

Pesky Words[©]

Thought itself needs words.

—Ugo Betti

With an astonishing vocabulary exceeding 600,000 words, the English language is the most expansive in human history. Of course, no one has mastered 600,000 words, but lawyers probably have a larger vocabulary than most.

And since law is especially language-dependent, lawyers are usually more adept than most at using words. Unfortunately, lawyers are also adept at misusing words. Certain misuses—such as those discussed below—are discouragingly frequent.

Pursuant to

This phrase is a favorite among lawyers—but only among lawyers. Laypeople rarely use it. If only it was as rare in the law, for it is clunky and often ambiguous. It can mean, for example, *by*, *under*, *in accordance with*, *in compliance with*, or *in carrying out*.

- Plaintiffs bring this lawsuit pursuant to [read *under*] the Tort Claims Act.
- The defendant was held pursuant to [*in accordance with*] the arrest warrant.
- Pursuant to [*According to*] the contract, the seller must forfeit the deposit.
- Pursuant to [*In carrying out*] the mandate, the trial court entered judgment.

That and Which

That should be used in restrictive clauses, while *which* (preceded by a comma) should be used in nonrestrictive clauses. A restrictive clause is essential to the meaning of the sentence. A nonrestrictive clause could be omitted without affecting the sentence's meaning, because it adds supplemental, nonessential information.

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Lawyers often use *which* when they should use *that*:

- Cases which [read *that*] support this rule are too numerous to list.
- The prosecutor wanted a jury which [*that*] would favor the death penalty.

Bryan Garner has offered two examples in which correct usage of *that* and *which* is essential to meaning:

- All the cases that were decided before the 1995 legislation support this argument.
- All the cases, which were decided before the 1995 legislation, support this argument.

As Garner explains: “The first sentence implies that some cases decided after the

- While she laughed at her own joke, she felt guilty.

Does this mean that she felt guilty only during the time that she laughed? Or does it mean that she laughed even though she felt guilty? To avoid this temporal ambiguity, it is often better to choose *although* over *while*.

But/However

Grammatically speaking, *however* can be used to start a sentence. But the simpler, cleaner word *but* is preferable. *However* works better in mid-sentence, as in this example:

- It seems unlikely, however, that Congress intended that result.

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1995 legislation don't support the argument. The second implies that no cases were decided after the 1995 legislation.”

While/Although

Technically, it is often acceptable to use *while* for *although*, since both can suggest a contrast. But be cautious: *while* also carries a connotation of temporality.

One meaning of *however* is always appropriate at the start of a sentence:

- However you read the statute [meaning in whatever way you read the statute], you must agree that it is poorly drafted.

And/or

How many times have you seen prose like this: “The negligence of Defendant Jones and/or Defendant Smith proximately caused Plaintiff's injuries”? Lawyers think they are being precise by including both the conjunctive *and* and the disjunctive *or*. But courts have not viewed this phrase as precise, calling it, among other things, “a verbal monstrosity,” “a befuddling, nameless thing,” and an “abominable invention.”

As Garner points out, the word *or* usually connotes *and* as well. So often, you can leave out the *and*. Overall, it is better to say “Defendant Jones or Defendant Smith or both” if you absolutely must convey both the conjunctive and the disjunctive.

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Said/Same

These are crutch words that lend awkwardness, not precision. There is no need to say “To the Honorable Judge of Said Court.” Just say “To the Honorable Court.” Don’t say “The said witness saw the said defendant run the light.” Simply say “The witness saw the defendant run the light.”

Don’t say “The pleading is filed by tendering same to the clerk.” Use common English and say “The pleading is filed by tendering it to the clerk.”

Whether or not

Most uses of the word *whether* do not require the qualifier *or not*, since *whether* implies *or not*. Thus, you can usually omit *or not* as superfluous.

- It is the client’s decision whether or not [read *whether*] to settle.

Or not should be included when *whether or not* means “regardless of whether:”

- The game will be played whether or not it rains.

Affect/Effect

Affect is a verb usually meaning “to influence” or “to have an effect on.” *Effect* is usually a noun meaning “a result or consequence:” Sometimes *effect* is used as a verb meaning “to bring about, accomplish:”

- The ruling did not affect him.
- The ruling had no effect.
- The ruling effected a change in the law.

Imply/Infer

Imply means “to suggest;” *infer* means “to deduce:”

- From the legislative history, the court inferred Congress’s intent.
- The legislative history implies that Congress meant something else.

Of course, the preceding list merely scratches the surface. For more complete treatment, consult any of Bryan Garner’s books, such as *The Redbook, A Manual on Legal Style* and *A Dictionary of Modern Legal Usage*. ◆

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