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Problem Words and Pairs in Legal Writing—Part III

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Problem Words and Pairs in Legal Writing — Part III

Lawyers and their words have been condemned through the ages. From Luke 11:52: “Woe unto you, lawyers! for ye have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindred.”¹ From Franklin’s *Poor Richard’s Almanac*: “I know you Lawyers can, with Ease, / Twist Words and Meanings as you please.”²

Lawyers use words to make a living by the sweat of their browbeating. As one court wrote, quoting Jonathan Swift: “Lawyers . . . practice ‘. . . the art of proving by words multiplied for the purpose, that *white* is *black*, and *black* is *white*, according as they are paid.’”³

Sometimes courts define words incorrectly. These errors become binding law. To the Supreme Court a tomato is a vegetable, not a fruit. Why did the Court nix a definition scientists accept? Because, according to *Nix v. Heddon*, a tomato is a vegetable “in the common language of the people.”⁴

Don’t be anti-Semantic. But recognize that the meaning of words changes over time and space. What was suitable yesterday might be unsuitable today. What’s suitable somewhere might be unsuitable somewhere else. As Justice Holmes noted, “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”⁵

In the law, words mean nothing by themselves. After all, wrote Justice Brandeis, “[T]he logic of words should yield to the logic of realities.”⁶ Moreover, explained Chief Justice

Vinson, “nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature.”⁷

Easy, easily. “Easy” is an adjective: “Writing is easy for those who sweat blood.” “Easily” is an adverb: “Judge X finished her opinion easily.” These clichéd exceptions are easy to remember: “take it easy” and “easy does it.” They should be “take it easily” and “easily does it,” but no one uses them that way.

Economic, economical. “Economic” is the science of economics and life’s necessities. “Economical” means “thrifty.”

Effete. “Effete” means “exhausted.” But since Spiro Agnew’s “effete corps of impudent snobs,” most people believe that “effete” means “snobs.” The solution is never to use this skunked word.

Egoist, egotist. “Egoists” think only of themselves. They are not altruistic, but they are not necessarily conceited, either. “Egotists” are immodest.

Elicit, illicit. To “elicit” is to evoke or draw. Something “illicit” is illegal or immoral.

Emblem, symbol. An “emblem” is a pictorial representation, often with a motto. A “symbol” is a spiritual sign. *Correct:* “The First Amendment prohibits religious symbols on our national emblem.”

Emigrate, immigrate. One “emigrates” from. One “immigrates” to. *Correct:* “The court attorney emigrated from Canada and immigrated to the United States.”

Eminent, immanent, imminent. “Eminent” means “outstanding.” “Immanent” means “dwelling within.” Something “imminent” is threateningly close.

Empathy, sympathy. To have “empathy” is to identify with another’s emotions. To have “sympathy” is to understand another’s feelings. *Correct:* “My sympathy is with you at this sad moment. My parents died last year; I empathize with your loss.”

Endorse, indorse. Use “indorse” for negotiable instruments and endorse in all other contexts. I believe that most American authorities will endorse this view.

Energize, enervate. “Energizing” gives energy. “Enervate” takes energy away.

Enormous, enormousness, immense. “Enormousness” and “immense” connote size. “Enormous” has a moral connotation, and “immense” does not. *Correct:* “Hitler committed enormous wrongs in an immense area.”

Enters, enters into. *Correct:* “After X entered the transaction in the books, X and Y entered into a contract.”

Envy, jealousy. “Envy” refers to resenting a luckier person. “Jealousy” refers to affairs of the heart. To have “sour grapes” is to malign what one wants but does not have or cannot get.

Epitaph, epithet. An “epitaph” is an inscription on a gravestone. An “epithet” is a slur.

Equivocate, prevaricate. To “equivocate” is to mislead by half-truths, ambiguities, and evasions. To “prevaricate” is to lie.

Every day, everyday. *Correct:* “If you wrote an opinion every day, that would not be an everyday feat.”

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Evoke, invoke. To “evoke” is to cause. To “invoke” is to ask for or use.

