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Problem Words and Pairs in Legal Writing—Part I

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Problem Words and Pairs in Legal Writing — Part I

Use words precisely. Use precise words. Eliminate improper word usage. And do not take this for granite: Make mincemeat of malapropisms — from the character Mrs. Malaprop in Richard Brinsley Sheridan's *The Rivals* (1775) — confusing words that sound alike. Make mountains of metathesis — transposing words, or sometimes things that just sound like words, like “ax” and “ask,” “irrelevant” and “irrevelant.” Finally, do not wix up your murds, and verse visa.

A lot. “A lot” is a measure of land. Only colloquially does the wordy “a lot of” mean “much” or “many.” “Alot” is incorrect.

Ability, capacity. “Ability” is the power to do something. “Capacity” is the ability to receive or hold something. *A tip:* Avoid both words. “He has the ability to write well” becomes “He can write well” or “He writes well.”

Abstruse, obtuse. “Abstruse” means “hard to understand.” “Obtuse” means “slow to understand.” *Correct:* “The reasoning of an obtuse judge is abstruse.”

Academic, moot. Something “academic” is no longer relevant. Something “moot” is debatable. *Incorrect:* “Now that defendant’s point is resolved against her, all her remaining contentions are moot.” If “moot” meant what most lawyers believe it means, “moot” would have contrary meanings: (1) pertaining to a settled controversy and (2) pertaining to an unsettled controversy. Moot Court is offered by academia, and often sponsored by academicians, but Moot Court covers debatable points, not irrelevant ones.

Accounting. “Accounting” requires judgment. “Bookkeeping” records debits and credits uncritically.

Accused, alleged, claimed, suspected. By definition, someone cannot be an accused or suspected criminal, as in, “Mr. X is an accused murderer.” God bless America: One is not a criminal until conviction. One can only be accused or suspected of murder. One may be accused of committing a crime, but one may not be accused of committing a civil fault. To “allege” is to assert without proof. One alleges in a complaint, therefore, but once proof, no matter how weak, is offered, the proof is no longer an allegation. Crimes and conditions can be “alleged”; people and law cannot be alleged. Wrong: “He is an alleged murderer.” Wrong: “Appellant alleged that the statute provides that . . .” An accusation is already an allegation. Thus, do not write, “Defendant was charged with alleged criminally possessing a sawed-off shotgun.” When you give a reason for or against something, you do not allege; you contend or argue. A “claim” is a demand for or entitlement to relief. To “claim” is to assert a right to something. Except colloquially, to “claim” is not to “allege,” “argue,” “conclude,” “contend,” “declare,” “maintain,” or “state.”

Actually. “Actually” means “in fact.” It no longer means “now.”

Adhesion, cohesion. Different substances are joined by “adhesion.” Similar substances are joined by “cohesion.”

Adjacent, contiguous. “Adjacent” means “neighboring.” “Contiguous” means “touching,” “abutting.”

Admission, admittance, confession. “Admission” is used in the figurative and nonphysical sense. *Correct:* “Joe Shmo was admitted to the bar in 1981.” “Admittance” is used in the physical sense. *Incorrect:* “No Admission. Restricted Area.” (Should be “No Admittance.”) In criminal law, an “admission” is a concession, without acknowledging guilt, that an allegation or factual assertion is true. A “confession” concedes the factual assertion and acknowledges guilt.

Adverse, averse. To be “adverse” is to be opposed. To be “averse” is to be unwilling. *Correct:* “Court attorneys averse to learning how to use computers must learn to tolerate adverse criticism.”

Affect, effect. “Affect” as a verb: to influence; as a noun: a feeling or state. “Effect” as a noun: something resulting from another action; as a verb: to come into being, to cause something to happen. *Correct:* “Mr. X, whose manner is affected, put his theory into effect. His theory had a profound effect. It affected many things.”

Affinity. To have an “affinity” with or between someone or something is to describe a reciprocal relationship. *Incorrect:* “Judge X has an affinity for the law.” (The law cannot have an affinity for Judge X.) “Affinity” is followed by “between” or “with,” not by “for” or “to.” Colloquially, to have an “affinity” for someone means “to like someone.” In this colloquial sense, “affinity” applies to people only. “Aptitude” or “knack” refer to things.

Aggravate, irritate. To “aggravate” is to worsen a condition. Only colloquially does it mean to “irritate” or “annoy.”

Agreeable, compatible. To be “agreeable” is to be easy to get along with or enjoy. “Compatible” shows a relationship between people or things. *Correct:* “The judge and his law clerk are compatible because they are agreeable.”

