Six Usage Mistakes Common in Legal Writing and Why They Matter

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Most attorneys, and certainly all attorneys who regularly read this publication, are familiar with the tried-and-true advice on legal writing: Write with clarity. Omit needless words. Use plain English. Favor active voice. Certainly, that's good advice, and these maxims deserve frequent repetition.

But when writing advice is given, correct usage often goes unmentioned. Legal-writing texts often give usage sparse coverage — or omit mentioning it altogether. Most practicing attorneys don't even consider usage when drafting and revising briefs, let alone crack open a usage guide and get into the gritty details. Indeed, most attorneys seem to ignore usage because they think that incorrect usage — while perhaps a little embarrassing — rarely rattles the strength of their analysis. It doesn't really matter if a writer says that a cabana boy had *less* bananas or *fewer* bananas. Everyone knows what the writer meant: there aren't as many bananas.

But correct usage doesn't deserve its current place on the bottom rung of the legal-writing ladder. On the contrary, correct usage is necessary for any sound analysis. Correct usage prevents the reader from drawing unintended conclusions or following a line of reasoning to a dead end. And incorrect usage can destroy good writing just as quickly as a run-on sentence, passive voice, or legalese.

To demonstrate, here are six usage mistakes common in legal writing. Each example below is taken from a court opinion in

which the usage mistake either detracts from the strength of the court's analysis or undermines the holding entirely.

Mistake #1: *Bemused*

Bemuse means "to make confused" or "muddle." If someone looks bemused, they look bewildered. For example, a person may look bemused when attempting to decipher the tax code or assemble an IKEA bookshelf without the directions. *Bemused* does not mean the same thing as *amused*. Someone who is amused is entertained, happy, or tickled. While these two words sound the same, they have distinct meanings.

Yet many writers confuse the two, using *bemused* instead of *amused*. This mistake commonly appears in opinions in which a judge is attempting to describe someone's expression. For example, a New York federal judge needed to describe porcelain angels' expressions when addressing a plaintiff's claim that the defendant's angelic candleholders infringed on its copyright.[1] When commenting on the similarities between the angels on both candleholders, the judge noted that "on both sets the angels have similar bemused expressions."[2] She then explained that a party cannot claim copyright protection for these "stereotypical attributes of baby angels" because "the depiction of baby angels as round-cheeked, smiling or bemused, and wearing loose robes or drapery" is commonplace.[3]

Is it? On the contrary, candleholders that portray baffled baby angels seem like a unique find. While seemingly minor, this error undercuts the entire opinion because it belies the judge's

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1 *Great Importations, Inc. v. Caffco Int'l, Inc.*, No. 95-CIV-0514, 1997 WL 414111 (S.D.N.Y. July 24, 1997).

2 *Id.* at *4.

3 *Id.*

point that the copyright might not extend to the product because angels are frequently depicted as bemused.

Mistake #2: *Disinterested*

Disinterested means "impartial," with nothing to gain from taking a position on the issue at hand. For example, a news correspondent might be described as a disinterested observer of a country's civil war. In many contexts, being disinterested is a decidedly good thing.

But many writers mistake *disinterested* for *uninterested*. *Uninterested* means "bored." It has nothing to do with whether an observer is unbiased. Most litigants want a disinterested judge because they want someone to preside over their case with a fair mind. They do not want an uninterested judge who will fall asleep during opening statements. It's true that dictionaries include both meanings under the entry for *disinterested*,[4] but in the legal context, blurring the two meanings can undermine analytical integrity.

Many judges confuse these two words when describing jurors. Far from an innocuous slip-up, the error frequently destroys the reasoning behind the opinions. In one case, a petitioner brought a *Batson* challenge after the prosecutor struck five out of six Native Americans from the jury pool.[5] In defending his strikes, the prosecutor argued that one of the panelists had been struck because the panelist "appeared disinterested in and bored with the proceedings."[6] An Arizona appellate court and an Arizona federal judge upheld the conviction.[7] And in a similar case,

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[4] *See, e.g.*, *Disinterested*, Merriam-Webster, https://www.merriam-webster.com/dictionary/disinterested (last visited Aug. 2, 2020).

[5] *Young v. Schriro*, No. 07-8000, 2008 WL 2562937, at *11 (D. Ariz. June 24, 2008).

