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LANGUAGE CHANGES, **BUT** SHOULD LEGAL WRITING CHANGE WITH IT?

BY: DIANE B. KRAFT

If you're a lawyer, you're a writer. And if you're a writer, you have likely been taught certain rules of grammar and vocabulary use: that you should never end a sentence with a preposition or split an infinitive, that *they* and *their* should not be used as singular pronouns, that *literally* does not mean figuratively. These examples were, and in some cases still are, longstanding rules. Some of them—like the preposition and split infinitive rules—have passed out of favor and are largely ignored by modern writers, even in formal contexts. Others, like the “*their* isn't singular” rule, are still followed by many writers, especially in formal writing, but are routinely disregarded in spoken language. All are examples of how language changes. As legal writers, one of the many choices we have to make when writing a legal document is to what extent our written language will adapt to the changes that are inevitable in English, as in any language.

Examples of how language has changed range from changes in the meaning of individual words (*decimate* used to mean to destroy a 10th of something, and now it means to destroy almost all of something; *merry* used to mean short; *used to* used to mean something habitual in the present tense as well as in the past tense) to the emergence of new languages (Latin became French because people used language in new ways).¹

While changes tend to happen faster in spoken language, written language—even writing as formal as that used in legal briefs and memoranda—also changes. For example, what used to be called a *demurrer* is now more commonly called a motion to dismiss. Sentences like this,

*The defendant ... pleaded that...the said covenant was contrary to the laws against champerty and maintenance, and void; to this the plaintiff demurred, and his demurrer was sustained....*²

now sound old fashioned, bordering on incomprehensible.³

Many common words and phrases that were once viewed as too new or informal or even controversial are also now acceptable in even the most formal writing. The title *Ms.* was first suggested as an alternative to *Mrs.* and *Miss* in 1901, but was then ignored for decades.⁴ When it reemerged in the mid-20th century, many people disparaged it.⁵ It wasn't until 1986 that the *New York Times* adopted *Ms.* as a female title⁶, and now it's commonplace to the point of being the default title for women.

Is the same future in store for using *their* as a singular pronoun? Many people, myself included, already use *their* as a singular pronoun when speaking. For example, I will say to my class, “Will the student who omitted their name from the assignment please see me after class?” The alternative, “Will the student who omitted his or her name from the assignment please see me after class,” sounds clunky to my ears. However, I never use *their* as a singular pronoun in writing, in part because I think it's still incorrect for formal writing and in part because I don't want my audience to think I'm ignorant of the rule. But with each passing year I am less annoyed when my students use *their* in place of *his* or *her* because in a way the students are right: the use of *their* is changing. Similarly, when I first noticed students using *based off* instead of *based on* a few years ago, I thought my students just needed a review session on prepositions. Perhaps in the short-term they do, but in the long-term, *based-off* may well be our future.

This does not mean, of course, that anything goes when it comes to writing, particularly formal writing. The writer John McWhorter offers some guidance on when to accept a change and when to resist it. For McWhorter, if a change doesn't impede understanding or clarity, it shouldn't be considered wrong⁷. That's good advice, and especially important in legal writing, where lack of precision and clarity can lose a case for your client.

For example, while McWhorter finds nothing wrong with using *literally* to mean *figuratively*⁸ when the meaning is unambiguous (the person who says "I was literally dead on my feet" is almost certainly alive), the word could easily introduce ambiguity where none was

intended. "After the incident my client literally went insane" could mean one thing to the writer (my client was extremely upset) and another to the reader (the client suffered a mental breakdown).

I would add to McWhorter's advice about ambiguity the idea of "audience." Legal writers should consider whether they're writing for an audience that is older and more traditional than the 20-somethings who are quick to adopt changes in language. Even if a change in language introduces no ambiguity, when the change is so new that the reader would likely not only be distracted by it but might even think the writer ignorant of correct usage, a writer is well advised to limit changes in language to informal writing. If

using *their* instead of *his* or *her*, or *literally* to mean *figuratively*, would leave a negative impression on the judge who is reading your brief, it's probably the wrong choice.

I still expect my students to follow traditional rules of grammar and vocabulary in the assignments they write for my class because I want them to be prepared for the expectations they will likely face as writers of formal legal documents. That said, when the time comes to accept *their* as a singular pronoun even in formal writing, I will do so. Language changes, and legal writing does, too.

ABOUT THE AUTHOR

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ENDNOTES

1. John McWhorter, *Words on the Move: Why English Won't—and Can't—Sit Still (Like, Literally)*, 71, 100-01, 111 (2016).
2. *Brown v. Beauchamp*, 21 Ky. 413, 414 (1827).
3. An example of an archaism that has managed to survive is *Comes now* as the opening of a complaint, much to the chagrin of plain English advocates like Joseph Kimble. See, e.g., Joseph Kimble, *Lifting the Fog of Legalese: Essays on Plain English* 4, 6 (2006).
4. Ben Zimmer, *Ms.*, N.Y. Times, Oct 23, 2009.
5. I remember members of my own family rolling their eyes at *Ms.* used as a title for women, never expecting it would become the norm.
6. Zimmer, *supra* note 4.
7. Morning Edition (NPR radio broadcast Sept. 15, 2016).
8. According to McWhorter, this is an example of a contronym, a word with contradictory meanings. Examples in English abound: seed can mean to remove seeds (as from a watermelon) or to plant seeds; dusting can mean the removal of dust or the addition of something like snow or powdered sugar; fast can mean quickly (as in to move fast) or to be still (as in sit fast). McWhorter, *supra* note 1, at 22-28.

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