Exist, subsist. One “exists” by being alive. One “subsists” on what one eats to stay alive. *Correct:* “To exist during court dates at 100 Centre Street, the prisoner subsisted on cold tea, cold pea soup, and cold bologna sandwiches.”

Explicit, implicit. “Explicit” means “express,” “clear,” or “definite.” It does not mean “full” or “complete.” “Implicit,” the antithesis of explicit, means “implied.” It does not mean “empty” or “incomplete.” Some explicit advice: Use “express” or “implied,” which have not acquired colloquial meanings.

Express, expressed. To “express” means, pretentiously, to “say” or “write.” “Express” also means “clear” or “definite.” “Expressed” means “stated.” *Correct:* “The New York State Unified Court System’s express policies are expressed in Title 22 of the New York Codes, Rules and Regulations.”

Factionous, factitious, fractious. “Factionous” is characterized by factions. “Factitious” means “artificial.” “Fractious” means “inclined to make trouble,” not “fractions.”

Falsehood, lie. A “falsehood” is untrue, intentional or not. A “lie” is an intentional falsehood. A lie is not a fiction; fiction does not pretend to be true.

Famous, infamous, notorious. All mean “widely known,” but “notorious” and “infamous” have negative connotations.

Farther, further. “Farther” refers to literal distance. “Further” refers to figurative distance and all senses but distance: “degrees,” “quantity,” “time.”

Feel, think. “Feel” indicates emotion or sensation. As a verb, to “feel” is to be aware of something instinctively rather than through experience or to be convinced of something emotionally rather than intellectually. *Correct:* “I feel for the witness.” *Correct:* “I feel I know who should win this case, but I cannot put my reasons into words.” “Feel” is not a synonym for “assert,”

“assume,” “believe,” “conclude,” “contend,” “infer,” “submit,” or “think.” X: “How do you feel?” Y: “With my fingers.” A court cannot feel, and judicial opinions are better written when the judges do not write how they feel about a case. Something to think about: Authors who write, “I do not think that the statement is true” suggest that they do not think, not that they believe that the statement is false. Write, “I do not believe that the statement is true” or, better, “I believe that the statement is false” or, best, “The statement is false.”

Few, fewer, less. Less is more: Use “less” for things that cannot be counted or which can be counted, but only as a group, not individually. Use “fewer” for things that can be counted individually. *Correct:* “Less sand; fewer grains of sand.” As a comparative, “fewer” means “a smaller number”: “fewer people.” As a comparative, “less” means “a smaller amount of”: “less pay.” “Fewer” is the correlative of “many.” “Much” is the correlative of “less.”

Flammable, inflammable. Both mean capable of being set on fire, but “flammable” is more popular. The antonym of both is “nonflammable.” Firesale advice: To be safe, use “combustible” and “noncombustible.”

Flaunt, flout. To “flaunt” is to show off. To “flout” is to scoff at.

Flay. To flay is to skin. Only metaphorically does it mean to criticize negatively.

Forbid. Do not use “from” with “forbid.” “The court did not forbid defense counsel from contacting the witness.” *Becomes:* “The court did not forbid defense counsel to contact the complaining witness.”

Foregoing, forego, forgoing, forgo. The “foregoing” is something that went earlier or has gone on before. “Forgoing” means “to give up.” *Correct:* “Forgoing the opportunity to make the lawyer read the entire opinion, the judge referred the lawyer to the foregoing.” Similarly, to “forego” is to precede in time and place. To “forgo” is to do without. *Tip:* When

you mean “to do without,” do without the “e” in “forgo” and “forgoing.” *Another tip:* Most words that use the prefix “for-” mean “completely” or “against.” All words that use the prefix “fore-” mean “before.”

Foreword. A “foreword” is a preface written by someone other than the author of the text for which the foreword is written. It is not spelled “forward.”

Former, ex-, latter. The “former” refers to what went first. The “latter” refers to what came most recently. These words may refer to two things only. In a series of three or more, use “the first (thing mentioned)” and “the last (thing mentioned).” As a time concept, “ex-” refers to the immediately preceding; “former” refers to all but the immediately preceding. *Incorrect:* “Bill Clinton is a former President.” As of October 2001, President Clinton is the ex-President. *Correct:* “Gerald Ford is [not was] a former President.” The word “ex” may be used without a hyphen. *Correct:* “Fred is Gwendolyn’s ex.”