[6] *Id.*

[7] *Id.* at *12–13.

a judge considered a plaintiff's *Batson* challenge after the prosecutor struck two African-American panelists.[8] The judge found that the prosecution offered a race-neutral explanation for its strikes when it argued that one of the panelists seemed "bored and disinterested."[9]

The reasoning in these cases is undermined by this common usage flub. Having a disinterested juror is a good thing. Parties want a jury that can consider their case impartially. Striking a juror because the juror looks disinterested is hardly a proper justification for a peremptory strike. And an opinion based on this reasoning is built on a shoddy foundation.

Mistake #3: *Flout*

Flout is a useful word, especially in legal writing. *Flout* means "to contravene or disregard," or "to treat with contempt." For example, a judge might say that a defendant flouted the conditions of his parole or that a party flouted rules of discovery.

But many judges fail to use this word correctly and mistakenly use *flaunt* in its place. *Flaunt* means "to show off" or "to parade (something) in an ostentatious manner." For example, a man might flaunt his new hat, or a woman might make a large donation to flaunt her wealth.

When judges use *flaunt* when they mean *flout*, their opinions become fertile ground for misunderstandings. For example, when ruling on a motion to preserve evidence, a judge for the Middle District of Louisiana noted that "[t]he plaintiff in this case does not allege, much less prove, that the defendants will flaunt their obligation under the Federal Rules without a preservation

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[8] *Smith v. Miller*, No. 1:12-cv-00790, 2014 WL 6924414, at *10 (E.D. Cal. Dec. 9, 2014).

[9] *Id.*

order."[10] The reader is left wondering: was the plaintiff required to prove that the defendants would ostentatiously comply with the requirements to preserve evidence? And how exactly does someone flaunt obligations under the Federal Rules, anyway?

Similarly, in addressing a plaintiff's habeas corpus petition, a judge in the Southern District of Texas found that the defendant "has continued to flaunt the laws of the United States."[11] Again, the reader is left wondering what's going on here. Did the defendant carry around a pocket-sized version of the U.S. Constitution, proudly showing it off to passersby? This usage mistake leaves a reader questioning not only the judge's choice of words but also the strength of the entire opinion.

Mistake #4: *Proscribe*

Proscribe is another useful word that attorneys frequently bungle. *Proscribe* means "to prohibit." Plenty of judges use the word correctly under that definition. But some writers think that *proscribe* is another (perhaps fancier) way of saying *prescribe*. It's not. *Prescribe* means "to impose authoritatively." In some ways, it means the opposite of *proscribe*. And when judges mistake *prescribe* for *proscribe*, their reasoning falls apart.

For example, when addressing whether a prisoner had been mistreated by the prison's medical staff, one judge noted that the plaintiff alleged that "the prison's doctors . . . supplied drugs that were less effective than available alternatives, proscribed drugs that were not effective at all, and committed medical malpractice."[12] But proscribing drugs that are "not effective at all" is

[10] *Hunter v. Sterling*, No. 08-0835, 2009 WL 4348660, at *1 (M.D. La. Nov. 24, 2009).

[11] *United States v. Perales-Marina*, No. CV H-16-509, 2018 WL 6331356, at *3 (S.D. Tex. Sept. 27, 2018).

[12] *Cunningham v. Belleque*, No. cv-03-1239, 2006 WL 468377, at *1 (D. Or. Feb. 24, 2006).

hardly poor medical advice. On the contrary, that sounds like a wise practice.

The confusion is compounded if a judge uses *proscribe* both correctly and incorrectly in the same opinion. For example, a judge for the District of Kansas noted that a nurse had "proscribed one Ibuprofen 800mg, three times a day, Ultram 50mg three times a day, and Tylenol every four hours as needed."[13] Later in the same opinion, the judge said that "[d]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment."[14] Since the judge correctly used *proscribe* later in the opinion, the reader is left with serious doubts whether the patient was told to take the ibuprofen or avoid it.

Mistake #5: *Verbal*

Misusing *verbal* is a classic usage mistake, and lawyers err more than anyone else. *Verbal* means "expressed in words." Those words can be either written or oral; *verbal* encompasses both. In contrast, *oral* means "involving the mouth," and when applied to words, it denotes words that are spoken as opposed to written.