All ready, already. To be “all ready” is to be prepared. “Already” means “by this,” “a specified time,” or “previously.” William Safire advises not to use a comma in “Enough already.”

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All right or alright? — the former. “Alright” is not an accepted word.

All round, all around. “All round” is well rounded. “All around” is to circle.

All together, altogether. “All together” means “things or people together.” “Altogether” means “entirely, with all included,” or “on the whole, with everything considered.”

Allude, elude, refer. To “allude” is to imply or to refer indirectly. To “elude” is to forget or to avoid detection. To “refer” is to identify indirectly.

Alternate (alternately), alternative (alternatively), option. To “alternate” is to offer or do one after the other. An “alternative” is a choice between two things. For more than two choices, use “option,” “selection,” “possibility.” Note: One cannot use “alternative” if no choice is offered. Thus, a last-minute decision to reschedule an event leads not to an alternative date but to a new, different date.

Although, while. “Although” is a contrast. “While” is a comparative time concept. Consider: “Judge A always rose when the jury entered the courtroom, while Judge B never did.” Does the “while” here mean “at the same time,” “and,” “but,” “whereas,” or “although”?

Ambiguous, ambivalent. Something “ambiguous” is uncertain or unclear. To be “ambivalent” is to have mixed feelings or conflicting desires.

Amend, emend. To “amend” is to change formally. To “emend” is to correct a mistake. Correct: “The Legislature amended the statute to emend the statute’s numbering.”

Amid, among, between. Use “amid” with mass nouns and “among” with plural nouns. Correct: “Amid [not among] a series of authorities, this opinion stands out.” Incorrect: “Amid [should be among] the judge’s three loyal staff members, her law clerk stood out.” Do not use “among” to mean “in,” or “with.” Correct: “In [or with, not among] the judge’s contingent was his confidential secretary.” “Among” refers to more than two people or things.

“Between” (“by-twain”) refers to two. Exceptions: (1) Use “between” if individual elements are closely related to one another. Correct: “An understanding was reached between the six co-defendants.” (2) Use “between” to express the relation of one physical thing to many surrounding things. Correct: “The property I own is between three mountains.” Note: Use an “and” to connect the two objects to which “between” refers. Correct: “Judge X sat in chambers between 8:00 a.m. and [not to or or] 9:00 a.m. every morning writing her opinions.” Recall that the expression is “Between you and me,” not the solecistic, hypercorrection “Between you and I.” The contractual expression “between and among A, B, and C” means “among A, B, and C and between A and B, A and C, and B and C.” If you read between the lines, you will find the following among White’s bric-a-brac: “A lawyer who doesn’t know the difference between ‘among’ and ‘between’ has missed his true calling as a bricklayer Why it is not enough to say simply that the contract is entered ‘by’ the parties is an issue going to the very heart of the law.” D. Robert White, *The Official Lawyer’s Handbook* 186 (1983).

Amount, number. An “amount” refers to a quantity of something that cannot be counted or counted easily: “amount of work,” “amount of sand.” A “number” refers to things that can be counted: “A number of motions.”

Amuse, bemuse. To “amuse” is to entertain. To “bemuse” is to confuse. Correct: “The amusing lawyer bemused the jury.”

Analogous, same, similar. “Analogous” refers to a partial similarity between different things. “Similar,” meaning “general resemblance,” is different from “same.” “Judge X died of a heart attack. His son met a similar [should be the same] fate.”

Antagonist, protagonist. An “antagonist” is an adversary. An “antagonist” is not necessarily the opposite of a “protagonist,” the leading character in a story. “Antagonists” and “protagonists” may be good or bad.

Ante-, anti-. “Ante-” means “in front of” or “before.” “Anti-” means “against” or “opposite.” Use a hyphen after “anti” if the next letter is an “i” (“anti-interdependent”) or a capital (“anti-Semitic”). (Note: “Antipasto” does not mean “against pasto.” And “provolone” does not mean “in favor of volone.”)

Anticipate, expect. To “anticipate” is to do something about a foreseen event. To “expect” something of a person, or from a nonperson, is to foresee but not do anything about it. Correct: “The judge anticipated the argument and therefore covered it in advance.” Correct: “Judges expect loyalty of their law clerks and efficiency from their computers.” Never follow “anticipate” with an infinitive or a “that” clause. Incorrect: “The attorney anticipated that his client would settle.”

Anxious, eager. “Anxious” means “worried.” “Eager” means “enthusiastic” or “impatient.”

