. Coyne* (1937) 19 Cal.App.2d 78, 87.)

Everyday proverbs, adages, and aphorisms can also be used to help guide your clients during litigation and outside of court.

The Maxims of Jurisprudence aren't the only phrases that encapsulate fundamental fairness principles. Advocates should also consider using other well-known sayings to persuade the court. For instance:

To the person trying to get out of a contract he or she signed: "Wise or not, a deal is a deal." (*United Food and Commercial Workers Union v. Lucky Stores, Inc.* (9th Cir. 1986) 806 F.2d 1385, 1386.)

When you want to remind your clients or cocounsel the importance of making alternative arguments and seeking alternative remedies: "Don't put all your eggs in one basket." (See *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1481 ["Having chosen to 'put all her eggs in one basket,' she cannot come back years later and add others"].)

When you want to persuade one of your clients that he or she should start thinking about settlement: "A bad compromise is better than a good lawsuit." (French proverb.)

An important reminder to hire good people to represent you: "A man is known by the company he keeps." (Greek philosopher, Aesop.)

Never forget to make a record of objections: "Better safe than sorry." (Samuel Lover, *Rory O'More* (1837).)

Remind your clients that objecting to opposing counsel's extension requests and other courtesy requests is bad practice and counterproductive: "Do unto others as you would have them do unto you." (See Luke 6:31; Matthew 7:12 [The Golden Rule].)

Always remember to be nice to your clients, or you won't have any: "Don't bite the hand that feeds you." (Greek poet, Sappho.)

And finally, remember that hiring an appellate attorney to help you during trial can save your client money in the long run:

"[A]n ounce of prevention is worth a pound of cure." (Benjamin Franklin, *On Protection of Towns from Fire*, The Pennsylvania Gazette (Feb. 4, 1735), capitalization omitted.)

In a sense, equity is involved in every case, even those not involving equitable rights. So, don't forget to find the right Maxim of Jurisprudence or equitable principle to help you explain what is fundamentally fair.

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