

Retaliation Clams

Watch Out for Tricky Typos

By Benjamin G. Shatz

Every writer should strive to produce error-free copy. This is especially true of legal writers, for whom credibility is essential for persuasion. A reader of sloppy legal prose may (consciously or not) equate poor writing with poor analysis. Similarly, a reader may equate careless proofreading with carelessness generally. Beyond that, because legal writing has such a broad potential audience (e.g., clients, judges, clerks, opposing counsel, appellate justices and their staff, the press, and posterity if posted on an on-line service or a weblog), an embarrassing typo may be seen by many readers. These errors not only detract from the effectiveness of the piece, but also tarnish the writer's reputation.

One of the most invidious and insidious error is the correctly spelled, but obviously wrong word. These errors are hard to catch because a word processor's spellchecker overlooks them as correctly spelled. A classic example is how a computer will not blink at the sentence "Eye mite knead sum knew shoos four Jim, ' Hairy tolled hour ant an," when the sentence should read "I might need some new shoes for gym, ' Harry told our Aunt Ann." See Ten Tips for Better Spelling, <http://www.factmonster.com/ipka/A0903395.html>. Legal writing is particularly prone to this sort of error. Here are several notable examples involving missing letters or switched letters:

Statue for Statute—A Westlaw search in the "all-cases" database returns 1,485 occurrences of "statue of limitations" alone. Given the many legal phrases involving the word "statute," as well as the ordinary use of the word, this figure probably just scratches the surface. Even United States Supreme Court Justices have missed this one; In the originally released version of a dissenting opinion in 2004, "statues" was used for statutes. See *How Appealing*, <http://howappealing.law.com>, April 28, 2004.

Pubic for Public—This one's an all-time classic. While researching an easement dispute involving recorded documents, I recently discovered the following heading in a leading treatise: "Notice from the pubic records." 6 Miller & Starr, California Real Estate 3d §15:70 at 223. A Westlaw search for "pubic policy" returns 51 cases—none of which involve regulation of nudity. And the less said about a "pubic nuisance," the better. See also *How*

Appealing blog post of Oct. 12, 2006 <http://howappealing.law.com/101206.html#018605> (noting "pubic" typos in appellate opinions and in ballots proposing an amendment to Michigan's constitution).

A few other typos of the missing letter variety include: "contact" for "contract"; "Easter District" for "Eastern District"; "fist" for "first"; "noting" for "nothing"; and "clam" for "claim" (Westlaw carries several amusing examples of "retaliation clams" and cases mentioning the "elements of the clam"). And there are instances of the two missing letter variety, such as "feral" for "federal" (though practice in some Article III courts may seem pretty wild).

Also look out for the wrong-letter typo, as in "prop-erly" for "property" (or vice-versa) or "band" for "bank" (or vice-versa). See http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=265613&doc_no=S115699 (California Supreme Court's docket mistakenly transforms the Agua Caliente Band of Indians into a Native American financial institution). And keep an eye out for the extra-letter typo, as in "latches" for "laches." Finally, make sure to spell the word "supersede" with an "s" instead of the common misspelling—used in one recent national advertising campaign—"supercede."

Similar to the missing-letter typo is the reversed-letter typo, such as "set froth" instead of "set forth" (which, according to Westlaw's allcases database, appears in 121 cases); "discreet" for "discrete"; "singer" instead of "signer"; or "Crop. Code" for "Corp. Code" (unless agricultural business entities are governed by the Crop Code?). In this category, be alert for the following:

Trail for Trial—A Westlaw search reveals 1,272 instances of "trail court," all of which must have meant to say "trial court"—unless there's some specialized tribunal for disputes on the open range? This error also may crop up as "trail judge," "trail date," "trail proceedings" "pre-trail statement," "post-trail motions," and many other permutations.

Untied for United—No matter how disconnected or unraveled one may feel our nation has become, its proper name remains the United States—despite the 481 instances (again found on Westlaw) of references to the "Untied States."

A related switching and dropping of letters may see "plenty" replacing "penalty," as is in the apocryphal story about how a dictation error resulted in: "I declare under plenty of perjury that...."

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Missing and reversed letters inject errors and torpedo effective advocacy



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Levity aside, these typos are serious. Such errors evade notice at the proofreading stage because they involve the type of words often skipped over when reading. A widely circulated example explains why errors involving mixed up letters in the middle of a word are so difficult to notice:

The phaonmneal pweor of the hmuan mind: Aoccdrnig to rscheearch at Cmabrigde Uinervtisy, it deosn't mtttaer in waht oredr the ltteers in a wrod are, the olny iprmoatnt tihng is taht the frist and lsat ltteer be in the rghit plcae.

On the topic of problems with word processor spellcheckers, be careful about relying on a computer to “fix” typos. While the typical word processing program helpfully automatically converts “tot he” and “doe snot” to “to the” and “does not,” other problems may arise. In early 2006, a lawyer filed a brief in the California Court of Appeal in which the computer’s automatic spellchecker converted all occurrences of the term “sua sponte” to “sea sponge.” *Sea Sponge’ Sabotages Spell Check in Danser Filing*, *The Recorder* (Feb. 28, 2006). This tale emphasizes not only a danger in computerized corrections, but the need to proofread the very final version of a document before it leaves your control.

Catching and correcting typos may affect a lawyer’s compensation as well. In 2004 a federal magistrate judge reduced a lawyer’s fee award for filing briefs riddled with errors, including “tired” for “tried.” *Judge Slashes Lawyer’s Rate for Typos, Careless Writing*, *The Legal Intelligencer* (Feb. 25, 2004).

How can the diligent practitioner avoid these common typos? Because these typos evade computer spellcheckers, the best way to detect and correct them is old-fash-

ioned proofing. And because these typos are easily missed by authors who have read and re-read their own writing so often that they become blind to such mistakes, the best proofreader is someone who has never read the document. Building proofing time into a filing schedule has the double benefit of encouraging the practitioner to have a final draft prepared early.

Lacking time to pass a brief to a fresh pair of eyes, some lawyers alter the spell check feature in their word processing programs

to flag problem words like “statue,” “pubic,” “trail” and “untied,” on the assumption that these words are unlikely to appear in the typical brief. A similar solution is to use the computer’s search feature on the final version of a brief to check for key problem words like those above to ensure that they have not slipped into a brief. Whatever remedy appeals to you, the most important lesson is to be aware of these common typos and to prevent your brief from becoming the next example held to ridicule. ■