Forthcoming. “Forthcoming” means “about to appear” or to be “available when required or promised.” To be “forthcoming” does not mean to be honest, helpful, or cooperative.

Fortuitous, fortunate. A “fortuitous” event is accidental or coincidental. “Fortunate” means “lucky.”

Founder, flounder. To “founder” is to go lame, to sink, or to fail completely. To “flounder” is to stumble about clumsily.

Fulsome, noisome. “Fulsome” is offensively excessive. “Noisome” is unpleasant, unwholesome, or dangerous. Neither word is complimentary, and neither necessarily refers to size or noise.

Good, well. Use “good” to modify a noun—“I feel good about this opinion.” Use “well” to modify a verb or adjective—“I feel well enough to write an opinion today.” *Correct:* “The law clerk did good things well.” Do not use “good” as an adverb. “You write good.” *Becomes:* “You write well.” Do not use “well” as an adjective to mean “good.” *Incorrect:* “Your robes look well.” *Becomes:* “Your robes look good.”

Gourmand, gourmet. A “gourmand” eats a great deal of food of whatever quality. A “gourmet” is an epicure, a fastidious eater who appreciates fine food.

Gratuitous. “Gratuitous” means “unwarranted,” “unnecessary,” or “undeserved.” It does not mean “free.”

Guilty, liable. “Guilty” carries a stronger connotation of blameworthiness than “liable.” One is guilty of a crime but liable for a civil wrong.

Hanged, hung. One is “hanged” by the neck. Something is “hung”: on the wall, a jury.

Healthy, healthful. To be “healthy” is to be in good health. Something “healthful,” such as good food, can make people healthy. *Correct:* “The healthful food made me healthy.”

Historic, historical. “Historic” means “important in history.” “Historical” refers to history, such as a historical book, like the Gutenberg Bible, as opposed to a history book. *Correct:* “The historical popularity of the printing press comes from the historic Gutenberg Bible.” Note: “A,” not “an,” precedes historic and historical, each of which has an aspirated “h.”

Hoi polloi. “Hoi polloi” are the common people, not the elite. It may be Greek to you, by the way, but “hoi” in Greek means “the.” “Hoi polloi” takes no “the.”

Hopefully. “Hopefully” means “with hope,” not “I hope.” “Hopefully I will

do the right thing.” *Becomes:* “I will do the right thing, I hope.” Or “I hope I will do the right thing.” I am hopeful that you will remember this rule: “Abandon ‘hopefully’ all ye who enter here.” ■

1. See also Fred Rodell, *Woe Unto You, Lawyers!* (2d ed. 1957).

2. 2 The Papers of Benjamin Franklin 254 (Leonard Larabee ed. 1960).

3. *Harris v. Superior Ct.*, 3 Cal. App. 4th 661, 666, 4 Cal. Rptr. 2d 564, 568 (2d Dist. 1992) (Gilbert, J.) (quoting Jonathan Swift, *A Voyage to the Country of the Houyhnhnms*, in *Gulliver’s Travels* (1726)) (emphasis in Swift). In this vein, the Supreme Court of California reached the height of the art by noting that the color “white” can mean its antithesis “black.” See *Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co.*, 46 Cal. 2d 517, 527, 297 P.2d 428, 433 (1954) (Carter, J.) (citing *Mitchell v. Henry*, [1980] L.J. 15, Ch. Div. 181).

4. 149 U.S. 304, 307 (1893) (Gray, J.). *Nix* isn’t the only vegetable case that spiced up the English language. See *Sea-Land Services, Inc. v. Pepper Source*, 941 F.2d 519, 519 (7th Cir. 1991) (Bauer, C.J.) (“This spicy case finds its origins in several shipments of Jamaican sweet peppers.”).

5. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

6. *Di Santo v. Pennsylvania*, 273 U.S. 34, 43 (1927) (Brandeis, J., dissenting).

7. *Dennis v. United States*, 341 U.S. 494, 508 (1951).

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