Yet when judges use *verbal*, they nearly always mean *oral*. In fact, Westlaw has more than 4,000 opinions by federal judges in which a judge referred to a "verbal agreement." In most of these cases, the judge meant an *oral* agreement.

This mistake is particularly confusing when the judge compares a written agreement with the parties' previous "verbal

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[13] *Ducharme ex rel. Rogers v. Bd. of Cnty. Comm'rs of Butler Cnty., Kan.*, No. 09-2338, 2011 WL 2173684, at *3 (D. Kan. June 2, 2011).

[14] *Id.*

agreement."[15] These comparisons make no sense to a reader who knows that a verbal agreement might well have been written down. For these readers, any reference to a "verbal agreement" is likely to leave them wondering whether that agreement was written or oral — and struggling to understand the opinion in light of that ambiguity.

Mistake #6: *Only*

Finally, many opinions suffer from what is probably the most common word-placement error in the English language: misplacing *only*. The rule for using *only* is simple — put it directly before the word it modifies. By following this rule, a writer can move *only* around in a sentence and drastically change its meaning. For example:

- The plaintiffs filed *only* two claims against their former employer. (*Meaning*: The plaintiffs limited the claims they chose to bring to two.)
- *Only* the plaintiffs filed two claims against their former employer. (*Meaning*: Of all the people who could have brought claims against this employer, only the plaintiffs did.)
- The plaintiffs *only* filed two claims against their former employer. (*Meaning*: While they could have done several things with their claims, the plaintiffs chose to only file them.)

But less careful writers place *only* in a sentence based on their gut instinct. These writers tend to want to put *only* before a verb,

[15] *See, e.g.*, *Camp Summit of Summitville, Inc. v. Visinski*, No. 06-cv-4994, 2007 WL 1152894, at *3 (S.D.N.Y. Apr. 16, 2007).

even when the verb is not the word being limited. Here are a few examples:

- "Throughout the duration of his employment, plaintiff subjectively believed he could only be terminated for cause."[16]
- "TEI further states that it attempted to resolve the confidentiality issues by suggesting that the documents be produced subject to an agreement that they will only be reviewed by TEI's outside counsel, and not by any in-house counsel for any of the parties, including Mr. Ferguson."[17]
- "Particularized guarantees of trustworthiness exist where . . . the district court instructs the jurors that the allocution may only be considered as evidence that a conspiracy existed . . . ."[18]

Careful readers will apply the rule for *only* and assume that the writer is trying to limit the verb. But is that what these judges meant? The plaintiff's employment could only be *terminated*, as opposed to suspended? The documents would only be *reviewed* by outside counsel, as opposed to copied? And the evidence may only be *considered* by the jury, as opposed to memorized, ignored, or thrown away? Careless placement of *only*, as in the examples above, nearly always leads to ambiguity. Again, this usage mistake points readers in directions that the writer never intended and creates misunderstanding.

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[16] *Hutton v. Jackson Cnty.*, No. 09-3090, 2010 WL 4906205, at *1 (D. Or. Nov. 23, 2010).

[17] *Se. Mech. Servs., Inc. v. Brody*, No. 1:09-cv-0086, 2009 WL 3095196, at *1 (N.D. Ga. Sept. 24, 2009).

[18] *United States v. Chan*, 184 F. Supp. 2d 337, 342–43 (S.D.N.Y. 2002).

Conclusion

Most judges take the task of writing an opinion seriously. They struggle over each step of their reasoning and dissect each line of their prose. They cut needless words, remove dangling participles, and restructure sentences to improve clarity. They have a long list of items to check and double-check before filing their opinions.

Checking for correct usage belongs on this list. A judge can labor over an opinion for hours, only to wreck its reasoning with a single misused word. And a judge who works tirelessly to write with clarity can suddenly introduce ambiguity through a single usage gaffe.

The same goes for all practicing attorneys. While this article has drawn examples from court opinions, there are surely many more examples (and far more egregious ones) in the briefs that attorneys filed with these courts. In the struggle for correct usage, all attorneys would benefit from keeping a copy of *Garner's Modern English Usage* nearby. It will answer all usage questions that an attorney, judge, or law clerk could ever have — and then some. Attorneys will do well to consult it often. If they do, the briefs and opinions that they've refined with care will be even further fortified by unassailable usage.