Any body, anybody, any one, anyone. “Any body” is a single mass of flesh, living or dead. Person in a morgue: “Is any body home?” “Anybody” is “anyone” — which is preferred to “anybody.” When stressing a single person, use “any one”: “The judge would have ruled for any one of them.”

Any more, anymore. Use “anymore” to mean “no longer”: “I do not write anymore.” Otherwise, use “any more.”

Any way, anyway. Use “anyway” to mean “in any event.” Correct: “Although the litigants should settle the case, they will try it anyway.” Otherwise, use “any way,” which means “in whatever way.”

Apology, excuse. Someone who “apologizes” accepts blame. Someone who offers an “excuse” accepts no blame.

Apparent, evident, obvious. Something “apparent” appears to be as believed. Something “evident” is proven. Something “obvious” is even more certain than something evident. The word “apparent” is apparently misused. “Judge Y died of apparent cancer.” Becomes: “Judge Y apparently died of cancer.” What is apparent is not the cancer but that Judge Y will now be judged by a court on high.

Appeal, apply. A litigant who “appeals” does so of right or after the litigant has already received permission to do so. But a litigant “applies” for discretionary review, such as for a writ of certiorari to the United States Supreme Court or for leave to the Court of Appeals.

Appraise, apprise. To “appraise” is to set a value. To “apprise” is to inform or notify.

Apprehend, comprehend. To “apprehend” is to come to know. To “comprehend” is to understand fully.

Arbitrator, arbiter. An “arbitrator” decides or settles legal disputes. An “arbiter” resolves disputes other than legal ones, such as a political or domestic dispute.

As, like. Use “as” as a comparison to introduce clauses: “It tastes good as [not *like*] a cigarette should.” Otherwise, “as” is a comparative time concept. Do not use “as” as a conjunction to mean “because,” “since,” “when,” or “while.” Use “like” as a comparison to introduce nouns or noun phrases: “Judge A decides cases like Learned Hand did.” Like, man, this is as good as it gets: “As” means “the same”; “like” means “similar to.” Use “like” when you make a valid comparison between substantives. *Correct:* “The judge treats her court attorney like [not *as*] a friend.” *Correct:* “Judges like [not *such as*] Brandeis write rhythmically.” Do not use “like” in place of “as though” and “as if”: “The judge sustained the objection *as if* [not *like*] the attorney had actually objected.” And can you appreciate this? Do not use “appreciate” to mean “like.” “I do not appreciate it when you question my integrity.” *Becomes:* “I do not like it when you question my integrity.” Old-fashioned grammarians prefer “so” to “as” in negative combinations, and all prefer “as” to “so” in positive combinations. *Correct:* “He is not *so* smart as Cardozo was.” *Correct:* “He is *as* smart as Cardozo was.”

Assume, presume. To “assume” is to posit the accuracy of an argument and then to go on from there. To “presume” is to take the truth of something for

granted. *Correct:* “I assume [delete “for the sake of argument”] that you were told, ‘Dr. Livingston, I presume?’”

Assure, ensure, insure, promise. *Correct:* “Please be assured that your insured investment will ensure high profits.” Do not use “promise” as a verb to mean “assure.” Hanging judge: “I *promise* you that you will be convicted.” *Becomes:* “I *assure* you that you will be convicted.” “Assure,” which has the sense of setting someone’s mind to rest, applies to persons. “Ensure” and “insure” imply making an outcome certain or securing something from harm. “Insure” means to cover with insurance.

Audience, spectator. An “audience” listens. “Spectators” look.

Authentic, genuine. What is “authentic” tells the truth about its subject. What is “genuine” is real. If you told your court-attorney colleagues about the amazing opinion you were drafting when all you really did was watch your judge conduct voir dire yet again, your story would be genuine but inauthentic. If you passed off as your own a true story you heard from another court attorney about writing an opinion, that story would be authentic but not genuine.

Average, median, mean, mode, mediocre. To determine an “average,” add the numbers and divide by the number in that series. The “median” is the middle number. With three numbers, 1, 2, and 3, “2” is the median (and, in this example, also the average and the mean). The “mean” is determined by adding the highest and lowest and dividing by two. The “mode” is the most common number; the mode of 5, 5, and 6 is “5.” “Mediocre” means “average.” It does not mean “below average” or “bad.”

Avocation, vocation. An “avocation” is a hobby. A “vocation” is a calling or profession.

Awhile. “Awhile,” an adverb, is not preceded by “for.” *Correct:* “Stay [not *for*] awhile.” ■

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